



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 39 OF 2013

NANCY WANGITHI MUNUI.....PLAINTIFF

VERSUS

GICHUHI GITHUMBI NYAMU.....DEFENDANT

JUDGMENT

By an Originating Summons filed in this Court on 26th January 2010, the plaintiff seeks the following orders against the defendant:-

- 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 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. That costs of this summons be borne by the defendant.***

The Originating Summons is supported by the affidavit of the plaintiff **NANCY WAGITHI MUNUI** and, as required, has annexed thereto the title deed to land parcel No. MWERUA/KAGIO/2636 (the suit land), the official certificate of search, the Green Card, receipt and a photograph of a building – see annexures **NWM 1** to **NWM 5**.

In her supporting affidavit, the plaintiff has deponed, inter alia, as follows: That she has been in exclusive and/or un-interrupted possession and occupation of approximately 0.21 hectares (50x100 feet) of land being a portion of all that property known as L.R No. MWERUA/KAGIO/2636 for over 13 years having acquired the same by way of purchase around 1996 from one **NANCY W. KAGIRI** who informed her that she had been allocated the same designated as plot No. A 134 KAGIO by the then County Council of Kirinyaga. That since 1996, she has been in open, exclusive and un-interrupted possession and/or occupation of the said portion on which she has constructed a permanent building where she lives with her family. That the defendant has at all material times been aware of her possession, occupation and development of the said portion of land and has not challenged the same for well over 13 years and for the foregoing reasons, she has now acquired possession of the same by way of adverse possession.

The Originating Summons is opposed through a replying affidavit in which the defendant has pleaded as follows: That the claim for adverse possession is misplaced since the plaintiff is in actual possession

and occupation of 0.21 hectares of plot No. 134 KAGIO which is not adverse to his title to the suit land. That the County Council of Kirinyaga had no title to pass to the plaintiff or the original allottee to plot No. A 134 KAGIO. That the plaintiff is nothing but a trespasser who has not acquired any adverse title against his property and therefore whatever buildings or development she had done on that portion ought to be removed forthwith and the plaintiff should also pay him mesne profits from 27th August 1992 until she removes her belongings from the plot. The plaintiff therefore has no claim under adverse possession and time started running from the time the notice was given to the plaintiff and the Originating Summons should be dismissed with costs.

In a supplementary affidavit filed on 23rd November 2015, the plaintiff states that the suit land is a sub-division of land parcel No. MWERUA/KAGIO/646 a copy of the Green Card of which is annexed as annexure **NWM 5**. That the sub-division was done by the defendant to give rise to three parcels of land one of which is the suit land. That she took possession of the portion that she is occupying in 1992 and started developing it and the defendant used to visit the plot while the construction was going on.

In reply to that affidavit however, the defendant has deponed that prior to the commencement of this suit, he was involved in **EMBU HIGH COURT CIVIL CASE No. 42 of 1999** with one **JOHN CERERE MWANGI**, a fact well known to the plaintiff. That the plaintiff claims that plot lock-up 108 B KAGIO has been in her possession since 1996 having purchased the same from one **LEONARD MUNENE KANYA**. However, both the said **LEONARD MUNENE KANYA** and the County Council of Kerugoya had no title over the plot. That the defendant was registered as owner of the suit land on 12th August 1998 and the plaintiff therefore has no claim against him.

Following the transfer of this case and others from the High Court Embu after the establishment of the Environment and Land Court in Kerugoya, it was agreed by counsel for the parties that this case and **KERUGOYA ELC CASE No. 37, 40 and 41 of 2013** be consolidated and that **KERUGOYA ELC CASE NO. 37 of 2013** be the test case. However, upon perusal of the said case files, I found it prudent to write separate judgments for each case. It was further agreed that the Court determines the cases on the basis of the parties' affidavits and the submissions by counsel.

I have therefore considered the parties respective pleadings, the annexures thereto and the submissions by counsel.

It is conceded that the defendant is the registered proprietor of the suit land. A copy of the title thereto shows that he become the registered proprietor thereof on 29th December 1998. It is also clear from paragraph 5 of the plaintiff's supplementary affidavit and the copy of the Green Card annexed thereto (annexture **NWM 5**) that the suit land is a sub-division of land parcel No. MWERUA/KAGIO/646 which belonged to the defendant. The plaintiff therefore claims that she is entitled to orders that she has acquired, through adverse possession, a portion of the suit land measuring 0.21 hectares (50x100 feet) having been in open, exclusive and un-interrupted possession and occupation thereof since 1996 and having put up a permanent building which he occupies with her family. The defendant's case however is that the plaintiff is infact in actual occupation of 0.21 hectares of a plot known as No. A 134 KAGIO and not the suit land. That this suit is therefore misplaced.

In **KASUVE VS MWAANI INVESTMENTS LTD & 4 OTHERS 2004 1 K.L.R 184**, the Court of Appeal set out what a party claiming to be entitled to land by adverse possession must prove. It 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 way of adverse possession to land registered under any of the Acts cited in **Section 37 of the Limitation of**

Actions Act 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 settled 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 any 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.**

Similarly, the new land laws promulgated after the 2010 Constitution recognize the doctrine of adverse possession. **Section 28 (h) of the Land Registration Act 2012** identifies some of the overriding interests in land 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”.

Section 7 of the Land Act 2012 provides as follows:-

“Title to land may be acquired through:-

(a)

(b)

(c)

(d) Prescription”

Although the Supreme Court of India has declared the doctrine of adverse possession to be archaic and recommended abolition of that law or suitable amendments thereto – **STATE OF HARYANA VS MUKESH KUMAR & OTHERS (2012) A.I.R, SCW 276**, the position in this country, as captured by the Court of Appeal in the case of **MTANA LEWA VS KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL No. 56 of 2014 (MALINDI)**, is that the doctrine of adverse possession is neither an arbitrary nor an un-Constitutional limitation of the right to property. That position will therefore remain the law in this country unless perhaps the Supreme Court of Kenya decides to follow the route taken by the Indian Court.

Possession of the land being claimed by the adverse possessor is a matter of fact to be observed on the land – **MAWEU VS LIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 K.L.R 430**. See also **KIM PAVEY & 2 OTHERS VS LOISE WAMBUI NJOROGE & ANOTHER 2011 e K.L.R** where the Court held:-

“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”

To develop the land in dispute or a portion thereof is perhaps the best evidence of possession or occupation. The claimant’s case is made even stronger where she is actually living on the suit land with her family as is the position in this case. While the plaintiff herein claims that she has been in open, exclusive and un-interrupted possession and occupation of the suit land since 1996 (in her supplementary affidavit she mentions the year as 1992), the defendant states that what the plaintiff actually occupies is plot No. A 134 KAGIO and not the suit land. In my view, therefore, the issue to be determined by this Court is whether the plaintiff occupies a portion of the suit land as she alleges or whether in fact she occupies plot No. A 134 KAGIO as claimed by the defendant. It is not really disputed that the plaintiff has indeed been in occupation and possession of a portion of land which she has developed and lives with her family. It is also common knowledge that the suit land which is registered in the names of the defendant is a resultant sub-division of land parcel No. MWERUA/KAGIO/646 before the defendant sub-

divided it and retained the suit land in his names while two other portions were registered in the names of other proprietors one of whom is his son **PATRICK GICHUHI**. To determine the issue identified above, this Court can only rely on the parties own affidavits and the annexures thereto since no viva voce evidence was adduced. In paragraph 2 of his supporting affidavit, the plaintiff has deponed as follows:-

“That I have been in open, exclusive and/or uninterrupted possession and occupation of the approximately 0.21 hectares (50x100 feet) of land being a portion of all that property known as L.R No. MWERUA/KAGIO/2636 for over 13 years. Annexed hereto and marked NWM 1 and NWM 1A respectively are copies of the Title deed and official search”

In reply to that averment, the defendant has deponed in paragraph 2 of his replying affidavit as follows:-

“That I have been advised by my advocate on record which advise I verily belief (sic) to be true that it is evident from the annexures and the documents annexed by the applicant that the claim for adverse possession is misplaced in that the applicant is in actual occupation of 0.21 Hectares plot No. A 134 KAGIO and not adverse to my title but in the belief that the said mentioned portion was actually his by right hence the occupation, construction, open exclusive and continuous and or uninterrupted possession was not and is not adverse to my title No. MWERUA/KAGIO/2636”.

The defendant then goes on to plead in paragraph 4 and 5 of his replying affidavit as follows:-

4: ***“That I am advised by my advocate on record which advise I verily believe to be true that the plaintiff/applicant is nothing but a trespasser who has not acquired any adverse title against me hence whatever building and or development on that portion ought to be removed forthwith”***

5: ***“That I am advised by my advocate on record which advise I verily belief (sic) to be true that the plaintiff must pay me mesne profits for the period starting 27th August 1992 till he vacates and removes all his belongings from the plot”***

Since the defendant is the registered proprietor of the suit land, he can only claim mesne profits from one who is illegally occupying such land. In paragraph 4 and 5 of his replying affidavit, the defendant seeks the removal of ***“whatever building and or development the plaintiff has made on the land and also mesne profits for the period starting 27th August 1992 till she vacates and removes all his belongings from the plot”*** In light of those averments, the only conclusion that this Court can arrive at is that the portion of land which the plaintiff has been in exclusive and uninterrupted occupation of since 1996 (or 1992) and on which she lives with her family and is therefore entitled to orders to have acquired by adverse possession is indeed a portion of the suit land. It is also instructive to note that on 26th January 2010 when the plaintiff moved the Court by way of Chambers Summons seeking orders to restrain the defendant from inter alia, demolishing her structures or in any way interfering with the plaintiff’s ownership, use and possession of 0.21 hectares (50x100 feet) being a portion of the suit land, **MAKHANDIA J.** (as he then was) issued injunctive orders in those terms. That can only mean that the Judge was satisfied that the plaintiff indeed occupies a portion of the suit land measuring 0.21 hectares (50x100 feet). The plaintiff’s averment that her occupation and possession of the said portion of the suit land has been open, exclusive, uninterrupted and with the knowledge of the defendant has not been disputed. There is no evidence that the defendant has made any attempt to evict the plaintiff from the portion that she occupies. All that the defendant has done in his response to the plaintiff’s supplementary affidavit is refer to **EMBU HIGH COURT CIVIL CASE No. 42 of 1999** in which he had sued one **JOHN CERERE MWANGI** a fact he says the plaintiff was well aware of. There is indeed an order issued in that case directing the plaintiff to move from the suit land. However, the plaintiff was not a party to that suit and that order could not therefore interrupt her possession and occupation of the suit land. The only way the defendant could have interrupted the plaintiff’s occupation of a portion of the suit land which she occupies would have been by taking legal action against her or making an effective entry. The defendant did neither of the above. In ***GITHU VS NDEETE 1984 K.L.R 776***, the Court of Appeal held that time ceases to run when the owner of the land in dispute asserts his right by taking legal proceedings or by an effective entry into the land or when his right is admitted by the adverse possessor.

The evidence before me shows that the defendant took out legal proceedings against one **JOHN CERERE MWANGI** in **EMBU HIGH COURT CIVIL CASE No. 42 of 1999** seeking his removal from the suit land. However, there is no evidence that such action was taken against the plaintiff who also occupies a portion of the suit land. And neither has it been suggested that the plaintiff was an agent or servant of the said **JOHN CERERE MWANGI** who could be removed from the suit land on the basis of the decree issued in **EMBU HIGH COURT CIVIL CASE No. 42 of 1999**. As already indicated above, the plaintiff has in her favour injunctive orders issued in this case on 26th January 2010 restraining the defendant from interfering with her possession of 0.21 hectares (50x100 feet) being a portion of the suit land. It is settled that a party can claim ownership of a portion of land registered in another person's names so long as that portion is clearly identifiable – ***GITHU VS NDEETE*** (supra). The plaintiff herein has produced as evidence a photograph of a building in which he claims she and her family have been residing in since 1996. This has not really been rebutted by the defendant whose only claim, which this Court has considered and found not to be the position, is that the portion which the plaintiff occupies is not part of the suit land and is infact a portion known as plot No. A 134 KAGIO. The period from 1996 when the plaintiff took possession of a portion of the suit land and developed it upto 20th January 2010 when this suit was filed is 14 years well in excess of the statutory period of 12 years that would entitle a party to orders of adverse possession.

From the evidence above, it is my finding that the plaintiff has proved her case against the defendant and is therefore entitled to the orders sought in her Originating Summons filed herein on 26th January 2010.

The up-shot of the above is that 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 all that parcel of land known as L.R No. MWERUA/KAGIO/2636 by virtue of adverse possession thereof having been in open, exclusive, continuous and un-interrupted possession and occupation thereof 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 absent

Mr. Mwangi for Mr. Munene for the Defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016