



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 146 OF 2015 (O.S)

EDWARD KIMOTHO MBIA.....PLAINTIFF

VERSUS

BENINA GACIRIKU MBIA.....DEFENDANT

JUDGMENT

BACKGROUND

By an Originating Summons dated 17th November 2015, the plaintiff sought for the determination of the following questions:

- 1. That the plaintiff be declared to have become entitled to land parcel No. INOI/KIAGA/356 registered under the provisions of the Registered Land Act Cap. 300 Laws of Kenya measuring 2.2. Ha or thereabouts by the plaintiff who have been in open, exclusive and continuous and/or un-interrupted possession or occupation for a period of over 40 years.**
- 2. That the title, rights and interest of the aforesaid land parcel No. INOI/KIAGA/356 are extinguished so that the defendant's title should be recalled and cancelled.**
- 3. That the Land Registrar Kirinyaga do register the plaintiff as the proprietor of land parcel No. INOI/KIAGA/356, that from all encumbrances.**
- 4. That the costs of this summons be borne by the defendant.**

In a supporting affidavit sworn the same date, the plaintiff stated that the defendant is the registered owner of land parcel Number INOI/KIAGA/356 and that he has been in open exclusive, continuous and/or un-interrupted possession and occupation of the suit land where he has fully developed building, structures and other developments which have been standing for a period of over 40 years. The plaintiff has annexed a copy of the official search and a bundle of photographs marked **FKM 1 & 2** respectively.

The defendant filed a replying affidavit in opposition thereto. According to the defendant, the plaintiff has never had continuous and un-interrupted occupation of the suit land and that he indeed laid claim over the years to the said parcel of land before competent Courts of law being Succession Cause No. 92 of 1990, High Court Civil Appeal No. 78 of 1996 both in which the Courts held that the plaintiff was not entitled to the suit land.

PLAINTIFF'S CASE

The plaintiff gave sworn testimony and stated that he lives in Ngaru Sub-location, Koroma Location within Kirinyaga Central in Kirinyaga County. He stated that the defendant is his step-mother. He stated that after his father passed away in 1989, they did succession in Succession Cause No. 92/1990. He was appointed administrator with his step-mother with the suit property being the only subject of the succession cause. The defendant was given the suit land as a beneficiary. He was dissatisfied with the outcome of the Court and he appealed to the High Court (Nairobi) in HCCA No. 78/1996. Later, he was told that the file had been misplaced and subsequently informed that the file was taken to Embu. The Appeal was finally heard and the same dismissed in HCCA No. 117/2009. He then decided to seek redress before this Court and he now pray for the orders in this case.

PW2 was Mungari Kimunge who is a Resident of Kathiga Village in Mwea. He stated that he comes from the same clan with the late Mbia Kori. He stated that he participated in the process of demarcation of the clan's land during the time of land demarcation. He further stated that the said Mbia Kori had 3 wives namely Benina Gaciriku, Juliana Wanjiku and Wanja Mbia. He further stated that there was another wife who had abandoned her home and remarried to one Kibara. He said that one of the wives of Mbia Kori gave birth to one Edward

Kimotho Mbia who is the plaintiff and who has lived in the suit land ever since.

DEFENDANT'S CASE

The defendant testified and stated that the suit land parcel Number INOI/KIAGA/356 belonged to her late husband, one Mbia Kori. Her late husband had three wives namely Juliana Wanjiku, Elizabeth Wangechi and herself. After her husband passed on, she took out letters of Administration proceedings vide Succession Cause No. 92/1990 (Kerugoya) where the Court sub-divided the suit land into two portions between Juliana and herself. She says that she does not know the plaintiff. She stated that the plaintiff was not given land in Succession Cause No. 92/1990. She appealed against the decision and the Appeal was also dismissed. She stated that the plaintiff is not living on her portion of land.

LEGAL ANALYSIS

I have considered the viva voce evidence adduced by the parties and their witnesses. I have also looked at the submissions by the counsels. The plaintiff's claim is hinged on adverse possession. The law on adverse possession is now settled and the essential principles required to be met in order for one to succeed in a claim for adverse possession have been articulated in numerous decisions. In the case of **WAMBUGU VS NJUGUNA (1983) K.L.R, 173**, the Court of Appeal held that Adverse possession contemplates two concepts; first possession and secondly discontinuance of possession. The Court further held that the proper way to establish proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period of not less than 12 years and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years. The requirement for adverse possession in Kenya has also been set out in the case of **MBURA VS GACHUHI (2002) I.E.A. L.R 137 which was cited with approval in MALIAMU NCURUBI M'IBIRI VS FRANCIS M'MANYARA M'RINGERA (2011) e K.L.R** where the Court held as follows:

“..... a person who seeks to acquire title to and by the method of Adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption”

These ingredients were even aptly put in a recent decision by the Court of Appeal in the case of **Mtana Lewa Vs Kahindi Ngala Mwangandi (2005) e K.L.R** where it was held thus:

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period in Kenya, 12 years”.

It is also a well settled principle that a party claiming Adverse possession ought to prove that his possession was “*nec vi, nec clam, nec precario*”. That is to say peaceful, open and continuous. The possession should not have been through force, nor in secrecy and without the authority or permission of the owner. It is further required from the claimant that he has been in continuous possession of the land for 12 years or more and that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.

From the evidence adduced, it is apparent that the property which the plaintiff seeks to be declared as owner is non-existent. The plaintiff himself produced a search certificate of land parcel No. INOI/KIAGA/356 which clearly indicates that the title to the said parcel of land was closed and the property sub-divided into two portions. The plaintiff confirmed that following sub-division, the land was afterwards registered in the name of the defendant and one Elizabeth Wangechi under land parcel No. 750 and 751 respectively. On cross-examination, the plaintiff indicated that he did not even know on which portion of the two he was in occupation of. The plaintiff also confirmed that he did not sue Elizabeth Wangechi as she was unknown to him.

The defendant in her testimony stated that the plaintiff occupy the portion which belonged to Elizabeth Wangechi and that she could not even understand why the plaintiff dragged her to Court yet the portion occupied by the plaintiff was the two (2) acres given to Elizabeth Wangechi.

It is also imperative to note that for a claim of adverse possession to succeed, the claimant must demonstrate when he entered the suit property for time to start running. The plaintiff in this case merely stated that he has been living on the suit land for 40 years. The plaintiff in his testimony stated that after his father died in 1989, together with the defendant herein, they instituted Succession Cause No. 92 of 1990 wherein they were appointed the administrators. He further stated that the defendant was given the whole suit property as a beneficiary. His testimony is incorrect as the evidence from the ruling which was annexed as **BGM 1** in the defendant's application shows that the plaintiff who has been the 2nd protestor had not proved that he was a son of the deceased and hence disentitled him from the estate of the defendant's husband.

I also find that the plaintiff has not shown that he has been having continuous and un-interrupted possession of the suit land. Between 1992 and 2010, there was constant interruption by way of litigation in respect of the suit property. The Succession Cause No. 90 of 1992 was determined in 1994. The plaintiff appealed the decision in 1996 and the appeal was determined in 2010 vide the judgment in Civil Appeal No. 117 of 2009 (Embu) following the transfer of the file. The plaintiff's claim to the suit property was each time dismissed in the aforementioned cases. It therefore goes without saying that during the pendency of the succession cause and the appeal, the plaintiff's claim to the suit property was interrupted and discontinued. I find that the plaintiff has failed to state precisely and with certainty the point when time started running and the precise point when the adverse title would have crystallized.

In the final analysis, I find and hold that the plaintiff has failed to prove the threshold for the claim of adverse possession and this suit must fail. Consequently, this suit be and is hereby dismissed with costs to the defendant. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 15th day of November, 2019.

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E.C. CHERONO

ELC JUDGE

15TH NOVEMBER, 2019

In the presence of:

1. Plaintiff – present
2. Mbogo – Court clerk – present
3. Mr. Murigu holding brief for Mr. Kariithi for Plaintiff