



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 99 OF 2014

(FORMERLY KERUGOYA ELC NO. 171 OF 2013)

CHARLES NJERU MUGO.....PLAINTIFF

VERSUS

IRIGA MAKENGO.....DEFENDANT

JUDGEMENT

1. By an originating summons dated 11th March 2011 brought under **section 38 of the Limitation of Actions Act (Cap 22)** the Plaintiff sought the following reliefs against the Defendant;

a. A declaration that the Plaintiff had become entitled to adverse possession of Title No. Evurore/Kathera/2522 (hereinafter known as the suit property).

b. That the Plaintiff be awarded costs of the suit.

2. The said originating summons was supported by an affidavit sworn by the Plaintiff on 11th March 2011 and the Plaintiff's witness statement of even date. It was averred in the said affidavit that the Plaintiff had occupied the suit property which was registered in the Defendant's name for over 12 years and had developed it with 2 khat trees, 19 timber trees and other indigenous trees. It was alleged that the Defendant was trying to dispose of the suit property without reference to him.

3. The Defendant responded to the said originating summons by filing a replying affidavit and two witness statements. The Defendant conceded his ownership of the suit property but denied that the Plaintiff had ever lived upon or developed the suit property as alleged in the originating summons.

4. The Defendant, in further response, stated that the Plaintiff had previously filed a case against him before the Mbeere Land Disputes Tribunal (hereinafter known as the Tribunal) vide Tribunal case No. 321 of 2006 claiming the suit property. It was his case that the Tribunal heard the case and made an award in his favour.

5. The Defendant further stated that the Plaintiff unsuccessfully challenged the said award of the Tribunal vide Embu Misc. High Court Civil Application No. 49 of 2008. The Defendant also invited the court to visit the suit property to confirm that the Plaintiff's averments in the originating summons were untrue.

6. When this suit was mentioned for directions before Hon. Justice H.I Ong'udi on 16th November 2011, the parties took directions for a *viva voce* hearing. The parties thereafter filed their respective witness statements and documents in preparation for trial.

7. The suit was partly heard before Hon. Justice Bwonwonga in 2015 when the Plaintiff and his witnesses were heard. The Defendant and one of his witnesses were also heard before the said judge.

8. The suit thereafter stalled for a considerable period of time until 16th January 2018 when the Defendant's third witness was heard before me. The hearing was then concluded and the parties directed to file and exchange written submissions within 30 days. The suit was thereupon fixed for judgement on 28th June 2018.

9. At the time of preparation of this judgement, however, none of the parties had filed written submissions. The court, therefore, proceeded to prepare the judgement without the benefit of the parties' submissions.

10. The only question for determination in this suit is whether or not the Plaintiff has proved the legal requirements for adverse possession with respect to the suit property. The law on adverse possession in Kenya is founded on the provisions of the **Limitation of Action Act (Cap 21)** and the common law of England. The law relating to adverse possession was restated in the following decided cases; **Wambugu Vs Njuguna [1983] KLR 171; Githu Ndeete [1984] KLR 776; Kimani Ruchire Vs Swift Rutherfords & Co Ltd [1980] KLR 10** and **Kasuve Vs Mwaani Investments Ltd & 4 Others [2003] 1KLR 184**.

11. The legal requirements were summarized in the case of **Kasuve Vs Mwaani Investments Ltd and 4 Others [2004] 1KLR 184** as follows;

“...And in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition, Wanje Vs Saikwa (No. 2) [1984] KLR 284”

12. At the trial hereof, the Plaintiff testified that he had been in occupation of the suit property since 1965 when he entered the property. He stated that he was living on the suit property with his wife and that he had planted some miraa and other trees on the land. He stated that when the Defendant cut down some of his trees in 2011 or 2012, he reported the matter to the Chief.

13. The Plaintiff's second witness was Kamunyi Mbuari who testified as PW 2. He stated that he knew both the Plaintiff and the Defendant. It was his evidence that he lived near the Plaintiff's home and that the Plaintiff was in occupation of the suit property, even though he did not know its parcel number.

14. The Defendant, on the other hand, testified that he was officially registered as proprietor of the suit property in 1978. It was his evidence that upon completing school in 1980 he started cultivating the suit property together with his wife. He insisted that there saw no one residing on the suit property and that he was still cultivating it.

15. During cross-examination, the Defendant stated that he had another parcel of land in Kariru sub-location and that he had not built a house on the suit property. He stated that he had merely put up a shade on the suit property for sheltering whenever it rains.

16. The second witness was Njeru Mugo (DW 2) who was the Defendant's father. He testified that he was the one who gave the suit property to the Defendant and gave some history on its acquisition from the previous owner. He stated that he did not know where the Plaintiff lived and that when he gave the suit property to the Defendant during the land demarcation process in 1974 it was not occupied at all.

17. The 3rd Defendant's witness was Phides Ngari (DW 3). She testified that she was the Defendant's wife and that since she got married in 1980 she had been farming on the suit property. It was her evidence that no one had ever stopped her from utilizing the land.

18. The court has noted from the evidence on record that the Plaintiff tried to demonstrate that the Defendant's title to the suit property was not fairly and honestly acquired whereas the Defendant devoted significant evidence to demonstrate that he lawfully and regularly acquired the suit property. I think the parties may have missed a point here. By seeking adverse possession, the Plaintiff was admitting that the defendant was the proprietor of the suit property. The Defendant did not have to demonstrate that the chain of ownership was clean either. His title was admitted in the pleadings and was, in fact, the basis of the claim for adverse.

19. All that the Plaintiff was required to demonstrate were the facts establishing adverse possession on the understanding that the Defendant was the lawful owner of the suit property. So, did the Plaintiff demonstrate that he had been in possession of the suit property for a period exceeding 12 years without interruption after either dispossessing the Defendant or after the latter having given up possession?

20. The Plaintiff asserted that he had been in possession since 1965 and had extensively developed the suit property. The Defendant and his witnesses denied this assertion completely. The court has noted from the record that the Plaintiff did not demonstrate that there was a house on the suit property. There were no photographic or video evidence of the existence of a residential house and other associated structures on the suit property. Similarly, there was no other evidence to back the allegation of having planted various trees and cash crops on the suit property. Where the development of a property is highly contested, as was the case here, the burden lies upon the Plaintiff to demonstrate the existence of such developments through cogent evidence.

21. The legal provisions on the burden of proof are contained in **Chapter IV of the Evidence Act (Cap 80). Section 107 (1)** of the said Act states as follows;

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

22. In my opinion, the Plaintiff has failed to demonstrate on a balance of probabilities, that he has had exclusive possession of the suit property for the statutory period of at least 12 years. Exclusive possession in this context means possession to the exclusion of the Defendant as registered owner. The evidence on record points either to the possibility that both the Plaintiff and the Defendant were cultivating the suit property at different times, or cultivating different portions of the suit property over the same period of time.

23. The court has also noted that although PW 2 supported the Plaintiff's claim of occupation since the 1960s, the witness statement he signed and filed on 22nd September 2014 stated that the Plaintiff's land was fraudulently taken away from him and the Plaintiff evicted to pave way for the Defendant to take it over. To quote him in the 2nd last paragraph of his statement;

“The land was fraudulently taken from the Plaintiff and Plaintiff was evicted by Chief for his brother to occupy.”

24. In my opinion, once a party fails to demonstrate exclusive possession for the statutory period, the entire claim for adverse possession ought to fail. Since the Plaintiff in this suit has failed to demonstrate such exclusive possession, the Plaintiff’s suit must fail.

25. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his case on a balance of probabilities as required by law and the same is hereby dismissed with costs to the Defendant.

26. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **28th** day of **JUNE, 2018**.

In the presence of Ms Muriithi holding brief for Mr P.N. Mugo for the Plaintiff and the Defendant in person.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

28.06.18