



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC CASE NO. 77 OF 2016(O.S)
IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22
LAWS OF KENYA
AND
IN THE MATTER OF ACQUISITION OF LAND
BY ADVERSE POSSESSION
AND
IN THE MATTER OF THE PARCEL OF LAND REFERENCE NO 10913 (GRANT NO. IR 19286)
BETWEEN
SIMON KAMUNYA WARUHIU APPLICANT
-VERSUS-
JOHN NJOROGE KARIUKI RESPONDENT
JUDGMENT

1. The Applicant herein (Simon Kamunya Waruhiu) took up the summons dated 26th April, 2016 and filed on the same day for determination of the following questions:-

- (a) Whether he has acquired by adverse possession all that parcel of land known as LR No.10913 (Grant I.R.19286) registered in the name of the respondent, John Njoroge Kariuki.
- (b) Subject to the outcome of (a) above, whether he should be registered as the proprietor of the suit property in place of the respondent?
- (c) Subject to the outcome of (b) above whether the Deputy Registrar of this court should be ordered to execute all documents necessary to effect transfer of the suit property to him?
- (d) Whether the Chief Land Registrar should be directed to dispense with production of

original certificate of title and respondent's documents in effecting the suit property to him.

(e) What is the order as to costs.

2. The application is supported by the affidavit of the applicant in which the applicant has deposed as follows:-

(i) That the suit property is registered in the name of the respondent;

(ii) That he is in exclusive possession and use of the suit property which is situated in Nanyuki (he is carrying farming activities e.g keeping livestock and planting trees thereon);

(iii) That he took exclusive possession of the suit property in 1989 and has since that time continuously used the suit property without interruption.

(iv) That despite being aware of his possession of the suit property, the respondent has never taken any step to repossess it from him apart from demands he initially made requiring him to either lease the land or vacate which demands have since ceased.

(v) That he has been in exclusive continuous, uninterrupted possession and use of the suit property for 26 years.

(vi) That it is just that he be granted the orders sought. (Averments paraphrased).

3. Service upon the respondent was effected by way of advertisement in a newspaper of national circulation (Standard Newspaper) following an application by the applicant to be granted leave to serve the respondent by way of substituted service. The application was premised on the grounds that attempts to trace the respondents for purposes of serving him were futile.

4. Despite having been served in the manner stated herein above, the respondent never entered appearance. Consequently, directions were taken to the effect that hearing of the suit proceeds as undefended and that the suit be determined on the basis of the pleadings on the court record.

5. Further directions were taken to the effect that the originating summons be converted into a plaint, the supporting affidavit into a witness statement and the documents annexed to the supporting affidavit as the list of documents.

6. The following are the documents annexed to the supporting affidavit and in essence the documents in support of the applicant's case:-

(i) Search in respect of the suit property marked **S-1** showing that the respondent is registered proprietor of the suit property; and

(ii) Photographs marked **S-2** showing the applicant's activities in the suit property.

Submissions

7. On behalf of the applicant, an overview of the evidence in support of the applicant's case is given and submitted that the applicant has made a case for being granted the orders sought.

8. Contrary to the averments contained in the supporting affidavit which was adopted as the applicant's witness statement, it is contended that the applicant's initial entry into the suit property was pursuant to an oral lease agreement between the applicant and the respondent. In that regard, it is explained that the respondent and the applicant agreed on a rent of Kshs.800/= per acre per year for the 20 acres of the suit property which the respondent was not using. The applicant is said to have paid the rent for 1989 amounting to Kshs.1600 for the 20 acres. (read 16,000/=).

9. It is the applicant's case that he never paid for the subsequent years because the respondent never came to the land until 1997 when he came and informed the applicant that he had relocated to the coast with his family after he was transferred.

10. According to the applicant, the respondent requested him to purchase the land instead of paying the accumulated rent.

11. Concerning the respondent's request to him to buy the suit property, he told him that he would inform him once he saved enough income. After the respondent left, he decided not to buy the land but to save for other projects.

12. It is the testimony of the applicant that he has never seen the respondent since that time. That notwithstanding he points out that in 2015, the respondent sent a relative to him who informed him that the respondent wanted to sell the suit land to a third party and gave him notice to vacate the suit property in 2016.

13. It is the applicant's case, that the respondent abandoned the tenancy agreement in the year 1991 and reiterates his contention that he has acquired title to the suit property by adverse possession.

14. The foregoing evidence is premised on the statement of the applicant filed on 20th October, 2017 which was filed without leave of the court and which was not adopted as part of the applicant's witness statement when directions were given.

15. Having reviewed the evidence flanked out vis-à-vis the averments contained in the supporting affidavit of the applicant, which affidavit was adopted as the applicant's witness statement, I find that evidence to be at variance with the averments in the supporting affidavit and which averments were adopted as the applicant's witness statement in the following respects:-

(i) In the affidavit, the applicant does not state that his entry was on account of a lease agreement. He only averred that the respondent demanded that he either leases the suit property or he vacates, which demands have since ceased;

(ii) There is no suggestion that the applicant ever paid any rent to the respondent or that the respondent ever offered to sell the suit property to the applicant.

16. It is clear from the foregoing, that the applicant departed from his pleadings contrary to the provisions of **Order 2 Rule 6** of the Civil Procedure Rules which prohibits parties from departing from their pleadings unless by way of amendment of pleadings. See the said provision of the law which provides as follows:-

“[Order 2, Rule 6.]

(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

(2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.”

17. Although the applicant's suit is undefended, by dint of the provisions of **Section 107** of the Evidence Act, Cap 80 Laws of Kenya, the fact that the applicant's suit is undefended does not release him from the burden of proving his claim before the court can grant him the orders sought.

18. To be said to have proved his case, based on his own pleadings which include the Originating Summons which was converted into a plaint and the supporting affidavit which was converted to a witness statement, the applicant needed to prove that his entry and occupation of the suit property was not permissible or on account of any licence granted by the respondent.

19. Although there is nothing in the supporting affidavit capable of showing the circumstances upon which the applicant took possession of the suit property, on account of the evidence introduced through the witness statement referred to above, albeit in an irregular manner, I gather that the initial entry was permissible. It is however, impossible to tell what the terms of the lease were because the applicant has not in his supporting affidavit stated that such a lease agreement existed leave alone stating what its terms were.

20. The irregularity introduced in the witness statement of the applicant, further talks about an offer for purchase of the suit property having been given to the applicant. The applicant agreed to consider the offer. Whilst the applicant claims that he decided not to accept the offer but to engage in other projects, he did not bother to inform the court what the terms of the offer were and whether he ever communicated his rejection of the offer to warrant time starting to run in his favour against the respondent who by offering to sell the suit property asserted his right to the suit property way before the applicant had gained any proprietary rights to the suit property.

21. The question to answer is whether without any evidence of what the terms of the offer to purchase were and in absence of any evidence to show that the applicant ever communicated to the respondent his rejection of the offer, the applicant's possession and occupation of the suit property can be said to have been without the sanction of the respondent.

22. Having determined that the applicant's entry into the suit property was permissible and there being no evidence capable of showing that the licence granted to the respondent to occupy the suit land was determined either by operation of law or otherwise, I find and hold that the applicant has not made up a case for being granted the orders sought.

23. Consequently, I dismiss the suit with no order on costs as the suit was undefended.

Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 8th day of May, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

N/A for the defendant

Court assistant - Esther