



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 471B OF 2013

IN THE MATTER OF REGISTRATION OF TITLE TO LAND BY ADVERSE POSSESSION

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

**IN THE MATTER OF LAND PARCEL NUMBER INOI/NDIMI/534 (FORMERLY
INOI/NDIMI/146 AND ALSO FORMERLY INOI/NDIMI/485, 486 AND 487)**

BETWEEN

GICHIRA NGUNGI.....PLAINTIFF

VERSUS

BETTY MUTHONI MITHAMO.....1ST DEFENDANT

PAUL NJIRAINI MITHAMO.....2ND DEFENDANT

JOHN MURIITHI MITHAMO.....3RD DEFENDANT

MICHAEL MURIUKI MITHAMO.....4TH DEFENDANT

JUDGMENT

The plaintiff **GICHIRA NGUNGI** filed this suit on 18th July 2007 premised under ***Section 38 of the Limitation of Actions Act*** claiming to have acquired a portion of land measuring 30 meters by 11 meters out of land parcel No. INOI/NDIMI/534 by way of adverse possession. He therefore sought the determination of the following questions:-

- a. Whether GICHIRA NGUNGI has been in open, exclusive, un-interrupted and continuous occupation of a portion measuring 30 meters by 11 meters on land parcel No. INOI/NDIMI/534.**
- b. Whether GICHIRA NGUNGI has been using the said portion of land exclusively since 1959.**
- c. Whether GICHIRA NGUNGI has constructed buildings on the said portion of land where**

he runs a bar and butchery business.

d. Whether the defendants' title to the portion of land measuring 30 meters by 11 meters on the land parcel No. INOI/NDIMI/534 has been extinguished.

e. Whether the defendants are holding the said portion of land in trust for GICHIRA NGUNGI.

f. Whether GICHIRA NGUNGI has acquired a portion of land measuring 30 meters by 11 meters on land parcel No. INOI/NDIMI by way of adverse possession.

g. Whether the said portion of land measuring 30 meters by 11 meters should be excised from land parcel No. INOI/NDIMI/534 and be registered in the names GICHIRA NGUNGI.

The plaintiff therefore seeks the following orders:-

- 1. That GICHIRA NGUNGI has acquired a portion of land measuring 30 meters by 11 meters out of land parcel No. INOI/NDIMI/534 by way of adverse possession.*
- 2. That GICHIRA NGUNGI be registered as the proprietor of a portion of land measuring 30 meters by 11 meters to be excised from land parcel No. INOI/NDIMI/534 by way of adverse possession.*
- 3. That costs be provided for.*

In support of his claim, the plaintiff has sworn an affidavit in which he has deponed, inter alia, that the land parcel No. INOI/NDIMI/534 was originally designated as land parcel No. INOI/NDIMI/146 which is registered in the names of the defendant but was previously registered in the names of **GITHINJI MITHAMO** the deceased father to the 2nd, 3rd and 4th defendants and husband to the 1st defendant. That soon after the process of land demarcation in 1959, he entered into and occupied a portion measuring 30 meters by 11 meters on land parcel No. INOI/NDIMI/146 and has been in open, exclusive, un-interrupted and continuous use and occupation of the same having put up a building which he uses as a bar and butchery. That on 2nd April 1986, the register for land parcel No. INOI/NDIMI/146 was closed and the parcel was sub-divided into INOI/NDIMI/485, 486 and 487 which were later combined into INOI/NDIMI/534 and registered in the names of **GITHINJI MITHAMO** in 1999. That the defendants title to the portion measuring 30 meters by 11 meters on land parcel No. INOI/NDIMI/534 was extinguished long time ago and therefore **GITHINJI MITHAMO** now deceased held and the defendants hold the said portion of land in trust for the plaintiff as he has acquired it by way of adverse possession.

The 4th defendant **MICHAEL MURIUKI MITHAMO** filed a replying affidavit on behalf of the other defendants in which he deponed, inter alia, that this suit is incompetent, bad in law and an abuse of the Court process because the defendants acquired land parcel No. INOI/NDIMI/534 on 9th August 2004 and therefore the plaintiff cannot purport to have been in occupation of the said parcel for more than 12 years. Further, that the plaintiff has merely trespassed on the aforesaid parcel of land since an order was issued in Kerugoya L.D.T Case No. 29 of 2007 declaring that the defendants are the owners of the land. The defendants further depone that their late father was called **MITHAMO GITHINJI** and not **GITHINJI MITHAMO** and that the plaintiff is their neighbour who owns a very big parcel of land known as INOI/NDIMI/95. That all along, the defendants thought that the bar and butchery was on the plaintiff's land No. INOI/NDIMI/95 and the plaintiff also used to insist that they were on his land. The plaintiff cannot therefore be said to be in adverse possession of their land when he did not know that he had encroached onto the defendants' land. That immediately the defendants discovered that the plaintiff had trespassed onto their land, they filed a dispute at the Land Disputes Tribunal and orders were issued in L.D.T Case No. 29 of 2007 on 4th June 2007. That this suit should therefore be dismissed with costs.

The plaintiff testified and called one witness in support of his case. He told the Court that the deceased **MITHAMO GITHINJI** was his neighbour and the 1st defendant is his wife while the other defendants are his children. He added that his land is INOI/NDIMI/95 while the late **MITHAMO GITHINJI's** land was initially INOI/NDIMI/146 and he had a butchery and bar on that land but did not know that it

belonged to **MITHAMO GITHINJI** until 2005 when the defendants took him to the Tribunal. He stated that he has been doing business on a portion measuring 13 meters by 11 meters on that land since 1998 although he has been ploughing it since 1959. He testified that both **MITHAMO GITHINJI** and his family have all along been aware about his occupation of the portion but have not tried to remove him. He produced his exhibits as per the list of documents marked 1 to 6.

His witness **JOHN WAHENYA NJERU** (PW2) testified that he knows the parties and their lands share a common boundary. He added that there is a bar on the land of **MITHAMO GITHINJI** put up by the plaintiff and to the best of his knowledge, none of the family members of the late **MITHAMO GITHINJI** have even used the portion where plaintiff has put up the bar.

JOHN MURIITHI MITHAMO the 3rd defendant testified on behalf of the defendants and confirmed that the 1st defendant is his mother while the other defendants are his siblings and that the plaintiff is their neighbour. He added that the plaintiff has been utilizing part of their land and this was only discovered after they did succession. They therefore filed a case at the Tribunal's being L.D.T Case No. 29 of 2007 and a decree was issued. He therefore asked the Court to rely on the affidavit of his brother **MICHAEL MURIUKI MITHAMO** and dismiss this suit. He produced the decree in that case – Defence Exhibit 1.

Submissions have been filed by **Mr. MUYODI** advocate for the plaintiff and **Mr. MAGEE WA MAGEE** advocate for the defendants.

I have considered the oral evidence by both parties, the documentary exhibits and the submissions by counsel.

It is not in dispute that the land parcel No. INOI/NDIMI/534 (the suit land) is registered in the names of the defendants since 2004. It is also clear from the evidence that the plaintiff is the registered proprietor of land parcel No. INOI/NDIMI/95 which has a common boundary with the suit land. It is also common knowledge that the plaintiff has been utilizing a portion of land out of parcel No. INOI/NDIMI/534 since 1959 and in 1996, he put up a bar and butchery thereon. In his evidence, the plaintiff says the portion measures 13 meters by 11 meters although in his pleadings, he says it measures 30 meters by 11 meters. That is not really significant because the plaintiff's construction of the bar and butchery on a portion of the suit land is not in dispute. What this Court has to determine is whether the plaintiff's occupation of a portion of the suit land satisfies the requirements of adverse possession or in the alternative, the defendants hold the said portion in trust for the plaintiff. The plaintiff's pleadings are clear that his claim is based both in trust and adverse possession.

On the issue of trust, the plaintiff did not really lead any evidence although that is part of his claim as per paragraph (e) of his Originating Summons. There is no mention of trust in his oral evidence and indeed I see no reference of trust in any of the submissions by counsel. The law is that a claim of trust must be proved by evidence. In **MBOTHO & OTHERS VS WAITIMU & OTHERS 1986 K.L.R 171**, the Court of Appeal said:-

“The law never implies, the Court never presumes a trust but in a case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”

Clearly, there was no intention on the part of the plaintiff to seriously pursue his claim to the portion of the suit land through trust and no iota of evidence was led in that respect. The parties are not even related and such a claim would obviously have been insurmountable in the circumstances of this case. It is accordingly dismissed.

The plaintiff's thrust was on the claim of adverse possession which is provided for under **Section 38 (1) of the Limitation of Actions Act**. That section provides as follows:-

“Where a person 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 registered under any of those

Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the 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. 2132 of 1996.*** Similarly, the new land laws promulgated after 2010 recognize the doctrine of adverse possession. ***Section 28 (h) of the Land Registration Act of 2012*** recognize 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”

On the other hand, ***Section 7 of the Land Act 2012*** states as follows:-

“Title to land may be acquired through –

- a.
- b.
- c.

d. Prescription”

What does a party claiming land by adverse possession have to prove? In ***KASUVE VS MWAANI INVESTMENT LIMITED & FOUR OTHERS 2004 1 K.L.R 184,*** the Court of Appeal held that:-

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

As indicated above, the plaintiff’s occupation and utilization of a portion of the suit land cannot be disputed on the evidence before me. However, what is also clear is that all this time, from 1959 when the plaintiff went into occupation and put up a bar and butchery in 1996, it was assumed by both parties that the plaintiff was infact occupying his land parcel No. INOI/NDIMI/95. In his evidence in chief, the plaintiff said:-

“I have a butchery and bar on the said land. The land belonged to Mithamo but I did not know. I only came to know when Mithamo’s family took me to the Lands Tribunal in 2005. However, I am still in occupation of the said land”

This is also reinforced by the plaintiff’s witness **JOHN WAIHENYA NJERU (PW2)** who testified in his evidence in chief as follows:-

“The portion on which the bar is has always been the property of the plaintiff since demarcation”

On his part, the 3rd defendant said as follows in his evidence in chief:-

“It is true that he has been using part of our land. We discovered that the land he is using is ours after we did succession. When we discovered that, we went to the Land Tribunal and filed Case No. L.D.T 29 of 2007”

He reiterated the same when cross-examined by **Mr. MUYODI** and said:-

“The plaintiff lives on our land. I don’t know for how long he has lived on it but we only knew after we did succession”

The import of all the above is that whereas the defendants were aware about the plaintiff’s occupation of a portion of the suit land, they were under the impression that the said portion was infact in the plaintiff’s land. Perhaps this confusion was due to the fact that both the plaintiff’s land parcel No. INOI/NDIMI/95 and the defendant’s land parcel No. INOI/NDIMI/534 share a common boundary. Under those circumstances, and notwithstanding the fact that the plaintiff’s occupation of a portion of the suit land has been well in excess of the 12 years stipulated in law, have all the elements of adverse possession been established? That is the issue that I have to grapple with.

The foundation of the law on adverse possession is that it prohibits the registered owner of the land being claimed by the adverse possessor from seeking the Court’s intervention in recovering it once he has been dispossessed of the same for a period of 12 years or more. Dispossession is defined in **BLACK’S LAW DICTIONARY 9TH EDITION** as:-

“Deprivation of, or eviction from, rightful possession of property; the wrongful taking or withholding of possession of land from the person lawfully entitled to it”

It is clear from the plaintiff’s own evidence that he was under the belief, mistaken though it was, that he was occupying his own land. The defendants similarly believed the same until 2005 when they discovered that the suit land actually belongs to them. In the circumstances, how can the plaintiff justify a claim of a portion of the suit land through adverse possession when all along he assumed it was his own property and he did not even know that it was registered in the names of **MITHAMO GITHINJI** and thereafter from 2004 in the names of the defendants? How could he have dispossessed the defendants of property that he believed all along to be his? And on the other hand, how can the defendants have been dispossessed of property that they did not know they owned? As was held in **WAMBUGU VS NJUGUNA 1983 K.L.R 172**, the **Limitation of Actions Act** on adverse possession contemplates two concepts; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years. The plaintiff herein was certainly in possession of the suit land for over 12 years. However, he occupied it as his own property and not the property of the defendants who also only knew that the suit land was their property in 2004 or 2005 after which they filed Land Dispute Tribunal Case No. 29 of 2007 in which a decree was issued declaring them as the rightful owners of the suit land.

In my view therefore, time began to run, by the plaintiff’s own evidence, in 2005 when he discovered that the suit land infact belonged to the defendants. The defendants took legal action soon thereafter to assert their right to the suit land culminating in a decree issued in their favour in 2007 and therefore, on the authority of **GITHU VS NDEETE 1984 K.L.R 776**, time ceased to run at that point. This suit was filed in July 2007. From the time the plaintiff discovered that he was infact in adverse possession of land belonging to the defendants (2005) to the time this suit was filed (2007) is a period of only two years which does not qualify the plaintiff for the orders sought in his Originating Summons. I am also guided by the dicta of **KNELLER J.** in **KIMANI RUCHIRE VS SWIFT RUTHERDORDS & CO. LTD 1980 K.L.R 10** as adopted recently by the Court of Appeal in **TITUS KIGORO MUNYI VS PETER MBURU KIMANI C.A CIVIL APPEAL No. 28 of 2014 (NYERI)** that:-

***“The plaintiff must show that the Company had knowledge (or the means of knowing actual or constructive) of the possession or occupation*”**

In the circumstances of this case, the plaintiff has not proved that the defendant had knowledge, constructive or otherwise, of his adverse possession of the suit land. If anything, the plaintiff has conceded that the defendants had no knowledge that the suit land was infact their land. Clearly, a key element that would entitle the plaintiff to orders of adverse possession with respect to the suit land or even a portion thereof is lacking.

Ultimately therefore and upon considering all the evidence herein, I am not persuaded that the plaintiff has established his case for the grant of any orders as pleaded in his Originating Summons filed herein on 18th July 2007. This suit is therefore dismissed with costs to the defendants.

B.N. OLAO

JUDGE

25TH NOVEMBER, 2016

Judgment dated, delivered and signed in open Court this 25th day of November 2016.

Mr. Ngigi for Mr. Magee for Defendants present

Mr. Okwaro for the Plaintiff absent

Right of appeal explained.

B.N. OLAO

JUDGE

25TH NOVEMBER, 2016