



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 137 OF 2012

JOSHUA KITHINJI M'ANYUKI.....PLAINTIFF/APPLICANT

VERSUS

PATRICK MUTHAURA M'MUKARIA...DEFENDANT/RESPONDENT

JUDGMENT

1. This suit was commenced by way of originating summons dated 26th June 2012 under **section 38 of the Limitation of Actions Act** and order **37 rule 7 of the Civil Procedure Rules**, where the applicant sought the determination of the following questions;

- 1) Whether the Respondent PATRICK MUTHAURA M'MUKARIA is the registered proprietor of the land known as AKITHI/AKITHI/1138 measuring 0.17 Ha. or thereabout?
- 2) Whether the applicant has been in occupation of the said land openly, continuously, uninterruptedly and adversely to the respondent's title for a period in excess of 12 years?
- 3) Whether the respondent's title to Parcel No. AKITHI/AKITHI/1138 has been extinguished by dint of section 38 of the Limitation of Actions Act?
- 4) Whether the applicant has now acquired absolute ownership of Land Parcel AKITHI/AKITHI/1138?
- 5) Whether the applicant is now entitled to be registered as the proprietor of Land Parcel AKITHI/AKITHI/1138?
- 6) Whether an order should be issued for the applicant to be registered as the proprietor of AKITHI/AKITHI/1138?
- 7) Whether the applicant is entitled to costs of this suit?

2. The originating summons was supported by the applicant's affidavit sworn on 27th June 2012 where it was stated that land parcel AKITHI/AKITHI/1138 is currently registered in the name of the respondent. In or about 1998 he entered and occupied the suit property which he developed and started living thereupon. During his occupation he planted trees, maize and beans and built a kiosk. The said land is his only source of livelihood.

3. In defence of the suit, defendant filed a replying affidavit on 17th September 2012 where he denies the claim of the plaintiff. He avers that plaintiff herein has his own parcel No. AKITHI/AKITHI 11/1827 and therefore he cannot claim that he has no other land, and that immediately this suit was filed the plaintiff started using force to occupy the suit land.

4. **PW1 JOSHUA KITHINJI** relied on his statement dated 22nd August 2017 where he indicated that the defendant herein is the owner of LR. AKITHII/AKITHII II/1138, that he (plaintiff) has been in occupation and use of the said land since 1998 and that he farms on that land. During cross examination, PW1 admitted to having another parcel on the upper part of the suit land.

5. **PW2 MARY IKOLOMI** also adopted her statement dated 22nd August 2017. She is the mother of plaintiff. Her evidence is that plaintiff took possession of AKITHI/AKITHI/1138 in or about 1998 and started cultivating thereon. During cross-examination, PW2 told the court that she had bought the suit land and that the family of the plaintiff stays on the land adjacent to the suit land.

6. **PW3 JOSHUA THAIRU** adopted his statement dated 22nd August 2017 as his evidence. He stated that PW2 had been using the suit land since the year 1984 till around 1998 when she gave the same to the Plaintiff who then took possession. The defendant herein never brought any claim with regard to the open occupation and use of the land.

7. **DW1 PATRICK MUTHAURA** adopted his statement filed on 20.3.2017 as his evidence. In his testimony he said that the suit land is in his name and he got his title in 1996. He knows Joshua and Mary. Mary is his sister in law. Joshua and Mary started using his land in 2012 when they served him with a court order. He never sold the land to Mary and before 2012 he would plant seasonal crops like maize. Currently there are no trees in that land, and that DW1 has never allowed them the use of his land.

8. In support of his case, DW1 produced the documents in his list filed on 20.3.2017 as his exhibits.

9. **DW2 PURITY THIRINDI KINYUA** adopted her statement dated 20th March 2017 into evidence where she stated that she has been a casual laborer working for defendant for a long time. Defendant used to give her contracts to weed his shamba, the suit property herein, until year 2012 when defendant stopped using the land. During the time she worked on the suit land, she would see Joshua (pw1) and Mary (pw2) working on the adjustment land. DW2 added that she has never seen any constructions on the said land.

10. It has been submitted for the plaintiff that adverse possession is a legal method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by the statute law. That in determining whether or not to declare that a party has acquired land by adverse possession, one must demonstrate that the land has a known owner and the owner must have lost his right to the land either by being dispossessed of the land or by having discontinued his possession of it. The period of dispossession or discontinued possession must meet the statutory period which is 12 years. It is also submitted that where a claimant pleads the right to land under an agreement, the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. To buttress these points, the plaintiff has made reference to the case of **Gerald Muriithi Vs Wamugunda Muriuki & Another (2010) eKLR**.

11. The plaintiff further submitted that from the year 1998 onwards, the continued occupation and possession of the suit property by the plaintiff and his mother was adverse to the title of Patrick Muthaura M'Mukaria, the defendant herein. The plaintiff argued that, his claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard. He further avers that his occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land.

12. The plaintiff therefore prays that the court makes a finding that he has now acquired absolute ownership of land parcel no. Akithi/Akithi/1138 by way of adverse possession and he should therefore be registered as the owner of the suit land.

13. The defence submissions are essentially in tandem with the plaintiff's arguments in so far as the legal principles on adverse possession are concerned. The defendant however contends that there was no evidence of sale of the land to the mother of the plaintiff, and that plaintiff does not occupy the suit land.

14. What defendant says is that plaintiff entered the suit land in 2012 via a court order barring the owner from accessing the same intended to bring a claim which cannot arise.

Analysis and determination

15. I have considered the pleadings, the evidence as well as the rival submissions. I am in agreement with the legal principles proffered by both parties. The question for determination is **whether the plaintiff has acquired Parcel No. AKITHI/AKITHI/1138 through adverse possession?**

16. In **MUNYAKA KUNA COMPANY LIMITED –VS- BERNADO VICEZO DE MASI (THE ADMINISTRATOR OF THE ESTATES OF DEMENICO DE MASI (DECEASED) 2018 eKLR** it was held that:

“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (animus possidendi). Secondly, one must prove that he has used the suit land without force without secrecy, and without persuasion (nec vi nec clam nec precario) for the prescribed limitation period of twelve years. Thirdly, he must demonstrate that the registered owner had knowledge (or the actual or constructive means of knowing) that the adverse possessor was in possession of the suit property. Fourthly, the possession must be continuous; it must not be broken or interrupted.”

17. In the case of **TITUS KASUVE VS MWAANI INVESTMENT LTD C.A CIVIL APPEAL No. 35 of 2002 (2004 1 K.L.R 184)**, the Court of Appeal laid down what a party claiming land by adverse possession has to prove and said that:

“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”.

18. From the evidence adduced herein, the element of exclusive continuous occupation of the suit land by plaintiff is missing. Missing too is the element of **animus possidendi**.

19. During cross examination PW 1 could not identify the suit land. He referred to it as no. 1130, then 1137. He went on to state that; **“I have built my house there. That is my place of dwelling. There are buildings on that land”.**

20. However PW 1's own mother (PW 2) stated that: **“Kithinji has built there. He had built a kiosk and he has trees. His family doesn't**

stay far away. They stay on the land adjacent to the suit land”.

21. PW 2 is the one who allegedly gave the land to her son PW 1 so she must be knowing the layout of the parcels well. And her evidence is to the effect that plaintiff ordinarily resides on the land adjacent to the suit land. It is therefore not true that plaintiff’s place of dwelling is on the suit land.

22. The evidence of PW2 regarding plaintiff’s place of dwelling is in tandem with the defence evidence where both DW 1 & 2 state that plaintiff’s land borders the suit land. DW 1 went further to produce a map which clearly shows the lay out of the land where plaintiff’s land apparently is no. 1827. DW 2 further states that she used to see PW 1 & 2 on the land adjacent to the suit land before year 2012. Thereafter, she was not given casual work on the suit land any more.

23. Another issue the court has considered is the point of entry on the suit land. How did the dispossession or discontinuation of possession occur?. It is averred by plaintiff and PW 3 that the initial entry on the land was made by plaintiff’s mother in 1984. However, PW 2 doesn’t give any such details save that she bought the land from defendant and that her son took over the land from her in 1998. PW 2 doesn’t state when she bought the land and how she entered the land. Likewise the alleged 1998 entry on the land by plaintiff is vague.

24. The element of exclusive possession is also lacking. The plaintiff has not stated whether the suit land is fenced by him such that no one else has access to the land. Plaintiff has also not been candid that in reality, the land next to the suit land is the one he owns.

25. Another issue which has arisen is the events of 2012 when the suit was filed. According to defendant this is when he stopped using the land as he was informed of the court order barring him from using the land. And while being cross examined, **PW 1** stated that; **“I got an order of injunction from court in 2012 around 6th...”**. **Pw 3** buttressed this point during cross examination when he stated that; **“THAT IS WHEN HE STARTED TO USE THE LAND....”**. **“IN 2012, I KNOW THERE WAS AN ORDER ALLOWING JOSHUA TO USE THE LAND”**.

26. It therefore appears that plaintiff asserted his presence on the land on the strength of the alleged court order of injunction. Sadly, there was never such a court order of injunction. The initial application for injunction and inhibition was filed on 28.6.2010 and on 2.7.2012, the court granted the prayer for **INHIBITION ONLY (issued on 5.7.2012)**.

27. On 12.11.2014 the defendant filed an application to have the orders of injunction issued on 5.7.2012 discharged. In a ruling delivered on 19.10.2015, the court only granted orders of inhibition as set out in that original application of 28.6.2012, while the orders of injunction were denied. The plaintiff’s use of a purported order of injunction amounts to an abuse of the court’s process.

28. In conclusion, I find that plaintiff has not met the criteria of an adverse possessor and hence this case is hereby dismissed with costs to defendant. The orders of inhibition subsisting herein are hereby discharged.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 25TH DAY OF SEPTEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Miss Mbogo holding brief for Rimita for plaintiff

Mwiti for defendant

Plaintiff

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE