



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 791 OF 2017 (OS)

IN THE MATTER OF ADVERSE POSSESSION

IN THE MATTER OF SECTION 38 OF LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LAND PARCEL NUMBER ENKARIAK / RONGENA / 667 AND ENKARIAK/ RONGENA / 668

BETWEEN

GRACE WAIRIMU GITHINJI.....1ST APPLICANT/PLAINTIFF

JOHN NJENGA GITHINJI2ND APPLICANT/PLAINTIFF

PETER GITHAE GITHINJI.....3RD APPLICANT/PLAINTIFF

STEVEN KANYORO GITHINJI.....4TH APPLICANT/ PLAINTIFF

AND

KARAU OLE SHONGE.....1ST RESPONDENT/ DEFENDANT

GRACE LUCY WANJIRU.....2ND RESPONDENT/ DEFENDANT

JUDGEMENT

By an Originating Summons dated the 27th June, 2017 and filed in court on 28th June 2017, the Applicants/Plaintiffs GRACE WAIRIMU GITHINJI, JOHN NJENGA GITHINJI, PETER GITHAE GITHINJI and STEVEN KANYORO GITHINJI who are in occupation of the whole of that piece or parcels of land known as ENKARIAK /RONGENA /667 and ENKARIAK /RONGENA /668 for the determination of the following issues:

- a. WHETHER the Plaintiffs has been in adverse possession of the said land for a period of twelve (12) years or more;
- b. WHETHER the Defendants' title to the suit land became extinguished at the expiry of twelve (12) years or more;
- c. WHETHER the Plaintiffs are entitled to be declared the owners of parcels of land known as ENKARIAK/ RONGENA/ 667 and ENKARIAK/ RONGENA/ 668;
- d. WHETHER the Registrar of Lands is to be directed that the Order made herein shall be an instrument of transfer of ownership of Land Reference Numbers ENKARIAK/ RONGENA/ 667 and ENKARIAK/ RONGENA/ 668 from the Defendants to the Plaintiffs;
- e. WHETHER the Defendants can be restrained from entering, wasting, damaging and/or in any way alienating Land Reference Number ENKARIAK/ RONGENA/ 667 and ENKARIAK/ RONGENA/ 668 until the hearing and determination of this matter;
- f. WHETHER the Defendants should pay costs of this suit.

The 1st Respondent/Defendant KARAU OLE SHONGE opposed the Originating Summons and filed a replying affidavit where he deposes that over the years, he severally issued Notices to Vacate and deliver vacant possession to Mr. Githinji (deceased) but although he promised to do so, he never moved out. Further, he reported him to OLOITOKITOK Police Station where he was taken into custody as he could not produce any title document and criminal proceedings were commenced against him at the Kajiado Law Courts. He avers that during the hearing, it emerged that the High Court in Nairobi had ordered him to pay Mr. Githinji (now deceased) Kshs. 6000, or he surrenders his parcel of land. He sought for Mr. Githinji to produce title documents or Sale Agreement but he failed to do so. He denies selling land to Mr. Githinji. He confirms reporting Mr. Githinji's sons to the District Commissioner (DC) OLOITOKITOK where they failed to produce any title document or sale agreement after which the DC issued them with a Notice to Vacate, whereupon they sought for more time and were granted a grace period upto July 2017. He contends that the Decree purportedly issued by the High Court in Nairobi Civil Suit No. 1991 of 1978 has never been executed and the orders therein were issued in vain and not capable of being implemented. He states that he tore the letters from an Advocate, which were served upon him by a Mr. Ole Tauwo in respect of the Nairobi suit. He insists that when Mr. Githinji died, he asked the Plaintiffs to vacate his land but they have failed to do so and commenced cultivating the said land again, hence they are in contempt of the orders of the court. He further contends that he reported Ms. Nyaruiru (Mr. Githinji's widow) to the District Officer OLOITOKITOK who issued her with a Notice to vacate his land but she declined and defiantly constructed a residential house thereon. He claims land parcel number ENKARIAK/ RONGENA/ 667 belongs to Moses Ole Kilouwa and he asked the Plaintiffs to vacate his land when Ms. Nyaruiru died. He disputes that Mr. Githinji was buried on his land but admits that Ms. Nyaruiru is buried thereon, despite the directive from Chief Kapaiko to the Plaintiffs' to vacate suit land. He denies selling parcel number ENKARIAK/ RONGENA/ 668 to the 2nd Respondent and explains that she came into possession of the mother title ENKARIAK/ RONGENA/ 524 when she informed him that she would assist him evict Mr. Githinji. He avers that the Applicants/Plaintiffs and the 2nd Respondent have failed to produce any title documents in court. He further reiterates that as at 13th December, 2018, the 2nd Respondent has never cultivated her parcel of land and it is the Applicants/Plaintiffs' residing thereon. He sought for general damages for illegal possession of the suit land; special damages; vacant possession; order for cancellation of titles to land parcel numbers ENKARIAK/ RONGENA/ 667 and ENKARIAK/ RONGENA/ 668 and the same be reissued to him; costs of the suit as well as interest.

The 2nd Respondent/Defendant GRACE LUCY WANJIRU opposed the Originating Summons and filed a replying affidavit where she deposes that she is the registered proprietor of land parcel number ENKARIAK/ RONGENA/ 668 which she acquired for value from the 1st Respondent/Defendant in the year 1978. She claims the instant application cannot succeed, as it is fatally defective since the Applicants' have failed to attach certified copies of the titles. She contends that one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor is the true owner of the said land. She avers that from the face of the suit, the Applicants never recognized her title and ownership of ENKARIAK/ RONGENA/ 668 until the 2016 and as such they cannot succeed in a claim for adverse possession. She claims to have only learnt of the presence of the Nairobi High Court Civil Case No. 1991 of 1978 and a Decree therefrom, where the Court held that the suit properties belonged to the Applicants' father through this present suit. She reiterates that the Applicants/Plaintiffs in filing this suit seek to prosecute the rights of a third party in a suit for adverse possession, which third party they have no legal rights to represent. She denies that Summons to Enter Appearance in respect to Nairobi High Court Civil Case No. 1991 of 1978 was ever served upon her. She insists she was a purchaser for value and in good faith without knowledge as to defect in title. She confirms that in 1981, she charged her land to the Ol Kejuado Trade Development Joint Loan Board under the Ministry of Trade to secure a loan, which remained unpaid until 2016 and in the circumstances; the charged property was not free for alienation. She avers that in the year 2011, the 2nd Applicant NJENGA GITHINJI moved to her land and constructed temporary dwellings thereon. Further, when she went to her land to protest the said construction, she was forced to flee for her life when the Applicants confronted her with pangas including rungas and she reported the matter to the District Officer. She states that in 2016, she started the process of ejecting the 2nd Applicant/Plaintiff from ENKARIAK/ RONGENA/ 668 using legal means which culminated into meetings before the local administration. She reiterates that since 2011 when the 2nd Applicant moved into and forcibly occupied her land, 12 years have not lapsed for there to be a claim of adverse possession. She explains that when the Applicants' mother died, she raised the objection of the burial of her remains in her land by reporting the incident to the District Commissioner who referred her to the area chief that communicated her objection culminating in the remains not being buried therein. Further, that the father of the Applicants' was buried away from the suit lands and it is false and misleading for them to allege that both parents were buried thereon. She further reiterates that she has taken possession of her land since 2016 by commissioning a Surveyor to survey it and realign the beacons. Further, that she has cultivated her land personally and through her agents since 2016. She further claims that following the order from the local administration to vacate, the 2nd Applicant requested for 7 months within which to find alternative dwelling and vacate her land. She insists that the Plaintiffs' Originating Summons Application does not meet the threshold and legal requirements for grant of adverse possession and prays that the suit be dismissed with costs.

The matter proceeded for hearing where the Applicants had three witnesses while the 1st Defendant called one witness with the 2nd Defendant also having one witness.

Evidence of the Plaintiffs/Applicants

The Applicants' claim revolves around the suit lands ENKARIAK/ RONGENA/ 667 and ENKARIAK/ RONGENA/ 668, which they claim to have acquired through adverse possession. They aver that the 1st Respondent sold the suit lands ENKARIAK/ RONGENA/ 667 and ENKARIAK/ RONGENA/ 668 to their late father GITHINJI KARANJA. They insist that they have resided and utilized both parcels of land and have never been told to vacate prior to the meeting held in 2016. They claim their late father instituted a land case in 1978 against the two Defendants where the Court made a decision in 1980 that the land belonged to their father. The Court further directed the Deputy Registrar to sign the transfer documents. However, when the Court awarded the land to their father, he was terminally ill, and the said order was not effected. They confirm their father died in 1985. They contend that in 2016 when their mother died, they were told by the Assistant Chief Paul Kapaiko that the land did not belong to them and they needed to move out but declined to do so. PW1 explained that as per the meeting of 16th October, 2016, at the Chief's Office, whose minutes she produced as an exhibit, the family of Githinji were supposed to vacate the suit lands by 30th July, 2017. It was PW1's testimony that from 1980 upto 2016 they never saw the Respondents but were only summoned by the Chief when their mother passed away and ordered to vacate the suit lands. The Applicants' insist the 2nd Respondent had never utilized her land prior to 2016. PW1 said she was born in 1978 while PW2 was born in 1966. PW2 produced the Decree from Nairobi HCCC No 1981 of 1978; Transfer Form dated the 7th April, 1982; Sale Agreement dated the 31st September, 1968 as Plaintiffs' exhibits. PW2 testified that the 1st Respondent had made the father be arrested for cultivating the suit lands and charged at Kajiado SRM Court Vide Criminal Case No. 359 of 1978, but was acquitted, which proceedings he also produced as an exhibit. PW2 stated that they have resided on

the suit land for 35 years openly and without interruption. Further, they refused to adhere to the Notice, which was issued to them to vacate suit land by 2017 but instead filed the instant suit.

Evidence of 1st Respondent/Defendant

DW1 who was the 1st Respondent herein relied on his replying affidavit and contended that there were people who wanted to forcefully take away his land yet he had given them Notice to vacate, but they have declined to do so. He explained that the suit lands were initially one parcel registered in his name. However, the 2nd Respondent and one Ole Kilowa stole his title. He denies selling land to the 2nd Respondent nor any third party. He confirms that the DC told the people on his land to move out but there was no notice from the Court. He however could not recall when the suit land was subdivided into ENKARIAK/ RONGENA/667 and ENKARIAK/ RONGENA/668 respectively. He confirmed suing Mzee Githinji for occupying his land where the court ordered him to refund Kshs. 6000 failure of which the land was to be transferred to Mr. Githinji. He could not recall the date of judgment for the 1978 case. He explained that he used to reside on the suit land but moved away before Mzee Githinji died but Mzee Githinji's sons currently occupy it and have put a permanent structure thereon. He insisted that the 2nd Respondent did not reside on the suit land and has never had any dispute with the Applicants' over it. Further, that it is Mzee Githinji's son who currently occupies the 2nd Respondents' land and has been cultivating it.

Evidence of 2nd Respondent/Defendant

The 2nd Respondent testified as DW2 and relied on her replying affidavit as her evidence in chief. She claimed to have purchased her land ENKARIAK / RONGENA/ 668 from the 1st Respondent in 1978 and obtained her title deed on 6th May, 1978. She confirmed that after purchasing the land, she visited and found Mzee Githinji occupying the whole land but later he moved from her portion into ENKARIAK / RONGENA/ 667. She averred that when she went to cultivate the land, a son of Mzee Githinji's called Njenga threatened her severally and chased her away. She reported these incidences to the Chief and Police. Further, that she took a loan and used the suit land as collateral. She contends that the 1st Respondent sold her land at the Land's Office in Oloitokitok. She insists it is Githinji's son Njenga who moved to her land after his father's demise and has refused to move out. She disputes the 1st Respondent's testimony and explains that the Chief said Githinji's wife could not be buried on her land and she was later buried on 1st Respondent's land. She confirmed that the Githinji family reside on 1st Respondent's land as they moved out of hers. She denied knowledge of any case in respect of the suit land or testifying as a witness where 1st Respondent had sued Githinji. She reiterated that it is the 1st Defendant who sold her land but she has never been in occupation of the same due to threats from Githinji's son. Further, that she has never sent any demand letter to Njenga as he had accepted to move out of her land. She stated that she has only cultivated her land for three years after the local Chief asked the Applicants' to move from her land.

Both parties filed their respective submissions that I have considered.

Analysis and determination

Upon consideration of the materials presented in respect of this suit including the pleadings, exhibits as well as hearing testimonies of the witnesses, the following are the issues for determination:.

- Whether the Plaintiffs/Applicants should be registered as owners of the suit lands having acquired them through adverse possession.
- Whether the 1st Defendant/ Respondent is entitled to damages, vacant possession; order for cancellation of titles to land parcel numbers ENKARIAK/ RONGENA/ 667 and ENKARIAK/ RONGENA/ 668.
- Who should bear the costs of the suit.

As to whether the Plaintiffs/Applicants should be registered as owners of the suit lands having acquired them through adverse possession. The Applicants have instituted a claim for adverse possession in respect to the suit lands owned by the Defendants/ Respondents. It was their evidence that their father Githinji (now deceased) purchased the land from the 1st Defendant/Respondent in 1968. PW2 informed Court that he was born in 1966 and was young when the father purchased the land from the 1st Defendant/Respondent. The Applicants contended that the father sued the 1st Defendant/Respondent in 1978 and in 1980 the Court made an order that the suit lands belonged to their father. PW2 produced a Copy of the Decree to confirm these averments. They claimed they have resided on the suit lands prior to their father's demise to date. In their submissions they relied on the cases of : **Ruth Wangari Kanyagia V Josephine Muthoni Kinyanjui (20170 eKLR; Mbira Vs Gachuhi (2002) 1 EALR 137; Jandu Vs Kirpal & Another (1975) EA 225; Mtana Lewa Vs Kahindi Ngala Mwangandi (2005) eKLR; Wambugu Vs Njuguna (1998) KLR 173 and Public Trustee V K Wanduru (1982 – 88) I KAR** to buttress their arguments in support of their claim for adverse possession. The Respondents however opposed the instant suit and insisted they had given the Applicants several notices to vacate the suit lands and hence they were not entitled to ownership of the said lands by way of adverse possession. The 1st Respondent denied selling the suit land to the 2nd Respondent. The 1st Respondent lodged a counterclaim where he sought for cancellation of title, vacant possession, general and special damages. He relied on the cases of **Joseph Gathumi Kiritu V Lawrence Munyambu Civil Appeal No. 20 of 1993; Teresa Wachika Gachira V Joseph Mwangi CA 325 of 2003; Civil Appeal No. 95 of 2014 and Civil Appeal No. 56 of 2014** to oppose the Applicants' claim for adverse possession. The 2nd Respondent insisted the Applicants' had not been on her land for more than 12 years and do not recognize her title hence their claim for adverse possession should fail. In her submissions, she relied on the cases of: **Wambugu Vs Njuguna (1983) KLR 173; David K. Tanui & Another V James Kigen Koikirok & Another (2019) eKLR; Jandu Vs Kirpal & Another (1975) EA 225; Haro Yonda Juaje V Sadaka Dzenzo Mbauro & Another (2014) eKLR; Parklands Properties Ltd V Patel (Civil Case No. 2 of 1970); Gabriel Mbui V Mukindia Maranya (1993) eKLR (54); Kasuve V Mwaani Investment Limited & 4 others (2004) 1KLR and Central Bank Kenya Limited Vs Trust Bank Limited & 4 Others (civil appeal No. 215 of 96)** to support her arguments that the Applicants are not entitled to the orders sought.

Adverse possession is governed by Section 38 (1) and (2) of the Limitation of the Actions Act that provides as follows:

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

The requirements to fulfill a claim for adverse possession were well articulated in the case of **Wambugu V Njuguna (1983) KLR 173** where the Court of Appeal stated that: ‘ **Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.**’

Judge Angote in the case of **Haro Yonda Juaje V Sadaka Dzenzo Mbauro & Another (2014) eKLR** aptly outlined the ingredients to be fulfilled in a claim for adverse possession and summarized them as thus:’ **a) That one has made physical entry on the land and is in actual possession of the land for the statutory period; b) That the said occupation is non permissive; c) That the occupant has the clear intention of excluding the owner from the property (*animus possidendi*) ; d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and e) that the possession was continuous, uninterrupted and unbroken for the statutory period.**’

At this juncture, I wish to delve into the evidence presented by the Applicants to confirm whether they have fulfilled the requirement of adverse possession. The Applicants contended that they have been on the suit lands from the time their father purchased the same from the 1st Respondent/Defendant. PW2 stated that he was born in 1966 and was young when the father purchased the land. It was the 2nd Respondent’s claim that the suit is a non starter since the Applicants failed to annex the proof of title in their pleadings. I however note that there are two Certificates of Official Searches in respect of the suit lands, which were filed in Court by the Applicants as part of their bundle of documents. To me, failure to annex the said Certificates of Official Searches to the affidavit cannot defeat a suit as the said documents were filed in Court. I opine that this requirement is procedural but can be cured by invoking the provisions of Article 159 (2) (d) of the Constitution which provides that Justice should be dispensed without undue regard to procedural technicalities. I will rely on the said Constitutional provision and decline to strike the suit on this point.

From the Decree and proceedings in the Kajiado DMC Cr Case No. 359 of 1978, it is evident that there existed a dispute in respect of the suit lands. The 1st Defendant/Respondent even lodged a complaint culminating in the deceased being charged vide Kajiado DMC Cr Case No. 359 of 1978. DW2 denied having participated in the criminal case but upon perusal of the proceedings, it is evident that she indeed testified against the deceased who was the Applicants’ father. In the said proceedings both DW1 and DW2 admitted the presence of the deceased and his family on the suit lands. DW1 and DW2 claimed he had issued several notices to the Applicants to vacate the suit lands but they declined. Except for the minutes of the meetings held in 2016, the Respondents did not furnish court with any notices they had issued to the Applicants to vacate the suit lands. DW1 confirmed in his testimony that the 2nd Defendant had never utilized her land and it was actually one of Githinji’s sons using. However DW2 insisted that the 2nd Respondent/Applicant forcefully entered her land in 2011 and violently chased her away whenever she attempted to enter therein. Further, that they reported to the local District Commissioner, DO and Chief who issued the Applicants with notices to vacate the land. I however note that none of the Respondents called any of these persons to testify and confirm that they indeed issued notices to the Applicants to vacate suit lands. In the criminal proceedings, I note DW2 while testifying in the said criminal case confirmed that she had given a notice in May 1978 to the accused who is the father to the Applicants herein, to vacate her land but he failed to do so. DW1 also admitted that the Applicants had been on the suit land since their father’s demise and he had given them notice to vacate but they failed to do so..

From the said criminal proceedings, it confirms the Applicants averments that they had been on the suit lands from 1968. Which brings me to the question on whether they entered into the said land with the consent of the Respondents or not and when did time start to run. Section 38(1) of the Limitation of Actions Act, Cap 22 provides as follows:

“Where a person claims to have become entitled by adverse possession to land...he may apply to the High Court for an order that he be registered as proprietor of the land or lease in place of the person then registered as proprietor of the land”.

Further section 17 of the Limitation of Actions Act, Cap 22 provides that:

“subject to section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land(including a redemption action), the title to that person to the land is extinguished.”

In the case of **Daniel Kimani Ruchine & Others versus Swift Lotherford & Co. Ltd and Anor (1977) eKLR** the court held that ‘ **The Plaintiffs have to prove that they used the land as of right, *nec vi, nec clam, nec precario* (no force, no secrecy, no evasion)**’.

On the issue when time started running, I hold that the same commenced running when the Applicants continued to occupy the suit lands after the determination of the two lawsuits which was around 1980 and before the demise of Mzee Githinji in 1985. I find that from 1980 up to 1992, 12 years had elapsed and the Respondents titles to the suit lands had been extinguished and they were simply holding the same in trust for the applicants. I opine that the mere use of one of the titles to the suit lands as security by the 2nd Respondent to obtain a loan did not defeat the Applicants claim for adverse possession.

The Respondents insisted that the Applicants were using the suit lands to their detriment and even buried their mother thereon despite their protests. The 2nd Respondent testified that the 2nd Applicant had severally chased her from the suit land whenever she attempted to take possession. Further, the 1st Respondent admitted in his testimony that he had moved away from the suit land before Mzee Githinji died and it is actually the Applicants who were cultivating the land and put up structures thereon. Further, DW2 in her testimony claimed that in 1978 the Githinji family were utilizing the whole parcel of land but when she protested, they moved to occupy the 1st Respondent's portion only. I note DW1 even claimed that the suit land did not belong to him and hence the Applicants'/Plaintiffs' claim for adverse possession should fail. I however note that from the Certificate of Official Search for ENKARIAK/ RONGENA/667 dated the 16th August, 1984, it revealed that the 1st Defendant KARAU OLE SHONGO was owner of the land while the other Search for ENKARIAK/ RONGENA/668 confirm the 2nd Respondent as owner of the land. The 1st Respondents' averments that he is not the owner of the land to me seems to be geared to defeat the Applicants' claim against him. From the evidence of DW1 and DW2 where they were contradicting each other, I opine that the Applicants entered into the suit lands without the consent of the Respondents and their use of the same was adverse to the Respondents who were their owners.

From the analysis above, it is evident that the Applicants had dispossessed the Respondents over their land and been in physical possession of the said suit lands since 1978 and openly, notoriously and peacefully possessed the same. It is only in 2016 after 38 years when the Respondents sought to use the services of the provincial administration to evict them.

In the circumstances, I find that the Applicants have indeed proved their claim for adverse possession in respect of the two lands. .

As to whether the 1st Defendant/ Respondent is entitled to damages, vacant possession; order for cancellation of titles to land parcel numbers ENKARIAK/ RONGENA/ 667 and ENKARIAK/ RONGENA/ 668. I note the 1st Defendant/Respondent never tendered any evidence to prove damages he was claiming from the applicants. He failed to furnish court with the latest Certificate of Official Search to prove that one of the parcels of land did not belong to him. Since I have already held that the Applicants have proved their claim for adverse possession in respect of the suit lands, I find that the 1st Respondent is not entitled to orders he sought in his replying affidavit.

As to who should bear the costs of the suit. Costs generally follow the cause and since the Applicants are the successful parties herein, I will proceed to award them the costs of the suit.

It is against the foregoing that I find that the Applicants have proved their case on a balance of probability and will proceed to make the following final orders:

- a. The Applicants/Plaintiffs be and are hereby declared to be the owners of parcels of land known as ENKARIAK/ RONGENA/ 667 and ENKARIAK/ RONGENA/ 668 having acquired the same by way of adverse possession;
- b. The Registrar of Lands Kajjado be and is hereby directed to transfer Land Reference Numbers ENKARIAK/ RONGENA/ 667 and ENKARIAK/ RONGENA/ 668 from the 1st and 2nd Defendants KARAU OLE SHONGE and GRACE LUCY WANJIRU to the Applicants/Plaintiffs; GRACE WAIRIMU GITHINJI, JOHN NJENGA GITHINJI, PETER GITHAE GITHINJI and STEVEN KANYORO GITHINJI.
- c. The costs of the suit is awarded to the Applicants/Plaintiffs.

Dated signed and delivered in open court at Loitoktok this 9th day of October, 2019.

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Mwaura for 1st Defendant

Ndungu holding brief for M/S. Atuya for the plaintiff

Court Assistant- Mpoye