



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 269 OF 2017(OS)

FRANCIS KAMAU IRUNGU.....1ST PLAINTIFF

(Legal representative of the estate of ESTHER WANJIRU NJOROGE-deceased)

FRANCIS KAMAU NJOROGE alias

FRANCIS KAMAU NDUNGU.....2ND PLAINTIFF

MUTARI NJOROGE.....3RD PLAINTIFF

VERSUS

WILLIE MWANGI NDEGWA.....DEFENDANT

JUDGMENT

1. Esther Wanjiru Njoroge brought the initial suit filed on 21/5/2013. Upon her demise and with leave of Court, she was substituted by Francis Kamau Irungu on 20/9/2017. The Plaintiff moved the Court by way of Originating Summons. She sought orders that the Plaintiffs have acquired title by way of adverse possession over Loc 8/FORTHALL/THERI/37 (suit land) and that the title should be cancelled and registered in the name of the Plaintiffs.

2. In her supporting affidavit, the Plaintiff deposed that the suit land was initially registered in the name of Gakuru Mutari. Gakuru Mutari (Ndegwa Thuo Kinja alias Haron Ndegwa Thuo Kinja) and her husband, namely Njoroge Mutari were brothers. It is her case that they entered into the land pursuant to a sale and have lived there uninterrupted since 1963. That after handing over the land to them, Gakuru Mutari and his family relocated to Malewa in the Rift Valley where he died. That he never set foot again on the land during his lifetime. She contends that though the Defendant succeeded his father and became registered owner of the suit land in 2013 pursuant to a grant issued on 28/12/2012 in Succession cause SPMCC No 75 of 2011, Muranga, he held it in trust for her family since the title of the said Gakuru Mutari became extinguished through adverse possession by the time he Gakuru Mutari died in 1995. Her husband died in 1983 and was buried on the suit land along with other relatives thereafter.

3. In his replying affidavit filed on the 16/1/2014 the Defendant denied the Plaintiffs' claim and stated that the Plaintiffs entered into the suit land with the permission of the then registered owner Gakuru Mutari. That they were licensees. That upon becoming the registered owner he revoked the said licence through an eviction notice issued on 15/8/2013 requiring the Plaintiffs to vacate the suit land. That the Plaintiffs cannot be said to be destitute as they have other pieces of land at LOC8/GITURA-KAIRICHI/136 and LOC 8/KAHATIAS-THERI/31. Contending that burial of relatives does not confer proprietary interest in land, he urged the Court to dismiss the Originating Summons with costs.

Evidence of the Plaintiffs

4. The 1st Plaintiff testified and stated that the suit land belonged to Gakuru Mutari and his family and has lived on the suit land since 1963 pursuant to a sale agreement between his father Njoroge Mutari and his brother Gakuru Mutari. That his father bought the land at Kshs 1200/-. At the time of the alleged sale he was 12 years old having been born in 1951. He informed the Court that they have been in sole and undisturbed possession of the suit land since 1963. He has built a business premise and a granary while his brother Mutari Njoroge has built his residential house thereon. That jointly and severally as a family they cultivate bananas, nappier grass maize and beans on the suit land. That his father and mother are buried on the suit land. He stated that the family owns two other parcels of land; LOC8/GITURA-KAIRICHI/136 and LOC 8/KAHATIAS-THERI/31. He stated that those two lands are not steep and are suitable for burial. That no one has denied them to build permanent houses.

5. In cross-examination, the witness informed the Court that he did not produce any contract of sale to evidence the sale nor any photographs to indicate the developments that he earlier alluded to. He denied receiving any notices to vacate the suit land. That he did not object to the issuance of the grant of letters of administration in respect to the estate of Gakuru Mutari.

6. PW2 – Wilson Njuguna Kungu in his brief testimony informed the Court that he is a neighbor of the Plaintiff and he has personal knowledge that they have occupied the suit land while the family of Gakuru Mutari have never lived on the land. That they live in Ol Kalau. That he was aware that Gakuru Mutari sold the suit land to Njoroge Mutari at KShs 1200/- through an informal agreement. On being cross-examined by Mr. Kirubi for the Defendant, he stated that he was present at the time of the sale of the suit land. He also informed the court that he was not aware if the Plaintiffs sued the Defendant's father claiming land.

Evidence of the Defendant

7. DW1- Willie Mwangi Ndegwa relied on his witness statement filed on the 4/2/14 in addition to the evidence he adduced at the hearing. He informed the Court that he is the son of Gakuru Mutari the original registered owner of the suit land. The land was inherited from their father Mutari Kamau. That his brothers including the Plaintiff's father was also given land. That in 1957 his father left to work in a settler's farm in Rift Valley. He went with his family and left the suit land under the care of his brother Njoroge Mutari. He permitted Njoroge Mutari to construct houses, as his own land was steep and not suitable for construction of houses. He informed that Court that his father did not sell the suit land to the Plaintiffs' father. That in 1983, his father allowed the burial of Njoroge Mutari because his own land was unsuitable for burial. That at the burial the family representative one Kamau Nyagi Mbauni made it clear to all family members that the burial Njoroge Mutari on the suit land did not entitle the deceased of the suit land but for the unsuitability of his land for burial. That his father too allowed a stepmother of the Plaintiff's one Wanjiru Mutari to be buried on the suit land. That he objected to the burial of the Plaintiffs mother Esther Wanjiru without much success.

8. Upon the death of his father in 1995, he succeeded him and became registered owner of the suit land in 2013 through succession. That through his advocates he notified the Plaintiffs to vacate the suit land on the 15/8/2013. That his father allowed the family of the Plaintiffs to bury their father on the suit land as their other parcels of land were not suitable for burial. However, he objected through the County Commissioner's office to the Plaintiffs mother's burial in 2015 as well as the installation of power lines on the suit land by KPLC in 2014, albeit unsuccessfully.

9. DW2- John Gitau Ndegwa testified that he was born on the suit property in 1943. That his father moved his family to his work place at a Settler's farm in Rift Valley in 1957 and left the suit land in the care of his brother Njoroge Mutari. He later worked in Kitale and then Nakuru before relocating and settling at Malewa in Naivasha with his family. That his father frequently visited the suit land in Muranga. That at the death of his uncle Njoroge Mutari, his father and the elders agreed to bury him on the suit land due to the unsuitability of Njoroge Mutari's land. It was sloppy and unsuitable for burial. That the family spokesperson clarified that the burial of Njoroge on the suit land did not give him or his dependants any rights over the suit land. He denied any sale of the land by his father to Njoroge Mutari.

10. The Plaintiffs submitted that the sale of the land was based on an oral agreement, which was recognized by the Law of Contract Act. The law recognized an oral agreement as long as it was coupled with performance of the same such as taking possession. That the consideration was paid in full the same day and the transaction was not subject to the Land Control Board Act, which came into existence in 1967, three years after the agreement. That time started running in 1963 and at the death of Njoroge Mutari in 1983, 12 years had lapsed. That the Plaintiffs have laid claim on the land on their own right and not under the title of Njoroge Mutari. That the nature of possession of the land by the Plaintiffs is such that they dispossessed the late Gakuru Mutari. They exercised the necessary animus possidendi by building houses, cultivating the land, burying their dead and even granting a way leave to KPLC over the suit land, just as an owner would do. These activities they submitted are inconsistent with a licence. The said Gakuru Mutari had full knowledge of their possession. Further, they submitted that the Plaintiffs were not caretaking the suit land. The Defendant did not adduce evidence to support this allegation. In any event, they argued there is no law that states that permanency in land occupation is determined by the permanent crops like coffee and tea on the suit land. Relying on the case of **Peter Mbiru Michuki Vs. Samuel Mugo Michuki (2014) EKLR**, they submitted that a purchaser in possession of the land purchased after paying full purchase price is a person in whose favour the period of limitation can run. They submitted that there was no necessity for the Plaintiffs to raise an objection to the confirmation of grant of letters of administration, as they are not entitled as beneficiaries of the lineage of Gakuru Mutari. That it was not necessary in view of section 16 of the Limitation of Actions Act, which provides that an administrator of the estate of a deceased person be taken to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration. That the acquisition of title by the Defendant in 2013 did not defeat the rights of the Plaintiffs.

11. The Defendant in his lengthy submissions stated that the onus to prove adverse possession lay with the Plaintiffs to do so on a balance of probabilities. The Plaintiffs were faulted for failing to discharge this duty. The Defendant averred that he became registered as owner pursuant to succession cause filed in 2013 in respect to the estate of this late father. That the Plaintiffs did not object to the issuance and confirmation of the said grant to assert their rights of adverse possession and in so doing their Originating Summons is rendered defective as relates to the suit land. That time started running for purposes of adverse possession in 2013 when the defendant became registered as owner of the suit land, which is only 4 months and therefore incapable of sustaining a claim under adverse possession.

12. Citing the Court of Appeal case of **Titus Mutuku Kasuve vs Mwaani Investments and 4 others** the Defendant submitted that the Plaintiffs should have sued the Defendant as an administrator of the estate of Gakuru Mutari and not in his personal capacity. That a claim of adverse possession against the beneficiaries of an estate is not maintainable in law. That the Plaintiffs are claiming land registered in the name of a deceased person, a suit can only be filed through the administrator of the estate, and the same should be filed before the estate is wound up. The Plaintiffs have sued the Defendant in his personal capacity and not as the administrator of the estate of his father and the claim must fail on that ground.

13. The Defendant submitted that adverse possession could only be claimed against the properly registered owner of the land. In this case, the Defendant was registered as owner of the suit land in 2013 and the Plaintiffs sued the Defendant, only 4 months upon registration. They cited the case of **Mwinyi Hamisi Ali Vs AG & 2 others CA 125 of 1997** where the Court of Appeal held that it is only the registered owner or rather their estates who should be parties to a suit for adverse possession.

14. Further, the Defendant submitted that the suit land was occupied by the Plaintiffs' father with the permission of the registered owner Gakuru Mutari. This rendered them licensees on the land. Adverse possession cannot be sustained where entry was permissive. He cited the case of **Wambugu Vs Njuguna (1998) KLR 172**.

Determination

15. The following facts are commonly admitted by the parties in this suit;

- a. The suit land was registered in the name of Gakuru Mutari on 28/3/1962. On the 26/11/86, a change of name was registered from Gakuru Mutari to Ndegwa Thuo Kinja.
- b. Gakuru Mutari and Njoroge Mutari were blood brothers.
- c. Njoroge Mutari occupied the suit land with his family since 1963 or thereabouts. They have continued to so occupy todate.
- d. Njoroge Mutari died in 1983 and was buried on the suit land. His wife Esther Wanjiru Njoroge died on 5/5/2015 and was substituted with her son Francis Kamau Irungu who was the 2nd Plaintiff originally. She was also buried on the suit land.
- e. Gakuru Mutari died in 1995 and his wife and son were appointed legal representatives of his estate vide succession cause no 75 of 2011, Muranga. Subsequently the land became registered in the name of the Defendant in 2013.
- f. The Plaintiffs have lived on the land since 1963, earlier through their parents and on their own todate.

16. Have the Plaintiffs established title by adverse possession? The Law on adverse possession in Kenya is very clear. I will highlight some sections of the Limitations of Actions Act Cap 22 and the Registration of Land Act No 6 of 2012 that anchor the doctrine of adverse possession.

Section 7 states that -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

Further, in Section 13 -

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”

Finally, Section 38(1) and (2) states;

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

The combined effect of the sections above is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years in adverse possession of the suit land.

17. Section 28(h) of the Land Registration Act, 2012 recognizes overriding interest on land some of which as rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the Land Act, 2012 prescription is one of the ways of acquisition of land.

18. For one to succeed in a claim for adverse possession you must show the following; that he has been in continuous and uninterrupted possession of the land for 12 years or more; that such possession has been open, continuous, and notorious to the knowledge of the owner; that such possession was without the permission of the owner and lastly that the plaintiff has asserted a hostile title to the owner of the property.

19. In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for adverse possession has to prove in the following terms;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

20. 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.

21. The burden to prove on a balance of probabilities that they had been in adverse possession of the suit property lay with the Plaintiffs. Possession is a question of fact depending on the circumstances of each case.

22. The Defendant has alleged that the Plaintiffs have been in possession of the land with the permission of his late father. According to his evidence his father left the land with his brother Njoroge Mutari to take care of whilst he was working in Rift Valley on settler farms and later settled with his family at Malewa in Naivasha. The Plaintiffs averred that their father entered into the land through an oral agreement which coupled with payment of the full purchase price and possession, became a valid agreement. This evidence was corroborated by PW2 who testified that he was present during at the time of the transaction. On cross examination by the Defendants counsel he stated as follows;

“ I am aware that the land was purchased by the Plaintiff’s father. I was present. I am not aware of any agreement of sale. The sale took place in 1963”

23. If the Defendants assertion is anything to go by, the question that begs an answer is why Gakuru Mutari did not reenter or retake the land from the Plaintiff’s father for so many years. It is in evidence that he settled in Rift Valley and never set foot on the land again. This can be prima facie evidence that he indeed had dispossessed himself of the land by way of sale to his brother Njoroge Mutari. It is not probable that an owner would leave his land under the care of another and return half a century later to claim it. The doctrine of laches would militate against an indolent owner. This Court holds and finds that on a balance of probability, the plaintiffs’ version that there indeed a sale is more probable.

24. When does time start running? In the case of **Public Trustee vs Wanduru (1984) KLR 314 at 319, Madam J A** stated that adverse possession should be calculated from the date the payment of the purchase price to the full span of 12 years if the purchaser takes possession of the property because from this date the true owner is dispossessed of possession. In this case evidence has been led that the payment was made in 1963 and possession was handed over to the Plaintiffs parents who lived there until their demise leaving the plaintiffs in situ to date. It therefore follows that the title of adverse possession started running in 1963 and by 1975 adverse possession had accrued and vested in the name of Njoroge Mutari.

25. In **Mwangi Vs Mwangi (1986) KLR 328** it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. This case established the principle that the rights of a person in possession or occupation are equitable rights which are binding on the land.

26. The right of adverse possession therefore accrued during the lifetime of the Defendant’s father. There is no evidence that has been led to show that he took any steps to reenter the land. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. In this particular case evidence was led by the Plaintiffs they occupied the suit land and upon payment of the purchase price and were put in possession by the Purchaser in 1963. The registered owner therefore was dispossessed of the suit land and according to the evidence by the Plaintiffs no one has dispossessed them nor have they handed over possession. It is their evidence that their possession has neither been broken nor interrupted.. The In the case of **Francis Gacharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (UR)**:

“...the possession must not be broken, or any endeavours to interrupt it.”

27. The Plaintiffs led evidence that they have been in exclusive control of the suit land and demonstrated their *animus possidendi* in developing the suit land through construction of the semi-permanent houses and practicing subsistence farming on the suit land as though it was theirs as of right. That they have done this since 1963 to date openly and without interruption by anyone least the Defendant and his family.

28. Chanan Singh J, in **Jandu v Kirpal [1975] E A 225, at p 237** and Simpson, J (as he then was), in **Wainaina v Murai and others [1976] Kenya L R 227 at p 231** were unanimous that the paper owner must have knowledge of the occupation of the adverse possessor and that he has been dispossessed. In this case the Defendant’s father had knowledge of the open and exclusive possession of the suit land by the Plaintiffs.

29. In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of facts” **Kweyu v Omuto, C A Civ Appeal 8 of 1990** (unreported). This Court is satisfied that the Plaintiffs have proved adverse possession. The title of the suit land is being held in trust for the Defendant, the right to title having

accrued to the Plaintiffs way back in 1975.

30. Final orders;

- a. The Plaintiffs have established a right to the suit land by way of adverse possession as prayed.
- b. The title to the suit land be and is hereby cancelled and the same be registered in the names of the 3 plaintiffs as absolute owners.
- c. The Deputy Registrar of this Court is ordered to execute all the documents necessary to effect transfer in the names of the Plaintiffs.
- d. Parties being related, each to bear their costs of the suit.

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:

Mbuthia for the 1st, 2nd & 3rd Plaintiffs.

Kirubi for the Defendant.

Irene and Njeri, Court Assistants