



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CIVIL SUIT NO. 560 OF 2014 (O.S)

IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT CAP. 22

BETWEEN

PATRICK KARIGE MUNGE.....PLAINTIFF

AND

RAPHAEL ARC MICHAEL MUNGE.....DEFENDANT

JUDGEMENT

1. The Plaintiff is the Defendant's son and seeks an order that he is entitled to L.R. Nos. 8107/2,3,4,5,8 and 9 ("the Suit Property") on the grounds that he has openly and peacefully, without any interruption, occupied and used these parcels of land since 1999. He seeks to have the Defendant's titles over these parcels of land extinguished under the Limitations of Actions; Act and to be registered as the owner of these parcels of land under Section 38 of the Limitations of Actions Act.

2. He depones in the supporting affidavit that his father went to reside in the United States of America (USA) in 1992 and that he moved into the Suit Property in 1999 after realising that it was lying idle and going to waste. He claims that he started maintaining the property and carrying out general and structural repairs. He annexed copies of the demand notes for rates issued by the City Council of Nairobi. He avers that when he tried to contact his father to inform him about the outstanding rates, his father categorically stated that there was no need to pay rates since he was not developing the suit land. He claimed that over the last 15 years, he had invested over Kshs. 10 million in refurbishing and developing the suit land and was currently running two businesses on it. He claimed that his father came back to Kenya in 2013 and indicated that he wished to sell the suit land. The Plaintiff believes that his father has no right to sell the land which he developed and managed for more than 14 years and from where he derives his daily living to take care of himself and his ailing brother.

3. The Defendant filed a replying affidavit in opposition to the suit. He deponed that he is the registered proprietor of L.R. No. 8107 together with all the subdivided portions. He brought up the Plaintiff and educated him up to university level where he graduated in 1998 with a Bachelor of Economics Degree. He also paid for his postgraduate studies in accountancy and the Plaintiff qualified as a Certified Public Accountant.

4. He purchased the suit land comprising about 5 acres in 1973 and moved into the land with his family. He divorced his wife in 1983 who moved out of the suit land and went to live in Kimathi estate. He continued to live on the suit land with his children until 1992 when he left for USA. He left the Plaintiff and his elder brother living in the suit premises. His daughter went to live with her mother in Kimathi in 1983 since she was very young. While in the USA, he educated his children by sending all the necessary fees. Although the land was about five acres initially, the Defendant had over time caused the land to be subdivided into various portions. He sold 2 1/2 acres before living for the USA.

5. He claimed that he came to Kenya in May 2001 and found that his land was intact. He also came to Kenya in January 2004 and found the land intact and unoccupied. Sometime in 1993, he learnt that the Plaintiff and his other son were involved in taking and selling drugs and got them evicted from the suit premises. They went to live with their mother in Kimathi Estate. He stated that the house which was situated on plot numbers 3 and 4 on the Suit Property burnt down sometime in 1998 when there was nobody living there. He was informed by neighbours and friends that the Plaintiff came back to live in the servant quarter which was partially burnt down, which is on plot number 3, sometimes in 2008 but was attacked by thugs and left the suit premises only to come back to the suit premises in 2010. He stated that when his son was attacked by thugs it was Engineer Njoka who called the police to go and rescue him in 2008.

6. He stated that he had obtained approval for the amendment of the subdivision plans for the suit land in 2010. The survey plan dated 12/10/2010 showed that plot number 9 was non-existent having been replaced by plot numbers 10 and 11. He sold plot number 8 in 2014 when he came back from the USA. He attached a rent clearance certificate issued to him on 1/7/2014 in respect of the Suit Property. He also

produced a copy of the letter dated 1/8/2010 addressed to the City Council of Nairobi on the encroachment on a road reserve together with the letter from the City council of Nairobi dated 23/8/2010 addressed to the Commissioner of Lands on the amendments to the approved subdivision of L.R. No. 8107. He also produced a copy of the letter from the Commissioner of Lands confirming that the amendments to the subdivision had been approved subject to the conditions set out in the letter. The letter forwarded the scheme plan for the survey work. The scheme plan is dated 8/3/2011.

7. Both the Plaintiff and the Defendant testified. The Plaintiff stated that he had resided on the suit land from the time he was born until 1992 when his father evicted him. He moved to his mother's house in Kimathi Estate. He was 19 years old in 1992 and studying in the University. When his father moved to the USA he left him in the house with his brother. He lived with his mother until 2000 when he moved back to the suit property without seeking his father's permission. His mother died in 2001. His father came for the burial. He confirmed that his father came to Kenya in 2004 from USA and visited the Suit Property. The Plaintiff confirmed that he was not there.

8. He stated that he did not move out of the property in 2008 after he was attacked. He also stated that he was residing on the suit land in 2001 and 2004. He confirmed that his father sold plot numbers 6 and 7 and that the property burnt down in 1998. In 1992 there was a two bedroom house with a servant's quarter on the suit property which had a gate. He confirmed that there were no structures in 1998 after the property burnt down. He claimed that he renovated the structure and fixed the place. He was only able to speak to his father for the first time in 2010.

9. He claimed that he resides on plots numbers 2, 3, 4 and 5. He claimed that he paid Kshs. 82,000/= and 83, 000/= as rates and got a waiver of the rates demand for Kshs. 2 million. He filed this suit because when his father came back in 2014, he asked him to move out since he wanted to develop the land. He was opposed to his father kicking him out of the land. He stated that between 1992 and 2000 his father did not allow him to go to the Suit Property.

10. The Plaintiff called two other witnesses who confirmed that the Plaintiff moved into the Suit Property in 2000 and that he had taken care of the property.

11. The Defendant gave evidence. He left the Suit Property in the hands of his sons when he went to the USA in 1992. In 2000 he allowed the Plaintiff to occupy the suit premises based on his mother's request. There was nothing in the suit premises in 2001 and 2004 when he visited the land. He confirmed that the servant's quarters had been renovated by the Plaintiff. He denied being informed of any threats to auction his land. He visited the suit premises after he came back from USA and found shanties and an information mast on the suit premises as well as the renovated servant's quarter. He did not give his son permission to put up the shanties or the communication mast. He did not allow the Plaintiff to carry out repairs on the suit premises. He was informed that the Plaintiff moved into the land in 2008. He stated that the Plaintiff is occupying plot number 3 and has put the mast and shanties on plot numbers 4 and 5.

12. The issue for determination is whether the Plaintiff is entitled to the orders of adverse possession of the suit land that he seeks. The Plaintiff submitted that he had spent Kshs. 2 million on land rates; over Kshs. 3 million on landscaping and irrigation; and Kshs. 6.1 million on securing and fencing the suit property. This figures were not proved at the hearing. The Plaintiff's claim to the Suit Property is based on possession of the suit premises from 1992 to date.

13. From the evidence adduced the court is unable to find that the Plaintiff has been in continuous occupation of the suit premise from 1992 to date. The Plaintiff was allowed to stay on the suit premises when the Defendant left for USA in 1992 while he was studying in the university. The Plaintiff had moved out of the Suit Property before 1998 when the house burned down.

14. The Plaintiff did not lead evidence as to when he went back to the suit land. The court is unable to find that the Plaintiff has been in continuous occupation of the Suit Property for twelve years to be entitled to the orders he seeks in the Originating Summons. The Plaintiff's suit is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 6th day of December 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Kibunja holding brief for Mr. Mureithi for the Plaintiff

Mr. Moriasi for the Defendant

Mr. V. Owuor- Court Assistant