



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

ELC CASE NO. 164 OF 2015

KITHINJI KIRAGU.....PLAINTIFF

VERSUS

TABITHA MUGO.....DEFENDANT

JUDGEMENT

1. By a plaint dated 30th April 1998 and amended on 17th January 2008 the Plaintiff sought the following reliefs against the Defendant;
 - a. That this court be pleased to grant orders for injunction, restraining the Defendant by herself, her agents or employees from cultivating, damaging, interfering with the fences or in any other way dealing with Mbeti/Gachuriri/438 and Mbeti/Gachuriri/439.
 - b. That the Defendant do remove herself, her belongings, family, servants and agents from the Plaintiffs' parcels of land, Mbeti/Gachuriri/438 and 439.
 - c. That the Defendant bear the costs of this suit together with interest thereto at court rates.
 - d. Any other relief that the court may deem fit and just to grant.
2. The Plaintiff pleaded that at all material times he was the registered proprietor of *Title Nos. Mbeti/Gachuriri/439 and 438* (hereinafter called the *suit properties*). It was further pleaded that sometime in April 1998 the Defendant wrongfully started to cultivate the suit property and to graze her cows thereon. It was also pleaded that the Defendant had chased away the Plaintiff's workers from the suit property hence the suit.
3. By a statement of defence dated 30th March 2006, the Defendant stated that it was her husband who settled on the suit properties in 1982 and that she merely accompanied him there by virtue being his wife. She stated that they had resided thereon openly and undertaken permanent developments. It was further pleaded that by the time the Plaintiff purported to purchase the suit property in 1995 he had full notice of the Defendant's occupation.
4. The Defendant also filed a counterclaim in which it was pleaded that she and her family had been in occupation of the suit property for a period exceeding 12 years and as such she ought to be declared as owner thereof. Consequently, she sought the following reliefs against the Plaintiff;
 - a. The land parcel Nos. Mbeti/Gachuriri/438 and Mbeti/Gachuriri/439 be declared properties of the Defendant.
 - b. That the Plaintiff's titles be cancelled and declared invalid.
 - c. The Defendant be paid costs of the suit and this counter claim.
 - d. Any other or better relief as to the court may deem just to be granted.
5. The Plaintiff filed a reply to defence and defence to counterclaim dated 16th August 2007 joining issue with the Defendant on her defence and counterclaim.
6. When the suit was listed for hearing on 5th December 2017 the advocates for the parties agreed to have the suit disposed of on the basis of the witness statements, documents and written submissions of the parties. The parties were also granted leave to file any additional documents. The parties were to exchange written submissions within agreed timelines. The suit was thereupon fixed for mention on 15th March 2018 to confirm compliance and fix a date for judgment.

7. The record shows that the Plaintiff filed his written submissions on 14th March 2018 whereas the Defendant filed hers on 18th April 2018.
8. The court has considered the pleadings on record, the witness statements and the documentary evidence filed on behalf of the parties. The court has also considered the respective written submissions of the parties. The court has noted that the parties did not file an agreed statement of issues. Instead, they filed separate statements of issues for determination. In the circumstances, the court shall frame the issues for determination. Under the provisions of **Order 15 Rule 2 of the Civil Procedure Rules**, the court can frame issues from any of the following;
- a. Allegations made on oath by or on behalf of the parties.
 - b. The pleadings.
 - c. The contents of documents produced by either party.
9. The court is of the opinion that the following issues arise for determination in this suit;
- a. Whether the Plaintiff acquired a good title to the suit properties.
 - b. Whether the Defendant has a legitimate defence to the action on account of her occupation of the suit properties.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the amended plaint.
 - d. Whether the Defendant is entitled to the reliefs sought in the counterclaim.
 - e. Who shall bear the costs of the suit and the counterclaim.
10. The 1st issue really turns out on whether the suit property was originally owned by Gekara clan or Gekara Group Ranch. It is common ground that the suit properties were created upon subdivision of *Title No. Mbeti/Gachuriri/172* (hereinafter called *parcel No. 172*). It is also common ground that the Plaintiff acquired the suit properties, through purchase, from the previous registered owner, Josiah James Mbaki (hereinafter called *Josiah*).
11. The court is aware that parcel No. 172 was the subject of *Embu ELC No 224 of 2015* (formerly *Kerugoya ELC No. 922 of 2013*). The main question for determination in that suit was whether parcel No. 172 was the rightful property of Gekara Group Ranch or Gekara Clan as a whole. The Defendant attached a copy of the judgement in that suit which was delivered by this court on 5th April 2018.
12. The court notes that Josiah was a party to that suit having been sued as the 13th Defendant. The court having heard and considered evidence on behalf of both Gekara Group Ranch and Gekara Clan came to the conclusion that parcel No. 172 was the property of Gekara clan which had been fraudulently registered in the name of Gekara Group Ranch. The court consequently issued a *declaration* that the registration of Gekara Group Ranch was fraudulent and that all sub-divisions and transfers of parcel No. 172 to the Defendants in that suit was null and void.
13. In those circumstances, the court is of the opinion that the Plaintiff did not obtain a good title to the suit properties. The court has also considered the evidence on whether the Plaintiff was a *bona fide* purchaser for value without notice. There is abundant evidence on record to demonstrate that the Defendant had been in occupation of the suit properties since the early 1980s. By the time the Plaintiff purchased the suit properties from Josiah in 1995 or thereabouts, the Defendant and her family were already in possession. There was no indication that any inquiry was made by the Plaintiff from the Defendant who was in possession. In the opinion of the court, the provisions of **section 30 of the Registered Land Act** (now repealed) protected the rights of a person who was in actual occupation by virtue of a right of occupation.
14. The 2nd issue is whether the Defendant has a legitimate defence to the Plaintiff's suit on account of her occupation of the suit property. The Defendant raised two defences to the action. First, it was contended that the Defendant had a possessory right to occupy the suit properties having been in possession and occupation thereof as clan land for a long time. Second, it was asserted that the Defendant had acquired a right by virtue of actual occupation for a period exceeding 12 years. This was in essence a defence of adverse possession. The court is of the view that both defences are available to the Defendant. The judgement of this court in *Embu ELC No. 224 of 2015* concluded that parcel No. 172 was clan land. There is also evidence on record that the Defendant's husband is a member of Gekara clan. There is also sufficient material on record from which the defence of adverse possession can be demonstrated. The court shall deal in detail with the aspect of adverse possession while considering the counterclaim.
15. The 3rd issue is whether the Plaintiff is entitled to the reliefs sought in the amended plaint. Since the court has found that the Plaintiff did not obtain a good title to the suit properties, it would follow that he is not entitled to the reliefs sought in the amended plaint. The other reason why the Plaintiff is not entitled to the reliefs sought is that at the time the Plaintiff acquired the suit properties in 1995 or thereabouts, the Defendant had an overriding interest by virtue of her possession under the then applicable law i.e. **section 3 (g) of the Registered Land Act**.
16. It was submitted by the Plaintiff's advocate that any rights under customary law were extinguished upon registration of land and that such rights cannot constitute an overriding interest. He relied on the case of **Mukanyu Vs Mbui [2004] 2KLR 256** in support of that submission. The court agrees that the decision reflects the state of the law at the time it was pronounced. That decision followed and affirmed the law as stated in the cases of **Esiroyo Vs Esiroyo [1973] EA 388** and **Obiero Vs Opiyo & Others [1972] EA 227**. However, that decision must be considered in light of the recent decision by the Supreme Court of Kenya in **Petition No. 10 of 2015 Isaac M'inanga Kiebia Vs Isaaya**

Theuri M'Lintari & Another which held that **Esiroyo Vs Esiroyo (supra)** and **Obiero Vs Opiyo & Others (supra)** were no longer good law.

17. The 4th issue is whether the Defendant is entitled to the reliefs sought in the counterclaim. The court has noted that the Defendant's counterclaim was essentially a claim for adverse possession of the suit properties. This is discernible from the contents of paragraph 10 where it was asserted that the Defendant had been in occupation as of right for a period exceeding 12 years. The counterclaim was not elegantly drawn. It was not drawn with any measure of professional precision. No reference was made to the Limitation of Actions Act or the elements of adverse possession other than possession. The reliefs were not meticulously drawn either.

18. The court shall, nevertheless, consider the merits of the counterclaim in light of the evidence on record. The requirements for proving adverse possession were summarized in the case of **Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1 KLR 184** 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 Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for part of the land...”

19. The court has considered the statements of the Defendant and her 4 witnesses. They all maintained that the Defendant and her husband, James Mugo, had been in actual occupation of the suit properties for a period exceeding 12 years prior to the institution of the suit. The court believes the statement of the Defendant that she and her family moved into the suit property in 1982 or thereabouts. The court also believes that she cultivated and undertook various developments on the suit property over the years.

20. The court also finds that from the evidence on record her possession had not been interrupted. The only attempt to evict her took place in 1997 or thereabouts when her house was burnt down in the attempted eviction. The intended eviction was not successful. The Defendant and her family had by then been in occupation of the suit property for over 12 years.

21. The court is aware that the Plaintiff only acquired the suit properties in 1995 through purchase from the previous owner who was a Defendant in *Embu ELC No. 224 of 2015*. The court is of the view that a mere charge of ownership does not interrupt possession and it does not necessarily affect a claim for adverse possession. See **Githu Vs Ndeete [1984] KLR 776**. The court is further alive to the fact that the suit properties are sub-divisions of parcel No. 172 which was registered in the name of Gekara Group Ranch in the 1970s.

22. The court is satisfied that the possession and occupation of the suit properties by the Defendants was hostile and adverse to the interests of the registered owner. There was no evidence that the Defendant was in possession of the suit properties with the consent of the previous proprietor.

23. In the premises, the court is satisfied that the Defendant has adequately demonstrated her claim for adverse possession. The court is satisfied that she is entitled to succeed on the counterclaim. The court shall make a declaration that she has become entitled to be registered as proprietor of the suit properties on account of adverse possession. The court shall also make a consequential declaration for the concerned Land Registrar to register her accordingly.

24. The 5th issue relates to costs of the suit and counterclaim. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. 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**. In this suit, there is no good reason why the successful party should not be awarded costs.

25. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove his case to the required standard. The court finds that the Defendant has proved her counterclaim to the required standard. The court accordingly makes the following orders;

a. The Plaintiff's suit is hereby dismissed.

b. The Defendant's counterclaim is hereby allowed in the following terms;

i. A declaration is hereby issued that the Defendant has become entitled to be registered as proprietor of *Title Nos. Mbeti/Gachuriri/438 & 439* on account of adverse possession.

ii. The Land Registrar, Mbeere shall cause the Defendant to be registered as proprietor of the said parcels in place of the Plaintiff.

iii. The Defendant is awarded costs of the suit and the counterclaim.

26. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **18TH** day of **OCTOBER, 2018**.

In the presence of Mr Muriithi holding brief for Mr Morris Njage for the Plaintiff and Ms Maina holding brief for Mr A.P. Kariithi for the Defendant.

Court clerk Muinde

Y.M. ANGIMA

JUDGE

18.10.18