



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANGA

ELC NO. 72 OF 2018(OS)

SIMON IRUNGU JOSHUA	-	1ST PLAINTIFF/APPLICANT
JAMLECK MWANGI NGANGA	-	2ND PLAINTIFF/APPLICANT
JOHN MUTUTHORO NGANGA	-	3RD PLAINTIFF/APPLICANT
DAVID WAIREGI NGANGA	-	4TH PLAINTIFF/APPLICANT
DISHON GICHARU NGANGA	-	5TH PLAINTIFF/APPLICANT
ESTHER MURURI GICHOHI	-	6TH PLAINTIFF/APPLICANT

VS

GICHOHI MWANGI	-	1ST DEFENDANT/RESPONDENT
TERESIAH WANJIKU MBURU	-	2ND DEFENDANT/RESPONDENT
EUNICE WANJIKU MUGO	-	3RD DEFENDANT/RESPONDENT
EUNICE WANJA GITHINJI	-	4TH DEFENDANT/RESPONDENT
ALICE WAMBUI MUTUA	-	5TH DEFENDANT/RESPONDENT
NANCY NJERI NDUNGU	-	6TH DEFENDANT/RESPONDENT
HANNAH RUGURU MWANGI	-	7TH DEFENDANT/RESPONDENT
BENSON IRUNGU MWANGI	-	8TH DEFENDANT/RESPONDENT
PAUL NGUNJIRI WAIRIMU	-	9TH DEFENDANT/RESPONDENT
ESTHER WANJIKU P MWANGI	-	10TH DEFENDANT/RESPONDENT
LUCIA THERERO NDIRANGU	-	11TH DEFENDANT/RESPONDENT

JUDGMENT

1. On the 13/9/2013 the Plaintiffs filed suit by way of Originating Summons seeking the following orders;

a. That the Respondents herein are resulting trustees of the Applicants in that title acquired over Land parcel No MARAGUA/RIDGE/104 measuring 5.6 ha or thereabouts by the Respondents in Muranga High Court Succ cause No 878 of 2013 had long been extinguished by way of adverse possession prior to the demise of the original owner MWANGI KAMBOGO.

b. That the said land title in the names of the Respondent should now be cancelled and the title issued to the Applicants as absolute proprietors

c. Costs of the summons be provided for.

2. In his supporting affidavit the 2nd Plaintiff/Applicant deponed that he and his co-Plaintiffs have been in possession of the suit land since demarcation and consolidation even before the suit land was registered in the name of Settlement Fund Trustee (SFT) on the 15/5/1990. He disclosed that they have carried out farming of subsistence crops and eucalyptus trees and built semi-permanent houses. That the Defendants and their families live on their own land MARAGUA RIDGE/183 and have never occupied nor utilized suit land.

3. It is their case that though the Defendants acquired the suit land through transmission in High Court Cause No 898 of 2013-Muranga on the 14/7/17, the said title had long been extinguished by way of adverse possession in their favour. That the Defendants now hold the suit land in trust for them.

4. In resisting the Plaintiffs claim the Defendants denied that adverse possession has accrued in favour of the Plaintiffs as they only acquired the land on the 14/7/17 and therefore the same has not been extinguished. They denied holding any land in trust for the Plaintiffs.

5. In their counterclaim the Defendants aver that the Plaintiffs are trespassers on the suit land who stealthily moved onto the land after the death of their father Joshua Nganga. They sought the following orders;

a. An order do issue for the eviction of the Defendants their servants agents and or anybody howsoever claiming through them in the Court land Maragua Ridge/104.

b. Costs of this suit and interest

c. Any other relief this Court may deem fit to grant.

6. At the trial the Plaintiffs led evidence and called two witnesses. PW1- Jamleck Mwangi Nganga informed the Court that he has lived on the suit land since 1980. He produced a copy of the green card for the suit land as well as a valuation report for identification. He adopted and reiterated the contents of the supporting affidavit in his testimony. He stated that his co-Plaintiffs are his siblings and entered the land at various times that is to say in 1983(1st Plaintiff), 1985 (3rd, 4th & 5th Plaintiffs). That his brother Duncan Gichohi was buried on the suit land in 2000. That he and his co-Plaintiffs have settled on the suit land with their families carrying out subsistence farming and livestock rearing.

7. That his father was called Joshua Nganga Kambogo. He died in 1985 and was buried at Gachocho. That the Defendants are children of Mwangi Kambogo the brother of Joshua Nganga Kambogo. That they live on parcel MARAGUA RIDGE/ 183 and not on the suit land. That the Defendants have not asked them to vacate the suit land except the claim for eviction in their counterclaim.

8. Further he stated that they have occupied the suit land for a period in excess of 12 years and urged the Court to grant their prayers.

9. In cross examination by the Learned Counsel for the Defendant's Mr Mbuthia, the witness informed the Court that the suit land became registered in the name of SFT on the 15/5/1990 and to the Defendants on the 14/7/17. He stated that though the suit land has not been formally surveyed each of the Plaintiffs occupy a designated area. That his father was buried in Gachocho in his land, family land.

10. PW2- Peter Gitau Ngugi informed the Court that he is a Registered Valuer (Reg No 267) by profession and works in the firm of Upcountry Valuers. That he was instructed by the Plaintiffs to advise on the current value of the suit land as well as the occupants. He informed the Court that the suit land is registered in the name of the Defendants, is agricultural and measures about 13.83 acres. He described in details the nature of the farming and buildings on the land and how the Plaintiffs have settled on the suit land. He stated that there are 2 plots which are vacant and was informed that they are reserved for David Waithegi. That there are also a number of graves on the suit land said to belong to the dead relatives of the Plaintiff. That the value of the land is 16 million. He produced the valuation report dated the 12/3/2019.

11. On being cross examined the witness stated that the developments of Mwangi Kambogo were not valued though he had two houses on the land. That he did not value any crops as they are perennial and subsistence in nature. That there are no surveys of the several plots on the land. The demarcations are all informal. That he did not estimate the age of the houses on the land. That though he was taken and shown parcel No MARAGUA RIDGE /183 he neither interviewed the owners nor assessed it.

12. DW1- Gichohi Mwangi informed the Court that his father, Joshua Nganga and the Plaintiffs father Mwangi Kabogo were step brothers. That after the death of his father the Plaintiffs who lived in Gachocho entered the suit land and settled there. He stated that in 1995 the Plaintiffs mother Ruth Wambui Nganga deceptively obtained letters of grant of administration in the estate of Joshua Nganga his father without their knowledge. The said grant was revoked and a new grant issued to the Defendants on the 12/4/17. Thereafter the title was registered in their names on the 14/7/17. He stated that the title was registered in the name of the Settlement Fund Trustees on the 15/5/90.

13. Further he stated that the Plaintiffs' father Joshua Nganga is buried in his land at Gachocho. That initially the Defendants all lived on the suit land before they were chased away in 1970 or thereabouts. That they moved and settled on parcel 183 acquired by her mother through purchase. He admitted that the Plaintiffs must have settled on the suit land between 1970-1980s. That they left Lucia Therero their Auntie on the land who lives on one acre.

14. DW2 – Teresia Wanjiku Mburu testified that that her father Mwangi Kabogo lived on the suit land and was buried at an unknown public cemetery. That she and her siblings were raised on the suit land and that they were removed from parcel MARAGUA RIDGE /104 in 1967

and she has never gone back there.

15. DW3- Lucia Therero Ndirangu stated that she lives on the suit land where she has a house and carries out farming. That her husband Simon Ndirangu was a cousin to Mwangi Kambogo. That she entered the suit land in 1974. That the Plaintiffs entered the suit land in 1985-86 after her husband died. Her husband is buried on the suit land. That the family of the Plaintiffs attempted a number of times to evict her in vain.

16. The parties filed written submissions which I have read and considered.

17. Having evaluated the Pleadings filed and the evidence led at the hearing of the suit, the key questions are; whether the Plaintiffs has proved a claim of adverse possession over the suit land; whether the Defendants are entitled to the orders of eviction.

18. It is not in dispute that the parties are related. It is not in dispute that the Plaintiffs have been in occupation of the suit land since 1985 or thereabouts. It is the case of the Plaintiffs that this occupation and possession has been in excess of the mandatory 12 years and therefore entitles them to title by way of adverse possession. On the other hand the Defendants case is that the claim of adverse is unfounded and have urged the Court to grant them orders of eviction of the Plaintiffs whom they have termed as trespassers.

13. In the case of **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for adverse possession has to prove;

“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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

14. In this case it is acknowledged that the Plaintiffs have been on the suit land since 1970s according to the Plaintiffs and 1985-86 according to DW3. All in all, they have been in occupation for over a period of 12 years. The valuation report coupled with the evidence of the Plaintiffs indicate that they have constructed houses and settled into subsistence farming. The Valuer confirmed that though the land has not been surveyed and subdivided, it has informal demarcations which clearly delineate each persons settlement and occupation on the ground.

15. From the evidence of the Defendants the occupation of the suit land by the Plaintiffs was open and in their knowledge. It is the Plaintiffs case that they have never been asked to vacate the suit land. That Defendants who have settled on parcel 183 are within the same locality and therefore were aware and took no steps to dispossess them of the occupation of the land.

16. In Kimani Ruchire –v – Swift Rutherfords & Co. Ltd. (1980) KLR 10 at page 16 letter B, where Kneller J. held that:

“The Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.

17. In the case of Sammy Mwangangi & 10 others –Vs- Commissioner of Lands & 3 others [2018] eKLR the Court of Appeal (Vishram koome karanja JJA) held that

“..... for the appellants to succeed in their claim for adverse possession to the suit land by statute of limitations, the burden was on them to prove the following conditions, on a preponderance of evidence; that their possession of the suit land was adverse to the true owner’s title; that it was without the authority or permission of the true owner and without use of force; that, without colour of right they had been in actual, open, peaceful, uninterrupted, notorious and exclusive possession for a period of at least 12 years.

18. In Wambugu –vs- Njuguna [1998] KLR 173 the Court of Appeal held thus:-

“In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. The proper way of assessing proof of adverse possession would then 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 has been in possession for the requisite number of years.”

19. All the parameters in this case point to a straight forward case of adverse possession. However the case will turn on the question whether the long possession and occupation can be said to be adverse to the registered owner of the suit land.

20. Evidence has been led by both the Plaintiffs and the Defendants that Ruth Wanjiru, the wife of Joshua Nganga and the mother of the Plaintiffs obtained a grant of letters of administration in SPMCC Succ cause No 98 of 1995. The superior Court found that she had obtained it through concealment of material facts; which were that she was the wife of Joshua Nganga hence disinheriting the Defendants. This grant was revoked vide HCCC succ cause No 566 of 2007 on 27/5/2011. A protest claim raised by the 1st Plaintiff faced the same fate in HCCC Succ cause No 878 of 2013 when the Court dismissed it and confirmed the grant to the Defendants on 12/4/17 whereupon they became

registered as proprietors of the suit land on 14/7/17.

21. The principle behind the doctrine of adverse possession is that the adverse possessor does not acknowledge the proprietors title and raises a claim as a trespasser and for the period of limitation. In this case it is clear from the preceding para that the Plaintiffs acknowledged the title of the registered owners when they sought through their mother Ruth Wanjiru to be declared as beneficiaries of the suit land. This conduct essentially destroys a claim based on adverse possession.

22. In the case of **Mtana Lewa –Vs- Kahindi Ngala Mwangandi [2015] eKLR** the Court of appeal summarized the doctrine of adverse possession while making reference to section 7 of the Limitation of Actions Act .The Court confirmed that the period of limitation is 12 years. **Makhandia, JA.** summarized the doctrine as follows:

"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

23. In the case of **Amos Weru Murigu v. Marata Wangari Kambi and Another** (H.C.C.C. No. 33 of 2002 (O.S) (at Kakamega) correctly held that:-

"adverse possession can only arise where land is registered in the name of the person against whom the claim for adverse possession is made for the simple reason that land must be occupied by a trespassing claimant adversely to the title of the owner (proprietor) against whom the claim is made under Section 38 of the Limitation of Actions Act."

24. In the case of **Francis Kimani Gathuita v Benson Irungu Njuguna [2018] eKLR** the ELC Court at Murang'a held that adverse possession is more about the equitable interest of a party in possession than a substantive declaration as to the legal right or validity of ownership.

25. The Plaintiff's Counsel submitted that the adverse possession runs against the estate of the late Mwangi Kambogo who was the equitable owner of the suit land. The Defendants have been sued as current proprietors and that the property vested in them as the beneficiaries before 2017. According to the Plaintiff the land did not belong to Settlement Fund Trustees but to Mwangi Kambogo. It is further argued without contest that adverse possession survives the estate of the deceased. That the Defendants having been registered, in 2017 now hold the title that is encumbered with adverse possession. That they hold the title in trust for them. They relied on the case of **Samwel Nyakenogo Vs Samwel Orucho Onyaru (2010) EKL**R the Court held that a claim of adverse possession is a claim in rem and not in persona and so the interest survives the death of the deceased owner and the right continues against the person who acquires title in the land.

26. I have perused the green card and the copy of title adduced in evidence and it is evident that the land was registered in the name of Settlement Fund Trustees on the 15/5/1990.

27. The provisions of Section 28 of the Land Registration Act provides that Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(h)

rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription".

28. This suit is brought under Section 38(1) of the Limitations of Actions Act which provides that

"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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."

29. It is evident that the suit land only became registered in the name of the Defendants in 2017. Prior to that the suit land was registered in the name of the Settlement Fund Trustees as a first registration.

30. In the case of **Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees [2016] Eklr** the Court of appeal at Nrb (. Vishram Minoti GBM Kariuki . held that

".....It is not difficult to discern that if the suit land is not registered, then compliance with Section 38 (1) may be problematic not least because, a litigant may be unable to show the Court that he has become entitled to be registered in respect of land whose title is not yet in place and more importantly, because as at the date of institution of the suit for adverse possession there must be in existence a title which the Court can declare to be extinguished by adverse possession under Section 38(1) (supra). Unless such suit

land is registered at the time of institution of the suit under any of the statutes referred to in Section 37 of The Limitation of Actions Act, a claim for the title by a trespassing claimant would be misplaced and, a Court order would be incapable of being effected.”

Further that if the land is registered in favour of the Government or a County Government, the doctrine of adverse possession would not apply to it and the claim would fail. The Court found that when the Respondent moved into possession of the suit land in 1980, the land belonged to the Kenya government and the issue of adverse possession could not arise.”

31. In case of **Gitu vs Ndungu [2001] EA 149** the Court approved an earlier decision of the Court in **Boniface Oredo vs Wabomba Mukile, CA No. 170 of 1989 (UR)** holding that the interest of SFT is not extinguishable under the Limitation of Actions Act.

32. In the case of **Kimoi Ruto & another v Samwel Kipkosgei Keitany & another [2014] EKLR** Munyao J held that *from* a reading of Section 41 (a) (i) the law is that one cannot acquire title by adverse possession to Government land, or land otherwise enjoyed by the Government. Government Land would presumably fall under the definition of public land, which in the Constitution of Kenya, 2010. Further that :

“.....It is not explicitly stated in the above provision whether or not land held by Statutory State Corporations are to be deemed to be Government land. State Corporations are themselves governed by the State Corporations Act, CAP 446, which provides in Section 2, what a State Corporation is. The section provides as follows:-

“**state corporation**” means— State Corporation under government jurisdiction .

That the Limitation of Actions Act, itself in Section 2, states that the definition of the term "the Government" includes "the Corporations" and in the same Act, "the Corporations" mean the Kenya Railways Corporation, the Kenya Ports Authority and the Kenya Posts and Telecommunications Corporation. The term "Government" in the Limitation of Actions Act, cannot therefore be taken to include all State Corporations but only the State Corporations specified therein.

At paragraph 37 his lordship similarly affirmed the above position of land registered in favour of SFT. The Court held that:

“Some State Corporations have, through specific provisions in the law, been immunized against the Limitation of Actions Act. One example is the Settlement Fund Trustees (SFT), established by Section 167 of the Agriculture Act. Section 175 of the same Act provides that no suit or proceeding by the SFT shall be rejected or dismissed on the ground only that the suit is barred by limitation under such law.””

33. From the above provisions of the law as well as precedent it is clear that the suit land having been registered in the name of the Defendants only in 2017, the claim of adverse is not founded because prior to that the land was registered in the name of SFT. The Plaintiffs have not demonstrated when the interest of SFT was discharged. In the absence of such a critical piece of evidence it is safe to conclude that the interest of SFT was only extinguished in 2017 upon registration of the Defendants as proprietors. The suit was filed in 2018, only one year has run and that is insufficient to found a claim of adverse possession.

34. In the end the claim of adverse possession fails. It is dismissed.

35. It is the case of the Defendants that the Plaintiffs have trespassed onto the suit land and urged the Court to order their eviction. Section 26 of Land Registration Act mandates the Court to acknowledge the title of a registered owner. In this case the suit land is registered in the names of the Defendants and there is no evidence that has been laid before the Court to impeach the title. The Defendants are therefore the indefeasible owners of the suit land. That said they are entitled to enjoy the rights of ownership as set out in Section 24 and 25 of the Land Registration Act. In the absence of any justifiable reason for the occupation and trespass of the suit land the Court finds that the Plaintiffs must be removed by way of eviction. It is so ordered

36. Final orders

- a. The Plaintiffs case is dismissed
- b. The Defendants counterclaim succeeds
- c. The Plaintiffs are ordered to vacate the suit lands within the next 120 days from the date hereof in default eviction to ensue
- d. The OCS commanding the Police Station of the area is ordered to supervise the eviction and ensure that law and order is maintained.
- e. The costs of the suit and the counterclaim shall be payable to the Defendants by the Plaintiffs

37. It is so ordered

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 19TH DECEMBER 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Awour HB for Kirubi for the 1st – 6th Plaintiffs

Maina HB for Mbuthia for the 1st – 11th Defendants

Irene and Njeri, Court Assistants