



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 526 OF 2012(OS)

THE FAMILY OF THE LATE MR. KARANJA THUKU

MARTHA NJERI KARANJA.....APPLICANT

-VERSUS-

SOLOMON MUKUNDI GICHINGA.....RESPONDENT

EQUITY BANK LIMITED.....INTERESTED PARTY

JUDGMENT

Background:

This suit was heard and determined by Mutungi J. after formal proof. In a judgment delivered on 15th March, 2013 he declared that the applicant, Martha Njeri Karanja had acquired title to all that parcel of land known as Nguirubi/Ndiuni/1401 (hereinafter referred to as “the suit property”) by adverse possession and ordered that the registration of the respondent as the owner of the suit property be cancelled and the property registered in the name of the applicant. When the applicant took the court decree to the Land Registrar, Kiambu County for implementation, the Land Registrar declined to comply with the decree on the ground that there was a charge registered against the title of the suit property in favour of the interested party on 1st February, 2013.

On 17th April, 2015, the court directed that the interested party, Equity Bank Limited be served with a notice to appear in court and to show cause why the charge registered in their favour against the title of the suit property could not be cancelled. The interested party filed an affidavit on 22nd June, 2015 sworn by John Njenga in which it explained the circumstances leading to the registration of the charge over the suit property.

When the matter came up for the interested party to show cause why the charge it had registered against the title of the suit property could not be cancelled, the respondent who had not entered appearance appointed an advocate who appeared on his behalf and sought time to make an application to set aside the judgment that was entered in favour of the applicant by Mutungi J. On 30th May, 2017, the parties entered into a consent pursuant to which the judgment that was entered in favour of the applicant on 15th March, 2013 was set aside with costs to the applicant which was agreed at Kshs 80,000/-. The respondent was granted leave to file a replying affidavit to the Originating Summons within 21 days from the date of the consent order. The respondent neither paid the said costs that had been awarded to the applicant nor filed a replying affidavit within the time that was given by the court.

The pleadings:

In the Originating Summons dated 17th August, 2012, the applicant sought a determination on whether she had acquired land parcel known as Nguirubi/Ndiuni 1401, Kiambu, (“the suit property”) by adverse possession and whether she was entitled to be registered as the absolute proprietor thereof in place of the respondent. The Originating Summons was supported by the affidavit of the applicant, Martha Njeri Karanja. The applicant averred that the suit property was in a settlement scheme where the Government of Kenya settled people who were landless. She averred that the respondent became registered as proprietor of the suit property on 2nd April, 1996 after she had entered and set up her home on the property in the year 1992. The applicant averred that she had been in possession of the suit property for a period in excess of 12 years.

On 27th July, 2017, the Originating Summons was once again fixed for hearing on 16th October, 2017 after the earlier proceedings had been set aside. The hearing date was taken in the presence of all the parties. When the suit came up for hearing on 16th October, 2017, the advocate for the respondent sought adjournment which was opposed by the applicant. The court reluctantly adjourned the matter to 29th

January, 2018. When the matter came up on 29th January, 2018 for hearing, the respondent's advocate did not turn up in court. Since the hearing date was given in court in the presence of the respondent's advocate, I allowed the applicant and the advocate for the interested party who were present to proceed with the hearing.

The evidence:

The applicant, Martha Njeri Karanja (PW1) testified as follows. She entered the suit property in 1992. The suit property was undeveloped. She put up a home on the property and started cultivating the same. Her late husband was buried on the suit property. She produced photographs of her homestead on the suit property which were marked as P.exh. 1 and P.exh. 2. She told the court further that she conducted a search on the title of the suit property which revealed that the property was registered in the name of the respondent. She stated that since her entry and occupation of the suit property in 1992, no one had laid claim to the property. She stated that the suit property was next to a road and that her occupation was open.

In cross-examination by the advocate for the interested party, the applicant reiterated that the suit property was bare when she occupied the same. She stated that she is the one who planted trees thereon. The applicant stated further that the suit property was used to secure a loan in 2013 during the pendency of this suit. She maintained that no one had laid claim over the suit property. By consent, a certified copy of the register for the suit property was produced as P.exh. 3. The applicant closed her case after her testimony.

The interested party's advocate told the court that the interested party wished to rely entirely on the affidavit of John Njenga that was filed on 22nd June, 2015. The interested party did not therefore call any witness. In the said affidavit sworn by John Njenga on 22nd June, 2015, the interested party averred that through a letter of offer dated 2nd January, 2013, the interested party advanced to one, Margaret Wangui Mwaura Kshs. 500,000/- which was secured by a personal guarantee of the respondent herein and a first legal charge over the suit property. The said letter of offer, the instrument of charge dated 31st January, 2013 and the deed of guarantee and indemnity were annexed to the said affidavit. The interested party averred that it advanced a further sum of Kshs 500,000/- to the said Margaret Wangui Mwaura secured by a personal guarantee of the defendant and the existing first legal charge over the suit property.

The interested party averred that it advanced the said loans in good faith and without knowledge of this suit and that it followed the due process in registering a charge over the suit property. The interested party contended that the applicant failed to give notice of her interest in the suit property by registering a caution on the title of the suit property. The interested party averred that the outstanding loan amount as at 4th June, 2015 was Kshs. 435,888/-and that it would suffer prejudice and loss by not being able to realise its security over the suit property which was the only known security for the loan advanced.

The submissions:

After the close of evidence, the parties were directed to make closing submissions in writing. The applicant filed her submissions on 16th February, 2018 while the interested party filed its submissions on 22nd March, 2018. In her submissions, the applicant reiterated that she entered the suit property with her late husband in 1992 and that she had remained in occupation without any interruption. The applicant urged the court to cancel the charge registered against the title of the suit property stating that the genuineness of the same was doubtful since the Kiambu Land Registrar took time to disclose its existence.

The interested party in its submissions filed on 22nd March, 2018 argued that having followed the due process in undertaking the registration of the charge, the applicant's adverse possession claim cannot negate the charge registered in its favour. The interested party cited section 25 of the Land Registration Act and submitted that a legal owner of a property enjoys all rights, privileges as well as encumbrances subject to that land. The interested party argued that the rights and encumbrances are indefeasible and therefore, that if the applicant succeeds in her claim for adverse possession, she will assume all rights of ownership including the charge registered against the suit property. In support of this submission, the interested party relied on the case of Micheal Oringo Alusi & 2 others v. Jobson Salano Mulanda[2016]eKLR.

The respondent did not file submissions. The matter came up on 14th June, 2018 for fixing a judgment date when the suit was fixed for judgment on 20th December, 2018. It was after the matter was fixed for judgment that the respondent without leave of the court filed a replying affidavit to the Originating Summons after the conclusion of the hearing and the filing of submissions. In his affidavit sworn on 12th June, 2018, the respondent averred that in the late 1980s, he applied to Kiambu County Council to be allocated land and was allocated the suit property. He stated that he was issued with a title for the suit property on 2nd May, 1996. The respondent contended that in 2013, he used the title deed for the suit property to secure a loan that was advanced to Margaret Wangui Mwaura by the interested party. The respondent stated that he learnt that the applicant had been a squatter on his land through a letter that was written to him by the interested party on 14th November, 2013 informing him of a decree that had been issued herein in favour of the applicant. The respondent contended that the applicant and her late husband must have entered the suit property without his consent and knowledge in 1990 after the suit property was pointed out to him by a surveyor.

The respondent averred that the applicant's late husband, Karanja Thuku was allocated Land Parcel No. Ngurubi/Thigio/574 in 1992 which parcel he later subdivided and sold to third parties. The respondent urged the court to dismiss the Originating Summons contending that it is an abuse of the due process of the court.

Determination:

The main issues arising for determination in this suit are, whether the applicant has acquired the suit property by way of adverse possession and if so, whether she should be registered as the owner thereof in place of the respondent. The other issue which the court will also have to determine is whether the charge that was registered against the title of the suit property in favour of the interested party should be cancelled. It came out in evidence that while this suit was pending, the respondent used the suit property as a security to secure a loan that was advanced by the interested party to one, Margaret Wangui Mwaura. The court will have to consider the implications of this charge on the

applicant's claim. I have considered the Originating Summons together with the evidence that was tendered by the applicant in support thereof. In the case of Salim v Boyd and Another (1971) E.A 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In the case of Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another (1977) KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, nec precario (no force, no secrecy, no evasion).....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

These principles were restated by the Court of Appeal in the case of Samuel Kihamba v Mary Mbaisi, KSM CA No. 27 of 2013 as follows:-

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land. See Eliva Nyongesa Lusenaka & Anor v Nathan Wekesa Omacha, Kisumu Civil Appeal No. 134 of 1993 (ur). These prerequisites are required of any claimant, irrespective of whether the claimant and the respondent are related or whether the claim relates to family/ancestral land.”

As I have stated earlier in this judgment, the respondent neither filed a replying affidavit on time nor appeared in court to give evidence in his defence. The suit was therefore undefended by the respondent. The evidence that was tendered by the applicant as to when and how she entered the suit property was not controverted. The same applies to the evidence that she led regarding the developments that she has carried out on the suit property since she took possession thereof. The applicant told the court that she entered and occupied the suit property in the year 1992 with her deceased husband and that she was still in occupation of the property. The applicant stated that her occupation of the suit property had been open and uninterrupted. The applicant produced in evidence photographs of her homestead on the suit property to demonstrate that she has been in occupation of the property for several years and even buried her late husband on the property.

Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides that an action to recover land cannot be brought after the end of 12 years from the date when the right of action accrued. Section 17 of the same Act provides that at the expiration of the said period of 12 years, the title of the person who was entitled to bring an action in respect of the land in question is extinguished.

From the evidence on record, as at the year 2012 when the applicant brought this suit, she had been in occupation of the suit property for 20 years. The applicant led evidence that her occupation of the suit property has been open. No action had been brought against the applicant by the respondent to recover the property. I am satisfied from the evidence on record that the applicant has established that she has acquired the suit property by adverse possession. I am therefore in agreement with the applicant that the title held by the respondent over the suit property has been extinguished by operation of law. Section 38 of the Limitation of Actions Act gives power to the court to order that the person who has acquired land by adverse possession be registered as the owner of the land in place of the person whose interest in the land has been extinguished. The applicant is in the circumstances entitled to be registered as the proprietor of the suit property.

With the main issue laid to rest, I will now consider the legal implications of the charge that was registered against the title of the suit property in favour of the interested party while this suit was pending. From the extract of the register for the suit property that was produced in evidence as P.exh. 3, it is clear that a charge was registered against the title of the suit property on 1st February, 2013 to secure a sum of Kshs. 500,000/- that was advanced by the interested party. The instrument of charge dated 31st January, 2013 was exhibited in the replying affidavit of John Njenga that was filed in court on 22nd June, 2015. The applicant contended that the interested party's charge cannot encumber or defeat her interest in the suit property because the same was created while this suit was pending. On the other hand, the interested party submitted that even if the applicant succeeds in her adverse possession claim against the respondent, her title to the suit property will be subject to the charge registered against the title of the suit property.

I am not in agreement with the submissions by the interested party. As I have stated earlier in this judgment, as at the time the applicant filed this suit in 2012, she had been in occupation of the suit property for 20 years. I have already made a finding that the applicant has established that as at the time she brought this suit she had acquired title to the suit property by adverse possession and that the title that was held by the respondent in the property had been extinguished by operation of law. It follows therefore that as at the time the respondent was offering the suit property to the interested party as security, the respondent's title over the property had been extinguished. Under section 37 of the Limitation of Actions Act, the respondent was holding the title in respect of the suit property in trust for the applicant. The respondent had no title or interest in the suit property over which a charge could be created in favour of the interested party. The interested party's charge must therefore give way to the applicant's title acquired by adverse possession. In Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees(2016) eKLR, the Court of Appeal cited with approval the finding by the High Court in Kipkoech Arap Langat & Another v Kipngeno Arap Laboso, Kericho HCCC No.124 of 2004 (O.S.) where the court stated as follows:

“Where a proprietor charges or mortgages land occupied by a trespasser adversely to the title of the proprietor, regardless of whether the trespasser is aware of such transaction, the act of charging or mortgaging the land does not interrupt time from running in adverse possession. Time for adverse possession continues to run. Such adverse possession is an overriding interest acquired or in the process of being acquired by virtue of Section 38 of the Limitations of Actions Act. It must be noted that where the proprietor transfers land, the act of transfer does not interrupt the running of time in adverse possession. In both cases of transfer and mortgage of land on which a trespasser is in adverse possession, the running of time in adverse possession is not interrupted. As adverse possession is an overriding interest (acquired or in the process of being acquired) under Section 30 (f) of the Registered Land Act, Cap 300, the mortgagee or transferee takes subject to such overriding interest.”

From the foregoing, I am of the view that the interested party's charge was subject to the applicant's adverse possession claim. Since the

claim has now crystalized, the charge cannot stand. I wish to add that the said charge was also created contrary to the doctrine of *lis pendens*. Under the doctrine, dispositions made during the pendency of a suit are subservient to the rights of the litigating parties and the decision of the court binds not only the litigating parties but also those who derive title under them by alienation while the suit is pending whether such parties had or had no notice of the proceedings. In the case of Mawji v US International University & Another [1976] KLR 185, the Court stated as follows:

“The doctrine of *lis pendens* under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other.....Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore purchase made of a property actually in litigation *pendete lite* for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit.”

In view of the doctrine of *lis pendens*, I find no merit in the interested party’s contention that the applicant failed to give notice of her interest in the suit property by registering a caution against the title thereof. Furthermore, adverse possession as stated earlier is an overriding interest and as such need not be registered against the title. In the case of Mweu v Kiu Ranching & Farming Co-operative Society Ltd. (1985) KLR 430 the court stated as follows:

“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”

Due to the foregoing, I am satisfied that the applicant has proved her case against the respondent and the interested party. I therefore enter judgment for the applicant as follows:

1. I declare that the applicant, Martha Njeri Karanja has acquired all that parcel of land known as Nguirubi/Ndiuni/1401 by adverse possession.
2. I order that the applicant, Martha Njeri Karanja be registered as the proprietor of all that parcel of land known as Nguirubi/Ndiuni/1401 in place of the respondent, Solomon Mukundi Gichinga.
3. I order that the charge registered against the title of all that parcel of land known as Nguirubi/Ndiuni/1401 on 1st February, 2013 in favour of the interested party, Equity Bank Limited be cancelled forthwith.
4. The cost of the suit is awarded to the applicant as against the respondent.

Delivered and Dated at Nairobi this 20th day of December 2018

S. OKONG’O

JUDGE

Judgment read in open court in the presence of:

The Applicant present in person

N/A for Respondent

N/A for the Interested Party

Catherine-Court Assistant