



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 239 OF 2017

CATHERINE WANJIRU MAKANDU.....1st PLAINTIFF

SUSAN WAIRIMU KOGLI.....2nd PLAINTIFF

VS

EDWARD KIRAGU MUNGUYU.....DEFENDANT

JUDGMENT

1. The Plaintiffs herein filed a plaint dated 3/9/14 against the Defendant seeking the following reliefs;

(a) An order of eviction to issue against the Defendant, his family members and agents to vacate the suit properties known as Loc.13/Gakoe/1852 and Loc.13/Gakoe/1856.

(b) Costs of this and interest thereon.

2. The Plaintiffs jointly claim proprietary interest over all those parcels of land known as Loc.13/Gakoe/1857 and Loc.13/Gakoe/1856 hereinafter referred to as the suit properties. It is their claim that they are absolute proprietors of the suit properties which were registered in their names on 15/5/12. That they acquired the suit properties pursuant to the grant issued to them in the High Court Succession Cause No. 3111 of 2003.

3. The Plaintiffs' claim is that upon obtaining the confirmed grant, the Defendant and his family entered the suit properties and erected some temporary structures. That the Defendant had unsuccessfully protested to the confirmation of the grant. The Plaintiffs aver that the unlawful entry into the suit properties by the Defendant and his continued occupation has denied the Plaintiffs their right of occupation therefore their claim against the Defendant is for trespass and illegal occupation.

4. The Defendant in his defence claims that he is an adopted son into the family of the Plaintiffs. That the Plaintiff's mother one Nyambura Macharia who had no son adopted him as a son in the year 1969 and complied with all the Kikuyu customary requirements to solemnize an adoption. That the portion of land he occupies of the suit properties is his rightful inheritance from his mother Nyambura Macharia. That he has been in occupation and use of his portion of the land since the year 1978. That the Plaintiffs all along recognized him as one of their siblings.

5. That he contested the confirmation of grant in High Court Succession Cause No.3111 of 2003 and has since applied for review of the decision therein as he was disinherited of his rightful inheritance. That the original parcel of land owned by Nyambura Macharia was Loc.131/Gakoe/301 which was subdivided after the confirmation of grant into the two parcels now registered in the names of the Plaintiffs. He opposes the averment by the Plaintiffs that he entered the suit property in the year 2003 and maintains that he has been in occupation of his share of the suit land since 1978 about 25 years before the grant was confirmed.

6. The Defendant filed a counter claim for adverse possession on grounds that he has enjoyed occupation and quiet possession of his portion of the suit property for over 25 years without any interruption. He therefore prayed for judgment in his favour to be the registered as the legal owner of the portion of the suit land he is occupying of the original parcel of land being Loc 13/GAKOE/301. Further that the Plaintiffs be restrained from interfering with his quiet enjoyment of the portion he is occupying.

7. The Plaintiffs' witnesses testified as follows;

PW1- Being the 2nd Plaintiff herein claimed that the Defendant was not known to her. That the Defendant trespassed on the land belonging to her and her sister (the 1st Plaintiff) which they inherited from their mother Nyambura Macharia. That it is not true the Defendant has been

in occupation on the suit land for 25 years. In cross examination she stated that she and the 1st Plaintiff were married before the year 1963 and after marriage they left their mother's home. That they had three (3) other siblings who are deceased. She denied that the Defendant was adopted by their mother as a son and that any adoption ceremony was conducted. She could not recall the year when the Defendant entered into the suit property but contends that the Defendant has not been in occupation of the suit land for 25 years. That she was not aware of the pending review proceedings on the confirmed grant. That the Defendant entered the suit property forcefully without permission.

8. PW2- Who is a son to the 1st Plaintiff and nephew to the 2nd Plaintiff testified that the suit property belonged to his deceased grandmother, who was succeeded by the 1st and 2nd Plaintiffs and the land was divided among the two Plaintiffs. That the Defendant entered the suit land forcefully and has refused to vacate the suit land. That his deceased uncle's wife initially lived in the suit property but she went away and left the Defendant on the suit property. In cross-examination he stated that the Defendant entered the suit property in the year 1995, which was before the titles of the Plaintiffs were issued and has been in occupation since. He admits that the Defendant is a relative but was unaware of the alleged adoption proceedings.

9. The Defendant testified that the Plaintiffs were his cousins as their mother Nyambura Macharia was married to his uncle. That Nyambura Macharia adopted him in 1969 according to the Kikuyu customary law as her two daughters were already married away from home and her only son was sick and soon after passed on. That he has occupied the 1.2 Acres of the suit property since the year 1978 and was asked to vacate in 2003 but declined. That he has done several developments on the suit property including building a house in 1979 and has been farming on it and has planted trees. That he has another parcel of land at his original parent's home measuring 1 Acre. That the Plaintiff's mother had directed that he be given land before her death on the suit property. That the Kikuyu customary law prohibits parents to distribute their land during their lifetime.

10. The Plaintiffs submitted that the Defendant is in occupation of the suit property. That the Plaintiffs are the registered absolute owners of the suit properties hence their rights are protected under sections 24, 25 & 26 of the Land Registration Act, 2012. That the Defendant's counter claim cannot succeed as the titles to the suit property were only issued to the Plaintiff's two(2) years before the suit was filed. That the claim by the Defendant as a dependant of the late Nyambura Macharia is res judicata as the Court already pronounced itself in H.C Succ. Cause No.3111 of 2003 vide ruling dated 22.4.2008. That the prayers sought by the Defendant in his counter claim are not tenable as the original parcel of land has since been subdivided and new titles issued respectively. That it is not clear if the Defendant's claim is against the 1st or the 2nd Plaintiff's land.

11. The Defendant in his submissions states that the 1st Plaintiff's claim against the Defendant should fail due to failure on the part of the 1st Plaintiff to testify. That the Plaintiffs failed to specify which of the two titles presented has the Defendant trespassed on hence their claim for eviction and trespass should fail. That eviction orders can only issue against a particular parcel of land which has not been proved by the Plaintiffs. That his entry on the suit property was not illegal as he entered thereon as a dependant of the deceased by virtue of adoption. That his entry into the suit property was with full knowledge of the elders and family of the Plaintiffs as per the wishes of Nyambura Macharia. That the Court was enjoined to invoke its powers to order for amalgamation of the two titles and redistribution of the original parcel of land and allocate 1.2 acres to the Defendant. He has relied on section 7 of the Limitation of Actions Act in support of his claim for adverse possession.

12. The following issues arise for determination;

- a. Did the Plaintiffs acquire titles to the suit land in a legal manner
- b. Was the Defendant a dependant of the deceased Nyambura Macharia?
- c. Has the Defendant established title to 1.2 acres of the suit lands through adverse possession.
- d. Whether the Plaintiffs are entitled to reliefs sought.

13. Both parties concede that the 1st and 2nd Plaintiffs acquired titles to the suit property upon issuance of confirmation of grant in H.C Succ. Cause No. 3111 of 2003 in respect to the estate of Nyambura Macharia. That the original parcel of land was LOC. 13/GAKOE/301 which was subdivided into two resulting into LOC. 13/GAKOE/1856 and 1857 now registered in the names of the 1st and 2nd Plaintiff's respectively as per the copies of title deeds on record. Thus, the acquisition of the titles to the suit properties by the Plaintiffs was through a legal process.

14. The issue of whether the Defendant herein was a dependant to the estate of the deceased Nyambura Macharia was dealt with exhaustively by the succession Court where the learned Judge determined that the Defendant had no claim on the estate of the deceased.

15. Adverse possession is recognized by our laws as one of the ways that one can acquire land as per section 28(h) of the Land Registration Act No. 3 of 2012.

16. The duration of time upon which a claim to recover land lapses is stipulated under section 7 of the Limitation of Actions Act as follows;

“An action may not be brought by any person to recover land after the end of twelve years from 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 that Act guides the adverse possessor on the steps to follow in order to be registered as the proprietor of the land he possesses.

17. The party claiming to be in adverse possession has to prove that he has been in open, continuous, exclusive, as of right and uninterrupted

occupation and possession of that land for a period time of not less than 12 years.

18. In the present case the Defendant has claimed to have been in possession of the 1.2 acres of the suit land since the year 1978 which would translate to 36 years before the filing of the present suit in 2014. That position though contested by the Plaintiffs they did not firmly establish the specific year that the Defendant took possession of the suit property. PW1 stated that she could not recall when the Defendant moved into the suit property while PW2 stated that the Defendant took possession in the year 1995. If it were so, it would mean that the Defendant was in possession for 19 years before the filing of the suit, which is still in excess of 12 years. Both the oral evidence of the Plaintiffs and documentary evidence on record indicate that the Defendant has been in possession of the suit property for a long period of time. There is also evidence of possession and use of the suit property by the Defendant way before filing the succession case in 2003. It would then be safe to conclude that indeed the Defendant has been in possession and use of the alleged 1.2 acres of the suit property in excess of 12 years before filing of the present suit.

19. Turning onto the issue of his mode of entry into the suit property the Defendant submitted that and I quote;

“.....that he took possession of 1.2 acres out of the original LOC.13/GAKOE/301 in the year 1978 with full knowledge of the elders and the family members and in accordance of the wishes of the deceased Nyambura Macharia who died on or around 1970”.

20. It was also the Defendant’s oral testimony that the Defendant’s mother had directed that he be given land out of the suit property. The Defendant has firmly established that his entry, if any, to the suit property was permitted by the deceased Nyambura Macharia.

21. The Defendant has invited me to look at the observations of the Court in **case of Litledale vs. Liver pool College (1900) 1ch.19,21** thus;

“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 permission of the owner

It therefore follows that a permitted entry to a parcel of land by the registered owner to any person and remaining thereon for a period in excess of 12 years cannot pass for adverse possession. In that regard the Defendant’s claim cannot succeed.

22. Going by the decision of the Hon Lady Justice Rawal rendered on the 22.4.2008 in Succ Cause No 3111 of 2003, the confirmed grant issued on 16.6.2008, the certified copies of titles for the suit lands in the names of the Plaintiffs, it is the finding of this Court that the Plaintiffs are the legitimate owners of the suit lands. They are therefore holding the title to the suit lands together with all the privileged and appurtenances belonging thereto and free from all other interests. The Defendant has failed to dislodge that position. The continued occupation of the Defendant on the suit lands is without any legal basis.

23. In the end the Plaintiffs claim succeeds and the final orders are as follows;

a. The Defendant by himself, his family members and agents is ordered to voluntarily vacate the suit premises within the next 90 days from the date of this judgement in default eviction to ensure as per law provided.

b. Costs of the suit shall be in favour of the Plaintiffs.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 31ST DAY OF MAY 2018

J.G. KEMEI

JUDGE