



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 272 OF 2015 (OS)

MASEK OLE TINKOI.....1ST PLAINTIFF

ODUPOI OLE LETOYA PARSITAU.....2ND PLAINTIFF

FRANCIS WAITITU IGANJO.....3RD PLAINTIFF

JOHN KARUNGAI NYAMU.....4TH PLAINTIFF

VERSUS

KENYA GRAIN GROWERS LIMITED.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

KENYA REVENUE AUTHORIT.....3RD DEFENDANT

JUDGMENT

Introduction

1. Proceedings herein were commenced through Originating Summons dated 1st October 2015 and filed in court on 2nd October 2015. The following orders are sought in the Originating Summons:

1. A declaration that the plaintiffs herein are entitled to be registered forthwith as the owners of parcel of land known as Title Number 9134/3, Naivasha and that the ownership of the 1st and 2nd defendants and the claim of rights over the same by the 3rd defendant has been extinguished in favour of the plaintiffs.

2. In the alternative and without prejudice to 1 above, the plaintiffs be declared as entitled to be registered as the owners of parcel of land known as land reference number 9134/3, Naivasha and be granted liberty to free the said parcel of land from any encumbrances imposed and/or registered against it by the defendants.

3. An order for permanent injunction be issued restraining the defendants whether by themselves, their servants or agents of successors in title or any person or entity claiming through them or by them from doing any of the following acts or all of them that is to say from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the plaintiffs' occupation and ownership or title to parcel of land known as title number 9134/3, Naivasha.

4. Costs of this suit be borne by the defendants.

2. The Originating Summons is supported by four affidavits, each of the plaintiffs swearing an affidavit. The 2nd and 3rd defendants responded to the originating summons each by filing a replying affidavit. The 1st defendant did not file any response.

The Plaintiffs' Case

3. In the supporting affidavit sworn by the 1st plaintiff; it is deposed that the 1st plaintiff was born around the year 1972 at Naivasha. His parents lived in manyattas alongside other herdsmen. The manyattas were erected on land fenced using poles and ropes. He later learnt that the land on which they lived was known as Land Reference Number 9134. Other communities such as the families of the 3rd and 4th plaintiffs also lived on the same land. The 1st plaintiff's father passed away in the year 2010. Before then, the family had lived on the land for a long time and the 1st plaintiff and his family have continued living on the land after his death up to the time of swearing the affidavit.

4. Upon investigating the title, the plaintiffs discovered that the land where they had lived all along is known as land reference number 9134/3. He annexed a certified copy of the certificate of lease. The land is registered in the name of the 1st defendant as a lease from the Government of Kenya for a term of 99 years commencing 1st October 1948. Investigations on the 1st defendant revealed that the registrar of companies had issued a notice of intention to strike it off the register of companies pursuant to Gazette Notice number 3308 of 9th November 1978. According to the 1st plaintiff, once the 1st defendant was struck off the register of companies, the land reverted to the government. It is for that reason that the 2nd defendant was enjoined in this suit. A search on the property also revealed that a Notification of Charge by the Commissioner of Income Tax was registered against the title on 2nd November 1976 pursuant to Section 103(2) of the Income Tax Act. The supporting affidavits sworn by the 2nd, 3rd and 4th plaintiffs similarly explain how they came onto the suit property.

Second Defendant's Case

5. The 2nd defendant filed a replying affidavit on 30th January 2018, sworn by Pauline Wanja, a Senior Assistant Registrar of Companies. She deposed that the 1st defendant was a limited liability company and that the Deputy Registrar of Companies vide a Gazette Notice No. 3308 of 9th November 1978 issued a notice under Section 339 (3) of the Companies Act requiring it to show cause why it should not be struck off the register of companies and be dissolved. She annexed a copy of the Gazette Notice. She believes that the Company was struck off the register of companies and its records may no longer be available. Efforts to trace the said records at the company's registry have been unsuccessful.

Third Defendant's Case

6. The third defendant filed a replying affidavit sworn by Willys Odeyo, an officer based at its Nakuru Regional Office. He deposed that the 3rd defendant was empowered under Section 103 of the Income Tax Act 1973 to place a caveat on property as security for unpaid tax. Acting on those powers, the Commissioner of Income Tax registered a Notification of Charge against the suit property on 2nd November 1976, on account of tax arrears of Kshs.42, 384,095/= owing to the government of the Republic of Kenya from the 1st defendant. The said amount is still owing. The Notification of Charge can only be lifted once the said amount is paid.

7. In addition to the replying affidavit, the 3rd defendant also filed a Preliminary Objection to the effect that the doctrine of adverse possession as propounded at Section 38 of Limitation of Actions Act is constitutional as it violates this right to property as enshrined at Article 40 of the Constitution. The preliminary objection was however abandoned at the submissions stage.

Submissions

8. The case was heard by way of affidavit evidence and written submissions. The plaintiffs encountered some difficulties when it came to serving summons to enter appearance upon the 1st defendant. They therefore filed a Notice of Motion dated 28th April 2016 pursuant to which they sought directions on service of summons upon the 1st defendant. It was deposed in the affidavit in support of the application that the 1st defendant could not be located so as to be served with summons to enter appearance. The application was heard by Munyao J. who in a ruling dated 13th October 2016 ordered that summons be served upon the 1st defendant by substituted means through a conspicuous advertisement in either the Daily Nation or Standard Newspaper and that additionally, an entity known as Kenya Farmers Association be served with summons in respect of the 1st defendant.

9. The plaintiffs' submissions were filed on 23rd March 2017. It is submitted therein that summons was validly served upon the 1st defendant as ordered by Munyao J. Citing the case of **Virginia Wanjiku Mwangi –vs- David Mwangi Jotham Kamau [2013] eKLR**, the plaintiffs submitted that they have satisfied the conditions necessary to establish a claim for adverse possession.

10. Regarding the fate of the suit property upon the 1st defendant being struck off, the plaintiffs cited Section 340 of the old Companies Act and submitted that it became *bona vacantia* and therefore belonged to the government. The same provisions have been retained at Section 905 of the Companies Act, 2015.

11. The 2nd defendant did not file any submissions despite being given more than one chance to do so.

12. The 3rd defendant's submissions were filed on 17th August 2017. The 3rd defendant took the position that the 1st defendant was not validly served with summons and further that following the dissolution of the 1st defendant its assets including the suit property reverted to the government. Consequently, in view of the provisions of Section 41(a) (i) of the Limitation of Actions Act and Article 62 (1) of the Constitution, the suit property became public and that adverse possession cannot operate against the government.

Analysis and Determination

13. I have considered the pleadings herein, the evidence and the submissions. Two issues emerge for determination: firstly, whether the suit property is government or public land and secondly, whether the relief sought is available.

14. Before embarking on examining each of the issues, it is important to have an overview of the nature of the proceedings before the court. The plaintiffs claim that they have become entitled to the suit property by adverse possession. The Limitation of Actions Act provides for adverse possession at Section 7 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.

15. Further, Section 13 of the Act provides:

(1) 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 (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 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.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12 (3), the land in reversion is taken to be adverse possession of the land.

16. Section 38 (1) of the Act enables a person who claims to have become entitled to land by adverse possession to apply to court to be registered as the proprietor. It provides:

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

17. Asike – Makhandia J.A. summed up adverse possession as follows in **Mtana Lewa v Kahindi Nala Mwagandi [2015] eKLR**:

... Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

18. Section 41 (a) (i) excludes public land from being acquired through adverse possession. It provides:

41. This Act does not -

(a) enable a person to acquire any title to, or any easement over-

(i) Government land or land otherwise enjoyed by the Government;

19. With the foregoing background in mind, we can now embark on considering the first issue: whether the suit property herein is public land. The suit property herein as can be seen from the Certificate of Title exhibited by the plaintiffs is Land Reference Number 9134/3 situated South of Lake Naivasha and measuring one decimal eight four two (1.842) hectares. The registered proprietor is indicated as Kenya Grain Growers Limited (the 1st defendant) as a lessee from the Government of the Republic of Kenya for a term of 99 years from 1st October 1948.

20. The plaintiffs herein and even the 2nd and 3rd defendants agree that the 1st defendant, a limited liability company was struck off the register of companies by the Registrar of Companies following publication of Gazette Notice No. 3308 dated 9th November 1978. The said notice was issued pursuant to Section 339 (3) of the Companies Act (repealed). The said Section provided:

339. Registrar may strike defunct company off register

....

(3) If the registrar either receives an answer to the effect that the company is not carrying on business or in operation, or does not within thirty days after sending the second letter receive any answer, he may publish in the Gazette, and send to the company by post, a notice that at the expiration of three months from the date of the notice the name of the company mentioned therein will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved:

Provided that the registrar shall not be required to send the letters referred to in subsections (1) and (2) in any case where the company itself or any director or the secretary of the company has requested him to strike the company off the register or has notified him that the company is not carrying on business.

21. The parties herein as well as the registrar of companies are in agreement that the 1st defendant was struck off the register pursuant to the above provisions. In the absence of any evidence to the contrary, and in view of the 1st defendant's failure to enter appearance and participate in these proceedings despite service by advertisement, I find and hold that indeed the 1st defendant was struck off the register of companies and that it therefore no longer exists. Such a striking out would have, in view of the provisions of Section 339(3) and (5), become operational from 18th February 1979, that is within three months of publication of the Gazette Notice.

22. Pursuant to Section 340 of the Act, the property of the 1st defendant became *bona vacantia* and belonged to the government with effect from 18th February 1979. In any case, considering that the 1st defendant held a leasehold from the government, what became *bona vacantia* and by extension government property is the remainder of the term and ultimately the reversion.

23. Besides the issue of the suit property reverting to the government, there is also uncontroverted evidence that the Commissioner of Income Tax registered a Notification of Charge against the suit property on 2nd November 1979 due to tax amounting to Kshs.42,384,095/= owed to the government of the Republic of Kenya by the 1st defendant. The charge was registered under Section 103 (2) of the Income Tax Act. The sections provided:

103. Security on property for unpaid tax

(1) ...

(2) If a person on whom a notice has been served under this section fails to make payment of the whole of the amount of the tax specified in the notice within thirty days of the date of the service of the notice, the Commissioner may by notice in writing direct the Registrar of Lands that the land or building, to the extent of the interest of the person therein, be the subject of security for tax of a specified amount, and the Registrar shall, without fee, register the direction as if it were an instrument of mortgage over or charge on, as the case may be, the land or buildings and thereupon that registration shall, subject to any prior mortgage or charge, operate while it subsists in all respects as a legal mortgage over or charge on the land or building to secure the amount of the tax.

24. Section 103 of the Income Tax Act was deleted by Section 110 of the Tax Procedures Act, 2015 which has equivalent provisions as reproduced below.

Section 32 (1) which provides:

32. Tax as a debt due to the State

(1) A tax payable by a person under a tax law shall be a debt due to the Government and shall be payable to the Commissioner.

Section 40 which provides:

40. Security on property for unpaid tax

(1) Where a taxpayer, being the owner of land or a Security on property building in Kenya, fails to pay a tax by the due date, the for unpaid tax. Commissioner may direct the Land Registrar in writing that the land or building, to the extent of the taxpayer's interest in the land or building, be the subject of a security for the unpaid tax specified in the notification to the Land Registrar:

Provided that the Commissioner shall notify the taxpayer in writing of the direction within seven days from the date of the notification to the Land Registrar.

(2) Where the Land Registrar has been notified by the Commissioner under subsection (1), the Land Registrar shall, without levying or charging a fee, register the Commissioner's direction as if it were an instrument of mortgage over, or charge on, as the case may be, the land or building of the taxpayer specified in the notice.

(3) A registration under subsection (2) shall, subject to any prior mortgage or a charge, operate as a legal mortgage over, or charge on, the land or building of the taxpayer to secure the amount of the unpaid tax and the provisions of the Land Registration Act relating to the rights of the mortgagee shall apply.

(4) The Commissioner shall, upon the payment of the whole of the amount of unpaid tax secured under this section, direct the Land Registrar in writing to cancel the direction made under subsection (2), and the Registrar shall, without levying or charging a fee, record the cancellation of the direction and the direction shall cease to apply.

25. The upshot of these provisions is that the suit property is currently used or enjoyed by the government of the Republic of Kenya as security for tax liabilities owing from the 1st defendant. This brings the land under the category of "land otherwise enjoyed by the Government" under Section 41 (a) (i) of Limitation of Actions Act as well as under the category of public land which is defined at Article 62(1) as follows:

62. Public land

(1) Public land is—

(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

(c) land transferred to the State by way of sale, reversion or surrender;

(d) land in respect of which no individual or community ownership can be established by any legal process;

(e) land in respect of which no heir can be identified by any legal process; [Emphasis supplied]

26. The suit property is therefore public land since it is being lawfully used by Kenya Revenue Authority which is a state organ, as security for tax owed to the government. That answers the first issue.

27. The answer to the second issue as to whether the relief sought is available, flows directly from the answer to the first issue. The provisions of Section 41(a) (i) of Limitation of Actions Act expressly exclude Government land or land otherwise enjoyed by the Government from being acquired through adverse possession. Consequently, the answer to the second issue can only be one: the relief sought is not available.

28. For all the foregoing reasons the Originating Summons is dismissed with costs to the 2nd and 3rd defendants.

Dated, signed and delivered in open court at Nakuru this 29th day of June 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Ikua holding brief for Mr Kariuki for the plaintiffs

No appearance for the 1st defendant

No appearance for the 2nd defendant

Ms Gitau holding brief for Ms Mburugu for the 3rd defendant

Court Assistants: Gichaba & Lotkomo