



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 18 OF 2015 (O.S)

IN THE MATTER OF SECTION 37 & 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ADVERSE POSSESSION OF 1.50 ACRES

OF LAND PARCEL NO. ABOTHUGUCHI/GITHONGO/1147

BETWEEN

ERIC MUTWIRI KINYUA.....PLAINTIFF

VERSUS

KIRAI M'IMWERIA.....DEFENDANT

JUDGMENT

BACKGROUND

The basis of the plaintiff's claim is that he has become entitled by way of adverse possession of a portion of 1.5 acres out of the suit property registration No. ABOTHUGUCHI/GITHONGO/1147 under **Section 38 of the Limitation of Actions Act** currently registered in the name of the defendant. The suit is commenced by way of Originating Summons supported by the affidavits sworn on 28th July 2015 and a supplementary affidavit sworn on 11th October 2017. The plaintiff averred that he has been in exclusive use and occupation of the 1.50 acres for more than 12 years from August 2002.

The defendant in response filed a statement of defence and counter-claim denying the plaintiff's claim and sought orders of eviction, mesne profits and costs of the suit.

PLAINTIFF'S CASE

The plaintiff testified on oath and asked the Court to adopt his witness statement dated 31st March 2017. He also referred to his two affidavits in support of the Motion and the amended Originating Summons sworn on 28th July 2015 and 11th October 2017 respectively. In the two affidavits, the plaintiff deposed to the effect that his late father Peter Kinyua had on 11th May 1999 entered into a sale agreement with the defendant for a portion of land measuring 1.5 acres from land parcel number ABOTHUGUCHI/GITHONGO/1147 for a price of Ksh. 450,000/=. The plaintiff further stated that the purchase price for the portion of the suit property was paid by his father in full after which survey was done and his father was given vacant possession whereby he built a farm house, a latrine and also started cultivating. In August 2002, he got married and he together with his wife moved onto the portion of the suit property which his father bought from the defendant and started developing the same. He stated that he has been in continuous, quiet and un-interrupted possession of the said 1.5 acres with the defendant's family occupying their portion. On 6th February 2008, the defendant through his advocates wrote to him a letter alleging that in 2003 he entered his land under a voided contract and demanded him to vacate the land failing which he would commence eviction proceedings against him. Instead, the defendant filed HCCC No. 32/2007 (Meru) seeking eviction orders against his father who allegedly had vacated the land in 2002. However, that suit abated after his father died in 2008.

PW2 was Eunice Mbiro Kinyua who is the plaintiff's mother. She referred to her statement which she recorded on 8th January 2018 and filed on 19th January 2018. She sought to have the same adopted in her evidence. In her testimony, PW2 stated that on 11th May 1999, her husband Peter Kinyua Nkanata (deceased) entered into a sale agreement with the defendant for a portion of land measuring 1.5 acres at a

price of Ksh. 450,000/=. Her late husband paid the purchase price in full. The defendant sub-divided his land and excised the 1½ acres for her husband which he took vacant possession and put up a farm house and a pit latrine. Later, her husband allotted the 1½ acres piece of land to their son Erick Mutwiri Kinyua (plaintiff). In August 2002, the plaintiff moved to the suit property with his wife and started developing the same where they have been living to –date.

PW3 was Edward Mutuma. He testified on oath and was referred to his witness statement dated 8th January 2018. He sought to have it adopted in his evidence. In his statement, the witness stated that he knew that the plaintiff's father one Peter Kinyua bought land from the defendant and put a small farm house and a pit latrine. Sometime in August 2002, the plaintiff who is the son of the said Peter Kinyua went to live with his wife in that land and are living there to-date.

PW4 was Gerald Mbwiria Kirigia who also testified on oath and adopted his witness statement sworn on 8th January 2018.

DEFENDANT'S CASE

The defendant stated that he entered into a sale agreement with the plaintiff's father one Peter Kinyua on 11th May 1999. In that agreement, he sold the said Peter Kinyua 1½ acres and was paid a purchase price of Ksh. 450,000/=. However, he was not able to transfer the land to the purchaser because the land turned out to be smaller on the ground than shown in the green card. According to the green card, the land was more than three (3) acres but upon conducting a survey, the land was two (2) acres. If he was to sell the 1½ acres to the said Peter Kinyua, he was going to remain with ½ an acre. He told Peter Kinyua that he was going to refund him his purchase price of Ksh. 450,000/=. In 2006, the plaintiff went and lived in a house his father had constructed. By then Peter Kinyua was still alive. He started ploughing crops in the land. He filed a case in 2007 seeking to have Peter Kinyua evicted from the suit property being HCCC No. 33/2007 (Meru). His lawyers wrote two demand letters before filing suit. The two letters were produced as Defence Exhibit 1 & 2 respectively. In 2015, he filed another case against the plaintiff and his mother in Githongo Law Courts being SRMCC No. 29 of 2015. He sought to have his statement adopted filed on 6th March 2017.

ANALYSIS AND DECISION

I have considered the evidence adduced by the parties and their witnesses. I have also considered their submissions and the applicable law. The plaintiff's claim is one of adverse possession based on **Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya**. Through precedents, the Courts have come up with principles one must establish a claim under adverse possession.

In the case of ***Mistry Valji Vs Janendra Raichand & 2 others (2016) e K.L.R.***, the Court of Appeal restated as follows:

“The following principles, among others, regarding adverse possession are now settled:

- (i) Adverse possession is not available to a party who is on the registered owner's land with his consent or where the entry and occupation was lawful and based on some agreement. In other words, where the title of the owner is admitted there can be no claim for adverse possession. See Samuel Miki Jane Vs Jane Njeri Richu Civil Appeal No. 122 of 2001.***
- (ii) The occupation of the land must be nec vi nec clam nec precario. See Mtana Lewa Vs Kahindi Ngala, Civil Appeal No. 56 of 2014.***
- (iii) The adverse possessor must prove that through his occupation, the true owner has been dispossessed or his possession discontinued. See Wambugu Vs Njuguna (1983) K.L.R 172.***
- (iv) It is established that adverse possession does not arise merely by occupation and use. See Alfred Warima Vs Mutaa Simba Baraza, Civil Appeal No. 186 of 2011 (KSM).***
- (v) The filing of a suit for recovery of land or any other recognized assertion of title to the land by the owner stops time from running for purposes of Section 38 of the Limitation of Actions Act. See William Gatuhi Murathe Vs Gakuru Gathumbi, Civil Appeal No. 49 of 1996”.***

The plaintiff who is the son of Peter Kinyua who entered a sale agreement with the defendant for the purchase of 1½ acres of the suit property has not taken any steps to enforce the agreement. The plaintiff's witness who is also his mother Eunice Mbuoro Kinyua has stated in her witness statement that her husband Peter Kinyua allotted the 1½ acres to their son Erick Mutwiri Kinyua. The plaintiff cannot therefore purport to be an innocent trespasser into the defendant's property oblivious of the sale transaction with his late father Peter Kinyua (deceased). The defendant who is the registered owner of the suit property consented the plaintiff's father Peter Kinyua (deceased) to take possession and occupy the suit property based on a sale agreement dated 11th May 1999. The plaintiff is well aware of the said transaction as deponed in affidavit in support of his Originating Summons sworn on 28th July 2015. At paragraph 5 of that supporting affidavit, the plaintiff stated as follows:

“5. That when my father bought that 1.50 acres, I was a minor but in August 2007 when I was an adult and married took possession of the 1.50 acres, built a 5 rooms semi-permanent house, connected with piped water and electricity, constructed a permanent zero grazing cows shed, cultivated the whole 1.50 acres where I grow seasonal food crops and on the hilly part planted eucalyptus trees”.

The plaintiff in his affidavit in support of his Originating Summons stated that he took possession and occupation of the suit property in

August 2007 after he got married. The plaintiff's possession and occupation of the suit property cannot be said to be adverse to the owner's title since he was allotted the property by his family as stated by his mother Eunice Mbiro Kinyua in her statement filed in Court on 3rd April 2017 at paragraph 5 as follows"

"My husband allotted those 1½ acres to our son Erick Mutwiri Kinyua for we have our land where we live"

The statement by Eunice Mbiro agree with that of the plaintiff who is her son that he took occupation and possession of the suit property as a licensee by his father Peter Kinyua (deceased) who had bought it from the defendant. I find and hold that the plaintiff's claim for adverse possession cannot therefore arise since his occupation and possession of the suit property was consensual through his father. The plaintiff is privy to the sale transaction between the defendant and his late father Peter Kinyua (deceased). That may explain the plaintiff's change of heart through amendment of his pleadings to reflect the date of taking possession and occupation of the suit property from August 2007 to August 2002. The all purpose of the amendment of the dates in my view is for the plaintiff to fit himself with the 12 years period for a claim of adverse possession. The amendment by the plaintiff was not in good faith but a gimmick to defeat justice. The plaintiff's claim therefore fails and the same is hereby dismissed.

In the alternative, I find the defendant's counter-claim has been proved on a balance of probabilities and the same is allowed as prayed. Consequently, I make the following orders:

(1) The plaintiff to vacate from the defendant's land parcel No. ABUTHUGUCHI/GITHONGO/1147 within six (6) months from today failing which he shall be evicted.

(2) The Land Registrar, Meru County to remove all cautions and any other inhibitions on the suit property placed by the plaintiff forthwith.

(3) In view of the circumstances of this case, I order each party to bear his own costs of this suit and the counter-claim.

(4) The OCS Githongo Police Station to supervise the enforcement of this order.

READ and SIGNED in open Court at Meru this 3rd June, 2019.

E.C. CHERONO

ELC JUDGE

3RD JUNE, 2019

In the presence of:

1. Mr. Mburugu for Plaintiff – present

2. Kirai M'Imweria – present