



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 199 OF 2017

FRANCIS KIMANI GATHUITA.....PLAINTIFF/APPLICANT

VS

BENSON IRUNGU NJUGUNA.....DEFENDANT/RESPONDENT

JUDGMENT

1. By an Originating Summons filed on 22/7/16 the Plaintiff sought the following orders;

- a) That having been in continuous and uninterrupted possession and occupation of the suit land parcel No. Loc.18/Kirere/647 for a period exceeding 12 years, the Plaintiff has now acquired prescriptive right to the title of the suit land through adverse possession.
- b) That this Honourable Court do order and direct that the Plaintiff herein be registered in the suit land in the place and instead of the Defendant.
- c) That such further or other orders be made as this Honourable Court deems fit and just.
- d) That the costs of this suit be met by the Defendant.

2. The Defendant opposed the Plaintiff's claim and denied that the Plaintiff had established title by way of adverse possession.

3. On the 19.11.14, the Court directed that the O.S be heard by *viva voce* evidence, the originating summons and Replying affidavit being deemed as pleadings of the parties and further directed the parties to comply with order 11 of the Civil Procedure Rules.

The case of the Plaintiff

4. According to the evidence of the Plaintiff, he bought the land in 1982 from one Njoroge Kinuthia, the Defendant's father at Kshs 27,000/- and was put into possession. He explained that at the time of the alleged sale he was aware that the suit land was registered in the name of the late Kinuthia Wageche, Njoroge Kinuthia's father. That in 1991 the parties reduced the agreement into writing. He sought to rely on an agreement of sale dated the 8.2.1991 to support his averments. He stated that no consent of the Land control board was obtained in respect to the said sale. He claims to be in occupation of the suit land farming coffee, bananas, trees, nappier grass, mangoes and avocados since 1982 to date in an open and uninterrupted manner. That he has acquired a right to title to the suit land by virtue of adverse possession having been in possession for a period of over 12 years. He relied on a certified copy of the official land search showing the Defendant as the registered owner.

5. The Plaintiff informed the Court that in 1995 he filed an objection to the confirmation of the grant of letters of administration being given to the Defendant in respect to the estate of Wageche Kinuthia but the objection was dismissed both in the lower Court and the High Court on Appeal, a decision that remains unchallenged to date.

6. The Plaintiff called one witness on trial, PW2 Paul Githae Githuku, who testified that he is a neighbor of the Plaintiff. He led evidence that the Plaintiff bought the land in 1982 from Njoroge Kinuthia and took possession in 1988. He informed the Court that the suit land was registered in the name of Kinuthia Wageche deceased. That he was present when the Plaintiff paid Njoroge Kinuthia the purchase price and even helped the Plaintiff to count the cash. On cross examination, he denied witnessing the agreement dated the 8.2.1991 but recalls signing an agreement at Kirere trading center where he witnessed the Plaintiff pay the purchase price to the Defendant. That the Plaintiff has lived on the suit land since uninterrupted carrying out farming activities.

The case of the Defendant

7. The Defendant led evidence that the suit land was registered in the name of his grandfather Kinuthia Wageche who died in 1968. Henry

Njoroge Kinuthia was his father and son of the late Kinuthia Wageche. His father died in 2006. He averred that he is the registered owner of the suit land having succeeded the estate of his grandfather Kinuthia Wageche in succession cause No 144 of 1995. That the High Court in Civil Appeal No 81 of 1998 affirmed the grant in respect to the estate of his grandfather in his name. He denied that the Plaintiff is in occupation of the suit land and stated that he is solely cultivating the suit land and all the Plaintiff has done is to lodge a caution on the suit land.

8. The Defendant stated that his father had 3 wives and several children and the suit land is family land. He claimed that his brother carries out subsistence farming on the said suit land albeit with interference from the Plaintiff by destruction of crops. On cross examination the Defendant admitted that both he and the Plaintiff have been farming on the land. That he has not filed any case for malicious damage of property by the Plaintiff nor filed suit against the Plaintiff for trespass on the suit land. That his father testified at the succession cause and admitted that the Plaintiff was in occupation of the suit land.

The submissions of the parties

9. Relying on the case of **Samwel Nyakenogo Vs Samwel Orucho Onyaru (2010) EKLR** the Plaintiff submitted that a claim of adverse possession is a claim in rem and not in persona and so the interest survives the death of the deceased owner and the right continues against the person who acquires title in the land.

10. In response to the issue of resjudicata, the Plaintiff submitted that the previous cases at both the lower Court and the High Court relate to succession matters in respect to the suit property and not a suit to dispossess the Plaintiff of the right in the suit land.

11. The Defendant submitted that the suit is resjudicata because the issue of the sale and the ownership rights in the suit land were extensively determined in the Succession Cause no 144 of 1995 and High Court Civil Appeal No 88 of 1998. That the Court found that there was no for sale in respect to the suit land between the Plaintiff and the Defendant's father. That the High Court agreed with the decision of the lower Court and went further to hold that the agreement could not bind the estate of the late Kinuthia Wageche on grounds that the purported sale was by an unauthorized person in law. Opining that the two issues are resjudicata then it follows that the Plaintiff's claim is incompetent before the Court. The Defendant argued that since the two decisions of the Court were delivered on 6.10.97 and 18.11.11 respectively, time for adverse possession is not founded.

12. On the issue of locus standi the Defendant argued that Njoroge Kinuthia was not the registered owner of the suit land and that therefore sold nothing to the Plaintiff. In any case the said Njoroge Kinuthia testified in the succession case and denied selling the land to the Plaintiff and stated that he only leased it for 6 years in the 1980s. That the purported entry into the land was criminal and as such cannot amount to forcible entry inconsistent with the owner's rights. That no prescriptive rights could attach on the estate. The Defendant argued that the Plaintiff lacks the locus to claim against the Defendant as the Defendant is not the legal representative of the estate of Njoroge Kinuthia but of Kinuthia Wageche. That since there was no privity of contract between the Plaintiff and Kinuthia Wageche's son, the Plaintiff's claim must fail.

13. The Defendant sought to persuade the Court with the following case law;

- a) John Florence Maritime Services Ltd & Another –vs- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) EKLR
- b) William Koros(Legal representative of Elijah C.A Koros) –vs- Hezekiah Kiptoo Komen & 4 Others (2015) EKLR
- c) Lilian Njeri Muranja & John Muranja Malinda –vs- Virgina Nyambura Ndiba & Kajiado County Government (2014) EKLR
- d) Chacha –vs Manini (2002) 2KLR at 83

The determination

14. The Plaintiffs have set out 4 issues for determination while the Defendants did not file any. Considering the pleadings, the rival submissions, and the evidence in totality, the issues that would determine the claims of the parties with finality are as set out; whether the suit is resjudicata; whether the Plaintiff has locus standi to bring this claim; whether the Plaintiff has established a case for adverse possession; who meet the costs of the suit.

15. As to whether the suit is resjudicata, Section 7 of the Civil procedure Act states as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”.

16. It is not in dispute that the suit land was owned by Kinuthia Wageche who died in 1963. His son Njoroge Kinuthia, notwithstanding that he was not the rightful owner of the land, leased the suit land to the Plaintiff in 1981 and put him in possession. It is alleged by the Plaintiff that he bought the land in 1991 vide an agreement for sale dated 8.2.91.

17. It is not in dispute that the estate of Kinuthia Wageche only became administered in 1995 when a grant was issued to the Defendant in Succession cause No. 144 of 1995. It is on record that the Plaintiff sought to object the issuance of the confirmed grant to the Defendant on the ground that he claimed a right in the land pursuant to an agreement of sale. The Lower Court held that there was no sale and proceeded to confirm the grant in favour of the Defendant. Aggrieved by the decision, the Plaintiff filed an appeal vide CA No 81 of 1998 where the

Appeal Court upheld the decision and went further to state that the Plaintiff had bought land from an unauthorized person who had no authority to deal with the deceased land and that his actions could bind the estate.

18. The net effect of the two decisions above is that the agreement was invalid. It was incapable of binding the estate. That the Plaintiff was not a creditor of the estate and therefore had no legal basis to object to the issuance and confirmation of the grant of administration of the estate. The Defendant became the registered owner of the land. The invalidity of the agreement of sale was therefore determined by the lower Court and upheld by the High Court (both being competent Courts). That issue is resjudicata.

19. In the instant case the Plaintiff is seeking title by adverse possession by reason of occupation and long stay. Adverse possession was neither determined by the lower Court nor the High Court. It is clear that the Plaintiff's entry into the land was unauthorized. It has been contested that either it was sold according to the Plaintiff or leased according to Njoroge Kinuthia for 6 years effective 1981. It is on record that the Plaintiff was put into possession pursuant to either the invalid sale or lease. It therefore follows that though permission was wrongful or invalid for that matter, he took possession and is still in possession. Occupation was also unauthorized. There is evidence led by the Plaintiff, PW2 and even the Defendant that the letters of grant of administration were issued and confirmed when the Plaintiff was in possession. The Plaintiff's possession is present throughout but entry remained non permissive.

20. Going by the definition of resjudicata given in section 7 of the Civil Procedure Act this Court finds that this suit is not resjudicata.

21. On the issue of Locus standi, the Plaintiff sought to establish that the title of the Defendant has been extinguished by his long possession occupation and stay on the land through farming. The Plaintiff was placed in possession by unauthorized person, Njoroge Kinuthia, who did not own the land. Unlawful and non- permissive entry is a basis of establishing adversity in land. The converse is where entry is permissible, consented, licensed or as of right i.e pursuant to a purchaser's right, then such entry does in law not create any adverse possession. Adverse possession is a claim on the land itself. It is a charge against the land.

22. Section 28 of the Land Registration Act states as follows;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(h)

rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”.

It is a prescriptive right or encumbrance that binds the land and runs against the registered owner (paper owner) in favour of the possessor. The mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession **Githu Vs Ndeete (1984) KLR 776.**

In **Mwangi & Another –v – Mwangi, (1986) KLR 328**, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. Adverse possession is thus more about the equitable interest of a party in possession than a substantive declaration as to the legal right or validity of ownership.

23. Section 7 of the Limitation of Actions Act states 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 or, if it first accrued to some person through whom he claims, to that person.”

24. Though the Defendant is the registered owner of the land that is encumbered by possession and long stay, adverse possession started running against the title from 1981 and in 1993, the Plaintiff had earned prescriptive rights on the land way before the grant of administration was granted to the Defendant.

25. This Court finds and holds that the issue of locus is not founded in this case. The Plaintiff's claim is on adverse possession which runs irrespective of change of ownership of title and is against those registered or those who claim under them.

26. Has the Plaintiff established a case for adverse possession? In the case of **Kasuve vs Mwaani Investments Ltd vs. 4 Others 2004 IKLR 184 the Court held that;**

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of 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”.

27. Under Section 13 of the Law of Limitation Act;

“A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run.”

Such possession as in this Act is referred to as adverse possession). 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. Subject to section 18 of this Act, at the expiration of the period prescribed by this Act, which is 12 years, for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

28. In **Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR)**, the Court delivered the following dictum:

“...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 of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in **Jandu v Kirpal [1975] EA 225** possession does not become adverse before the end of the period for which permission to occupy has been granted”.

29. In this case the Defendant’s father admitted under oath in the succession cause No 144 of 1995 that he leased the land to the Plaintiff in 1981 for a period of 6 years. It is already been determined by the High Court that the Defendant’s father was unauthorized to transact and whether be it a lease or sale the transaction was invalid. Therefore, the entry and possession by the Plaintiff into the suit land was unauthorized and invalid that is to say non permissive. It therefore follows that time started running from 1981 for purposes of adverse possession by 1993 the Plaintiff had established rights over the land by virtue of adverse possession. It mattered not that the registered owner was long deceased in 1963. The asset of the estate of the deceased therefore remained encumbered under section 30(f) of the RLA (now repealed) by an overriding interest known as prescriptive rights. By the time the Defendant is registered as owner in 1998 the suit land is already subject to rights acquired vide the doctrine of adverse possession. The application of the letters of grant of administration did not interrupt the Plaintiff’s adverse possession which had accrued in 1993. The mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession as aptly stated in **Githu Vs Ndeete (1984) KLR 776**.

30. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. The Plaintiff has maintained that he has been in exclusive possession of the land since 1981 farming mixed crops openly publicly. This fact was admitted by the Defendant’s father who died in 2006 at the succession proceedings in 1995. The Defendant also admitted this on trial when he stated that;

“ the Plaintiff has been in occupation of the land”.

Further on trial he confirmed that the Plaintiff’s possession of the land is still continuing and added that they are now in joint cultivation of the land. The Plaintiff has claimed that he is in occupation and possession of the whole 0.5 acres of the land. The Defendant did not identify the portion he claims to possess and for how long he has been in cultivation. The evidence of the Plaintiff is consistent with occupation and cultivation. The Defendant has not endeavoured to show any evidence of occupation and cultivation other than a statement that he also cultivates through his brother. He did not state which part of the land he cultivates. He had a duty to identify the land that had been relinquished by the Plaintiff to him. There is no evidence that the Plaintiff discontinued his possession or the Defendant dispossessed the Plaintiff. In the absence of evidence to the contrary the Court finds this unsupported and shaky. It is the Courts finding that the Plaintiff has occupied the suit land exclusively openly and publicly.

31. There is no evidence that the possession by the Plaintiff has been broken. Possession has been present throughout and with the knowledge of the Defendant’s father and later the Defendant. It was not hidden. The Plaintiff’s witnesses testified that he is aware that the Plaintiff has been in possession of the land from 1981 and has not ceased. The Court of Appeal in the case of **Francis Gacharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (UR)** held that:

“...the possession must not be broken, or any endeavours to interrupt it.”

The Defendant admitted that he has not sued the Plaintiff for eviction from the suit land. It therefore means that the Plaintiff’s occupation has not been broken since 1981 to date, a clear 31 years by the time this suit was filed.

32. This Court is satisfied that the Plaintiff has been in possession of the suit land for over 22 years, over and above 12 years permitted by law, which is more than adequate in continuity, publicity and in extent that it has established an adverse interest against the registered owner, namely the Defendant.

33. From the above the Court is satisfied that the Plaintiff has met the requirements set by the Court in the case of **Kimani Ruchire vs. Swift Rutherfords & Co. Ltd (1980) KLR 10** where it stated;

“...the Plaintiffs have to prove that they have used this land which they claim, as of right, nec vic, nec clam, nec precario.....The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by way of recurrent consideration”.

34. The upshot is Judgement is entered in favour of the Plaintiff against the Defendant as follows;

a) That the Plaintiff has established and acquired a right in title through adverse possession on account of continuous uninterrupted possession and occupation of LR. No. Loc.18/Kirere/647.

b) That the Defendant to execute the documents to effect title in the name of the Plaintiff within 30 days and in default the Deputy Registrar of this Honourable Court be and is hereby authorized to execute all documents necessary to facilitate the transfer of all that piece or parcel of land comprising or measuring 0.5 LR. No. Loc.18/Kirere/647 to the Plaintiff.

c) The Defendant to meet the costs of the suit.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 10TH DAY OF MAY, 2018.

J G KEMEI

JUDGE