



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 188 (OS) OF 2017

IN THE MATTER OF LIMITATIONS OF ACTIONS

ACT, CHAPTER 22 LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR ADVERSE

POSSESSION BETWEEN CECILIA KIRIGO MUNENE.....PLAINTIFF

(Suing as the legal representative of HEZEKIAH MUNENE)

VERSUS

CECILIA KIENDE.....DEFENDANT

(Suing as the legal representative of RUTEERE KINYUA)

JUDGMENT

Plaintiff's case

1. Plaintiff's case is advanced by herself (Cecilia Kirigo Munene –PWI) and her witnesses who are her son Geoffrey Guantai (PW2), her daughter Justa Gaicugi Mugambi (PW3), her neighbor Gerald Kangoria Arithi (PW4) and her husband's brother Julius Kithaka (PW5). These witnesses gave oral testimony and they also adopted their statements as evidence.
2. The plaintiff avers that Cecilia Kiende and Kiende's husband (Known as Ikunyua Rutere) sold the suit land to her at a price of shs. 30 000. She (plaintiff), then started using the land with her deceased husband (who was known as Ezekiel or Hezekiah) from the year 1982. They built houses there, and there were few trees. The tress have apparently been cut down by the previous owner of the land while the house was destroyed by floods and the fence was destroyed by persons unknown to her.
3. Plaintiff avers that her family has been on the suit land for 35 years. She however vacated the land after harvesting maize during the last season.
4. PW 2 and PW3 who are siblings stated that their father (plaintiff's husband) had told them that he had acquired the suit land. They then participated in fencing the land using euphoria plants. They used to take cows there for grazing. A latrine was also built as well as a mud walled shelter.
5. As to when the family started to utilize the land, Pw2 mentioned the years 1983 Or 1984. PW3 clarified that the entire parcel of land is about 10 acres and the suit land was about 2 acres.
6. PW 4 one Gerald Kang'oria Arithi stated that the suit land was about 1km from his home and that the plaintiff's husband was his neighbor. On cross examination PW 4 averred that plaintiff's husband had bought the land from defendant's husband in 1982.
7. PW5, the brother of plaintiff's husband stated that Ezekiel had informed him when the latter was buying the land. PW5 participated in straightening the boundary with a rope.

8. In support of her case, plaintiff produced the documents in her list dated 31/5/2017 as exhibits. The documents are:

- (i) Copy of green card for parcel no. ABO/GAITU/530 where the acreage is 4.252 hectares (Plaintiff exhibit 1).
- (ii) Three photographs of the parcel of the suit land (Plaintiff exhibit 2).
- (iii) A copy of the certificate of death for the late Hezekia Mugambi Mutea (Plaintiff exhibit 3).

Defence case

9. Defendant testified and called a neighbor, one Josphat Mbui M'Itwerandu as her witness. The two also relied on their statements dated 18/2/2018 as their evidence.

10. Defendant's case is that her late husband (Ikunyua Rutere) is the registered owner of land parcel no. ABOTHUGUCHI/ GAITU/ 530. Her husband, and the husband of the plaintiff (Ezekiel) were apparently great friends. It is on the basis of this friendship that Ikunyua gave Ezekiel a licence to utilize part of the suit land in 1982. Defendant therefore contends that the occupation of the suit land by plaintiff's family was via consent from her husband.

11. Defendant further states that plaintiff's family does not occupy the suit land. They stay about two kilometers away from the suit land.

12. Defendant also states that in 2016, she duly informed the plaintiff that she would not allow her to till the suit land as she wanted to share the land with her children pursuant to the orders in the succession cause no. Meru H.C.C. 745 of 2015. According to defendant, plaintiff was in agreement and she vacated the land never to return.

13. Defendant claims that from the last season, it is herself who is utilizing the land.

14. DW 2 averred that the plaintiff's husband was given the land for a short period of time and he was to return the land to the owner and that there are no developments on the suit land as earlier stated by the plaintiff.

15. In support of her case, defendant produced the documents in her list dated 8/2/2018 as exhibits, which are:

- (i) Copy of the green card for Land parcel L.R No. Abothuguchi/Gaitu/530 (Defence Exhibit 1).
- (ii) Copy of the grant of the defendant's husband's estate (Defence exhibit 2).
- (iii) Copy of the death certificate of Kinyua M'Rutere (Defence exhibit 3).
- (iv) Bundle of photographs (Defence exhibit 4).

Issues for determination

16. I have considered all the evidence adduced herein as well as the submissions of the parties. The undisputed issues are that the entire parcel of land is known as Abothuguchi/Gaitu/530 which is approximately 4.252 hectares registered in the name of Ikunyua Rutere who is the husband of defendant. It is also not disputed that defendant is the legal representative of the estate of her late husband. Defendant has also admitted that the family of plaintiff started to utilize a portion of the land in 1982. The suit land itself is about 2 acres. It is also not disputed that plaintiff's family is no longer utilizing the suit land, having ceased to till the same the last season.

17. Where a person claims to have become entitled by adverse possession to land which has been registered, he is allowed by virtue of the provisions of **section 38** of the Limitation of Actions Act to apply to the High Court (ELC) for an order that he be registered as the proprietor. The key ingredients of this claim are that the claimant must have exclusive use of the property continuously for a period of at least 12 years. The claimant must be in actual possession of the property. The occupation must be open and notorious.

18. There is nothing to indicate that plaintiff's occupation of the suit land was on the basis of a licence given by Ikunyua. If there was such a license, then there ought to have been an indication as to when the licence was to expire. Ikunyua died in 1989 without bringing the alleged licence to an end. I am not convinced that plaintiff's family were given a licence to utilize the land by defendant's husband.

19. The family of plaintiff had not put up a homestead on the suit land. However, they are the ones who were tilling the land. Defendant even admits that the family of the plaintiff used to leave their farm implements on her land whenever they would come to cultivate the suit land. Plaintiff's occupation of the suit land appears to have been open and notorious since 1982, when the family entered the land and during the lifetime of deceased Ikunyua.

20. **In the Court of Appeal at Malindi (Coram: Makhandia, Ouko & M'inoti JJA.) Civil Appeal No. 56 of 2014, Mtana Lewa (Appellant) Versus Kahindi Ngala Mwangandi (Respondent)**, the court stated thus;

“The Limitation of Actions Act makes further provision for adverse possession at **Section 13** that:

(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 afresh right of action does not accrue unless and until some person again takes adverse possession of the land.”.

21. In the present case, Plaintiff and her family are no longer utilizing the suit land, having vacated the same during the last season. Plaintiff told the court that she doesn't stay on the suit land. Her children PW2 & 3 stated that they don't stay on the suit land. Their home is about 3 kilometers from the suit land. PW4, the neighbor of plaintiff also stated that “**It is now Cecilia Kiende who is using the suit land. Cecilia Kiringo stopped using the land last year**”.

22. As rightly submitted by the defendant “**in order to be entitled to land by way of adverse possession, the claimant must prove that he has been in exclusive possession of the land and as of right, and without interruption...**”. See the case of John Nyabuto vs James Ombaye Orori and another (2017) eKLR.

23. The plaintiff appears to have either peacefully or forcefully been evicted by the defendant thus interrupting the claim. I am therefore not in agreement with plaintiff's submissions that plaintiff's claim was not defeated by the interruption which allegedly occurred in 2016.

24. In conclusion, I find that plaintiff's claim has not met the threshold of an adverse possessor. Plaintiff's case is dismissed with costs to defendant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 26TH DAY OF SEPTEMBER, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Mungania for plaintiff

Miss Mmamu holding brief for Kithinji for defendant

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE