



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
MISC. APP. NO. 318 OF 2017 (OS)
RAHAB WANJA MICA.....PLAINTIFF
VS
JONAH MUCHOKI KARIUKI.....DEFENDANT

JUDGMENT

1. On the 25/9/2008 Rahab Wanja Mica moved the Court under section 37 and 38 of the Limitations of Actions Act, Section 30 of the of Registered Land Act Cap 300 and Order 36 Rules 1,2 & 3D & F of the Civil Procedure Act and all enabling laws (as they then were). She sought several orders as follows;

a) An Order that the Plaintiff has been entitled by way of adverse possession to all that piece of land comprised in title number Loc.2/Kinyona/T.28 in Murang'a District registered in the names of the Defendant because she (the Plaintiff) has been in possession and occupation for more than 12 years immediately preceding the presentation of this suit.

b) An Order that the Defendants title to the said piece of land that is Loc.2/Kinyona/T.28 measuring $\frac{1}{4}$ of an acre or thereabouts has been extinguished in favour of the Plaintiff under section 37 and 38 of Limitation of Actions Act.

c) An Order that the Defendant do transfer to the Plaintiff the suit premises being land parcel number Loc.2/Kinyona/T.28 free from all encumbrances failing which the Deputy Registrar of this Court be authorized to sign all necessary papers, documents and transfer forms, application for the consent of the land control board to ensure that the Plaintiff is registered as owner of the said piece of land free from all encumbrances.

d) An Order that the Plaintiff has been entitled by way of adverse possession to all that pieces of land comprised in titles numbers:

a) Loc.2/Kinyona/T.27

b) Loc.2/Kinyona/T.28

c) Loc.2/Kinyona/T.29

d) Loc.2/Kinyona/T.30

e) Loc.2/Kinyona/T.31

e) An Order that the titles to the said pieces of land that is :

- a) Loc.2/Kinyona/T.27 measuring ¼ of an acre.
- b) Loc.2/Kinyona/T.28 measuring ¼ of an acre.
- c) Loc.2/Kinyona/T.29 measuring 0.052 hectares.
- d) Loc.2/Kinyona/T.30 measuring 0.052 hectares.
- e) Loc.2/Kinyona/T.31 measuring 0.052 hectares.

Or thereabout have been extinguished in favour of the Plaintiff under section 37 and 38 of the Limitations of Actions Act.

f) An Order that the Administrators of the estate of my late father and mother Mr. MICA CHEGE MWARANGU and MRS. WAITHIRA MICA CHEGE (deceased's) do transfer to the Plaintiff the suit premises being land parcel numbers;-

- a) Loc.2/Kinyona/T.27 measuring ¼ of an acre.
- b) Loc.2/Kinyona/T.28 measuring ¼ of an acre.
- c) Loc.2/Kinyona/T.29 measuring 0.052 hectares.
- d) Loc.2/Kinyona/T.30 measuring 0.052 hectares.
- e) Loc.2/Kinyona/T.31 measuring 0.052 hectares.

free from all encumbrances failing which the Deputy Registrar of this Court be authorized to sign all necessary papers, documents and transfer forms application for the consent of the land control board to ensure that the Plaintiffs are registered as owner of the said piece of land free from all encumbrances.

- g) Any other or further relief that this Court may deem fit to grant.
- h) That the costs of and incidental to this suit be provided for.

2. The application is anchored on the disclosed grounds as set out; -

- a) Respondent obtained the title to L R No. Loc.2/Kinyona/T. 28 fraudulently.
- b) The applicant is entitled to be declared owner by reason of prescription/adverse possession.
- c) Other grounds to be adduced at the hearing hereof.

3. The Applicant deponed that she is the daughter of Mica Chege Mwarangu & Waithera Chege who died in 1972 & 1978 respectively. That she has 7 siblings whom she has listed. That upon her break up of her marriage she returned home to her mother's house where she lived with her from 1973 till her demise. That she has continued to live on L R No. Loc.2/Kinyona/T. 28 todate uninterrupted. That she has been cultivating Plot Nos Loc.2/Kinyona/T.27-31 since 1973. That she was jolted when she was asked to vacate the house where she has lived since birth (initially built by her own parents and later by her siblings) hence filing the current motion.

4. The Respondent filed a Replying Affidavit in opposition of the motion on 5/11/08 maintaining that the motion was fatally defective in the absence of copies of titles being annexed as provided for under Order 37 rule 7(2). Further that the motion was a nullity for seeking Orders against owners of L R No. Loc.2/Kinyona/T. 27, L R No. Loc.2/Kinyona/T. 29, L R No. Loc.2/Kinyona/T. 30 & L R No.

Loc.2/Kinyona/T. 31 who are not parties to the suit. That she cannot be seeking reliefs from him as the registered owner at the same time from the administrators of the estate of her late father in respect to the same plot No. L R No. Loc.2/Kinyona/T. 28.

5. The Applicant sought and was granted leave by the Court on 7/7/2009 to file supplementary affidavit annexing copies of titles for plots Nos. L R No. Loc.2/Kinyona/T. 27 – L R No. Loc.2/Kinyona/T.31.

6. Parties have filed a total of 12 agreed issues which I have reduced to; Did Plaintiff occupy the parcels for a period of 12 years; who is the owner of L R No. Loc.2/Kinyona/T. 27, L R No. Loc.2/Kinyona/T. 29, L R No. Loc.2/Kinyona/T. 30 & L R No. Loc.2/Kinyona/T. 31; Are they parties to this suit; Has the Plaintiff established adverse possession on the 5 plots or any of them at all; Has the Plaintiff proved fraud on the part of the Defendant; who meets the cost of the suit?

7. At the hearing of the suit the Plaintiff called 3 witnesses. In her testimony she stated that she occupies L R No. Loc.2/Kinyona/T. 27 – T.31. That L R No. Loc.2/Kinyona/T. 28 belongs to the Defendant who sought to evict her in 2008. That she has lived on L R No. Loc.2/Kinyona/T. 28 since she was born and returned back to it in 1973 to date. She produced copies of green cards together with certificate of official searches for L R No. Loc.2/Kinyona/T. 27 - L R No. Loc.2/Kinyona/T. 31.

8. On Cross-examination by Mr. Kirubi Learned Counsel for the Defendant she stated that though she has filed the case against the Defendant, she also seeks Orders to be granted Plot No. L R Loc.2/Kinyona/T. 27, L R No. Loc.2/Kinyona/T. 29, L R No. Loc.2/Kinyona/T. 30 & Loc.2/Kinyona/T.31 notwithstanding that the owners are not parties to the suit. That the owners of L R No. Loc.2/Kinyona/T. 27 & L R No. Loc.2/Kinyona/T. 30 is Samson Kagunda Chege (her deceased brother) and Naomi Wambui Kagiri L R No. Loc.2/Kinyona/T. 29 & L.R No. Loc.2/Kinyona/T. 31.

9. At the trial the Plaintiff insisted that her claim is on adverse possession and not fraud. In her pleadings she had anchored her prayers inter alia on the premise that the acquisition of the title by the Defendant was fraudulent. Further she informed the Court that the 5 plots belonged to her parents. That notwithstanding, none of the suit properties are registered in the names of her parents.

10. She stated that the reason why she has not sued the owners of the other 4 titles is because they have not disturbed her peaceful occupation save for the Defendant who sought to evict her in 2008. She explained that by the time the Defendant obtained title in 1971, her parents had been in occupation since the 1960s, which occupation she continued in her own right from 1973 to date. That her parents built a house on the property. That the Defendant has not built any house on the suit property neither does he live there.

11. PW 2 & PW 3 – gave similar testimony in support of the Plaintiff's case. They stated that their parents lived on Loc.2/Kinyona/T. 28 and the Plaintiff has been in occupation since 1973 to date. That they were all born on Loc.2/Kinyona/T. 28 and grew up there before getting married. They confirmed that the Defendant has not occupied the suit land. They relied on their written statements as their evidence in chief.

12. The Defendant testified solely and adopted his written statement as well as his Replying Affidavit filed on 27/9/17 and 5/10/08 respectively. He confirmed that he is the registered owner of Loc.2/Kinyona/T. 28 having bought the same from Ephraim Kuria in 1971. He denied obtaining the land through fraud. He stated that the Plaintiff resides on Loc.2/Kinyona/T. 27 and not Loc.2/Kinyona/T. 28 and it is on this realization through reading the map of the area that she asked her to move to Loc.2/Kinyona/T. 27. That he sought intervention from the area chief.

13. Earlier the Defendant confirmed annexing titles for Plot No.s Gacharage/Gikigii/27,29, 30 & 31 as the plots for which the plaintiff was claiming title by way of adverse possession. On cross examination he stated that he did not know the owners of these plots.

14. Challenged to produce evidence to support his assertion that he purchased the land from Ephraim

Kuria, he responded that he paid him in cash and has no documentary evidence nor oral evidence in support. He confirmed that he does not live on Loc.2/Kinyona/T. 28 nor built any house on the same. He confirmed that the Plaintiff is in occupation of the suit property. Further that at the time he purchased the suit property Loc.2/Kinyona/T. 28 in 1971 the Plaintiff through her family was in occupation.

15. In his witness statement he sought to explain that the Plaintiff is occupying Loc.2/Kinyona/T.27, Loc.2/Kinyona/T. 29, Loc.2/Kinyona/T. 30 & Loc.2/Kinyona/T. 31 on the ground. That his plot Loc.2/Kinyona/T. 28 being sandwiched in the middle of the 4 plots, the Plaintiff mistakenly assumes that Loc.2/Kinyona/T. 28 belongs to her. He clarified that he has not produced any survey plan to support this assertion on the ground situation.

16. In his testimony the Defendant opposed the Plaintiff's claim of adverse possession stating that though he bought the land in 1971, he was only issued title in 2001, and therefore the suit having been filed in 2008, adverse possession does not apply. He stated that it was unfair for the Plaintiff to have sued him alone leaving the owners of the other 4 plots namely;

- a) Loc.2/Kinyona/T.27 is registered in the name of Samson Kagunda Chege
- b) Loc.2/Kinyona/T.29 is registered in the name of Naumi Wambui Kagiri
- c) Loc.2/Kinyona/T.30 is registered in the name of Samson Kagunda Chege
- d) Loc.2/Kinyona/T.31 is registered in the name of Naumi Wambui Kagiri

17. At the close of the hearing the Learned Counsels for the parties sought to file written submissions which they did on 21/11/2017 & 22/11/17 respectively. I have carefully considered them.

Determination

18. It is commonly admitted that the parcels of land are owned as follows; -

- a) Loc.2/Kinyona/T.27 is registered in the name of Samson Kagunda Chege
- b) Loc.2/Kinyona/T.28 is registered in the name of Jonah Muchoki Kariuki
- c) Loc.2/Kinyona/T.29 is registered in the name of Naumi Wambui Kagiri
- d) Loc.2/Kinyona/T.30 is registered in the name of Samson Kagunda Chege
- e) Loc.2/Kinyona/T.31 is registered in the name of Naumi Wambui Kagiri

19. It is not in dispute that the Defendant is the registered owner of Loc.2/Kinyona/T.28. It is also commonly known that the Plaintiff has sought a declaration that she is entitled by way of adverse possession to Loc.2/Kinyona/T.27, 28,29, 30 & 31. It is also commonly acknowledged that the Plaintiff has not enjoined the registered owners of Loc.2/Kinyona/T.27, 29, 30 & 31.

20. There is a question that I must address on the onset. Whether the Plaintiff can succeed in establishing a title by way of adverse possession over Loc.2/Kinyona/T.27,29,30 & 31 in the absence of joinder of the registered owners. It is on record that the above parcels are owned by;

- a) Loc.2/Kinyona/T.27 -Samson Kagunda Chege
- b) Loc.2/Kinyona/T.29 -Naumi Wambui Kagiri
- c) Loc.2/Kinyona/T.30 - Samson Kagunda Chege

d) Loc.2/Kinyona/T.31 - Naumi Wambui Kagiri respectively.

The Plaintiff has only sued the Defendant leaving the other 4 registered owners. It is on record that the Defendant has complained of discrimination by the Plaintiff in the way she singled him out in the suit and left the rest. The Plaintiff has led evidence that in addition to her parents and her own occupation of the Loc.2/Kinyona/T.28, they also grew food crops on Loc.2/Kinyona/T.27, 29, 30 & 31, a tradition that she has continued to date. In her own evidence she is entitled to those titles by way of adverse possession. That may be so save for non-joinder of the parties.

21. Article 50 of the constitution of Kenya 2010 guarantees every Kenyan fair hearing and the right to be heard. The right to be heard is a fundamental tenet of our bill of rights as well as a principle of natural justice. The Plaintiff seeks reliefs which affect property rights of the parties not party to the suit which is likely to affect negatively or positively their rights to property enshrined in Article 40 of the constitution. If the Plaintiff was minded in seeking reliefs from the parties, she ought and must have invited them to the contest so as to afford them the opportunity to defend their cases as regards the claims of the Plaintiff. There is no short cut.

22. Order 1 Rule of the Civil Procedure Rules states as follows;-

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.

23. In view of the above I shall proceed to decide the case and the issues in controversy in relation to Loc.2/Kinyona/T.28 between the Plaintiff and the Defendant and to the exclusion of registered owners of Loc.2/Kinyona/T.27,29,30 & 31 as far as they are not joined as parties to the suit. In my view the non-joinder of the parties does not make the whole suit fatal and the justice of the case will be achieved by deciding the case of the parties as far as regards the rights and interests of the parties actually before me. In the circumstances the prayers listed as Nos 4,5 & 6 are hereby struck out for non-joinder and being an abuse of the process of the Court.

24. Has the Plaintiff established title by adverse possession on Loc.2/Kinyona/T.28? The Law on adverse possession in Kenya is very clear. I will highlight some sections of the Limitations of Actions Act Cap 22 and the Registration of Land Act No 6 of 2012 that anchors adverse possession.

Section 7 states that

“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”

Further in Section 13

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession

of the land”.

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”

Finally, Section 38(1) and (2) states;

“(1) 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.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

The combined effect of the sections above is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years in adverse possession of the suit land.

Section 28(h) of the Land Registration Act, 2012 recognizes overriding interest on land some of which as rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the said Act prescription is one of the ways of acquisition of land.

25. In **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 the following terms;

“ 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”.

26. The key test is that the Plaintiff must have been dispossessed or has discontinued possession of the property. In this particular case evidence was led by the Plaintiff that their father Michael Chege alias Mica and his wife Waithera Chege occupied the land before 1960s. The Plaintiff stated in evidence that her and her siblings were raised in the house which they lived on the suit property. This was corroborated by the 2 witnesses; Jedidah Wangui Mwangi and Lilian Wambui Njoroge, her sisters. That she lived with her parents at the plot Loc.2/Kinyona/T.28 except for the period 1965 – 71 when she was married. She re-entered the plot in 1971 on her return from her broken marriage. She led credible evidence that she has not left the possession of the property nor been dispossessed or interrupted by anyone. That she resides on Loc.2/Kinyona/T.28 and carries out crop growing on Loc.2/Kinyona/T.27, 29, 20 & 31 to date. The fact of the occupation was in the knowledge of the defendant as demonstrated in his admission that the plaintiffs parents and on their death, the plaintiff have been in occupation of the suit land. In **Githu Vs Ndeete (1984) KLR 776**, the Court of Appeal stated as follows;

“ The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons adverse possession”. In the instant case the plaintiff is claiming a right under adverse on her right. It suffices to note that the same may have accrued during the lifetime of her parents. In my evaluation I hold that the Plaintiff has met the test above.

27. When did time start running for purposes of establishing title under adverse possession. The Defendant has claimed that she was registered as owner in 1971 upon purchase of the property from one Ephraim Maina. But it is only until 2001 that title was issued. That time should therefore be calculated from 2001 in which event then the claim for adverse possession would not have accrued. I have examined

the title entries on Loc.2/Kinyona/T.28 and concur with the Defendant that the registration was in 1971. However in 2001 there is an endorsement showing the Defendants name against the words C/name meaning change of name in registration language. The names of the Defendant in 1971 are similar to that of 2001. The Defendant has not explained what the change of name referred to. It would appear that the Defendant was registered twice as the owner in 1971 and also 2001. In 2001 the registration was by change of name. I will take the 1st registration of 1971 as the time of registration. Time started running therefore from 1971 and by the time the Plaintiff filed suit in 2008 she had been on the land for about 34 years, way in excess of 12 years provided for by law. It therefore follows that by the time the Defendant purportedly purchased the property in 1971, the Plaintiff through her parents were in possession and had taken no steps to dispossess the Plaintiff or take possession from the Plaintiff. The Possession is therefore continuous, and uninterrupted for over 34 years. The Defendant has never asserted his right to the land until when he defended this suit. He is guilty of laches and that is how he gets got by the doctrine of adverse possession.

28. The Plaintiff has led evidence that she has used the suit as residential purposes as well as growing crops. This is a demonstration of sufficient *animus possidendi* – intention to use the land in direct conflict with the intention of the Defendant. PW 1 and PW 2 stated that the Plaintiff has occupied the land openly, initially as they grew up, later with her deceased mother and finally alone after the death of mother in 1978. This denotes publicity. That except in 2008 when the Defendant asked the Plaintiff with the help of the local chief to vacate the land, nobody has bothered her quiet possession and enjoyment of the soil. The Plaintiff averred that she and her siblings knew from their parents that her father bought the land from Ephraim Maina and built the family house. Later the siblings built their mother a new house which the Plaintiff lives upto date. The Defendant has admitted in evidence that at the time he bought the suit land the parents of the Plaintiff lived there and later the Plaintiff. He admitted that he has neither built a house nor occupied the land since he bought it in 1971. Save for defending this case, there is no evidence that the Defendant took steps to take possession of the suit property either from the Plaintiffs parents or the plaintiff.

29. The Plaintiffs application as aforesaid is grounded *inter alia* on grounds that the respondent obtained the title to L.R NO LOC 2/Kinyona/T.28 fraudulently. Though it is generally held that a party cannot plead adverse possession and at the same time challenge the title of the paper owner, I note that this case is distinguishable in the manner it has been pleaded. The Plaintiff has not included a prayer to nullify the title on account of fraud. The prayers for adverse possession are premised on fraudulent acquisition of the title by the Defendant. Be that as it may, At the trial the Plaintiff stated as thus;

“ my claim is on adverse possession and not fraud”.

I understood the evidence of the Plaintiff to say that she vacated the ground of fraud and proceeded with her claim on adverse possession. In the circumstances the Court considers that the claim was withdrawn and therefore there is no need to consider the same.

30. The Defendant purported to attach plots numbered Loc.2/Gacharage /T.27, 29,30 & 31 owned by Wambui Kihara, Johana Hama Joshua, Hezekiah Njoroge & Johana Hama Joshua Hezekiah Njoroge & Johana Hanna Joshua as owners of Loc.2/Kinyona/T.27,29,30 & 3. The Plotsd are situate at Gacharage Gikigii village which is distinct and separate from Kinyona. The owners of Loc.2/Kinyona/T.27,29.30 & 31are different from the owners of the plots at Kinyona. The defendant did not explain this fully. Despite alluding to a mistake on the part of the Plaintiff occupying Loc.2/Kinyona/T.28 by error instead of Loc.2/Kinyona/T.27, the Defendant did not support that assertion with a survey plan to show the positions of the land on the ground.

31. The Defendant has stated that the Plaintiff’s claim of adverse possession cannot succeed in the face of a caution lodged on the suit property on 10/9/08 claiming licencees interest. The question is whether the Plaintiff was in occupation pursuant to an agreement from the Defendant. It is trite law that a person who occupies as licencee cannot claim land by dint of the doctrine of adverse possession. This was settled in the case of **Hughes v Griffin (1969) All ER 460** where it was held that a licensee or tenant at will, does not have time running in his favour, for the purposes of a claim for adverse possession. In the case of

Delamere Estates Limited vs Ndung'u Njai & 42 Others, Nakuru HCCC No. 184 of 2003 (2006) eKLR. In this case Musinga J held that:

"If a person is an employee of another and by virtue of his employment he is allowed to reside on his employer's property, his entry and occupation thereon is not adverse to his employer's rights because he entered therein with permission of his employer".

I have reviewed the caution vis-a-vis the evidence in totality in my considered view all evidence on record has established that the Plaintiffs occupation was not permissive. The Defendant has admitted in evidence that at the time of purchase of the suit property in 1971 the plaintiff's parents were on the land and later the Plaintiff. There was no evidence tendered to support a permissive entry.

32. In the end the Plaintiff's claim succeeds as regards prayer 1,2 & 3 as follows; -

- a) An Order that the Plaintiff has been entitled by way of adverse possession to all that piece of land comprised in title number Loc.2/Kinyona/T.28 in Murang'a District registered in the names of the Defendant because she (the Plaintiff) has been in possession and occupation for more than 12 years immediately preceding the presentation of this suit.
- b) An Order that the Defendants title to the said piece of land that is Loc.2/Kinyona/T.28 measuring $\frac{1}{4}$ of an acre or thereabout has been extinguished in favour of the Plaintiff under section 37 and 38 of Limitation of Actions Act.
- c) An Order that the Defendant do transfer to the Plaintiff the suit premises being land parcel number Loc.2/Kinyona/T.28 free from all encumbrances failing which the Deputy Registrar of this Court be authorized to sign all necessary papers, documents and transfer forms, application for the consent of the land control board to ensure that the Plaintiff is registered as owner of the said piece of land free from all encumbrances.
- d) Costs shall be borne by the Defendant.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 23RD DAY OF FEBRUARY, 2018.

J.G. KEMEI

JUDGE.