



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 291 OF 2015 (O.S)

BERNARD MAINA WACHIRA.....PLAINTIFF

VERSUS

FRANCIS NJUKI GAIITHIDEFENDANT

JUDGMENT

1. The plaintiff herein took up the originating summons dated 8th December, 2015 for determination of the questions summarized as follows:

(i) whether he has become entitled to be registered as the proprietor of the parcel of land known as LR No. Kirimukuyu/Mbogo-ini/145 in place of the defendant by adverse possession;

(ii) who should bear the costs of the suit?

2. As can be discerned from the plaintiff's pleadings and the evidence led in support thereof, the plaintiff's case is premised on the grounds that his family and he have lived in the suit property for over 49 years; that he has extensively developed the suit property by building semi permanent houses therein, planting over 50 coffee trees, planting over 200 assorted trees and digging a bore hole in the suit property and that the defendant does not utilize the suit property.

3. The defendant denies the contention that the plaintiff has gained proprietary rights over the suit property and explains that the plaintiff has been occupying the suit property on account of being his relative, (nephew); that he allowed the plaintiff to occupy the suit property after his sister, who was married, returned home and joined her mother whom he was accomodating in the suit property.

4. Terming the plaintiff his licensee in the suit property, the defendant argues that the fact as to whether or not he occupies the suit property and whether or not the plaintiff has effected developments in the suit property is immaterial for the purposes of the claim for adverse possession as the plaintiff is merely a licensee in the suit property.

5. Pursuant to directions taken on 20th June, 2016 to the effect that the originating summons be converted into a plaint and the replying affidavit to a defence and that the suit be disposed of by viva voce evidence, the parties to this suit tendered evidence reiterating their respective positions concerning the subject matter of this suit, to wit the plaintiff's occupation of the suit property.

6. On his part, the plaintiff informed the court that he was born and brought up in the suit property and he still resides therein to date. He has effected massive developments in the suit property, planted 50 coffee trees, 200 blue gum trees, 200 assorted trees, mangoes included. He has also dug a well in the suit property. His family lives in the suit property.

7. He informed the court that the defendant wants to evict him from the suit property after residing therein for 50 years without interruption.

8. He complained that during the pendency of the suit, the defendant felled 200 trees. He reported to the police who took no action because the defendant is the registered owner of the suit property. The court heard that the defendant has directed him not to touch the coffee or his trees. He urged the court to grant him permission to continue utilizing and tending his crop and trees arguing that he should have been given time to remove what he had planted in the suit property.

9. In cross examination, he stated that he has all along known the defendant as his father. In school, he was known as Benard Maina Wachira. He does not know whether his mother was ever married. He maintained he was born in 1965 in the suit property.

10. The court heard that the suit property initially belonged to the plaintiff's maternal grandmother who gave it to the defendant. She did so when his mother was a student.

11. They lived with their grandmother in the suit property before she died. He does not know who built the house they lived in.
12. There was coffee, tea and trees planted in the suit property. All along he believed the coffee belonged to his grandmother because his mother used to pick the tea.
13. Concerning the defendant's contention that he is a licensee in the suit property, he stated that he is not aware that he is on the suit property courtesy of his mother having been given accommodation by her brother because she separated from her husband.
14. The court heard that he met his father while he was already an adult. His father passed on in 2006.
15. He stated that he is aware that his father had land in Cheregany but he is not aware that his mother was given a portion of that land. He is also not aware that his father has land in Tumu Tumu.
16. He maintained that he planted trees in the suit property without any question from the defendant.
17. In a rejoinder, the plaintiff stated that he has not signed any document to the effect that he is in occupation of the suit land with either the defendant or his mother's permission. He has always known that the suitland belongs to his grandmother. He stated that he did not at any time ask or need the consent of the defendant. If he was a trespasser, his uncle should have prevented him from planting coffee and trees therein. According to him, no evidence has been adduced to show that his mother was given a portion of his father's land or his father owned land in Tumu Tumu.
18. P.W.2 Augustine Wachira Muchiri, informed the court that has known the plaintiff since childhood. He stated that he does not know the owner of the suit land but knows that it has been utilized by the plaintiff and his family. When they were young the plaintiff kept saying the defendant was his father but never met the defendant until late eighties. He informed the court that in the suit property, there is coffee and other crops planted therein and that Coffee occupies a third of the suit property.
19. The defendant who testified as D.W.1, informed the court that the plaintiff is his sister's son. He acknowledged that both the plaintiff and his sister live in the suit property having lived there since 1965.
20. He informed the court that his sister left her husband and came to live with his mother who was living in the suit property. He allowed his sister to live in the suit property and put it in writing but he never entered into any arrangement with the plaintiff.
21. In cross examination, the defendant stated that by 1959, when land demarcation and consolidation took place, the plaintiff's mother was in primary school. Women and girls were not being registered as land owners. He stated that he has 150 coffee trees in the suit property and that if the plaintiff planted any trees, it was through his mother whom he had permitted into the land and had permission to cultivate and take care of his land. He admitted that the plaintiff has built a small house in the land but stated that he had on several occasions asked the plaintiff to vacate the suit property because he had started claiming ownership to his land. He acknowledged the plaintiff has lived in the suit property for over 50 years but contended that he did so with his permission.
22. He told the court that he does not know whether the plaintiff has any other place to move to once he moves out of the land but stated that he is aware that the plaintiff's mother has been given land by the plaintiff's father although he had no documents to prove that.
23. In re-examination, he stated that the continued stay of the plaintiff in the suit property has been with his permission.
24. D.W.2, Emma Mumbi Gaiithi, the plaintiff's mother and the sister to the defendant informed the court that she lives in the suit property which belongs to the defendant.
25. She informed the court that she disagreed with her husband in 1965 by which time she had two children. At that time, her mother and the defendant were living in the suit property and the defendant was in the university. The defendant allowed her to live in his land and utilize it to assist herself and her children. She stated that the plaintiff is on the land courtesy of her and that she is the one with permission from her brother who had even allowed her to bury her son in the suit property. She is not demanding any portion of land from the defendant. She stated that before her husband died, he gave her twelve and a half acres which land is registered in the name of the plaintiff.
26. In cross examination, D.W.2 maintained that they live in the suit property with the defendant's permission. She acknowledged that the plaintiff buried his son in the suit property but with her permission and out of the respect the defendant has for her, as his sister.
27. She maintained that she was given land by her husband which she gave the plaintiff but the plaintiff sold it. She acknowledged that the plaintiff has lived in the suit land for over 50 years with his family. She reminded the plaintiff that she lives in the defendant's house and if the defendant requests her to leave, she will leave without question.
28. In re-examination, she reiterated that she is in the suit property with the permission of her brother and that she is not claiming anything from him. She stated that her children have no right to demand anything from the defendant because they have their father and that is the person they should claim land from.
29. At close hearing, parties filed submissions which I have read and considered.
30. From the pleadings filed in this suit and the submissions I find the sole issue for determination to be whether the plaintiff has made up a case for being granted the orders sought or any of them.

31. With regard to that issue, it is common ground that the plaintiff and his family have lived in the suit property for a long period of time; over 50 years. However, because the defendant was issued with a title deed in respect of the suit property in 2007, time for purposes of the plaintiff's claim for adverse possession against the title held by the defendant only began to run from the time he was issued with a title deed in respect of the suit property and not before. However, this is not to say that the plaintiff could not urge a claim for adverse possession against the person who held the suit property before the defendant and claim that the transfer of the suit property to the defendant was subject to his interest in the suit property by virtue of having gained proprietary rights over it. In such a situation, the plaintiff would be required to prove that the rights of the defendant's predecessor in entitlement to the suit property had been extinguished by his adverse possession and that the defendant's ownership of the suit property is subject to a trust in his favour on account of the rights which had accrued in his favour. Unfortunately, in the circumstances of this case, the plaintiff chose to directly urge his case against the title held by defendant yet he is unable to show the time required to acquire land by adverse possession against that title had accrued in his favour. I say this because from the time the defendant became the registered proprietor of the suit property and the time the suit herein was filed, barely 8 years had elapsed, meaning time for purposes of urging a claim for adverse possession against the title held by the defendant had not accrued in his favour.

32. As the plaintiff cannot succeed in his claim for adverse possession without first satisfying the threshold of time, I need not consider the issue as to whether his occupation of the suit property was with the permission of the defendant or his mother save to say that as a distinct individual from his mother, the plaintiff could, upon satisfaction of all the ingredients of acquiring land by adverse possession, acquire land against the defendant regardless of the fact that his mother's entry into the suit property was with the permission of the defendant.

33. The upshot of the foregoing is that the plaintiff has not made a case for being granted the orders sought or any of them. Consequently, his case is dismissed with costs to the defendant.

Dated, Signed and Delivered in open court at Nyeri this 20th day of December, 2018.

L N WAITHAKA

JUDGE

Coram:

Bernard Maina Wachira – plaintiff

Ms Macharia for the defendant

Court assistant - Esther