



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 519 OF 2017 (OS)

STANLEY WAINAINA NDUATI - PLAINTIFF

VS

GEORGINA WANJIRU KARIUKI - DEFENDANT

JUDGMENT

1. The Plaintiff took out an originating summons against the Defendant claiming adverse possession of 0.1 acres out of Land Reference No LOC 18/GACHOCHO/5388 (hereinafter called the suit land). He sought the following orders;

a. A declaration that the title of Georgina Wanjiru Kariuki to the land parcel number LOC.18/GACHOCHO/5388 has been extinguished by the Plaintiff adverse possession thereof for a period of more than Twelve (12) years in terms of the Limitation of Actions Act.

b. That the Plaintiff have become entitled by adverse possession to a portion of land measuring approximately zero decimal one (0.1) acres of that land parcels comprised in title Number LOC.18/GACHOCHO/5388 situated in Gachocho Location in Kigumo Division within Murang'a County and registered under the Land Act in the names of the Defendant.

c. An order that the District Land Registrar Murang'a to register the Plaintiff as absolute proprietor of the portion of land measuring approximately zero decimal one (0.1) acres of the land parcel number LOC.18/GACHOCHO/5388 in place of the Defendant.

d. That the District Land Registrar Murang'a be directed that the order herein shall be instrument of subdivision and transfer of ownership of the portion of land measuring approximately zero decimal one (0.1) acres of land reference Number LOC.18/GACHOCHO/5388 from the Defendant to the Plaintiff.

e. That costs of this suit be provided for.

2. The application is supported by the grounds thereto and the affidavit of the Plaintiff annexed thereto.

3. The Defendant opposed the application vide a Replying affidavit filed on the 8/1/2018 where she *inter alia* averred that the Plaintiff occupied with the permission of her late father and hence he was a mere licensee.

The Plaintiffs case

4. At the hearing of the application the Plaintiff relied in his evidence in chief on the supporting affidavit dated the 21/12/17, the grounds upon which the application is based, witness statement dated the 30/5/18 and the list of documents annexed thereto.

5. It is his evidence that the suit land is registered in the name of the Defendant. The original land was LOC 18/GACHOCHO/1254 and was registered in the name of Davison Mwangi Macharia (deceased) who was the father of the Defendant. The Defendant is both the administratrix and beneficiary of the estate of her deceased father. It was subdivided into two portions to wit; LOC 18/GACHOCHO/5388 and 5389. He produced a green card to support his averment.

6. That though he was licensed by the then Muranga County Council to operate a kiosk at Ndugamano Market in Gachocho location in Kigumo District area, his kiosk was declared to be on a road reserve. In 1968 the Defendant's father gave him a portion of 0.1 acres from LOC 18/GACHOCHO/1254 at Karuiro shopping centre in Gachocho location to locate his kiosk. He was put in possession immediately and developed the kiosk. In 1970 with his small business thriving, he built a permanent building comprising of a house and 3 rooms at the backyard, which premises are now being rented for a bar business. He averred that the deceased also erected his business premises next to his.

7. That he has been in occupation of the suit land since 1968 to date with the full knowledge of the deceased family, the Defendant included. After the death of the Defendant's father on the 11/8/1984, he avers that initially he was included as a beneficiary but later a dispute arose relating to the distribution of the estate and the Defendant excluded him. That the Defendant became registered as the owner of LOC 18/GACHOCHO/1254 and subdivided it into two portions 5388 and 5389. The suit land comprises of 5388 which was registered in the name of the Defendant on 7/11/17. She has threatened him with eviction. It is his evidence that he has been in peaceful, open, continuous and uninterrupted use and occupation of the suit land for 49 years and therefore the title of the Defendant has been extinguished by way of adverse possession and the title is now vested in his name.

8. The Plaintiff further testified that he was allowed entry into the suit land by the Defendant's father to build the shop/building. That he did not buy the suit land but expected the deceased to give him the suit land he had built.

9. Pharis Ndungu Njoroge adopted his witness statement filed on the 30/5/2018 and stated that he knew the Defendant's father and the Plaintiff well. From his knowledge he informed the Court that he is aware that the Plaintiff has occupied the suit land since the 1970s with the permission of the Defendant's father. That initially he operated a kiosk on a road reserve before moving onto the suit land. That his occupation was with the knowledge of the Defendant, her father and family and in recognition of his occupation and possession the family of the Defendant included the Plaintiff in the list of the beneficiaries of the estate of the Defendant's father but was later excluded.

10. The Defendant in her evidence testified and relied on her Reply affidavit sworn on the 8/1/18, witness statement and the list of documents filed on the 31/5/18. She informed the Court that she is the daughter of Davison Mwangi Macharia, the registered owner of the original land LOC 18/GACHOCHO/1254. That pursuant to succession she inherited LOC 18/GACHOCHO 5388 which was a subdivision of 1254. That 5389 was vested in the name of her step mother Winnie Mugure and is not subject to this suit. That the suit land is situated in Loc 18/GACHOCHO/5388 registered in her name. It is her case that the Plaintiff had been listed as one of the beneficiaries of the estate of her late father in the lower Court but on appeal he was not found as of the persons entitled to the estate hence his name was excluded.

11. She averred that the Plaintiff utilized the suit land with the permission of her late father and thus was a mere licensee. That he used to pay rent in the sum of Kshs 300/- before he was asked to vacate for defaulting on the rentals in around 1970. That her deceased father died before evicting him. She refuted the Plaintiff's claim that he has been in occupation and possession of the suit land between 1975 and 2016. She stated that she was not privy to the agreement between the Plaintiff and her late father. That the suit land vested in her name on the 7/11/17 and therefore adverse possession cannot have accrued against the said title.

12. She stated that the suit of the Plaintiff is resjudicata given that the matter was heard and determined in the succession Court all the way to appeal in the high Court.

13. Further she testified that she does not know when the Plaintiff made entry into the land. The Plaintiff is still on the suit land and has rented the premises to a third party who uses it as a bar.

14. Parties have filed written submission which I have read and considered.

Determination

15. The undisputed facts are as follows; the suit land was owned by the Defendant's father who allowed the Plaintiff to construct a kiosk and later a building that exists today; the Plaintiff is still in occupation and possession of the suit land. The suit land is now vested in the name of the Defendant.

16. The key issues for determination are; whether the suit is resjudicata; whether the entry of the Plaintiff into the land was permissible; whether the Plaintiff has established a claim for adverse possession; who meets the costs of the suit.

17. It is the Defendant's contention that the suit is resjudicata having been heard and determined in the succ cause No 174 of 1995 Muranga and later in HCCC No Civil Appeal No 3 of 2001 where the Plaintiff was found not to be entitled as a beneficiary to the estate of the late Davison Mwangi Macharia.

18. Section 7 of the Civil Procedure Act states 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.

19. It is the understanding of this Court that the suits referred to in para 18 were in relation to succession of the estate of the late Davison Mwangi Macharia. In it the succession Court determined the asset of the estate and alongside it identified the beneficiaries entitled to inherit the estate of the deceased. This case relates to a claim in adverse possession in respect to a right of ownership in land. It cannot therefore be said that the issues in the succession cause are the same as in this case. The Court holds and finds that this case is not resjudicata.

20. Was the entry of the Plaintiff into the land permissible? In the case of Gabriel **Mbui v Mukindia Maranya [1993] eKLR** Justice Kuloba discussed this aspect in great detail as follows;

“The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If

one is in possession because of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the ground of charity or relationship was intended, limitation operates from the time when possession first became adverse; a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence; where possession was consensual or contractual in its inception, it cannot be called "adverse". Thus, when the vendor gives possession in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken. It does not matter how one describes the nature or the giving or taking of possession, but if the occupier did not go into possession against the will of the owner, and if the owner's will accompanied the occupier's possession, the owner thereby gives leave, permission, or consent to the occupier, and the occupier is not a trespasser or anything like that. The actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as "hostile" possession, to emphasize that "hostility" is the very marrow of adverse possession. In addition, to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (**Cobb v Lane [1952] 1 All E R 1199; Denning, MR, in Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and B P Ltd [1974] 3 All ER 575 at p 580; Chanan Singh, J, Jandu v Kirpal and another (1975) EA 225 at pp 233, 234, 237; Madan, J (as he then was), in Gatimu Kinguru v Muya Gathangi, 1[1976] Kenya L R 253, at pp 257, 258**);

21. In his evidence in chief the Plaintiff expressed himself as follows;

" I was allowed by Davison Mwangi to build the shop on his land. I did not buy the land from Macharia. I was not a purchaser. I expected the said Macharia to give me the land that I had built."

22. Pharis Ndungu Njoroge testified and stated to the Court as follows;

" Davison Mwangi Macharia allowed the Plaintiff to build on his land".

This evidence is consistent with the evidence of Erastus Gatere and Nicholas Njama when they informed the Court in the succession case in the lower Court that the Plaintiff utilized the suit land with the permission of the late Davison Mwangi Macharia.

23. In the case of Samuel Miki v. Jane Njeri Richu CA No. 122 of 2001 the Court held that;

"It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of or in pursuance of an agreement of sale or lease or otherwise."

24. In the case of **Mwinyi Hamisi Ali Vs Attorney General and Philemon Mwaisaka Wanaka Civil Appeal No 125 of 1997** it was held that;

" adverse possession does not apply where possession is by consent and in a Court of law sympathy takes a second stand as the Court is governed by statutes.

25. The Plaintiff has not adduced evidence to show when the permission became adverse or hostile to the title of the original owner as well as the current owner. The Court finds and holds that the entry into the land was permissive.

26. Has the Plaintiff proved adverse possession? At the heart of the doctrine of adverse possession is hostile occupation and use of land in a manner inconsistent with the rights of the registered owner and amounting to dispossession of the owner, for a period of 12 years.

27. From the evidence on record, this Court is not satisfied that the Plaintiffs have discharged the onus of proof on a balance of probabilities that a claim of adverse possession has been proved. In the case of **Peter Njau Kairu v. Stephen Ndung'u Njenga & Another C.A. 57of 1997, CA** such evidence must be stringent and straightforward because a property owner should be deprived of his title only in the clearest of cases. None has been led to oust the title of the Defendant.

28. Consequently, the Plaintiff's case is dismissed with costs.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 8TH DAY OF NOVEMBER, 2018.

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of:

Plaintiff present in person

Defendant – Absent. Advocate is present.

Irene and Njeri, Court Assistant