



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC CASE NO. 70 OF 2006 (O.S)

PAULINE MPAKA.....PLAINTIFF

VERSUS

MARK MUNGIRIA MUGUNA.....DEFENDANT

JUDGEMENT

BACKGROUND

In an originating summons brought under Order XXXVI Rules 30, 7 and 12 CPR and Section 3 and 3A dated 14th August, 2006, the Plaintiff sought the determination of the following questions;

- 1. Whether the Plaintiff has been in continuous, peaceful, quiet and undisturbed possession, occupation and user of all that parcel of land known as NTIMA/NTAKIRA/3349 over which he claims proprietorship pursuant to the doctrine of adverse possession by virtue of having occupied the same for a period of 12 years?**
- 2. When did the period of adverse possession commenced and for how long has the same run?**
- 3. Whether the Plaintiff has extensively developed the suit land?**
- 4. Whether the Plaintiff's possession, user and occupation of the land is adverse to the Defendant's interest?**
- 5. Whether an inhibition ought to be granted and status quo be maintained?**
- 6. Whether the Defendant's registration as a proprietor is not subject to the Plaintiff's overriding interest under Section 30 of the Registered Land Act (Cap. 300) Laws of Kenya?**
- 7. Whether the Plaintiff is entitled to the reliefs sought?**

In a supporting affidavit sworn the same date, the Plaintiff deposed that though the Defendant is the registered proprietor of the suit property No. NTIMA/NTAKIRA/3349, the same is a sub-division of the original parcel no. NTIMA/NTAKIRA/1808 which was an ancestral land belonging to her father-in-law one M'Iringo M'Kirika (deceased) who caused it to be registered in the name of her brother-in-law Marete M'Iringo to hold in trust for himself and his brothers-in-law including her late husband Gilbert Karagania who died in 1989. The Plaintiff further deposed that her brother-in-law fraudulently transferred the suit land to the Defendant who was aware of her exclusive possession occupation and user.

She contends that the Defendant's title therefore is subject to her rights as an adverse possessor. In a replying affidavit sworn on 28th August 2006, the Defendant deposed that the Plaintiff's suit is full of falsehood. He stated that Plaintiff entered into his land in 2003 after having had a history of settling on people's neighbouring parcels of land and later being evicted through court orders. He cited land parcel No. NTIMA/NTAKIRA/3350 where she was evicted vide CMCC No. 321 of 1992 which he annexed the ruling as MM1. The Defendant also referred to another land parcel No. NTIMA/NTAKIRA/3348 where the proprietor filed CMCC No. 744/99 and she was similarly evicted. He attached the proceedings and order as MM2. The Defendant also referred another land parcel No. NTIMA/NTAKIRA/3355 where the owner moved to court in Misc. application No. 73A/03 copies of which he annexed as MM3.

The Defendant also deposed that the Plaintiff has previously lived settled and constructed houses on other people's land parcel Nos. NTIMA/NTAKIRA/3548, 3350 AND 3358 as illustrated in replying affidavits in CMCC No. 321/92 and CMCC No. 744/99 annexed and marked MM4A and MM4B respectively. The Defendant stated that Plaintiff merely moved into his land in the year 2003 after being evicted from literally all the other neighbouring parcels of land forcing him to also file case No. 94/06 seeking eviction orders. The Defendant stated that he settled on the suit land in the year 2002 after he bought it and thereafter constructed a semi-permanent house.

PLAINTIFFS CASE

The Plaintiff in a statement filed in court on 15/01/2015 stated that the suit property is a family land initially owned by her father-in-law one M'Iringo who transferred to her brother-in-law Marete M'Iringo to hold in trust for the family. She contends that she has lived in the suit land since she was married in 1978 and in 1989, her husband passed on. The Plaintiff also stated that the original land parcel No. NTIMA/NTAKIRA/1808 was sub-divided in 1999 into different parcels among them NTIMA/NTAKIRA/3349. After the sub-division, the Defendant got their shares but she was not given any portion.

DEFENDANTS CASE

The Defendant in a statement dated 2/2/2015 and filed the same day stated that he is the registered proprietor of land parcel No. NTIMA/NTAKIRA/3349 which was a sub-division of land parcel No. NTIMA/NTAKIRA/1808. He said that he bought the land from one M'Marete M'Iringo who handed him vacant possession. The Defendant stated that the Plaintiff was initially occupying and living on land parcel No. NTIMA/NTAKIRA/3350 when he bought the suit land before she was evicted vide CMCC No. 321/1992. The Defendant also deposed that after she was evicted from land parcel No. NTIMA/NTAKIRA/3350, she moved to NTIMA/NTAKIRA/3348 where she was similarly evicted in CMCC No. 744/99. After she was evicted from the two parcels of land, the Plaintiff invaded his land while he was away at work and started destroying his barbed wire fence.

PLAINTIFF'S SUBMISSIONS

The Plaintiff's claim is based on the doctrine of adverse possession which has four ingredients as follows:

- 1. Both factual possession and the requisite intention to possess the land**
- 2. Demonstrate that he has used the land without force, without secrecy and without persuasion (*nec vi nec clam nec precario*) for the prescribed limitation period of twelve (12) years.**
- 3. Demonstrate that the registered owner had knowledge that the adverse possessor was in possession of the suit land and,**
- 4. The possession must be continuous, not broken or interrupted.**

The Plaintiff stated that she has proved all the ingredients for adverse possession. She cited the following cases in support thereof;

- 1. Munyaka Kuna Company Limited –Vs- Bernado Vicezo Musi (The Administrator of the Estate of Domenico De Masi (deceased) (2018) eKLR.**
- 2. Chevron (K) Ltd –Vs- Harrison Charo was Shutu (2016) eKLR.**

DEFENDANTS SUBMISSIONS

The Defendant submitted that he is an innocent purchaser for value having purchased the suit property on 30/11/99. He also submitted that the evidence adduced in court demonstrates that the Plaintiff has not been in exclusive and open possession of the suit land. He stated that the Plaintiff only came into the suit land after being evicted from three (3) other parcels of land. He cited the following cases in support of his defence.

- 1. Wilson Kazungu Kalana & 101 Others –Vs- Salim Abdalla Bashshwein & Another (2015) eKLR**
- 2. Gulam Miriam Noordin -Vs- Julius Charo Karisa (2015) eKLR**

ANALYSIS AND DECISION

The Plaintiff's claim is based on the doctrine of adverse possession which has its underpinning in Sections 7,9,13,37 and 38 of the Limitation of Actions Act. 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 claimant must demonstrate that he has used the land without force, without secrecy and without persuasion (*nec vi nec clam nec precario*) for the prescribed period of twelve (12) years. The facts of this case as presented are that the suit property LR No. NTIMA/NTAKIRA/3349 is a sub-division of an ancestral land LR No. NTIMA/ NTAKIRA/1808. That land was registered in the name of Marete M'Iringo to hold in trust for the family after the demise of the registered owner. After the demise of the original proprietor, his five sons agreed to share the land in equal shares. The five sons are Mbaya M'Iringo, Marete M'Iringo, Nkumbu M'Iringo (deceased) Gilbert Karagania (deceased) and Jacob Murithi. In her testimony, the Plaintiff stated that the sons of the late M'iringo Kirika who her late father-in-law shared the only family land parcel No. NTIMA/NTAKIRA/1808 leaving her out with her children. Though the Defendant and his witness alleged that the Plaintiff was given land parcel No. NTIMA/NTAKIRA/3356, there is no evidence to show that indeed the said land is registered in her name. I have looked at a replying affidavit sworn by Jacob Murithi M'Iringo on 13th March, 2000 in CMCC No. 321 of 1992 (Meru). At paragraphs 29 and 30 the said deponent stated as follows:-

“29 THAT the deceased's residential house has always been on the current NTIMA/NTAKIRA/3350 which is intended to be transferred to the second Defendant herein above.

30 THAT the deceased graveyard lied on NTIMA/NTAKIRA 3357 which is intended to be transferred to Ali and Mbaya as

joint proprietors.”

The Plaintiff is the widow of Gilbert Karagania. When she got married in 1978, her father-in-law M'Iringo M'Kirika who was the proprietor of the ancestral land consented to her taking occupation and possession of part of the family land together with her late husband Gilbert Karagania.

The family and the clan accepted her as one of their own. That explains why she was allowed to use part of the family ancestral land parcel No. NTIMA/NTAKIRA/1808 until it was sub-divided between the sons of M'Iringo Kirika (deceased). It follows therefore that the Plaintiff was using part of the family land No. NTIMA/NTAKIRA/1808 as a licensee and that explains why the Plaintiff lodged a caution on the suit property on 26th March, 2002 citing licensee interest.

As a licensee, the Plaintiff cannot therefore claim any interest or right in the suit property by way of adverse possession. In **Munyaka Kuna Company Limited- Vs- Bernado Vicezo De Masi (The Administrator of The Estate of Domenico De Masi (Deceased) (2018) eKLR**, the court while addressing the four ingredients stated as follows:

“ 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.

Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

From my analysis of the evidence adduced, the Plaintiff has not demonstrated that she used the suit land without persuasion or consent. She has not shown that she was using the suit land without consent. In her submissions through the firm of Mithiga & Kariuki Advocates, the Plaintiff at paragraph 2 stated as follows:

“On the second ingredient, the Plaintiff indicated that her occupation of the suit land was pursuant to marriage to Gilbert Karagania who was a son to the initial registered owner. This position was confirmed by DW2 and DW3. Therefore, her possession was with the permission of the then registered owner who was the Plaintiff's father-in-law. The Plaintiff therefore entered the subject portion of land without force, without secrecy and without persuasion (*vic ni vic clam vic precario*)”

The Plaintiff in his own admission confirms that she entered the suit land in 1978 pursuant to marriage to Gilbert karagania and that her possession was with the permission of the then registered owner who is her late father- in- law. That admission that her possession and occupation of the suit property was with permission outrightly disqualifies the Plaintiff from laying claim to the suit property by adverse possession.

In the final analysis, I find the Plaintiff's claim does not meet the ingredients for adverse possession. The same is hereby dismissed for lacking merit. In order to maintain the family co-existence between the parties herein, I order each party to bear his own costs.

DATED AND SIGNED THIS 18TH DAY OF OCTOBER, 2018.

E. C. CHERONO

ELC JUDGE - KERUGOYA

DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF OCTOBER, 2018

LUCY N. MBUGUA

ELC JUDGE - MERU

In the presence of:

C/A: Janet

Thangicia H/B for M. Kariuki for plaintiff

Muriuki for defendant

Defendant