



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CASE NO 16 OF 2017 (O.S)

[FORMERLY NAKURU ELC CASE NO 27 OF 2012 (O.S)

IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT (CAP 22)

LAWS OF KENYA

AND IN THE MATTERS OF THE LAND REGISTRATION ACT, 2012

AND IN THE MATTER OF THE LAND REFERENCE NAROK/TOWNSHIP/163

AHMED ABDI MURASA.....PLAINTIFF

VERSUS

ZAKARIA NJENGA KAMITI.....1ST DEFENDANT

KONENEN NARANKAIK.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff moved court by way of an Originating Summons dated 17th October 2012 and filed on 19th day of October 2012. The Plaintiff sought among others a declaration that he acquired rights to the suit property **LR NAROK/TOWNSHIP/163** as against the 1st Defendant as the lawful registered proprietor by adverse possession and that the 1st Defendant rights over the said land were extinguished under the provisions of the Limitations of Actions Act (CAP 22)
2. It is the Plaintiffs case that his father Abdi Murasa was in occupation and possession of the suit land **LR NAROK/TOWNSHIP/163 A** since 1936 after he was allocate the same by the colonial government for purposes of trading and that is where he brought up his family and was buried on the said land.
3. The plaintiff claims that after the death of his father he took over possession of the said suit land and continued staying there without interference and in the year 1985 he applied to have it formally allocated to him by the Narok County Council.
4. He further claims that the same was irregularly allocated to one Zakaria Njenga the 1st Defendant who unlawfully acquired a certificate of title in respect of the suit property.
5. The Plaintiff claims that the 1st Defendant attempted to evict the Plaintiff through **Nairobi RMCC 4887 of 1986** where they subsequently entered into a consent that the said suit be withdrawn on the understanding that the Plaintiff will be allocated another property by the Narok County Council.
6. The Plaintiff's adduced evidence in court by way of witnesses and list of documents. **AAM1** is an agreement between Land Officer of the Colony and Protectorate of Kenya and Abdi Murasa for allocation of Plot no 1 situate in Narok Township Trading measuring 2 acres and for purposes of trading and a requirement of yearly rent payment of Kenya shillings 30 failure to which the license would be forfeited. The agreement was dated 1936.
7. The Plaintiff annexed **AAM2** being rent payment receipts of years 1924, 1958,1959,1963,1964,1965 as proof of payment of rent as stipulated in the said agreement. Worth noting However, is that there isn't any other receipt on record as proof of payment of rent since year

1965.

8. A letter dated 4th July 1985 written by the plaintiff to the Narok county council seeking to be given a new plot number and an allotment letter however there's an annexure **AAM3** being an allotment letter issues to the 1st defendant dated 2nd June 1983 and registered on 22nd April 1985.

9. In support of his case, the plaintiff produces a certificate of lease **AAM4** to the subject land bearing the names of the 1st Defendant running from year 1983 and to be valid for 99 years.

10. Also attached is a plaint of Civil Suit 4887 of 1986 between the 1st Defendant and Abdi Mohammed Murasa, Defence and summons to enter appearance all as proof of suit.

11. The Plaintiff stated that by virtue of his late father being allocated the suit land in 1936, he inherited the same from his father, however what is not explained is any succession proceedings that allowed him to inherit and also there was no evidence of authority to sue on behalf of the rest of the family, raising the important question of capacity to sue.

12. The Plaintiff testified on 21/9/2017 where he stated that he is he stated that the 1st defendant sued him and not his father in **RMCC 4887/1986**, he also states confirms that he's pursuing the matter on behalf of his siblings and that he has not taken out letters of administration and has no consent from his siblings to show authority to file the suit. on cross-examination the plaintiff states that he does not have title to the suit property and that he has no document to show that Plot no 1 which is the number appearing on the documents he presented before court, was later registered as Plot no 163. Upon re-examination the Plaintiff admits that he made an application for registration of the said plot on 4th July 1985.

13. **Pw2 Zeina Juma** testified on 21/09/2017, she adopted her witness statement filed on 1/3/2016. The statement states that she knew by virtue of living near the said plot which according to her belonged to the plaintiff and she used to attend prayers in the house. She also states that she knew of some tenants who had rented on the said plot. On cross-examination she stated that the plot belonged to the children of Mohammed and mama Aisha. She also states that she does not know if the plaintiff has any document but she knows it belongs to them.

14. **Pw3, David Koyaki** he states that he used to visit the plot because the plaintiff used to live on the plot and met the plaintiffs mother. He further states that he used to work with the plaintiffs deceased father at the Narok county council. On cross examination he states that he only knew the Plaintiff and not his father. He further adds that it's the plaintiff who demolished the houses on the plot in 1988 and that he knows the plaintiff inherited the land from his parents.

15. **Pw4 Sahra Mohammed relied** in her written statement stated that she was born and raised on the subject land and there was a family home on the said land. She further states that there were rental houses on the same land and her mother would collect rent. On cross-examination she stated that she has no record as proof of rent collection and that there was no power of attorney signed giving the plaintiff authority to file this suit.

16. **PW5 SOLOMON TAJEU NANYU**

SUMMARY OF THE 1ST DEFENDANT'S CASE

1. It's the 1st Defendant's case that he was lawfully allocated the suit land being **L.R NAROK/TOWNSHIP 163** by the Narok County Council in 1983 and the same duly registered in 1985. He makes reference to the Plaintiffs attachment of the Certificate of Lease and the Allotment letter marked **AAM4 AND AAM6** respectively.

2. The 1st Defendant has further annexed a copy of plot list allocations marked **ZNK1** issued by Narok county council showing that the Plaintiff had been allocated plot **No 319** according to the 1st Defendant caused him to withdraw the suit **SRMCC 4887 OF 1986**.

3. The 1st Defendant states that he has been paying rates and rents in respect to the suit property up and until 2012 when he sold the said land to the 2nd Defendant. He attached several receipts and proof of such payments.

4. The 1st Defendant opposes the claim by the Plaintiff that he filed an encumbrance/caution on the suit land and states that he was able to sell and effect transfer on the suit land to the 2nd Defendant because there was no caution and if there was it would have been impossible to sell and the same would be evidenced. He attached a certificate of official search as at **01-09-2011** indicating that the 1st defendant was the owner of the parcel of land.

5. The 1st Defendant insists that he sued the Plaintiffs father in **SRMCC 4887 OF 1986**, and not the Plaintiff and draws courts attentions to the names of the parties on the attached plaint, Defence and Summons to enter appearance. He refutes the Plaintiffs claim that he was a party to the said suit.

6. The 1st Defendant testified in court on 29/01/18 where he stated that he applied for allocation of plot no 163 and not Plot no 1 the number reflecting on the Plaintiffs attached documents. The said allocation took place in 1983 and registered in 1985. He therefore acquired the land lawfully. He also states that he was summoned by the Criminal Investigations Department concerning a complaint that had been lodged about the said parcel of land. He honoured the summons and produced all the documents in his possession relating to the ownership of the said land and he was cleared. On cross examination the he stated that he obtained eviction orders from court to evict the Plaintiffs father from the suit property but had not attached the order as part of his documents since he could

not trace it. According to him, one Jeremiah Gathogo was the person who was on [living on the parcel of land until he vacated after he sold the land to the 2nd defendant. He also states that he has no rates/rent receipts prior to 2008. He also states that he has never met the Plaintiff's sister who alleged to have solicited money from in return of the said plot back to them.

7. On re-examination by his advocate concerning a letter drafted from his lawyer's office agreeing to have him withdraw the suit filed in Nairobi in exchange of allocation of another parcel of land, the 1st Defendant states that he could not verify the authenticity of the said letter having asked his advocate on record then on the matter who denounced the said letter.

8. **DW2 GEORGE KINYANJUI** testified on **19/02/2018**, states that the 1st Defendant is his father and he knows that the father had allowed one Jeremiah Gathogo to use the said plot which he did until 2012 when his father sold the land to the 2nd Defendant. He states that he has not seen anyone else live on the said plot of even pay rent. On cross-examination DW2 states that he was not involved in selling the plot as the same belonged to his father. He also states that he knew the Plaintiff and his children and have never talked about ownership of the land.

SUMMARY OF THE 2ND DEFENDANT'S CASE

1. The 2nd Defendant testified on 19/02/19 and relied on his Replying affidavit dated 31st October 2012 and filed in court on 1/11/2012 as his evidence. He deponed that the Plaintiff has not been in continuous occupation of the suit land.

2. He further avers that sometimes in 2012 he bought the suit land from the 1st defendant for value after a physical inspection of the plot and proper search of the land.

3. The 2nd Defendant was duly issued with a Certificate of Lease marked **KN1**. He further states t.

4. That there were temporary wooden structures at the corner of the sit land which the plaintiff was ordered to remove by the Narok Town Council vide a letter attached marked **KN2**.

5. The 2nd defendant confirms that he is currently in position of the suit land since 19/09/2012 when he bought the land for Kenya Shillings 10 Million from the 1st Defendant and has carried on development on the land costing approximately Kenya Shillings 80 million.

6. During Chief examination the 2nd Defendant stated that he never found/seen any caution put against the said land otherwise he'd not have bought it, never the less he conducted due diligence on the said land and never saw the Plaintiffs name.

7. On Cross-examination the 2nd Defendant stated that he started developing the said land in 2013 and there was no one on the land.

ANALYSIS

At the close of the hearing of the suit all the parties were directed to file their respective submissions. It is the Plaintiffs case as pleaded in the Originating Summons dated 17th October, 2012 he seeks adverse possession and other declaratory orders and contend that he has acquired rights of adverse possession against the 1st Defendant as the 1st Defendant title was extinguished and he had no title to pass to the 2nd defendants.

The Plaintiff contended that he was born on the suit land and that it was his late father who was allocated the land prior to independence and even though no title was issued to him and that he made several attempts to obtain title to the land but the 1st Defendant in an suspicious manner obtained title before him in 1985 in which the 1st Defendant attempted to dispossess him of the property vide Nairobi SRMCC No. 4887/1986 but the matter was withdrawn by the 1st Defendant and it remained 5 years therefore he had acquired uninterrupted, peaceful, open occupation and use of the suit land and that the 1st Defendant never made any attempt to interrupt his occupation until the 1st Defendant later sold the land to the 2nd Defendant.

The Plaintiff further contended that after the demise of his father he took possession of the land and his siblings were staying on his authority.

The 1st Defendant in his submissions stated that for a claim of adverse possession to succeed the Plaintiff must proof that he has been living in an open, continuous and uninterrupted land for a continuous period of 12 years and that the rightful owner of the land had knowledge whether actual or constructive. The 1st Defendant contends that the Plaintiff was not in actual or physical possession of the suit land when the suit herein was filed and thus his claim to adverse possession cannot stand. He states that the Plaintiff's testimony was in conclusive and further that the Plaintiff's assertion that the suit land belonged to him and his siblings meant that he was not in exclusive possession of the land and that all the Plaintiff's witnesses stated that the suit land belonged to mama Asha the Plaintiff's mother who is deceased.

The 1st Defendant further stated that the Plaintiff testified that he inherited the suit property from his father and he brought the instant suit on his behalf and that of his family and there was no proof that he brought the suit herein on their behalf.

The 2nd defendant in his submissions contended that the Plaintiff must answer the question on the basis of his possession to the suit land and knowledge that the Defendant was a trespasser.

In the instant case it is the plaintiff's contention that he acquired the suit property by way of adverse possession having been in continuous occupation of the land when the 1st Defendant had acquired title to the land later sold the land to the 2nd defendant. The testimony by the plaintiff and that of his witness to mind have not been controverted that the Plaintiff entered into the suit land in 1964 and constructed houses thereon.

The 1st Defendant contended that the Plaintiff has disposed off the land after he failed to remove him from the land.

The Defendants also contended that the will and testimony of the Plaintiffs witness points to one of illegality of title and not about adverse possession. He states that the Plaintiff had failed to demonstrate actual and constructive possession of the suit and in the circumstances the suit is nonstarter.

DETERMINATION

Having considered the evidence and testimony the issues for determination before me is: -

(a) Whether the Plaintiff has established the grounds for declaration of adverse possession

On the issue of whether the Plaintiff has the capacity to sue the Plaintiff in his testimony stated that the suit land belonged to his father and after his demise he took over the same. The plaintiff contended that the defendant had not taken out letters of administration in respect of the estate of his deceased father and therefore the Plaintiff lacked the capacity to sue.

The plaintiff filed the suit herein in the year 2012 and from that time up to the filing of the submissions the defendants had not raised the issue of the plaintiff not having capacity to sue, the Defendant could have taken the earliest opportunity to determine whether the Plaintiff had the capacity furthermore the 1st Defendant had sued the Plaintiff in 1998 vide **NAIROBI SRMCC NO. 497 OF 1998** and thus knew that the plaintiff was the person who was in occupation of the suit land and from the above I do find that the Plaintiff had the capacity to sue.

On whether the plaintiff has proved adverse possession it is my finding that despite the Defendants contention the Plaintiff has not been in continuous occupation of the suit land when the 1st Defendant had acquired title to the land. It is the testimony of all the witnesses that indeed it was the plaintiff family that occupied the suit land until when they were evicted by the Defendant when he acquired title. the 1st Defendant attempts to extinguish the plaintiff claim was not by lawful means as required in law since the said eviction was not sanctioned by court.

Having considered the witness testimony and the evidence before me I find that the Plaintiff have discharged the burden of proof in the matter I find that they have proved all the ingredients required for a claim under adverse possession to succeed and I thus make the following orders and declarations: -

1. That the Plaintiff/Applicant had acquired title to Land Parcel No. LR NAROK/TOWNSHIP/163 by adverse possession.
2. That the 1st Defendant had no title or rights to sale and transfer the suit land to the 2nd defendant.
3. That the allocation and registration of the suit land to the 1st defendant was illegal and unlawful and there be a rectification of the register in the name of the Plaintiff and in the alternative and in the interest of justice, since the 2nd Defendant has developed the suit land the 2nd defendant do pay the Plaintiff the value of the suit land at the time when the same was sold and transferred to him.

DATED, SIGNED and DELIVERED in open court at **NAROK** on this **19th** day of **July, 2019**

Mohammed Kullow

Judge

19/7/19

In the presence of: -

Mr Kinoti holding brief for Gwandaro for the Plaintiff

Ms Magana for the 1st Defendant

Mr Githui for the 2nd Defendant

CA:Chuma/Kimiriny

Mohammed Kullow

Judge

