



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 415A OF 2017

STANLEY WARIMA WAWERU.....APPLICANT

VERSUS

NDONGA MUNGA.....1ST RESPONDENT

FRANCIS NDONGA NGUTHI.....2ND RESPONDENT

JUDGMENT

1. The Applicant (hereinafter called the Plaintiff) brought an Originating Summons against the Respondents (hereinafter called the Defendants) on the 4/7/17. With leave of the Court granted on the 30/4/18, the Originating Summons were amended to remove the name of the 1st Defendant. The suit will proceed with only one Respondent namely Francis Ndonga Nguthi.

2. The Plaintiff sought the following orders;

a. That the applicant be declared as the absolute owner of parcel of land No FORT HALL LOC 19/GACHAREGEINI/T.237 by adverse possession.

b Costs of the suit.

3. The Defendant denied the Plaintiff's claim in his Replying Affidavit filed on the 8/12/2017.

4. During the trial of the case the Plaintiff adopted his written statement and stated that he has been in occupation of the suit land cultivating maize, fruit trees and nappier since 1998, a period that is in excess of 12 years with the full knowledge of the Respondent who has never claimed the suit land from him, therefore the Respondents claim is now extinguished by affliction of time.

5. Further he informed the Court that the title of the suit land is registered in the name of the Defendant. That he learnt from the Defendant's brother that the Defendant lives in Kericho. That the Defendant had knowledge of his occupation and possession of the suit land. He disputed that the suit land was being hired to many individuals. He informed the Court that indeed the Defendant's other name was Ndonga Munga and that through change of name he acquired the current names, which change of name was registered on the title of the suit land.

6. On cross examination he stated that the house in the picture produced in Court was in his own land which is next to the suit land. That he took the pictures in July 2007 at the time of filing suit. That he planted Napier grass in 2017 on the suit land. He informed the Court that he does not know the Defendant personally and neither has he met him. He stated that he entered into the suit land on his own volition in 1988. Further that he was given permission by Kimindi Nguthi (deceased), the step brother of the Defendant.

7. PW2 – Charles Macharia Kamau stated in his evidence in chief that he is from Gacharageini village and is well known to the Plaintiff as he is a neighbor. He informed the Court that the Plaintiff is cultivating the suit land as shown on the pictures tendered in Court. He confirmed that the Plaintiff lives on his own land next to the suit land. That he has personal knowledge that the Plaintiff has occupied the suit land since 1998 to date and no one has dispossed him.

8. On cross examination he stated that he was not certain when the Plaintiff occupied the suit land but could have been 1997-1998. He did not know when the maize and nappier grass were planted on the suit land. He informed the Court that he did not know the Defendant. That Kimindi Nguthi is deceased but did not know the relationship that the said Kimindi had with the Defendant. That he knew the suit land to belong to Kimindi Nguthi. He testified that he did not see any bush that the Plaintiff claimed was clearing on the suit land. He confirmed that the distance between his land and the suit land was around 100 meters.

9. The Defendant testified and stated that he is the registered owner of the suit land as at 1960s having inherited from his father. He denied the Plaintiff's claim that he has been in occupation and possession of the suit land since 1998. That the applicant has taken advantage of his

absence on the land and termed him as a trespasser and an imposter who should be removed from the suit land. That he has been in occupation and possession of the suit land since inheriting it from his father in 1960s. That he transfers the land to his name in 2011 by change of name and therefore the period cannot be in excess of 12 years. That if at all he entered the suit land then it is only in the last two years.

10. At the hearing of the suit the Defendant informed the Court that Ndonga Nguthi are his names. That he registered the change of name on the suit land in 2011 but he was registered as owner since the 3/5/63. That he moved to Kericho when he was young and has never utilized the suit land. That the last time he visited the land was in 1968. That he did not know whether there were people cultivating the land. He confirmed the Kimindi Nguthi was his step brother but that Kimindi died long time before he himself relocated from Muranga. He denied that he was the caretaker of the suit land. That he did not know the Plaintiff and that he saw him for the first time in Court. He informed the Court that he had no knowledge that the Plaintiff was cultivating the suit land. That he did not need the land then.

11. Parties filed written submissions which I have read and considered.

12. The Plaintiff submitted that he entered in to the suit land in 1998. That the land was bushy and he cleared the bushes and has since been cultivating nappier grass maize and the Defendant has never reclaimed the land from him. That the evidence of the Plaintiff was supported by PW2 who is a neighbor. Relying on the case of **Mtana Lewa Vs Kahindi Ngala Mwangandi (2015) EKLR Appeal No 56 of 2014** the Plaintiff submitted that he has been in uninterrupted occupation for almost 20 years. That the Defendant has lived in Kericho for the extent of the period and has no knowledge of his land as a result of which he has lost his claim over the suit land. He urged the Court to find for the Plaintiff.

13. As to whether the Plaintiff has proved adverse possession of the land for a period of 12 years or more, the Defendant submitted that the Plaintiff was only able to show possession since 2017 through the pictures showing the maize and nappier grass growing thereon since 2017.

14. Relying on the case of **Ruth Wangari Kanyagia Vs Josephine Muthoni Kinyanjui (2017) EKLR**, the Defendant contended that the Plaintiff was allowed by a Kimindi to cultivate the land. He claimed that Kimindi was a step brother to the Defendant. This shows the occupation of the land was permissive and therefore not hostile or adverse to the title of the Defendant.

15. The Defendant submitted that the Plaintiff gave evidence that he has occupied the suit land since 1998 but however produced pictures that were taken in 2017. That he also informed the Court that the napier grass was planted in 2017 as well as the maize that, as he explained, were ready for harvesting as per the pictures produced. He stated in evidence that he did not know the Defendant and that he saw him for the first time in Court. That the Plaintiff stated that he was permitted to utilize the suit land by a Kimindi, a step brother of the Defendant who gave him permission to cultivate after he found him clearing the bushes to keep away animals that were interfering with his crops on his land.

16. Further he submitted that the PW2 was not certain about the actual date when the Plaintiff entered the suit land and he stated that he could have been cultivating the land either in 1997 -1998. The witness stated that he did not know the Defendant and had never met him but he knew Kimindi however he did not know the relationship between Kimindi and the Defendant. He submitted that occupation must not be by stealth secrecy as in this case where the Plaintiff went ahead to clear a bush ostensibly to chase away animals and ended up taking over the suit land albeit with the permission of a Kimindi. That did not amount to hostile or adverse takeover of the land.

17. Further the Defendant submitted that while in Kericho he did not have the means of knowing about the plaintiff's activities. Neither parties knew each other and both admitted that they saw each other in Court for the first time. The Defendant submitted that the Plaintiff ought to show that the Defendant had knowledge or means of knowing actual or constructive knowledge of the possession or occupation. That the Plaintiff has failed to do so. In addition the Defendant contended that the admission of the Plaintiff that he took possession with the permission of a Mr Kimindi shows that the entry was permissive and therefore does qualify under adverse possession.

18. The key issue for determination is whether the Plaintiff has proved title by way of adverse possession.

19. I will highlight the key sections of the Limitations of Actions Act Cap 22 and the Registration of Land Act No 6 of 2012 that anchors 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.

Section 28(h) of the Land Registration Act, 2012 recognizes overriding interest on land such of which are 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 said Act prescription is one of the ways of acquisition of land.

20. In the case of **Kimani Ruchire –v – Swift Rutherfords & Co. Ltd. (1980) KLR 10 at page 16 letter B**, where Kneller J. held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.

21. On the issue of whether or not the knowledge of the registered owner is necessary for adversity to be founded, **Kneller J. in Kimani Ruchire supra**, further held that in adverse possession:

“The Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation...”.

22. In the Court of Appeal decision in **Titus Kigoro Munyi Vs Peter Mburu Kimani CA No 28 of 2014**, the Court observed that

“Computation of time for adverse possession could only start when there is actual or constructive knowledge by the registered proprietor that a third party claiming adversity is in possession of the suit property”.

23. In the instant case, the Plaintiff led evidence that he entered the suit land in 1998 and has since been in possession cultivating the suit land to date. To support his averment, he produced in Court pictures of growing nappier grass and mature maize crop which he informed the Court was planted in 2017. He also led evidence which was corroborated by his witness PW2 that he lives on his own land and even showed the Court the picture of his house situate on another land next to the suit land. It is trite law that the one who alleges adverse possession must prove on a balance of probability that he has had long uninterrupted and peaceful occupation and possession of the suit land. This proof is important because a person could be deprived of his land if adverse possession is proved. In that case the Court should only do so in very clear cases. The Plaintiff has not discharged this burden.

24. Going by the decision of the Appellate Court in para 22 above, the Plaintiff stated that he was permitted by one Kimindi to utilize the suit land. It is not in dispute that the said Kimindi was the step brother of the Defendant. The Defendant led evidence that Kimindi died long time even before he relocated to Kericho. If indeed the Defendant moved to Kericho when he was a young man say before 1968, by which time Kimindi had died, how did he permit the Plaintiff to utilize the land in 1998 as he claims. It is not feasible that Kimindi would have permitted the Plaintiff to utilize the land if he was long dead by 1998 when the Plaintiff claims to have started utilizing the land. In view of this reasoning therefore the Plaintiff’s claim that the Defendant was aware of his occupation/utilization of the land, perhaps through his relation to Kimindi does not hold water. The Defendant has led evidence that he did not know that the Plaintiff was utilizing his land for farming. He contended that if indeed he did he must have done so in the last two years and not earlier. This evidence taken together with the pictures tendered in evidence in Court by the plaintiff, the Court finds the evidence to be plausible. In any event the PW2 expressed uncertainty as to the actual date when the Plaintiff entered the suit land. in his evidence he stated that;

“ I do not know when the Plaintiff entered the suit land; may be 1997 -1998 . I am not sure of the exact date. I did not see any bush on the land”.

It must be noted that the Plaintiff presented two contradictory versions of how he entered the suit land. In the first instance he stated that he did it on his own volition that is to say by clearing the bushes that harboured animals that were interfering with his crops on his farm.

Secondly, he stated that he did it with the permission of Kimindi. The Court disbelieves the evidence of the Plaintiff in this regard.

25. In other instances, he stated that he did it with the knowledge of the Defendant. The Plaintiff did not explain how the Defendant had actual or constructive knowledge of his alleged occupation of the suit land. The Defendant has contended that he did not have knowledge about the occupation and utilization of the suit land by the Plaintiff and that though he last visited the suit land in 1968, he has not needed to utilize his land. He stated that he did not detail Kimindi to take care of the land and in any event he died long before he relocated to Kericho.

26. In view of the evidence adduced and the material placed before this Court, the Court finds that the Plaintiff has not proved adverse possession and the Plaintiff's claim is dismissed with costs to the Defendant.

It is so ordered.

DATED AND DELIVERED AT MURANG'A THIS 20TH DAY OF DECEMBER 2018.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ogeto HB for Njiraini for the Plaintiff

Mbuthia for the 1st and 2nd Defendants

Irene and Njeri, Court Assistants