



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 158 OF 2014

JOHN WAWERU GITHINJI.....PLAINTIFF

-VERSUS-

WAHOME GITHINJI.....1ST DEFENDANT

PAUL KIHUNGI WAHOME.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 3rd July, 2014 and filed on 17th July 2014, the plaintiff herein, John Waweru Githinji, brought this suit seeking judgment against the defendants, Wahome Githinji and Paul Kihungi Wahome, for:

(a) A declaration that the defendants are trespassers on the suit property, LR No. Nyeri/Mweiga/626, hence they should be evicted therefrom.

(b) A permanent injunction restraining the defendants and their agents from entering into the suit property and committing any acts of waste therein or from in any way interfering with his quiet possession, occupation, use and enjoyment of the suit property.

(c) An order for removal of the caution lodged by the 2nd defendant on the register of the suit property.

(d) Costs of the suit.

2. The plaintiff's suit is premised on the grounds that he is the registered proprietor of the suit property; that the defendants' use and occupation of the suit property was pursuant to a license given by him to them as his brothers and that the license was conditional on his terms and conditions.

3. It is the plaintiff's case that the defendants breached the terms of the licence causing him to issue them with a notice terminating the licence which notice they failed to heed and instead filed a suit in the defunct Land Disputes Tribunal claiming that he held the suit property for them. He points out that the Tribunal found in favour of the defendants but the decision was reversed by the High Court following an appeal by the 1st defendant.

4. The plaintiff blames the 2nd defendant for having unlawfully or without any justification caused to be registered a caution on the register of the suit property.

5. Arguing that the defendants became trespassers in the suit property from 2007 when he terminated the licence on the basis of which they occupied and used the suit property, the plaintiff laments that the defendants have wrongfully denied him his rights as the registered proprietor of the suit property.

6. In reply and opposition to the suit, the defendants filed a statement of defence and counter-claim denying the plaintiff's contention that their use and occupation of the suit property was pursuant to a licence granted by the plaintiff to them and instead contending that the suit property, which is a subdivision of Nyeri/Mweiga/295, was family land and as such the plaintiff held it in trust for them.

7. The defendants blamed the plaintiff for having declined to transfer the suit property to the 1st defendant owing to what they term selfish reasons.

8. Concerning the lodging of the caution, it is the defendants' case that they lodged it after they realized that the plaintiff had the intention of dealing with the suit property in a manner which was prejudicial to them.

9. In the counter-claim, the defendants contended that their occupation and use of the suit property has been adverse to that of the plaintiff.

EVIDENCE

The Plaintiffs case

10. When the matter came up for hearing, the plaintiff, John Waweru Githinji, informed the court that land parcel No. Nyeri/Mweiga/275 (hereinafter referred as the original parcel of land) belonged to a white settler who had employed them (1st defendant and him) before it was taken over by Settlement Fund Trust (SFT) and allocated to them in 1963. They were given some money to build, farm and buy cows in respect of which they signed some loan documents.

11. He completed paying the loan in 1986 and got issued with a statement showing his payments. He was given a discharge and the land transferred to him.

12. After the land was transferred to him, he sub-divided it into four portions/parcels to wit Nyeri/Mweiga/625, 626, 627 and 628. He transferred parcel No. Nyeri/Mweiga 627 to his brother Kanene Githinji as a gift (he also owed him money) and sold parcel No. Nyeri/Mweiga/628 to Joseph Karimi Mwai on 10th December, 1996 and 20th July, 1986 respectively.

13. Concerning the defendant's occupation of the suit property, he stated that in 1987, the 1st defendant, who is his brother, sought his permission to temporarily occupy that parcel as he organized himself to get his own land. He (plaintiff) allowed him to stay in the land for 20 years (from 1987 to 2007).

14. Explaining that during that period the 1st defendant never put up any developments in the suit property (was living in the timber house he built for him), the plaintiff informed the court that in 2007 the 1st defendant started cutting down the trees and crops he had planted thereon, after he informed him that he wanted to subdivide the land.

15. Because of the defendants' aforementioned conduct and because the defendants also abused him, he issued the 1st defendant with a notice to vacate the suit property, which notice the 1st defendant failed to comply with and instead filed a claim at the Land Disputes Tribunal, Mweiga.

16. He participated in the suit at the Tribunal which found in favour of the 1st defendant. He appealed to the Provincial Appeals Committee (PAC) which ruled that he should give the 1st defendant a portion of his land.

17. He pointed out that the defendant appealed the decision of the PAC to the High which set aside the award.

18. After the award was set aside, he filed this suit seeking the orders listed herein above.

19. Terming the defendants' contention that the suit property is family land false, he pointed out that the 1st defendant is older than him and submitted that traditionally if the land belonged to his father, it would have been registered in the name of the 1st defendant being his older brother to hold in trust of the rest of the family members.

20. Pointing out that none of the documents he has relied on in support of his case is in the name of the 1st defendant or his father; he maintained that the suit property is not family land.

21. Concerning the 1st defendants' claim for adverse possession, he stated that if the 1st defendant was interested in such a claim, he ought to have filed a suit in respect thereof within 12 years from the time he got registered as the proprietor of the suit property (1986).

22. Upon being cross examined by counsel for the defendants, he:-

(i) admitted that before sub-division of the original parcel of land, plot No. Nyeri/Mweiga/295, the defendants were living in a small portion of what became the suit property;

(ii) acknowledged that their mother is buried in one of the sub-divisions of the original parcel of land to wit plot No. Nyeri/Mweiga/627 owned by his eldest brother;

(iii) agreed that the 1st defendant's son is buried in the suit property and that the 1st defendant has a mental problem;

(iv) agreed that he sold a portion of the original parcel of land to clear the SFT Loan and that the parcel of the original parcel of land which the 1st defendant occupied became the suit property; and

(v) he agreed that the defendants still live in the suit property and that they cultivate thereon.

23. He denied the contention that his problem with the 1st defendant started after the 1st defendant demanded that he transfers the suit property to him just as he had done to his other brother, Kanene.

24. He maintained that the 1st defendant was his licensee and denied having informed the Tribunal that the suit property became his in 1964.

25. In re-examination, he stated:-

- (i) That the 1st defendant and his family only started cultivating the suit property after this suit commenced;
- (ii) That before 1987, the 1st defendant and his mother were living in the colonial village;
- (iii) That he was an adult in 1964;
- (iv) That none of the documents he has relied on indicate that he held the suit property in trust for any other person; and
- (v) That none of his brothers or mother gave him consent to sell one of the sub-divisions of the original parcel of land to meet the obligations owed to SFT.

The defence case

26. The 2nd defendant, Paul Kihungi Wahome, informed the court that he is a son of the 1st defendant and that the plaintiff is his uncle.

27. Contrary to the plaintiff's case that the 1st defendant came to the suit property in 1987, he stated that he was born in the suit property in 1977 and has lived therein all his life.

28. According to the 2nd defendant, it is not only the family of the 1st defendant who live in the suit property but also the other brothers of the plaintiff. He has personally built a house therein.

29. He stated that in 2003 they buried one of their brothers therein. He further stated that the plaintiff has not made any investment in the suit property and that though he had no documents to prove that the offer from SFT was made to the plaintiff on behalf of their family, the offer from SFT to the Plaintiff was in trust for their family.

30. He explained that they did not take any action against the plaintiff for transferring the subdivisions of the original parcel to himself because they were not aware that the plaintiff had caused the sub-divisions to be registered in his name. However, in 2007, they took action after the plaintiff served them with a notice to vacate but not because the alleged licence had expired.

31. He termed the transfer from the plaintiff to Kanene (their brother) of plot No.Nyeri/Mweiga/627 as a transfer from one family member to another based on the pleaded trust.

32. Although the caution he registered against the suit property is based on licensee interest, he maintained that they are not licensees in the suit property.

33. As to why the suit property was registered in the name of the plaintiff despite having been the youngest, he explained that it was because the plaintiff was the most educated in his grandfather's family.

34. He reiterated that the plaintiff has never given them permission to live on the suit property either before 1987 or after and maintained that the plaintiff was registered as the proprietor of the suit property because he was the only one in their family who was educated.

Submissions

35. At the close of hearing, parties to this dispute filed submissions which I have read and considered.

36. From the pleadings filed, the evidence adduced and the submissions made on behalf of the respective parties, I find the issues for determination to be as follows:-

- (i) When did the defendants' start living in the suit property?
- (ii) Was the defendants' possession and occupation of the suit property pursuant to a license granted by the plaintiff?
- (iii) If the answer to (ii) above is in the affirmative what were the terms of the licence?
- (iv) If the answer to (ii) above is negative, on what basis did the defendants take possession and occupation of the suit property?
- (v) Whether the defendants' occupation of the suit property has been adverse to the plaintiff's interest therein?

(vi) If the answer to (v) above is in the affirmative, whether the defendants' have become entitled to be registered as proprietors of the suit property by adverse possession.

37. With regard to the first issue, according to the plaintiff's pleading and oral testimony in court, the defendants entered the suit property in 1987 from the colonial village.

38. On their part, the defendants pleaded that they have lived and occupied a portion of the original parcel of land, Nyeri/Mweiga/295 since 1963 or thereabout. The 2nd defendant in his oral testimony in court reiterated that averment.

39. According to the proceeding of the Land Dispute Tribunal, which were produced as an exhibit in these proceedings, in the findings section, the defendants herein settled in the suit land in 1963. That fact tallies with the plaintiff's testimony on cross examination that was as follows:-

“...It is true that parcel No.625 (read 295) ceased to exist in 1987 after sub-division. Before 1987 the 1st defendant and his family were living in a small portion of parcel No.625 (read 295).”

40. In view of the foregoing, I find the plaintiff's testimony to the effect that the defendants entered the suit property in 1987 to be contradictory and to that extent unbelievable.

41. There being no reason for disbelieving the findings of the Tribunal to the effect that the defendants settled in the suit property in 1963 as it is corroborated by the plaintiff's own admission aforementioned, I find and hold that the defendants entered the suit property in 1963 or thereabout when it was a portion of 295 and not in 1987 as claimed by the plaintiff.

42. On whether the defendants' possession and occupation of the suit property was pursuant to the licence allegedly given by the plaintiff, having determined that the defendants were in occupation of the suit property long before the time the plaintiff purports to have given them the license to live in the suit property, I return a negative verdict to that question.

43. Regarding the grounds upon which the defendants' took possession of the suit property, the defendants have pleaded that despite the ownership documents of the original parcel of land having been processed in the plaintiff's name, the suit property was family land.

44. Whereas going by the documents produced in this matter there is no iota of evidence that the suit property was subject of any trust in favour of the defendants and the family of the plaintiff's father, upon review of the totality of the evidence produced in this case to wit the fact that the defendants had lived in the suit property for over 40 years, effected developments thereon and buried there kinsmen therein without the permission or any complaint from the plaintiff; coupled with the fact that the plaintiff did transfer one of the sub-divisions of the suit property without any consideration to one of his brothers, with the other remaining portions being occupied by the defendants and the plaintiff respectively, I find and hold that the conduct of the parties shows that the plaintiff's family had beneficial interest in the suit property.

45. It is my finding that the defendants and their family lived in the suit property courtesy of that beneficial interest and not because the plaintiff had given them license to live in the suit property. The conduct of the defendants' of effecting developments in the suit property and interring the remains of their kinsmen in the suit property, which actions do not form part of the actions the defendants could do under the license allegedly given to them by plaintiff without any sanction from the plaintiff, negates a finding that the defendants were merely licensees of the defendant.

46. In view of the foregoing, I need not say more to demonstrate that the defendants' occupation and possession of the suit property was premised on their belief that the suit property was family land and as such they had beneficial interest therein.

47. On whether the defendants' occupation and possession of the suit property has been adverse to the plaintiff's interest therein, I begin by reviewing the law on adverse possession which was espoused in the persuasive authority of **Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau [2013] eKLR** thus:-

“The plaintiff's claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession has the right to apply to the High Court for an order that he be registered as the proprietor of the land. The person must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years. The adverse party is the one who dispossesses the true owner of the property. The former must openly occupy the property exclusively, keeping out others, and use it as if it were his own. Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continual (although not necessarily continuous or constant) without challenge or permission from the lawful owner, for a fixed statutory period to acquire title. Where the property is of a type ordinarily occupied only during certain times, the adverse party may need to have only exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely (a) open and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.

The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about. (b) Continuous use of the property – The adverse party must, for statute of limitations

purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned. (c)*Exclusive use of the property* – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met. (d)*Actual possession of the property* – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

The actions of the adverse party must change the state of the land, as by *clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock* and constructing buildings or other improvements. If the property is residential, such actions may include *mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures* (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner. (e)*Non-permissive, hostile or adverse use of the property* – The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: Objective view—used without true owner's permission and inconsistent with true owner's rights. *Bad faith* or intentional trespass view—used with the adverse possessor's subjective intent and state of mind. Good faith view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.

The Specific requirements for adverse possession by the court is a Claim of title or claim of right. The mere intent to take the land as one's own constitutes "claim of right. A claim of right exists if the person believes he has rightful claim to the property, even if that belief is mistaken. A negative example would be a timber thief who sneaks onto a property, cuts timber not visible from the road, and hauls the logs away at night. His actions, though they demonstrate actual possession, also demonstrate knowledge of guilt, as opposed to claim of right, Good faith or bad faith, improvement, cultivation, or enclosure, Payment of property taxes, color of title: A legal document that appears (incorrectly) to give the claimant title, dispossession not under force of arms is a specific requirement for the principle of adverse possession to apply. In such cases dispossessing the owner or after discontinuation of possession by the owner of his own volition the person in adverse possession has a right to acquire title...."

48. In applying the principles espoused in the above cited authority which I associate myself with to the circumstances of this case, there is evidence that the defendants entered the suit property long before it was registered in the name of the plaintiff and continued living therein after the suit property was registered in the name of the plaintiff in the mistaken belief that it was family land; and there being no evidence capable of proving that the defendants' occupation was ever interrupted by the plaintiff after he became the registered proprietor of the suit property to necessitate the granting of the pleaded licence, I find that the continued occupation of the suit property by the defendants even after the suit property was registered in the name of the plaintiff was adverse to the plaintiff's interest in the suit property.

49. As to whether the defendants have become entitled to be registered as the proprietors of the suit property courtesy of their adverse possession thereof, by dint of the provisions of **Sections 7, 13 and 37** of the Limitations of Actions Act, Cap 22 Laws of Kenya, the defendants gained proprietary rights to the suit property after 12 years lapsed without the plaintiff taking any action to remove them from the suit property.

50. As pointed out in the case of **Virginia Wanjiku Mwangi**, supra, it matters not that the defendants' occupation of the suit property was premised on the mistaken belief that they were entitled to it as members of the plaintiff's family. All what the defendants needed to prove is that their occupation of the suit property was without the permission of the plaintiff and that the possession had been peaceful and uninterrupted for the period provided for in law.

51. At the pain of repeating myself, the evidence adduced in this case shows that the defendants entered the suit property long before it was registered in the name of the plaintiff. Even after it was registered in the name of the plaintiff, they continued living therein without any interruption from the plaintiff until 2007 when disputes arose between them and the plaintiff.

52. There being no evidence capable of supporting the plaintiff's contention that the defendants' occupation of the suit property as from 1987 was pursuant to the alleged licence given by him to the defendants and having found the plaintiff's testimony concerning the circumstances upon which the defendants entered and lived on the suit property to be unbelievable, I find and hold that the defendants became entitled to be registered as the proprietors of the suit after 12 years lapsed without the plaintiff taking any action to remove them from the suit property which they had been occupying without his permission for the period stipulated in law for them to acquire land by adverse possession.

53. The upshot of the foregoing is that the plaintiff's suit has no merits and is dismissed. Conversely, the defendants' counter-claim is found to be merited and is allowed.

54. This being a family dispute, parties shall bear their own costs of the suit.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 16th day of May, 2018.

L N WAITHAKA

JUDGE

Coram:

John Githinji Karweru Githinji for the plaintiff

Wahome Githinji – 1st defendant

Paul Kihungi Wahome – 2nd defendant

Court assistant - Esther