



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC SUIT NO. 458 OF 2008

ROSEMARY WANGUI & ANOTHER.....PLAINTIFFS

=VERSUS=

DANIEL MUNGE MUKUNYA.....DEFENDANT

JUDGEMENT

1. The defendant is the registered owner of LR No. Dagoretti/Riruta/T.50 (Suit property). The suit property was registered in the name of the defendant on 29th January 1977. On 25th September 2008, the plaintiffs filed an originating summons in which they sought to have the suit property registered in their names by way of adverse possession.

2. The Plaintiffs contend that they both entered the suit property in 1989. The suit property was then used as a dumpsite. They cleared the bushes which were there and set up temporary structures in which they live to date. In 2008, the defendant came and claimed that the suit property was his. The defendant wanted to evict them using the local administration but they stayed put. They contend that they have stayed on the suit property for a period of over 12 years and as such the title held by the defendant has been extinguished and they should therefore be registered as owners having acquired the suit property by way of adverse possession.

3. The defendant on his part states that after he purchased the suit property he allowed his brother in-law to take a loan using the suit property as security. He had intended to build a commercial building on it to act as a source of income after he retired from the University of Nairobi where he was a lecturer. He however put his plans on hold as he did not have funds to put up the building and did not want to take a loan to do so. He regularly used to inspect the suit property.

4. There were persons who were occupying a road reserve near the suit property. The occupiers of the road reserve had put up shanties. In 2008, while he was passing near the suit property, he noticed that some persons had encroached on to part of the suit property and put up temporary structures on it. He went to the area chief who wrote a letter to the illegal occupants to move out of the suit property. Some occupants moved out but the two plaintiffs refused to move. Shortly after this, he received summons in respect of this case.

5. The defendant stated that he has been paying rates and rent in respect of the suit property. In 2008, he sent a contractor to go to the suit property and commence construction of a permanent house. The contractor went to the suit property with building materials but they were prevented from offloading the materials by hired goons who vowed not to let them construct on the suit property.

6. I have carefully considered the evidence adduced by the plaintiffs as well as that of the defendant. The main issue for determination is whether the plaintiffs have been in possession of the suit property for a period of 12 years as to acquire the suit property by way of adverse possession. For a plaintiff to succeed in a claim for adverse possession there must be evidence that he has been in occupation of the land for twelve or more years. The plaintiff must have been using the land openly and as of right and such use must not have been interrupted.

7. In the instant case, the plaintiffs state that they entered the suit property in 1989; that since that time, their occupation had not been interrupted until 2008 when the defendant came and claimed that he was the owner of the suit property and sought to have them evicted using the area chief. The defendant on his part stated that the plaintiffs are part of a group which had invaded his land in 2008. He contacted the chief over the invasion. Some invaders moved out but the two plaintiffs refused to move out. The defendant testified that he lives in Lavinton and he used to pass by the suit property quite often.

8. The first plaintiff while being cross-examined stated that she used to live with her parents but she was chased away. She went to live in a village from where they were evicted. Though she did not state when her parents chased her away or when they were evicted from the village which they were occupying, there is no doubt that she may have moved into the suit property in 2008 as the defendant states. The defendant testified that there were people living in shanties next to the suit property. The property was invaded in 2008. Though the first plaintiff claimed that she had five children who lived with her on the suit property, she did not call any of them to come and testify as to when they occupied the suit property.

9. The Plaintiffs instead called Pw3 David Ndungu Machawa who testified that he knew the two plaintiffs in 1959 when they were living at Kabiru village and that they came to the suit property in 1989. While this witness was being cross-examined, he admitted that the plaintiffs were his friends and that they asked him to come and give evidence in their favour. This witness stated that though he had title to plot No.T 95, he was staying in a temporary structure four plots away from where the plaintiffs stay.

10. In the case of **Wambugu Vs Njuguna (1983) KLR 173**, the court of Appeal held as follows:-

“ In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. The proper way of assessing proof of adverse possession would then be whether or not the title holder had been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years”.

11. On the strength of the Wambugu case (supra), it is clear that the defendant has neither been dispossessed of the suit property nor has he discontinued his possession of it. There is evidence which is confirmed by a certificate of official search that there was a charge against the suit property. That charge has not been discharged. The defendant lives at Lavington which neighbours Kawangware where the suit property is located. The defendant used to pass by the suit property quite often and those around the suit property before it was invaded knew that he was the owner. When the defendant realized that there was invasion of the suit property in 2008, he contacted Chief Nyambisa of Kwawangware who issued a letter asking those on the suit property to move out. Some moved out but the plaintiff did not move and the evidence of the first plaintiff is clear that she stayed put and did not want to move out of the suit property.

12. In the case of **Maweu Vs Liu Ranching and farming ,Cooperative Society Limited 1985) KLR 430** the Court of Appeal held that:-

“ Adverse possession is a fact to be observed upon the land. It is not to be seen in a title ,even under Cap 300 . Any man who buys land without knowing who is in possession of it risks his title, just as he does if he fails to inspect his land for twelve years after he had acquired it”.

In the instant case, there is credible evidence from the defendant that he regularly used to visit his land. When he noticed that there was invasion, he took steps to have the invaders removed. The invaders who are the plaintiffs brought this suit after receiving the demand from the chief at the instance of the defendant. From the evidence on record, the plaintiffs appear to be what has come to be known as professional squatters who invade other people’s land and then quickly file cases and if they succeed, they dispose it off and move to the next available land. I am fortified in this by the first plaintiffs own admissions in cross –examination that she had been chased away by her parents. She went to live in a village where she was evicted from before she moved to the suit property. Her witness PW3 stated that despite him having land with title, he is staying on a temporary structure near the suit property perhaps waiting for an opportune time to lay claim for adverse possession if the land is private property.

13. Even if there was credible evidence that the two plaintiffs entered the suit property in 1989 which is not the case, then on the strength of the **Wambungu case (supra)**, they have not succeeded to prove that they have dispossessed the defendant of the same or that the defendant has discontinued his possession if it. In **Harrison Mbaria Mbogo & another Vs Mbutu Mutungi (1997) eKLR** the Judges of Appeal held as follows:-

“ It is the owner of the land who is obliged to take reasonable steps to re-enter his land. This he can do by use of peaceful means or by instituting action to exert his rights over the land”.

14. I have already found that there is no credible evidence that the plaintiffs entered the suit property in 1989. In a case of adverse possession, there must be credible evidence adduced otherwise many property owners would lose their properties to persons who come and claim that they have been on the property for over 12 years even when that is not the case. As soon as the defendant noticed invasion to his land, he took peaceful steps to have those invaders go out of the land. As at the time he was doing this, the plaintiffs had not been on the suit property for the required statutory period. I therefore find that the plaintiffs have failed in their suit which is hereby dismissed with costs to the defendant.

Dated, Signed and Delivered at **Nairobi** this **12th** day of **April 2018**.

E.O .OBAGA

JUDGE

In the presence of :-

M/s Waweru for Mr Gatumuta for Plaintiff

Court Assistant: Hilda

E.O .OBAGA

JUDGE