



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 929 OF 2000 (O.S)

JOSEPH KAMAU GICHUKI

(Suing as the administrator of the Estate of

GICHUKI CHEGE(DECEASED).....PLAINTIFF

VERSUS

JAMES GATHERU MUKORA.....1ST DEFENDANT

JAMES NGUGI MUKORA.....2ND DEFENDANT

JUDGMENT

The plaintiff is the legal representative of the estate of Gichuki Chege, deceased (hereinafter referred to as “the deceased”) while the defendants are the legal representatives of one, Mukora Mukaria deceased (hereinafter referred to as “Mukaria”). The deceased died on 15th April, 1994 while Mukaria died on 14th July, 1960. At all material times, all that parcel of land known as Lari/Bathi/T.59 (hereinafter referred to as “the suit property”) was registered in the name of Mukaria as the absolute proprietor thereof. He was so registered on 25th April, 1959. Mukaria had four (4) wives and a number of children. Some of the children of Mukaria were Shadrack Kariuki Mukora (hereinafter referred to as “Kariuki”) and the defendants. The plaintiff brought this suit by way of Originating Summons dated 19th June, 2000 seeking orders that the estate of the deceased be declared to have acquired the suit property by adverse possession having had continuous, open, uninterrupted and exclusive physical possession of the same since 1974 and an order for the cancellation of the registration of the defendants as proprietors of the suit property and the registration of the plaintiff as the owner of the property in his capacity as the administrator of the estate of the deceased.

The Originating Summons was supported by the affidavit of the plaintiff and affidavit and further affidavit of one, John Chege Ng’ang’a. The plaintiff’s case in summary is as follows. The deceased purchased the suit property from Kariuki in 1974, took possession and remained in occupation thereof until his death in 1994. The plaintiff contended that the deceased developed the suit property by putting up permanent and temporary structures thereon which he rented out and that after the deceased’s death, his estate continued to receive rent from the tenants occupying the said structures. The plaintiff contended that during his lifetime, the deceased occupied the suit property peacefully and no third party claim of any nature was raised in respect thereof.

The plaintiff contended that with the full knowledge of the deceased’s interest in the suit property, the defendants caused themselves to be registered as the owners of the suit property on 14th March, 1996 and thereafter gave the plaintiff a verbal notice on 19th May, 1996 demanding that he vacates the suit property. The plaintiff averred that in May, 2000, the defendants entered the suit property without his permission and attempted to excise a portion thereof. The plaintiff averred that the deceased’s interest in the suit property was not registered and that by virtue of the deceased open, continuous, uninterrupted and exclusive use and occupation of the suit property since 1974 he had acquired ownership of the property by adverse possession which interest devolved to his estate upon his death. The plaintiff contended that the defendants’ attempt to dispossess the estate of the deceased of the suit property was unlawful.

The defendants opposed the Originating Summons through a replying affidavit sworn by the 2nd defendant. The defendants contended that the agreement for sale between the deceased and Kariuki was void on account of the fact that Kariuki who purported to sell the suit property to the deceased was not the registered owner of the suit property and as such had no interest in the suit property which he could convey to the deceased. The defendants denied that the deceased took possession of the suit property in 1974. The defendants contended that the deceased was a licensee on the suit property. The defendants contended that the plaintiff had never occupied the suit property neither had he carried out any development thereon. The defendants admitted that they had given the plaintiff notice to vacate the suit property. The defendants contended that they had already completed the process of subdividing the suit property.

The defendants averred that neither the deceased nor the plaintiff had open, continuous and uninterrupted possession of the suit property. The defendants denied that the plaintiff took possession of the suit property after the death of the deceased. The defendants denied that their entry onto the suit property was illegal and contended that as registered owners of the property, they had a right to do so. The defendants

contended that the plaintiff did not raise objection to the petition for grant of letters of administration in respect of the estate of Mukaria filed in 1991 pursuant to which a grant was issued which vested the suit property upon them.

The defendants averred that between 1960 and 9th January, 1992 when a grant of letters of administration in respect of the estate of Mukaria was issued, the estate of Mukaria had no administrator and as such the occupation of the suit property by the deceased during that period could not have been adverse to the interest of Mukaria in the property.

At the trial, the plaintiff gave evidence and called two (2) witnesses. On the part of the defendants, the 2nd defendant gave evidence and called one (1) witness. I have considered the Originating Summons together with the affidavits filed in support thereof. I have also considered the replying affidavit that was filed in opposition to the Originating Summons. Finally, I have considered the evidence tendered by the parties in support of their respective cases and the submissions of counsels for the parties.

On 4th July, 2003, the advocates for the parties filed in court a statement of agreed issues for determination by the court. The issues agreed upon by the parties were as follows;

1. Does the plaintiff/applicant have a right to sue in these proceedings?
2. When did Gichuki Chege (“deceased”) take possession of the suit property and for what duration did he have possession?
3. Did Gichuki Chege have open, uninterrupted and exclusive physical possession of the suit property?
4. Was Gichuki Chege a mere licensee on the suit property?
5. Was Gichuki Chege’s possession of the suit property adverse?
6. What development if any, did Gichuki Chege carry out on the suit property during the time he had possession that would go into establishing adverse possession?
7. Did the defendants’ right of action to recover the suit property lapse and at what point?
8. Do the defendants hold the suit property in trust for the estate of Gichuki Chege?
9. Did the defendants take any action to recover the suit property from the plaintiff and was such action lawful?

In their submissions, the advocates for the parties did not address all these issues; in fact, the plaintiff’s advocates summarised the issues into two (2) namely, whether Gichuki Chege (“deceased”) had acquired the suit property by adverse possession and whether the registration of the suit property in the names of the defendants as the proprietors thereof was lawful in view of the interest which the deceased had acquired in the property.

The defendants did not frame and did not address the court on any specific issues in their submissions. The submissions which were general in nature were however in their tone geared towards answering the two (2) issues which were framed by the plaintiff. On my part, I would summarise the issues arising for determination in this suit as follows;

1. Whether the plaintiff has established that the deceased had acquired the suit property by adverse possession.
2. Whether the plaintiff is entitled to the reliefs sought in the Originating Summons.
3. Who should bear the costs of the suit?

Whether the plaintiff has established his adverse possession claim against the defendants.

As I have stated earlier in this judgment, the plaintiff is the legal representative of the deceased, Gichuki Chege. The plaintiff led evidence that the deceased purchased the suit property from Shadrack Kariuki Mukora (“Kariuki”) between 1973 and 1974 and took over possession of the entire property in 1974. He stated that after taking possession, the deceased developed a portion of the suit property by putting up a permanent building which he let out to tenants and used the remaining portion for cultivation. He stated that the deceased also had an office on the suit property which he used for his business of selling hides and skins. The plaintiff led evidence that the deceased remained in occupation of the suit property until his death on 15th April, 1994. He stated that during the entire period of 20 years when the deceased occupied the suit property, no dispute of any kind arose over his title to the property. The plaintiff stated that it was after the death of the deceased that the defendants laid a claim to the suit property and demanded a portion thereof. The plaintiff stated that Kariuki who was in occupation of the suit property vacated the same after selling the property to the deceased and that neither Kariuki nor the defendants had occupied or carried out any business on the property. The evidence of the plaintiff which was corroborated by the evidence of his mother, Tabitha Wanjiru (PW2) and Peter Mwangi Kabiru (PW3) was not shaken in cross-examination. The plaintiff’s evidence as to when the deceased took possession of the suit property and the nature of the developments that he carried out thereon was not challenged. The photographs that were produced by the plaintiff in evidence in proof of the developments that the deceased had carried out on the suit property were not contested. The agreements for sale said to have been entered into between the deceased and Kariuki in 1973 and 1974 on the strength of which the deceased is said to have entered the suit property was not challenged either. The administrators of the estate of Kariuki who was alleged to have disowned the agreements aforesaid were not called as witnesses for the defendants.

In his evidence, the 2nd defendant and his witness (DW2) did not challenge the fact that Kariuki sold the suit property to the deceased in 1973/1974 or that the deceased took possession of the property in 1974 and constructed buildings thereon. The defendants' contention in their defence was that the suit property was registered in the name of Mukaria and as such Kariuki had no right to sell the property to the deceased. The defendants led evidence that until a grant of letters of administration in respect of the estate of Mukaria was issued to them in 1992, no one had authority to deal with the suit property.

The 2nd defendant stated in his evidence that the deceased was allowed to enter the suit property by Kariuki who had no right to do so. The 2nd defendant admitted in his evidence that there were residential buildings on the suit property which were occupied by the deceased's tenants and that the suit property was at all material times in occupation of the deceased's tenants. The defendants did not contend that anyone else occupied the suit property between 1974 and 1994 apart from the deceased or that the developments on the suit property were carried out by someone else apart from the deceased.

Having considered the evidence adduced by the parties in totality, I am satisfied that the plaintiff has established on a balance of probabilities that the deceased took possession of the suit property in 1974 and remained in possession until his death in 1994. I am also satisfied that the developments on the suit property were carried out by the deceased. The plaintiff's claim over the suit property was not based on the agreements for sale between the deceased and Kariuki. The claim was based on adverse possession. In the circumstances, it is irrelevant whether the agreements for sale between the deceased and Kariuki were valid or not. The only relevant issues for the court's consideration are, whether the deceased took possession of the suit property, whether his possession was open, continuous and uninterrupted for the statutory period of 12 years and whether his possession was adverse to the interest of the registered owner of the property.

I have already held that the deceased entered the suit property in 1974. It was not contested that when the deceased took possession of the property, the property was registered in the name of Mukaria. It was also not contested that as at that time, Mukaria was deceased. The deceased did not enter the suit property with the permission of Mukaria or his legal representatives. The evidence that was adduced by the plaintiff that the deceased occupied the suit property openly and without interruption until he died in 1994 was not contested. There is no doubt from the developments which the deceased carried out on the suit property that he asserted ownership rights over the suit property. His occupation was therefore adverse to the interest of Mukaria in the property. By the time he died on 15th April, 1994, the deceased had been in occupation of the suit property for over 19 years.

The defendants had contended that since Mukaria died on 14th July, 1960 and no administrator had been appointed in respect of his estate until 1992, the limitation period could not run against him. I am not persuaded by this argument. Under the Limitation of Actions Act, Chapter 22 Laws of Kenya, death of a registered owner of land does not stop time from running for the purposes of adverse possession. Section 16 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides as follows: -

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration.”

From the evidence placed before the court, the defendants are the legal representatives of the estate of Mukaria. Their right to claim the suit property dates back to the date of death of Mukaria. What this means is that when the deceased entered the suit property in 1974, the defendants are deemed to have been entitled to possession of the property as at that date and in that regard, for the purposes of limitation of actions, time started running against them from that date although they had not obtained grant of letters of administration. It follows therefore that, as at the time the defendants were issued with a grant of letters of administration in respect of the estate of Mukaria in 1992, their claim over the suit property was already time barred, the deceased having occupied the suit property continuously for over 18 years.

I am in agreement with the plaintiff that as at the time the defendants obtained grant of letters of administration in respect of the estate of Mukaria and purported to transfer the suit property to themselves by transmission, the suit property was not available for distribution amongst the beneficiaries of the estate of Mukaria since Mukaria's title over the property had been extinguished under section 17 of the Limitation of Actions Act, Chapter 22 Laws of Kenya and the property acquired by the deceased by adverse possession. The registration of the defendants as the owners of the suit property was therefore unlawful.

Due to the foregoing, I am satisfied that the deceased had acquired the suit property by adverse possession.

Whether the plaintiff is entitled to the reliefs sought in the Originating Summons:

From my findings above, I must answer this question in the affirmative. The plaintiff having proved that the deceased had acquired the suit property by adverse possession, the plaintiff is entitled to a declaration to that effect. The defendants who were registered as the proprietors of the suit property after the same had been acquired by the deceased through adverse possession have been holding the property in trust for the estate of the deceased. Pursuant to the provisions of Section 38(1) of the Limitation of Actions Act, Chapter 22 Laws of Kenya, the plaintiff as the administrator of the estate of the deceased is entitled to be registered as the owner of the suit property. The plaintiff is in the circumstances entitled to the reliefs sought in the plaint.

Who is liable for the costs of the suit?

The general rule on costs is that the same is at the discretion of the court. Costs normally follow the event unless the court orders otherwise for good cause. In this case no valid reason has been given to warrant a departure from the established rule on costs. I will therefore award the plaintiff the costs of the suit.

Conclusion:

In conclusion, it is my finding that the plaintiff has proved his case against the defendants on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendants jointly and severally as prayed in the Originating Summons dated 19th June, 2000. The plaintiff shall have the costs of the suit.

Delivered and Dated at Nairobi this 24th day of October 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Ouma h/b for Mr. Ayieko for the Plaintiff

Ms. Oseko h/b for Mr. Karuga for the Defendants

C. Nyokabi-Court Assistant