



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO.473 OF 2017

(FORMERLY NAIROBI ELC 307 OF 2015)

ANDREW KARIUKI BORO.....PLAINTIFF

VERSUS

DAVID KINUTHIA KIMANI..... DEFENDANT

JUDGMENT

By an **Originating Summons** dated **8th April 2015**, the Plaintiff brought this suit against the Defendant seeking for orders that:-

- 1. A declaration that the Plaintiff has acquired title to the whole land parcel No.Kiambaa/Ruaka/1956, by way of adverse possession.***
- 2. An order that the Plaintiff be registered as proprietor of land parcel No.Kiambaa/Ruaka/1956.***
- 3. An order directing the Defendant to execute transfer of the said Land Parcel No.Kiambaa/Ruaka/1956.***
- 4. Alternative to prayer 1 and 2 above a declaration that the Defendant holds land parcel No.Kiambaa/ Ruaka/1956, in trust for the Plaintiff.***
- 5. An order for costs of and incidental to this suit***
- 6. Such other or further relief as nature of the case may require or this Honourable Court may deem fit to grant.***

In his **Supporting Affidavit** sworn on the **8th of April 2015**, the Plaintiff averred that the suit land is a sub division of a parcel of land **L.R No.Kiambaa/Ruaka/1943**, registered in his name and was the subject of a dispute between him and one **Robert Boro Mbugua**, subject to proceedings in the **Land Dispute Tribunal** at **Kiambaa**. That the dispute was heard and an award made directing it to be subdivided into two portions and one portion measuring **0.405ha**, be transferred and registered in the name of **Robert Boro Mbugua**, while **0.755ha** remained with him. That the award was adopted by the **Principal Magistrate's Court** and the Court Ordered the Executive Officer to execute the necessary documents to facilitate the subdivision and transfer of the land. That the land was thereafter subdivided into two portions one being **Kiambaa/Ruaka/1956**, registered in the name of **Robert Boro** and the 2nd one **Kiambaa/Ruaka/1957**, registered in his name. However the said Robert never gave him title to the land in his name.

That being dissatisfied with the proceedings at the **Land Disputes Tribunal**, he filed **Judicial Review Proceedings**. However when the suit was still ongoing, **Robert Boro Mbugua** illegally transferred the suit property to the Defendant. He then filed an application for contempt. However, the Application was dismissed on a technicality. That further a finding was made at the High Court and being dissatisfied, he lodged an Appeal, and before it could be decided, he learnt that the said **Robert Boro Mbugua**, had died and he was unable to substitute him with his Administrator as he did not know his relatives.

He contended that he has always been in possession of the land **L.R**

No.Kiambaa/Ruaka/1943, which was later subdivided and that he has always exercised rights of ownership. He further averred that the suit land is located within his land and that in order to access the compound, a visitor would have to be let in by a member of his family. Further that if the Defendant had carried due diligence, he would have known that the said **Robert Boro Mbugua**, did not reside within the said compound and he had not been in the suit land since **1984**. That he has been advised by his Advocates that the sale of the suit property was against the principle of **lis pendens**. He further averred that he has always enjoyed open, peaceful, uninterrupted and quiet possession of the land and at no time has anyone demanded for possession. He further averred that there is no boundary between the two parcels of land and that he occupies the two,

The suit is contested and the Defendant **David Kinuthia Kimani**, filed a **Replying Affidavit** sworn on the **29th of May 2015**, and averred that that he purchased the suit property from **Robert Boro Mbugua**, and that the suit property was transferred to him on the **11th of March 2010**. That before purchase, he had carried out due diligence and that there was no caution, restriction or inhibition. He averred that after the purchase, he was taken by the deceased to take possession and it was then that the Plaintiff served him with contempt proceedings. He further averred that he participated in the **Judicial Review** proceedings in which the Court refused to grant the Orders sought. Further that though the Plaintiff had filed an Appeal, the Application was withdrawn but the Appeal was still pending. It was his contention that the dispute over the suit property dates back to the year **2000** when there was active litigation and the Plaintiff had an Order from the year **2002**, and the Order remained in existence until the **Judicial Review** was finalized and it is therefore untrue that the Plaintiff has been living on the suit property openly and without interference. Further that it is untenable to base a claim of an adverse possession which possession was enabled by a Court Order. He further averred that he has been advised by his Advocates that if the Plaintiff intended to substitute the deceased in the Appeal, the law allows for citation.

It was therefore his contention that the Plaintiff's occupation of the land is illegal and that he intended to counter claim for vacant possession and eviction as his portion of land is adjacent to his and he cannot claim his land by mere extension of **Kei apple**.

The Plaintiff filed a further affidavit and averred that the suit land was initially part of **Kiimbaa/Ruaka/268**, owned by his father. That he acquired the suit land through Succession and that his brothers had already been bequeathed by their father their own portions of land and at the time the Succession was concluded, title could not be given for land exceeding **3 acres** and that is why they registered in the name of **Peter Kamau Mungai** and himself wherein his share was **4 acres** and that of **Peter** was **2 acres**. He further averred that they then subdivided the land and soon after **Robert Boro**, his nephew started to lay claim to the suitland and alleged that he had been given an **acre** by the Plaintiff's father. He contended that the allegations were untrue. That his nephew then filed a suit at the **Land Disputes Tribunal** and that the tribunal heard the dispute and decision made. He averred that he has been advised by his Advocates that the proceedings by the **Land Disputes Tribunal** were unlawful as the tribunal did not have jurisdiction to determine a case involving title to land.

PLAINTIFF'S CASE

PW1 - Andrew Kariuki Boro adopted his **Affidavit** and **Supplementary Affidavits** as evidence in Court. He produced the official search and further list of documents as exhibits in Court. It was his testimony that after the dispute at the **Land Disputes Tribunal**, **Robert** got **one acre**. He further testified that he has never moved out of the suit property and that **Robert Boro** lived on the suit and for only one year in the year **1984** and **David Kinuthia** has never lived on the suit land. It was his further testimony that the said **Robert Boro** was his nephew who had been given a place to build his house and when he sued him at **Land Disputes Tribunal**, the tribunal ordered that the said **Robert Boro** be given **one acre** being **Kiimbaa/Ruaka/1956** and he remained with **Kiimbaa/Ruaka/1957**. Further that his permanent house is in **1957** and **1956** is empty. He further testified that the Tribunal's Order was issued in **2002**, and the subdivision was done on the **20th of November 2002** and

that the orders have never been vacated.

He told the Court that he obtained a **Stay Order** and he lives on the suit land . That he later went to Court after the said **Robert Boro** had sold the land. However the **Stay Order** was never entered in the court record. He further testified that he had filed the suit after **Robert Boro** went to take possession of the suit property. Further that **Robert** built a house on his land and he cultivates on the suit land. Further that the Defendant obtained title in **2010**, but has never taken possession of the suit land as he was still, on the suit land.

PW2 - Francis Karanja Mungai adopted his witness statement and testified that **Robert Boro** was a nephew to the Plaintiff and that he was given a place to built, but he later moved out in **1982**. It was his testimony that the said **Robert Boro** lived in **Ngong** and that he had been jailed severally and though he was married, he did not know his family.

DEFENCE CASE

DW1 - David Kinuthia Kimani, adopted his **Affidavit** dated **29th May 2015** and further stated that he bought the suit land from one **Robert Boro**, a nephew to the Plaintiff after having conducted due diligence. That the land was transferred to him and later registered in his name and he did not take possession until the year **2011**. He further testified that he went to take possession through the Chief who informed him that there was a pending suit and that in **2012**, he was enjoined in a suit and the suit was dismissed. That the said **Robert Boro** was not living on the suit land, but was the owner. He confirmed that when he purchased the land, he knew that there was someone on the adjacent land. Further that the Plaintiff did not allow him access the suit property and he got possession after he used the Chief to access the land. It was his testimony that there was no encumbrance to the land as he carried out a search and there was no **caveat** and the Plaintiff has not doubted his title to the suit property.

Thereafter, parties filed written submissions which the Court has now carefully read and considered. The issue for determination is whether the Plaintiff has acquired the suit property by way of **Adverse possession and therefore entitled to the orders sought**.

The Defendant has claimed that the suit is **Res Judicata**. As this goes to the root of the Court's jurisdiction, the Court will make a finding on it first. The Court has noted that the previous suit was dealing with the entitlement and ownership of the suit property. However the instant suit is with regard to **Limitation** and the question is whether the Plaintiff has acquired the suit land by virtue of adverse possession. Further the parties to this suit are not the same and therefore the Court finds and holds that the suit is not **Res Judicata**. See the case of **James Maina Kinya ..Vs.. Gerald Kwendaka [2018] eKLR** where the Court held that;

The Plaintiff has in his submissions invited the Court to consider whether or not this matter is resjudicata. The matter was not pleaded but I will address it more because resjudicata is a bar to jurisdiction of the Court. Section 7 of the Civil Procedure Act states as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

The current suit though seeking ownership is based on Limitation i.e. adverse possession. The issue for determination in the current suit is whether or not the Plaintiff has established ownership by way of adverse possession admittedly the Plaintiff in both suit was/is pursuing a right of ownership with the divergence being the issues of specific performance pursuant to a contractual claim and while the present suit is based on a legal claim. In conclusion therefore, the causes of action in both cases are different and I see no bar to the jurisdiction of this Court in determining the matter before it.”

Adverse possession is a doctrine that allows a person to claim a property right in land owned by another. Further that that person must be using the property in a way that is adverse to the owners’ rights. In this instant, the Plaintiff has claimed adverse possession and claimed that he has been using the suit land in a way that is adverse to the rights of its owners. It is not in doubt that the suit property in issue was previously ancestral land before it was passed to the Plaintiff. Further It is also not in doubt that the said **Robert Boro** acquired rights and ownership to the suit property in the year **2012**, when he filed a suit against the Plaintiff herein seeking to have the suit land subdivided and he be given his portion. It is also not in doubt that the suit was heard and the said **Robert Boro** was granted his share being the suit property. The Plaintiff would then become the owner of the suit property in the year **2012**. The **Limitation of Actions Act** under **Section 7** provides that a person would not bring an action to recover land after the lapse **12 years**. Therefore it means that for a person to claim adverse possession, he must have been in possession of the suit property for a continuous period of **12 years** and the said occupation should be continuous and interrupted.

The Plaintiff has claimed to have been in continuous and open possession of the suit land for a period that has enabled him to claim adverse possession. As already noted by this Court, the suit land was previously ancestral land and therefore the said **Robert Boro** could not claim rights over it until he was given such rights. The Court further notes that the said **Robert Boro** was given such right to the suit property when the **Kiambaa Land Disputes Tribunal** delivered its Ruling on the **9th of November 2000**. It is therefore not in doubt that the said **Robert Boro** sought to assert his rights over the suit property in the year **2000**. It would therefore mean that when he sought to assert his rights then automatically time stopped running. See the case of **Lazaro Kabebe ...Vs...Ndege Makau & another [2017] eKLR**, where the Court held:-

“We agree with the learned trial Judge that the appellant did not establish a right by way of adverse possession in respect of 3 acres registered in favour of the 2nd Defendant’s name. This was because time stopped running in the first instance in 1977 when there was demand of the entire suit land by the 1st Defendant which interrupted the quiet and continuous possession. Possession was further interrupted in 1988, by way of another law suit in Embu filed by the 2nd Defendant who was claiming 3 acres as registered owner. The present suit was filed in June, 1999 which was after about 10 years of un- interrupted possession since 1988. In the case of Githu v Ndete [1984] KLR page 776 Madan, Law & Potter JJA had the following to say about change of ownership in a claim of adverse possession; -

“...Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.

The instant suit was filed on the **20th of April 2015**, from the year **2000** when the Senior Principal’s Magistrates Court adopted the award and this Court concurs that it has been over **12 years** since the said **Robert Boro** acquired rights and interests over the suit property. However the Court Ordered subdivision which was done in the year **2002** and that is when the suit property originally came into existence . Further the suit property was transferred to the Defendant and the rights that the Plaintiff’s claims to have being having adverse to must be to those of the registered owner and in this instant being that of the Defendant who became the owner of the suit property when it was transferred to him.

The Court further notes that the Plaintiff acknowledged that he filed a suit challenging the grant of the orders of the award to the said **Robert Boro** and that the Judicial Review proceedings operated as a stay. This Court has already found and held that time stopped running when the owner of the suit property asserted his rights. See the case of **James Maina Kinya v Gerald Kwendaka [2018] eKLR**, where the Court held that:-

“Did the filing of HCCC No. 30 of 1988 stop time from running? Once time begins to run for purposes of limitation it will continue to do so unless the true owner brings an action to recover the disputed land. Re Berson (1914) 2 Ch. 68 page 76. The action must be brought to recover the disputed land. The true owner must seek to retake possession or specifically raise the claimant’s right to possession. In this case the suit filed by the Plaintiff in 1988 was for specific performance asserting title pursuant to a contract of sale. It was met by the Defendant denying the sale of the property to the Plaintiff. It is trite law that time stops running the moment a suit is filed by the title owner. In this case time would have stopped running had the defendant filed an independent suit or a counterclaim in the suit of the Plaintiff. He did not so. In the circumstances therefore, I find that time was running continuously notwithstanding the suit of the plaintiff.”

There was **Stay Order** that had been issued and the grant of **Stay Orders** of **Judicial Review** proceedings operated as Stay and therefore there is no way the owner of the suit property could assert their rights while there were competent Court Orders barring them. Therefore the Court holds and finds that the Plaintiff has failed to prove that he has been in continuous, uninterrupted occupation of the suitland. The Plaintiff is therefore not entitled to the grant of claim of adverse possession. See the case of **Mbira –v- Gachuhi (2002) IEALR 137**, in which the Court held that:-

“.....a person who seeks to acquire title to land 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....”

This is so as at the time which the suit over the subject property subsisted time stopped to run and therefore the Plaintiff has failed to prove that he had been in continuous possession in a way that was adverse to the owner of the suit property. See the case of **Jandu –v- Kirplal & Another (1975) EA 225**, where it was held:-

“to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious.”

Taking into account the circumstances of this case, the Court finds that the Plaintiff has not proved that he had dispossessed the Defendant of the portion of land on the suit land for a period of **12 years**. It is clear that for the purposes of adverse possession if any, time started to run from the time the Defendant was registered as owner and that. That effectively stopped time from running.

Having now carefully considered the available evidence, the exhibits, the written submissions and the relevant provision of law, the Court finds that the Plaintiff has failed to discharge his burden of prove on the required standard of balance of probabilities. Consequently, the Court finds the instant **Originating Summons** not merited and proceeds to dismiss it entirely with costs to the Defendant.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of December 2019.

L. GACHERU

JUDGE

19/12/2019

In the presence of

M/S Mwangi holding brief for M/S Kimani for Plaintiff

Mr. Mageto holding brief for Mr. Mbabu for Defendant

Lucy - Court Assistant.

L. GACHERU

JUDGE

19/12/2019