



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 264 OF 2016

BONIFACE KARANJA MWANGI

COSMAS CHEGE

DUNCAN NJOROGE NYOKABI (Being Officials of

AGGRERIAN RUARAKA UPGRADING SCHEME).....PLAINTIFFS

VERSUS

NTIKYA ENTERPRISES LIMITED.....DEFENDANT

JUDGMENT

1. Through the Originating Summons filed in court on 16/3/2016, the Plaintiffs sought to be declared the legal owners of land reference number 8480/2 situated along Kasarani – Mwiki Road (“the Suit Property”) having acquired it by effluxion of time through adverse possession. They sought a permanent injunction to restrain the Defendant from dealing with the suit land or evicting them from the land. They also sought cancellation of the Defendant’s title so that they can be registered as the owners of the Suit Property.

2. Boniface Karanja Mwangi, who swore the affidavit in support of the suit deponed that he was the Chairman of the Plaintiff Welfare Group. The Plaintiff was registered as a welfare group by the Ministry of Labour, Social Security and Services on 14/4/2014. He produced a list of 63 names who he claimed were members of the Welfare Group. He deponed that the Plaintiffs with their parents have been in continuous and uninterrupted occupation of the Suit Property registered in the Defendant’s name for more than 12 years. He deponed that the Plaintiffs’ parents have been farming and carrying out economic activities on the Suit Property with the knowledge and consent of the Defendant and that they hold ballot number 003. He deponed that members of the Plaintiff group derive their livelihood from the Suit Property. He deponed at paragraph 7 of the affidavit that having acquired the property through adverse possession, the Plaintiffs applied for permission to develop the Suit Property from the City Council of Nairobi on 13/10/2014.

3. He deponed that it came to the attention of the Plaintiffs that the Defendant had subdivided the Suit Property into 352 plots under plan registration number 3050 containing amendments to the approved subdivisions. He averred that those amendments did not take into consideration the plots which belonged to the Plaintiff and that the Defendant had wrongly assumed that the Suit Property was vacant. He deponed that the Plaintiffs had nowhere else to go and that they did not have any alternative means of earning an income. He deponed that having occupied the Suit property for more than 12 years without any interruption the Plaintiffs should not be forcefully evicted from the land. He produced a copy of the certificate of registration for the Welfare Group and a copy of the approved subdivision plan for the suit land.

4. James Waithaka Chege swore the replying affidavit in opposition to the suit which was filed on 20/6/2018. He denied that the Plaintiffs had the legal capacity to file this suit. He averred that the Defendant purchased the Suit Property from the Agricultural Finance Corporation (AFC) more than 15 years ago. The property initially belonged to Agraffin Management Series Limited which had charged the land to AFC. The land was vacant at the time the Defendant purchased it and took possession. The Defendant obtained approval to subdivide the land on 9/6/2004. He produced copies of the titles over some of the portions created from the subdivision of the Suit Property. He stated that the Plaintiffs had never been on the land and only tried to get onto the land on 28/1/2018 after obtaining court orders on 31/3/2017 through misrepresentation. Mr. Chege attached copies of titles issued to third parties to show that the suit land was subdivided and sold to new owners some of whom he claimed had developed the land. He annexed photographs showing multi-storeyed commercial buildings. He deponed that the Plaintiffs have never lived on the Suit Property and annexed receipts for payment of rates to the Nairobi City Council.

5. Mr. Waithaka swore a supplementary affidavit on 2/3/2018 and annexed photographs showing more developments on the suit land, together with a letter dated 23/2/2018 from the Chief, Kasarani Location confirming that there were no squatters on the Suit Property. The letter stated that a group of people attempted to invade the suit land on 28/1/2018 but were repulsed by the security personnel on the ground. He produced a copy of the title confirming that the Defendant was registered as the owner of the suit land on 10/2/2004. Entry number 10 of the title shows that the land was surrendered to the Government on 25/2/2014 in consideration for the approval for change of user.

6. Boniface Karanja Mwangi gave evidence and adopted the averments in his replying affidavit. He stated on cross-examination that the Plaintiffs parents were born and lived on the suit land. He stated that he was aware that AFC sold part of the land but maintained that the Plaintiffs were given the other part of the land. He had no document to demonstrate this. He added that the Defendant went to fence the land and demolished their houses in 2008 and 2018. He conceded that part of the land was already developed and added that the Plaintiffs were claiming 25 acres of the land.

7. James Waithaka Chege testified for the defence. He adopted the contents of his replying affidavit as his evidence in the case. He stated that he did not know the Plaintiffs and stated that the Defendant bought and subdivided the land into plots in 2004 after surrendering the mother title. He stated that the Plaintiffs attempted to enter the Suit Property in 2018 and that there was nobody on the land when the Defendant purchased it from AFC. He denied that the Defendant had demolished the Plaintiffs' houses on the Suit Property.

8. Parties filed and exchanged written submissions which the court has considered. The Plaintiffs submitted that the officials of the welfare group were mandated to institute the suit on behalf of its members. They submitted that they have been living on the land and farming on it for over 12 years. They relied on Section 7 of the Limitation of Actions Act in support of their claim for adverse possession. Further, they submitted that having acquired the land through adverse possession they were issued ballot number 003 and they applied to the City Council of Nairobi for permission to develop the Suit Property in 2014 and that at that point the Defendant subdivided the land into 352 plots without giving them notice.

9. The Defendant urged the court to take note of the fact that the certificate of registration of the welfare group was issued to the Plaintiffs in 2014 which was 12 years after it purchased the Suit Property, subdivided it and transferred the plots to third parties. The Defendant submitted that the Plaintiffs had not proved that they had physical possession and control of the suit land or that they had had peaceful, open and uninterrupted enjoyment of the land for more than 12 years so as to be entitled to the claim they now make. The Defendant urged the court to dismiss the suit.

10. The Plaintiffs filed further submissions and attached authorities in support of their claim for adverse possession. On the issue of locus, they submitted that the welfare group was registered in May 2014 way after the Plaintiffs and their families had been in occupation of a portion of L.R. No. 8480/2.

11. The issue for determination is whether the Plaintiffs have proved their claim for adverse possession of the Suit Property. The court has looked at the certificate of title for L.R. No. 8480/2 for land measuring 40.4 ha. Apart from averring that they had been on the suit land and that their parents were born there, the Plaintiffs did not lead evidence to prove this. The Plaintiffs welfare group was registered in 2014 and had the 63 or so members on the list produced in court been living on the suit land, then the area Chief would have confirmed this. The Chief, Kasarani Location, confirmed in his letter dated 23/2/2018 confirmed that there were no squatters on the Defendant's land. Being on the ground, the area Chief is better placed to tell whether or not a group of people reside at a specific place.

12. It is unlikely that the Plaintiffs had built on the suit land. The application for development approval they produced in court was dated 13/10/2014. No evidence was led on what sort of structures the Plaintiffs had developed on the Suit Property and when the Defendant demolished the structures. The Plaintiffs' witness produced ballot number without showing which entity issued the ballot and when. No evidence was led to show who issued the ballot and what it related to. In any event, no other party could have allocated the Defendant's land through ballots without its consent.

13. The Plaintiffs failed to prove that they have been in peaceful, open and uninterrupted possession of the suit land for more than 12 years. The suit is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 13th day of December 2019.

K. BOR

JUDGE

In the presence of: -

Boniface Karanja Mwangi, one of the Plaintiffs

Mr. J. Museve for the Defendant

Mr. V. Owuor- Court Assistant