



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 50 OF 2015 (O.S.)

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF

ACTIONS ACT (CAP. 22)

AND

IN THE MATTER OF LAND PARCEL NO. NTHAWA/GITIBURI/1945

BETWEEN

JOACHIM NJUGUNA MBUGUA.....1ST PLAINTIFF

JOHN NDUNG'U MBUGUA.....2ND PLAINTIFF

PAUL NJOROGE MBUGUA.....3RD PLAINTIFF

VERSUS

JENESIO MUGO.....DEFENDANT

JUDGEMENT

1. By an originating summons dated 7th May 2010 the Plaintiffs sought the following orders:

a) That the Plaintiffs be declared to have become entitled to 0.5 acres out of land parcel Nthawa/Gitiburi/1945 registered under the Registered Lands Act (Cap. 300) by having had adverse possession of the said land for over twelve (12) years.

b) That the Defendant's title to the said land be declared extinguished and or invalid, null and void and the Plaintiffs be registered as proprietors of 0.5 acres out of the said land.

c) That the Defendant does execute the necessary documents to effect the transfer of 0.5 acres out of land parcel Nthawa/Gitiburi/1945.

d) That the costs be provided for by the Defendant.

2. The said originating summons was supported by an affidavit sworn jointly by the Plaintiffs on 7th May 2010. It was contended that the Plaintiffs had been in possession and occupation of a portion of 0.5 acres out of *Title No. Nthawa/Gitiburi/1945* (hereafter *parcel 1945*) since the year 1985. It was further contended that the Plaintiffs had erected rental houses and cultivated maize crops thereon. The Plaintiffs contended that they had been in open, exclusive and continuous occupation of the portion claimed hence they had acquired it by virtue of adverse possession.

3. The Defendant filed a replying affidavit sworn on 1st November 2013 in answer to the said originating summons. The Defendant denied that the Plaintiffs had ever been in occupation of parcel 1945. The Defendant further stated that before he was registered as proprietor, it was one Njue Alexander who was in occupation of parcel 1945. Defendant further denied that the Plaintiffs had developed parcel 1945 and asked the court to dismiss the suit with costs.

4. When the suit was listed for hearing on 5th March 2019 the 3rd Plaintiff, Paul Njoroge Mbugua, testified on his own behalf and on behalf of his co-Plaintiffs. He adopted his witness statement dated 6th July 2017 as his sworn testimony. He stated that he was born and brought up

on Title No. Nthawa/Gitiburi/1571 (hereafter *parcel 1571*). He stated that he resides on that parcel of land and that he has a permanent house thereon.

5. During cross examination by the Defendant's advocate, the 3rd Plaintiff stated that he resided on parcel 1945 which he claimed was a *sub-division* of parcel 1571. He further stated that he had cultivated some miraa stems on parcel 1945.

6. The Defendant testified on his own behalf at the trial hereof. He stated that parcel 1945 has never been occupied since 1995 when he was registered as proprietor. He stated that he had been using it for grazing animals only. He asserted that there was no one living or residing thereon. He further stated that he knew the 3rd Plaintiff in the suit and that he was residing about 1½ km away from parcel 1945. He further stated that the 1st Plaintiff was residing about 5 km away from parcel 1945 but he did not know where the 2nd Plaintiff resided.

7. When the court questioned the Defendant on what developments, if any, were on parcel 1945, he insisted that there was no house, miraa or crops on the land. He asserted that the land was not fenced and that he uses it for grazing purposes only.

8. The Defendant called one more witness, Titus Njeru (DW2), before closing his case. DW2 adopted his witness statement dated 28th December 2018 as his evidence in chief. He stated that he knew the Defendant well since he was his neighbor. His evidence was to the effect that the Defendant was using parcel 1945 to graze his domestic animals only and that there was no dwelling house or crops on the land. He denied that the 3rd Plaintiff was residing on parcel 1945.

9. Upon conclusion of the hearing, the court made an order directing the sub-county Land Surveyor, Mbeere to visit parcel 1945 and to prepare and file a report on the developments, if any, on the suit property, including any crops which may be growing thereon. The suit was thereupon fixed for mention on 16th May 2019 to confirm compliance with that order and to give directions on the disposal of the suit.

10. When the suit was mentioned on 16th May 2019 the Plaintiffs' advocate informed the court that the Plaintiffs were not agreeable to the report filed by the Mbeere sub-county land surveyor. The court thereupon directed the parties to nominate their private licensed surveyors to accompany the sub-county land surveyor to parcel 1945 for the purpose of preparing a second report. The Plaintiff was to meet the cost of the two private surveyors. The suit was thereupon fixed for further mention on 17th July 2019 to confirm compliance and give further directions on the disposal of the suit.

11. When the suit was mentioned on 17th July 2019, the advocates for the parties informed the court that a site visit was yet to take place because the sub-county land surveyor had declined to revisit the site. The court directed the parties to file their separate private surveyor's reports together with their respective written submissions within 45 days. The suit was thereupon filed for judgement on 28th November 2011.

12. The court has noted from the record that whereas the Defendant filed his written submissions on 11th September 2019, the Plaintiffs filed their submissions on 25th November 2019. The court has, however, noted that the Defendant did not attach any surveyor's report to his written submissions.

13. The court has taken note of the report dated 16th April 2019 by the sub county surveyor filed in court on 9th May 2019. It indicates that when the surveyor visited parcel 1945 on 5th April, 2019, the ground was clear and that no crops were found thereon. It stated that there was no development on the land save for one stranded cow shed structure. The court has also noted the contents of the report by the Plaintiffs' private surveyor. The report is not confined to the suit property as per the court order but it covers about 22 other parcels which are not in dispute in this suit. Notably, the report failed to identify and specify what developments, if any, are on parcel No. 1945 which is the subject of this suit.

14. 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 Rutherford & Co Ltd [1980] KLR 10.**

15. 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...”

16. The court is aware that the main question for determination in this suit is whether or not the Plaintiffs have demonstrated their claim for adverse possession. The first element is whether the Plaintiffs have demonstrated that they have been in open, continuous and exclusive possession of parcel 1945 for the minimum statutory period of 12 years. The court has considered the evidence on record and the submissions on record on this aspect. The Plaintiffs contended that they had been in possession of parcel 1945 since 1985 and that they had a permanent house, food crops and cash crops on the land. The Defendant completely refuted the Plaintiffs' case insisting that there was no dwelling house or crops of any sort on parcel 1945.

17. The court has also considered the report of the Mbeere sub-county land surveyor who visited the suit property on 5th April 2019. The report indicated that contrary to the Plaintiffs' contention, there was no dwelling house on the suit property. There were no cash crops or food crops on the suit property. The court is inclined to accept the government surveyor's report as credible since there was no evidence to suggest that he was either biased or had any interest in the matter. The court takes his report as that of an independent expert. As indicated

before, the report by the Plaintiffs' surveyor does not indicate what specific developments are on the suit property. It is just a general report alleging developments over a large area of approximately 50 acres as opposed to the 0.5 acres the Plaintiffs are claiming.

18. Apart from the surveyor's report, the court is satisfied that on the basis of the evidence tendered at the trial the Plaintiffs have failed to demonstrate their exclusive possession of the suit property. The Defendant's evidence on the status of the suit property was quite credible. The evidence of the defence to the effect that the suit property was not developed and that it was only being used for grazing purposes was not shaken even during cross examination. The court therefore finds and holds that the Plaintiffs have failed to demonstrate the element of exclusive and continuous possession for the statutory period of at least 12 years.

19. Since the court has come to the aforesaid conclusion it shall not be necessary to consider the other elements of adverse possession. The issue of whether suit property is a sub-division of parcel 1571 is no longer a live issue since the Plaintiffs have not demonstrated exclusive possession of any parcel of land belonging to the Defendant.

20. The upshot of the foregoing is that the court finds that the Plaintiffs have failed to prove their claim for adverse possession on a balance of probabilities as required by law. Consequently, the Plaintiff's originating summons dated 7th May 2010 is hereby dismissed with costs to the Defendant.

21. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **28TH DAY** of **NOVEMBER, 2019**

In the presence of Mr. Kamunda holding brief for Mr. Ngaruiya for the Plaintiffs and Ms. Nzekele holding brief for Mr. Ndolo for the Defendant.

Y.M. ANGIMA

JUDGE

28.11.19