



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1291 OF 2014 (O.S)

EDWARD NYINGI GATONYE

JAMES NJUGUNA GATONYE

PAUL MWANGI GATONYE

CHRISTOPHER GITHUA GATONYE

STANLEY KAGIMBI GATONYE.....PLAINTIFFS

VERSUS

GREENHILL ESTATE CO. LTD.....DEFENDANT

JUDGEMENT

All that parcel of land known as L.R No. 7953, Title No. I.R 8628 (hereinafter referred to as “the suit property”) is registered in the name of the defendant as the leasehold proprietor thereof for a term of 957 years with effect from 1st July, 1951. The suit property was registered in the name of the defendant on 29th January, 1952. The special conditions of the lease between the defendant and the Government of Kenya provide among others that the suit property shall only be used for borehole and water supply and that no buildings shall be erected on the property except such as are necessary for the foregoing user. The suit property measures 0.275 acres. On 8th October, 1953, a charge was registered against the title of the suit property in favour of Harold Heydon Storey and John Mathias Oxenharm Dyer. The suit property is still encumbered by the said charge.

What is before the court is the Originating Summon dated 19th September, 2014 in which the plaintiffs have sought the determination of the following questions:

- a) Whether the plaintiffs have acquired title to the suit property by way of adverse possession;
- b) Whether the defendant who presently has the title to the suit property should execute a transfer of the same in favour of the plaintiffs;
- c) Whether in default of the defendant to execute the said transfer, the Deputy Registrar of this Honourable court should execute the same;
- d) Who should pay the cost of the suit?

The application is premised on the grounds set out in the supporting affidavit sworn by the 2nd plaintiff, James Njuguna Gatonye, on 19th September, 2014. The 2nd plaintiff has averred that his co-plaintiffs are his brothers. He has averred that their father, one, Peter Gatonye Kagimbi bought a parcel of land known as L.R No. 4885/20(original number 4885/11/9) measuring 24.51 acres from the defendant in the year 1967. He averred that from the year 1967 his family has occupied the said parcel of land. The 2nd plaintiff has averred that the suit property is in the middle of L.R No. 4885/20(original number 4885/11/9) and that they have used the borehole on the suit property from the time they occupied L.R No. 4885/20(original number 4885/11/9) to date. The 2nd plaintiff has averred that the borehole on the suit property has been the sole source of their water over the years a fact which is in the public knowledge. The 2nd defendant has averred that their use of the borehole on the suit property has been uninterrupted and that since the defendant has acquiesced to their use and occupation of the suit property which has been open from the year 1967, the defendant’s title to the suit property stood extinguished from the year 1979. The 2nd plaintiff has averred that they have acquired the suit property by adverse possession. The 2nd plaintiff annexed to his affidavit a copy of the search on the title of the suit property. The defendant was served with the Originating Summons by way of substituted service but failed to

enter appearance.

The suit was fixed for formal proof on 27th February, 2018 when the 2nd plaintiff, James Njuguna Gatonye (PW1) gave evidence on his own behalf and on behalf of the other plaintiffs. In his evidence, the 2nd plaintiff adopted his witness statement dated 6th November, 2017 as part of his evidence in chief. He stated that the suit property is within L.R No. 4885/20(original number 4885/11/9) (hereinafter referred to only as "Plot No. 4885") which his late father Peter Gatonye Kagimbi (hereinafter referred to only as "the deceased") bought from Oxford Mathias Dyer who was the father of John Dyer in 1967. He told court that when the deceased purchased Plot No 4885, he was not aware that there was another parcel of land within Plot No 4885 and that the borehole which was within Plot No. 4885 had a separate title. He stated that they discovered the existence of the suit property after the death of the deceased while they were pursuing the administration of his estate. He stated that from 1967 when the deceased acquired Plot No. 4885 they have been using the borehole on the suit property and that no one had laid a claim to it. He stated that the defendant was incorporated by Harold Haydon Storey and Oxford Mathias Dyer who were white settlers. He stated that the suit property and the borehole thereon are owned by the defendant. He told the court that after Oxford Mathias sold Plot No. 4885 to the deceased, he vacated the said parcel of land and went to live at Tigoni where he died and was buried. He added that his son, John Mathias Dyer left for Nairobi where he died and was cremated. He stated that the properties neighbouring Plot No. 4885 are served with their own boreholes and that the borehole on the suit property is not for public use. The 2nd plaintiff told the court that they decided to come to court so as to protect their interests in the suit property and that the borehole on the suit property is strictly used for dairy farming. He added that the plaintiffs are comfortable with the terms of the lease. He relied on the documents attached to his statement in support of his testimony and urged the court to grant the reliefs sought in the Originating Summons. In cross-examination by the court, the 2nd plaintiff stated that the borehole on the suit property had never been claimed by Limuru Town Council or Kiambu County Government. He reiterated that the borehole had been used only by them.

Submissions:

The plaintiffs made closing submission in writing. They filed their submissions dated 23rd February, 2018 on 27th February, 2018. The plaintiffs submitted that adverse possession is a doctrine under which a person in possession of land owned by someone else may acquire a valid title to that land as long as certain common law requirements are met. They cited the following decisions as outlining the principles upon which the doctrine is founded, Mbira v Gachuhi (1920)1 EALR 137, Jandu v Kirpial & Another (1975) E.A. Wambugu v Njuguna (1983) KLR 172, and Elements of Land law 5th Edition by Kerin Gary and Susan Francis Gary at paragraph 9.1.44 to 9.1.52. The plaintiffs submitted that they had demonstrated the requisite elements of adverse possession. The plaintiffs submitted further that the leasehold interest held by the defendant in the suit property had not reverted to the Government of Kenya as at the time they entered the property.

Determination:

I have considered the Originating Summons together with the evidence that was tendered by the plaintiffs in support thereof. In the case of Salim v Boyd and Another (1971) E.A 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In the case of Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another (1977) KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, nec plecario (no force, no secrecy, no evasion).....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

As I have stated earlier in this judgment, the defendant did not enter appearance. The suit was therefore undefended. The evidence that was tendered by the plaintiffs as to when and how they entered the suit property was not controverted. The same applies to the evidence that they led regarding the use of the suit property. The plaintiffs told the court that they entered and occupied the suit property in the year 1967 when their deceased father purchased the adjacent parcel of land. They stated that they were still in occupation of the property. The plaintiffs stated that their occupation of the suit property had been open, peaceful and uninterrupted.

Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides that an action to recover land cannot be brought after the end of 12 years from the date when the right of action accrued. Section 17 of the same Act provides that at the expiration of the said period of 12 years, the title of the person who was entitled to bring an action in respect of the land in question is extinguished.

It is over 51 years since the plaintiffs took possession of the suit property. No action has been brought against them by the defendant to recover the property. I am in agreement with the plaintiffs that the title that was held by the defendant in the suit property has been extinguished by operation of law and that the plaintiffs have acquired the property by adverse possession. Section 38 of the Limitation of Actions Act gives power to the court to order that the person who has acquired land by adverse possession be registered as the owner of the land in place of the person whose interest in the land has been extinguished.

Due to the foregoing, I would answer questions (a) to (c) in Originating Summons in the affirmative. On the issue of costs, each party shall bear its own cost of the suit since the suit was not defended. In conclusion, I am satisfied that the plaintiffs have proved their claim against the defendant on a balance of probabilities. Consequently, I hereby enter judgment for the plaintiffs against the defendant as follows:

1. I declare that the title that was held by the defendant, Green Hill Estate Company Limited in all that parcel of land known as L.R No. 7953, Title No. I.R 8628 has been extinguished by operation of law.
2. I declare that the plaintiffs have acquired leasehold interest in L.R No. 7953, Title No. I.R 8628 by adverse possession.
3. The defendant shall transfer to the plaintiffs as tenants in common the remainder of the leasehold interest in L.R No. 7953, Title No. I.R 8628 within thirty (30) days from the date hereof failure to which the Deputy Registrar of this court shall be at liberty to

execute all documents necessary to transfer the said interest to the plaintiffs.

4. The plaintiffs shall meet all the expenses and costs associated with the transfer of the said leasehold interest in L.R No. 7953, Title No. I.R 8628 into their names.

5. Each party shall bear its own costs of the suit.

Delivered and Signed at Nairobi this 29th day of November 2018

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Wanjiku h/b for Mr. Mworio for the Plaintiff

N/A for the Defendant

Catherine Court Assistant