



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 68 OF 2014

MARY NYAMBURA MUGO.....PLAINTIFF

VERSUS

JAMES RWIMBO NYAGA.....DEFENDANT

JUDGEMENT

1. By an originating summons dated 25th June 2008 brought under **Order XXXVI Rule 3D** of the former **Civil Procedure Rules**, the Plaintiff sought the following reliefs;

- a. That this honourable court be pleased to make a declaration that the applicant Mary Nyambura Mugo has obtained an adverse title to piece of land Gaturi/Weru/1552. (sic)*
- b. This honourable court be pleased to make an order that the Defendant's title to the suit land has been extinguished.*
- c. That this honourable court be pleased to cancel the registration of the Defendant James Rwimbo Nyaga as the proprietor of piece of land Gaturi/Weru/1552 and in place thereof, order the registration of the Plaintiff Mary Nyambura Mugo.*
- d. That costs of this application be awarded to the applicant.*

2. The said originating summons was supported by the affidavit of the Plaintiff sworn on 17th June 2008 and the annexures thereto. It was stated in the said affidavit that she had resided in *Title No. Gaturi/Weru/1552* (hereinafter described as the suit property) since 1971. She further stated that the suit property was once part of *Title No. Gaturi/Weru/822* (hereinafter parcel No. 822) which belonged to her father. The said parcel was then registered in the name of her brother Kiarie Ndungu who later sub-divided and sold parts thereof leaving *Title No. Gaturi/Weru/1148* (hereinafter parcel No. 1148) which was transferred to her younger brother Kiragu Ndungu.

3. The said parcel No. 1148 was later on sub-divided into parcel Nos. 1552 and 1553 and parcel No. 1552 (the suit property) was sold and transferred to the Defendant herein.

4. The Plaintiff claimed to have resided on the suit property continuously since 1971 and to have extensively developed it by constructing a semi-permanent house thereon, connecting piped water, planting trees and bananas among other developments.

5. The Defendant filed a replying affidavit sworn on 6th August 2008 in opposition to the said originating summons. He stated that he bought the suit property from the Plaintiff's brother, Kiragu Ndungu in 1984. It was his case that although the Plaintiff initially occupied the suit property together with her mother and brother, they moved out to an adjoining parcel of land.

6. It was the Defendant's case that because he was residing at Nairobi at the material time, he allowed the Plaintiff to cultivate the suit property and later on to take care of it and to keep thieves and trespassers at bay. He stated that the Plaintiff moved into the suit property around 2001 with his permission.

7. The Defendant further stated that at some point the Plaintiff filed a case against him before the defunct Land Disputes Tribunal (hereinafter the Tribunal) claiming the suit property but the claim was dismissed by the Tribunal.

8. With leave of the court, the Plaintiff filed a further affidavit sworn on 26th July 2017 in which she exhibited several photographs of the various developments she claimed to have undertaken on the suit property. The photos showed some trees, bananas, houses, a cow shed and what looked like a pit latrine. She also denied having been given any permission by the Defendant to occupy the suit property or to undertake such developments.

9. The Plaintiff also filed a witness statement dated 10th February 2015 signed by one Shadrack Mwaniki as her witness. The said witness supported the Plaintiff's assertion that she had been in occupation since 1971 and had developed the suit property.

10. The Plaintiff's list of documents consisted of the said photographs and copies of the land register for suit property and parcel Nos. 822 and 1148.

11. In addition to the replying affidavit, the Defendant filed a witness statement dated 3rd April 2014 in which he reiterated the contents of his replying affidavit of 6th August 2008. He denied that his title to the suit property had been extinguished or that the Plaintiff had acquired the suit property through adverse possession.

12. The Defendant also filed a list of documents dated 14th November 2017 in which he attached copies of the proceedings of the Tribunal and the decree in Embu CM's Court Award No. 8 of 2008 in which the award of the Tribunal was adopted as a judgement of the court.

13. When this suit was listed for hearing on 15th June 2017, the Advocates for the parties agreed to dispose of the suit on the basis of the affidavits, witness statements and documents on record. They also agreed to file written submissions in support of their respective clients. The Plaintiff's advocate filed his written submissions and authorities on 15th November 2017 whereas the Defendant's advocate filed his on 14th December 2017.

14. The main question for determination in this suit is whether or not the Plaintiff has satisfied the requirements for an order of adverse possession as required by law. The legal requirements for proving adverse possession are fairly well settled in Kenya. They were restated in the case of **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2003] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

15. In the case of **Kasuve Vs Mwaani Investments Ltd** (supra), the requirements of adverse possession were summarized 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 dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

Such possession must, of course, be without force, without secrecy and without evasion as expressed in the *Latin* rendition *nec vi, nec clam, nec precatio*.

16. The first element relates to the Plaintiff's exclusive possession of the suit property for the statutory period of at least 12 years. The court has considered the affidavits, witness statements, documentary evidence and photographic evidence on record. The court is aware that the suit property was derived from parcel No. 1148 which was itself a derivative of parcel No. 822. It may be the case that the Plaintiff and her family members may have settled on parcel No. 822 way back in 1971. They may have continued in possession in 1978 upon sub-division of parcel No. 822 to create parcel No. 1148. However, such possession could not be said to be adverse to the then registered proprietors who were the Plaintiff's brothers.

17. In my opinion, the important period for purposes of the Limitation of Actions Act (Cap 22) is 1984 when the Defendant acquired the suit property from the Plaintiff's brother, Kiragu Ndungu. There is no doubt that the Plaintiff had been in possession since 1984. The Defendant claimed in his statement and affidavit that after the sale in 1984 the Plaintiff and her mother resided on the suit property briefly before moving out to an adjacent parcel of land. The Defendant didn't specify in which year they allegedly moved out.

18. The Defendant, however, conveniently remembered that it was in 2001 when he permitted the Plaintiff to occupy the suit property in order to take care of it. If the Defendant had soon after acquiring the suit property discovered that his bananas and trees were being destroyed or stolen by some unknown people, why would it take him a whooping 17 years for him to get a caretaker for the suit property? That is not consistent with normal human behavior.

19. The other interesting aspect of this case relates to the nature of developments on the suit property. Although the Defendant claims to have allowed the Plaintiff to grow some food crops for her upkeep, the photographs produced by the Plaintiff show a different picture altogether. It would appear that there are some houses, mature banana stems, trees and a cowshed on the suit property. In my view, such developments are totally inconsistent with the owner's title to property. These developments were not denied by the Defendant. There was no evidence on record to demonstrate that such developments were undertaken with the consent of the Defendant.

20. If the statutory period of 12 years were to be reckoned from 1984 then the period ended by the end of 1996 by which time there was no indication of the Plaintiff's possession having been interrupted by either the Defendant making an effective entry into the suit property or initiating legal proceedings for eviction of the Plaintiff. There was also no evidence of any developments having been undertaken on the suit property by the Defendant since his acquisition of the suit property in 1984.

21. The court is also satisfied on the basis of the evidence on record that the Plaintiff's occupation of the suit property was without force, without secrecy and without evasion. In my view, it was open, notorious and without interruption at all.

22. The Defendant produced copies of the proceedings of the Tribunal and the resultant decree which showed that the Plaintiff had earlier on lodged a claim for the suit property against the Defendant. The said claim was ultimately dismissed. The court has perused the copy of the proceedings of the said Tribunal as well as its verdict. It was not a claim for adverse possession. The Plaintiff's case was grounded upon the claim that it was the wish of her late father for her to obtain one acre out of parcel No. 822. She claimed to have been shortchanged by her

younger brother who had sold the suit property to the Defendant.

23. In my opinion, nothing really turns out on the proceedings before the Tribunal or its outcome. The said proceedings could not be said to have interrupted the Plaintiff's possession of the suit property. It could not be said that the instant suit for adverse possession was bad in law on account of *res judicata* either.

24. The upshot of the foregoing is that the court finds and holds that the Plaintiff has demonstrated her claim for adverse possession as required by law. The court, therefore, finds merit in the originating summons dated 25th June 2008 and allows the same in terms of prayers (1), (2) and (3) thereof.

25. On the issue of costs, the court shall follow the general principle laid down in **section 27 of the Civil Procedure Act (Cap 21)**. Costs of the suit shall follow the event hence the successful party herein, the Plaintiff, shall have the costs of the suit.

26. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th** day of **JUNE 2018**.

In the presence of Mr Morris Njagi for the Plaintiff and Mr Okwaro for the Defendant.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

14.06.18