



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 786 OF 2013

IN THE MATTER OF L.R. NO. MWERUA/BARICHO/1634 AND 1635

AND

IN THE MATTER OF THE LIMITATION OF ACTION CAP 22 OF THE LAWS OF KENYA

MOSES WARUI GATIMU..... PLAINTIFF

VERSUS

DOUGLAS MWAI MACHURU1ST DEFENDANT

DANIEL KARIMI WANJOHI2ND DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff vide an Originating Summons dated 1st November 2013 sought the following orders:

(a) That the plaintiff has acquired title by adverse possession to a portion of 1.40 Ha. (3 ½ acres) on L.R. MWERUA/BARICHO/1635 and 1634 which are resultant numbers of L.R MWERUA/BARICHO/1635 and 1634 and be registered in the names of the plaintiff in place of the defendant.

(b) That the said portion of 1.40 Ha.(3 ½ acres) be excised from L.R. MWERUA/BARICHO/1635 and 1634 and be registered in the name of the plaintiff in place of the defendant.

(c) That the costs of this suit be provided for.

According to the pleadings, the plaintiff averred that he entered into the suit property L.R MWERUA/BARICHO/224 in the year 1982 and has utilized the said land for more than 31 years without any interruption. The plaintiff further averred that he has developed the suit property extensively by planting banana stems, maize and trees and he lives on the land with his family. It is the plaintiff's contention that the suit property is registered in the name of the 1st defendant who recently caused the land to be sub-divided into two portions namely MWERUA/BARICHO/1634 and 1635 measuring approximately 2.95 Ha. and 1.21 Ha respectively. The plaintiff further averred that the 1st defendant transferred parcel No. MWERUA/BARICHO/1635 to the 2nd defendant.

He said that he extensively utilizes land parcel No. MWERUA/BARICHO/1635 and ½ acre out of MWERUA/BARICHO/1635. He seeks to be awarded the portion he has developed for the 31 years he has utilized the suit land.

PLAINTIFF'S CASE

The plaintiff testified on oath and adopted his witness statement dated 1st November 2013. In his testimony, the plaintiff stated that his late father one Josiah Gatimu Migwi (deceased) entered into a sale agreement with Douglas Mwai Machuru (1st defendant) for a portion measuring 1.4 Ha. (3 ½ acres) in the year 1982. He further stated that the portion was excised from the ground but the paper work was not completed. The plaintiff further stated in his testimony that he was shown the portion by his late father and immediately entered the suit property the same year. He then planted banana stems and trees on the said portion. He also cultivated maize and beans which he derives his livelihood. He said that recently, the 1st defendant sub-divided the original land into two portions namely MWERUA/BARICHO/1634 and 1635. The 1st defendant thereafter transferred parcel No. MWERUA/BARICHO/1635 to the 2nd defendant who purports to have bought it.

He said that the said parcel of land squarely lies on the portion where he has been in occupation and possession. In conclusion, the plaintiff stated that he entered the suit property without the consent of the defendants and that he has been in continuous occupation for a period of 31 years and therefore he has acquired the same by way of adverse possession. He therefore seeks an order to have the portion he has occupied excised from the two parcels of land. The plaintiff is also seeking costs of this suit.

DEFENDANT'S CASE

The 1st defendant stated that initially land parcel Number MWERUA/BARICHO/224 measuring approximately 4.2 Ha was registered in his name until 10th September 2013 when he caused it to be sub-divided into two portions namely MWERUA/BARICHO/1634 and 1635 measuring approximately 2.95 Ha and 1.21 Ha respectively. The 1st defendant further stated that on 11th September 2013, he sold land parcel No. MWERUA/BARICHO/1635 to the 2nd defendant who took possession immediately thereafter. He denied entering into a sale agreement with the plaintiff's father one Josiah Gatimu Migwi for the sale of three (3) acres out of the suit property for Ksh. 54,000/=. To the contrary, the 1st defendant stated that he had entered into a verbal lease agreement with the plaintiff's father Josiah Gatimu Migwi for one (1) acre out of title number MWERUA/BARICHO/224 from the year 1981 upto 1985.

ANALYSIS AND DECISION

The claim for adverse possession is based on **Section 38 of the Limitation of Actions Act Cap 22** Laws of Kenya. The principles upon which a party may succeed in a claim of adverse possession are now settled. In the case of **MISTRY VALJI VS JANENDRA RAICHAND & 2 OTHERS C.A No. 46 of 2015, reported on (2016) e K.L.R.**, the Court of Appeal sitting in Mombasa set out the principles for adverse possession as follows:

“(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.

(ii) The occupation of the land must be nec vi, nec clam, nec precario.

(iii) The adverse possessor must prove that through his occupation, the true owner has been dispossessed or his possession discontinued.

(iv) It is equally established that adverse possession does not arise merely by occupation and use.

(v) The filing of a suit for recovery of land or any other recognized assertion of title to the land by owner stops time from running for purposes of Section 38 of Cap 22”.

The plaintiff in his statement which he adopted in his evidence stated his late father bought a portion of the suit property from the 1st defendant sometime in the year 1982 and that he was shown the portion which immediately he entered and planted banana stems, maize, French beans and trees. Through his own testimony, the plaintiff admitted that he entered into the 1st defendant's land pursuant to a sale transaction between him and his late father Josiah Gatimu Migwi. From the principles set out from the Court of Appeal in the above celebrated case, it is my finding that the claim by plaintiff for adverse possession is not available. First, the plaintiff's father Josiah Gatimu Migwi (deceased) entered into the 1st defendant's suit property based on some agreement who thereafter invited his son the plaintiff herein to take possession. In my view, the plaintiff's entry and occupation of the suit property was by consent of the owner. Adverse possession cannot therefore be envisaged since the plaintiff was invited to occupy the 1st defendant's property through his late father Josiah Gatimu Migwi (deceased). The plaintiff therefore cannot purport to claim as of his own right. It was in my view incumbent upon the plaintiff to take out legal representation of his deceased father. Without the impugned sale of land agreement between his late father and the 1st defendant, the plaintiff would not have entered the suit property or purport to do the developments therein. Since no letters of administration was produced by the plaintiff, he cannot also purport to enforce a contract entered into between the 1st defendant and his late father.

The upshot of my finding is that this suit lack merit and the same is hereby dismissed with costs. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 20th day of September, 2019.

E.C. CHERONO

ELC JUDGE

20TH SEPTEMBER, 2019

In the presence of:

1. Plaintiff – present

2. Mr. Maina Kagio holding brief for Mr. Ngigi for Defendants