



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 21 OF 2014

(FORMERLY KERUGOYA NO. 238 OF 2013)

WILSON NJAGI NJERU.....PLAINTIFF

VERSUS

JAMES KARIUKI WALLACE CHEGE.....DEFENDANT

JUDGEMENT

1. By an originating summons dated 2nd October 2012 and filed on 3rd October 2012, the Plaintiff sought determination of the following questions;

- a) *Whether the Plaintiff has been in open, continuous, uninterrupted and exclusive occupation, possession and use of land parcel number Mbeere/Mbita/226 for over twelve years?*
- b) *Whether the Plaintiff has been in occupation of land parcel number Mbeere/Mbita/2261 since 1975.*
- c) *Whether the Plaintiff has been in occupation of land parcel number Mbeere/Mbita/2261 by way of adverse possession.*
- d) *Whether the Defendant's title to land parcel number Mbeere/Mbita/2261 has been extinguished.*
- e) *Whether the Plaintiff has extensively developed land parcel number Mbeere/Mbita/2261.*
- f) *What should be the orders as to costs?*

2. The Plaintiff also sought the following orders in the said originating summons;

- a) *That the Defendant's title to land parcel number Mbeere/Mbita/2261 has been extinguished.*
- b) *That the Plaintiff has acquired the title to land parcel number Mbeere/Mbita/2261 by way of adverse possession and the Plaintiff is therefore entitled to be registered as the proprietor of the said parcel of land.*
- c) *That the names of James Kariuki Chege be cancelled and/or deleted from the register of land parcel number Mbeere/Mbita/2261 by the District Land Registrar and the Plaintiff Wilson Njagi Njeru be registered as the proprietor of land parcel number Mbeere/Mbita/2261 by way of adverse possession and the Plaintiff Wilson Njagi Njeru be issued with a title deed to the said land.*

d) That the Plaintiff be awarded costs of this suit.

3. The said originating summons was supported by an affidavit sworn by the Plaintiff on 2nd February 2012. It was stated in the affidavit that although the Defendant was the registered proprietor of *Title No. Mbeere/Mbita/2261* (hereinafter referred to as the 'suit property'), the Plaintiff had been in open, continuous, exclusive and uninterrupted possession thereof since 1975 before the process of land adjudication and demarcation was concluded. He further stated that he had developed the land by planting trees, erecting houses and cultivating some cash crops. It was further stated that the Defendant had never taken occupation of the suit property although he was issued with a title deed on 14th January 2000.

4. The Defendant entered an appearance and filed a replying affidavit on 12th April 2012 in response to the said originating summons. The Defendant opposed the orders sought in the originating summons on the basis that he had purchased the suit property from the Plaintiff's father in 1977. He stated that he took possession thereof and marked its boundaries upon completion of payment of the purchase price.

5. It was the Defendant's further response that there was an objection raised by a third party during the land adjudication process which culminated in an appeal to the Minister which was finalized in his favour in 2010. He also stated that sometime in 2004, the Plaintiff's father called him to inform him that the Plaintiff had forcibly built a house on the suit property. The Defendant apparently issued the Plaintiff with an eviction notice which was not heeded. The Defendant finally filed Embu High Court Civil Case No. 19 of 2012 for an eviction order.

6. At the hearing hereof, the Plaintiff called 2 witnesses and closed his case whereas the Defendant called 4 witnesses. The Plaintiff was the first one to testify as PW 1. He adopted his witness statement dated 4th February 2015 as his sworn testimony. It was his evidence that he was allocated the suit property by the Ikunda clan of the Mbeere tribe during the process of land adjudication around 1975. He further stated that he took possession and developed it extensively as stated in his supporting affidavit of 2nd February 2012. However, by the time of hearing, the houses had increased to 5. There were 2 granaries and 2 pit latrines on the suit property.

7. The Plaintiff further stated that his son one Peter Murithi had also settled on the suit property and had built a house and a pit latrine thereon. It was his case that he had planted 500 stems of miraa, 75 mikau trees, 30 grafted mangoes, 17 orange trees and other trees. He had also fenced the land using barbed wire. It was his testimony that the Defendant had never been in occupation of the suit property and that he had been in open, continuous, exclusive and uninterrupted possession for over 40 years. He conceded that there were various cases or disputes concerning the suit property and he produced a bundle of documents in respect thereof.

8. The Plaintiff's 2nd witness was Albert Njeru Gachoni who testified as PW 2. He stated that he knew the Plaintiff well since they were cousins. He stated that sometime in 1975 he and the Plaintiff were shown their respective parcels of land by elders of the Ikunda clan. The Plaintiff's father, one Njeru Nthakanio was the clan Chairman at the time.

9. It was the evidence of PW 2 that the Plaintiff took possession of the suit property which he developed by erecting houses, planting trees and cultivating various crops thereon. He further stated that his house is located about half a kilometer from the suit property where the Plaintiff has been residing.

10. The Defendant was the first to testify as DW 1. He testified that the Plaintiff was the son of the late Francis Njeru Nthakanio who sold the suit property to him in 1975. He stated that he bought the suit property when it was vacant and that he took possession in 1977. It was his evidence that he cleared bushes on the suit property in 1980 but planted some trees in 2001 due to commitments of work. It was his testimony that during his lengthy absence, the Plaintiff's father was the one taking care of the suit property.

11. He further stated that in 2004, he was called by the Plaintiff's father who informed him that the Plaintiff was building on the suit property. He therefore visited the suit property to confirm the position after which he reported the matter to the District Commissioner in the company of the Plaintiff's father. It was his further evidence that there were 3 houses on the suit property and about 2 acres were under miraa cultivation in 2015. He stated that he planted about 2000 trees on the suit property.

12. The Defendant's 2nd witness was Johnson Mwangi Wagoto who testified as DW 2. His evidence was that he was a witness to the sale agreement between the Defendant and the Plaintiff's father in 1975. He stated that the Defendant took possession upon completion of payment of the purchase price. During examination by the Plaintiff's counsel, he stated that he did not know who was currently occupying the suit property and that the last time he visited the suit property was in 1975.

13. The 3rd Defendant's witness was Jonathan Kariuki Kiura who testified as DW 3. His evidence was that he was a resident of Mbita and that he was residing on his father's parcel of land Title No. Mbeere/Mbita/2233. It was his testimony that his father settled in Mbita in 1978 and that at the time the suit property was bushy and forested and that no one resided thereon. He further stated that the Defendant's land was next to his father's land. He stated that the Plaintiff started cultivating the suit property at around 2004. He also stated that there were 3 houses on the suit property and that the Plaintiff was occupying about 1 $\frac{3}{4}$ of the entire suit property.

14. During cross-examination by the Plaintiff's counsel, DW 3 denied that the Plaintiff was occupying most of the land. It was his evidence that most of the suit property is still forested and unoccupied. He also stated that the Plaintiff was his immediate neighbor and that he is the one who dug a pit latrine for the Plaintiff in 2005.

15. The 4th defence witness was Josephat Rwigi Muchange who testified as DW 4. He stated that the Defendant was his neighbour in that the Defendant was owner of parcel No. 2261 whereas he was the owner of parcel no. 2233. He stated that he bought his said parcel of land in 1982. It was his evidence that at the time, the suit property was densely forested and that nobody was residing there. His further evidence was that the Plaintiff was not occupying the entire suit property but only about 1 $\frac{1}{2}$ acres out of 13 $\frac{1}{2}$ acres. It was his further evidence that there were about 3 houses and pit latrines on the property and that the Plaintiff was cultivating the suit property.

16. During cross-examination, he conceded that two of the Plaintiff's sons had erected houses on the suit property. He also stated that the Defendant planted his trees on the suit property under security. It was also his evidence that the Plaintiff started constructing on the suit property at around 2004 even though he had been cutting down some trees prior to that date.

17. During re-examination by the Defendant's counsel, DW 4 insisted that there were no houses on the suit property in 2000 and that the suit property was not occupied. He, however, stated that there were some beans, maize and miraa stems on the suit property at the time of hearing.

18. The issues for determination in this suit for adverse possession are quite evident. The Plaintiff framed them in a very verbose manner whereas they could just be summarized into two issues and maybe a third one on costs. In my opinion, the real questions in controversy may be summarized as follows:

- a) Whether the Plaintiff had acquired the suit property through adverse possession.
- b) Whether the Defendant's name should be cancelled from the register as proprietor and the Plaintiff registered as proprietor thereof.
- c) Who shall bear the costs of the suit.

19. The law relating to adverse possession is now fairly well settled in Kenya. Both the Plaintiff and the Defendant relied upon the case of ***Kasuve Vs Mwaani Investments Ltd and 4 Others [2004] 1KLR 184***. The Plaintiff relied on it in order to demonstrate that the Plaintiff had satisfied the requirements for

proving adverse possession whereas the Defendant relied on it to persuade the court that the Plaintiff had failed to meet those requirements. The point of difference is really on the application of the legal principles to the facts of this case.

20. In the said decided case, it was held, *inter alia*, that;

a) In order to be entitled to 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.

b) A person's title by adverse possession can be acquired under the Limitation of Actions Act for a part of the land.

c) The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession.

21. The Plaintiff also relied on the case of **Githu V. Ndete [1984] KLR 776** for the proposition that time stops running for purposes of the Limitation of Actions Act only when the owner asserts his right by taking legal proceedings or makes an effective entry to the land. The giving of a notice to quit to the possessor is not adequate to stop time from running.

22. The court has considered the evidence tendered by the parties herein and their respective written submissions. On the first issue, the parties were not agreed on the date of possession. Whereas the Plaintiff and his witnesses testified that the Plaintiff took possession in 1975 or thereabouts, the Defendant and his witness claimed that it was after the year 2004. There was no dispute that the Plaintiff's possession was open, continuous, or exclusive. The major dispute was on the date when possession was taken. There was no dispute that the Plaintiff's possession was hostile i.e without the permission of the registered owner. However, the size or acreage of land in possession was contested. The Plaintiff contended that he occupied the entire suit property ie 13 ½ acres whereas the Defendant maintained that he occupied only a small portion of about 2 acres.

23. I have perused the green card for the suit property and noted that the Defendant's name was entered in the register on 14th January 2000. For purposes of the claim for adverse possession, I am of the view that time can only start running from the time the Defendant acquired the property unless there was a previous registered owner or owners. In the instant case, the Defendant appears to have been the first registered proprietor. So, if time were to be reckoned from that date, the 12th year would lapse on or just before 14th January 2012 whereas the instant suit was filed on 3rd February 2012.

24. But when did the Plaintiff actually take possession of the suit property and in respect of what acreage? I have perused the bundle of documents in the Plaintiff's list of documents dated 4th February 2015 and noted that there were previous proceedings concerning the suit property. In the copies of proceedings of the Gachoka Land Disputes Tribunal, (exhibit No P.2) the Elders found that the suit property was as a result of the subdivision of parcel No. 2233 by the Plaintiff's late father to create parcels 2261 and 2569. The elders found that it was unjust for the Plaintiff's late father to have subdivided the said land and deprived him of parcel No. 2261 when the Plaintiff had started occupying and developing it as from 1979. So, it would appear that the Plaintiff may have started occupying part of the suit property as far back as 1979. The court is, therefore, satisfied that the Plaintiff had been in occupation of the suit property or part thereof for a period of at least 12 years immediately preceding the filing of the originating summons.

25. The difficult question is the determination of acreage which the Plaintiff is occupying. The Plaintiff claims it all but the Defendant contends that only a small portion of the whole is occupied. Neither the Plaintiff nor the Defendant produced any surveyor's report or other expert's report to demonstrate the area under effective occupation. The court shall therefore rely entirely upon the contradictory oral testimony of the parties. The Defendant testified that when he last visited the suit property in 2015, there

were at least some 3 houses and other structures thereon. He also conceded that about 2 acres was under miraa cultivation.

26. The court is satisfied that the Plaintiff is in possession of part of the suit property but is far from satisfied that the Plaintiff is utilizing the entire 13 ½ acres. The court takes the view that part of the suit property is still forested. There is some oral and photographic evidence on record to that effect. The court finds that the Plaintiff is not entitled to entire suit property of 13 ½ acres since there is no evidence on record that he occupies or utilizes the entire land. The Defendant conceded that about 2 acres is under miraa cultivation whereas it is common ground that the Plaintiff has houses and some mango trees on part of the suit property. The court is of the view that the Plaintiff is in occupation of approximately than 3 acres out of the entire suit property.

27. The court is unable to find any evidence of interruption of the Plaintiff's possession of the part of the suit property he has been occupying. A notice to vacate or demand letter is not effective to interrupt possession or to stop time from running for purposes of adverse possession. Although the Defendant claimed to have filed a suit for eviction in 2012, it is not clear on which date such suit was filed. The Defendant did not produce a copy of the pleadings to enable the court determine if it was filed before the Plaintiff's right to adverse possession had crystallized.

28. In view of my holdings above, the court finds that given the Plaintiff has proved his case of adverse possession to part of the suit property, it would follow that he would be entitled to be registered as proprietor to such portion and not the entire suit property. Consequently, in answer to the 2nd issue for determination, the court finds that the Plaintiff is entitled to be registered as proprietor of a portion of 3 acres only out of the suit property. Such registration shall be undertaken upon a sub-division of the suit property. The court shall direct the Defendant to execute all necessary documents necessary to facilitate such sub-division and transfer in default of which the Deputy Registrar of the court shall execute them.

29. Since the Plaintiff has partially succeeded in his claim, the court shall not order payment of any costs.

30. The upshot of the foregoing is that the court enters judgement in favour of the Plaintiff in the following terms only:

- a) The Plaintiff as acquired a portion of there (3) acres out of *Title No. Mbeere/Mbita/2261* by adverse possession and the Plaintiff shall be entitled to be registered as proprietor thereof upon subdivision.
- b) The said property shall be subdivided and a portion of 3 acres only shall be transferred to the Plaintiff absolutely. The Defendant shall sign and execute all necessary documents to facilitate such sub-division and transfer in default of which the Deputy Registrar of the Court shall sign them.
- c) There shall be no order as to costs.
- d) It is so ordered.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **19th** day of **OCTOBER, 2017**

In the presence of Mr Njoroge holding brief for Mr Okwaro for the Plaintiff and in the absence of the Defendants.

Court clerk Njue

Y.M. ANGIMA

JUDGE

19.10.17