



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 261 OF 2016 (O.S)

JOSEPH GITHINJI KAMAU (Suing as the legal representative

of the estate of Douglas Kamau Thumbi (deceased).....PLAINTIFF

VERSUS

KIPRUGUT ARAP KEINODEFENDANT

JUDGMENT

1. Proceedings in this matter were commenced on 15th July 2016 when the plaintiff filed Originating Summons (O.S) dated 20th May 2016. He averred that he is the legal representative of the estate of Douglas Kamau Thumbi (deceased) and claimed to have acquired all that parcel of land known as Dundori/Muguathi Block 2/336 (hereinafter the suit property). He seeks judgment against the defendant for orders that:

- 1. The plaintiff be declared to have become the legal owner entitled by adverse possession having occupied, cultivated and developed the said parcel of land continuously and uninterrupted for over thirty (30) years since 1985 and as the sole proprietor of all that parcel of land comprised in Dundori/Muguathi Block 2/336 situated in Nakuru.*
- 2. The honourable court do direct that Nakuru District Land Registrar rectify the land register accordingly and the plaintiff be registered as the sole proprietor of the said parcel of land namely Dundori/Muguathi Block 2/336 in place of the above named defendant in whose favour the land is currently registered.*
- 3. The last original title deed in respect of Dundori/Muguathi Block 2/336 which is with the defendant be dispensed with.*
- 4. Costs of this application be provided for.*

2. The O.S is supported by a supporting affidavit and supplementary affidavit both sworn by the plaintiff and is opposed by a replying affidavit sworn by the defendant. Directions were given by consent that the O.S be heard by viva voce evidence, the O.S be deemed as plaint, the affidavits filed by the plaintiff be deemed as the plaintiff's witness statements, and the replying affidavit be deemed as both defence and counterclaim as well as defendant's witness statement. The counterclaim is contained at paragraphs 18 to 20 of the replying affidavit. The defendant seeks judgment for:

- a) A declaration that he is the lawful and registered owner of the suit property.*
- b) A declaration that the plaintiff is a trespasser and an order that he be evicted from the suit property.*
- c) Costs of the suit and the counterclaim.*

3. At the hearing only the plaintiff and the defendant testified. The plaintiff stated that he obtained letters of administration ad litem in respect of the estate of Douglas Kamau Thumbi, his late father, on 8th April 2016. The deceased passed away on 10th January 2005. He produced a copy of the letters of administration as an exhibit. He added that he has been living on the suit property since 26th June 1985 to the date of his testimony. That he inherited the suit property from the deceased. The deceased had himself purchased it from the defendant at a consideration of KShs 60,000 through a sale agreement dated 26th June 1985. The deceased paid the purchase price, complied with the sale agreement, took possession of the suit property, developed a residential house on it and moved his dependants into it. That sometime in the year 2014 the defendant started claiming the suit property and filed Nakuru CMCC No. 92 of 2014 against the plaintiff. He added that he learnt that the defendant had clandestinely obtained title to the suit property on 12th June 2000. He discovered this sometime in the year 2013 when the defendant served him with a demand letter. He added that he has a homestead on the suit property comprising of a dwelling house and other developments. That he and his family have enjoyed uninterrupted continual possession of the suit property with the defendant's knowledge since 1985 and that the deceased is buried on it.

4. Under cross examination, he stated that he was born in the year 1982 and was three years old when the sale agreement was signed. He was not present at the place where the agreement was signed. His father passed away 20 years after the sale agreement and never had any title deed for the suit property issued in his name. He added that he has 4 brothers and his mother is still alive. He also has a sister. Besides obtaining letters of administration Ad Litem, the family has never had an administrator with full grant in respect of the deceased's estate. The Grant Ad Litem was obtained with a view to filing this case.

5. The plaintiff further stated that his mother and his siblings had authorized him to file this case in court and that the defendant had filed a case against him seeking eviction in 2014. He responded to the case by filing a defence and a witness statement which he signed. At paragraph 3 of the statement he stated that his mother and brother have lived on the land since 1987 and that he moved there on 1st November 2013. He added that he wants the court to order that he be given the title in his name. Regarding the sale agreement, he stated that he is not aware that it was cancelled and that his father was refunded his money.

6. The plaintiff's case was then closed.

7. On his part, the defendant testified that he does not know the plaintiff. He only knew Douglas Kamau (the deceased) who he was selling the suit property to in 1985. He confirmed that they signed the sale agreement which the plaintiff had produced and that the deceased paid KShs 60,000. He never transferred the plot to the deceased since his wife refused. The defendant and the deceased went to the office of the District Officer in 1989 and agreed that the defendant refunds the purchase price to the deceased. The defendant accordingly refunded the money there in the DO's office. Present at that meeting were the defendant, the deceased, the deceased's wife, Chief Lelei and the defendant's wife. After the deceased was refunded the defendant continued to live on the suit property until 2007 when there were tribal clashes in the area. The defendant then moved to his ancestral land at Lesos in Eldoret. When he went back to check on the suit property, he found that the plaintiff had entered it in the year 2013, constructed on it and cut his trees. He filed Nakuru CMCC No. 92 of 2014 against the plaintiff. Among the documents the plaintiff filed in response to the case was a witness statement in which he stated that he moved into the suit property on 1st November 2013 and built a semi-permanent house on it.

8. He added that the deceased passed away in the year 2005 and the family buried him on the suit property at night without his (the defendant's) consent. He further stated that he does not know the plaintiff and that he has never had any agreement with him over the suit property. He urged the court to order that the plaintiff be evicted from the suit property. He produced copies of title deed for the suit property, clearance certificate dated 9th June 2000, letter dated 21st February 1989 from Kanu Chairman, letter from District Officer Bahati Division dated 22nd August 1989, plaintiff's witness statement in Nakuru CMCC No. 92 of 2014 and demand letter dated 2nd December 2013 as exhibits.

9. Under cross examination, he stated that he moved out of the suit property in 1997 due to tribal clashes. At that time, the deceased's children were on the plot. From 1985 when he sold the plot to 1989 when he refunded the purchase price, the defendant and his family lived in a rented house. When the deceased came into the property after the defendant sold it to him, the deceased lived in the defendant's mud house then he built an iron sheet house. He added that he has not gone back to live on the plot since he moved out. From the moment the deceased moved in, he never moved out until he passed away in the year 2005. He further stated that he did not take any step to stop the burial of the deceased on the suit property.

10. Under re-examination, he stated that the deceased moved out after a few days after he was refunded.

11. The defence case was closed at that point.

12. Parties filed and exchanged written submissions. For the plaintiff, it is submitted among others that his stay on the suit property became hostile when the defendant sought to terminate the sale transaction and to refund the deceased in the year 1989; that the defendant had not taken any action to take possession from the plaintiff save for **Nakuru CMCC No. 92 of 2014** and that in any case the plaintiff was sued in that case in his personal capacity and not as a personal representative of the deceased's estate and generally that the plaintiff has satisfied the test for one to succeed in a claim for adverse possession.

13. For the defendant, it is submitted that the plaintiff moved to the suit property in the year 2013 and has therefore not been in adverse possession for 12 years; that a claim for adverse possession cannot coexist with a claim for purchaser's interest; that the plaintiff is a trespasser and eviction should issue as prayed in the counterclaim.

14. I have considered the pleadings, the affidavits filed, the oral testimony and the submissions. I have distilled the following as the issues for determination: firstly, whether the plaintiff has established the ingredients of a claim for adverse possession; secondly, whether the plaintiff is a trespasser; and lastly, whether the reliefs sought by both parties are available. Since proceedings herein commenced by way of O.S and parties filed various affidavits which are on record, I will consider the oral testimonies as well as the affidavits.

15. The law on adverse possession is well settled and is founded on **Sections 7, 13, 17 and 38 of Limitation of Actions Act. Section 7** provides:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person.

16. The Court Of Appeal discussed the circumstances under which the cause of action accrues as follows in **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR**:

So when does the cause of action accrue? Section 13 provides that:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....” (Emphasis added)

Further, under Section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor’s title to the land stands extinguished. The legal implication of the doctrine was well summarized by this Court in the case of Benjamin Kamau Murima & Others vs. Gladys Njeri, C A No. 213 of 1996 where it was held that:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

Once an adverse possessor is eligible for title under the doctrine, he must move court Section 38 of the Act; which provides that:-

“(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

[13] Having the above pre-requisites in mind, it therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of *nec vi, nec clam, nec precario* (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1st appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.)

[14] Consequently and as rightly submitted by the appellants’ counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine. ...

17. Ingredients of adverse possession were further discussed by the Court of Appeal in Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR as follows:

The doctrine of adverse possession has received its fair share of criticism both locally and internationally as sometimes arbitrary, illogical, irrational, disproportionate and an aberration in our land tenure system. The constitutionality of it has even been tested in our courts severally, but this Court in Mtana Lewa vs Kahindi Ngala Mwagandi [2015] eKLR held that it was neither arbitrary nor an unconstitutional limitation of the right to property. In that case Makhandia, JA. summarized the doctrine as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

See also sections 9, 13, 17, 37 and 38 of the Limitation of Actions Act (LAA) which make further provisions on the mechanics of the doctrine.

In the case of Mate Gitabi vs Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others [2017] eKLR, this Court stated as follows:

*“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*. See also ... Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1KLR where this Court stated as follows:*

‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’”

It is clear from those principles that the onus lies on the person claiming title by adverse possession to prove the essential elements before an order is granted in his or her favour. ...

But the main issue still remains: did the appellants acquire ownership as against the registered owner openly without force or

stealth, or under the licence or knowledge of the owner and have they shown continuity and non-interruption of that process? The onus of proving all that remains on the appellants and it is not for the respondent to prove, as submitted, that there was no adverse possession or that if there was any, it was extinguished. ...

18. The plaintiff holds limited grant of letters of administration ad litem in respect of the estate of Douglas Kamau Thumbi (deceased) who he says was his father and who passed away on 10th January 2005. The letters were issued to him on 8th April 2016 in **High Court Probate and administration Cause No. 78 of 2016 (Nakuru)** and are expressly stated to be limited for the purpose of filing suit. I also note that in the title of this case, the plaintiff has indicated that he is suing as the legal representative of the estate of Douglas Kamau Thumbi (deceased). Simply put, he is not pursuing his own rights but those of the deceased's estate.

19. There is no dispute that the deceased and the defendant entered into a sale agreement dated 26th June 1985 pursuant to which the deceased was buying the suit property from the defendant. According to the defendant, the transaction was terminated in 1989 and the purchase price refunded. So as to succeed, the plaintiff must prove that the deceased has been in exclusive possession of the suit property openly and as of right and without interruption for 12 years, either after dispossessing the defendant or by discontinuation of possession by the defendant owner on his own volition. From the evidence on record, the plaintiff claims that the deceased entered the suit property on 26th June 1985 pursuant to the sale agreement. Needless to state, such an entry and possession would be contractual as opposed to adverse and time does not begin to run.

20. In **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR** the Court of Appeal stated:

... tenants in possession have no adverse possession. Time cannot run in their favour until the tenancy is terminated. The situation of a tenant as far as adverse possession is concerned is similar to that of a licensee and we therefore re-echo the decision of this Court cited by the learned counsel for the appellant, namely, the case of WAMBO v NJUGUNA 1983 KLR 172 at holding 4 where the Court held:-

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist.”

21. According to the defendant, the sale transaction was cancelled in the year 1989. Time could therefore only start running from 1989, assuming possession by the deceased as at that date is established. The plaintiff stated while under cross examination that he was three years old in 1985. It is impossible of his own knowledge to testify to entry of the deceased into the suit property as at 1985 or even 1989. Nevertheless, the defendant made the plaintiff's work easy when he stated under cross examination that the deceased moved into the suit property after he sold it to him and that the deceased lived in the defendant's mud house then built an iron sheet house. He also stated that from the moment the deceased moved in he never moved out until he passed away in the year 2005 and that from 1985 when he sold the plot to 1989 when he refunded the purchase price, the defendant and his family lived in a rented house. Additionally, he stated that when he (the defendant) moved out of the suit property he never went back to live on it. I am aware that there is a contradiction between what the defendant stated in evidence in chief and what he stated in cross examination. I take the version in cross examination as the correct one since there would be no motivation for the defendant to give false testimony during cross examination.

22. Arising from the foregoing, it is manifest the deceased was in possession of the suit property from 1985 to the year 2005 when he passed away. This translates to a period of 20 years. Although he entered pursuant to a sale transaction, the defendant maintains that the sale was cancelled in the year 1989. Time therefore started running from 1989 and by the time of his death the deceased had been in adverse possession for 16 years. The possession was open since the defendant admits that the deceased built his own house on the suit property and was ultimately buried on the suit property when he passed away.

23. There is no dispute that the defendant filed **Nakuru CMCC No. 92 of 2014** against the plaintiff seeking eviction. Did it disrupt the running of time? I do not think so. I have perused the plaint in that matter which is annexed to the affidavit in support of the O.S and I note that the said suit was filed against the plaintiff in his personal capacity and not against the estate of the deceased. It therefore had no impact of the running of time as far as the deceased's estate is concerned. I am therefore satisfied that the plaintiff, as an administrator of the deceased's estate, has satisfied the ingredients of a claim for adverse possession. That resolves the first issue for determination.

24. The answer to the second issue for determination, as to whether the plaintiff is a trespasser, is tied to the first issue. I have held that the deceased's estate has established the ingredients of a claim for adverse possession. The defendant admitted that the deceased was on the suit property with his children. That would include the plaintiff. He cannot therefore be termed a trespasser. He was and continues to be on the suit property validly. The defendant's counterclaim is in the circumstances untenable and is dismissed.

25. Is the plaintiff entitled to the reliefs sought? From the foregoing discussion, I am persuaded that the deceased's estate has satisfied the ingredients of a claim for adverse possession. The plaintiff holds limited grant of letters of administration ad litem in respect of the deceased's estate. The grant is expressly stated to be limited for the purpose of filing suit. This suit is one such suit. The estate is thus entitled to the full benefits of this suit which was filed pursuant to the said grant. Nevertheless, the plaintiff does not have a full grant and he cannot therefore be registered as the proprietor of the suit property. Such a grant may be issued to him or some other person in the future once appropriate proceedings are filed. The estate will therefore only access the full benefits of this judgment through such administrator of the deceased's estate who will obtain a full grant. So as to protect the interest of the estate pending issuance of full grant, I will order registration of an inhibition against the suit property.

26. In the end, I make the following orders:

a) The defendant's counterclaim is dismissed.

b) The estate of Douglas Kamau Thumbi (deceased) has become entitled by adverse possession to all that parcel of land known as Dundori/Muguathi Block 2/336 situated in Nakuru.

c) The District Land Registrar Nakuru to register such person or persons who will obtain **full** grant of letters of administration in respect of the estate of Douglas Kamau Thumbi (deceased) as the registered proprietor(s) of all that parcel of land known as Dundori/Muguathi Block 2/336 situated in Nakuru.

d) An order of inhibition is hereby issued inhibiting the registration of any dealing in respect of all that parcel of land known as Dundori/Muguathi Block 2/336 situated in Nakuru pending compliance with (c) above.

e) The plaintiff shall have costs of these proceedings.

27. Judgment herein was to be delivered on 13th February 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 15th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for plaintiff

Mrs Oliech holding brief for Mr Juma for defendant

Court Assistants: Beatrice & Lotkomoi