



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 207 OF 2013

RUITA KABUTU.....APPLICANT

VERSUS

ANNA WAMBUI ELIZA.....RESPONDENT

JUDGMENT

By an Originating Summons filed herein on 30th June 2011, the plaintiff **RUITA KABUTA** sought the following orders against the defendant **ANNA WAMBUI ELIZA**.

- 1. The plaintiff be declared to have become entitled by adverse possession of over 12 years to all that 5.8 acres of land registered under Chapter 300 Laws of Kenya and comprised in the title No. KABARE/NYANGATI/826 situated within Kirinyaga County.***
- 2. That the plaintiff be registered as the sole proprietor of 5.8 acres out of 3.04 Ha of the said land parcel No. KABARE/NYANGATI/826 in place of MARGARET WANGITHI MBIRO (deceased) who is the current registered owner but a grant to her Estate has been issued to the defendant ANNA WAMBUI ELIZA.***
- 3. That the Land Registrar Kirinyaga do register the plaintiff as the proprietor of 5.8 acres out of L.R No. KABARE/NYANGATI/826.***
- 4. The defendant be ordered to pay the costs of this suit to the plaintiff.***

The Originating Summons was supported by the plaintiff's supporting affidavit dated 28th June 2011 and a further affidavit dated 1st December 2015. That further affidavit contained a translation into English language of agreement of sale of 5.8 acres by one **NJUKI MBIRO** to the plaintiff herein. The original supporting affidavit did not contain a translation of the agreement from Kikuyu language in which it was written into English language and this Court directed on 2nd November 2015 that a translation be availed. The further affidavit also contained the Green Card to land parcel No. KABARE/NYANGATI/826 showing that it was registered in the defendant's names on 21st September 2014. It also had annexed thereto photographs of the land and houses constructed thereon which the plaintiff alleges she has been living in since the 1960's. The import of the plaintiff's two affidavits is that on or about 5th March 1966, he entered into a sale agreement with one **NJUKI MBIRO** (deceased) for the purchase of 5.8 acres out of land parcel No. KABARE/NYANGATI/826 and entered the land the same year. As a sign of good faith to demonstrate his wish to transfer a portion of land parcel No. KABARE/NYANGATI/826 (the suit land) to the plaintiff herein, the deceased **NJUKI MBIRO** allowed him to keep the title. Since entering the land, the plaintiff has extensively developed and cultivated it and lives there with his family. When **NJUKI MBIRO** died, the suit land was registered in the names of his mother **MARGARET WANGITHI MBIRO** who is also deceased and following her death, the suit land

is now registered in the names of the defendant.

In opposing the plaintiff's claim, the defendant filed a replying affidavit in which she deponed, inter alia, that the plaintiff is a stranger to the suit land and has never been in occupation thereof. That the defendant and her deceased mother **MARGARET WANGITHI MBIRO** have always been in occupation of the suit land which is family land which originally belonged to the deceased brother to the defendant. That after her mother died on 11th October 1983, she filed **KERUGOYA SUCCESSION CAUSE No. 97 of 2007** and was issued with a grant on 14th August 2009 and at no time did the plaintiff protest during the Succession Cause. That the documents annexed to the supporting affidavit are not legible and nowhere do they indicate that there was any sale agreement regarding the suit land. That the claim for adverse possession cannot stand since the suit land has since changed hands. That the defendant has no other home except the suit land.

Directions having been taken, the parties agreed on 2nd November 2015 that the suit be determined on the basis of the parties respective affidavits and that counsel do file written submissions. However, only **Mr. NGANGAH** advocate for the plaintiff had filed his submissions by 28th April 2016 and although **Mr. MWAI** advocate for the defendant sought and was granted 14 days to file his submissions, he had not done so by 13th October 2016 and so this Court fixed a judgment date for 11th November 2016 as **Mr. MWAI** advocate did not even attend Court to explain why submissions had not been filed as directed.

I have considered the pleadings herein, the rival affidavits and plaintiff's further affidavit and annexures thereto as well as the submissions by **Mr. NGANGAH** advocate for the plaintiff. From the affidavits herein, it is clear that although the suit land was originally registered in the names of **NJUKI MBIRO** and later in the names of **MARGARET WANGITHI MBIRO** (both deceased), it has since 21st September 2014 been registered in the names of the defendant and a title deed issued to her accordingly. This is as per the Green Card annexed to the plaintiff's further affidavit. The issue for this Court's determination therefore is whether the plaintiff has proved that he is entitled to an order that he has acquired by way of adverse possession 5.8 acres out of the suit land.

In **KASUVE VS MWAANI INVESTMENTS LTD & FOUR 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 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**.

This suit is premised under **Section 38 of the Limitation of Actions Act** which 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 lease in place of the person then registered as the proprietor thereof. 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 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**.

Similarly, the new land laws that followed the promulgation of the new Constitution in 2010 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 on the other hand provides as follows:-

“Title to land may be acquired through:-

(a)

(b)

(c)

(d) Prescription”.

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**. In **KIM PAVEY & OTHERS VS LOISE WAMBUI NJOROGE & ANOTHER 2011 e K.L.R**, the Court of Appeal said:-

“Thus to prove title by way of 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”

What then is the plaintiff’s evidence to prove possession? In paragraph two (2) of his supporting affidavit, he has deponed how he took possession of 5.8 acres of the suit land on 5th March 1996 following an agreement for sale between him and the deceased **NJUKI MBIRO**. He then depones in paragraphs 3 and 5 of the same affidavit as follows:-

3: “That I entered into the land soon after we commenced the transaction of the sale early in the year 1966”

5: “That since entering the land in 1966, I have extensively developed the land, cultivated the same and the land served as my matrimonial home where I have brought up my family”.

The above is however refuted by the defendant who in paragraph 5 of his replying affidavit has deponed as follows:-

5: “That the applicant has never been in occupation of the subject matter property as claimed”

However, in his further affidavit dated 1st December 2015, the plaintiff not only repeated the averment that he has continued to live and work on 5.8 acres of the suit land since the 1960’s but he has also annexed thereto photographs of the land showing a crop of rice, bananas and also houses and two graves one of **SAMUEL RUITA WANJIRU** and the other of **JAMES NJERU NJUKI**. Although he has not told us who those two persons are that are buried on the land that he claims, the Court can only presume that they are his relatives. It is noteworthy that there was no response to this further affidavit. There is therefore no evidence to rebut the plaintiff’s assertion that the houses in the photographs are where he has lived with his family since 1966. On that evidence, this Court must find, which I hereby do, that indeed the plaintiff and his family have been in occupation of 5.8 acres out of the suit land and continue to do so since 1966. The plaintiff states that he went into possession of 5.8 acres out of the suit land following a sale agreement on 5th March 1966. He has annexed a copy of that agreement to his supporting affidavit. The defendant challenges that agreement arguing that it is not legible and neither does it refer to the suit land. However, an English translation of that agreement clearly shows that it was in respect to a portion out of the suit land and even if the said agreement was voidable after six months for want of the relevant consent, it would mean that time started running in October 1966. This suit was filed on 30th June 2011 and therefore the plaintiff and his family had occupied part of the suit land for some 45 years which is well beyond the required statutory period of 12 years that entitles him to lay a claim on 5.8 acres thereof

in adverse possession.

No evidence has been placed before this Court to demonstrate that the plaintiff's occupation and possession of the portion of the suit land that he claims has been interrupted either by the defendant or his predecessors by taking legal action against the plaintiff or making an effective entry onto the land occupied by the plaintiff and his family. The plaintiff's occupation and possession of the portion of the suit land has also been open, exclusive and with the knowledge of the defendant as is clear from the photographs showing the development that he has done on the land since 1966.

The defendant has also pleaded in paragraph 15 of his replying affidavit that the plaintiff's annexure does not indicate the current owner of the land in question and further, that the title has changed hands and therefore the claim for adverse possession cannot stand. It is clear from the Green Card of the suit land which is annexure **RK 7** of the plaintiff's further affidavit that the defendant became the registered owner thereof on 21st September 2014 when a title deed was issued to her. There is no evidence that she is no longer the registered owner of the suit land. It is of course correct that the suit land was previously registered in the names of **NJUKI MBIRO** and later **MARGARET WANGITHI MBIRO** both deceased. That is also reflected on the Green Card in respect to the suit land. It is however now well settled that the change of ownership of the land being claimed by the adverse possessor does not interrupt the adverse possession – **GITHU VS NDEETE 1984 K.L.R 776**. Therefore, by the time the defendant was registered as proprietor of the suit land in September 2014, such registration was subject to the rights of the plaintiff and his family which had in fact long crystallized and only needed an order of the Court to declare it as such. That is precisely what the plaintiff now seeks through his Originating Summons. It is also clear from **GITHU VS NDEETE** (supra) that a party can acquire by adverse possession only a part of the land registered in the names of another. Although the defendant deponed that she lives on the suit land, it is clear from the photographs annexed to the plaintiff's further affidavit that the portion which the plaintiff occupies can be clearly delineated as it has a crop, houses and graves on it. There is nothing to suggest that the said photographs are not a reflection of what is on the suit land. In my view, the plaintiff has met what the Court set out in the case of **KIMANI RUCHIRE VS SWIFT RUTHERFORDS & CO. LTD 1980 K.L.R 10** where it said:-

“..... the plaintiffs have to prove that they have used this land which they claim, as of right; nec vic, nec clam, nec precario The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by way of recurrent consideration”

There can be no better evidence of occupation and possession of land than where, as in this case, the plaintiff grows crops, has a home and has even buried his relatives on the land being claimed in adverse possession.

From the above evidence, I am satisfied that the plaintiff has established that he is entitled to the orders that he has acquired 5.8 acres out of the suit land by way of adverse possession thereof.

Judgment is therefore entered for the plaintiff against the defendant in the following terms:-

- 1. The plaintiff is declared to have become entitled by way of adverse possession of over 12 years to all that parcel measuring 5.8 acres comprised in the title No. KABARE/NYANGATI/826.***
- 2. The plaintiff be registered as the sole proprietor of 5.8 acres out of 3.04 Ha of the said parcel No. KABARE/NYANGATI/826.***
- 3. The Land Registrar Kirinyaga do register the plaintiff as the proprietor of 5.8 acres out of land parcel No. KABARE/NYANGATI/826.***
- 4. Such registration should as much as possible be in accordance to the portion that the plaintiff and his family now occupy.***
- 5. Each party to meet their own costs.***

B.N. OLAO

JUDGE

11TH NOVEMBER, 2016

Judgment dated, delivered and signed in open Court this 11th day of November 2016

Mr. Macharia for Mr. Ngangah for Plaintiff present

Mr. Mwai for Defendant absent but Defendant present in person

Right of appeal explained.

B.N. OLAO

JUDGE

11TH NOVEMBER, 2016