



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 128 OF 2017

HARRISON KAMORE KAGUTU.....APPLICANT

VS

HARRISON MURAGURI NDONGA NEPHAT.....RESPONDENT

JUDGMENT

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

- a) That a permanent injunction be granted restraining the Defendant by himself, his agents and/or anyone claiming through him as against evicting, entering, transferring, charging, selling and/or in any way whatsoever interfering with the Plaintiff's quiet occupation and possession of LR. No. Loc.15/Kigongo/1426 (1 Acre portion).
- b) That the Defendant's interest over the one (1) Acre out of LR No. Loc.15/Kigongo/1426 occupied by the Plaintiff be deemed to have been extinguished through adverse possession of the Plaintiff and the Plaintiff be declared and registered as the proprietor of the said one (1) Acre out of LR. No. Loc.15/Kigongo/1426.
- c) That the Deputy Registrar of this Honourable Court be authorized to execute all legal documents to facilitate the sub-division and consequent transfer of LR. No. Loc.15/Kigongo/1426 and the Land Registrar Murang'a be ordered to dispense with the production of the old title deed should the Defendant default.
- d) That costs be borne by the Defendant.

2. The Originating Summons was premised on the grounds stated below;-

- a) That the Plaintiff has acquired one (1) Acre out of LR. No. Loc.15/Kigongo/1426 by way of adverse possession having been in exclusive occupation and possession of the said portion of land since early 1986.
- b) That the Plaintiff did establish his matrimonial home on the subject portion of land and has extensively developed the same with a permanent home and the same was done freely with no interference by any person.
- c) The Defendant has never been in possession of the land and will suffer no prejudice if the orders sought are granted as it is the Plaintiff who has been in actual possession and occupation of the

land.

3. The Plaintiff in his Supporting Affidavit dated 21/7/16 stated that by a verbal agreement with the Defendant, he took possession of the suit land in 1986 and he has continued to so occupy exclusively to date. That at the time he took possession the suit land was virgin as characterized by bushes and shrubs. That he subsequently developed the suit land over 30 years including building a house, kitchen, toilet block, animal sheds and trees and crops. He has attached a valuation report marked HKK/2 to support the developments. That his occupation over 30 years has been exclusive without any interference from the Defendant. That the Defendant has demanded that he vacates the land thus interfering with his quiet possession. He attached a certified copy of official search, which shows that the registered owner is the Defendant having become registered in 1991.

4. In opposing the Plaintiffs claim, the Defendant filed a Replying Affidavit on 28/11/16 in which he deponed that the Plaintiff entered the suit premises with consent and permission of the Defendant in 1994 and not 1986 as alleged. He admits that there were financial assistance advanced to his family through his wife by the Plaintiff in the years 1991-1994.

5. That the Plaintiff has not established exclusive possession of the suit land for over 12 years from the time of entry in 1994 to 2000 when he demanded that he vacates the land. That he became registered as owner of the suit land in 1991. That the Kshs. 60,000/= advanced to his family should be treated as rent for the utilization of the suit land from 1994 to date.

6. At the hearing of the suit the Plaintiff testified solely and reiterated the contents of his averments in the Supporting Affidavit. In addition, he stated that he entered into the land in 1986 but had been in cultivation since 1981.

7. He testified that he paid the Defendants' family through his wife monies amounting to Kshs. 60,000/= over a period since 1991 towards school fees, medical expenses etc. That when they could not refund, the Defendant agreed to sell to him a portion of 1.0 acre out of Loc.15/Kigongo/1426. That later he acquired another parcel Loc.15/Kigongo/1427 adjacent to the suit land but he lives on Loc.15/Kigongo/1426. That he continuously occupied the suit land since 1986 to date.

8. The Defendant testified that he bought the land and became registered owner in 1991. That he found out in 1994 that the Plaintiff had taken possession of his land and built a house when the Defendant was in hospital. That the Plaintiff built the house without the Defendant's consent. He also stated that the Plaintiff had his permission to live on the land between 1994-1997 and in 2000 he requested him to leave and when he refused he filed a case at the tribunal.

9. Parties elected to file written submissions which have been reviewed.

10. Having considered the pleadings, the rival affidavits and annexures, thereto as well as the written submission it is not in doubt that the suit land is registered in the name of the Defendant having become so registered in 1991. A copy of the title to support the above facts was annexed.

11. The Plaintiff has stated in evidence that he occupied the suit land in 1981 and later acquired the land through a verbal agreement from the Defendant. It is on record that the plaintiff advanced money to the Defendant's family through his wife that was admitted by the Defendant. That the Defendant at some stage decided to give one acre of land (suit land) to the plaintiff in consideration of the loan earlier stated. That the cost of the land was agreed at Kshs. 60,000/=.

12. According to the Defendant the Plaintiff only occupied the land in 1994 but with his permission and not 1986. That his occupation from 1994 to 1997 was with his permission and he demanded that he vacates in 2000 when the Plaintiff refused to so cavate on his own. According to the Plaintiff, he started cultivation in 1981 and constructed a house in 1986. This seems to support the Defendant's evidence that he bought the land in 1981 and only became registered as owner in 1991. There is also evidence that Defendant put the plaintiff in possession much earlier i.e 1981.

13. For one to succeed in adverse possession he has to prove the following; See **Kasuve vs Mwaani Investments Ltd vs. 4 Others 2004 IKLR 184**:

“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”.

From the evidence on record it is clear that the Plaintiff has been in uninterrupted occupation of the suit land from 1981. Although the Plaintiff has stated that he took possession from 1981 through cultivation and occupied from 1986 by building a house, the Defendant avers that possession commenced in 1994 and not 1986. It is his evidence that he allowed the Plaintiff to occupy the land in 1994-1997 and in 2000 filed a case with the Land Dispute Tribunal to assert a right to title.

14. It is trite law that any occupation of land through permission or license or consent does not amount to adverse. The Defendant has claimed that the Plaintiff occupied with his consent. This contradicts his evidence under oath where he states that he came out of hospital in 1994 and found out that the Plaintiff had entered the land and built a house without his consent. In the same evidence he also contradicted himself when he stated that the Plaintiff had his permission to stay on the land between 1994 – 1997. The evidence of the Plaintiff that he entered onto the land in 1981 and built a house and did developments in 1986 is consistent and cogent.

15. From the above analysis therefore taking the year of possession as 1981, it means that by the time the Defendant filed suit in 2000, the plaintiff had been in possession for 19 years. Even if the Defendant is given the benefit of doubt and 1994 is taken the plaintiff would have been in possession for a period of 13 years. By the time the defendant filed a case with the Land Dispute Tribunal in the year 2000, adverse possession had crystallised. The finding of the Court is that the Defendant has not led any evidence to show that the Plaintiff occupied the land by consent. It is therefore clear that the Plaintiff has occupied the suit land exclusively openly and as of right without interruption for a period of over 12 years in either scenarios described above.

16. The Plaintiff has tabled evidence by way of a valuation report in support of evidence that he has occupied the suit land and made developments. The Defendant has stated that the developments are on Loc.15/Kigongo/1427 and not the suit land. No evidence was adduced to controvert the contents of the valuation report which clearly states that the developments are on the suit land. In addition, the Defendant did acknowledge in evidence that there is a house on the suit land belonging to the Plaintiff. This is clear evidence that the Defendant has been dispossessed by the Plaintiff. The fact is that he does not occupy the suit land. See the case of **Wanje vs. Saikwa 1984 KLR 284**.

17. Guided by the case of **Kim Pavey & Others vs. Loise Wambui Njoroge & Anor. 2011 eKLR** where the Court of Appeal stated;

“Thus to proof title by way of adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate in continuity, in publicity and in extent and that, it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

This Court is satisfied that the Plaintiff has been in possession of the suit land for over 12 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.

18. There is therefore no evidence that has been placed before the Court to show that the Plaintiffs occupation and possession of the portion of the suit land that he claims has been either interrupted by the Defendant filing suit or making a successful entry on to the land occupied by the Plaintiff before the year 2000, which period adverse possession had crystalized. The Plaintiffs occupation and possession has been open and in the knowledge of the Defendant as is attested by the Defendant from the evidence adduced in

Court.

19. 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”.

From the evidence the Court is satisfied that the Plaintiff has established that he is entitled to 1.0 acres out of the suit land by adverse possession.

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

a) That a permanent injunction be granted restraining the Defendant by himself, his agents and/or anyone claiming through him as against evicting, entering, transferring, charging, selling and/or in anyway whatsoever interfering with the Plaintiff's quiet occupation and possession of LR. No. Loc.15/Kigongo/1426 (1 Acre portion).

b) That the Defendant's interest over the one (1) Acre out of LR No. Loc.15/Kigongo/1426 occupied by the Plaintiff be deemed extinguished through adverse possession of the Plaintiff and the Plaintiff be declared and registered as the proprietor of the said one (1) Acre out of LR. No. Loc.15/Kigongo/1426.

c) That the Deputy Registrar of this Honourable Court be and is hereby authorized to execute all documents necessary to facilitate the sub-division and consequent transfer of all that piece or parcel of land comprising or measuring one (1) acre out of LR. No. Loc.15/Kigongo/1426 and transfer of the same to the Plaintiff and the Land Registrar Murang'a be ordered to dispense with the production of the old title deed should the Defendant default.

d) That such registration should be in accordance to the position being occupied by the Plaintiff currently.

e) Each party to bear their own costs.

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

J G KEMEI

JUDGE