



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1253 OF 2015(OS)

STEPHEN NJACI MIRARA.....APPLICANT

VERSUS

JACINTA WAMBUI WARUIMBO.....1ST RESPONDENT

HAWAJO INVESTMENT LIMITED.....2ND RESPONDENT

JUDGMENT

The applicant brought this suit by way of Originating Summons dated 8th December, 2015 seeking among others, a declaration that he was the owner of a portion measuring 0.022 hectares (“the suit property”) of all that parcel of land known as L.R No. Ruiru/Ruiru East Block 2/998 through adverse possession having occupied the same for a period of over 12 years and, an order that he be registered as the proprietor thereof and a title be issued to him. The Originating Summons was supported by the applicant’s affidavit sworn on 8th December, 2015 in which the applicant stated that he purchased the suit property from the 2nd respondent in the year 2001 and was given vacant possession thereof.

The applicant stated that he had since then enjoyed exclusive and uninterrupted possession of the suit property as of right, without secrecy, force or permission of the respondents. The applicant stated that he had put up a home on the suit property where he lived with his family and that he had occupied the property with the intention to own the same to the exclusion of all others including the respondents.

He stated that all was well until the 1st respondent entered the suit property in the company of police officers and arrested him on the ground that he was a trespasser on the suit property since the property belonged to the 1st respondent. He stated that on 24th November, 2015, he was served with a demand letter by the 1st respondent to vacate the suit property. The applicant stated that he was apprehensive that unless restrained by the court, the 1st respondent was likely to evict him from the suit property which was his only home. The applicant annexed to his affidavit among others, a certificate said to have been issued to him in confirmation of his ownership of the suit property by the 2nd respondent in the year 2002, photographs showing the developments he had carried out on the suit property and a copy of the title deed for the suit property in favour of the 1st respondent dated 24th June 1992.

The Originating Summons was opposed by the respondents through separate replying affidavits. In her replying affidavit sworn on 16th December 2015, the 1st respondent stated that she purchased L.R No. Ruiru/Ruiru Est Block 2/998 (“Plot No. 998”) from one, Wanjiru Karanja who held a share in Nyakinyua Investments Limited (“Nyakinyua”). The 1st respondent stated that the said share entitled the said Wanjiru Karanja to a parcel of land then owned by Nyakinyua. The 1st respondent stated that Plot No. 998 was transferred and registered in her name and she was issued with a title deed on 24th June 1992. She stated that in the year 2000, she left Kenya to go and work in Britain where she worked until her retirement.

The 1st respondent stated that she visited Kenya from time to time and that she only discovered that the suit property which is part of Plot No. 998 was occupied by the applicant when she wanted to develop it. The 1st respondent stated that when she inquired from the applicant as to why he was occupying the property, the applicant claimed that he had purchased the same from the 2nd respondent. She stated that she informed the applicant that he was a trespasser on the property and served him with a notice on 24th November 2015 to vacate the property. She stated that the 2nd respondent had never owned the suit property. The 1st respondent attached to her affidavit among others, a copy of her title for Plot No. 998.

The 2nd respondent opposed the Originating Summons through a replying affidavit sworn by one Margaret Njoki on 28th December, 2015. Margaret Njoki stated that she was one of the directors of the 2nd respondent. She admitted that the 2nd respondent had sold to the applicant a parcel of land measuring 0.022 hectares and issued him with a share certificate. She stated that when a survey was done, it was discovered that the land that had been sold by the 2nd respondent to among others the applicant belonged to Nyakinyua Investments Limited (“Nyakinyua”). She stated that upon this discovery, the 2nd respondent moved the persons to whom it had sold land in the area to other

parcels of land and that only the applicant defied the 2nd respondent's request to move. She stated that this request was made in the year 2002 and that by the year 2004, all the purchasers had moved out of Nyakinyua's land save for the applicant who instead of moving out from the land which is registered in the name of the 1st respondent commenced construction thereon.

At the hearing of the suit on 4th March, 2019, the respondents did not turn up in court. The applicant adopted his affidavit sworn on 8th December, 2015 in support of the Originating Summons as his evidence in chief and the documents annexed thereto as exhibits and urged the court to allow the application.

I have considered the Originating Summons together with the affidavit filed in support thereof. I have also considered the affidavits filed by the respondents in opposition to the same. In the case of Wambugu v. Njuguna [1983] KLR 173, it was held among others that: -

“In order to acquire by the statute of Limitations title to land which has a known owner that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

From the evidence on record, it is not in dispute that Plot No. 998 is registered in the name of the 1st respondent and that the same was acquired by the 1st respondent on 22nd June, 1992. It is also not disputed that the suit property which measures 0.022 hectares is a portion of Plot No. 998 which in whole measures 0.400 hectares. There is also no dispute that the applicant entered the suit property in 2002 when he was given possession of the property by the 2nd respondent which mistakenly thought that the property belonged to it.

From the affidavit of Margaret Njoki sworn on 28th December, 2015 in opposition to the Originating Summons the contents of which was not controverted, the 2nd respondent realised in 2002 that the suit property that it had allocated to the applicant did not belong to it and requested the applicant among others to relocate to an alternative land which had been made available to them. Margaret Njoki stated that the applicant refused to vacate the property and instead commenced construction of a house thereon. From the evidence on record, as at the time the 2nd respondent purported to allocate the suit property to the applicant, the same was registered in the name of the 1st respondent. The 1st respondent was however not in occupation of the property at the material time.

I am satisfied from the evidence on record that the applicant occupied the suit property openly and continuously without the permission of the 1st respondent from 2002 until sometimes in 2015 when the 1st respondent who was all along residing in Britain came back to Kenya and attempted to take possession of the same from the applicant. By the time the 1st respondent attempted to take possession of the suit property from the applicant, the applicant had been in open, continuous and uninterrupted possession of the property for over 12 years. I am satisfied that the applicant has established on a balance of probabilities that he has acquired a portion of Plot No. 998 measuring 0.022 hectares (the suit property) by adverse possession. The applicant has established that he entered the disputed land without the 1st respondent's permission in 2002 and that he occupied the same openly for a continuous uninterrupted period of over 12 years before the 1st respondent sought to recover the land from him. The applicant has also demonstrated that while in occupation of the suit property, he performed acts thereon which were inconsistent with the 1st respondent's rights over the same. The court is persuaded that the applicant dispossessed the 1st respondent of the suit property and occupied the same for more than the statutory limitation period of 12 years without the 1st respondent taking any action to recover the same.

Due to the foregoing, I find the applicant's Originating Summons merited but only as against the 1st respondent. The claim against the 2nd respondent was not established. I therefore enter judgment for the applicant as follows;

1. The suit against the 2nd respondent is dismissed with costs.
2. It is declared that the applicant has acquired a portion of all that parcel of land known as L.R No. Ruiru/Ruiru East Block 2/998 measuring 0.022 hectares by adverse possession and that the 1st respondent's title to that portion of land has been extinguished.
3. The 1st respondent shall subdivide L.R No. Ruiru/Ruiru East Block 2/998 within 60 days from the date of this judgment using a surveyor employed in the public service or any other surveyor as may be agreed upon between the 1st respondent and the applicant and shall transfer a portion thereof occupied by the applicant measuring 0.022 hectares to the applicant.
4. The applicant shall meet the costs and other expenses associated with the subdivision and transfer of the property to his name.
5. In the event that the 1st respondent refuses or neglects to effect the subdivision of L.R No. Ruiru/Ruiru East Block 2/998 and/or to transfer a portion thereof measuring 0.022 hectares to the applicant as aforesaid, without prejudice to any other remedy or remedies the applicant may have against the 1st respondent, the applicant shall be at liberty to carry out the subdivision of L.R No. Ruiru/Ruiru East Block 2/998 and the transfer of the said portion of land to his name in which case, the Deputy Registrar of this court shall be authorised to execute on behalf of the 1st respondent, application for consent if necessary, mutations, instrument of transfer and any other document that may be required to effect the transfer of the said portion of land to the applicant.
6. There shall be a permanent injunction restraining the 1st respondent from interfering with the applicant's quiet possession of the said portion of land measuring 0.022 hectares.
7. As between the applicant and the 1st respondent, each party shall bear its own costs of the suit.

Delivered and Dated at Nairobi this 31st day of October 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Bodo h/b for Mr. Kago for the Applicant

N/A for the 1st Respondent

N/A for the 2nd Respondent

C. Nyokabi- Court Assistant