



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC NO. 1135 OF 2014(O.S)

DR. JOHN NJUGUNA MUGO.....PLAINTIFF

VERSUS

ESTATE OF GIKONYO THUU.....DEFENDANT

JUDGMENT

The Plaintiff brought this suit by way of Originating Summons dated 19th August 2014 for the determination of the following questions:-

1. Whether the title to all that parcel of land known as Ngenda/Mutomo/T.202(hereinafter referred to as “the suit property”) has been extinguished by operation of law?
2. Whether the Plaintiff has acquired title and has become the proprietor of the suit property by adverse possession?
3. Whether the Plaintiff should be registered as the proprietor of the suit property in place of GIKONYO THUU, deceased?
4. Whether the Deputy Registrar should be authorized to execute all forms and documents to effect the registration of the Plaintiff as the owner of the suit property?
5. Who should bear the costs of the suit?

The Originating Summons was supported by the Affidavit of the Plaintiff sworn on 19th August 2014 in which the Plaintiff stated as follows. Gikonyo Thuu, deceased(hereinafter referred to as “the deceased”) whose estate has been sued herein is the registered proprietor of L.R No. Ngenda/Mutomo/T.202(“the suit property”). In the year 1976 or thereabouts,the Plaintiff’s deceased father, one, Asaph Mugo Muratha(hereinafter referred to as “Muratha”) purchased the suit property from the deceased. Muratha paid the full purchase price to the deceased and took possession of the suit property. Muratha died on 24th November 1976 while in possession of the suit property but before the same was transferred to him by the deceased. After the death of Muratha, the Plaintiff took possession of the suit property in or about January 1977, fenced the same and carried out extensive developments thereon. The Plaintiff has been in continuous and uninterrupted possession of the suit property for more than 30 years.

The Defendant was served with the Originating Summons by way of substituted service on 24th March 2015 through advertisement in the Daily Nation newspaper after attempts to serve it personally failed. The Defendant did not enter appearance to the summons. On 14th July 2015 the court gave directions that the Originating Summons be heard by way of viva voce evidence. The Originating Summons came up for

hearing on 23rd January 2017 when the Plaintiff gave evidence. In his evidence, the Plaintiff adopted the contents of his affidavit in support of the Originating Summons and produced the documents attached thereto as exhibits.

I have considered the Originating Summons together with the affidavit filed in support thereof. In the case of Salim vs. Boyd and Another (1971) EA 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 Vs. 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, necplecario (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.”

As I have stated earlier in this judgment, the Defendant did not enter appearance. The suit is therefore undefended. The averments contained in the Plaintiff’s affidavit as to how he entered the suit property, the developments he has carried out thereon and the period for which he has been in occupation of the same without any interference was not controverted. The Plaintiff led evidence that he entered and occupied the suit property in the year 1977. He stated that as at 20th August 2014 when he filed this suit, he was still in possession of the suit property. The Plaintiff stated that his occupation of the suit property has been open, peaceful and uninterrupted. 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 the land in question is extinguished. It is over 30 years since the Plaintiff took possession of the suit property. No action has been brought against him by the deceased or his estate to recover the property from him. From what I have stated above, the title of the deceased in the suit property has been extinguished by operation of law and the Plaintiff has acquired the property by adverse possession. 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. Due to the foregoing, I would answer the questions (a) to (d) in Originating Summons in the affirmative. On the issue of costs, each party shall bear its own cost of the suit since the suit was not defended.

In conclusion, I am satisfied that the Plaintiff has proved his claim against the Defendant on a balance of probability. Consequently, I hereby enter judgment for the Plaintiff against the Defendant as follows:-

1. I declare that the title of GIKONYO THUU, deceased in all that parcel of land known as L.R No. Ngenda/Mutomo/T.202 has been extinguished by operation of law.
2. I declare that the Plaintiff has acquired L.R No. Ngenda/Mutomo/T.202 by adverse possession.
3. The Defendant shall transfer to the Plaintiff L.R No. Ngenda/Mutomo/T.202 within thirty (30) days from the date hereof failure to which the Deputy Registrar of this court shall be at liberty to execute all documents necessary to transfer the property to the Plaintiff.
4. The Plaintiff shall meet all the expenses and costs associated with the transfer of L.R No. Ngenda/Mutomo/T.202 to his name.
5. Each party shall bear its own costs of the suit.

Delivered and Signed at Nairobi this 15th Day of September, 2017

S. OKONG’O

JUDGE

Judgment read in open court in the presence of:

Mr. Gachomba for the Plaintiff

No appearance for the Defendant

Catherine Court Assistant