



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND CASE NO. 90 OF 2013 (OS)

GEOFFREY NKONGE MAIRANYI PLAINTIFF

VERSUS

THIURU M'RUGERA.....1ST DEFENDANT

TIMOTHY KIMATHI MARETE.....2ND DEFENDANT

JUDGMENT

1. By way of an Originating summons dated 26th March, 2013, plaintiff is claiming entitlement to land parcel number **NGUSISHI SETTLEMENT SCHEME/1303** by adverse possession. The land is about one acre. He avers that he has lived on this land and has cultivated the same openly and continuously from the year 1999 to date. He therefore claims that 1st Defendant's title ceased and could not pass to the 2nd Defendant.

2. The suit is grounded upon the affidavit of Geoffrey Nkonge Mairanyi sworn on 26th March, 2013. He averred that the 1st Defendant was the registered owner of Land Parcel NGUSISHI SETTLEMENT SCHEME/1121. That in July 1999 the 1st Defendant agreed that he enter into and start cultivating the portion of one acre pending its purchase. He openly and continuously lived, occupied and farmed the same until 3rd December, 2001 where the sale of land was formalized and the 1st Defendant accepted receipt of Kshs. 60,000 as consideration.

3. The suit has been opposed by the Timothy Kimathi Marete, the 2nd Defendant through his Replying affidavit filed on 11th April 2013.

4. The 1st defendant did not file any response to the Originating summons. However, he has participated in these proceedings as a witness for 2nd defendant, though he even recorded a statement for plaintiff's side too.

5. The matter was heard via *viva voce* evidence. The Plaintiff testified and called three witnesses. **PW1 Geoffrey Nkonge (plaintiff)**, adopted his statement which he wrote on 27th February 2018 as his evidence along with the contents of his affidavit, the one filed with the Originating Summons whereby he produced the annexures 1-6 thereof as plaintiff exhibits 1-6 respectively.

6. Plaintiff's case is that it is his son who was working on that land before he (plaintiff) bought it in year 2001. He avers that he took possession of the land and to date his son who testified as **PW 4** is in occupation of the suit land. Plaintiff further states that the original land parcel was number 1121, but was subdivided into several portions such that his one acre is now **Land Parcel no. NGUSISHI SETTLEMENT SCHEME/1303 (hereinafter- 'suit land')**. Plaintiff claims that 1st Defendant purported to transfer the Suit Land to the 2nd Defendant on 24th January, 2012, yet he has acquired title for the suit land since 1999, his occupation having been exclusive and without disturbance for a period of over 12 years, until, 9th October, 2012 when he received a notice from the 2nd Defendant's advocates asking him to vacate the Suit Land.

7. **PW2** and **PW3** appear to be from the same neighbourhood with plaintiff. Their evidence is that the year 1999 is when they started to see the son of plaintiff on the suit land and that this son has never left the suit land. They also aver that later in 2001, plaintiff bought the land from 1st defendant.

8. **PW4** who is a son of the plaintiff adopted his statement of 27th February, 2018 as his evidence. His evidence is in support of what the other plaintiff's witnesses have stated.

9. Defence side had two witnesses, they are the two defendants. **DW1 Zakayo Thiuru** is the original owner of the Suitland. He adopted his statement filed on 3rd May 2018 as evidence. He however admitted that he also wrote another statement at the office of advocate for the plaintiff and is dated 27.2. 2018. In both statements, he admits that he sold land to plaintiff. In the statement of 27.2.2018, he avers that he also sold a different parcel of land to 2nd defendant. In the statement of 3.5.2018, he avers that plaintiff failed to pay him the agreed amount,

that is why he sold the same land to 2nd defendant.

10. **DW2 Timothy Kimathi Marete** adopted his statement filed on 3rd May 2018 and his affidavit of 11th April 2013 as evidence. He told the court that he is the registered owner of the suit land of which he is in possession of. He admits that when he went to view the land at the time of buying the same, he found a semi-permanent house built there. During cross examination, he admitted that Danson Kirimi, the son of the plaintiff is on the suit land and he has two houses.

11. It is not in dispute that 2nd defendant is the registered owner of the suit land. It is also quite apparent that PW4 has been in occupation of the suit land for many years. However, 2nd defendant seems to have also brought a structure there, after he bought the land.

12. I have considered the record, the evidence and submissions brought before this court. The question for determination before me is: **whether the Plaintiff acquired L.R. NO.NGUSISHI SETTLEMENT SCHEME/1303 through adverse possession?**

13. Bryan A. Garner, *Black's Law Dictionary*, Ninth Edition, 2009, Thomson Reuters at page 62 defined adverse possession as:

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person’s claim and is continuous, exclusive, hostile, open, and notorious.”

14. Accordingly, to acquire land through adverse possession there must be an exclusive, uninterrupted possession and occupation of the land for a period of twelve years. The occupation must be one that is not without the consent of the owner.

15. Further, in the case of **James Mwangi and others vs. Mukinye Enterprises Ltd Nairobi High Court civil case number 3912 of 1986**, it was held that a person relying on adverse possession must show:

- a) Clear possession;
- b) Lack of consent of the owner; and
- c) Occupation for more than 12 years before action.

16. **Has the Plaintiff met the requirements of an adverse possessor?** Without a doubt, plaintiff’s agent, the son, has been using the suit land even before plaintiff bought the same. As to when this use commenced, it is not very clear. From the evidence adduced, the Plaintiff stated that he was allowed to settle on the Suit Land by the Defendant upon part-payment of its consideration. This has not been denied by the 1st Defendant. In his affidavit of 26.3.2013, plaintiff has mentioned July 1999 as the time he took possession of the suit land. This is also reiterated by his witnesses including his son in their recorded statements.

17. However, in his statement dated 27.2.2018, plaintiff avers that the year 1999 is when his son, **PW 4** leased the land from 2nd defendant, then on 3.12.2001, he bought this land from 1st defendant. While on the dock during his evidence in chief, cross examination and re-examination, Plaintiff repeated mentioned the year 1989 as the year he took over the land.

18. In a case of adverse possession, the manner in which one entered the land is very crucial. In the present case plaintiff has availed a land sale agreement, which is plaintiff exhibit 2 which bears the date of 3.12.2001. Any occupation of the land prior to this date appears to have been with the consent of the owner of the land since plaintiff even admits that his son used to lease the land. I am therefore not in agreement with plaintiff’s submissions that time runs from 1999.

19. Clause 5 of the said agreement of (of 3.12.2001) indicates that the transaction was a controlled one as per the applicable law of the land control Act. A person cannot claim adverse possession during the time of validity of the contract. Section 8 of the Land Control Act provides for 6 months to have the consent. In this case, no such consent was obtained and hence, transfer was not affected. It follows that time started to run six months from the time the agreement was made, which date falls on 3.6.2002. Time can also be computed from the time the last installment was paid. It is not clear when this was done. This suit was filed on 26.3.2013. If computation of time is done from 3.6.2002 to 26.3.2013, then occupation in between was 10 years and 9 months. If computation is done from time of the agreement (since it’s not clear when any other instalments were made), then the occupation in between was for 11 years and 3 months. In both instances, the statutory period required under section 38 of the limitation of Actions Act has not been met.

20. In the final analysis, I find that plaintiff has not proved his case on a balance of probability. The suit is dismissed with costs to defendant. Any orders of injunction and inhibition that may be in force are hereby discharged.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 8TH NOVEMBER, 2018 IN THE PRESENCE OF:-

C/A: Janet

Gitonga for plaintiff

Ashaba H/B for Kimathi K for Defendant

Defendants

Plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE