



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO.218 OF 2017

BETHWEL MWANGI GITHINJ - 1ST PLAINTIFF

STEPHEN MUGANE S/O

ERASTUS GITHINJI - 2ND PLAINTIFF

WILLIAM KUNGU KARANJA - 3RD PLAINTIFF

VS

HARRISON WACHIRA WANJOHI - 1ST DEFENDANT

BERNARD MWANGI NGUNJU - 2ND DEFENDANT

JUDGMENT

(Consolidated with ELC No 113/2015)

1. The above files were consolidated by consent of the parties recorded on 26/4/17 and the lead file was taken as ELC No. 218/2017. The Originating Summons in the 113/15 were deemed as the 1st Defendant's Counterclaim and the Replying Affidavit by the Respondents was deemed as their defence to the Counterclaim.

2. On the 24/12/14 the Plaintiffs filed suit against the 1st Defendants by way of Plaint, which plaint was amended on 19/10/17 seeking interalia the following Orders;-

a. That the Defendants and their servants do move and vacate out of land parcel Loc.14/Kamune/1013 now Loc. 14/Kamune/2487 and Loc.14/Kamune/2488 failing which the Court bailiff of this Court (Muibau Auctioneers) do forcefully evict them at their own costs.

b. That the Defendants and his servants do exhume the remains of any of their persons(s) who was buried in the land known as Loc.14/Kamune/1013 (now Loc. 14/Kamune/2487 and Loc.14/Kamune/2488 and specifically Rose Wangui Ngunju) which belongs to the Plaintiffs.

c. A permanent injunction do issue restraining the Defendants, their agents/servants and or assignees from occupying and or dealing in any manner with the parcel of land loc. 14/Kamune/2488.

d. That the Defendants do pay mesne profits and pecuniary damages to the Plaintiffs for preventing the Plaintiffs from using their land from 1997 to date.

e. Costs of this suit and interests thereto at Court rates.

f. Any other or better relief that this Court deems fit to grant.

3. The Plaintiffs claim is based on the alleged illegal and wrongful occupation of the suit land by the Defendants without any colour or right an act that has prevented the Plaintiffs from taking full charge over the suit properties. That despite demand and notice to the Defendants to vacate the said suit land the Defendants have persisted in their refusal.

4. As would be expected the Defendants filed a defence denying the Plaintiffs claims. The 1st Defendant filed a counterclaim (through O.S) seeking a declaration that he has acquired an absolute title of all those parcels of the suit land by way of adverse possession and sought an Order directing the Land Registrar to effect the transfer of the said suit lands in his name. The basis of his Counterclaim is that he has been in continuous open and exclusive uninterrupted possession of the suit lands for over 12 years. Further the Defendants filed an amended defence on the 6/11/17 where the 1st Defendant laid claim on the ownership of the land based on open exclusive occupation of the suit lands. In a rejoinder to para 6 of the Plaint which called for the vacation of the 1st Defendants from the suit lands, and in default they be evicted, the 1st Defendant stated that he is a stranger to the averment but stated that the deceased Rose Wangui Ngunju was related to the 2nd 1st Defendant and the said burial was done publicly.

5. At the hearing of the case the 1st Plaintiff Bethwel Mwangi Githinji led evidence on his own behalf and on behalf of the other 3 Plaintiffs, having been authorized as such vide a letter of authority dated 23/12/14 and filed in Court on 24/12/14.

6. The 1st Plaintiff led evidence in chief and traced the history of the original land Loc.14/Kamune/1013 measuring 4.9 acres. That this land belonged to one Karanu Waitathu who left it to the 1st Plaintiffs father, one Eustace Githinji Kironjo on condition that upon the death of Karanu, Kironjo would bury his remains on the suit land. At the time Karanu lived at Thuita, the matrimonial home of his daughter Gatuki who is deceased. On the death of Karanu, Kironjo was given the land.

7. Further he averred that Karanu had another daughter called Jane Ngunju who had been bequeath another parcel of land Loc.14/Kamune/1350. That he and his brothers were registered as owners of Loc.14/Kamune/1013 pursuant to the judgement in RMCC No. 123 of 1978. In said Judgment delivered on 15/2/79 the Court ruled that LR No.s Loc.14/Kamune/1013 & Loc.14/Kamune/805 be registered in the names of;

- Obadiah Kaguru
- Bethwel Mwangi
- Stephen Mugane
- Mannaseh Kung'u
- Maina Karanja
- Kungu Karanja

8. That the said Judgment has not been set aside and remains valid. That they were issued with the titles jointly for LR Loc.14/Kamune/1013 on 7/8/79. That 3 out of his 7 brothers have died leaving behind 4 necessitating changes to be made on the title in 2015 when a new title in joint proprietorship was issued. That in the year 2017, the suit land was subdivided into two parcels Loc.14/Kamune/2487 & Loc.14/Kamune/ 2488 measuring 1.296 Ha. & 0.60 Ha respectively. That both titles are registered in the joint names of the Plaintiffs.

9. Further the Plaintiff averred that Rose Ngunju was buried on the suit property against their protestations that went unheeded. They filed a suit against the 1st Defendant barring the burial however the burial went on before they could obtain an order for injunction. That currently Loc.14/Kamune/1013 is being leased to third parties by the 1st Defendant. He clarified that the first time he sued the 1st Defendant was in 1997 seeking that he vacates the suit land. He confirmed that both Rose and Jane

Ngunyu were buried on LR No. Loc.14/Kamune/2487, a portion of the original Loc.14/Kamune/1013. In 2014 the 1st Defendant entered into the suit land when the said Jane Ngunju was alive. He averred that since 1997 the 1st Defendant has been leasing out the land and collecting rent without the Plaintiffs consent.

10. The Plaintiffs stated that on 6/11/06 they caused a demand letter to be drawn by their Advocates Kagondú Mukunya asking Wachira Wanjohi and Christopher Mwangi to vacate the suit land, which demand letter went unheeded. That again on 2/9/11 another demand letter was sent to Mwangi Mutahi to vacate in vain. Both parties were tenants of the 1st Defendant on the suit land.

11. The Plaintiffs aver that the 1st Defendant has neither lived on the suit lands nor built any dwelling house. That he has his own land elsewhere. That the plaintiffs have attempted to fence the suit land but were repulsed by the 1st Defendant.

12. The 1st Defendant led evidence and relied on his witness statements filed on 13/4/15 and 8/11/17. He explained that the land Loc.14/Kamune/1013 was owned by one Karanu Waitatu who sold the same to his father. That the said Karanu died in 1965 and when challenged to produce the agreement for sale between his father and the said Karanu, the 1st Defendant stated that he had none and could not produce the witnesses as they had long passed away.

13. The 1st Defendant stated that in 1979 the Plaintiffs were registered as owners of the suit property pursuant to the judgement of the Court in RMCC No. 123 of 1978. That notwithstanding he has been in possession of the land since 1960s and even on being registered as owners in 1979, the Plaintiffs have not interrupted his stay until 2014 when they filed the present suit. That though he does not live on the suit land, he has had control by leasing it to third parties who pay him annually with the farm produce from the farm. That by the time the Plaintiffs wrote to some of his tenants to vacate the suit land in 2006 and 2011 he had been in possession of the land in excess of 12 years.

14. He stated that he was neither aware that Jane Ngunju, the daughters of Karanu had filed a case to recover the suit land from the Plaintiffs. He stated that the late Karanu lived at his married daughter Gathuki's home at Thuita until his death. He had no sons. He averred that Karanu and his father were brothers while the Plaintiffs were not blood relatives with the Karanus. That he buried his niece Rose Ngunju on the suit land in 2014. She was the granddaughter of Karanu. This was in addition to the 1997 burial of Jane Ngunju Karanu. The 2014 burial was objected by the Plaintiff albeit unsuccessfully.

15. The Plaintiffs submitted that they are the registered owners of the suit properties. Pursuant to the Judgement of the Court in Succession Cause No. 123 of 1978 delivered on 15/2/79, which directed that the Plaintiffs together with some of their deceased brothers to be registered as proprietors of Loc.14/Kamune/1013 & Loc.14/Kamune/805. That one Jane Ngunju Karanu being aggrieved by the Decision of the Learned District Magistrate in Succession Cause No. 123 of 1978 appealed to the Resident Magistrate Court vide Civil Appeal No. 25 of 1979 where a ruling was granted in her favour. The Plaintiffs being aggrieved by the decision in turn filed an Appeal No. 80 of 1980 at Nyeri where the Court set aside Resident Magistrate's decision and reinstated the District Magistrate's Judgement, which judgement has not been appealed nor set aside todate.

16. That the Defendants have refused to vacate the suit land despite the demands being issued to them to so vacate. The Plaintiffs contended that the Defendants have not established a case of adverse possession on grounds that they did fail to proof 4 ingredients spelt out in the Court of Appeal at Malindi **Civil Appeal No. 17 of 2016 – Chevron (K) Ltd vs. Harrison Charo wa Shutu** which they have relied on.

17. The 1st Defendant submitted that his claim is based on adverse possession. He pointed out that the Plaintiffs have admitted being in occupation since 1977 and time only stopped running on 24/12/14 when the Plaintiffs filed suit seeking to retake possession of the land through eviction of the 1st Defendants. That by 2014, the 1st Defendant had been in possession for a period in excess of 12 years by which time the title for the Plaintiffs had been extinguished.

18. That in 1997 the Plaintiffs filed suit against the 1st Defendant seeking to bar him from interring the remains of Jane Ngunju Karanu on the suit land. That was a recognition of his occupation/possession of the suit land since then 1997. She was eventually buried and the body has not been exhumed since then.

19. Further the 1st Defendant submitted that the Plaintiff readily admitted that the 1st Defendant has been leasing the suit property to other third parties. It is the 1st Defendants position that time started running in 1979 when the Plaintiffs acquired title to the suit land. That the title of the said property was extinguished by operation of law by 1992.

20. Relying on the cases of **Cryrus Muriithi Mbau vs. Gichuhi Githumbi Nyamu 2014 EKLR and James Kinyua Muriithi vs. Gichuhi Nyamu (2016 EKLR)** The 1st Defendant contended that he has been in open exclusive possession of the suit land uninterrupted for a period in excess of 12 years that is to say close to 35 years. That the entry was not permissive and that he has been using the suit land adverse to that of the intentions of the Plaintiffs. Finally that he has satisfied the requirements of adverse possession and urged the Court to grant its claim in the Counter Claim.

21. I have considered the parties respective pleadings annexures hereto as well as the evidence and the submissions by both Counsels.

22. It is not clear what the Defence of the 2nd Defendant is from the record other than general denials in the statement of defence. He did not file any witness statement nor advance any evidence on trial.

23. The issues for determination are whether the 1st Defendant has established ownership by way of adverse possession, whether the Plaintiffs are entitled to an Order of eviction of the 1st and 2nd Defendant from the suit premises and who meets the costs of the suit.

24. In respect to the order consolidating the suits, the claim will be determined in the following manner; ELC No. 218 – Land case for the Plaintiff claim against the 1st Defendant. ELC 113 (OS) which is the claim of the 1st Defendant in the Originating Summons and will be determined as though it were a Counterclaim against the Plaintiff in the lead suit No. 218, so much so that subject to any final findings of the Court, the Plaintiff instruction fees would be based on the pleadings in the plaint and instruction given to defend the Counterclaim of the 1st Defendant in the Originating Summons. In the same vein the 1st and 2nd Defendant instruction fees would be based on their defence as filed against the Plaintiffs claim and the 1st Defendant Counter claim (specific to the 1st Defendant's only) against the Plaintiffs.

25. It is not in dispute therefore that the Plaintiffs are registered owners of the suit property It is also on record that the suit land Loc.14/Kamune/1013, later subdivided to Loc.14/Kamune/2487 & 2488 was owned by one Karanu Waitathu in 1962. Upon his demise his land became the subject of Succession Cause No. 123 of 1978 between the Plaintiffs (including their deceased kin) and the family of the late Karanu Waitathu led by their daughter Jane Ngunju Karanu. The matter went all the way to the High Court where Kubasu J. (as he then was) in HCCA No/. 80 of 1988 at Nyeri delivered judgement in favour of the Plaintiffs on the 18/6/1982. The Resident Magistrates Court had earlier ruled in favour of the Plaintiffs in 1979 culminating in the Plaintiffs being registered as owners of the suit land Loc.14/Kamune/1013. This is reflected on the copy of the title on record issued on the 7/8/1979.

26. Section 7 of Limitations of Actions Act states as follows;

“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.”

Section 38 of Limitations of Actions Act states as follows;

“ Where a person claims to have become entitled by adverse possession to land registered under

any of the Acts cited in section 37 of this Act, 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.

Section 28(h) of the Land Registration Act No 3 of 2012 states as follows;

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

This section provides for adverse possession as one of the ways as one could acquire land in Kenya.

27. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

Adverse possession therefore is a fact to be observed on the land and not on the title. The evidence of the 1st Defendant as given by DW 1 – DW 3 support the facts cited above.

28. The burden of proving a claim in adverse possession rests in the person claiming the same. In addition to proving that he has been in possession of the land in excess of 12 years, he must prove that he has taken possession without the permission of the owner; that he has dispossessed the owner of the suit property or the owner discontinued his possession and that his acts of possession are inconsistent with that of the owner as to the enjoyment of the soil for which the registered owner intended to use the land; that he has been in open, continuous, exclusive, as of right and uninterrupted occupation and possession of the land. (See **Littledale vs. Liverpool College (1900) 1 Ch. 19, 21**).

29. When does time start running for purposes of calculating adverse possession? The 1st Defendant has contended that he has lived on the suit land since he was born. He averred and albeit with no evidence that his father bought the land from Karanu Waitathu. That he has lived the land for over 50 years. This evidence was not challenged by the Plaintiff. It is his case that when the Plaintiff became registered as owners of the suit land in 1979, he was already in the possession of the land. That he has never ceased his possession nor have the Plaintiffs ever taken possession from him. Even if the period of 1979 is taken as the period when time begun running, it follows that the Plaintiff has been in possession for a period of 35 years by the time the suit was filed on the 24/12/2014. It is on record that the appeal was decided in favour of the Plaintiffs in 1992, that would make the period 32 years. Further even if the year 1997 is taken when the Plaintiffs filed suit unsuccessfully barring the 1st Defendant from burying Jane Ngunju that would be 17 years. In either of the cases; 1979, 1982, and 1997 it would mean that the title of the Plaintiffs became extinguished in 1991, 1994 and 2009 respectively. In the case of **Sophie Wanjiku John vs Jane Mwhaki Kimani ELC NO.490/2010**, it was held that adverse possession can only be maintained against a registered owner. For purposes of this case, I would take 1979 as the time that the period of limitation started running in favour of the 1st Defendant, in which case the 1st Defendant would have in possession for 35 years, way in excess of 12 years as provided by the law. From the period 1991-2014 the Plaintiffs have been mere paper owners holding the title in trust for the 1st Defendant.

30. The 1st Defendant has led evidence that he has been in open, uninterrupted possession of the land. It is on record that the Plaintiff attempted to file suit against the 1st Defendant in 1997 seeking to bar him and others from burying the remains of Jane Ngunju Karanu on the suit land. The suit was unsuccessful and the burial proceeded. It is also on record that the 1st Defendant and others did inter the remains of Rose Ngunju in 2014 on the suit land. There is no evidence that these bodies have been exhumed to date.

31. The Plaintiffs in their plaint have prayed for mesne profits and pecuniary damages against the

defendants for using the land since 1997 to date. This is further admission that the 1st Defendant has been in possession. It is on record and stated by Bethwel Mwangi that they have never enjoyed the fruit of the land since the 1st Defendants have been cultivating it.

32. The 1st Defendant led evidence which was also admitted by the Plaintiffs that he has been leasing the land to 3rd parties for cultivation of crops. That he is paid by the tenants with the farm produce of the land as rent. It is on record that the Plaintiffs wrote demand letters to the said tenants Christopher Mwangi and Wachira Wanjohi on 6/11/2006; Wachira Wanjohi on 2/9/2011 and Mwangi Mutahi on 2/9/2011, requiring them to vacate the suit property. These are the 3rd parties tenants of the 1st Defendant on the Land. The 1st Defendant has also indicated that he has been cultivating the land over the years. This is a demonstration that the land was in control of the 1st Defendant and occupation by himself directly and through the 3rd party tenants. It is clear from the 1st Defendant's action above that he dealt with the land as if it was exclusively (leasing the land and burying relatives on the said land) and in clear conflict with that of the registered paper owner's i.e the Plaintiffs. Those acts in my view were *nec vi, nec clam, nec pricario* that to say without force, not secretly and without permission. The actions were publicly carried out and these acts dispossessed the Plaintiffs.

33. Going by the evidence analyzed above, I find and hold that the 1st Defendant has established a claim of adverse possession. The title of the Plaintiffs therefore stands extinguished. It is in my view immaterial that the Plaintiff made a demand to the 1st Defendant of a recovery to the suit land as at the time they did so in 2006, the title they were holding had been extinguished in 1992 and as aforesaid they were holding it as paper owners in trust for the 1st Defendant.

34. Based on my findings above, it follows that the consent of the Plaintiffs to the 1st Defendants to bury the said Jane Ngunju Karanu on the land was not necessary because as at 1997 the title of the Plaintiffs had been extinguished in favour of the 1st Defendant.

35. From the foregoing therefore, the Plaintiffs claim for Orders sought in the plaint fail in its entirety. The 1st Defendant has established ownership by adverse possession and therefore ceased to be a trespasser.

36. In the end I make the final Orders as follows;

a. The 1st Defendant's Counterclaim succeeds and the 1st Defendant is hereby declared to have acquired an absolute title for all that piece of land known Loc.14/Kamune/1013 (new titles Loc.14/Kamune/2487 & 2488) measuring 1.296 hectares and 0.60 hectares respectively by virtue of adverse possession thereof having been in open exclusive and uninterrupted occupation of the suit land for a period in excess of 12 years.

b. The Plaintiffs be and hereby ordered to execute all documents of title in respect to Loc.14/Kamune/2487 & 2488 to the 1st Defendant and take all steps necessary to effect transfer to the 1st Defendant.

c. In default the Deputy Registrar of this Court be and is hereby mandated to execute all appropriate documents to effect transfer of title Nos. Loc.14/Kamune/2487 & 2488 to the 1st Defendant.

d. Costs shall be in favour of the 1st Defendant payable by the Plaintiffs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 25TH DAY OF JANUARY, 2018.

J.G. KEMEI

JUDGE