



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MERU
ELC CASE NO. 10 OF 2013
FORMERLY EMBU HCC NO. 69 OF 2007
NOW CONSOLIDATED WITH MERU HCC NO. 179 OF 2014 O.S
GEORGE MUDIA GICHERU.....PLAINTIFF
VERSUS
PETER NJAGI NJUE.....DEFENDANT

JUDGMENT

BACKGROUND

1. The suit land is parcel No. Muthambi / Igamurathi/268 which was initially owned by Cheleste Njue Erenkanya . Cheleste took a loan with African Finance Cooperation sometime in 1973 using the suit land as security. AFC apparently transferred this land to Stanley Kamere who in turn sold the land to the present plaintiff. Cheleste died after this case was filed and his son , Peter Njagi Njue stepped in as the present defendant.

THE RECORD

2. This matter was initially filed by the plaintiff George Mundia Gicheru against one Cheleste Njue Erenkanya vide Embu H.C.C No. 69 of 2007 on 22.5.07. The plaintiff's claim was that he bought the suit land Muthambi / Igamurathi / 268 from one Stanley Kamere in year 2005 and he therefore wanted the defendant to be evicted from this land.

3. The matter was heard exparte and Judgment was delivered in favour of plaintiff on 23.4.08 and a decree was issued on 30.6.11. Cheleste Njue, the original defendant died on 27.6.11.

4. Before his death, Plaintiff had made an application of 13.8.09 to have the exparte Judgment set aside. That application was not prosecuted during the life time of the original defendant.

5. A Grant of letters of administration was issued to the estate of Cheleste Njue Erenkanya on 14.10.11 to one Peter Njagi Njue.

6. The application to have the exparte judgment set aside was finally heard and a ruling was delivered on 7.12.12 where the Court proceeded to set aside the earlier Exparte Judgment. The Court also directed that the matter be transferred to Meru Environment and Land Court.

7. The matter was then transferred to this Court (Meru Environment and Land Court) and was registered as ELC NO. 10 OF 2013.

8. On 27.11.14 another suit was filed Meru High Court C. No. 179 of 2014 (OS) by eight (8) plaintiffs, namely Flavia Mukwanjeru Erenkanya, Peter Njagi Njue, Antony Kinyua, Sophia Muthoni, Lawrence Kiraithe, Kenneth Gitonga, Murithi Njue & Mutembei Njue as against George Mundia Gicheru. Plaintiffs in this suit aver that the 1st plaintiff is the wife of Cheleste Njue while the rest of the plaintiffs are her children.

9. The plaintiffs' claim in the suit No. 179 of 2014 is that they are entitled to the suit land by way of Adverse Possession.

10. On 6.12.16, the two suits Meru Environment and Land Court Case No. 10 of 2013 and High Court Civil Case No. 179 of 2014 were consolidated with an order that **“Environment and Land Court Case No. 10 of 2013 to be the suit in which all matters will be heard and determined.”**

11. The matter proceeded to full hearing with each side calling one witness. Submissions were also filed.

Plaintiff's Case

12. Plaintiff testified that he bought the parcel of land Muthambi / Igamurathi / 268 from one Stanley Kamere Kigwachi in 2005.

13. Plaintiff avers that he tried to take possession of the land but was prevented from doing so by Cheleste Njue. He tried to get assistance from the Chief, District Officer and even the District Commissioner but was not successful.

14. That is when the plaintiff decided to file this case in Embu (as H.C.C No. 69 of 2007 Embu).

15. The plaintiff states that he is the lawfully registered proprietor of the suit land as is evident from the copy of the title deed produced as Plaintiff Exhibit 1.

The plaintiff also produced as Exhibits;

- A letter of 20.10.09 written to him by a daughter of Celeste where the two sides were exploring settlement.
- Land Control Regulation letter of consent.
- Another letter of consent of 20.10.09 still written by Celeste's daughter touching on issue of settlement.

16. The plaintiff also adapted his statement dated 17.12.14 and filed on 18.12.14 as his evidence.

DEFENCE CASE.

17. DW1, Peter Njagi stated that he is a son of Cheleste Njue and Flavia Mukwanjeru (1st plaintiff in Case No. 179 of 2014) whereas the other plaintiffs in Case No. 179 of 2014 are his siblings.

18. In his testimony, Peter Njagi told the court that the suit land belonged to his father Cheleste Njue who had taken a loan with AFC in 1957. The land was sold by AFC to Stanley Kamere.

19. Peter Njagi avers that it is his mother who was cheated to sign some documents and this resulted in litigation in H.C.C No. 2663 of 1975.

20. Peter Njagi further stated that him and his entire family have always stayed on the suit land and that

the plaintiff has never taken possession of the suit land. Defendant therefore avers that the land in question belongs to his family.

21. In support of his claim, the defendant produced as Exhibits the documents in his list of 27.11.14. These documents are: -

- (i) Green Card for the Land Ref No. MUTHAMBI / IGAMURATHI/268.
- (ii) Letter to Branch Manager (AFC) from Celeste Njue dated 4th May 1975.
- (iii) Notice of Advertisement of Sale by Public Auction dated 7th November 1975.
- (iv) Memorandum by AFC dated 1st December 1975.
- (v) Plaint in Nairobi HC.CC No. 2663 of 1975 filed on 23rd December 1975.
- (vi) Letter by Flaria Mukwanjiru to Branch Manager (AFC) Bank dated 4th February 1976.
- (vii) Letter by Celeste Njue to the Attorney General dated 15th September 1981.
- (viii) Plaint in Meru HC.CC No. 167 of 1990 dated 2nd May 1990.
- (ix) Defence in Meru HC. CC No. 167 of 1990 filed on 24th January 1991.

DETERMINATION

22. The issues for consideration are:-

- a) Whether the plaintiff has a good title in respect of the suit land?**
- b) Whether the defendant and his family have acquired the title to the suit land by way of adverse possession?.**
- c) Whether an order of eviction should be issued against the defendants?**

Plaintiff's Title to the land

23. The copy of Title produced as Plaintiff Exhibit No. 1 by PW1 shows that plaintiff is the registered owner of Parcel No. Muthambi / Igamurathi / 268 which is approximately 6.0 Ha. This Title was issued on 11.2.2005.

24. Section 26 of The Land Registration Act provides :-

“The certificate of title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.**

25. No evidence has been adduced to indicate that the Title held by Plaintiff is questionable.

26. I therefore find that the plaintiff has a good Title.

Claim of Adverse Possession

27. The law is that where a person claims to have become entitled by adverse possession to land which has been registered, he is allowed by virtue of the provisions of **section 38 of the Limitation of Actions Act** to apply to the High Court (ELC) for an order that he be registered as the proprietor of that land.

28. Defendant's claim is that him and his family have lived on the suit land for many years and they are the rightful owners of the land by virtue of adverse possession.

29. The following key ingredients are essential for the claim of adverse possession to succeed: -

i) **Exclusive use and possession of the property.**

ii) **Open and notorious use of the property.**

iii) **Non permissive, hostile or adverse use of the property.**

iv) **Continuous/uninterrupted use of the property for a period of at least 12 years.**

30. Exclusive use and possession of the property

It appears that the plaintiff has never utilized this land. I am inclined to believe that the defendant and his family are the ones who have been in exclusive use of the suit land.

31. Open and Notorious Use of the suit land.

Plaintiff has testified that he had found two semi-permanent structures on the suit land. He, plaintiff had then talked to Cheleste Njue, but the latter had said he would not move from that land. This indicates that the family of defendant was occupying the Suitland openly and notoriously.

32. Non permissive / hostile occupation

The occupation by the defendant and his family on the suit land has definitely been hostile to the plaintiff who even tried to go to the Chief, District Officer and District Commissioner to no avail. Plaintiff has told the court that he tried to take over the land but Cheleste Njue refused to move from that land.

33. Continuous /uninterrupted use of the property for a period of at least 12 years.

A claimant of land on the basis of adverse possession must demonstrate that the occupation of the land has been continuous without interruption for a period of at least 12 years. The fact that one is an adverse possessor does not give him title, but prevents the owner from asserting his title, and forms a basis for applying to have the title issued to him by the Court.

34. In the present case the plaint was filed on 22.5.2007, long before the counter-claim was filed on 11.2.13. The suit no. HCC 179 of 2014 was filed on 27/11/2014

35. The plaintiff had therefore taken steps to assert his rights before the defendants could do like wise.

36. In the case of *Elija Ikaha Ikanjo Vs Joseph Ngairo Asutsa (2006)eKLR*, it was held that: -

“for there to be interruption, the proprietor must evict or eject the trespasser, but because eviction is not always possible without breach of peace, institution of suit against the

trespasser does interrupt and stop the time.”

37. It follows that even if the defendant and his family had been on the suit land for many years, their occupation of the suit land was interrupted by the filing of this suit. And upon interruption, the period must start to run all over again.

38. It is also not lost to this Court that there appears to have been previous interruption of the defendant's family peaceful occupation of the land going by the fact that there existed of previous suits.

39. The initial suit was apparently filed by Cheleste as the plaintiff in H.C.C.C No. 2663 of 1975. The Court has not been told as to what became of this suit. However, defence Exhibit 1, a copy of Green Card shows that Stanley Kiguachi became the registered owner of the land. This can only mean that Cheleste lost the claim in H.C.C.C. No. 2665 of 1975 and that is why Stanley was able to acquire the land a year later.

40. Stanley Kagwachi had filed the suit No. 167 of 1990 seeking orders to evict Cheleste Njue, where according to paragraph 12 of the defence and counter-claim herein, Cheleste lost the case in 1994.

41. The claim of adverse possession by defendant and his family fails.

42. Order of eviction.

I have already established that plaintiff is the lawfully registered proprietor of the suit land, and that defendant's claim of adverse possession has failed. It follows that defendant and his family members have no right to be on the suit land. An order of eviction is appropriate.

43. CONCLUSION.

1. The counter-claim filed on 11.2.13 by the defendant herein is hereby dismissed.

2. It is hereby declared that the plaintiffs in H.C.C NO. 179 of 2014 Flavia Mukwanjeru Erenkanya, Peter Njagi Njue, Antony Kinyua, Sophia Muthoni, Lawrence Kiraithe, Kenneth Gitonga, Murithi Njue & Mutembei Njue are NOT entitled to the suit land by way of adverse possession.

3. It is hereby declared that the plaintiff George Mundia Gicheru is the rightful owner of the suit land.

4. An order of eviction is hereby issued against the defendant and his family members from parcel no. MUGAMBI/IGAMURATHI/268.

5. The plaintiff is awarded costs as against the defendant in suit No, 10 of 2013.

DELIVERED, DATED AND SIGNED AT MERU THIS 15TH DAY OF NOVEMBER, 2017 IN THE PRESENCE OF:-

CA: Janet/Haway

Carlpeters Mbaabu H/B Mr.Kaumbi for Plaintiff-Present

B.G. Kariuki for Plaintiff

Hon. L. N.MBUGUA

ELC JUDGE