



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 102 OF 2017

SAMUEL KARICHU KAMAU..... PLAINTIFF

VS

ROBERT MACHARIA MWANGI.....DEFENDANT

JUDGMENT

1. The Plaintiff filed a suit against the Defendant on the 18/7/2007 seeking *inter-alia* to be declared the owner of LOC 11/MARAGI/1363 by way of adverse possession. He also sought the following prayers;

a. The Respondent's title to all that parcel of land known as LOC 11/MARAGI/1365 measuring 0.97 Hectares in the approximate be declares to have been extinguished through adverse possession of the Applicant.

b. The Applicant be declared and registered as proprietor of all that parcel of land known LOC 11/MARAGI/1365 having become entitled to it by way of adverse possession of over twelve (12) years.

c. The Respondent do execute the necessary documents to effectuate the transfer of all that parcel of land known as LOC 11/MARAGI/1365 to the Applicant and in default the Learned Deputy Registrar of this Honourable Court be empowered to do so.

d. Costs of this application be borne by the Respondent.

2. In response to the Plaintiffs claim the Defendant field a Replying affidavit on the 2/7/2009 in which he denied the Plaintiffs claim.

3. At the trial of the case the Plaintiff gave evidence and informed the Court that he has been in actual possession and occupation of the suit land since 1966 until 2009 when he was evicted by the Defendant. That the suit land was purchased by his father, Delvino Kamau Kahi from the Defendant's father Simon Kahi, in 1966 and he and his mother took occupation in 1968. Prior to that the suit land had been registered under the name of the Defendant in 1965 while he was still a minor (at the age of 13 years). He stated that he entered into the suit land in 1968 with his mother. That the Defendant had full knowledge of his occupation of the suit land but did not take any steps to remove them from the suit land.

4. On cross examination he stated that he and his mother were evicted in 2008 through a Court order. That his mother did not appeal the judgment in the lower Court. That his father was buried on the land. That he now lives elsewhere with his family. The Plaintiff produced various agreements for sale in the Kikuyu language accompanied with the English translations to support his case.

5. His witnesses James Maru (PW2) and Ambrose Mwangi Francis (PW3) elected to adopt their witnesses statements in which they stated that they witnessed the agreements for sale in respect to the purchase of the suit land by the Plaintiff's father from the Defendant's father in 1966.

6. The Defendant gave evidence and stated that he became registered as owner of the suit land in 1965 while still a minor while aged 13 years. That in 1995 he filed SPMCC No 147 of 1995 against the Defendant's mother wherein the Court decided in his favour and the Plaintiff and his mother were evicted. That in the same year 1995 the Plaintiffs mother filed a case in Nyeri HCCC No 123 of 1995 against him for adverse possession. This case was dismissed for want of prosecution in 2008. That upon the eviction of the Plaintiff and his mother he now occupies the suit land. That there cannot be found any adverse possession on account of the fact that the Plaintiff and his mother were evicted in 2008.

7. The Defendant informed the Court that he was neither involved in the sale of the land nor did he have control of the suit land when he was still a minor. That he learnt that he was the owner of the suit land in 1971 at the age of 19 years. At that time the Plaintiff and his family were in possession and occupation of the suit land. They had built on the land. That his father died in 1995. He explained that he did not remove the Plaintiffs between 1971 and 1995 as he did not have money to file the case in Court.

8. Parties have filed written submissions which I have read and considered. Both parties have raised the issue as to whether the suit is res-judicata in view of the previous cases and the judgment thereto. In the Courts view there are two key issues for determination; whether the suit is res-judicata; whether the Plaintiff has established title by adverse possession; whether the title of the Defendant should be cancelled and the Plaintiff registered as proprietor of the suit land; costs of the suit.

9. Section 7 of the Civil Procedure Act provides as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

10. Res-judicata relates to a matter in which the issue raised had previously been raised and has been heard and finally decided by Court. The rationale of the doctrine of Res-judicata is twofold; Firstly that no hardship to the individual that he should litigate twice for the same cause. Secondly that it is public policy that litigation must come to an end.

11. In this case evidence was led that the Plaintiff’s mother filed a suit against the Defendant in Nyeri in 1995 vide HCCC No 123 of 1995 seeking title by way of adverse possession. This suit was dismissed for want of prosecution in 2008. By the mere dismissal that suit cannot be held to have been heard and decided. It does not fall under the doctrine of resjudicata.

12. In the same year 1995 the Defendant sued the Plaintiff’s mother for eviction from the suit land which case was decided in 2008 and eviction issued in 2009 where the Plaintiff and his mother were successfully evicted. In the eviction case SRMCC No 147 of 1995 the Plaintiff’s mother in her defence filed on 5/5/95 she stated as follows;

- a) The Defendant states that the land in question originally belonged to the Plaintiff’s father Mwangi Kanyi in or about 1966.
- b) The Defendant further states that the said Mwangi Kanyi put the Defendant in possession of the suit land and the Defendant is and has been in actual possession and occupation ever-since.
- c) The Defendant states that he has been in actual continuous and uninterrupted possession for some 29 years and has therefore acquired title to the suit land by adverse possession.
- d) The Defendant contends that he is in the process of filing a High Court suit to claim title through adverse possession.

13. A matter cannot be said to be directly and substantially in issue unless it was alleged by one party and denied or admitted either expressly or by implication by another side. It would appear that the lower Court went ahead and determined a matter with an issue of adverse possession. According to Section 38(1) of the Limitation of Action Act, where a person claims to have become entitled by adverse possession to land registered under Section 37 of the said Act, he may apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as the proprietor of the land. It therefore follows that the lower Court was not the competent Court to determine the issue of adverse possession.

14. From the Defence it is clear that the Defence of adverse possession was manifestly raised to enable the Learned Magistrate to appreciate that he did not have the jurisdiction to so determine the dispute before him. In the **case of the Owners of the Motor Vessel Lilian ‘S’ v. Caltex Kenya Limited (1989) KLR 1** in which the Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Where a Court has no jurisdiction it must of necessity down its tools at the first instance and take no further action. It behoved the Learned Magistrate to stay the case in the Court to pave way for the parties to prosecute the issue of adverse possession in the right forum. In any event the two suits would on application or suo moto by the Court be consolidated and heard at once. It would appear that the issue of adverse was not adjudged by the Court and even if it did, it had no jurisdiction.

15. I have perused the file and according to the record, the Plaintiff actually filed this current suit on the 18/7/07 while he and his mother were still in possession of the suit land. By the time the verdict was issued in SRMCC No 147 of 1995, in 2008 the current suit had already been filed and was subsisting at the High Court. The case was actually filed before the eviction orders were issued. In my view the said eviction orders do not bind me. I must add that the outcome of this case could have been different if the matter of jurisdiction was not flouted.

16. All in all the Court finds and holds that this matter is not resjudicata for the reasons given above.

17. On the issue of whether adverse possession has been proven, it is on record that the Plaintiff’s father bought the suit land from the Defendant’s father at Ksh 1200/- which payments were not disputed except that the Defendant stated in his evidence that he was too young to have knowledge of the same. In the case of **Public Trustee vs. Wanduru Ndegwa [1984] eKLR Madan J A** stated as follows;

“... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in

possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

18. It therefore follows that the Defendants father constructively held the land under trust for the Plaintiff’s father. I say so because the land was registered in the name of the Defendant in 1965 at the age of 13 years. In any event the Plaintiff did not take possession with the permission of the Defendant. In his own evidence he found the Plaintiff and his mother in occupation of the land in 1971.

19. It is on record that the Plaintiff and his mother did occupy the suit land from 1968 to 2008 when they were evicted pursuant to the Court orders in SPMCC No 147 of 1995. The Defendant did not take any steps to dispossess the Plaintiff of the possession for a period in excess of 12 years.

20. When did time start running for purposes of adverse possession? There are three scenarios that time could have started running for purposes of adverse possession. The first is in 1968 when the Plaintiff and his mother took possession of the suit land. 12 years would run upto 1980. The second instance is 1971 when the Defendant became of age of maturity and 12 years would expire in 1983. The Defendant has claimed that he had knowledge of the Plaintiff’s continuous occupation and possession of the land from 1971 to 2008, a period of 36 years. It is instructive to note that he neither dispossessed them of the said possession nor did they hand over possession to the Defendant. The third scenario is 1974 when the Defendant completed school and 12 years would end in 1986. Taking any of the three scenarios that is to say 1980, 1983 or 1986, the right to adverse possession had accrued and crystalized in favour of the Plaintiff and his mother who were in possession. By the period 1995 when the Defendant filed suit for eviction, it was 27 years of peaceful uninterrupted and continuous occupation. The suit in 1995 was filed too late in the day. The suit did not stop time from running. The eviction orders in 2008 were of no consequences as the right to adverse possession had long accrued and crystalized in favour of the Plaintiff.

21. In the end the Plaintiff has proven adverse possession and the Court grants the prayers sought as follows;

- a. The Respondent’s title to all that parcel of land known as LOC 11/MARAGI/1365 measuring 0.97 Hectares in the approximate be declared to have been extinguished through adverse possession of the Applicant.
- b. The Applicant be declared and registered as proprietor of all that parcel of land known LOC 11/MARAGI/1365 having become entitled to it by way of adverse possession of over twelve (12) years.
- c. The Respondent do execute the necessary documents to effectuate the transfer of all that parcel of land known as LOC 11/MARAGI/1365 to the Applicant and in default the Learned Deputy Registrar of this Honourable Court be empowered to do so.
- d. Costs of this application be borne by the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 29TH DAY OF NOVEMBER, 2018

JG KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff/Applicant – Absent

T M Njoroge for the Defendant

Irene and Njeri, Court Assistants