



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ORIGINATING SUMMONS NO. 104B OF 2009

IN THE MATTER OF LAND PARCEL NO. NYAKI/THUURA/580 REGISTERED IN THE NAME OF JOHN KAIMENYI MWORIA

WILSON KATHURIMA.....PLAINTIFF

VERSUS

JOHN KAIMENYI MWORIA.....DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff has commenced this suit by way of originating summons dated 29th September 2009 and filed the same date, seeking determination of the following questions:

1. Has the plaintiff occupied land parcel No. Nyaki/Thuura/580 for more than 12 years?
2. Has the plaintiff's occupation been open, unhindered, notorious, undisturbed and uninterrupted for more than 12 years?
3. Has the plaintiff been in occupation of the suit land since the year 1989?
4. Has the plaintiff become entitled to the whole of the suit land by way of adverse possession?
5. Has the defendant ever occupied the suit land?

In his supporting affidavit in support of the said originating summons the plaintiff deponed that the suit property no. Nyaki/Thuura/580 is registered in the name of the defendant. He annexed a copy of the green card as WK 1. He further stated that he entered the suit land vide a sale agreement wherein he bought the same in the year 1989 from one Marcella Njiru. Immediately upon purchase of the suit land he took possession and did extensive development by building permanent houses and a store. He also did farming and planted trees as well as keeping animals and doing subsistence farming. The plaintiff further deposed that the person who sold him the land resides at Giaki on another parcel of land and works at Gakoromone in Meru town.

In a replying affidavit sworn on 8th February, 2010 the defendant/respondent stated that the plaintiff's supporting affidavit is full of falsehoods. He deponed that he is the legal registered proprietor of the suit land and that the plaintiff is a trespasser on his land from March 2009 when he filed a suit for his eviction vide HCCC No. 125 of 2009 (Meru) he attached a copy of the judgment and decree in that suit marked JK 1.

PLAINTIFF'S CASE

The plaintiff proceeded by way of oral evidence and stated that he entered into the suit land parcel no. Nyaki/Thuura/580 in 1989 after he bought it from one Marcella Njiru who was the widow of Igweta Riata. He produced the green card as P. Exhibit no. 3. He took possession of the land upon purchase and started building a permanent house. He also planted bananas avocado and trees. He also connected water to the suit land. He bought the land at Kshs.62,500. The seller was to do succession but she refused. He took her to the land disputes tribunal in LDT no. 7 of 1999.

The tribunal directed her to do succession. The tribunal's award was adopted by the court in LDT case no. 39/99. He produced the proceedings as p. exhibit no. 4. The lady appealed to the provincial dispute appeal tribunal. While he was in Nairobi he was told that the lady came with some people and he evicted his family. He went to the district commissioner Meru who gave him a letter reinstating him to the land dated 20/6/2005. The letter was produced as P. Exhibit no. 5. In 2009 he was removed from the suit property vide a court order being HCCC No. 125 (2009) (Meru). He instructed his lawyer to go back to court where the said orders were set aside. He said that he has lived in

the suit land from 1989 until 2009. He said that the person in possession of the suit property is John Kaimenyi Mworio who is the defendant in this case. He said that he was not a party in the High court case no. 125/2009. He produced a decree as P. Exhibit no. 6.

PW2 was Mary Kirumba. She is the wife to the plaintiff. She stated that they bought the suit property land parcel No. Nyaki/Thuura/580 in 1959 from Marcella and immediately, built a house and in 1995 they built a permanent house. She planted maize, bananas and beans. The witness further stated that there was a time the seller attempted to remove them from the suit property but the District commissioner said that they should remain until a case they had filed in the tribunal is heard and determined. The case was filed by her husband in Embu in 1999. They are not in the suit land now as they were removed vide a court order which she could not remember. They were removed on 23/12/2009. They were removed by the OCS and some police officers who demolished their houses.

PW 3 was Justus Kathurima M'Thinyai who works as a guard. He stated that he is familiar with the suit property parcel No. Nyaki/Thuura/580 which was registered in the name of Igweta Riyata before he passed on. He said that the late Igweta Riyata was his uncle. He said that his uncle never lived in the suit land as he was living in Giaki with his family which is about 15 kilometres away. His wife was Maricela Njiru who passed away later. He said that the land was sold to Wilson Kathurima who took possession and did development in the suit property in 1989. He said that the suit land was an ancestral land and that they had an interest. He sued his uncle Igweta and after he passed on, he substituted with his son and wife but the suit was later dismissed. He also placed a caution on the suit land in 1986. Wilson Kathurima lived in the suit land until he was removed vide a court order in 2009 and John Kaimenyi was put in possession. He said that according to the proceedings in HCCC No. 125/2009 he was named as defendant. He said that he was in the suit land from 1989 to 2009 when he heard that the land was sold to John Kaimenyi. He stated that John Kaimenyi entered the suit property through a court order after removing Wilson Kathurima.

DEFENCE CASE

The defendant gave sworn testimony and stated that he lives in the suit property no. Nyaki/Thuura/580 which is registered in his name. He acquired the land through succession cause no. 364/2005 (Meru). He was one of the administrators of the estate of Andrew Igweta M'Iritha who was the original registered owner of the suit land. He produced a copy of the succession cause and the order issued on 17/10/2008 as D. Exhibit No. 1 (a) (b) & (c). When he took possession of the suit property he found a structure where an old man was living. He asked him what he was doing inside his land and the old man told him that the structure belonged to his son known as Kathurima. He went to court and obtained orders to evict him from the suit premises in HCC no. 129/2009 (Meru).

He said that there was nobody in the suit land when he took possession in 2009. He started doing developments in the suit property including the building of houses. Nobody challenged him in that case. He produced the letters of administration as p. exhibit no. 1 (a). He also produced the green card of the suit property as P. exhibit no. 2. The defendant also produced a copy of the high court registry records as P. Exhibit no. 3.

ANALYSIS EVALUATION AND DECISION

The plaintiff's claim in this suit is for a declaration that he has acquired the suit property registration No. Nyaki/Thuura/580 comprising in measurement 0.6 Hectares or thereabouts registered in the name of John Kaimenyi Mworio. From the evidence adduced, the plaintiff bought the suit property from one Maricella Njiru in 1989 and immediately took possession and occupation and did developments therein including building permanent houses and extensive farming activities. From the green card attached to the supporting affidavit and marked as WK 1 indicates that in 1987 the suit property was registered in the name of Igweta Riata. It is not shown how the plaintiff purchased the suit property from Marcella Njiru while the same was still in the name of the original owner. The plaintiff has not produced a copy of the sale agreement to enable this court determine the legality or otherwise of his agreement with the alleged Maricella Njiru.

The green card also indicates that the defendant herein became registered as proprietor of the suit land on 15/07/2009. The defendant produced a grant of letters of administration intestate issued in succession cause no. 364 of 2005 (Meru) in respect of the estate of Igweta Riata who died on 11/1/1986 and the administrators of his estate were Julius Gituma Igweta. They were the same people who transferred the suit property to the defendant on 15/7/2009 from that background the purported purchase of the suit property by the plaintiff from Maricella Njiru in 1987 was not capable of conferring any interest to the plaintiff as the said Maricella Njiru had not obtained letters of administration to enable her transact any legal business on behalf of the estate of Igweta Riata.

If indeed the plaintiff was claiming any interest from the estate of the said Igweta Riata by way of a purchase of land, he should have presented the same before the administrators for consideration before the grant was confirmed and the estate distributed to the beneficiaries. The administrators of the estate of a deceased person occupy a legal position in law similar to that of the deceased before his demise. They have the same legal capacity to sue and be sued on behalf of the estate of the deceased for any interest or claim. Being a purchaser for value in the suit land which was an interest in the estate of the deceased Igweta Riata the plaintiff failed to assert his right and/or interest in the estate of the said Igweta Riata by suing the administrators in 2009 after they obtained letters of administration on behalf of the estate of the said Igweta Riata.

The other issue for determination and which the plaintiff's claim is hinged is that of adverse possession. In case of adverse possession, possession of the suit land is critical to the claimant's case. Once the claimant loses possession to the registered owner, he ceases to be in adverse possession of the suit land. The plaintiff having admitted that he no longer in occupation of the suit land, a claim for adverse possession cannot stand. Having said that, I also note that the plaintiff was removed through a court order HCCC No. 125 of 2009 which was produced as P. Exhibit no. 6. Though the defendant in that suit was one Justus Kathurima, his contest is that his eviction on grounds that he was not the defendant in the alleged suit and that his interest in the suit property was that of an adverse possession which is protected by law. Once the plaintiff failed to challenge his removal from the suit property through a court order, it is not open for him to file a separate suit seeking to be reinstated back to the same property. I note from the affidavit in support of the originating summons that the plaintiff deposed that he entered the suit property, vide a sale agreement wherein he bought the same in the year 1989 from one Maricella Njiru.

In order to succeed in a claim for adverse possession, the plaintiff must prove the cardinal principles as set out in case of **MBIRA VS**

GACHUHI (2002) 1 EALR at page 137 where it was held as follows:

“A person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non permissive or non-consensual actual open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption”.

The admission by the plaintiff that he took possession of the suit property as a purchaser clearly removes his claim from the principles of adverse possession. In the case of Benjamin Kamau Murima & others vs Gladys Njeri – Civil Appeal No. 213 of 1996 (unreported) the court held as follows:

“In determining whether or not the nature of the actual possession of the land in question is adverse, one needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the land in form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived then it is adverse”.

My reading of the plaintiff’s supporting affidavit and the findings of the court in that decision makes me to hold and find which I hereby do that the plaintiff’s occupation before he was evicted through a court order was not adverse.

In the totality I find that the plaintiff’s claim for adverse possession for a period of 12 years was not proved. This suit therefore has no merit and is hereby dismissed with costs.

READ, DELIVERED AND SIGNED BY E. C. CHERONO, ENVIRONMENT AND LAND COURT JUDGE KERUGOYA AT MERU THIS 14TH DAY OF NOVEMBER 2018.

.....

In the presence of:

C/A: Janet

Mr. Mwenda Mwarania for defendant

Ms. Njenga for plaintiff