



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO 353 OF 2017

JOSPHINE NDUTA MWANGI..... PLAINTIFF

VERSUS

MUNGAI MUCHIRI.....DEFENDANT

JUDGMENT

1. Through her originating summons dated 25/04/2017, the Plaintiff sued the Defendant for orders that; -

a. That an order of injunction do issue restraining the Defendant herein either by himself, his spouse/s, his employees, agents, relatives or anybody else whatsoever from entering, trespassing thereon, charging, transferring to in any way whatsoever dealing with all the plot of land known as Fort hall LOC. 16 NDUNYU CHEGE/T.11 pending the hearing and final determination of this suit.

b. That this honourable Court to declare that the Plaintiff herein has become entitled to all that parcel of land known as Fort hall LOC. 16 NDUNYU CHEGE/T.11 by Adverse Possession.

c. That the Land Registrar Thika or any other relevant Land Registrar be ordered to transfer and register the said plot of land in the name of Plaintiff Josephine Nduta Mwangi and that the said Land Registrar dispense with demanding the title documents or any other documents in respect of the Defendant Mungai Muchiri from the Plaintiff who may not have them.

2. The summons are based on the grounds that; the Plaintiff is the widow of the late Nahashon Mwangi Njoroge and also the administrator of her said husband's estate who passed away on 04/12/1999. The Plaintiff claims that her late husband purchased the suit land from the Defendant Mungai Muchiri in 1968. Mungai Muchiri had been registered on 18/07/1962 as the proprietor. That immediately after the purchase in 1968 her late husband entered into the suit land and took possession of the same where he remained in occupation and use until his demise in 1999. That after his death, the Plaintiff herein being his widow and administrator of his estate took over the possession of the suit land and continued utilizing the same to date. That the Plaintiff and her husband have enjoyed peaceful, quiet, open possession, occupation and use of the suit land for a period in excess of 49 years without any interruption. That some stranger has recently started suspiciously visiting and eyeing the suit land. The Plaintiff therefore contends that she has become entitled to ownership of the suit land through Adverse Possession.

3. The Plaintiff avers that she was unable to trace the Defendant for service of summons. With leave of the Court the service was done through substituted service vide an advertisement in the local dailies being the standard newspaper dated 20/03/2018.

4. Despite being duly served the Defendant failed to enter appearance, interlocutory judgment was then entered against him and the matter was set down for formal proof.

5. The Plaintiff testified that her late husband and the Defendant entered into an agreement for purchase of the suit land on 28/04/1968 and the husband paid the purchase price in full, after which they both moved into the suit land in the same month of April 1968 and have remained in possession and use to date. That she uses the suit land for farming. She produced the agreement dated 28/04/1968 in Kikuyu language translated to English on 25/04/2017. The said agreement is in respect to several plots of land among them being the suit land herein, all claimed to have purchased at a price of kshs. 130/- each. She also swore an affidavit claiming to have lost the original sale agreement sometimes in the year 2008 along with other documents that she apparently misplaced in her house and made a report to the Thika police station on 03/11/2008 and obtained the annexed police abstract. She also produced the grant of letters of administration to her husband's estate in her favour dated 24/01/2001, an official search of the suit land dated 05/04/2016 and a letter from the chief dated 28/08/2008. She claimed that her husband died before the vendor could transfer the suit land to him because they did not know the whereabouts of the vendor.

6. The issues for determination by this Court are as follows; -

a. Whether the Plaintiff has occupied the suit land for over 12 years.

b. Whether the Plaintiff's occupation has been open, unhindered, notorious, undisturbed and uninterrupted for more than 12 years.

c. Whether the Plaintiff has become entitled to the suit land by way of Adverse Possession?

d. Can the orders sought be granted without producing the original title?

7. The Plaintiff's claim is that her husband purchased the suit land via a sale agreement dated 28/04/1968 from the Defendant and paid the purchase price in full after which the Plaintiff and her husband entered the suit land in the same month of April 1968 and have remained in possession and use to date. The said sale agreement shows the agreement was entered into by the vendor namely E. MUNGAI UNO who apparently sold the suit land that belongs to someone else being the Defendant herein namely MUNGAI MUCHIRI. However considering that the suit land constitutes agricultural land then the failure to obtain the consent of the land board within the stipulated time, the agreement became void by operation of the law. She explained that her husband died sometimes in the year 1989 after which she continued to be in occupation and use of the suit land. She claims to do farming on the suit land. In support of her claim she produced the sale agreement dated 28/04/1968 which is in respect to several plots sold by the Defendant to her husband at a consideration of Kshs. 130/- for each plot. She also produced a letter of administration to her husband's estate, an official search and letter from the chief that confirms the fact of the purchase and the possession and use of the suit land by the Plaintiff.

8. The evidence adduced by the Plaintiff is uncontroverted since the Defendant failed to enter appearance and defend the suit despite being duly served with the summons.

9. Section 7 of the Limitation of Actions Act cap 22 provides as follows;

"Actions to recover land 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."

10. Section 38 of the Limitation of Actions Act cap 22 provides;

"Registration of title to land or easement acquired under Act (1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37 of this Act, 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."

11. The requirements that one has to meet in order to succeed in Adverse Possession are set out in the case of **Titus Mutuku Kasuve –vs- Mwaani Investment Ltd & Others, Civil Appeal 2004 1 KLR 184** the Court held that;

".....for an order that he be registered a proprietor in place of the registered proprietor and in order to be entitled to the land by Adverse Possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition."

In the words of Gicheru, JA:

"In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts" **Kweyu v Omuto, C A Civ Appeal 8 of 1990 (as yet unreported)**.

12. In 1975, the late Mr Justice Chanan Singh of the High Court of Kenya approved of the definition of "Adverse Possession" given by Mr Justice Markby in the Indian case of **Bejoy Chundra v KallyProsonno [1878], 4 Cal 1327, at p 329**, in the following words:

"By Adverse Possession I understand to be meant possession by a person holding the land on his own behalf (or on behalf) of some person other than the true owner, the true owner having a right to immediate possession".

13. The Court of Appeal in the case of **The Public Trustee and Beatrice Muthoni v Kamau Wanduru, Civil Appeal No 73 of 1982**, at Nairobi, held

"that since the agreement was null and void, the period of limitation and conferring Adverse Possession title started to run from the date of the signing of the land sale agreement."

14. In the present case the Plaintiff has proved that she has been in occupation of the suit land since the year 1968 which amounts to a period in excess of 12 years before the filing of this suit in 2017, that occupation has been continuous, uninterrupted and without the authority of the registered owner of the suit land. That she does farming on the suit land to denote that she is utilizing the land as of right and in an inconsistent manner to the rights of the Defendant. Even if the date of her husband in 1999 is taken to be the year of her own possession, 12 years ended in 2011. The suit was filed in 2017, more than 12 years later.

15. I am satisfied that the Plaintiff has proved her case on a balance of probability and I allow her claim.

16. I make no orders as to costs.

17. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANGA THIS 26TH DAY OF SEPTEMBER 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Absent

Defendant: Absent

Kuiyaki and Njeri, Court Assistants