



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC NO 310 OF 2013 (OS)

**IN THE MATTER OF THE PROPERTY KNOWN AS LR. NO. 5947/2 AND LR. NO. 5988 / 2
AND SECTIONS 7, 37, & 38 OF THE LIMITATION OF ACTIONS ACT, CHAPTER 22 OF THE
LAWS OF KENYA AND SECTION 24, 25, 28, & 32 OF THE LAND REGISTRATION ACT NO.
3 OF 2012 AND ORDER 37 RULES 1A, E, G, & 7 OF THE CIVIL PROCEDURE RULES**

BETWEEN

DAUGHLAS MUGAMBI ELIPHAS.....1ST PLAINTIFF

SAMUEL KINYUA MBOGORI.....2ND PLAINTIFF

AND

YVONNE FAIRGRIEVE ENNION.....1ST DEFENDANT

DAPHINE MILLIAS SHEPHARD.....2ND DEFENDANT

JUDGMENT

The Plaintiffs initiated this suit by way of an originating summons dated 28th February 2013 seeking the following orders:

1. *A declaration that the Plaintiffs are entitled to the entire title, possession, occupation and transfer of property namely **LR. No. 5947/2 and 5988/2** by adverse possession on account of continuous uninterrupted possession thereof for over 24 years since the year 1989.*
2. *A declaration that **LR. No. 5947/2 and 5988/2** if registered in the names of the Defendant are held by the Defendants in trust for the Plaintiffs.*
3. *A declaration that **LR. No. 5947/2 and 5988/2** if registered in the names of the Defendants be cancelled and transferred to the Plaintiffs' name, Plaintiffs have acquired title to the property by adverse possession.*
4. *An order directing the Defendants to execute and deliver to the Plaintiffs within 21 days, a transfer of **LR. No. 5947/2 and 5988/2** together with the original title(s) of the properties, procure, execute and deliver all documents necessary to confer title of the property to the Plaintiffs free from any encumbrances failing which the Deputy Registrar of the High Court should execute the transfer.*

5. *An order be issued restraining the Defendants whether by itself, agents, servants or otherwise howsoever from interfering with the Plaintiffs' and/or their trustees' servants and members' access to, quiet possession of, accessing, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning, sub-dividing and/or otherwise dealing with LR. No. 5947/2 and 5988/2.*

6. *A declaration that the Defendants are not entitled to enter or use a portion of Plaintiffs' land and where an injunction should issue restraining the Defendants whether by themselves or their servants or otherwise howsoever from entering or using the said parcel of land.*

The originating summons is supported by an affidavit sworn by the 1st Plaintiff on 28th February 2013. He deposes that they have been in open, continuous, and uninterrupted possession of the properties situated in Karen since 1989. Further that they took possession of the same without the permission of the Defendants wherein they have lived with their families, cultivated crops, planted trees, and undertaken extensive development by putting up permanent and semi-permanent structures thereon. It is his deposition that no one has demanded that they vacate the properties and in effect, they have dispossessed the registered owners. Consequently, that the Defendants' titles to the properties have been extinguished by operation of the law.

In support of the originating summons, the Plaintiffs annexed a copy of an Indenture made on 12th September 1967 transferring ownership of LR. No. 5947/2 and LR. No. 5988/2 from Walter Thomas Shapley to **Yvonne Fairgrieve Ennion**, together with survey maps showing the location of the properties. The Plaintiffs also annexed demand notes from the City Council of Nairobi for the payments of rates addressed to **Daphine Milliais Shepard** for LR. No. 59882 dated 2nd March 2012 and 6th March 2012 and another addressed to CER R B Shepard & Another for LR. No. 5947/2 dated 12th April 2012.

The originating summons, affidavit and supporting documents is said to have been served upon the Defendants. There is an affidavit of service on record sworn on 11th March 2013 by **John Webo Asakhulu**, a licensed Court Process Server. It was his deposition that he did not find the Defendants on the property but met a gentleman by the name George. He deposes at Paragraphs 6, 7, 8 and 9 thereof that there are two semi-permanent structures on the property used as garages and that a gentleman George was one of the mechanics. Apparently, George had never seen or met the Defendants ever since he started to work on the premises. Surprisingly, however the said George said he had instructions to receive summons on behalf of the Defendants. The Defendants failed to enter appearance and/or file a response to the summons when after the Plaintiffs applied Judgment in default. The application was heard by the Deputy Registrar of this court who entered Judgment and ruled that the matter be set down for formal proof.

The 1st Plaintiff swore a Witness Statement on 13th June 2013 and gave oral evidence. He testifies that he is a peasant farmer and has settled on the properties with his family as well as the 2nd Plaintiff. The 1st Plaintiff reiterated that he has been in occupation without permission from the registered owners for a period of over 25 years and asked the court to grant him the orders sought. The 1st Plaintiff testified that he got to learn of the Land Reference Number of the properties when the City Council of Nairobi made a demand for the payment of land rates.

Osundwa & Co. Advocates for the Plaintiffs filed written submissions dated 17th December 2014 wherein counsel submitted that the Plaintiffs had, on a balance of probabilities, demonstrated that they had acquired rights to the properties by way of adverse possession. Counsel submitted that the Plaintiffs had established that they have been in exclusive possession of the properties without any interference from the Defendants. Further that the Plaintiffs have over the years cultivated food crops, fruits, planted trees and constructed permanent and semi-permanent structures thereon. It was also submitted that the Plaintiffs had shown that the Defendants' are the registered owners thereof. Counsel referred to several authorities on the doctrine of adverse possession and conditions that must be met in claiming ownership by operation of the law.

This suit is undefended and therefore the court only has the Plaintiffs' evidence to make a determination. Counsel for the Plaintiff referred the Court to **Halsbury's Laws of England, 4th (ed.)**,

Vol. 28 Par. 768 which provides that

“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”(Emphasis Mine).

The guidance offered to this court by the above citation is that Adverse Possession is a question of fact and he who claims must prove its elements. This was the finding of **Justices Prof. Ngugi** and Dulu in the case of **Symon Gatutu Kimamo & 587 Others v East African Portland Cement Co. Ltd [2011] eKLR** where they stated:

“Adverse Possession is a question of fact. Possession is hostile if it is open, without right, without force or fraud, and exclusive. To establish ownership by adverse possession, the disseisor, the person seeking title, must prove the elements of adverse possession by clear and convincing evidence. This higher standard of proof reflects the fact that "Adverse possession" is an extraordinary doctrine which permits one to achieve ownership of another's property by operation of law; accordingly, the grant of this extraordinary privilege should be based upon clear evidence.”

Section 38 (1) of the Limitation of Actions Act gives the claimant an avenue to approach the court for an order that he be registered as the proprietor of the land in place of the person registered as proprietor of the land. It follows therefore that an order for adverse possession can only be made against a Defendant who is registered as an owner of the land. The Plaintiffs herein annexed to their originating summons, a copy of an indenture dated 12th September 1967 and copies of demand for land rates by the City Council of Nairobi to show that the Defendants are the owners of the said properties. A title document is indeed conclusive evidence of proprietorship. However, in this instance, the title document bears the name of the 1st Defendant whereas the demand notes for land rates bear the name of the 2nd Defendant. It is not clear to this court whether the properties are owned jointly by the Defendants or whether the 1st Defendant transferred the properties to the 2nd Defendant. In my view, an official search undertaken at the time of filing the suit would shade light on the current status of proprietorship. Despite the demand notices for land rates being of recent dates, does not suffice to show any changes that might have occurred in respect to ownership.

As to the elements of adverse possession, I have perused the pleadings and annexures and considered evidence by the 1st Plaintiff and submissions made by counsel. As stated in the case of **Symon Gatutu Kimamo** (Supra), **the person seeking title must prove the elements of adverse possession by clear and convincing evidence.** In this instance, it is only the 1st Plaintiff who made depositions in his supporting affidavit and testified reiterating the contents on the pleadings. It was his evidence that the 2nd Plaintiff had given him authority to prosecute the matter and thus did not attend court to give evidence. Therefore, the 1st Plaintiff was the sole witness despite his averments that he lives on the property with his brother and their families. No other witnesses, neither family nor neighbors were called to corroborate the 1st Plaintiff's evidence. I also do note that the Plaintiffs did not avail any photographs to accompany their averments about the utilization of land. It is my finding that the Plaintiffs have failed to prove their averments on a balance of probabilities to enable them achieve ownership of another's land in the light of the above the Plaintiff's originating summons is dismissed. I make no order as to costs.

28 days Right of Appeal.

Dated, Signed and delivered this **8th** day of **April, 2015**

L. GACHERU

JUDGE

In the Presence of:-

Mr Kariuki holding brief **Mr Osundwa** for the Plaintiffs

None attendance for the Defendants

Hilda: Court Clerk

Court:

Judgement read in open Court in the presence of the above counsels.

L. GACHERU

JUDGE