



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 116 OF 2017

WILLIAM KIMANI GICHIRAAPPLICANT/PLAINTIFF

VERSUS

EDITH NJERI CHEGE (sued as the

Administrator of the Estate of HARRIS M.C MWANGI)RESPONDENT /DEFENDANT

JUDGMENT

1. On the 3/6/16 the Applicant/Plaintiff took out an originating summon under the provisions of Section 7 & 38 of the Limitations of Actions Act and Order 37 rule 7 of the Civil Procedure Rules. With the leave of the Court an amended Originating Summon was filed on the 4/9/18. In it, the Plaintiff urged the Court to determine the following issues;

- a. The honorable Court do make a declaration that the Applicant has acquired by way of adverse possession an absolute title to the land title number LOC.11 /MUCHUNGUCHA/1915 (suit land).
- b. That an order be issued directing the Respondent/Defendant to execute all documents and take steps necessary to effect transfer to the Applicant land parcel no. LOC.11 /MUCHUNGUCHA/1915 in default whereof the said documents be executed by the Deputy Registrar.
- c. Costs of the suit be granted by the Applicant.

2. The Applicant annexed his affidavit in support of the originating summons and further avers that he has been in continuous, open, exclusive uninterrupted occupation and /or possession of the suit land firstly since birth and secondly for a period exceeding 12 years from the 1997 to date. That he has extensively developed the suit land. He has annexed pictures of the suit land and a copy of the green card.

3. The Respondent whilst urging the Court to dismiss the Applicants suit stated that her husband purchased the suit land from Joseph Marubu Njoroge after which the title was transferred to his name. That upon being served with the summons in this suit she visited the suit land and found out that there is an old temporary house made of mud and though seemed uninhabited its mud walls were freshly repaid and the roof had new iron sheets. A small portion of the land was under cultivation while the rest was bushy. That most of the land is used for quarrying and the old house appears to be used as a shelter during rainy and sunny seasons. She informed the Court that her husband had charged the suit land to secure loan facilities with a lender as seen in the copy of the green card. That the Plaintiff had knowledge of her husband's acquisition of the land and did not raise any objection.

4. At the hearing of the case the Plaintiff testified and informed the Court that the suit land belonged to his late Brother Joseph Marubu Njoroge who sold the suit land to Defendants husband in 1997. Prior he owned the larger parcel of land before he gave 2 acres to his brother who sold one acre and retained one acre which is the suit land. He lived on the land since birth as it was family land. He continued living and cultivating on the suit land even after it had been acquired by his late brother. This was because his brother did not have a family. He worked as a teacher away from their home. His parents as well lived on the suit land and that they are buried there after their deaths in 1998 (father) and 2001(mother). It is his testimony that he continued in open occupation and possession of the suit land even after the Defendant's husband acquired the land in 1997 to date. That his occupation and possession before was with the permission of his deceased brother. He informed the Court that he utilizes the land for quarrying of stones as well as farming. That he has employed quarry workers to work on the suit land. That upon acquisition by the Defendants husband, his occupation was without any consent or permission of the Defendants husband. It is his evidence that the Defendant did not evict him nor refuse him to bury his parents on the suit land. He informed the Court that all along he was not aware that his brother had sold the suit land and only discovered when he sought to file succession proceedings against his estate.

5. He informed the Court that he lives on the land next to the suit land. He urged the Court to declare that he has established ownership by way of adverse possession from the year 1997 when the Defendants husband purchased the suit land.

6. PW2 – Simon Mwangi Ngirita testified and stated that he is a neighbor of the Plaintiff and has known him since childhood. That the

Plaintiff's father subdivided his land amongst his two sons the Plaintiff and Kamau. Joseph Marubu Njoroge was still young and therefore was not given land. However later the Plaintiff gave Joseph Marubu two acres out of his land. Joseph Marubu sold one acre and retained an acre the suit land. That the said Joseph Marubu and both their parents are buried on the suit land. He testified and informed the Court that the Plaintiff has been farming and mining quarry stones on the suit land openly and exclusively.

7. The Defendant testified and stated that her husband purchased the suit land in 1997 from Joseph Marubu Njoroge. Thereafter he charged the suit land as to Kenya Industrial Estates in 1991 to secure a loan facility for purposes of developing other parcels of land and projects. She stated that he was not cultivating the suit land as most of it was for quarrying stones and only a small portion was fit for cultivation. That on receipt of summons in this case she visited the suit land and found an old mud house freshly repaired with new iron sheets and mud walls. The house appeared uninhabited and the compound was bushy. On the land were small portions of crops growing. She stated that the house could have been used as shelter by the quarry workers during rainy and sunny seasons. She testified that she does not know who built the structure but she informed the Court that it could be the Plaintiff who is also carrying out quarrying on the land. She informed the Court that she learnt that the Plaintiff lives next to the suit land where he has developed with houses and crops and trees. She stated that they have never occupied nor cultivated the suit land.

8. She contended that the Plaintiff has not been on the land uninterrupted as the suit land was under a charge to the Kenya Industrial Estates Limited. On that account she urged the Court to dismiss the Plaintiff's suit with costs.

9. The parties elected to file written submissions which I have duly read and considered.

10. The one question that the Court needs to determine to settle this suit is whether or not the Plaintiff has established ownership by way of adverse possession.

11. 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 anchor 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.

12. 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.

13. Going by Para 12 and 13, a claim for adverse possession is supported by the following factors;

- i) Whether entry and continued occupation of the suit land is adverse to the person in respect of whom adverse possession is alleged.
- ii) Whether the occupation is open, continuous, peaceful and uninterrupted.
- iii) Whether entry and or occupation has not been disrupted in at least 12 years.
- iv) Whether entry is permissive.

14. The Plaintiff led evidence that he has been in occupation of the suit land openly, peacefully and uninterrupted from 1997 when the Defendant’s husband acquired the suit land. That he possessed the land before with the permission of his brother Joesph Marubu Njoroge who owned the suit land. His brother did not have a family of his own and worked as a teacher away from home. His brother died in 1998. After the acquisition of the suit land by the Defendant’s husband he continued occupying the land carrying out farming and quarrying of stones. He informed the Court that he buried his parents in 1998 and 2001 on the suit land. PW2 testified that even Joseph Marubu Njoroge was buried on the suit land in 1998. The Plaintiff testified that the Defendant’s husband did not reclaim or take possession of the suit land and neither has he relinquished his possession to the Defendant.

15. The Defendant in her testimony did not contest the occupation and possession of the land by the Plaintiff. Indeed, her testimony that she found crops on a small portion of the land, quarrying going on and a temporary house used for shelter in hot and rainy seasons by the quarry workers corroborates the evidence of the Plaintiff of his long uninterrupted open occupation of the land. In her own words she stated as;

“She stated that he was not cultivating the suit land as most of it was for quarrying stones and only a small portion was for fit for cultivation. That on receipt of summons in this case she visited the suit land and found an old mud house freshly repaired with new iron sheets and mud walls. The house appeared uninhabited and the compound was bushy. On the land were small portions of crops growing. She stated that the house could have been used as shelter by the quarry workers during rainy and sunny seasons. She testified that she does not know who built the structure but she informed the Court that it could be the Plaintiff who is also carrying out quarrying on the land. She informed the Court that she learnt that the Plaintiff lives next to the suit land where he has developed with houses and crops and trees. She stated that they have never occupied nor cultivated the suit land”. (emphasis mine).

16. From the Defendant’s evidence above it is clear that the Plaintiff occupied the suit land with the knowledge and without the permission of the Defendant and her late husband.

17. The Defendant has argued that the charging of the suit land interrupted the possession of the suit land. It is trite law that adverse is interrupted in three ways; that is to say where the owner files suit to assert title in a Court of law competent to determine adverse possession, secondly where the title owner retakes, reclaims the land back (repossession) and thirdly where the possessor relinquishes possession and hands over the suit land to the title owner.

18. The High Court sitting in Kericho in the case of **Kipkoech Arap Langat & Another versus Kipngeno Arap Laboso [H.C.C.C. No.124 of 2004 (O.S.)]** correctly held that;–

“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.”

19. This Court is unable to find that a charge on a suit land interrupts adverse possession.

20. The Court agrees with the Plaintiff’s submission that by the time the Defendant’s husband died in 2014 the right to adverse possession had accrued and vested in the Plaintiff. Time started running in 1997 when the Defendant acquired the suit land and took no steps to interrupt the peaceful occupation and possession of the Plaintiff on the suit land which had existed before but with the permission of his late brother.

21. The Court has noted that the green card has a prohibitory order stating that no dealings until further order of the Court in civil Suit No 531 of 2012. Although the green card was placed before the Court in evidence, the parties did not place any the material in respect to the case referred to and the position of the prohibitory orders in respect to the suit land. The Court is therefore unable to ascertain what was prohibited by the Court order. The Court does not foresee that the Court order may have prohibited the rights of the Plaintiff accruing in adverse possession or enforcement of any Court order subsequently made in respect of the suit land.

22. In conclusion the Plaintiff's claim succeeds and the Court makes the following orders;

- a. It is hereby declared that the Applicant has acquired ownership by way of adverse possession an absolute title to the land title number LOC.11 /MUCHUNGUCHA/1915
- b. The Respondent/Defendant be and is hereby ordered to execute all documents and take steps necessary to effect transfer to the Applicant land parcel no. LOC.11 /MUCHUNGUCHA/1915 to the Plaintiff.
- c. In default of b) above the said documents be executed by the Deputy Registrar of this Honourable Court.
- d. Each party to bear their own costs of the suit.

It is so ordered.

DELIVERED, DATED AND SIGNED 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 HB Gacheru for the Defendant

Irene and Njeri, Court Assistants