



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT THIKA

ELC CASE NO. 81 OF 2017

(Formerly NAIROBI ELCC NO. 624 of 2003)

SERAH NJERI MWAURA.....PLAINTIFF

Versus

HENRY MWANGI KIMANI.....DEFENDANT

JUDGMENT

1. By an originating summons dated 17th June 2003 and filed on 23rd June 2003, the plaintiff claims entitlement to the suit land namely LR NO. KAKUZI/GITUAMBA/BLOCK 2(NGATHO/241 by way of adverse possession. She has sued the defendant for the following orders.

a) THAT the plaintiff has become entitled by adverse possession to that parcel of land comprised and known as KAKUZI/GITUAMBA/BLOCK 2/NGATHO/241 in Thika District and registered under the registered Land Act in the name of the defendant.

b) THAT the plaintiff be registered as the proprietor of the said parcel of land Kakuzi/Gituamba/Block 2 (Ngatho) 241 in substitution of the defendant.

c) THAT the Chief Land Registrar enter in his register the said substitution under Section 125 of the Registered Land Act Chapter 300 Laws of Kenya (repealed).

d) THAT the costs of this suit be provided for.

2. The originating summons is anchored on the plaintiff's affidavit and a copy of green card (register) filed together with the said summons. The plaintiff averred, inter alia, that the suit land originally belonged to Kakuzi Limited and it was allocated to squatters and retirees. That on 3rd January 2002, the defendant acquired title to the land from one Grace Mwhaki Makibia. That since 1983, the plaintiff has been in exclusive, continuous and uninterrupted possession of the suit land. That the defendant's title to the suit land has been extinguished thereby hence the plaintiff is entitled to the land by adverse possession.

3. In his replying affidavit sworn on 2nd July, 2003, and filed on even date, the defendant denied the plaintiff's claim. He averred that he is the registered proprietor of the suit land which he bought from Grace Mwhaki Makibia on 12th March 2001 at Kshs. 160,000/= being the purchase price of the land. That he built thereon in January 2003 without any objection from the defendant. Thus, the defendant has sought dismissal of the suit with costs.

4. The plaintiff is represented by learned counsel, Lucy Nyaencha of Nyaencha Waichari and company Advocates. The defendant is represented by learned counsel Wambui Ngugi of Wambui Ngugi and Company Advocates.

5. On 16th April, 2008, Kubo J gave directions that the suit be heard by viva voce evidence. The suit was then transferred from Nairobi Environment and Land Court to Thika Environment and Land Court for hearing and determination.

6. The plaintiff (PW1) testified and relied on her statement dated 12th February 2014, and G.G. Kariuki registered surveyors' report filed on 26/11/2018 (PExhibit 1). She also relied on abstract of title to the suit land (PExhibit 2).

7. PW2, JOSEPH NGOGE THIONGO, a farmer testified that PW1 entered the suit land in 1983. That the land was allocated to the mother of PW1, but the late Njenga, a brother to PW1 changed it's ownership to his wife, Grace Mwhaki Makibia and then sold it to the defendant (DW1).

8. DW1 relied on his statement dated 15th September 2014 and filed on 17th September 2014 in his evidence. He further relied on his list of documents dated 15th September 2014 (P Exhibits 1 to 4).

9. Learned counsel for the plaintiff filed submissions dated 3rd December, 2018 whereby he briefly provided the background of the case, the parties' respective cases and evidence. He cited **Section 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya)**, **Mutiso –v- Mutiso (1998) KLR 3268 (CAK)** applied by Justice Joel.M. Ngugi in **Symon Gatutu Kimamo and 87 others –v- East Africa Portland Cement Company Ltd (2011) eKLR** and **Kimani Ruchine and another –v-s Swift Rutherford Company and another (1980) KLR 10**. Counsel submitted that by virtue of the identity of the suit land and its possession, the plaintiff has proved that she is entitled to the prayers sought in the originating summons.

10. Learned counsel for defendant filed submissions dated 30th November 2018. She made brief reference to the pleadings, evidence of the respective parties, agreed issues duly filed on 1/9/2004 and analysed the said issues. Counsel relied on the case of **Ramco Investment Ltd –v- Uni Drive Theatre Ltd (2018) eKLR** that open and continuous occupation of suit land is not adverse if it is not exclusive but consensual between the parties. Counsel cited **Articled 40** of the Constitution of Kenya, 2010 on protection of right to property and urged this court to dismiss the plaintiff's case with costs to the defendant.

11. I have anxiously considered the entire pleadings, testimonies of PW1, PW2 and DW1 including P Exhibits 1 and 2 and D EXhibits 1 to 4. I also take into account the entire submissions including agreed issues by counsel for the respective parties in this suit. I bear in mind the case of **Great Lakes Transport Company (U) Ltd –vs- Kenya Revenue Authority (2009) KLR 720** regarding issues for determination generally in a suit. In that regard, I embrace the statement of agreed issues dated 1st September 2004 filed on even date as well as two other issues for determination namely; whether the defendant is the proprietor of the suit land and whether costs of the suit shall be borne by the defendant.

12. It is common baseline in the instant dispute that the suit land is registered in the name of the defendant. It is so discerned from the respective statements of PW1, PW2 and DW1 as well as P Exhibit 2 and D Exhibits 1 to 4. I also note the definition of the term "proprietor" under **Section 2 of the Land Registration Act, 2016 (2012)** and that the suit land was registered under the **repealed Registered Land Act (Cap 300)**; see also the case of **Wainaina –vs- Murai and others (1976-80) I KLR 283 at 289/290**.

13. As regards the issue of open and exclusive possession of the suit land, PW1 stated that she has been in exclusive and uninterrupted possession of the land since 1983. That she has occupied the land without the defendant's consent and in adverse manner to the defendant.

14. PW2 stated that PW1 lives on the suit land. He confirmed that PW1 has been in uninterrupted occupation of the suit land since 1983.

15. On the other hand, DW1 stated that PW1 lives on land reference No. Kakuzi/Gituamba Block 2 (Ngatho) 231 where her (PW1) daughter the late Leah Njoki was buried sometimes in the year 2009. That DW1 has never lived on the suit land as alleged by the plaintiff.

16. DW 1 further stated, inter alia, that he is the owner of the suit land which he bought from Grace Mwhaki Makibia at kshs. 160,000/= on 12th March 2001. That PW1 has been in occupation of a store house measuring 20ft by 30ft of Grace Mwhaki Makibia thereon. That PW1 did not contest the sale and transfer of the suit land to DW1.

17. It was the statement of PW1 that by his continuous occupation of the suit land for a period of over 12 years, the defendants' title to the land has been extinguished hence she has acquired title to the land by adverse possession. DW1 stated that in January 2003, he constructed a house on the land to its completion without any objection from PW1.

18. **Sections 7 and 18 of the Limitation of Actions Act (Cap 22)** provide for exclusive and uninterrupted possession of land. **Section 38** of the same Act stipulates how title to land is acquired by adverse possession.

19. It is trite law that possession can take different forms such as fencing or cultivation of the land in dispute; see the case of **Kimani Ruchine (supra)**.

20. The concept of adverse possession means possession of land which is inconsistent with the title of the owner. For possession to be adverse, there must be denial of the owner's title in one form or another; see **Mutiso case (supra)**.

21. Again, the concept of adverse possession was discussed in **Kasuve –v- Mwaani Investment Limited and 4 others (2004) 1KLR** wherein the Court of Appeal was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that :-

a) **He or she has been in exclusive, open possession of the land, and**

b) **The possession of the land is of right and without interruption for a continuous period of twelve (12) years.**

c) **The claimant has dispossessed the owner or discontinued the owner of possession of the land on his own volition.**

22. In the case of **Virginia Wanjiku Mwangi –v- David Mwangi Jotham Kamau (2013) eKLR**, it was held that where the claimant had been given permission by the owner to be in possession of the land in dispute, adverse possession doctrine can not apply. There must be exclusive, open and nonconsensual possession of the land for a period of over twelve years by the applicant or claimant.

23. In the instant suit, PW1 testified that she had the permission of her late brother Joseph Njenga Mwaura who was the owner of the land and husband of Grace Mwhaki Makibia, to be in occupation of the suit land. PW1 has demonstrated that he obtained title to the land by way

of transfer from its owner; see also **section 26 (1) of the Land Registration Act, 2016 (2012)**.

24. Quite clearly, the possession and occupation of half an acre of the suit land by PW1 has been open and continuous for a period in excess of twelve (12) years. However, it is evident that her possession of the suit land is not exclusive as it has been purely consensual. Thus, adverse possession of the land as claimed by the plaintiff (PW1) is plainly inapplicable in the circumstances of the case.

25. The upshot is that that the plaintiff has not proved her claim against the defendant on a balance of probability.

26. Accordingly, I dismiss the plaintiff's suit with costs to the defendant.

DATED AND SIGNED AT MIGORI THIS 30TH DAY OF APRIL, 2019:

G.M.A. ONGONDO

JUDGE

DATED, SIGNED AND DELIVERED AT THIKA THIS 14TH DAY OF JUNE, 2019.

L. N. GACHERU

JUDGE

In the presence of:

1. Mr. Mburu holding brief for Nyaencha for the plaintiff
2. M/s Mwangi holding brief or Ngugi for defendant
3. Lucy –Court Assistant