



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 509 OF 2014 (O.S)

(Formerly Nyeri HCCC No. 120 Of 2011 (O.S))

NDUHIU KANJA PLAINTIFF/APPLICANT

-VERSUS-

FRANCIS KANAKE WAHOME DEFENDANT/RESPONDENT

JUDGMENT

Introduction

1. **Nduhiu Kanja** (hereinafter referred to as the applicant) took up the summons dated 2nd September, 2011 for determination of five questions which can be summarised as follows:-

1) Whether he has become entitled to the parcel of land known as L.R No. Thegenge/Karia/857 (hereinafter referred to as the suit property) by adverse possession?

2) If the answer to (1) above is in the affirmative, whether he should be registered as the proprietor of the suit property.

3) Who should pay the costs of the suit?

2. The application is supported by the affidavit of the applicant where he has, *inter alia*, deposed that during land consolidation (in 1954) the suit property was registered in the name of his brother, Wahome Kanja, to hold on behalf of himself, his siblings, the applicant included. That his brother passed on in 1996 before the trust was determined.

3. The applicant explains that vide Nyeri HCCC No. 236 of 1996, he had sued M/s Nyeri Muslic Housing Cooperative Society (the predecessors in entitlement of the title held by the defendant) claiming entitlement to the suit property by adverse possession.

4. The applicant contends that the society with intent to defeat his claim, caused the suit land to be sold to the defendant by public auction.

5. Explaining that he had been living in the suit property long before the title in respect of the suit property was created, the applicant contends that by the time the suit land was transferred to the respondent, he had already become entitled to the suit property by adverse possession.
6. The applicant further explains that when he learnt that the suit land had been sold to the defendant, he withdrew his case.
7. The applicant admits that he was evicted from the suit property but contends that the eviction was of no consequence as he had already obtained title to the suit property.
8. The applicant also contends that the suit land was registered in the name of his brother as a trustee.
9. In reply, the respondent filed the replying affidavit which he swore on 6th October, 2011. In that affidavit, the respondent has explained that he bought the suit property through public auction and that the auction was conducted pursuant to a decree issued in Nyeri CMCCC No. 542 of 1998. Pointing out that he was not a party to the case in which the decree for sale was issued, the respondent explains that upon buying the suit property, he followed all the legal processes before the land was registered in his name.
10. The respondent further points out that he was registered as proprietor of the suit property on 23rd July, 2003 and the current suit was brought in 2011, barely 8 years from the time he obtained title to the suit property.
11. Explaining that the plaintiff has not been in occupation of the suit property or any portion thereof since February 2004, the respondent contends that the plaintiff cannot sustain a claim for adverse possession against the title he holds.
12. The respondent faults the plaintiff for having failed to inform the court that he no longer occupies or utilises any part of the suit property.
13. The plaintiff's claim for adverse possession is also said to be unmaintainable because the respondent obtained rights to the suit property pursuant to a court order. In this regard, the respondent contends that the order of eviction issued on 29th January, 2004 in Nyeri PMCCC No. 542 of 1998 is a bar to any claim for adverse possession from the said date.
14. In support of the averments contained in his replying affidavit, the respondent has annexed the following documents to the affidavit:-
 1. Notification of sale of the suit property issued in Nyeri PMCCC NO.542 of 1998 marked **FKW-1**.
 2. Order issued in Nyeri PMCCC NO.542 of 1998 marked **FKW-2**.
 3. Order authorising the chief executive office of the court to execute documents of transfer **FKW-3**.
 4. Application for consent of Land Control Board, the consent issued by the Land Control Board and the transfer form marked **FKW 4, FKW-5** and **FKW-6** respectively.
 5. Eviction order dated 29th January, 2004 marked **FKW-7**.

EVIDENCE

The Plaintiff's case

15. When the matter came up for hearing, the plaintiff (P.W.1) reiterated what he has deposed in his supporting affidavit. He explained that the his elder brother who was the registered proprietor of the suit

property was cheated by a group of people to give them the title to the suit property so that they could hve off their one acre entitlement from the suit property.

16. The plaintiff told the court that the person who was given the title never returned it. For that reason, his elder brother and himself filed a case against those people.

17. The plaintiff reiterated his contention that he had lived on the suit property since he was born.

18. Concerning the circumstances that led to the suit property being sold by auction to the defendant, the plaintiff explained that the people who had taken their land had been sued by other people who had dealings with the land. Maintaining that his brother did not sell the suit property, the plaintiff urged the court to allow his claim for adverse possession.

19. Concerning his eviction, he lamented that the defendant did not compensate him.

20. Upon being cross-examined by counsel for the respondent, the plaintiff informed the court that he is aware of Nyeri PMCCC No.542 of 1998; James Kariuki Wanyamba Vs. Makata Abdi Muenyi & others, but stated that he was not aware that the court decreed that all the occupants of the suit property be evicted.

21. The plaintiff further informed the court that after he was evicted, he referred the matter to the area District Officer (D.O) who advised him to go to court. The plaintiff confirmed that he was evicted from the suit propety over twenty (20) years ago and that he only moved to court in 2011 following the advice of the D.O.

22. With regard to his claim that his late brother held the suit property in trust for him, he stated that he had no document capable of proving that he was entitled to a share of the suit property. He admitted that the defendant bought the suit property through auction and that the defendant was not a party to the suit in which the order for sale of the suit property by auction was made.

23. P.W.1 further informed the court that one of the officials/members of Nyeri Muslim Housing Cooperative Society had been registered as an owner of the suit property since 1977.

24. Concerning the registration of the defendant as the proprietor of the suit property, he wondered how the defendant was registered as the proprietor of the suit property yet there was a case in the High Court concerning the same property.

25. Explaining that nobody informed him about the processes that led to the registration of the defendant as proprietor of the suit property, the plaintiff stated that if he had been informed, he would have objected.

26. **P.W.2, Chira Miatu Kingata**, corroborated the plaintiff's testimony to the effect that the suit property was registered in the name of the plaintiff's eldest brother to hold on his own behalf and on behalf of his siblings and that the plaintiff had been living in the suit property until he was evicted therefrom about ten (10) years ago.

27. Although he had no documents capable of showing how the suit property was dealt with, P.W.2 stated that he is aware of how the land was dealt with.

28. Unlike the plaintiff who stated that they had sued Nyeri Muslim Housing Cooperative Society over the suit property, P.W.2 stated that he does not know the said Society and the reason why the plaintiff was evicted from the suit property.

29. P.W.2 also disowned his witness statement to the effect that Wahome Kanja had borrowed Kshs. 70,000/- from the Society and given the title to the suit property as security. He further denied having stated in his witness statement that the plaintiff withdrew the claim he had filed against the society.

The defence case

30. On his part, the defendant, **Francis Kanake Wahome** (D.W.1) informed the court that he purchased the suit property in a public auction and that the previous owner of the suit property was the Society mentioned herein above. D.W.1 further informed the court that he was aware that the suit property was previously owned by Wahome Kanja (the plaintiff's brother).

31. The defendant informed the court that he could not tell the duration of time the plaintiff or his brother had lived in the suit property because none of them was living in the suit property when he bought it. The defendant told the court that the plaintiff only came into the suit property after he had bought and taken possession of it.

Submissions

32. On behalf of the plaintiff, it is submitted that according to the evidence led in support of the plaintiff's case, the plaintiff had peaceably and quietly occupied the suit property for about sixty (60) years before he was evicted. Referring to the cases of **Githu vs. Ndeete Nairobi Court of Appeal Civil Appeal No.24 of 1979** and the case of **Wasui v. Musumba (2002) KLR 396**, counsel for the plaintiff submitted that by the time the plaintiff was evicted, he had acquired prescriptive rights to the suit property.

33. In the case of **Githu vs. Ndeete** (*supra*) it was held:-

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession...Where the person in possession has already began and is in the course of acquiring rights under section 7 of the Limitation of Actions Act (cap 22) and by virtue of section 30(f) of the registered Land Act (cap 300), those rights are overriding interests to which the new registered purchaser's title will be subject to...”

34. In the case of **Wasui v. Musumba** (*supra*) it was held:-

“...An order for the relief by way of adverse possession can only be made against a respondent if the said respondent is the currently registered proprietor of the land which the applicant seeks to have registered in his name....If the applicant has been in adverse possession of the land for 12 years prior to sub-division, the proprietors of new title would not have been able to shake off his rights”

35. On behalf of the respondent, it is submitted that vide his testimony before the court, the plaintiff admitted that he does not live on the suit property and that he had nothing to show that there existed any trust relationship between him and his late brother or that he had any share of the suit property.

36. Terming the suit by the plaintiff a fishing expedition, counsel for the plaintiff has submitted that the proper forum for determining whether there existed any trust relationship between the plaintiff and his late brother would have been in a suit between the plaintiff and his late brother (read the administrator of the estate of his late brother).

37. Counsel for the respondent has also faulted the plaintiff for having failed to initiate any proceedings to invalidate the auction or the process that led to auctioning of the suit property, if indeed he had any legally recognised interest in the suit property. Having failed to challenge the proceeding that led to issuance of title in favour of the respondent, it is submitted that the plaintiff cannot be heard to challenge a purchaser for value in a process sanctioned by the law.

38. Pointing out that the plaintiff was not the registered proprietor of the suit property at the time the respondent bought it, counsel for the respondent submits that it is the owner of the suit property at the time who ought to have brought the current proceedings (because the plaintiff was not the registered owner of the suit property at the material time, counsel for the respondent calls the plaintiff a busybody as

far as title to the suit property is concerned).

39. Referring to the documents produced by the respondent in support of his entitlement to the suit property, counsel for the respondent submits that the documents show that the respondent bought the land in a sale that was above board. For the foregoing reasons, counsel for the respondent has submitted that the applicant has failed to prove his claim against the respondent and urged the court to dismiss the plaintiff's case with costs to the respondent.

Analysis and determination:

40. From the pleadings and the submissions, the issues for determination are:-

1. Whether the plaintiff has established his claim for adverse possession against the title held by the defendant?

2. What order(s) should the court make?

Whether the plaintiff has established his claim for adverse possession against the title held by the defendant?

41. With regard to this question, I begin by pointing that it is not in dispute that the plaintiff had been in occupation of the suit property as at the time the respondent obtained proprietary rights over the suit property. In support of that finding, see the respondents witness statement where he has, *inter alia*, stated that:-

“After acquiring the said piece of land I applied for defendants named in the said case to be evicted from the suit land together with their servants, agents and anybody else who was residing or cultivating on the suit land to enable me take possession of my said piece of land and on 29/1/2004 the honourable court issued the eviction order to Providence Auctioneers.....sometimes during the month of February 2004 the plaintiff herein his families among others were evicted from the suit land and the eviction took place with the assistance of the officer in-charge Nyeri Police Station and the knowledge of the D.O Nyeri municipality.”

42. Also see paragraph 12 of the respondent's replying affidavit where the said averments are replicated.

43. It is also not in dispute that by the time, the respondent obtained the order for eviction, the plaintiff had instituted a suit before the High Court for determination of the question as to whether he had become entitled to the suit property by adverse possession and/or whether the respondents in that suit (Nyeri Muslim Housing Cooperative Society Limited) held the land in trust for him.

44. It is noteworthy that by the time the applicant was evicted, his claim to entitlement to the suit property either by adverse possession or the alleged trust relationship had not been determined.

45. The evidence on record shows that parallel proceedings concerning the suit property were initiated in the lower court to wit Nyeri Chief Magistrate's Court. Although it is not clear whether that court was informed of the suit pending in the High Court concerning the suit property, it is clear that orders were issued in that case that adversely affected the plaintiff's claim to the suit property.

46. The evidence on record further shows that instead of challenging the proceedings in which the adverse orders were issued against his claim to the suit property, the plaintiff opted to withdraw the suit he had filed against the respondents' predecessor in title and after waiting for about three years, chose to institute another suit reviving his claim to entitlement to the suit property by adverse possession.

47. The evidence on record shows that by the time the plaintiff was evicted from the suit property in 2004, he had been in adverse possession to the title held by the respondent for about one year only. In this

regard, see the certificate of search which shows that the suit property was registered in favour of the respondent on 14th July, 2003. The plaintiff was evicted from the suit property on 29th January, 2004 barely a year from the time the defendant's title was issued.

48. Whereas in the changed circumstances of the case, the plaintiff was justified in instituting the case against the respondent who was the new registered proprietor of the suit property, my view of the matter is that to sustain a claim for adverse possession against the title held by the respondent, he must prove, that by the time the new title was issued in favour of the defendant, he had already become entitled to the suit property by adverse possession. In this regard see the decisions in the cases of **Githu vs. Ndeete** and **Wasui v. Musumba** cited herein above.

49. Whilst the plaintiff maintains that by the time he was evicted from the suit property he had become entitled to the suit property, the evidence on record shows that that issue was still under consideration when the plaintiff was evicted (no conclusive determination had being made concerning that question of law).

50. Whereas a determination to the effect that by the time the plaintiff had become entitled to the suit property as at the time he was effected would entitle the plaintiff to an order for adverse possession against the title held by the respondent, the question to answer is whether given the peculiar circumstances of this case, where the claim for adverse possession flows from the title held by the respondent's predecessor in claim, a determination can be made that the plaintiff's occupation of the suit property was adverse to the rights of the plaintiff's predecessor in claim when the respondent's predecessor in claim is not a party to the current suit.

51. My view of this matter is that this court cannot make a finding to that effect because to do so would amount to condemning the respondent's predecessor in claim without affording them an opportunity to defend themselves.

52. Having found that the respondent had only been in adverse possession of the title held by the respondent, if at all for a period of less than a year and having determined that this court cannot, in the circumstances of this case, determine whether the plaintiff's occupation of the suit property was adverse to that of the defendant's predecessors in entitlement to the suit property, I return a negative verdict to the first issue.

What is the order as to costs?

53. On the issue of costs, having considered the circumstances that led to the eviction of the plaintiff, I note that there is a possibility that the plaintiff was not given an opportunity to defend his occupation to the suit property. I say this because the order for eviction was not restricted to the defendants in that suit but anybody residing or cultivating thereon. Such a wide order no doubt would prejudice the rights of persons in occupation of the land in question, especially where those people were not notified of any suit against them.

54. In this case, the plaintiff has averred that he was not informed about the suit pursuant to which the order for his eviction was issued. Such a conduct was greatly prejudicial to the plaintiff who was rendered destitute, yet if he had been given an opportunity to be heard before the eviction proceedings were carried out, the outcome of the application in which the orders was obtained would have been different. Be that as it may, since the plaintiff did not move the court for review or setting aside of those orders, I say no more concerning those orders.

55. Although the plaintiff has not succeeded in his claim for adverse possession against the respondent, given the circumstances surrounding his eviction from the suit property, I find and hold that condemning him to pay the costs of the suit would be unfair to him. Consequently, I direct that each party bears its own costs of the suit.

Dated, signed and delivered at Nyeri this 25th day of February, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Njenga h/b for Andrew Kariuki for the plaintiff

Mr. Theuri Wangiti for the defendant

Court assistant - Lydia