



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 644 OF 2003

DAVID KIRURI MUMIRA.....PLAINTIFF

=VERSUS=

MARGARET WANJIRU CHEGE.....DEFENDANT

(As administratrix of the Estate of CHEGE MBATHA NJOGU)

JUDGMENT

Introduction

1. The dispute in this suit relates to one acre of land forming part of Land Title Number **Karai/Renguti/57** (the **suit property**). At the time of initiating this suit, the suit property was registered in the name of Chege Mbatha (**the deceased**). Chege Mbatha bears the following other names: (i) Haron Chege Mbatha Njogu; and (ii) Mbatha Njogu. He died on 5/3/2000. In this judgment, I will refer to him as “**the deceased**”.

2. On 27/6/2003, the plaintiff, David Kiruri Mumira, took out an Originating Summons dated 3/6/2003 against the Estate of **the deceased** seeking the following orders:

a) That one (1.00) acre of land in Title No Karai/Renguti/57 does not form part of the estate of the deceased Chege Mbatha Njogu and that his right and title to the said one (1,00) acre have been extinguished by the plaintiff's adverse possession thereof exclusively peacefully openly and as of right for a period of over twelve years prior to the institution of this suit.

b) The plaintiff is under Section 38 of the Limitation of Actions Act entitled to be registered as proprietor of the said one (1.00) acre of the suit land.

c) That the said one acre does not form part of the late Chege Mbatha Njogu estate.

d) That costs of this suit be awarded to the plaintiff.

3. The originating summons is supported by the plaintiff's affidavit sworn on 27/6/2003. The originating summons is opposed by the defendant through a replying affidavit sworn by her on 30/9/2003. In addition, parties filed witness statements and led oral evidence to support their respective cases. The written statements were adopted as the respective witnesses' sworn evidence in chief.

4. The plaintiff's case is that he has occupied one acre out of the suit property to the exclusion of all other persons since 1984. He contends that he has been farming on the said one acre and has planted thereon blue gum trees, mikinduri, nappier grass, potatoes, maize and beans.

5. The defendant contests the plaintiff's contention and contends that, together with the deceased, they have all along been in occupation of the suit property. She adds that the plaintiff stays on a different piece of land at a place called Renguti, 1½ km away from the suit property.

Evidence

6. At trial the plaintiff testified as PW1 and called two other witnesses. His testimony was that in 1984, the deceased agreed to sell to him one acre out of the suit property at a price of Kshs 30,000/-. He paid him the 1st instalment of Kshs 2,200 on 18/10/1984. He paid the 2nd instalment of Kshs 7,000 on 1/11/1984. He paid a third instalment of Kshs 2,000 on 1/9/1985, making a total of Kshs 11,500. In 1986, he made an attempt to pay a further instalment of Kshs 10,000 but the deceased declined. He made similar abortive attempts to make further payments in 1990 and 1994. He further testified that he has developed the one acre portion by planting thereon nappier grass, trees and bananas.

7. PW2 – Mary Ngechi Kimani testified that the plaintiff is her husband. She added that she witnessed the payment of Kshs 2,000 in 1985 in Renguti. She further stated that her husband has been in occupation of the one acre since 1984. PW 3 – James Ngibe Kuria testified that the plaintiff is his neighbour at Renguti and they have known each other since their school days. He stated that he similarly witnessed the payment of Kshs 2,000 in 1985. He added that the plaintiff has been in occupation of the suit property since 1984, having acquired it pursuant to a sale agreement.

8. The defendant testified as DW1 and called one other witness. His evidence was that she is widow of the late Chege Mbatha Njogu also known as Haron Chege Mbatha and also known as Chege Mbatha. On 18/10/1984, her late husband proposed to sell one acre out of the suit property to the plaintiff at Kshs 30,000. The intended sale aborted because the plaintiff was unable to raise the purchase price. No sale agreement was drawn and no excision of the one acre was effected. She added that the plaintiff tried to invade the suit property but met resistance. She further testified that, together with her late husband, they have all along been in possession of the suit property where she grows trees, maize and beans. She added that the plaintiff has never been allowed to take possession of any portion of the land.

9. DW 2 – Ruth Njoki testified that she has been a neighbour of the defendant since the year 2000. She stated that there is no fence or boundary over the disputed portion of the suit property. She stated that she has witnessed the defendant uproot bananas planted by the plaintiff. She has similarly witnessed the plaintiff cut down trees planted on the disputed land by the defendant.

Submissions

10. In his written submissions dated 8/3/2018, the plaintiff argued that his occupation of the disputed land ceased to be contractual when there ceased to be a valid agreement for sale due to lack of consent of the land control board. He emphasized that he is an adverse possessor. He relied on the case of **Githu v Ndeete**. He emphasized that his possession of the one acre was never interrupted. He urged the court to grant the prayers sought in the originating summons.

11. In written submissions dated 20/2/2018, the defendant submitted that there was no evidence of exclusive possession of the suit property by the plaintiff. She added that there has been no dispossession of the suit property from her. She relied on the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR**.

Determination

12. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the legal framework on the doctrine of adverse possession, the essential common law features of the doctrine and the guiding jurisprudential principles. The key issue falling for determination in this suit is whether the plaintiff has satisfied the criteria for acquisition of title under the doctrine of adverse possession.

13. According to the certified copy of the parcel register presented by the plaintiff, the suit property was on 15/12/1973 registered in the name of the deceased and was still so registered on 17/6/2003. The deceased died on 5/3/2000. Subsequently, on 25/4/2001, the plaintiff herein lodged a caution on the suit property, claiming the interest of a beneficiary.

14. It is common ground that in 1984, the deceased and the plaintiff entered into an understanding pursuant to which the deceased was to sell to the plaintiff one acre out of the suit property at Kshs 30,000. Neither party to this suit has produced a compliant copy of any formal sale contract executed pursuant to that common understanding. It is however conceded that between 1984 and 1985, the plaintiff paid to the deceased three instalments totaling Kshs 11,500. He did not pay balance of the purchase price, Kshs 18,500. The plaintiff contends that efforts to make further payments through instalments were declined by the deceased. On her part, the defendant rebuts that contention and contends that the plaintiff was unable to raise purchase price and the intended sale aborted due to the plaintiff's failure to raise purchase price.

15. Secondly, it is common ground that there was no formal excision and parcelling of the one acre. The one acre remains part and parcel of Title Number **Karai/Renguti/57** measuring 4.9 acres. The defendant together with her family live on the said parcel of land.

16. The plaintiff contends that he has had possession of the one acre since 1984 and that time started running for the purpose of adverse possession once the time for obtaining consent of the land control board lapsed. The defendant contests possession by the plaintiff and contends that together with her late husband, they have had physical possession of the whole of Parcel Number **Karai/Renguti/57** all through. She adds that attempts by the plaintiff to undertake farming activities on the land have always been thwarted.

17. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion [*nec vi, nec clam, nec precario*] for the prescribed limitation period of twelve years. Thirdly, he must demonstrate that the registered owner had knowledge [or the actual or constructive means of knowing] that the adverse possessor was in possession of the suit property. Fourthly, the possession must be continuous; it must not be broken or interrupted. In **TITUS KIGARO MUNYI v PETER MBURU KIMANI, CA NO 28 OF 2014**, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.

18. The doctrine of adverse possession has its statutory underpinnings in **Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act**. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in **MTAMA LEWA v KAHINDI NGALA MWAGANDI, [2015] eKLR** and found that the doctrine does not offend the spirit and letter of the Constitution of Kenya 2010 on protection of the right to property.

19. The plaintiff testified that he has never resided on the disputed one acre. He lives in Renguti which is about 1½ Km away from the suit property. He contended that he has been cultivating the one acre, a claim which is vehemently disputed by the defendant. PW2 is the

plaintiff's wife and her evidence was a replica of the evidence of the plaintiff. PW3 is a childhood friend and neighbour of the plaintiff in Renguti, 1½ Km away from the suit property. DW2 is an immediate neighbour of the defendant living adjacent to the suit property. She testified that she has in the past witnessed parties to this suit uproot and cut each other's plants on the suit property.

20. From the evidence presented to the court, there is doubt that the plaintiff has had factual possession characterized with the appropriate degree of single, exclusive and uninterrupted physical control or possession of the disputed one acre. The evidence before court is that whenever the plaintiff has attempted to gain possession of the one acre, he has encountered resistance from the defendant who has promptly uprooted his plants. The one acre forms part of **Karai/Renguti/57** which is held by the defendant and on which the defendant resides. The defendant did not lead any evidence relating to any distinct and identifiable portion of the suit property upon which he is laying claim. The plaintiff does not reside on the suit property. Consequently, the essential features of factual possession are missing in the plaintiff's claim.

21. The totality of the foregoing is that, the plaintiff's claim does not satisfy the criteria for the crystallization of title under the doctrine of adverse possession. The net result is that the plaintiff has failed to prove his case on a balance of probabilities. Consequently, the orders sought in the Originating Summons herein are declined. The plaintiff, David Kiruri Mumira, shall bear costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF SEPTEMBER 2018.

B M EBOSO

JUDGE

In the presence of:-

David Kiruri Mumira - plaintiff present in person

Joseph Ngige Chege – son to the defendant - present

Ms June Nafula - Court Clerk