



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 255 OF 2015**

**KANYOTI KITHUA.....PLAINTIFF**

**VERSUS**

**NYAGA MARINGA.....DEFENDANT**

**JUDGEMENT**

1. By an originating summons dated 19<sup>th</sup> May 2008 filed pursuant to **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 has become entitled by adverse possession of over 12 years to parcel of land No Mbeere/Mbita/524 (registered under the Registered Land Act Cap 300 Laws of Kenya).*
- b. That the Plaintiff be registered as proprietor of parcel No. Mbeere/Mbita/524.*
- c. That the costs of this originating summons be awarded to the Plaintiff.*
- d. Such further orders or other orders as may be just.*

2. The said summons was supported by the affidavit of the Plaintiff sworn on 19<sup>th</sup> May 2008. It was stated that the Plaintiff had sometime in 1964 entered and settled upon *Title No. Mbeere/Mbita/524* (hereinafter the *suit property*). It was further stated that he had developed the suit property and occupied it openly and without interruption for more than 12 years.

3. The Defendant filed a replying affidavit sworn on 19<sup>th</sup> September 2008 in opposition to the said originating summons. It was denied that the Plaintiff had ever occupied or worked on the suit property. It was further denied that the Plaintiff had developed the suit property. The Defendant contended that the Plaintiff was occupying a separate parcel of land which was owned by his brother, Njeru Macharia. He, therefore, asked the court to dismiss the case with costs.

4. The said summons was listed for directions on 10<sup>th</sup> November 2008 before the Hon. W. Karanja, J (as she then was). It was directed that the originating summons shall be treated as the plaint and the replying affidavit as the defence. It was further directed that the suit would be disposed of through *viva voce* evidence.

5. The suit was ultimately heard on 20<sup>th</sup> March 2018. The Plaintiff testified on his own behalf and called two other witness in support of his case. The Plaintiff adopted his witness statement dated 17<sup>th</sup> April 2015. He stated that the suit property originally belonged to his late grandfather. It was his evidence that he entered the suit property in 1964 and settled thereon. He stated that the Defendant was not in possession at the time he entered the land and that the latter had never occupied the suit property.

6. The Plaintiff's other witnesses supported the Plaintiff's evidence on the aspect of his occupation of the suit property. They stated that they had known the Plaintiff for very many years. They stated that the Plaintiff had been in possession of the suit property since the 1960s and that they had never seen the Defendant on the suit property.

7. The Defendant, on the other hand, adopted his witness statement dated 19<sup>th</sup> March 2018 as his sworn testimony. He stated that although he was the registered proprietor of the suit property, the Plaintiff was the one wrongfully occupying it. It was his evidence that the Plaintiff settled on the suit property only in 2008. It was his case that when the Plaintiff started constructing a house on the suit property in 2007, he reported the matter to the area Chief who wrote to the Plaintiff asking him to stop the construction. The Plaintiff was said to have ignored the Chief's letter.

8. The court has noted that the parties did not agree on the issues for determination. Instead, they filed separate statements of issues for

determination. The court shall, therefore, frame the issues for determination in this suit. In the opinion of the court, the following two issues fall for determination;

- a. Whether the Plaintiff has demonstrated his claim for adverse possession of the suit property.
- b. Whether the Plaintiff is entitled to the reliefs sought in the originating summons.
- c. Who shall bear the costs of the action.

9. The court has considered the pleadings in this case, the oral evidence of the parties as well as the documentary evidence on record. The record shows that none of the parties had filed their respective submissions by the time of preparation of the judgement. The court shall, nevertheless, proceed to determine the suit.

10. The legal requirements for proving adverse possession 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 [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

11. In the case of **Kasuve Vs Mwaani Investments** (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...”**

12. The first element relates to possession of the suit property. The court is satisfied on the basis of the evidence on record that the Plaintiff has been in exclusive possession of the suit property. The court believes the evidence of the Plaintiff and his 2 witnesses on this issue. The witnesses appeared to know the Plaintiff well and they appeared to be residents of same locality as the Plaintiff. The court accepts the Plaintiff's evidence that he had been in possession since 1964.

13. The Defendant conceded in his evidence that he had never cultivated the suit property. He had never been in occupation thereof. He had never resided thereon and had not erected any structures thereon. He only claimed to have planted some trees thereon.

14. The court further finds and holds that the Plaintiff's possession was without force, without secrecy and without evasion. He was not in occupation with the permission or licence of the true owner. His possession was hostile to the owner's title. The mere fact that there was a change of ownership from the previous owner to the Defendant did not interrupt possession in the legal sense. See **Githu Vs Ndeete** (supra).

15. The court, however, finds that time for purposes of adverse possession does not start running until the suit property is registered under a system of law relating to land registration. In the instant case, the green card shows that the suit property was first registered on 14<sup>th</sup> January 2000 hence time started running against the registered proprietor from that moment. It would, therefore, follow that by the time the Plaintiff filed suit in 2008, the statutory period of 12 years had not lapsed. The lengthy period of the Plaintiff's occupation prior to 14<sup>th</sup> January 2000 cannot be reckoned in the computation of time for purposes of the **Limitation of Actions Act (Cap 22)**. See **Wilson Kazungu Katana & 101 Others Vs Salim Abdala Bakswein & Another [2015] eKLR**.

16. On the basis of the evidence on record, the court is not satisfied that the Plaintiff has proved his claim for adverse possession on a balance of probabilities. The first issue for determination is accordingly answered in the negative.

17. The second issue for determination is whether or not the Plaintiff is entitled to the reliefs sought in the originating summons. Since the Plaintiff has failed to demonstrate his claim for adverse possession, it would follow that the Plaintiff is not entitled to the reliefs sought in the originating summons.

18. The third and final issue is on costs of the action. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. See **section 27 of the Civil Procedure Act (Cap 21)**. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court has noted from the evidence on record that the parties are relatives by virtue of being cousins. In those circumstances, the court shall order that each party should bear his own costs.

19. The upshot of the foregoing is that the court finds no merit in the Plaintiff's originating summons dated 19<sup>th</sup> May 2008 and the same is hereby dismissed. Each party shall bear his own costs.

20. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **18<sup>th</sup>** day of **OCTOBER, 2018**.

In the presence Mr Okwaro for the Defendant and in the absence of the Plaintiff.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

18.10.18