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Kabiru & 3 others v Wainaina & another (Land Case 526 of 2016) [2023] KEELC 63 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 63 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE 526 OF 2016

FM NJOROGE, J

JANUARY 19, 2023

BETWEEN

LUCY WANJIRU KABIRU .... 1ST PLAINTIFF

GEORGE TIBI GACHUHI .... 2ND PLAINTIFF

LUCY WANGUI WAINAINA .... 3RD PLAINTIFF

STEPHEN KARANI MACHARIA .... 4TH PLAINTIFF

AND

NYOKABI WAINAINA .... 1ST DEFENDANT

SAMUEL NJUGUNA WAINAINA .... 2ND DEFENDANT

RULING

1. In the notice of motion dated 18/07/2022 brought under Order 45 Rule 1 (1) (a) of the *CPR* the plaintiffs pray for the following orders:

    1. Thehon. court to review the judgment dated 14/7/2022 on account of some mistake and an error apparent on the face of the record.

    2. Thehon. court to review the said judgment as there are other sufficient grounds as shall be urged before the court.

    3. The hon. court do make such further orders as may meet the ends of justice in this suit.

    4. Costs of this application and of the main suit be provided for.

2. The advocate for the plaintiffs, Esther Gathoni Mwangi, swore an affidavit in support of the motion attached to and filed with the motion and also her supplementary affidavit dated 5/10/2022. Her evidence is as follows: that the court was of the opinion that had there been in existence any other

evidence, including a letter of allotment, showing that a title in the name of the defendants or Kiratina Farmers' Cooperative Society had been issued, the results of the case would have been different. She avers that the plaintiff had through the 3rd defendant produced a letter of allotment dated 5/6/1982 showing that Wainaina Kingara was allocated the suit land; that the said Wainaina is the deceased in whose Succession Cause the defendants were issued with the certificate of confirmation of grant dated 16/8/1990 and that therefore there is an error apparent on the face of the record and the judgment of this court dated 14/7/2022 ought to be reviewed on that account.

3. The plaintiffs had moved the court by way of an originating motion dated 24/11/2016 in which they had sought the following orders:

    a. An order that the plaintiffs herein have become entitled by adverse possession to land parcel No. 13542/7 now sub-divided into 13542/110 and 13542/111, which measures approximately 2 acres and registered in the names of the Defendants.

    b. An order that the plaintiff/applicants be registered proprietors over the said land parcel(s) 13542/7 (new sub-divisions 13542/110 and 13542/111) which land the plaintiffs/applicants have occupied for over 12 years.

    c. Such other or further orders as my meet the ends of justice in this case.

    d. Costs of this suit be provided for.

4. I have considered the motion, which is unopposed and the submissions filed on 6/10/2022. The applicant submits that there is a copy of a letter of allotment filed in the record by the 3rd plaintiff on 19/10/2021. She maintains that there was an error at paragraphs 16 and 17 of the court's judgment. She cites paragraph 15 of the judgment as stating that the only evidence that would aid the plaintiffs' case as that which would demonstrate that the title had been registered in the name of some other person before the registration of the defendants as proprietors, the kind of evidence that would favour the conclusion that time ran in the plaintiffs' favour even before the defendants' registration as proprietors.

5. The plaintiffs also singled out the letter of allotment to the 2nd defendant dated 5/6/1982 and grant no IR 100188 for the suit land issued on 28/11/2005 as such evidence. The plaintiffs further argued that paragraph 17 of the court's judgment also noted that no letter of allotment was produced and aver that in view of the production of the allotment letter and title mentioned above, there was therefore ample evidence to demonstrate that the defendants had been allotted the land and been registered as proprietors over it for a period in excess of 12 years before the case was filed. However, it is important to examine if the argument is correct.

6. It is noteworthy that this court sought and found in its analysis evidence at paragraph 14 that the plaintiffs had been in possession of the suit land for more than 12 years and the remaining question was whether the last 12 years of their possession was during a period when title had been issued in respect of the suit land, for indeed a declaration of adverse possession obtains where there has been paper title to land. The court found that the defendants' title was executed by the Commissioner of Lands on 28/11/2005 but registered on 16/01/2006 while the plaintiff's claim was lodged on 25/11/2016.

7. Even if it the date of the execution of the grant by the Commissioner of Lands were taken to be the date of acquisition of title by the defendants, a computation of time would show that by the date of filing suit the 12-year period was not complete, the deficit being only 3 days or so. However, the court took 16/1/2006 as the date of the issuance of title to the defendants and noted that the 12-year period had not been attained, the difference being 52 days. It was at that juncture that the court sought some other evidence that title had been registered in the name of some other person against whom time

could run, before the registration of the defendants' title. Therefore, if the plaintiffs still maintain that the computation of time as above and using any of the quoted dates would mathematically result in a period equivalent to or in excess of 12 years then this court can not agree with them.

8. The plaintiffs cite the case of *Gachuma Gacheru v Maina Kabuchwa* NBI Civil Appeal No 164 of 2011 where the Court of Appeal stated as follows:

> "Lastly, on argument by the respondent that time in adverse possession can only begin to run once title is issued, we disagree and set out the sentiments of this court *Maweu v Liu Ranching & Farming Cooperative Society* (1985) eKLR."

9. The plaintiffs also relied on the decision in ELC Case No 71 of 2021 (OS Eldoret *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau* where it was stated as follows:

> "Adverse possession on the other hand is about occupation of land belonging to another, and asserting a right to be given title to it on the basis of prolonged occupation of the said property. In the instant case, there was no evidence that he filing of the succession cause was for eviction of the applicant from the suit property or was meant to assent rights over the land. Adverse possession accrues to land not title and unless the respondent took steps to evict the applicant from the suit land, which he did not."

10. They also cited the case of *Isaac Cypriano Shingore v Kipketer Togom* 2016 eKLR (Civil Appeal No 212 OF 2012 and quoted the following passage therefrom:

> "By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years."

11. With the above decisions in mind the plaintiffs posited that in the present case time began to run between 1987 and 1997 when the plaintiffs entered the suit land and dispossessed the defendants.

12. However, this court notes that by citing the *Gachuma case* (*supra*), *Stephen Mwangi case* (*supra*) and the *Isaac Cypriano case* (*supra*) that plaintiffs appear to miss the point, this court agrees with the courts in those cases in so far as those decisions, while applied to the instant case, lead to a finding that the mere change of title from one person to another does not stop time from running. Indeed, they buttress this court's search for evidence demonstrating that someone else against whom time could run was registered as the proprietor of the suit land before the defendants, so that the plaintiffs may, if that was the case, benefit from the period they had occupied the land before then. It is clear that the grant falls short of doing that. What about the allotment letter?

13. I have considered that allotment letter. It is from Kiratina Farmers' Co-operative Society Ltd. It shows that land was allocated to Wainaina Kingara, presumably the person the distribution of whose estate gave the defendants the suit land. This is not an allocation from the government but by a private entity which has to prove it had capacity to allocate. Divestiture of title by Kiratina is not similar to divestiture of title and interest by the government. For Kiratina, there has to be proof that it had any title or interest to divest itself of by way of a letter of allotment. For the Government, it is clear that since the importation by the colonialists of the theory of eminent domain into Kenya, a letter of allotment issued by the government is all that is required to establish that the government has divested itself of the suit land and that the allottee has become the new owner. This position was recognised by the court of appeal in the *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* 2016 eKLR.

Therefore, as Kiratina had no eminent domain, the letter of allotment it issued to Wainaina Kingara was not sufficient to establish that it owned the suit land and so other proof of title in the name of Kiratina Farmers Co Ltd was necessary. It is also evident from paragraph 17 and 18 that this is not the kind of evidence that the court sought while writing its judgment, for it stated as follows:

> "No copy of title was produced in the name of Kiratina to show that the land was owned by that entity and that title or a letter of allotment had been issued to it by the government before the plaintiffs acquired the suit land or that the suit land was covered by an earlier title issued in its favour."

14. The court therefore considered the evidence on record and found it insufficient to support the claim of adverse possession and it sought some other evidence that would indicate that the land was registered in the name of some person other than the defendants just before they were registered. It is further evident from paragraph 18 of the judgment that while conducting this inquiry the court found that no evidence of when the surrender was registered or took effect was adduced. In brief, the cumulative meaning of the contents of paragraphs 17 and 18 of the impugned judgment is that the defendant's grant having been a direct grant from the government, the plaintiffs had failed to demonstrate that title had issued to some other person before their registration, so that time could be deemed to have run in their favour against him, even for the minimum required of 52 days.

15. The upshot of the foregoing is that the court having found that it considered the evidence that the applicant thinks of as being capable of changing the outcome of the instant suit, an appeal, not a review is the proper remedy for the applicant. The application dated 18/7/2022 lacks merit and the same is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nakuru via electronic mail on this 19th day of January, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

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