



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 502 OF 2017

JOHN NDUNGU KIPSOI.....PLAINTIFF

VERSUS

SAMUEL CHEPKULUL.....1ST DEFENDANT

MOSES MURAGURI MURIMI.....2ND DEFENDANT

JUDGEMENT

1. By an originating summons dated 27th January 2012, and filed under Section 38 of the Limitation Act and under Order 37 Rule 7(1) (2) and (3) of the Civil Procedure Rules and all other enabling provisions of the Law, the plaintiff herein who claimed to be entitled to be registered as the sole absolute Proprietor of NDARAGWA/ABERDARE FOREST NORTH BLOCK 1/96 by adverse possession seeks for the following:

i. That there be a declaration that the Plaintiff has become entitled to be the registered owner/proprietor of all parcel of land known and described as NDARAGWA/ABERDARE FOREST NORTH BLOCK 1/96 by adverse possession which the plaintiff had been in continuous, quiet, peaceful and uninterrupted possession for over twelve (12) years preceding the presentation of this suit.

ii. That there be a declaration that the 1st Defendant's rights over the suit land became expired by prescription, he had no valid title to the suit land to sell, transfer, or dispose of the same to the 2nd Defendant and/or that the right of the Plaintiff as an adverse possessor and his accrued overriding interests against the suit land could not be interrupted or extinguished either by filing of any suit, sale or transfer of the suit land by the 1st Defendant to the 2nd Defendant.

iii. That an order be made for transfer of the suit land by the 2nd Defendant to the plaintiff and in default the Deputy Registrar of the High Court to execute the transfer and/or all related and necessary documents to effect the transfer thereof.

iv. That a permanent injunction do issue restraining the defendants, their servant, agents, employees, relatives, heirs, assigns, holders of the Power of Attorney, representatives and/or persons claiming through them or under them by virtue of any written law from alienating, entering, transferring, charging, selling, disposing of it or in any other manner whatsoever interfering with the Plaintiff's overriding interests or rights of adverse possession in actual and exclusive occupation and possession of the suit land.

v. That an order be made for Costs and interests to be paid by the defendants jointly and severally.

2. The Originating Summons is premised on the grounds stated on the face of it as well as the Supporting *Affidavit* of John Ndungu Kipsoi, the Plaintiff herein.

3. Aggrieved by the suit, the Defendants filed a notice of motion dated the 3rd July 2010 praying that the suit be stuck out with cost to them for reasons that the same did not disclose any cause of action against the Defendants and further it was an attempt to create nonexistence property rights and as such it was scandalous, frivolous and an abuse of the court process.

4. The Plaintiff filed a response to the application which application was subsequently heard and dismissed on the 3rd May 2013.

5. Directions were subsequently taken that the matter proceeds by way of viva voce with Originating summons to be deemed as the Plaintiff, the replying affidavits as the statements and exhibits be deemed as documents.

6. The Plaintiff however changed his mind and took directions that the Originating Summons proceeds by way of affidavit and that the same be disposed of by way of written submissions. The court obliged and directed parties to file their respective submissions and subsequently highlight on the same.

7. The Plaintiff filed his submissions on the 29th November 2017 whereas the 2nd Defendant filed his submissions on the 13th February 2018, the 1st Defendant did not file his submissions.

8. Briefly, the Plaintiff seeks orders that he has acquired title by way of adverse possession to the whole of the land parcel No. NDARAGWA/ABERDARE FOREST NORTH BLOCK 1/96.

9. The Originating Summons was accompanied by his affidavit vide which he explained why he is entitled to the suit land through the doctrine of adverse possession.

10. The plaintiff and 1st Defendant herein are siblings. The Plaintiff inter alia averred that the suit land herein which was previously Plot No 96 D had been allocated to his mother Mary Waithaka Ndungu(deceased) since she was a shareholder with Gatarakwa Farmers Company Limited.

11. The 1st Defendant herein had been given money by their mother to buy for her three shares at Gatarakwa Farmers Company Limited instead of doing as instructed, he had used the money to purchase two shares in the name of their father (plot 95) and had bought one share in his name being Plot No. 96.

12. That the 1st Defendant subsequently erected a semi-permanent structure on Plot No.95 and after the death of their mother, he cut down the trees that had been planted thereon and even sold the plot, No. 95 to a village elder.

13. That since the y had known that these two plots belonged to their mother, while the 1st Defendant took possession of Plot No. 95 and developed it, the Plaintiff had taken possession of plot No. 96 the suit land.

14. In the year 1987 when the 1st Defendant got registered as its proprietor, the Plaintiff had been living on the said suit land and had cultivated thereon,, planted trees, built 5 houses, reared animals, and raised his family thereon.

15. That he had been in actual ad continuous and uninterrupted possession of the same for over 12 years until sometime in June 2011 when he learnt from reliable resources that his brother the 1st Defendant herein had the intention of disposing of the suit land of and had even issued him with a notice to vacate.(he did not comply)

16. That unknown to the Plaintiff the 1st Defendant had gone and registered himself as the proprietor of the suit land on the 6th June 1987 and had hiddden this information from both the plaintiff and their mother who is now deceased.

17. That subsequently on the 8th September 2011, the 2nd Defendant herein had filed Nyahururu PMCC No. 191/2011 seeking for interim orders and eviction against the Plaintiff which suit was struck out and no Appeal was filed thereafter.

18. That it was as a result of this suit that the Plaintiff had discovered that the 1st Defendant herein had without authority, sold the suit land to the 2nd Defendant yet the plaintiff had overriding interest on the land as the person who had exclusive possession of the same for more than 24 years.

19. The Plaintiff further averred that the 1st Defendant had no title to pass to the 2nd Defendant as apart from the fact that the Plaintiff had overriding interest on the suit land, no consent from the Land Control Board was ever sought.

20. The plaintiff averred that even though the suit land in dispute was registered in the name of the 2nd Defendant on the 8th June 2011, he had never taken possession of the same and that he(plaintiff) continues to be in continuous peaceful, quiet and uninterrupted possession of the same for a period of over 12 years and as such, he was entitled to the orders sought herein.

21.The Plaintiff's submission, reiterated his disposition in both his affidavit and supplementary affidavit in support of the Originating summons which facts have been stated herein above where he contended that the rights of the 1st defendant were extinguished a long time at the expiry of 12 years since 1987 in terms of the provisions of Section 17 of the Limitation of Actions Act. The plaintiff relied on the decided cases of:

i. Hosea vs. Njiru and Another [1974] E.A 526.

ii. Wangila Situma Wakali vs. Andrew Makhanu Mutoro and Another [2006]eKLR.

iii. Gerald Murithi Kamonde vs Wamugunda Muriuki and Another [2010] eKLR

22. The plaintiff submitted that his presence on the suit land was not founded and does not arise from permission or consensual entry by virtue of lineal consanguinity and affinity.

23. In response, and while opposing the Plaintiff's suit, the 1st Defendant through his affidavit dated the 4th February 2012 deponed that the suit land herein was issued to him in 1978 wherein he became the first Registered proprietor pursuant to the provisions of Section 12,14, and 143 of the Registered Land Act(now repealed)

24. That in the event the Plaintiff claimed the land to have belonged to their mother, that a provisional allocation (to their mother) could not supersede a first registration. That he was issued with the suit land in 1978 and he and the Plaintiff were allowed by their parents to stay until the 1st Defendant left for Bomet in the year 1985. That he only returned to Gatatakwa in the year 2009 and started causing problems thereon where the disputes was sorted put at the administration level.

25. At the time their mother fell sick in the year 2011, the Plaintiff herein started laying claim to the land and restricting the 1st Defendant from entry therein to the effect that when he took their is mother to Bomet for treatment, the Plaintiff took possession of their mother's houses and started laying claim to the suit land.

26. That he had sold the suit land to the 2nd Respondent in his capacity as its proprietor in a transaction that was above board.

27. The 2nd Defendant through his Affidavits dated the 3rd July 2012 and 3rd February 2013, deponed that he was the lawful registered owner of the parcel of land No. NDARAGWA/ABERDARE FOREST NORTH BLOCK 1/96 having purchased the same from the 1st Defendant herein, pursuant to their agreement dated the 8th June 2011

28. That he had genuinely bought land from the 1st Defendant with the knowledge that he was the registered proprietor. He attached the sale agreement pertaining to the sale transaction as well as the title deed in the name of the 1st Defendant herein dated the 8th June 2011.

29. That the Plaintiff herein had been living in Bommet where he had been allocated another land by their father and only came on the suit land to live with his mother on permission by the 1st Defendant and his parents wherein 12 years had therefore not elapsed since he came upon the suit land.

30. The 2nd Defendant further stated that the Plaintiff had filed the present case only after the matter filed at the Nyahururu PMCC No. 191/2011 seeking for interim orders and eviction against the Plaintiff had been struck out for want of jurisdiction.

31. The 2nd defendant's submission reiterated what had been deponed in his affidavit save for the fact that the 1st Defendant died in the pendency of this suit and the case against him abated thereafter.

32. The 2nd defendant deponed that for one to claim adverse possession pursuant to Section 38 of the Limitation of Actions Act, (s)he must demonstrate and/or prove factually that (s)he has been in open occupation for a period of 12 years.

33. That this was a contested issue that needed to have been heard through viva voce evidence where the evidential burden was upon the Plaintiff to prove his case on a balance of probability. When the Plaintiff however decided to change his mind on the approach of proving his case, the court was left with only dispositions on contested matters. The Plaintiff had therefore failed to demonstrate his open and notorious occupation of the suit land thus failing to prove his case.

34. The 2nd Defendant further submitted that the claim for adverse possession was against the 1st Defendant, therefore the sale or transfer to the 2nd Defendant did not intercept the plaintiff's right. However the suit against the 1st defendant abetted after no substitution was made by the Plaintiff, within one year after his death, pursuant to the provisions of Order 24 Rule 4 of the Civil Procedure Rules.

35. That since the primary case against the 1st defendant collapsed, then there was no secondary claim against the 2nd Defendant and based on this submission alone, the Plaintiff's case ought to be dismissed.

36. That in a claim for adverse possession, the Plaintiff ought to have demonstrated that the possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

37. The Defendant relied on the cases of;

i. Titus Kogoro Munyi vs peter Mburu Kimani [2015]e KLR

ii. Fauzia Tariq Abubakar Zubedi vs Athman Hassan Awadh and 3 Others [2016] eKLR

38. In the case of **Patrick Magu Mwangi Kimunyu v Joreth Limited [2015] eKLR**, the court held that the holding by the Court of Appeal in the case of **Titus Kigoro Munyi vs Peter Mburu Kimani (2015) eKLR** reaffirmed the fact that for one to succeed in a claim for adverse possession, he must show that he was aware that the land was registered in the name of a third party for time to start running. Time could not start running in a situation where a person was not aware that the subject property had an owner in the first place.

39. The defendant thus submitted that since the plaintiff had challenged the legality of the ownership by the 1st Defendant, a claim for adverse possession could not stand and this claim for adverse possession should be dismissed.

40. That further the plaintiff initial entry onto the land was by permission, thus the claim of adverse possession cannot accrue in the circumstance. On this point the Defendant relied on the case of **Mbira vs Gichuhi] 2002] EA 137**.

41. This being a matter where the Plaintiff has sought for orders that he be registered as proprietor of parcel NDARAGWA/ABERDARE FOREST NORTH BLOCK 1/96 having acquired the title by virtue of the doctrine of adverse possession, the court is mindful of the legal

attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

42. Section 7 of the Limitation of Actions Act provides 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...”

43. Section 13 of the Limitation of Actions Act aforesaid further provides that:

A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor 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 the 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.

44. Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

45. Section 37 of the Limitation of Actions Act 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, to land or easement 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.”

46. In terms of Section 38 of the Limitation of Actions Act, where a person claims to have become entitled by adverse possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in *Order 37 Rule 7 of the Civil Procedure Rules* as follows:

- i. An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.
- ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

47. As stated herein above, the critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See **Littledale vs Liverpool College (1900)1 Ch.19, 21.**

48. It is against the background of the affidavits and the submissions herein submitted, that the issues that arises for my determination are:

- i. Whether or not the Plaintiff has acquired the suit property by way of adverse possession.
- ii. Whether adverse possession can be claimed against a deceased person not substituted in the suit.
- iii. Whether there can be a claim for adverse possession when entry is by consent

49. I have looked at the green card marked as JNK1as well as a copy of the Title deed marked as MMM1 and one thing is clear, that unlike the submission by the Plaintiff to the effect that the land belonged to his mother, on the contrary, the same was registered in the name of the 2nd defendant Mr. Moses Muraguri Murimi the proprietor of the suit land on the 8th June 2011.

50. It is also clear from the documents herein is that the suit land had been registered in the name of the Government on 16th June 1987 and thereafter to the 1st Defendant (deceased) on 16th June 1987. That subsequently on the 8th June 2011 the suit land was registered in the name of the 2nd Defendant herein where that the plaintiff herein instituted this suit on the 27th January 2012.

51. According to the rule on adverse possession, a party claiming must have been in possession for over 12 years and that the period starts running a fresh whenever there are changes in the title. Indeed in the case of **Kimani Ruchine & Anor -vs- Swift Rutherford & Co.Ltd and Another(1980) KLR 10**, it was held for example that where cultivation of land is advanced to support the claim to adverse possession, the evidence of the cultivation must be definite as to the area and time

52. I find that in the present case, that the Plaintiff has not proved that he dispossessed the Defendant for a period of 12 years as it is clear that for the purposes of adverse possession if any, time started to run from 8th June 2011 when the 2nd Defendant got registered as the proprietor of the suit land up to 27th January 2012 when the Plaintiff subsequently commenced legal proceedings that effectively stopped time from running, which makes it about one year thus making the filing of the present suit premature.

53. On the second issue as to whether adverse possession can be claimed against a deceased person not substituted in the suit the counsel for the plaintiff had been informed that the 1st defendant in this suit, Samuel Chepkulul had died yet he was not substituted with his legal

representative. This suit had therefore abated as against the 1st defendant and the Plaintiff cannot therefore claim that he was in possession of the suit land without permission of the 1st Defendant.

54. As to whether there can be a claim for adverse possession when entry is by consent, both the Defendants deponed that the plaintiff, who was a brother to the 1st Defendant (deceased) was in possession of the suit property pursuant to consent given by the 1st Defendant and their parents. From these submissions it is clear that the Plaintiff herein entered the suit property not as a trespasser but as a licensee; that for adverse possession to take place, the person must enter the suit property as a trespasser. There can therefore be no adverse possession when entry is by consent of the registered proprietor.

55. In the case of *Mwinyi Hamis Ali – v- Attorney General and Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997*. it was held that:

“adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes.”

56. In the case of **Samuel Miki v. Jane Njeri Richu CA No. 122 of 2001** the court of appeal held as follows:

“It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise.”

57. I find and hold that the Plaintiff has not proved on a balance of probabilities that his right of action as against the 2nd Defendant had accrued as at the time of filing this suit for the suit property to be said to have fallen into his possession pursuant to the provisions of section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.

58. In the circumstance herein I dismiss the Plaintiff’s Originating Summons dated 27th January 2012 in its entirety with costs to the 2nd Defendants.

Dated and delivered at Nyahururu this 25th Day of April 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE