



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 85 OF 2016 (O.S)

**IN THE MATTER OF L.R NO. GATARAKWA/GATARAKWA BLOCK III/1316 &
GATARAKWA/GATARAKWA BLK III/1317**

IN THE MATTER OF SECTION 38 OF THE

LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF ACQUISITION OF LAND BY

ADVERSE POSSESSION

BETWEEN

JOHN KARIUKI WAIRIMU 1ST APPLICANT

LUCY WAHITO KARIUKI 2ND APPLICANT

-VERSUS-

PAUL MAINA KABUGU RESPONDENT

RULING

Introduction

1. The plaintiffs herein took out the originating summons dated **25th April, 2016** for determination of the following questions:-

a) Whether a declaration should issue to the effect that they have acquired land parcels L.R No. Gatarakwa/Gatarakwa Blk III/1316 and Gatarakwa/Gatarakwa Blk III/1317 by adverse possession registered in the name of Paul Maina Kabugu?

b) Whether an order should issue for transfer and registration for L.R No. Gatarakwa/Gatarakwa Blk III/1316 and Gatarakwa/Gatarakwa Blk III/1317 in their names instead of Paul Maina Kabugu?

c) Whether a declaration should issue to the effect that the administration of the estate of

Reuben Kabugu Kabanya (deceased) is subject of their claim to land parcels Nos. L.R Gatarakwa/Gatarakwa Blk III/1316 and Gatarakwa/Gatarakwa Blk III/1317 by adverse possession?

d) Who should pay the costs of the suit?

2. In support of the suit/application, the plaintiffs vide the affidavit sworn on **25th April, 2016** have deposed that sometime in the year 1999, Reuben Kabugu Kabanya (deceased) sold the two parcels of land mentioned herein above to John Kariuki Kibara (deceased); that in the same year they (read the plaintiffs) took exclusive possession and use of the suit properties (they built a house and began farming thereon); that the suit properties were demarcated and surveyed on the ground ready for transfer to them. Unfortunately the seller of the two parcels of the land passed on before transfer of the suit properties was effected. It is further submitted that they have buried their father thereon.

3. Maintaining that they have acquired title to the suit properties by adverse possession, the plaintiffs' complain that the respondent, who is the administrator of the estate of the deceased, has lately been making attempts to dispossess them of the suit properties.

4. In support of the application, the applicants have annexed the following documents to their affidavit:-

i) Copies of a sale agreements dated 17/12/1999 and 26/2/2000 marked **JKK-1(a) and (b)** (Not translated into the language of the court).

ii) Photographs of the the developments allegedly effected by the applicants on the suit property **JKK 2;**

5. Simultaneously with the Originating Summons, the applicants brought the notice of motion of even date seeking to *inter alia* restrain the respondent from interfering with their possession and use of the suit properties pending the hearing and determination of the application and the suit herein.

6. The applicants who maintain that they have been in use and occupation of the suit property for over 15 years reiterate their contention that the respondent has begun interfering with their possession of the suit property by bringing strangers thereon.

7. It is the applicant's case that unless the orders sought are granted, they stand to suffer great loss (may lose the crops on the land and get evicted from the suit properties).

8. In reply and opposition to the application, the respondent has through the affidavit he swore on 8th June 2016, deposed that the application and the main suit are an abuse of the court process; that the applicants have no capacity to file the claim against the him. He explained that the suit properties belonged to his father who passed on on 13th July, 2003. After his father passed on, he petitioned and obtained letters of administration in respect of his father's estate, the suit properties included.

9. He further explained that the claim of the applicants has been subject of arbitration by the area assistant chief and the court vide the succession proceedings which he instituted. He contends that the applicants/their predecessors in claim to the suit property, were unable to establish their claims before those forums.

10. The respondent further denies the applicant's allegations that they have been in use and occupation of the suit property.

11. Terming the respondents allegations that they reside in the suit property false, the respondent alleges that the structures marked **JWW-2** in the affidavit sworn in support of the suit were constructed by his father.

12. Explaining that he has since disposed of the suit properties to third parties, the respondent faults the

applicants' for having failed to challenge the grant pursuant to which he obtained the suit properties.

13. The following documents are annexed to the respondent's affidavit:

(i) Copy of letter from the area assistant chief dated 12/07/2003 confirming that the applicant's predecessors in claim had lodged a claim before the area assistant chief to compel the respondent's father to transfer the suit lands to them, marked **MK-1**.

(ii) Summons for confirmation of grant dated 30th January, 2008, marked **MK-2**.

Hearing

14. When the matter came up for hearing, counsel for the applicants **Mr. Warutere**, reiterated the applicants' contention that the applicants have been living in the suit property and stand to suffer irreparably if the orders sought are not granted.

15. Counsel for the respondent, **Mr. Kiminda**, reiterated the averments contained in the respondent's replying affidavit and maintained that the applicants' claim was considered in Nyeri High Court Succession Cause No. 496 of 2003 and found to be wanting.

16. He further submitted that the applicants' who were aware of the succession proceedings and failed to establish their claim through those proceedings should not be entertained by this court. According to him (counsel for the respondent), since the plaintiffs' claim touches on the estate of a deceased person, they should at least have obtained a limited grant of letters of administration of that estate before they could be allowed to prosecute the claim.

17. Terming the plaintiffs claim none suited, he submitted that the applicants should have applied for revocation of the grant issued to the respondent.

18. Based on annexure 1 in the affidavit sworn in reply to the application herein, it is admitted that there was a dispute between the applicants' predecessor in claim but contended that the applicants' predecessors in claim were not allowed to occupy the suit land.

19. It is reiterated that the houses in the pictures annexed to the applicants' supporting affidavit were constructed by the respondent's father.

20. The applicants are faulted for having failed to annex extracts of title to the suit property as by law required.

21. In a rejoinder, counsel for the applicants submitted that there was no need for the applicants to take out limited letters of administration ad litem because they have brought the claim in their individual capacities (as persons who have been in occupation of the suit property since 2000).

22. With regard to failure to extract and annex the title, he stated that he will file a further affidavit to introduce the title deeds.

Analysis and determination:

23. In determining the plaintiff's claim for adverse possession, I begin by pointing out that **Order 37 Rule 7** of the Civil Procedure Rules requires that an application under **Section 38** of the Limitations of Actions Act be made by originating summons. **Sub-rule 2** of **Rule 7** requires that the application be supported by an affidavit to which a certified extract of title to the land in question has been annexed.

24. The foregoing provisions of the law make it clear that a claim for adverse possession can only be brought against a registered proprietor of the land. In this regard see the case of **Beatrice Syokau Gatumbu v Kenya Airports Authority & 2 Others [2012]eKLR** where **Lenaola J.**, observed:-

“The period of time for which title to real property is acquired through the doctrine of adverse possession is provided for under Section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya. Section 7 of this Act reads:-

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person....

The issue of time has also been settled by case Law where it has been held over and over again that time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In the case of Tayebali AdamjiAlibhai – Vs – AbdulhusseinAdamjiAlibhai (1938), 5 E.A.C.A 1, it was held that **in respect of a registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is prima facie entitled to possession and, therefore, entitled to take action against any intruder to the land.** This was later on quoted with approval in the case of Peter Wanyoike Gathure – Vs – A. Beverly (1965) E. A at Pg. 514 where it was held:-

(i) That certificates of ownership issued under the Land Titles Ordinance must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interest than those mentioned therein.

(ii) That no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of the certificate. (emphasis supplied).

25. In applying the above principles, which I totally agree with, to the circumstances of this case, the respondent’s respective titles having being issued in 2016 and the current suit having been filed in 2016 (less than a year from the time the respondent obtained title to the suit properties), I hold the view that the applicants have not made up a prima facie case with a probability of success against the title held by the respondent.

26. In the circumstances of this case, I agree with the submissions by the respondent’s counsel that the plaintiffs ought to have challenged the respondent’s entitlement to the suit property through the succession proceedings of the estate of the respondent’s father, by at least leading evidence to show that the suit property did not form part of the free estate of the respondent’s father.

27. In my view, the only way in which the plaintiffs can challenge the title held by the respondent is by leading evidence to show that the title held by the respondent’s father had become extinguished by their adverse possession of it. Did the plaintiffs lead such evidence? I am afraid they did not. I say so because they did not lead evidence concerning when the title issued in favour of the respondent’s father was issued. Without such evidence and given the fact that the respondent is sued in his individual capacity as opposed to as the administrator of the estate of his father, I entertain serious doubts whether the plaintiffs’ can sustain a claim for adverse possession against the title held by the respondent’s father.

28. The upshot of the foregoing is that the suit has no merit and is dismissed with costs to the respondents.

Dated, signed and delivered at Nyeri this 14 th day of October, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Kimunga h/b for Mr. Warutere for the applicants

Mr. Kiminda for the respondent

Court assistant - Lydia