



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 291 OF 2014

MUHU HOLDINGS LTD.....1ST PLAINTIFF

DURURUMO ESTATE LTD.....2ND PLAINTIFF

SERAH MWERU MUHU.....3RD PLAINTIFF

VERSUS

ACHINA NANGOMO & 27 OTHERS.....DEFENDANTS

JUDGMENT

(Suit by plaintiff seeking eviction against the defendants; defendants having been former employees of the plaintiff; defendants raising a counterclaim on adverse possession; employees cannot seek land by adverse possession as they have been in occupation through permission of the land owner; counterclaim dismissed; judgment entered for the plaintiffs).

1. This suit was commenced through a plaint which was filed on 14 October 2014. In the plaint, the plaintiffs have averred to be proprietors of the land parcels LR No. 11791 (Dururumo Farm) where various farming activities are carried out including horticulture, dairy farming and coffee planting. It is claimed in the plaint that the defendants have invaded the suit property, destroyed parts of it, and have interfered with the plaintiffs' occupation of the same and that the 1st – 7th defendants were charged with the offence of Forcible Detainer which case was said to be pending when the suit was filed. In this case, the plaintiffs want orders of eviction against the defendants, a permanent injunction restraining them from the suit land, and general damages for trespass and malicious damage to property.

2. The defendants filed a defence and counterclaim through the law firm of M/s Hari Gakinya & Company Advocates. They pleaded that they have been on the suit land since the colonial period as employees of the colonial owner of the suit land and their employment was passed on to the new African owners and that they have continued to occupy a small space in the farm for over 50 years and that some of the defendants are of the 3rd generation. It is pleaded that the plaintiffs want them evicted from the farm and replaced with local communities without paying them their dues. It is said that despite occupying less than 20 acres of the farm, and having been on the land for over 50 years, the plaintiffs have denied them to allow them to settle on the farm. In the counterclaim, they have claimed that the plaintiffs owe them dues amounting to over Kshs. 2 Million. They have contended that they are entitled to the about 20 acres or so of land that they occupy through the doctrine of adverse possession. They have sought a declaration that they have acquired the 20 acres by adverse possession and also want payment of their employment dues.

3. In her evidence, Sarah Mweru Muhu, the 3rd plaintiff, and director of the 1st and 2nd plaintiffs, testified that the suit land is now owned by the 1st plaintiff. The land was initially purchased by Muhu Kangari and Peter Muigai Kenyatta, but Mr. Kenyatta sold his shares to Mr. Kangari. In his will, Mr. Kangari willed the property to Muhu Holdings and the property is now registered in the name of Muhu Holdings. She testified that when the land was purchased, there were only about 10 workers living in the workers quarters but who refused to vacate. Some new workers were also employed some of whom were dismissed but have also refused to vacate the premises. She did not personally know those in occupation and stated that the farm manager is better placed to give the particulars.

4. PW-2 was Samuel Kamau Githinji, the Manager of Dururumo Farm, which is of 708 acres. He stated that when Mr. Kangari purchased the farm, he retained him as an employee and also retained other employees from the previous white settler. He testified that the defendants were employees of the farm but they no longer are, as some of them resigned, and others were sacked. They presented their claims to the labour office and their dues were calculated. Some collected their money and some refused. He stated that they have tried to remove them from the farm in vain and that they have done a lot of damage to the farm. Some of them got arrested and were charged with the offence of Forcible Detainer. Cross-examined, he stated that the defendants live in one corner of the farm, and occupy about one acre of land where there are 28 houses. He stated that the defendants were employed at different periods of time and were also laid off at different periods. He asserted that all of them were paid their terminal dues.

5. With the above evidence, the plaintiffs closed their case.

6. The defendants called John Koech Lelei, Eunice Njeri Muiruri, James Enathe Loris, and Jackson Lopuke Lopanga as their witnesses. DW-1 testified that he was born in 1966 on the suit land as his parents were employed here. He stated that both his parents died and were buried on the suit land. He himself got employed in the year 1987 and worked for 25 years as a watchman. He was sacked in the year 2013 and he complained that he was never paid his terminal dues. He denied having been given any notice to vacate the land. He stated that there are about 35 houses erected by the former employees with the permission of the land owner. While resident he was also cultivating a part of the land but he never asked for permission to cultivate. He stated that they occupy about 1 ½ acres of land where they have built their houses. He stated that he knows no other land. Cross-examined, he stated that there is a space of about 1 acre which the land owners had set apart as a burial ground. While in employment he lived in a house allocated to him by his employer and did not build his own structure. He affirmed that he was among those charged with the offence of Forcible Detainer. Eunice Njeri on her part, stated that her parents also used to work on this farm and were buried here. She herself got employed in the year 1978 in the coffee farm. She was dismissed in the year 2013. She believed that she has a right to claim part of the land as she was born here and her parents buried here. To her, even a ¼ acre would do. It was more or less the same evidence from James Enathe. He was born on this land in the year 1978 and later got employed in the year 2001. He was also among those charged with the criminal offence of Forcible Detainer. James Epuke on his part, got employed in the year 1984 and was also laid off in the year 2013. His mother also used to be a worker in the farm and was buried here. All of them complained of not having been paid their terminal dues.

7. In her brief submissions, Mrs. Gatei, learned counsel for the plaintiffs submitted that the defendants cannot claim adverse possession as they came into possession of the land by virtue of their employment.

8. I have considered the matter. If I disallow the defendants' claim for the land under the doctrine of adverse possession, then I will have no reason to deny the plaintiffs their prayers in the plaint. I therefore opt to start with the defendants' counterclaim.

9. It is trite law that to claim land by way of adverse possession, such person needs to demonstrate quiet, continuous and uninterrupted possession of the land, for a period of at least 12 years. Such possession must be without force, without stealth and without the permission of the land owner. The occupant must also possess the requisite animus possidendi, to have the land.

10. In this case, most of the defendants, if not all of them were born here. Their parents used to work here and after their death, they were buried here. All defendants were absorbed to be employees of the plaintiff. They worked on the farm until the year 2013 when they were laid off. While they were employed in the farm, they were given some workers' quarters to live in, and it appears as if some were permitted to build their own houses. They also cultivated on part of the land. Now, it is apparent to me that their occupation of the land came as a result of the employment of their parents and latter their own employment. It is therefore patently clear to me that their occupation of the suit land was with the permission of their employer. It is trite law, that where an employee is in possession of land or a house, by virtue of his employment, he cannot seek to have that land or house by way of adverse possession. This has been decided in several cases including that of *Delamere Estates vs Ndungu Njai & Others (2006) eKLR*, and *Wellington Lusweti Barasa & 75 Others vs Lands Limited & Another (2014)*. The reason why employees cannot claim the land that they have occupied by virtue of their employment is that their occupation is with the permission of the land owner yet, to support a claim for adverse possession, the possessor is required to be in possession without the permission of the land owner.

11. The fact that the defendants were born on this land, or that their parents were born on this land, or that they have been on this land all their lives, does not allow them to claim the land by dint of the doctrine of adverse possession. Their claim that they are entitled to this land through the doctrine of adverse possession therefore fails. The defendants have other prayers for payment of their terminal dues but I do not see how it is related to their claim for the land. They can file a separate suit in the Employment and Labour Relations Court if they feel that they have some outstanding unpaid terminal dues.

12. Having dismissed the defendants' counterclaim, I have no reason not to allow the plaintiffs' suit. The plaintiffs have already dismissed the defendants from employment. The defendants no longer have the permission of the plaintiffs to be on the land. As the land owners, the plaintiffs are vested with the right of ingress and egress, and are also entitled to exclusive possession of their land. Once the licence that they had given the defendants was terminated, the defendants became trespassers on the land. The plaintiff is fully entitled to have the defendants evicted and I do grant them the orders of eviction. The defendants are also permanently restrained from entering, being upon, or in any other way occupying or utilizing the suit land. There is a claim for general damages and malicious damage. Given that the defendants stubbornly failed to vacate even after being notified to do so, I will in my discretion, taking all factors into consideration, including but not limited to the relationship that the parties had, the nature of land, and the standard of life of the defendants, I will award the plaintiffs the sum of Kshs. 10,000/= against each defendant as general damages for trespass. The claim for damages for malicious damage was not supported by any cogent documentary evidence giving the value of what was damaged or lost and I will therefore not make any award under this head.

13. Before I close, I must say that I had a lot of sympathy for the defendants. They were born here, have been employed here all their lives, and truly know no other home. All this, I appreciated but the law is not on their side, and I cannot bend the law based on my emotions. It will also be remiss of me not to mention, that while this case was proceeding, and while the defendants were represented by the law firm of M/s Hari Gakinya & Company Advocates, I stayed proceedings and encouraged the plaintiffs to see if they can spare some little land for the defendants, in an attempt at an out of court settlement. The plaintiffs were agreeable but made it clear that they want the defendants out of their land because they have been troublesome. They agreed to get for them other land within the vicinity though not within any of their property in an attempt to settle this case out of court. Mr. Gakinya, then acting for the defendants, and Mrs. Gatei for the plaintiffs, did report that they have identified some 8 ½ acres for the defendants to settle which the plaintiffs were willing to pay for and settle the defendants. However, the defendants refused to take that land, asserting that the only land they want is this land owned by the plaintiffs. They thereafter sacked their advocate and chose to proceed in person. They took a gamble by pursuing this case rather than accepting the out of court offer and did not see the wisdom of having a bird in hand, rather than several, but which are all in the bush. They have now lost and essentially thrown away the baby with the bathwater. What more can I say ?

14. I was tempted to spare the defendants costs, but given their conduct, costs in this matter will follow the event. The defendants shall therefore pay the costs of the main suit and of the counterclaim.

15. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 21st day of November 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU