



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 38 OF 2015 (O.S.)

FORMERLY KERUGOYA HC ELC NO. 803 OF 2013 (O.S.)

IN THE MATTER OF LAND PARCEL NO. MBETI/GACHURIRI/167

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT

MKELI MUNYIA KIOKO.....PLAINTIFF

VERSUS

ANTHONY NDII.....1ST DEFENDANT

MURIITHI NJOMO NJUKI & NAHASHON NJUKI

NJOMO (being sued as the legal representatives of) NJOMO NJUKI...2ND DEFENDANT

NATHAN MUREITHI MAGANJO.....3RD DEFENDANT

JUDGEMENT

1. By an originating summons dated 20th November 2013 and amended on 17th September 2018 brought under **Section 38 of the Limitation of Actions Act (Cap. 22) and Order 37 Rule 7 of the Civil Procedure Rules**, the Plaintiff sought the following reliefs:

- a. *That the Plaintiff has been in open, continuous, uninterrupted and exclusive occupation and use of land parcel Nos. Mbeti/Gachuriri/167, 166 and 242 for more than twelve years.*
- b. *That the Defendants' title to land parcel Nos. Mbeti/Gachuriri/167, 166 and 242 has been extinguished.*
- c. *That the Plaintiff has acquired the title to land parcel Nos. Mbeti/Gachuriri/167, 166 and 242 by way of adverse possession.*
- d. *That the names of the Defendants Mlango Komo, Antony Ndi, Njomo Njuki and Nathan Mureithi Maganjo be cancelled from the register for land parcel Nos. Mbeti/Gachuriri/167, 166 and 242 and the name of the Plaintiff Mkelo Munyia Kioko be inserted in the register for land parcel Nos. Mbeti/Gachuriri/167, 166 and 242 as the proprietor and title deeds be issued to the Plaintiff.*
- e. *That the land registrar of the relevant land registry to dispense with the production of the original title deeds to land parcel Nos. Mbeti/Gachuriri/167, 166 and 242 for purposes of registration of the Plaintiff as the proprietor.*
- f. *That costs be provided for.*

2. The said originating summons was supported by an affidavit sworn by the Plaintiff on 17th September 2018 in support of her claim for adverse possession. The Plaintiff contended that she and her late husband Munyia Kioko started residing on the suit properties in 1950s and that all her children were born on the suit properties. The first born was said to have been about 55 years of age at the time of amendment of the originating summons in 2018.

3. The Plaintiff further contended that she had extensively developed the suit properties by planting trees, putting up houses and cultivating crops thereon. It was contended that none of the Defendants had lived, occupied or worked on any of the suit properties.
4. The 1st Defendant filed a replying affidavit sworn on 11th October 2018 in answer to the originating summons. He denied that the Plaintiff had been in occupation of his *Title No. Mbeti/Gachuriri/167* at any given time. It was denied that the Plaintiff had demonstrated the elements of adverse possession. It was contended that the Plaintiff was unsure which of the three suit properties she was in occupation of. It was further contended that the suit properties had been the subject of litigation in previous cases, to wit, *Embu High Court Civil Case No. 97 of 2005* and *Nyeri Civil Appeal No. 11 of 2014* hence the issue of adverse possession could not arise. He urged the court to dismiss the Plaintiff's originating summons with costs.
5. The 2nd Defendant filed a replying affidavit sworn on 11th October 2014 in which he disputed the Plaintiff's claim for adverse possession. It was contended that the Plaintiff had never been in possession or occupation of *Title No. Mbeti/Gachuriri/166*. The 2nd Defendant also stated that the Plaintiff was unsure which of the three suit properties she was occupying. The rest of the objections to the originating summons were similar in every respect to the 1st Defendant's.
6. The 3rd Defendant filed a replying affidavit sworn on 15th October 2018 in response to the said originating summons. He denied that the Plaintiff was ever in occupation of his *Title No. Mbeti/Gachuriri/242*. It was contended that the Plaintiff was unsure of which parcels she was occupying and that there was no way the Plaintiff could be in possession of 3 different parcels of land belonging to different owners. The rest of the objections to the originating summons were similar in every respect to the 1st Defendant's. He, therefore, urged the court to dismiss the Plaintiff's originating summons with costs.
7. When the suit came up for trial, the Plaintiff testified on her own behalf and called two more witnesses in support of her case. One of the two witnesses was her daughter while the other was said to be her neighbour in Gachuriri. The evidence tendered on behalf of the Plaintiff was to the effect that he had been in occupation of the suit properties for several decades beginning from 1950s.
8. The 1st Defendant testified on his own behalf. He did not call any additional witness. He stated that he purchased parcel 167 from one James Karimi Kangoro in 2016. He stated that he was a resident of Kangatta village which was about 5km from parcel 167. He stated parcel 167 was not developed at all and there were no on-going activities thereon.
9. The 2nd Defendant testified on his own behalf at the trial hereof. He did not call any additional witnesses. He testified that he was a resident of Kutus in Kirinyaga County and that his late father had never resided on parcel 166 during his lifetime. He was not aware if anybody else was cultivating or utilizing parcel 166. In fact, he had never visited the said property at any time.
10. The 3rd Defendant also testified on his own behalf at the trial hereof. He stated that he had previously cultivated his parcel No. 242. Although he was not residing thereon, he denied that the Plaintiff was in occupation of or utilizing parcel 242.
11. Upon conclusion of the trial on 21st May 2019 the parties were directed to file their respective written submissions within specified timelines. The Plaintiff was given 30 days to file and serve her submissions whereas the Defendants were granted 30 days thereafter to file theirs. The record shows that the Plaintiff's submissions were filed on 25th June 2019 whereas the Defendants' submissions were filed on 5th August 2019.
12. The requirements for proving adverse possession were restated in the following cases: **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**
13. In the case of **Kasuve Vs Mwaani Investment Ltd** (supra) the elements of adverse possession were summarized as follows;

“...and in order to be entitled to 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 dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”
14. The court is aware that the main question for determination is whether the Plaintiff has demonstrated her claim for adverse possession of the suit properties. The court has considered the pleadings, evidence and submissions on record. There is no doubt that the Plaintiff has been in occupation of at least two of the suit properties (i.e. parcel 166 and 167) for a considerable period of time. The court is also satisfied on the basis of the evidence on record that the 1st and 2nd Defendants have never been in occupation of parcel Nos. 166 and 167. The 1st and 2nd Defendants have never cultivated or occupied their respective parcels of land. The material on record points to possession and occupation on the part of the Plaintiff and her family.
15. The court, however, does not agree with the Plaintiff that merely grazing on parcel 242 can constitute dispossession of the true owner of the land. The court is of the view that grazing is merely transient and does not constitute exclusive possession of the property in question. There was no evidence that the said parcel 242 had been fenced off by the Plaintiff for exclusive use.
16. The court is, however, satisfied on the Plaintiff's possession and use of parcel Nos. 166 and 167 where the Plaintiff's family appears to reside and cultivate to the exclusion of the registered owners. The court also accepts that the period of possession has been considerable even though it could not be computed as from 1950s. The material on record shows that the two parcels were first registered in 12th July 1976. Since time cannot run before registration, then time can only be computed as from 1976.

17. An arithmetical computation would show that the statutory period of 12 years lapsed in 1988. The instant originating summons was first instituted in 2013 meaning that the claim for adverse possession had already crystallized by the time of filing suit.

18. There is no material on record to suggest that the Plaintiff entered possession with the consent or permission of the 1st and 2nd Defendants. Such entry appears to have taken place without their consent hence satisfying the requirement of hostile possession. There was also no evidence to suggest that the Plaintiff's possession was vitiated by force or secrecy.

19. The Defendants contended that since there have been previous suits between members of Nditi clan and Murugu clan over some of the suit properties then the Plaintiff's possession was interrupted in the legal sense since the last of the cases was decided in 2017.

20. The court is of the opinion that the mere existence of civil proceedings between clans does not necessarily mean interruption of possession on the part of the persons in possession. In the case of **Githu Vs Ndeete** (supra) the court addressed the issue of interruption as follows:

“Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. See *Cheshire’s Modern Law of Real Property*, 11th Edition at p. 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act...”

21. So, did the 1st and 2nd Defendants assert their property rights by either making an effective entry into their parcels or taking legal proceedings for the eviction of the Plaintiff? There is no evidence on record to demonstrate that proceedings for eviction were undertaken. The proceedings in *Embu HCCC No. 97 of 2005* were proceedings by Nditi clan challenging the cancellation of their registration with respect to certain properties which did not include parcel Nos. 166 and 167. The judgement of Hon. Justice H.I. Ong’undi indicates that those two parcels were not the subject of the dispute. They were, in fact, amongst the 10 parcels which were given to Mbadi clan members by the Minister in the appeal decided on 27th May 1999. The parcels which appear to have been the subject of the dispute were Nos. 242-244; 246; 248-250; 252-257; 259-260; 272-273; 276-277; 280; 285-294. Those are the parcels which were to revert to the original owners as per the decision of the Minister.

22. Although the Defendants did not produce a copy of the plaint and amended plaint in *Embu HCCC No. 97 of 2005*, it is clear from the judgement of the High Court that the parcels which were the subject of the suit were the ones mentioned in the immediately preceding paragraph. In fact, the Interested parties in that case (who were members of Muruga clan) appeared to concede that parcel Nos. 166 and 167 among other parcels belonged to Mbandi clan.

23. The Defendants have taken issue with the Plaintiff's contention that the Defendants may have obtained their titles unlawfully or fraudulently. The court does not think that anything much would turn on this aspect. It is clear from the amended originating summons that the Plaintiff's claim is solely a claim for adverse possession. It is not a claim seeking cancellation of the Defendants' titles on account of the alleged fraud or illegality. In any event, there was no cogent evidence of fraud or illegality on the part of the Defendants which was tendered by the Plaintiff.

24. As was held in the case of **Wasui Vs Musumba [2002] 1KLR 396** the only legitimate question for determination in such an originating summons is the issue of adverse possession. In the said case, Ringera J (as he then was) held as follows;

“Lastly, I desire to say that the Applicant's claim that he may have an overriding interest over the Respondent's land under the provisions of the Registered Land Act cannot be a matter for adjudication in this originating summons as the only relief sought and indeed the only relief which could be sought in an originating summons of this nature was the registration of the Applicant as proprietor of the suit land by virtue of adverse possession. I will, therefore, express no opinion on the merits or otherwise of that claim.”

25. The upshot of the foregoing is that the court is satisfied that the Plaintiff has proved her claim for adverse possession with respect to parcel Nos. 166 and 167 as against the 1st and 2nd Defendants only. The claim for parcel 242 as against the 3rd Defendant was not proved. Accordingly, the court makes the following orders for disposal of the originating summons amended on 17th September 2018:

a. The 1st and 2nd Defendant's title to Title Nos. Mbeti/Gachuriri/167 and 166 respectively has been extinguished on account of adverse possession.

b. The Plaintiff is entitled to be registered as proprietor of Title Nos. Mbeti/Gachuriri/167 and 166 on account of adverse possession in place of the 1st and 2nd Defendants respectively.

c. The Land Registrar Mbeere shall cause the Plaintiff to be registered as proprietor of Title No. Mbeti/Gachuriri/167 and 166 in place of the 1st and 2nd Defendants and title deeds issued to her.

d. The Land Registrar Mbeere shall dispense with the production of the original title deeds for the said parcels for the purpose of effecting the decree.

e. The Plaintiff's claim for Title No. Mbeti/Gachuriri/242 as against the 3rd Defendant is hereby dismissed.

f. Each party shall bear his own costs.

26. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 24TH DAY of OCTOBER, 2019

In the presence of Ms. Materi for the Plaintiff and Mrs. Njuguna holding brief for Mr. Andande for the Defendants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

24.10.19