



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO 19 OF 2017(O.S)

PETER MUCHOKI.....PLAINTIFF/APPLICANT

VS

ELIAS MWORORO KAMAU.....DEFENDANT/RESPONDENT

JUDGMENT

1. By an Originating summons filed on 3/1/13 the Plaintiff citing Order 37 rule 7 of the Civil Procedure Rules urged the Court to determine the following questions; that the Applicant is entitled to be registered as the proprietor of all that parcel of land known as Loc 16/Mbugiti/2102 by way of adverse possession; that the Respondent's title has been extinguished by dint of section 17 of the Limitations of Actions Act; that the Plaintiff be registered as the proprietor of the suit land under Sec. 38 of the Limitations of Actions Act.

2. The Originating Summons is supported by the affidavit of the Plaintiff where he deponed *inter alia* that the suit land currently registered in the name of the Defendant was a resultant sub division of Loc 16/Mbugiti/143 originally registered in the name of Kamau Mwororo, the Defendant's father now deceased, and also his uncle. That during the land demarcation in 1960s Loc 16/Mbugiti/143 was registered in the name of Kamau Mwororo to hold on his behalf and that of Njuguna Mwororo who died before the said consolidation. The Plaintiff is the son of the said Njuguna Mwororo.

3. Further that in 1986, he took over possession of a portion of two acres (suit land) out of Loc 16/Mbugiti/143 and has been living on the said suit land to date. That in 2005 the Defendant and one Teresia Wanjiru Kamau subdivided Loc 16/Mbugiti/143 into two creating *inter alia* Loc 16/Mbugiti/2102 measuring 2 acres, the suit land. That the Defendants title was extinguished in 1998, after a period of 12 years.

4. The Defendant opposed the Plaintiff's claim in his replying affidavit where he denied that his father Kamau Mwororo was registered as trustee of Loc.16/Mbugiti/143 on behalf of the Plaintiff's father Njuguna Mwororo. He stated that Kamau Mwororo was the owner of Loc.16/Mbugiti/143. That Kamau Mwororo had 2 other brothers and he could not have been a trustee of only one of them if indeed the land was family land. He confirmed that the Plaintiff is the son of Njuguna Mwororo. That the Plaintiff's occupation of land was as a licensee pursuant to the permission given by his father on humanitarian grounds.

5. Further he and his mother Teresia Wanjiru Kamau became registered owners of Loc.16/Mbugiti/143 pursuant to the certificate of confirmation of grant of administration issued on 21/6/2004 in Succession Cause No. 75 of 2001. That the Plaintiff's father died in 1992 while the Defendant's father died in 2001 as evidenced in the death certificates presented to Court. That the Plaintiff's father never raised any claim on the suit land during his lifetime. That original land was later subdivided into 2 portions creating Loc.16/Mbugiti/2102 (suit land) and 2103.

6. That his grandfather Ikua Mwororo owned Loc.16/Gatura/112 and upon his death his estate was distributed vide a certificate of confirmed grant issued on 18.3.2011 as follows;

- | | | |
|---------------------------|---|-----------|
| a. Nganga Mwororo | - | 1.4 acres |
| b. Julia Njeri Mwororo | - | 1.1 acres |
| c. Sarafina Njeri Njuguna | - | 1.2 acres |
| d. John Kanyori Mwangi | - | 1.2 acres |

That the Plaintiff's mother Sarafina Njeri Njuguna was allocated her husband's share in their grandfather's estate.

7. The Defendant further stated that he gave notice to the Plaintiff on 17.9.12 to vacate the suit land by 31.12.2012 because the Plaintiff and his family were given their share of the family land i.e Loc.16/Gatura /112.

8. At the trial the Plaintiff reiterated his evidence as adduced in the pleadings and stated that he entered the land with the permission of the then registered owner of the Loc.16/Mbugiti/143, Kamau Mwororo who pointed out to him the portion of 2 acres (currently the suit land) to settle on in the presence of his father Njuguna Mwororo, uncles Nganga Mwororo, Mwathi Mwororo and the Defendant. That he built a temporary house, planted nappier grass and tea. That the total area of Loc.16/Mbugiti/143 was 7.7 acres. That the land had some tea bushes hitherto planted by the Defendant's father and he planted more to bring the number in excess of 2000 bushes. Further he stated that the Defendant too occupies the suit land and has planted tea and trees. He stated that he had no knowledge of the succession cause over the suit land and hence did not raise his claim then. That he has occupied the land since 1986, a period in excess of 12 years and therefore is entitled to it by way of adverse possession.

9. PW2 – John Kanyoria Mwangi stated that he is the son of Lucy Wanjiru Mwororo (daughter of Ikua Mwororo). He stated that the suit land belonged to Ikua Mwororo who caused it to be registered in the name of his son Kamau Mwororo to hold in trust for the other family members. That when the family of Njuguna Mwororo returned from Njabini in Rift Valley, they were settled at the family land at Loc.16/Gatura /112 except the Plaintiff who settled at the family land at Mbugithi i.e Loc.16/Mbugiti/143. He also stated that the family land at Gatura was distributed to the children of Ikua Mwororo, amongst them the Plaintiff's father (their share was registered in the name of his mother Sarafina Wanjiru Kamau). On cross examination he stated that he was unaware that the suit land is being occupied by both the Plaintiff and the Defendant.

10. PW3 – Simon Ngugi Kuria testified that Loc.16/Mbugiti/143 was family land and the Plaintiff occupied the suit land with the consent of the Defendant's father who showed him the portion of the land he settled in the presence of his uncles and the Defendant. That he was unaware of any other claimant to the suit land.

11. The Defendant reiterated his evidence as captured in the replying affidavit and denied that Loc.16/Mbugiti/143 and consequently the suit land was family land. That the land belonged to his father and later devolved to him and his mother pursuant to the confirmation of grant aforesaid. In 2005 he subdivided the land into Loc.16/Mbugiti/2102 and 2103. Loc.16/Mbugiti/2102, the suit land is registered in his name absolutely. That the suit land has never been subject to any trust as it was not part of the family land. That his father became registered as owner in the first registration. That the Plaintiff occupied the land and has continued to so occupy as a licensee. That he too occupies the suit land with the Plaintiff and has made developments i.e planted tea and trees. He referred the Court to the consent order recorded in Court on 3.5.16 which required both parties to maintain status quo in the joint occupation and utilization of the suit land.

12. That The Plaintiffs father never laid any claim on the land during his lifetime. He presented copies of the death certificates which contradicted the Plaintiff's assertion that his father died before the demarcation. He died in 2001 while the Defendant's father died in 1992.

13. DW2- Nganga Mwororo stated that he is the only surviving son of Ikua Mwororo and the brother to the fathers of the Plaintiff and the Defendant. That his brother Kamau Mwororo owned Loc.16/Mbugiti/143 absolutely. That it is not true that Njuguna Mwororo had a right to the suit land. That there was no trust created over the land as it was not family land. He confirmed that the Plaintiff's father died in 2001 contrary to the Plaintiff's allegations that he died during the time of demarcation. That the Plaintiff settled on the suit land with the permission of the Defendants father. That the Plaintiff was a squatter on the land (Muhoi) as he has no right to the suit land.

14. Further that the Plaintiff's father's share in Mwororo Ikua's estate went to the Plaintiff's mother Sarafina Wanjiru Kamau. That the Plaintiff's father Njuguna Mwororo never laid any claim on Loc.16/Mbugiti/143 during his lifetime.

15. DW3 Julia Njeri Mwororo whose statement is on record though she was not called to testify associated herself in her witness statement with the evidence of DW2.

16. Parties have filed written submissions which I have considered.

17. Having carefully considered the evidence on record and at the trial, the rival affidavits and submissions and issues the following are the issues for determination;

- a. Whether the Defendant's father held Loc.16/Mbugiti/143 under trust for the Plaintiff's father.
- b. Whether the Plaintiff has established a right to title by adverse possession
- c. Who meets the costs of the suit?

18. From the record the suit is by persons who are related as follows; Kamau Mwororo who was registered as owner of the suit land is the brother of the Njuguna Mwororo. Njuguna Mwororo was the father of the Plaintiff while Kamau Mwororo was the father to the Defendant. The Plaintiff and the Defendant share a common grandfather; Mwororo Ikua. The parties therefore are first cousins.

19. The Plaintiff's claim is based on adverse possession, however in his pleadings and evidence on trial he has raised the issue of trust. The Court will determine the claim as pleaded under adverse possession. However, it is important that the issue of trust is determined at the onset. It is the Plaintiff's evidence that Loc.16/Mbugiti/143 was family land. That it belonged to his grandfather Mwororo Ikua who caused it to be registered in the name of Kamau Mwororo during the demarcation to hold in trust for Njuguna Mwororo as his father Njuguna Mwororo had died around the time of consolidation of land in the 1960s. That it is on his family's return from Njabini that he settled on the portion that belonged to his father. The Defendant denied the claim of trust and stated that the land belonged to his father absolutely. This was confirmed by the evidence of Nganga Mwororo who stated that the land was not family land.

20. For one to succeed in a claim of trust he must inter alia prove that the land was family land for which a trust had been established either customarily or by registration. There is no evidence presented to the Court by the Plaintiff to support this averment. Nganga Mwororo gave evidence that the family land was in Gatura for which the father of the Plaintiff received his share as per the certificate of the confirmed grant which share was registered in the Plaintiff's mother's name. That the Plaintiff should claim land from their family share. That he has no claim on the suit land. That his father never laid any claim on the suit land which would have been consistent on a claim in trust if indeed he had any right in the suit land. There is no evidence of financial contribution if any from the Plaintiff's father in the acquisition of the suit land either. In the end the Court is unable to find any evidence to support this claim at all.

21. In **Kasuve Vs Mawani 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”.

22. The elements to prove for a claim of adverse possession to succeed are: the intruder resisting the suit or claiming the right by adverse possession must make physical entry and be in actual possession of the land for the statutory period; the entry must be with some claim or colour of right or title; the occupation of the land by the intruder must be non-permissive, the non-permissive actual possession must be unequivocally exclusive and with the clear intention of excluding the real owner (**animus possidendi**) and the acts of the owner must be inconsistent with the owner's enjoyment of the soil.

23. In the case of **Mwinyi Hamis Ali – v- Attorney General and Philemon Mwaisaka Wanaka, -Civil Appeal No. 125 of 1997** the Court held that entry of land by the consent, permission and licence of the registered owner does not create a right to title to land by way of adverse possession. It is on record that the Plaintiff was settled on the suit land by the Defendant's father in the presence of his father and uncles. In his evidence on trial he states as follows;

“ I entered on to the land with the permission of the Defendant's father. In the presence of my father and uncles he pointed out to me the portion where I settled.”

Such a scenario negates the non-permissive entry which is a key tenets of adverse possession.

24. It is on record that both the Plaintiff and the Defendant are in occupation of the suit and as captured in the consent order recorded in Court on 3.5.2016 which stated as follows;

“By consent the Court ruling dated the 26.2.16 be and is hereby set aside.

By consent the status quo of Loc 16/Mbugithi/2102 be maintained between the Plaintiff and the Defendant as to occupation cultivation and use pending the hearing and determination of the suit.

By consent the Defendant not to interfere with the Plaintiff's homestead or tea bushes under his cultivation

Be consent the Defendant be at liberty to cultivate pick and harvest his tea bushes and nappier grass”.

The import of the above is that the Plaintiff did not enjoy exclusive possession of the land and neither did he dispossess the registered owner of the land. No evidence has been led to show that the Plaintiff is in exclusive possession or such possession that would dispossess the registered owner or that would be hostile or in conflict with that of the registered owner.

25. The occupation of a portion of the suit land by the Plaintiff is not disputed. However, the Court finds that such occupation has been consistent with the permissive terms of entry as given by then registered owner of the land and later the Defendant. It is on record that the Defendant demanded the Plaintiff's vacation of the suit land when the family land at Gatura became available for distribution and where the Plaintiff's father was allocated 1.2 acres through his mother. This act is consistent to the humanitarian act exercised by his father in 1986 when he permitted the Plaintiff to settle on his land before he acquired his own. The Defendant waited until the Plaintiff had found an alternative land i.e family land at Gatura.

26. This case brings into sharp focus the observation of the learned Judge in the case of **Mbui Vs Maranya (1993) KLR 726** where the Hon Mr Justice Kuloba stated as follows:

“Now, in this country, go to the country side, where our largest population resides, and see for yourself how people are so caring and mindful of one another's welfare. In the countryside, a lot of people are living on other people's land, thanks to the African milk of generosity and kindness Our way of living has always been to depend on one another for mutual survival and progress. This is at every level.

To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given these things, because the owner knows that it does not matter for how long you borrow this things; he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even void land sale agreements. They do not ever think of claiming or losing title, by adverse possession..... I would be surprised if anyone pretended to be ignorant of these things. And ignorance on the part of a judge would be a calamity for the innocent.

The keeping on our land of landless relatives, clansmen...for long periods of time until they are able to buy their own land is a custom we all know.... The doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideals and sound cultural foundations and destabilize the society.”

27. This Court associates itself with the sentiments made above by the learned Judge which were relevant then and are still relevant today to the instant case. There is a presumption of consent where relatives are allowed to occupy another’s land and the burden of proving absence of consent rests on the person claiming a right in title by way of adverse possession. The Plaintiff has not discharged that burden.

28. The burden of proving acquisition of title by adverse possession rests upon the Plaintiff to proof on a balance of probabilities that he has acquired title to the suit property by way of adverse possession. The Plaintiff has not discharged this duty too and the Court finds that the claim is unfounded.

29. The upshot is that the claim fails and it is hereby dismissed.

30. The costs of the suit are in favour of the Defendant.

RED, DATED AND SIGNED AT MURANG’A THIS 12TH DAY OF APRIL 2018.

J.G. KEMEI

JUDGE