



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 593 OF 2014

(Formerly NYERI HCCC No. 232 OF 2001)

ANN WAMUYU BAARU.....APPLICANT

-VERSUS-

CORNELIUS KANYORA NGATIA ALIAS

KANORA S/O NGATIA.....RESPONDENT

JUDGMENT

1. The plaintiff herein (Ann Wamuyu Baaru) took up the summons dated **29th November, 2001** for determination of the following questions:-

- (a) Whether she had acquired land parcel Magutu/Marigu (“hereinafter referred to as **the suit property**”) by adverse possession;
- (b) Subject to the outcome of (1) above whether the land Registrar should be ordered to rectify the register in respect of the suit property to reflect her as the registered proprietor of the suit property;
- (c) Whether the respondent should be compelled to meet the costs of the suit?

2. The application is supported by the affidavit of the plaintiff sworn on **29th November, 2001** in which the plaintiff has deposed as follows:

- (1) That she is the daughter of Githinji Maina now deceased;
- (2) Githinji Maina, his wife, Joan Wanjugu Githinji and herself entered and occupied the suit property on or around 1959;
- (3) That at the time they entered the suit property, it was registered in the name of Kanyora s/o Ngatia;
- (4) That their entry and occupation of the suit property was not permitted by the registered owner (constituted trespass into the land);
- (5) That they enjoyed peaceful and exclusive use of the suit property from the time they took

possession of it on or about 1959;

(6) That they effected developments on the suit property (put up a homestead on the suit property and planted crops, both cash and food crops thereon);

(7) That their occupation of the suit property had become adverse to those of the registered proprietor of the suit property as early as 1971. (Averments paraphrased).

3. In reply and opposition to the suit, the defendant (now deceased) (vide the affidavit he swore on **29th March, 2005** deposed as follows:

(1) That the plaintiff is not a daughter of Githinji Maina;

(2) That he allowed Githinji and his wife with Joan Wajugu Githinji (hereinafter referred to as the plaintiff's purported parents) to occupy the suit property as licensees;

(3) That the plaintiff never lived in the suit property during the lifetime of her purported parents;

(4) That only Githinji Maina's wife was secretly buried in the suit property by the plaintiff's husband, Baaru Ngatia;

(5) That he is a stranger to the averments that the plaintiff and his purported parents had lived in the suit property exclusively and without interruption by anybody;

(6) That the homestead and crops found in the suit property belonged to his father;

(7) That the purported parents of the plaintiff were merely allowed to take care of the suit property and the developments thereon;

(8) That neither the plaintiff nor her purported parents acquired title to the suit property by adverse possession. (Averments paraphrased).

4. The defendant passed on during the pendency of this suit and was substituted with the administrators of his estate, Teresia Wangare Kanyora and Solomon Ngatia Kanyora through orders made on 14th May, 2010.

EVIDENCE

The plaintiff's case

5. When the matter came up for hearing, the plaintiff who testified as P.W.1 informed the court that the suit property is hers; that she has lived therein since 1959; that her purported parents adopted her as their child because they had no children of their own; that they enjoyed peaceful use and possession of the suit property and that her purported parents were buried in the suit property when they passed on.

6. In support of the averments contained in the affidavit she swore in support of her claim and her testimony before court, the plaintiff produced the following documents:

(i) Grant of letters of administration issued to her in respect of the estate of Joan Githinji (her purported mother) as Pexbt-1;

(ii) Grant of letters of administration issued to her in respect of the estate of Githinji Maina (her purported father) as Pexbt-2;

(iii) Copy of green card in respect of the suit property as Pexbt-3;

(iv) Nyeri District Cooperative Union Ltd passbook for her purported parents as Pexbt-4;

(v) Receipts issued by the factory as Pexbt 5(a) to (j);

(vi) Copy of area map as Pexbt 6.

7. In cross examination, the plaintiff denied being an imposter and stated that she had been living in the suit property since 1964; she denied having illegally buried her purported parents in the suit property and stated that the defendant only came to the suit property after she filed the suit herein. She still lives in the suit property.

8. P.W.2, Julius Kamau Joshua Karuguthi, informed the court that he is a retired veterinary officer and a friend of the plaintiff's husband, Baaru. He corroborated the plaintiff's testimony that she used to live in the suit property with her purported parents. He occasionally visited them in the suit property to treat their animals.

9. P.W.3, Benson Muchina Baaru testified that he is a son of the plaintiff. He informed the court that he was born in 1968 and brought up in the suit property. He stated that they have effected developments in the suit property.

The defence case

10. D.W.1 Dadson Ikua Ngatia a brother of the defendant, informed the court that the original owner of the suit property was his father, Joseph Ngatia Mweri (deceased) who gave the suit property to the defendant.

11. According to D.W.1, the plaintiff's purported parents were allowed to live in the suit property by the defendant's father because they were assisting him pick the coffee he had planted thereon.

12. Based on the report of the Criminal Investigation Department (CID) contained in the letters from the CID dated 18th November, 2005 and 6th December, 2005 he stated that it is not true that the plaintiff has lived in the suit property since 1959 or at all.

13. He acknowledged that the plaintiff's purported parents lived in the suit property and that the plaintiff's purported mother was buried in the suit property.

14. Concerning his claim that his father used to pick coffee from the suit property, he stated that he had no documents capable of proving that fact.

15. He further stated that his father had put up a temporary grass thatched house in which he used to live.

16. D.W.2, James Mureithi Ngatia, stated that he is a brother to the defendant and D-1. Like D-1, he stated that the suit property was given to the defendant by their father. Unlike D-1, he stated that the plaintiff's purported parents lived in the suit property with the permission of the defendant (had been requested by the defendant to assist him in taking care of the suit property).

17. Unlike D-1, he stated that the house constructed by their father was thatched using iron sheets.

18. Like D-1, he stated that the coffee in the suit property was planted by their father. They used to pick the coffee in 1964.

19. Like D-1 he stated that it is not true that the plaintiff lived in the suit property.

20. According to him, investigations conducted by the CID established that the property belonged to the defendant.

21. D.W.3, Robert Muchemi Ngatia, a brother of the defendant stated that the defendant left Githinji as the caretaker of the land. He stated that the land was given to him by their father. The house in the suit property was built by their father. Like the other defence witnesses, he stated that the plaintiff has never lived in the suit property. He further stated that they occasionally visited the suit property to pick coffee. He stated that the plaintiff purported father did not at any time claim the suit property. His father introduced the plaintiff's purported father as his caretaker.

22. D-4 Solomon Ngatia Kanyora, a son of the defendant stated that the defendant worked in the ministry of lands. After his father passed on, his mother and he were appointed as administrators of his estate. His father's estate includes the suit property. He relied on the affidavit by his father dated 29th March, 2005. During his father's lifetime, they occasionally visited the suit property. He stated that he has never seen the plaintiff but knew Joan Wanjugu. He could not remember when his father was registered as the proprietor of the suit property. He recalled visiting the property in 1991 to 1992.

23. He stated that they used to get reports from their aunt who lives in the adjacent parcel of land and is aware that the plaintiff never lived in the suit property. Githinji and Joan lived in the suit property. He is aware that Joan had lodged a caution in 1986.

Submissions

24. At the close of hearing, the parties to the suit filed submissions which I have read and considered.

25. From the pleadings filed in this matter and the submissions filed by the respective parties, the sole issue for determination is whether the plaintiff has made up a case for being granted the orders sought.

26. For the plaintiff to be said to have made acquired the right to be registered as the proprietor of the suit property by adverse possession she must demonstrate among other things that her possession of the suit property has been adverse to that of the registered proprietor of the suit property for a the period stipulated in law for acquiring title to land by adverse possession, that is to say for over 12 years.

27. On whether the plaintiff has met the above legal threshold, I must start by pointing out that from the evidence adduced in this matter, I entertain no doubt that the plaintiff and her purported parents have lived in the suit property for a period of time way beyond that stipulated in law for acquiring proprietary interest in land.

28. Whereas the defendant and his witnesses claimed that the plaintiff never lived in the suit property, a review of the evidence on record some of it coming from the defendant's own witnesses (for example the assertion by D.W. I that Joan Wambugu Githinji, was buried by the plaintiff's husband in the suit property, lends credence to the evidence presented on behalf of the plaintiff that the Githinji's were being helped by the plaintiff's husband whom they had adopted as their child.

29. The court record shows that the defendant, through an affidavit he swore on 27th January, 2003 in support of his application filed on 27th January, 2003 had acknowledged that the plaintiff and her family had taken possession of the suit property and built houses thereon. That averment by the defendant runs counter to the evidence offered by the defence witnesses to the effect that the plaintiff never lived in the suit property. The testimonies of the defendant's witnesses also run counter to the affidavit the defendant swore and filed 31st December, 2002 in support of his undated application filed on 31st December, 2002. In that affidavit paragraph (c) thereof, the defendant has deposed as follows:

“...I permitted the respondent/plaintiff to be taking care of L.R No.Magutu/Murigu/23 in my absence as I have not been using my parcel of land.”

30. The defendant having under oath acknowledged that the plaintiff was in use and occupation of the suit property is estopped from claiming otherwise.

31. Did the defendant prove that the occupation of the suit property by the plaintiff and her purported parents was permissive?

32. My answer to that question is that they did not. I say this because in the absence of any express permission from the defendant and/or his predecessor in entitlement allowing the plaintiff and/or her purported parents to occupy the land either as caretakers or otherwise, the conduct of the parties becomes a very important factor in helping the court assess the relationship of the parties to the dispute.

33. In the circumstances of this case, it is not in dispute that the plaintiff's purported parents took possession of the suit property as early as 1959. They lived in the suit property uninterrupted until they passed on. All that time, they enjoyed the development from the suit property. There is no indication whatsoever that the defendant's father who was the original owner of the suit property is the one who was benefiting from the development in the suit property. On the other hand, there is evidence that it is the plaintiff and her purported parents who were benefiting from the proceeds from the suit property.

34. As attested by the defendant's own averments in portions of his pleadings in the court record, the plaintiff had effected massive development in the suit property which developments were not sanctioned by him. When the plaintiff's purported mother died, the plaintiff husband buried her in the suit property. Although the defendant's claimed that the burial was done secretly, no evidence was produced capable of proving that fact. There is no evidence of the defendant having taken any action against the plaintiff or her husband after their action was discovered.

35. There is evidence that after the defendant got registered as the proprietor of the suit property, the plaintiff's purported mother launched a caution to restrict dealing in the suit property claiming that she had interest in the suit property. There is also evidence that the defendant's witnesses were arrested for interfering with the developments the plaintiff had effected in the suit property.

36. In my view, the conduct of the parties to this suit is not the conduct of persons who were in the relationship of a land owner and a mere care taker of the land. Had that been the case, there would be proof of the defendant's involvement in the activities the plaintiff's were undertaking in the suit property some of which had the potential of undermining the defendant's interest in the suit property. For example burying the plaintiff's purported mother in the suit property.

37. Although the plaintiff's claim to the suit property is also tied to her purported parent's claim to it, I note that the plaintiff also claims the suit property of her own right. In that regard see paragraph 17 of the affidavit she swore in support of the summons which is in the following terms:

“that in any case the applicant herself, on her own right had acquired title by her persistent trespass in living and working on the said land uninterrupted since 1959”.

38. In view of that averment, I am of the considered view that the plaintiff can sustain her claim for adverse possession without proving any relationship with her purported parents, provided that she is able to prove that her entry and occupation of the suit property was not authorized by the defendant or his predecessor in entitlement.

39. Whilst I entertain no doubt that the plaintiff occupation of the suit property had become adverse to the title held by the defendant's father, noting that the defendant is not sued as an administrator of the estate of his father, whose title to the suit property had been extinguished by her adverse possession of the suit property, and given that the plaintiff does not claim that the defendant holds the suit property in trust for her, I entertain serious doubt whether the plaintiff can sustain her claim against the title held by the defendant. I say so because as at the time the plaintiff brought the current claim against the defendant she had only been in adverse possession of the title held by the defendant for about 5 years. In this regard see the case of **Mwinyi Hamisi Ali v. Attorney General & Another; Mombasa Court of Appeal Civil Appeal No. 125 of 1997** where the Court of Appeal observed:

“In Order that Mr. Hamisi Ali could claim successfully, title by adverse possession, he had to

show that the title of the said four persons stood extinguished. That can only be done if the title holders were parties to the suit. In our view, the learned judge erred when he proceeded to decree title by virtue of adverse possession where the registered proprietors were not parties to the suit.”

40. Also see the case of **Pashito Holdings Limited & Another v. Paul Nderitu Ndungu & 2 Others (1197)eKLR** where the Court of Appeal stated:

“The learned Judge without having the Commissioner before him and without hearing him in his defence has finally condemned him on an interlocutory application for injunction in the following terms: - "It was not open to the Commissioner of lands to re-alienate the same".

He could have made only a *prima facie* finding and that too if the Commissioner had been sued and served with the application. Not only that, the learned Judge appears to have finally sealed the fate of this suit which is yet to be heard on merits by holding: " So the alienation was void *ab initio*"

No such finding *prima facie* or final can be made without the Commissioner's participation in the proceedings.

The gravamen of the respondent's suit is that the Commissioner had no right to alienate a public land to any person for any use other than that for which it has been reserved. The respondents could not have established a *prima facie* case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".

There is an unpronounceable Latin maxim which in simple English means: "He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right".

The learned Judge quite erroneously in our view said:

" However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings".

With respect, he should have seen that it was not upto the appellants to fill up the gaping holes in the respondents case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief.”

41. And the case of Wilson Kazungu Katana & 101 Others v. Salim Abdalla Bakswein & Another (2015) eKLR where the Court of Appeal observed:

“As correctly observed by the trial court, beyond prescribing the limitation period, the Act does not expressly define “adverse possession” as a term. Section 13(1) however, provides that a right of action in recovery of land does not accrue unless the land in the possession of some person in whose favour the period of limitation can run (which possession in this Act is referred to as adverse possession. Tied to this, is section 7 of the Limitation Act which bars an owner of a parcel of land from an action to recover it at the expiry of twelve years. From

these provisions, what amounts to “adverse possession”? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in adverse manner to the title owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this court. Suffice to mention but two, *Kasuve v. Mwaani Investment Ltd & 4 others* (2004) 1KLR 184 and *Wanje v. Saikwa (No.2)* (1984) KLR 284

42. Whilst the evidence on record shows that by the time the defendant got registered as the proprietor of the suit property in 1996, the plaintiff and her purported parents had become entitled to be registered as the proprietors of the suit property by adverse possession, to find that the title held by the defendant had by extension been extinguished by the plaintiff’s occupation of the suit property will not be factually correct. The true position in law is that the defendant holds the suit property in trust for the plaintiff who had become entitled to the suit property by adverse possession. However, since the plaintiff’s claim is not based on trust, I will say no more about it.

43. The upshot of the foregoing is that the plaintiff’s claim against the title held by the defendant in as far as is based on adverse possession is unsustainable. Consequently, I dismiss it but with no orders as to costs.

44. Each party shall bear their own costs of the suit.

Orders accordingly.

Dated, signed and delivered at Nyeri this 18th day of December, 2017.

L N WAITHAKA

JUDGE

Coram:

Ms Mwikali h/b for Muchiri wa Gathoni for the plaintiff

Mr. Gathega Mwangi for the defendant

Court assistant – Esther