

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
EMBU
ELC CASE NO. 199 OF 2014 (OS)

NICASIO NJUE NJAGI.....
PLAINTIFF

VERSUS

DESDERIO NJAGI.....1ST
DEFENDANT

PATRICK RUGENDO.....2ND
DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide the Amended Originating Summons dated 5//5/2022 seeking a declaration that the Defendants' title over the land known as Kyeni/Kigumo/1567, which is now Kyeni/Kigumo/3890 and 3891 had been extinguished and the Plaintiff had acquired title to the land through adverse possession. The Plaintiff sought cancellation of the 2nd Defendant's name from the register and to be registered as proprietor and issued a title deed. He also sought costs of the suit.
2. The Plaintiff claimed that he filed the originating summons against the 1st Defendant in respect of Kyeni/Kigumo/1567 but the 1st Defendant subdivided the land into Kyeni/Kigumo/3890

and 3891, and sold those parcels to the 2nd Defendant, who is the current registered owner of the land. He averred that when the 2nd Defendant purchased the parcels of land, he was aware that they were the subject of litigation.

3. The Plaintiff contended that he was in occupation of the suit land and has been in open, continuous, exclusive and uninterrupted possession and use of the land since the 1980's before the process of adjudication and demarcation was completed. Further, that the Defendants had never occupied or used the land. He added that he had developed the land extensively by erecting six houses, pit latrines and two granaries. That he planted banana stems and Napier grass on the land. He averred that his parents used to cultivate and lived on a portion of the suit land before passing it to him and that the land originally belonged to Kina Clan of the Embu tribe to which he belonged.
4. The 1st Defendant filed a replying affidavit and deponed that he was the original registered owner of parcel no. 1567, which he sub-divided into three portions, including parcel numbers 3890 and 3891. He sold parcel numbers 3890 and 3891 to the 2nd Defendant who is the current registered owner. He denied that the Plaintiff had been in continuous and exclusive occupation of the land since 1980's. He explained that he had numerous suits in court with the Plaintiff's father, John Njagi Njeru over the suit land and in one case, the Plaintiff's father was ordered to vacate the land.

5. He elaborated that the Plaintiff's father was also ordered to vacate the land in a recent case filed by the 2nd Defendant being ELC Appeal Case No. 15 of 2016, and that the Plaintiff and his other family members were evicted from the land by auctioneers and a certificate of vacant possession filed in court. He contended that there is another case pending at the Embu Chief Magistrates Court between the Plaintiff's father and the 2nd Defendant over the land and that the Plaintiff's occupation cannot be said to have been peaceful since the suit land has been the subject of litigation over the years.
6. The 2nd Defendant filed a replying affidavit where he denied that the Plaintiff was in occupation of the suit land. He averred that the Plaintiff occupied his neighbor's land where he had built his home and that there were no developments made by the Plaintiff on his land. He averred that it is the Plaintiff's father who is illegally occupying the suit land and that they have had cases in court over the land some of which are still pending. He urged that the suit lacks merit and should be dismissed with costs.
7. During the hearing, the Plaintiff gave evidence. He stated that he was born in 1980 and was brought up on land parcel 1567. That the land was given to him by his father John Njagi Njeru. He claimed that the suit land was originally clan land and his father was a beneficiary by virtue of being the first born in his family. That when his father went to register the land in his name to obtain a title, he was informed that the land was registered in the 1st Defendant's name in 1979.

8. Sometime in 1999, he moved from his father's compound and established his home in another section of the land. He averred that he had developed the section he occupies since 1998 and that his family lived there. Further, that he had lived on the land peacefully without interference from the Defendants until he filed this suit. While this suit was pending in court, the Defendants invaded his compound and destroyed his houses and other property in 2018 despite the fact that he was not a party to the suit which they had filed against his father.
9. On cross examination, he stated that he uses parcel no. 1567. That parcel 1567 belongs to his father and that according to the records at the Lands Office, this land was subdivided but on the ground it is not subdivided. He added that his father, his brothers, his aunt and grandparents live on the land and that his dead sisters were buried there. He stated that they occupy the whole parcel of land. He did not bring evidence to prove that the land is not subdivided on the ground. He produced copies of the land registers for parcels 3890 and 3891 and letters dated 16/8/1996 and 23/7/1996.
10. The Plaintiff relied called Njeru Njenga and Erasmus Muriithi Nguru as witnesses. They stated that the Plaintiff was born on the suit land in 1980 and that his father had been in occupation of the land since 1962. They stated that in 1998, the Plaintiff moved and occupied a section of parcel no. 1567 and started developing it where he lives with his family. That in October 2018, the Defendants demolished the Plaintiff's father's and

brothers' houses but the Plaintiff's house was not demolished. They maintained that parcels 3890 and 3891 did not exist on the ground and that the Plaintiff occupied about $\frac{1}{4}$ acre of the suit land and farms on the other portion of the land with his brothers. They did not know the Defendants. They urged that the 1st Defendant sold the land without going to the ground.

11. The 1st Defendant told the court that he was given parcel no. 1567 by his clan Kina, in 1961. He subdivided it into three portions, including parcels 3890 and 3891, which he sold to the 2nd Defendant and Peter Dedan Mugo respectively. Around 1964, Njeru Nyaga, the Plaintiff's grandfather Plaintiff requested for a place to settle from the 1st Defendant's father Kithendu Karandango, because the land allocated to him by the clan was bushy. The 1st Defendant stated that his father allowed Njeru Nyaga to settle temporarily until he could move to his own land. He stated that Njeru Nyaga's son, John Njagi (the Plaintiff's father), later refused to vacate the land even after a court ordered Njeru Nyaga to move out.
12. He stated that in 1978, the Plaintiff's father sued him for impersonation in Criminal Case No. 190 of 1978, but the 1st Defendant was acquitted. Subsequently, both John Njagi and his father, Njeru Nyaga, filed Nairobi High Court Misc. Civil Case No. 323 of 1979, while he filed an eviction suit in 1980. The two cases were consolidated, and Justice D. Schofield (as he then was) ruled in favor of the 1st Defendant, dismissing John Njagi's and Njeru Nyaga's case and ordering them to vacate the suit

land within six months, which they failed to do. He stated that the Plaintiff's father then filed Civil Application No. 73 of 1991 at the Court of Appeal, which was dismissed on 29/11/1991. That he also filed Civil Application No. 111 of 1998 when the Plaintiff's father registered a caution against his land and the court ordered removal of the caution.

13. The 1st Defendant asserted that despite the court order to vacate, the Plaintiff's father continued to occupy the land. He argued that the Plaintiff's father's continued occupation of the suit land is unlawful having been ordered to vacate by the judge before 1991. Further, that the Plaintiff and his family were evicted by the current registered owner of the suit land after he obtained eviction orders against them but they later re-entered the land. He urged that it was not true that the Plaintiff had been in continuous occupation of the land.
14. On cross examination, he stated that he has not utilized the land because he lives far from it. He stated that John Njagi entered the land in 1963 and that his family lives on the land. He produced copies of the title deeds for parcels 3890 and 3891, the order and decree in Civil Suit No. 111 of 1998, the judgment in High Court Civil Case No. 323 of 1979, the order in Civil Application No. 73 of 1991, the decree in ELC Appeal Case No. 15 of 2016, a certificate of vacant possession by Quickline Auctioneers and the plaint in Civil Case No. 193 of 2016.
15. The 2nd Defendant stated in his evidence that it is the Plaintiff's father who occupies the suit land and not the Plaintiff since the

Plaintiff occupies his neighbour's parcel of land which he has developed. He stated that he evicted the Plaintiff's father from the land but he rebuilt illegally and that they are still litigating on the same issue to date. On cross examination, he stated that he bought the suit land in 2014 and when he bought it, he did not find anybody on the land when the 1st Defendant was showing him the boundaries. He stated that he has never used the land.

16. The 2nd Defendant produced copies of title deeds for parcels 3890 and 3891 together with the ruling, judgment, decree and memorandum of appeal in Embu ELC Appeal no. E015 of 2022.
17. Parties filed written submissions, which the court considered. The Plaintiff submitted that he has been living on the suit land together with his family since the 1960's when the clan gave the land to them. He maintained that the 1st Defendant was registered as the owner after he fraudulently presented himself to the adjudication board as the Plaintiff's father since they shared a similar name. He submitted that the 1st Defendant went ahead and subdivided the suit land without ever stepping on it and setting up beacons. He maintained that the suit land had never been subdivided on the ground and neither were beacons put on the land.
18. He submitted that he had met the requirements for a claim for adverse possession and had demonstrated that he has lived on the suit land with his family openly since the 1960's and that they have built permanent houses and cultivated the land for all the years with the knowledge of the 1st Defendant. He submitted

that the 2nd Defendant purportedly purchased the suit land with the full knowledge that there was an ongoing dispute over the land and that the land he bought was contentious in nature therefore he is not a bona fide purchaser for value.

19. He further submitted that it is not true that he does not occupy the 2nd Defendant's land. He claimed that he occupies a portion of the land while his father occupies a different portion. He maintained that the 2nd Defendant has never used the land since he bought it and that he only started harassing him and his family after he bought it. He stated that the 2nd Defendant cannot possibly know his portion of the land since there are no beacons on the suit land and he has never bothered to know where they are.
20. The Defendants maintained that the Plaintiff does not occupy the 2nd Defendant's parcels of land but was on his neighbour's. They submitted that it is the Plaintiff's father who occupies parcels 3890 and 3891 and even so, his occupation has not been continuous as it has been repeatedly challenged in court. They submitted that the Plaintiff did not provide evidence linking his occupation to the suit land and therefore there is no proof of actual possession. They expressed the view that the Plaintiff's admission that his claim flows from his father's occupation proved that the Plaintiff's possession is not independent but derivative and could not therefore constitute exclusive possession adverse to the Defendants' title. They maintained that the Plaintiff's father's occupation of the suit land has not

been continuous for it was interrupted through lawful court processes.

21. They submitted that in Misc Civil application no. 73 of 1991 and Civil Case No. 111 of 1998, the court ruled in favour of the 1st Defendant and the Plaintiff's father was ordered to vacate the land within six months. Recently in Embu ELC Appeal Case No. E015 of 2022, the court gave orders for the Plaintiff's father to vacate the suit land parcels on 24/9/2024. That the family was evicted by the auctioneers, which means that those outcomes broke continuity of occupation and any subsequent presence on the land was unlawful and in defiance of court orders. They maintained that the Plaintiff did not meet the essential requirements of adverse possession and that his claim for cancellation of the Defendant's title could not be sustained. The court was urged to uphold the sanctity of the Defendants' registered title as protected by Sections 26 and 28 of the Land Registration Act.
22. The issue for determination is whether the Plaintiff has proved that he has become entitle to land parcel Kyeni/ Kigumo/1567 now Kyeni/Kigumo/3890 and 3891 by way of adverse possession. From the material placed before this court, it is evident that this is not the first dispute concerning Kyeni/Kigumo/1567. The genesis of the conflict dates back to the 1970s when the Plaintiff's father, John Njagi Njeru, together with his father Njeru Nyaga, the Plaintiff's grandfather, filed High Court Civil Case No. 323 of 1979 against the 1st Defendant seeking a declaration that

they had acquired the suit land by adverse possession and that the land originally belonged to their clan but the 1st Defendant was fraudulently registered as proprietor when he impersonated the Plaintiff's father.

23. The 1st Defendant argued that the land was allocated to him by the Kina Clan and that the Plaintiff's grandfather was merely allowed to settle temporarily on the land by the 1st Defendant's as he sought alternative land since the 1st Defendant, who actually owned the land was a minor then. The High Court, presided by Justice Schofield D. found that the occupation of the Plaintiff's grandfather and father was through a licence, which was terminated in 1968 when the 1st Defendant wrote a letter to them to vacate the land. The court held that the claim for adverse possession was premature, having been filed before the lapse of twelve years from the date of termination of the licence, and therefore dismissed the suit on 17/3/1989. He ordered the Plaintiff's father and his grandfather to vacate the land within 6 months.
24. The 1st Defendant's testimony was that despite the court's order to vacate, the Plaintiff's family remained on the land until they were evicted by the 2nd Defendant in October 2018 after the 2nd Defendant purchased the land and obtained eviction orders in Embu Chief Magistrates Court Civil Suit No. 193 of 2016. Further, it was the 2nd Defendant's evidence that the Plaintiff does not reside on or occupy land parcels Kyeni/Kigumo/3890 and 3891, which form the subject of this suit, but occupies an adjacent

portion of land. The Plaintiff's witnesses told the court that during the eviction, the house belonging to the Plaintiff's father was demolished.

25. Although the Plaintiff contended that he occupies part of the original Kyeni/Kigumo/1567 and that the subdivision into 3890 and 3891 was not effected on the ground, this court is inclined to agree with the Defendants that the Plaintiff does not occupy the suit land. If he did, his home would have been demolished during the eviction exercise. Moreover, the Plaintiff admitted that he resides on a different portion of the original parcel no. 1567. The Plaintiff was under a duty to go beyond mere assertions that the subdivision of the original parcel no. Kyeni/Kigumo/1567 had not been effected on the ground, and adduce evidence that shows that his occupation specifically extended to Kyeni/Kigumo/3890 and 3891, which are the subject matter of this suit. The evidence placed before this court does not establish that the Plaintiff occupies the suit land. The registered owner of the remaining parcel was not joined in these proceedings, which weakens the Plaintiff's case.
26. The Plaintiff failed to prove actual possession of Kyeni/Kigumo/3890 and 3891, one of the main ingredients under the doctrine of adverse possession. Having failed to prove actual possession, this court need not delve into the other ingredients, which the Plaintiff needed to prove in order to succeed in a claim for adverse possession.
27. The Plaintiff's suit is dismissed with costs to the Defendants.

Delivered virtually at Bungoma this 9th day of February 2026.

K. BOR
JUDGE

In the presence of: -

Mr. Momanyi Gichuki for the Plaintiff

Ms. Wanjiku Kamochu for the 1st Defendant

No appearance for the 2nd Defendant

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