



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 40 OF 2013

JAMES KINYUA MURIITHI.....PLAINTIFF

VERSUS

GICHUHI GITHUMBI NYAMU.....DEFENDANT

JUDGMENT

The plaintiff filed this Originating Summons on 26th January 2010 under the provisions of **Section 38 of the Limitation of Actions Act** seeking the following orders:-

- 1. That the plaintiff be declared to have become entitled to a portion approximately 0.21 hectares (50x100 feet) of all that parcel of land known as L.R No. MWERUA/KAGIO/2636 measuring about 0.83 hectares or thereabout by virtue of adverse possession thereof, having been in open, exclusive and continuous and/or uninterrupted possession or occupation of the same for over 12 years.***
- 2. That the aforesaid portion of 0.21 hectares now part of L.R No. MWERUA/KAGIO/2636 be excised therefrom and the plaintiff be registered as the proprietor thereof free from all encumbrances.***
- 3. That costs of this summons be borne by the defendant.***

In support of the Originating Summons, the plaintiff swore a supporting affidavit in which he deponed, inter alia, that he has been in open, exclusive and un-interrupted possession of approximately 0.21 hectares (50x100 feet) out of the land known as L.R No. MWERUA/KAGIO/2636 (the suit land) for over 12 years. That the said suit land was a sub-division of L.R No. MWERUA/KAGIO/646 and that he acquired the portion thereof from one **GLADYS NYAMBURA** in 1996 who informed him that she had been allocated the same by the then County Council of Kirinyaga and that it had been designated as plot No. A 242. That having taken possession of the portion of the suit land, he applied for the approval of his building plans which was granted on 10th April 1997. That he has since 1996 been in open, exclusive and un-interrupted possession and occupation of the said portion on which he has constructed a permanent building for his family and part of which he has rented. That although the defendant has at all material times been aware of his occupation, possession and development of the said portion, no attempt has been made to challenge him and he has therefore acquired it by way of adverse possession. Annexed to said affidavit is a copy of the title deed to the suit land, copy of official search, copy of green card, minutes of the Kirinyaga County Council approving the transfer of plot No. A 242 from **GLADYS NYAMBURA** to the plaintiff, receipt of Ksh. 4,000 and the approved development plans – annexures **JKM 1 to JKM 5**.

In opposing the Originating Summons, the defendant filed a replying affidavit in which he deponed, inter alia, that he was and is still the legal owner of land parcel No. MWERUA/KAGIO/2636 yet the plaintiff

has always purported that the portion of land he occupies is plot No. KAGIO A 242. That the County Council of Kirinyaga had no title over the suit land which it could give the original allottee of plot No. KAGIO A 242 who was **GLADYS NYAMBURA** or the plaintiff herein. That the original allottee of plot No. KAGIO A 242 (**GLADYS NYAMBURA**) could not sell any interest to the plaintiff since she had no ownership rights over the suit land and therefore the plaintiff's occupation of 0.21 hectares of plot No. KAGIO A 242 is not adverse to his title over the suit land. That the plaintiff should pay him mesne profits for occupying part of his land parcel, the suit land, while purporting it to be plot No. KAGIO A 242. That the plaintiff cannot therefore purport to have been in continuous and un-interrupted occupation of 0.21 hectares of the suit land.

Directions having been taken before **W. KARANJA J.** (as she then was) on 24th November 2010, it was agreed that the suit would be determined on the basis of the filed affidavits although any party was at liberty to call any other evidence if need be. On 28th December 2012, **ONGU'DI J.** made orders transferring the suit from the High Court Embu to this Court and the matter was first mentioned before me on 15th June 2015 and the counsel were allowed to file further affidavits and submissions. Counsel for the plaintiff **JOE N. MWANTHI** advocate filed his submissions on 22nd January 2016 while counsel for the defendant **NGIGI GICHOYA** advocate filed his submissions on 27th May 2016.

I have considered the Originating Summons together with the supporting affidavit and annexures thereto, the replying affidavit and submissions by counsel.

The plaintiff's claim as can be gleaned from his Originating Summons is that he is entitled to orders that he has acquired by adverse possession a portion measuring 0.21 hectares (50x100 feet) out of the suit land by reason that he has been in exclusive and un-interrupted occupation thereof since 1996. He has fully developed that portion and a picture of the building was annexed to his supplementary affidavit. The defendant's case is that if the plaintiff purchased plot No. KAGIO A 242 from the original allottee **GLADYS NYAMBURA**, he did not acquire any interest in the suit land. In **KASUVE VS MWAANI INVESTMENTS LTD & 4 OTHERS (2004) 1 K.L.R 184**, the Court of Appeal set out what a person claiming to be entitled to land by adverse possession should prove. The Court said:-

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of 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”

See also **WANJE VS SAIKWA 1984 K.L.R 284**. **Section 38 of the Limitation of Actions Act** entitles a person who claims to have become entitled by adverse possession to land registered under any of the Acts cited in **Section 37** or land comprised in a lease to apply to the High Court for an order that he be registered as the proprietor of the land or a lease in place of the person then registered as proprietor of the said land. It is now well established that the combined effect of the relevant provisions of **Sections 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – **BENJAMIN KAMAU & OTHERS VS GLADYS NJERI C.A CIVIL APPEAL No. 2136 of 1996**. The new Land Laws promulgated after the 2010 Constitution also recognize the doctrine of adverse possession. **Section 28 (h) of the Land Registration Act 2012** recognizes some of the overriding interests as

“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

Similarly, **Section 7 of the Land Act 2012** provides that:

“Title to land may be acquired through:-

(a)

(b)

(c)

(d) **Prescription**”.

It is not in dispute that the defendant is the registered proprietor of land parcel No. L.R MWERUA/KAGIO/2636 which is the suit land herein. Among the documents annexed to the plaintiff’s supporting affidavit is a copy of the title deed to the said land issued on 29th December 1998. From the defendant’s replying affidavit, his case is that what the plaintiff occupies is plot No. KAGIO A 242 and not a portion of the suit land as claimed. According to the plaintiff’s supporting affidavit at paragraph 4, when he acquired the portion of land subject of this case from one **GLADYS NYAMBURA** in 1996, she informed him that the same has been allocated to her and designated as plot No. KAGIO A 242. What has engaged this Court is whether the portion of the suit land that the plaintiff occupies and plot No. KAGIO A 242 which he purchased are one and the same property. He says that is what the seller told him. I find the answer to that question in paragraph 8 of the defendant’s replying affidavit where he has deponed as follows:-

“That plaintiff should pay mesne profits for occupying part of my land parcel number MWERUA/KAGIO/2636 while purporting it to be plot number A 242 KAGIO”

The defendant has therefore conceded that what the plaintiff occupies and claims is a portion of the suit land registered under his names. Adverse possession is a fact to be observed upon the land – **MaweU VS LIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 K.L.R 430**. In **KIM PAVEY & 2 OTHERS VS LOISE WAMBUI NJOROGE & ANOTHER (2011) e K.L.R** the Court observed that:-

“Thus to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”

It is not disputed that the plaintiff has developed a portion of the suit land where he lives with his family and even has tenants. There can be no better evidence of possession and occupation than developing and living on the property being claimed by the adverse possessor. However, each case must be determined on its own peculiar circumstances. The plaintiff’s evidence is that he took possession of the portion of the suit land measuring 100x 50 feet or 0.21 hectares in 1996. That has also not been disputed. The defendant became registered as proprietor of the suit land two years later in 1998. He did not sue the plaintiff for recovery of the land he was occupying. Time ceases to run when the owner asserts his right by taking legal action or by an effective entry or when his right is admitted by the adverse possessor – **GITHU VS NDEETE (1984) K.L.R 776**. The defendant’s counsel has submitted that he asserted his ownership over the suit land by filing **EMBU HIGH COURT CIVIL SUIT No. 42’A’ of 1999**. However, a perusal of the judgment in that case show that the plaintiff herein was not a party to those proceedings which involved the defendant herein (as the plaintiff) suing one **JOHN CERERE MWANGI** as the defendant. No evidence has been placed before me to demonstrate that the defendant made any attempt to evict the plaintiff by filing legal proceedings against him from the time he became the registered owner of the suit land in 1998. It follows therefore that by the time this suit was filed in January 2010, the plaintiff had been in continuous, exclusive open and un-interrupted occupation of a portion thereof measuring 100x50 feet or 0.21 hectares for a period of 14 years having gone into occupation in 1996. It is not clear how the defendant acquired ownership of the suit land but the law is that one can claim adverse possession in respect to a portion of the defendant’s land. I am therefore satisfied from the evidence before me that the plaintiff has proved as required in law, that he is entitled to the orders sought in his Originating Summons.

Ultimately therefore, there shall be judgment for the plaintiff against the defendant in the following terms:-

1. The plaintiff is declared to have become entitled to a portion approximately 0.21 hectares (50x100 feet) of that portion of land known as L.R No. MWERUA/KAGIO/2636 measuring about 0.83 hectares or thereabout by virtue of adverse possession thereof having been in open, exclusive, continuous and un-interrupted possession or occupation of the same for a period of over 12 years.

2. That the aforesaid portion of 0.21 hectares now part of L.R No. MWERUA/KAGIO/2636 be excised therefrom and the plaintiff be registered as the proprietor thereof free from all encumbrances.

3. Each party shall meet their own costs of this suit.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016

Judgment dated, delivered and signed in open Court this 30th day of September 2016.

Plaintiff present in person

Mr. Mwangi for Mr. Ngigi for Defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016