



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 71 OF 2013 (OS)

YUNUKE MORAA NDEGEPLAINTIFF/APPLICANT

VERSUS

SAGWE AKUMA alias AGORI AKUMADEFENDANT/RESPONDENT

J U D G M E N T

1. The plaintiff/applicant by an originating summons dated 13th February 2013 brought under Order 37 Rules 7 and 8 of the Civil Procedure Rules and Section 38 of the **Limitation of Actions Act**, Cap 22 Laws of Kenya, claims to have acquired by way of adverse possession a portion of land measuring 1.5hectares out of land parcel No. **West Mugirango/Bonyamatuta/527** owned and registered in the defendant's name. the plaintiff/applicant claims to have been in adverse possession of the portion of 1.5hectares continuously and for uninterrupted period of more than 12 years and seeks orders that:-

(a) Declaration that the respondent's rights to recover a portion measuring 1.5hectares in land parcel No. West Mugirango/ Bonyamatuta/527 is barred under the Limitation of Actions Act, Cap 22 of the Laws of Kenya and is thereto extinguished on ground that the estate of the deceased Ndege Nyamora has openly, peacefully and continuously been in occupation and possession of the same for a period now exceeding twelve (12) years.

(b) That there be an order that the applicant herein be registered as the proprietor of a portion measuring 1.5hectares approximately in land parcel No. West Mugirango/Bonyamatuta/527 in place of the respondent.

(c) That there be an order restraining the respondent by himself, his agents, servants and/or employees from interfering with the applicant's peaceful possession and occupation of a portion measuring 1.5hectares approximately in land parcel No. West Mugirango/Bonyamatuta/527.

(d) Costs of the originating summons be borne by the respondent.

(e) Such further and/or orders be made as the court may deem jut and expedient in the circumstances of the case.

2. The originating summons was supported on the annexed supporting affidavit of Yunuke Moraa Ndege the applicant herein sworn on 13th February 2013. The applicant brought the action as the administrator of the estate of Ndege Nyamora (deceased) as per the annexed certificate of confirmation of grant marked "YMNI". The applicant avers that the respondent is the registered owner of land parcel **West Mugirango/ Bonyamatuta/527** while her late husband was the registered owner of land parcel **West**

Mugirango/Bonyamatuta/526. Further the applicant states that the physical boundaries of the two land parcels were established following a decree/determination in DMs court case No. 60 of 1963 at Gesima. However the applicant states that during land adjudication a portion of 1.5hectares from land parcel **526** was erroneously annexed to land parcel **527** as per the Registry Index Map (RIM) which was used to process and issue title deeds. The applicant states that this resulted in the respondent's land size in respect of land parcel **527** being increased from 2.5hectares to 4.0hectares approximately and the applicant's land reflected as being smaller by a corresponding 1.5hectares respectively.

3. The applicant nonetheless states the portion of 1.5hectares annexed to land parcel **527** belonging to the respondent has exclusively been possessed, occupied and used by the deceased's estate since 1963 a fact that has been confirmed by a ground survey carried out by Arch Surveyors in December, 2012 (report and sketch plan annexed as "YMN6" and "YMN7" respectively). The applicant asserts that the possession and use of the portion of 1.5hectares comprised in the title of land parcel **527** has been continuous and uninterrupted since 1963 and on that account avers that the respondent's title to that portion, even if it existed has been extinguished by virtue of the applicant's deceased husband's estate having adversely possessed and occupied the land for over 12 years.

4. The defendant/respondent filed a replying affidavit sworn on 5th March 2013 in response to the originating summons. The respondent acknowledges that he and the defendant's late husband had a case at the DM's court at Gesima and affirms that his parcel of land is separated from that of applicant's husband by a foot path. He states further that following his removal from the applicant's husband's land by the court in 1963 he and his family have honoured the boundaries shown to them and they have maintained intact boundaries. The boundary along the foot path is fenced and trees are planted along the boundary. The defendant affirms he was satisfied with the decision of the DM's court at Gesima and further states his land on the ground measures 2.5hectares but the Registry Index Map shows his land is 4.0hectares which he further states the applicants have been using a portion of 1.5hectares of his land for a long period of time.

5. The court on 16th May 2013 gave directions for the originating summons to be heard viva voce. The originating summons was fixed for hearing before me on 11th July 2017 when only the plaintiff and his advocate attended. The defendant/respondent as per the affidavit of service sworn on 3rd July 2017 by one, Isaiah Miruka was served with a hearing notice on 7th June 2017. The hearing proceeded ex parte.

6. One Patrobas Ndege (PW1) testified on behalf of the applicant who is his mother pursuant to a General Power of Attorney dated 2nd June 2017 and registered on 4th July 2017 produced in evidence as "PEX.1". The witness relied on the sworn affidavit of his mother in support of the originating summons. He testified that the defendant is the owner of land parcel **West Mugirango/Bonyamatuta/527** which as per records held by the lands office measures 4.0hectares (see abstract of title annexed as "MYN3"). He further testified that the defendant occupies 2.5hectares of the parcel of land while his mother, Moraa Ndege the applicant occupies 1.5hectares where she has built a house and has cultivated tea thereon since 1963 when the portion was awarded to their family in 1963 by the court. Further he testified that a survey has revealed that the portion of 1.5hectares occupied by the applicant's family since 1963 is included in the title held by the defendant in respect of land parcel **527**. The applicant wishes to have the portion of 1.5hectares hived off and transferred to her on the basis that the defendant's title to the portion has been extinguished and that she has become entitled to be registered as the owner thereof by virtue of having been in adverse possession for a period in excess of 12 years.

7. Questioned by the court the witness stated that the portion of 1.5hectares was included in parcel **527** by error and the same ought to have been included in land parcel **526**. The witness further stated his late father planted tea on the portion in 1978 and that he also planted his own 12,000 tea bushes on the portion in 2001. He further stated that his second born brother has constructed a permanent house on the portion of 1.5hectares. He reiterated that the defendant and his family occupy the remaining portion of 2.5hectares of land parcel **527** while the applicant's family occupies the portion of 1.5hectares and that the portions are clearly delineated on the ground.

8. The plaintiff's counsel Mr. J. O Soire filed written submissions dated 28th July 2017 where he reiterates the evidence as contained in the affidavits in support of and in response to the originating summons. I have considered and reviewed the pleadings and the evidence tendered and the submissions by counsel and the issue for determination is:

(i) Whether the applicant has been in possession and occupation of a portion of 1.5hectares of land parcel West Mugirango/ Bonyamatuta/ 527?

(ii) Whether the possession and occupation has been adverse?

(iii) Whether the applicant is entitled to be registered as the owner of the portion of 1.5hectares to be excised from land parcel West Mugirango/Bonyamatuta/527

9. There is undisputed evidence that the applicant's late husband and the defendant had a land dispute before the DM's court at Gesima which was resolved in favour of the plaintiff's husband resulting in the defendant being removed from what was determined to be the plaintiff husband's land in 1963. From 1963 there is uncontraverted evidence that the applicant's family and the defendant's family occupied distinct parcels of land on the ground. However during land adjudication it would appear a portion of 1.5hectares belonging to the applicant's husband was included as part of land parcel 527 which was adjudicated in favour of the defendant but that never affected the possession and occupancies on the ground. The defendant in his replying affidavit confirms that indeed the applicant is in possession of a portion of 1.5hectares of his land parcel **West Mugirango/Bonyamatuta/527** and that the applicant has houses and has planted tea on the said portion. The defendant admits he and his family occupy a portion of 2.5hectares of parcel 527 which is in accord to the decision of the DM's court at Gesima. He however acknowledges the records at the lands office show his land to be 4.0hectares and not 2.5hectares as appears on the ground and in consequence he avers that the applicants have been in possession and occupation of a portion of his land unlawfully.

10. Patrobas Ndege confirmed that the applicant's occupancy of the portion of 1.5hectares of land parcel 527 goes as far back as 1963 and that the possession has been continuous and uninterrupted. The applicant and her family have constructed permanent houses and planted tea on the portion of land.

11. I have considered the evidence and I am satisfied that the inclusion of a portion of 1.5hectares onto land parcel 527 during land adjudication may have been inadvertent and/or by mistake as the adjudication failed to take account of the decision by the DM's court Gesima in land case No. 60 of 1963 where the boundaries of the applicant's and defendant's land parcels were delineated and defendant was removed from the applicant's husband's land. Notwithstanding that the applicant had not sought rectification of the register, I am satisfied that this could have been a proper case for the court to order rectification under Section 80 of the **Land Registration Act, 2012**. Section 80(1) provides:-

80(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be canceled or amended if it is satisfied that, the registration was obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

12. The defendant under paragraph 12 of his replying affidavit admits the applicant's husband was not present when survey for adjudication purposes was done in the 1970's as he was away in Tanzania. The defendant had a duty to guide the surveyors to delineate the correct boundary between himself and the applicant's husband particularly having regard to the decision of the DM's court at Gesima. The defendant's acts or neglect occasioned the inadvertent error or mistake in the Registry Index Map (RIM) that was used to process the titles. The defendant cannot properly claim entitlement to the portion of 1.5hectares occupied by the applicants.

13. I note the applicant's claim is predicated on adverse possession and it is my finding and holding that on the evidence there is uncontroverted and credible evidence that the applicants are and have been in adverse possession of the defendant's land parcel 527 ever since the land was registered in the defendant's name on 13th July 1976 as appears on the abstract of title annexed to the supporting affidavit. The applicant and his family have constructed permanent houses on the portion of 1.5hectares and have planted tea thereon. In addition to the tea bushes planted on the portion by the applicant's husband in 1978, PW1 who is the applicant's son in 2001 planted 12,000 tea bushes. There is no evidence that the possession of the applicant's family of the portion of 1.5hectares was at all interrupted from 1963 upto the time of the institution of the suit. I hold that the possession was adverse and that the title of the defendant to the portion of 1.5hectares was extinguished on 13th July 1988 after expiry of 12 years from the time he was registered as owner of the land parcel 527. The defendant took no action to recover possession of the land within 12 years after he was registered as the owner. He cannot claim the land now as his action would be statute barred. Even if he had a valid title to the portion of the 1.5hectares, such title was extinguished by effluxion of time. After the expiry of 12 years his title to the portion of land ceased.

14. From my foregoing assessment and evaluation of the evidence, it must have become clear that I must resolve the issues that I highlighted in the affirmative.

15. In the case of **Githu –vs- Ndeete [1984] KLR 777** the Court of Appeal considered what would constitute adverse possession to an identifiable portion of land as per **Potter JA** with **Madan JA** and **Law JA** concurring where he stated:-

“The case of Gatimu Kinguru –vs- Muya Gathangi High Court Civil Case No. 176 of 1973, is an example of an adverse possessor obtaining title by adverse possession to an identifiable portion of an owner's land. It is stated in Volume 24 of Halsbury's Laws of England, 3rd edition, at page 252;

“To constitute dispossession acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

16. In the instant case, both ingredients of fencing off and cultivation are in abundance as the applicant's portion of 1.5hectares is separated from the defendant's portion by a footpath along which fencing has been done and trees have been planted along the fence. The portion occupied by the applicant is thus identifiable and the possession is not denied. Having held that the possession has been adverse, I hold and find that the plaintiff/applicant has proved her case on a balance of probabilities and I accordingly enter judgment in her favour in the following terms:-

(i) That the applicant has adversely possessed a portion of 1.5hectares of the respondent's land parcel No. West Mugirango/Bonyamatuta/527 for a period of over 27 years and that the respondent's title to the said portion is extinguished in favour of the plaintiff.

(ii) That the applicant is hereby ordered to be registered as proprietor of the portion of 1.5hectares of land parcel No. West Mugirango/ Bonyamatuta/527 that she has adversely possessed in place of the respondent.

(iii) That I order and direct that land parcel No. West Mugirango/ Bonyamatuta/527 registered in the name of the respondent be subdivided and the portion of 1.5hectares occupied by the applicant be transferred to the applicant, the said Yunuke Moraa Ndege.

(iv) Each party to bear their own costs of the suit.

Judgment dated, signed and delivered at Kisii this 6th day of October, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Soire for the plaintiff

N/A for the defendant

Milcent court assistant

J. M. MUTUNGI

JUDGE