



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE NO. 40 OF 2015

ABDUL KADIR SHARIFF.....PLAINTIFF

VERSUS

FLORENCE KATHAMBI MUTHURI.....1ST DEFENDANT

PAULINE KANANA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff filed this suit on **15/6/2015** vide a plaint dated **12/6/2015**. The defendants filed a joint statement of defence and counter claim dated **30/6/2015**.

The Plaintiff's Claim

2. The plaintiff's claim is that he is the bonafide occupier of plot title **No. ISIOLO TOWNSHIP/BLOCK V/27** (hereinafter called "the suit land"); that the defendants have trespassed upon the plaintiff's suit land and carried out quarrying activities thereon; that the defendants have thus made use of the suit land to the detriment of the Plaintiff and for that reason the plaintiff seeks that an order of permanent injunction do issue against the defendants and their agents restraining them from interfering with the suit land.

The Defence

3. The defendants' defence is that they are the rightful owners of the suit property commonly known as **MWANGAZA** area where there are no plot numbers issued. In their counterclaim they reiterated the issues in their defence and sought an order of declaration to the effect that land parcel number **ISIOLO TOWNSHIP/BLOCK V/27** measuring **7 Hectares** belongs to them through adverse possession.

The Plaintiff's Evidence

4. The plaintiff testified on **27/6/2018**. He adopted his statement dated **12/6/2015**. According to the plaintiff, in **1991**, he applied for a light industrial plot from Isiolo County Council; that the plot committee after identifying a zone area for industrial plot approved his application and subsequently the minutes of the committee were forwarded to the Commissioner of Lands; that a part development plan was made and the Commissioner of Lands issued a letter of allotment on **1/10/1991**; that upon payment of the requisite fees, he was issued with a Certificate of Lease in **1996**; that afterwards, some squatters entered the suit land and began interfering with the same until he made a report with the authorities. On cross examination, he averred that even after making the report and filing the instant case, the squatters are still in occupation of the land.

The Defendants' Evidence

5. The 1st defendant testified on **17/12/2018** as **DW1**. She adopted her written statement dated **30/6/2015** filed in court on **2/7/2015**. Her evidence was to the effect that she entered the suit land in **1982** and began farming while gathering stones; that there was no one on the land as it was government property; that together with 27 other people, they began making ballast and sold the same; that they later registered the group and they are now over 50 people and they have all lived in the suit land. She produced a certificate of registration of the group. She contended that she only got to know the plaintiff when he introduced himself as the owner of the suit land; her prayer was for a declaration that the suit land belonged to them. She also produced a copy of a letter from the Chief confirming that they were in occupation of the suit land.

6. **DW2 Nahman Tabathia** testified on the same date as the defendant and adopted his witness statement dated **30/6/2015**. He stated that he entered the suit land in **1983**; that no land adjudication officer has ever visited the suit land to demarcate the same; that **DW1** is his neighbour and a member of the group and he married a wife while in occupation of the suit land and has 5 children; he averred that they are in the process of doing survey on the suit land.

7. DW3 Patrick Mutethya testified on the same date and adopted his written witness statement dated 30/6/2015. His evidence is that he has been on the suit land for over 30 years; that there are many people in occupation of the suit land and they work on the same individually; that together with other persons, they formed Mla Jasho Self Help Group in 1992 and registered the same in 2011; that the group is still operational to date and that the quarry is their livelihood.

Submissions

8. The plaintiff filed his submissions on 13/2/19 and the defendants filed theirs on 12/2/2019. I have considered those submissions.

Determination

Issues for determination

9. The issues for determination in this suit are as follows:-

(a) *Whether the defendants are entitled to the prayers sought in the Counter-claim.*

(b) *What orders should issue.*

10. It is not in doubt that the current registered owner of **Isiolo Township/Block V/27** is the plaintiff. The defendants' prayer on the other hand, vide a counter claim, is for a declaration that the suit land in question belongs to them through adverse possession.

11. The Plaintiff has produced documentary evidence in form of a Certificate of Lease over the suit land in his name as proof of ownership. Section 24 of the **Land Registration Act No. 3 of 2012** states that;

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Section 25 of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject - to encumbrances charges or leases shown on the register and the overriding interests as stated in section 28 of the Act”

12. Section 26 of the said Act provides as follows:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

13. The interpretation of the above provisions is that by statute Courts are mandated to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. I do consider the plaintiff to be the true registered title holder to the suit land.

14. Among the rights to be enjoyed by a registered owner of any land is the right to peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to the land has a right to quiet possession, occupation and use of the suit land. However his rights may be defeated by those of an adverse possessor.

15. I have perused the record and it seems the Plaintiff did not respond to the said counterclaim as there is no reply to counterclaim. The plaintiff did not respond to the counterclaim.

16. A counterclaim is a suit separate from the claim lodged by the plaintiff and any defendant to a counterclaim who desires to oppose the same must file a defence thereto. In the absence of a defence to the counterclaim the contents thereof must be deemed to be uncontroverted and therefore true.

17. I note that there has been a shift in the earlier jurisprudence as espoused by **Njuguna Ndatho -vs- Masai Itumo and 2 others, eKLR** that had held that one should never seek to invoke the doctrine of adverse possession by way of a counterclaim. The case of **Teresa Wachuka Gachira -vs- Joseph Mwangi Gachira, Civil Appeal No. 325 of 2003**, is an example. In that case the Court of Appeal said:

“The mandatory procedure for invoking that section is in Order 36 r 3D of the Civil Procedure Rules and ordinarily the failure to follow that procedure is fatal to the suit. That is because under rule 10 an originating summons may be continued as if the cause had begun by filing a plaint, but the converse is not acceptable - see E. vs. E. [1970] EA 604. In this case however, adverse possession was made in a counterclaim, a procedure which was adopted and received acceptance in the *Gatimu Kinguru case (supra)*.”

18. For one to establish a claim for adverse possession, one must demonstrate that he has been in quiet, open, peaceful, and uninterrupted possession of the land being claimed, for a period of at least 12 years, without the permission of the title holder. In the **Teresa Wachuka Case** (supra) the Court of Appeal stated as follows:

“Whatever the procedure, the onus is on the person claiming adverse possession to prove, in the words of Kneller J. (as he then was) in Kimani Ruchine v Swift, Rutherford & Co. Ltd [1980] KLR 10 that:

“The plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec precario* (No force, no secrecy, no evasion). So the plaintiffs must show that the company 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 Beverly [1965] EA 514, 518, 519, per Miles J.

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; see sections 9(1) and 13 of the Limitation of Actions Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (see generally paragraphs 481 and 482 on pages 251, 252, of 24 Halbury’s Laws of England (3rd Edn.).”

19. In the counter claim, the defendants have pleaded for adverse possession. In their evidence, they produced documentary evidence through photographs showing how they have utilized the suit land.

20. In the **Teresa Wachuka Case** (supra) the Court dismissed the suit and held that:

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor”

21. In this case, the defendants’ version is that they took possession of the suit land in the 1980s and began utilizing the same. The plaintiff found the defendants on the suit land. Even after obtaining a title document in the year **1996** he never evicted them.

22. The plaintiff has not demonstrated that his efforts to evict the defendants bore any fruit in a manner that can be said to have interrupted their possession of the suit land. Unless the defendants were effectively evicted from the suit land, their possession thereof is to be deemed as continuous and adverse to the plaintiff’s title.

23. I find that in this case the plaintiffs have exhibited evidence of their physical possession of the suit land. In his evidence on cross examination the plaintiff admitted that there are “squatters” on his land. After the plaintiff obtained title to the land and after the defendants learnt of it they must be deemed to have continued occupying the land with the intention of dispossessing the plaintiff of the land. Their occupation was therefore adverse to his title.

24. I find that the plaintiff has failed to effectively oppose the counterclaim. On the basis of the evidence on the record, the defendants have been in possession of the suit land for a period in excess of 12 years. Their possession has been exclusive, continuous, notorious and adverse to the plaintiff’s title to the suit land.

25. I therefore dismiss the plaintiff’s claim and I grant the orders as prayed in the counter claim. The plaintiff shall bear the costs of both the suit and the counterclaim.

Dated and signed at Kitale this day of 2019.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered in open court at Meru this 31st day of October 2019.

HON. LUCY. N. MBUGUA

ELC JUDGE

JUDGE

ENVIRONMENT AND LAND COURT

