



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NYERI
ELC CASE NO. 515 OF 2014
(Formerly NYERI HCCC NO. 134 OF 2011 (O.S))

JOHN MAINA GATUNDU APPLICANT

-VERSUS-

FRANCIS MWANGI WAITITU RESPONDENT

JUDGMENT

Introduction

1. The applicant herein, John Maina Gatundu, took up the summons dated **28th September, 2011** for determination of 4 questions that can be summarised as follows:

- a) **Whether he has become entitled to be registered as the proprietor of the parcel of land known as Nyandarua/Ndaragwa/Uruku Block2/564 by adverse possession?**
- b) **Whether he is entitled to the costs of this suit.**

2. In support of the suit/application, the applicant has, through the affidavits filed on **29th September, 2011** and on **28th February, 2013**, deposed that his family and himself have lived in the suit property for over 12 years (from 1990 to 2007); that their stay in the suit property had been continuous and uninterrupted before the respondent instituted proceedings before the Land Dispute Tribunal in 2007; that he has extensively developed the suit property by constructing semi permanent structures, digging a bore hole and planting more than 1000 assorted plants thereon and that the respondent occupies and utilises the applicant's own parcel of land to wit, Nyandarua/Ndaragwa/Uruku Block 2/561 and Nyandarua/Ndaragwa/Uruku Block 2/561 belonging to the Government of Kenya.

3. In reply and opposition to the application the respondent has, vide the replying affidavit he swore on **13th December, 2012**, deposed that the application is frivolous and an abuse of the court process. In this regard the respondent deposes that:

- i) That there are orders issued in Nyandarua Principal Magistrate's Court Land Dispute Case No. 16 of 2009 requiring the applicant to vacate the suit land;
- ii) That there is a pending judicial review application in respect of the orders issued in Nyandarua Principal Magistrate's Court Land Dispute Case No. 16 of 2009;

iii) That in view of what is stated in (i) and (ii) above, the application/suit herein offends **Section 6** of the Civil Procedure Act.

4. Through the affidavit filed on **28th February, 2013** the applicant argues that the Tribunal did not address the issue of his entitlement to the suit property by adverse possession.

5. Concerning the allegation that there are pending judicial review proceedings in respect of the orders obtained, he explains that no such proceedings are pending because his advocate did not file the main motion within the time ordered by the court.

6. Pointing out that his averment that he has been in occupation of the suit property for over 12 years has not been controverted, the applicant maintains that he has made up a case for being registered as the proprietor of the suit property and urges the court to allow the application as prayed.

7. The application was disposed of by way of written submissions.

SUBMISSIONS

The applicants submissions

8. The applicants submissions, the applicant has pointed out that the respondent has challenged the application on the ground that it offends **Section 6** of the Civil Procedure Act (CPA) and submitted that as the claim is based on adverse possession which neither the Tribunal nor the sub-ordinate court had jurisdiction to hear and determine, the claim is properly before this court.

9. Arguing that the 1st respondent did not advance any material evidence to rebut his evidence, the applicant submits that based on the evidence on record, he has made up a case for being granted the orders sought.

The respondents submissions

10. On behalf of the 1st respondent it is submitted that the applicant has not made up a case for being granted the orders sought because:

i) He has failed to prove that he has been in exclusive and open possession of the suit property for the stipulated time;

ii) The applicant's possession of the suit property has not been open and uninterrupted (there have been suits in the High Court (Nyeri Miscellaneous Application No.71 of 2009) and the sub-ordinate court (Nyahururu PMCC No.16 of 2009) concerning the suit property.

iii) The applicant has failed to extract and annex a certified extract of the title to the suit property as required by **Order 37 Rule (7)(2)** of the Civil Procedure Rules.

11. Concerning the contention that the applicant did not extract and annex a certified extract of the title to the suit property as by law required reference is made to the case of **Titus Mutuku Kasuve v. Mwaani Investments Ltd & 4 Others Civil Appeal No.35 of 2002** where the Court of Appeal stated:-

"...in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition-Wanje v. Saikwa (No.2) (1984)KLR 284...The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed, Rule 3 D(2) of Order XXXVI Civil Procedure Rules requires that a certified extract of the title to the land in question should be annexed to the affidavit supporting the originating summons...The burden was on the

appellant to produce the certified extracts of title in respect of the suit properties. In the absence of extracts of title the affidavit evidence of George Matata Ndolo that the suit lands are encumbered and therefore not free for alienation has not been refuted...” (emphasis supplied) and submitted that without a certified copy of the title to the suit property, it is not possible to know whether the title is encumbered or when time for adverse possession began to run in favour of the applicant.

Analysis and determination

12. This being a claim for entitlement of land based on the doctrine of adverse possession, the burden is on the plaintiff/applicant to prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his volition. See the case of **Wanje v. Saikwa (No. 2) (1984) KLR 284** quoted in the case of **Mutuku Kasuve v. Mwaani Investments Ltd & 4 Others (supra)**.

13. Has the plaintiff/applicant discharged that burden?

In determining this question, I begin by pointing out that the plaintiff/applicant has vide his pleadings and in particular the further affidavit filed on 28th February 2013 deposed that he has been in uninterrupted, continuous and open occupation of the suit property for a period of over 12 years. Although that averment was not expressly controverted by the respondent, I note that the applicant did not extract and annex a certified extract of the title to the suit property which can guide the court on issues like when the suit property was registered in favour of the respondent.

14. As time for the applicant’s claim began to run from the time the respondent became the registered proprietor of the suit property, the applicant ought to have led evidence capable of showing that the property is indeed registered in favour of the respondent and that he has been in possession of the property for at least 12 years openly and without interruption from the time the property was registered in the name of the respondent.

15. In the absence of evidence of the respondent’s registration as the registered proprietor of the suit property and/or when that registration was effected in the respondent’s favour, I agree with the respondent’s contention that the suit/application is fatally defective. See the case of **Serah Muthoni Kimani v. John Wanyoike Gerald (2014) e KLR** where it was held:

“In respect of the provision of Order 37 Rule 7 of the Civil Procedure Rules, the Defendant submits that the provision is couched in mandatory terms and dictates that the affidavit in support of the Originating Summons must have an extract of the title as its annexure and that a Certificate of Official Search is not sufficient. Thus, the suit is fatally defective. The Plaintiff on other hand is of the view that this is a technicality which is curable by filing a further affidavit to avail the correct document. This issue has been subject of numerous judicial decisions all of which are categorical that annexing an extract of the title is a mandatory requirement in pursuing a claim of adverse possession. Order 37 Rule 7 reads:

- 1. An application under Section 38 of the Limitation of Limitation of Actions Act shall be made by originating summons.***
- 2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.***
- 3. The court shall direct on whom and in what manner the summons shall be served.***

The purpose of annexing an extract of the title is t so as to ascertain who the title holder is, and when the title holder acquired rights over the said land. It provides a means to the court to ascertain the existence and proprietorship of the suit land. See **Symon Gatutu & 587 others v E.A.**

Portland Cement (2011) eKLR. It is therefore not a technicality as submitted by the Plaintiff, but a mandatory requirement in a claim of adverse possession.

There is annexed to the Plaintiff's affidavit in support of the Originating Summons a certificate of official search. Counsel submits that the property having been registered under the Registered Land Act, an official search is an equivalent of an extract of a title. The question whether a certificate of official search suffices in place of an extract of a title was answered by the Court of Appeal in the case of John son Kinyua v Simon Gitura Rumuri Civil Appeal 265 Of 2005 (Nyeri) [2011] KLR

“Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act, and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate. Thus Section 36 (2) of the Registered Land Act provides:-

“Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto and certified copies of any documents or of the registry map or of any plan filed in the registry.”

Concerning the same point section 37(2) of the Registered Land Act states:-

“Every document purporting to be signed by a Registrar shall, in all proceedings be presumed to have been so signed until the contrary is proved.”

In our view reference to certified extracts in Order 37 refers to titles under the other systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration we think a search certificate meets the requirements of the relevant law.”

I am guided by the decision of their lordships that a certificate of official search is sufficient. However, I must satisfy myself that the said search must be duly signed by the Registrar, give particulars as to the date of registration of the Defendant, or of the date of issue of a title deed to the Defendant. On perusal of the search annexed and marked “SMK1”, I note that it was conducted on 24/6/2013. The same has been signed by the Land Registrar and reveals that title in favour of the Defendant was issued on 23/5/1990. It follows therefore that the court is able to make a determination as to whether the threshold of 12 years has been met for adverse possession to attach.”

16. On whether the plaintiff's claim is res subjudice (offends **Section 6** of the Civil Procedure Rules), there being no evidence of another case in which the issue of the plaintiff's claim to the suit property on account of adverse possession was under consideration when this suit was filed, I find that contention to be unsubstantiated.

17. Having found the application/suit to be fatally defective, I strike it out with costs to the respondent.

Dated, signed and delivered at Nyeri this 22nd day of February, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Ng'ang'a for the defendant

N/A for the plaintiff

Court clerk - Esther