



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 594 OF 2014 (O.S)

(Formerly Nyeri HCCC No. 28 Of 2012)

IN THE MATTER OF L.R NO. THEGENGE/UNJIRU/152

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT, CAP 22, LAWS OF KENYA

BETWEEN

LEAH NYAMATHIRA WERU 1ST PLAINTIFF

JOSEPH WANGAHU WERU 2ND PLAINTIFF

ROBERT MATHENGE WERU 3RD PLAINTIFF

-VERSUS-

GEORGE GACHIRI GITUGIRI DEFENDANT

JUDGMENT

1. Leah Nyamathira Weru and her sons, Joseph Wangahu Weru and Robert Mathenge Weru (hereinafter referred to as the plaintiffs) took up the summons dated **4th February, 2012** for determination of the following questions:-

1) Whether they have become entitled to a portion of the parcel of land known as L.R No. Thegenge/Unjiru/152 (hereinafter referred to as the suit property) measuring 1 acre by adverse possession?

2) If the answer to (1) above is in the affirmative, whether the said portion should be excised from the suit property (L.R No. Thegenge/Unjiru/152) and registered in their names in trust for themselves and the other members of their family in place of the defendant?

3) If the answer to (2) above is in the affirmative, whether the defendant should be ordered to sign all necessary transfer papers/documents to facilitate the transfer of the suit property to them?

4) Whether in the event the defendant fails to sign the necessary transfer documents, the executive officer of this court should sign such documents in his place?

5) Who should bear the costs of the suit?

2. In support of the suit/application, the plaintiffs swore and filed affidavits in which they have deposed that they have been in occupation and possession of the portion they claim for more than 50 years; that their occupation and use of the portion has been continuous and uninterrupted and that they have effected developments thereon (have planted trees and continue growing crops thereon). It is the plaintiff's case that the defendant, who is the registered proprietor of the suit property, holds it in trust for them.

3. Vide his replying affidavit sworn on **12th March, 2012** the defendant has denied holding the suit property on behalf of the plaintiffs and the allegation that the plaintiffs have been in occupation of the suit property from the time of its demarcation and registration of his predecessors in title.

4. Concerning the plaintiffs' occupation and possession of the suit property, the defendant has deposed that his father had given his uncle (the 1st plaintiff's husband) a portion of land to cultivate because he had no land of his own.

5. Pointing out that his uncle was an adult at the time of demarcation and registration of the suit property, he contends that if he had his own land, nothing would have prevented him from being registered in his own name.

EVIDENCE

The plaintiff's case

6. When the matter came up for hearing, the 1st plaintiff **Leah Nyamathira Weru**, informed the court that her sons (2nd and 3rd plaintiffs) have been using the suit property since the time of its demarcation and registration in the name of the defendant's predecessor in title. Explaining that there is a clear boundary between the parcel of land used by her family and the family of the defendant, she maintained that the defendant's father was registered as the proprietor of the suit property because he was the eldest son in their father's family.

7. Concerning their failure to claim their entitlement to the suit property during the lifetime of the defendant's father, she explained that there was no need to do so because there was no dispute concerning the suit property. She stated that they brought this suit after the defendant refused to recognise their entitlement.

8. **P.W.2 Esther Wanjiru Wanguru**, a sister of the 1st plaintiff's husband and the defendant's father, informed the court that the land belonged to her mother. Like P.W.1 she informed the court that during demarcation, the suit property was registered in the name of the defendant's father in trust for himself and his siblings (the 1st plaintiff's husband and his brother Ngotho). She maintained that the defendant's father did not buy the suit property.

9. Like P.W.1, P.W.2 informed the court that the plaintiffs have been in use and occupation of the suit property since the time of demarcation. She stated that were it not for the fact that his brothers had land elsewhere, they would have settled on the suit property.

10. The 3rd and 4th plaintiffs who testified as P.W.4 and P.W.5, informed the court that they claim the and because it is ancestral.

The defence case

11. On his part, the defendant maintained that the land belonged to his father and that his father did not hold it in trust for his brothers. He stated that his father gave his siblings land because they did not have

any. He maintained that the plaintiffs have been in use and occupation of the suit property with his father's permission. He informed the court that his uncle sued him claiming ½ an acre of the suit property but his interest in the suit property was not established.

12. After the parties closed their cases, their advocates filed submissions which I have read and considered.

Submissions for the applicants

13. In the submissions filed on behalf of the plaintiffs, reference is made to the cases of **Wakaria Mboi Njaramwe & another vs. Loise Kaguu Mugwe; Nyeri Civil Appeal No. 220 of 2010; Ng'ati Farmers Cooperative Society Limited v. Ledidi & 15 others (2009)KLR 331; Gatimu Kinguru vs. Muya Gathangi (1976-80)1 KLR 317** and submitted that the plaintiffs have proved that their use and occupation of the portion of the suit property they claim has been adverse to the defendant's rights thereto.

Submissions for the respondent

14. On behalf of the defendant, it is submitted that the plaintiffs have not established their case for adverse possession. The following reasons are given for the said contention:-

i) The plaintiffs' entry into the suit property was not hostile to that of the registered proprietor (was with permission of the owner);

ii) The size of the area the plaintiffs claim is not identifiable (plaintiffs did not prove that the area they possess and occupy is one acre);

iii) The defendant's possession of the property was never discontinued.

15. The following cases are cited in support of the defendant's submissions:-

a. **Stasso Properties Limited v. Manji & others(1991)KLR 167** where it was held:-

“The claim being expressly based on permission having initially been granted to the claimant's family it is quite doubtful as to whether the applicant can successfully invoke Section 38 of the Limitations of Actions Act (Cap 22) against the owner.”

b. **Kasuve v. Mwaani Investment Limited & 4 Others (2004) KLR** where it was held:-

“the identification of the land in possession of an adverse possession is an important integral part of the process of possession.”

c. **Public Trustee v. Wanduru (1984)KLR 315** where it was held:-

“the period of 12 years began to run the day the appellant and her husband took possession of the land as that was the day when the respondents possession was discontinued.”

d. **Wanje v. Saikwa (No.2) (1984) 284** where it was held:-

“A person who occupies another person's land with that person's consent cannot be said to be in possession as in reality he has not disposed the owner of the land.”

16. With regard to the plaintiffs' claim that the defendant holds the portion they occupy in trust for them, it is submitted that the plaintiffs abandoned that claim in favour of the claim for adverse possession. Be that as it may, it is submitted that the conduct of the plaintiffs negates inference of existence of a trust relationship. In this regard, it is submitted that since the defendant's father was in detention camp at the

time of demarcation, it defeats logic to say that the land would be registered in the name of their absent brother. The defendant also wonders why the plaintiffs did not raise their claim during the lifetime of their brother.

Analysis and determination:

17. It is not in dispute and/or controverted that the applicants have been in possession and occupation of the suit property for a long period of time. (for 1st plaintiff since 1958). Although the respondent claims that the applicants' and their parents moved into the suit property with the permission of his father (his predecessor in title), there is no evidence that the plaintiffs entered the portion they claim with anyone's permission. The evidence on record shows that the plaintiffs, in particular the 1st plaintiff, has been occupation and use of the section claimed since 1958. At no time did the registered owner(s) of the suit property interrupt their occupation and use of the suit property. This was so even after the 1st plaintiffs' husband obtained his own parcel of land in 1973. The 1st plaintiff and her family continued occupation and use of the portion of land she used and that used by her husband's brother Ngotho.

18. In view of the foregoing, I find the explanation offered by the defendant that the plaintiffs were allowed by their father to occupy the portion they occupy because they had no land of their own unconvincing.

19. As to whether the suit property belonged to the defendant's father, upon reading and considering the testimonies of P.W.2 and that of D.W.2 on ownership of the suit property, I have no doubt that the suit property belonged to the defendant's grandfather. D.W.2 was categorical that the defendant's grandfather had land which he had bought from Mbogo and Wachira. His explanation that Mbogo later on redeemed the land and sold it to his father and the defendant's father is incredible as it is hearsay. It is also contradictory to what he stated in his statement-that all what Mbogo wanted is to be added more money failing which he would sell the suit property to a third party. The allegation that the defendant's father invited his brothers to join him in redeeming the suit property is also hearsay.

20. Even if one was to assume that what D.W.2 said is true, then that explanation would only explain why the defendant's father occupies a larger portion of the suit property. He simply added the purchase price paid by his father to redeem the property from the seller who had threatened to sell it to a third party.

21. All in all, the conduct of the parties in this suit makes it very difficult for this court to find that the defendant's predecessor in title allowed his brothers to occupy and use the suit property simply because they had no land. If that was the case, there would have been no reason for the plaintiffs to continue using the portion they were using even after they acquired their own land. Most importantly, there would be no reason at all for the 1st plaintiff to continue using the portion that was being used by her husband's brother Ngotho. From the conduct of the parties, it is not unreasonable to infer a trust relationship between the defendant's predecessor in title and his brothers, which I hereby do.

22. It is therefore clear from the foregoing, that the defendant's father held the suit properties for himself and his siblings.

Consequently, the registration of the defendant's father as the absolute proprietor of the suit property is subject to the overriding interest contemplated in **Section 28** as read with **Section 30(g)** of the Registered Land Act, Cap 300 Laws of Kenya. The said Sections of the law, which by dint of the provisions of **Section 107** of the Land Registration Act, 2012 apply to the suit property, provide as follows:-

“28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register: Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.....

30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed (Emphasis supplied)

23. I am guided in my finding above by the decision in the case of **Mbui v. Mbui (2005)1 E.A 264** where the Court of Appeal stated:-

“...Gerald in this case, was in occupation and occupation of the land with the consent and knowledge of Mbui since his birth in 1956. He has constructed a five-roomed permanent house and has planted coffee in the suit land....We think the superior court was right in distinguishing the authorities cited in that score. But more significantly, we think a trust arose from the possession and occupation of the land by Gerald which has the protection of Sections 28 and 30(g) of the Act unless there is an inquiry made which discloses no such rights...”

24. In the circumstances of this case, there is evidence that the applicants are in possession and occupation of the suit property. They have been in such possession and occupation for a long period of time. There is no evidence that the inquiry contemplated under **Section 30(g)** of the Registered Land Act was made and the rights of the plaintiffs found not to exist. For those reasons, I find and hold that the possession and occupation of the applicants of the suit property constitutes an overriding interest to the title held by the defendant’s father for which registration is not required.

25. On whether the plaintiffs’ have become entitled to be registered as proprietors of the suit property by adverse possession, the evidence on record shows that the acts of the plaintiffs on the parcel of land they claim have been inconsistent with the registered proprietors enjoyment of the land for over forty years. There is no evidence that their entry into the suit property was permissible, as contended by the defendant.

26. In the case of **Wambugu vs. Njuguna (1983) KLR 173** the Court of Appeal held :-**“For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.**

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 of the requisite number of years.”

27. In the case of **Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau [2013] eKLR Ombwayo J.** stated as follows concerning a claim for adverse possession:-

“The plaintiff's claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession has the right to apply to the High Court for an order that he be registered as the proprietor of the land. The person must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years. The adverse party is the one who dispossesses the true owner of the property. The former must openly occupy the property exclusively, keeping out

others, and use it as if it were his own. Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continual (although not necessarily continuous or constant) without challenge or permission from the lawful

owner, for a fixed statutory period to acquire title. Where the property is of a type ordinarily occupied only during certain times, the adverse party may need to have only exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely **(a) open and notorious use of the property**. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.

The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about. **(b)Continuous use of the property** – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long

true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned. **(c)Exclusive use of the property** – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met. **(d)Actual possession of the property** – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

The actions of the adverse party must change the state of the land, as by clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings or other improvements. If the property is residential, such actions may include mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner. **(e)Non-permissive, hostile or adverse use of the property** – The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: Objective view—used without true owner's permission and inconsistent with true owner's rights. Bad faith or intentional trespass view—used with the adverse possessor's subjective intent and state of mind. Good faith view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.

The Specific requirements for adverse possession by the court is a Claim of title or claim of right. The mere intent to take the land as one's own constitutes "claim of right. A claim of right exists if the person believes he has rightful claim to the property, even if that belief is mistaken. A negative example would be a timber thief who sneaks onto a property, cuts timber not visible from the road, and hauls the logs away at night. His actions, though they demonstrate actual possession, also demonstrate knowledge of guilt, as opposed to claim of right, Good faith or bad faith,

improvement, cultivation, or enclosure, Payment of property taxes, color of title: A legal document that appears (incorrectly) to give the claimant title, dispossession not under force of arms is a specific requirement for the principle of adverse possession to apply. In such cases dispossessing the owner or after discontinuation of possession by the owner of his own volition the person in adverse possession has a right to acquire title.”

28. In applying the foregoing principles, which I totally agree with to the circumstances of this case, the testimonies of the witnesses show that the plaintiffs’ family and the family of the defendant occupy distinct portions of the suit property. Even though there are no boundaries, the portions are identifiable. In fact according to the testimony of D.W.3 there is a footpath which separates the portions to ensure no one interferes with the other’s portion.

29. Upon reading and reviewing the totality of the evidence adduced in this suit and the conduct of the parties and/or their predecessors in title or entitlement, I have no doubt that the defendant’s predecessor in title had no intention whatsoever of dispossessing the plaintiffs of the interests they had in the parcels of land they occupy.

30. For the foregoing reasons, I find and hold that the plaintiffs have made up a case for being granted the orders sought, which I hereby grant in terms of prayers 1 and 2 of the Originating Summons dated 4th February, 2012.

Dated, signed and delivered at Nyeri this 17th day of September, 2015.

L N WAITHAKA

JUDGE.

In the presence of:

Ms Kahiga h/b for Mr. Wachira for the defendant

Mr. Muchiri for Gathoni h/b for Mr. Wahome Gikonyo for

the plaintiff

Court assistant - Lydia