



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 272 OF 2016

DOUGHLAS MWANGI MUTERU.....APPLICANT

=VERSUS=

VICTORIA MERE DZILLA.....RESPONDENT

RULING

1. By an Originating Summons dated 10th October 2016 and filed herein on 11th October 2016, the Applicant Douglas Mwangi Muteru seeks the determination of this court of the following questions:

(i) Whether the applicant(s) is entitled to be registered as owner of all that piece or parcel of land measuring 4.29m by s.22.37m (i.e. 96.0 square meters) occupied by the plaintiff on title no. CR: 24754 that is PLOT No. MN/111/2195 by virtue of adverse possession.

(ii) Whether the defendant(s) title or right to all that parcel of land (if any) measuring 4.29m by 22.37m (i.e. 96.0 square meters) On TITLE NO. CR 24754 PLOT NO. MN/111/20195 and her claim to the same was extinguished and barred by virtue of section 17 of the Limitation of Actions Act.

(iii) Whether the transfer of all that parcel of land measuring 4.29m by 22.37m (i.e. 96.0 square meters) on TITLE NO. CR 24754 PLOT NO. MN/111/2195 to the respondent was a sham and was merely intended to defeat the Applicants right to an order of adverse possession and therefore invalid and whether by the time the said transfer was effected the applicants right to the property by adverse possession had accrued.

(iv) Who should bear the costs of this suit?

2. The Originating Summons is brought under ***Order 37 Rule 7,1,2 and 3 of the Civil Procedure Rules, section 3A of the Civil Procedure Act*** and section 38 of the Limitation of Actions Act. The Summons is supported by the Applicant's Affidavit sworn on 10th October 2016. The gist of the Application as borne out in the 11 paragraphs of the Supporting Affidavit is that:

(a) The Applicant is the registered owner of Plot No. MN/111/2196 Mtwapa which plot boards with Plot No. MN/111/2195(hereafter the next Plot)

(b) The Applicant's said plot had prior to the Applicant's purchase thereof encroached on the next plot by approximately 96m²

(c) The previous owner of the next plot had built a sock pit and septic tank in the area covered by the 96m²

(d) The Respondent, Victoria Mere Dzilla subsequently bought the said next plot.

(e) When the Respondent bought the next plot, the Applicant was already in occupation of the portion measuring 96m² and was enjoying quiet possession of the land.

(f) When the Respondent purchased the said next plot, she was fully aware of the Applicant's rights and interests in the 96m² as the septic tank had already been built on and was clearly visible; and

(g) The applicant has now sought legal advice and has been advised that since the septic tank and the sock pit have existed for over 15 years, he has now acquired a good title to the encroached area, and as such this court should make a declaration that he is the registered owner of all that portion measuring 96m² under the next plot belonging to the Respondent.

3. Upon receipt of the Summons, the Respondent Victoria Mere Dzilla filed a Replying Affidavit sworn on 26th October 2016. The gist of the Affidavit again as I understood it may be summarized as follows:

(i) THAT the summons is a diversionary tactic and an abuse of the Court Process as the Applicant has not disclosed the existence of Mombasa ELC No. 270 of 2016 filed by the Respondent against the Applicant.

(ii) THAT while buying the land, the Applicant was aware that the 96m² portion in the said next plot was not part of the land he bought and he cannot therefore claim adverse possession.

(iii) THAT the applicant bought his plot on 8th September 2009 and as at the time he lodged his claim for adverse possession he had not stayed in the property for 12 years, as by law required

4. Simultaneous with the Replying Affidavit, the Respondent filed a Notice of Preliminary Objection giving notice of her intention to raise an objection to the continuation of this suit, at the earliest opportunity on the following three grounds.

(i) That the Honourable Court lacks jurisdiction to entertain this suit for adverse possession in that it offends the provisions of Sections 7, 15, 38 of the Law of Limitation of Actions Act-Cap 22, Laws of Kenya.

(ii) That, the Originating summons offends Section 6 of the Civil Procedure Act-Cap 21 Laws of Kenya.

(iii) That the summons offends the clear Provisions of Section 38 of the Limitation of Actions Act -Cap 22, Laws of Kenya.

5. Subsequently and before the Applicant could take any steps in regard to the summons, the Respondent moved to Court on 10th November 2016 and fixed the matter for the hearing of the Notice of Preliminary Objection on 16th February 2017. When the matter came before me on the said date, Mr. Ambwere for the Respondent urged this court to dismiss the summons on the basis that the same was fraudulent and amounted to an abuse of the Court Process. Learned Counsel submitted that the Applicant herein bought the suit land in the year 2010 and 12 years had not expired by the time the suit was filed to warrant the court to make an order for adverse possession.

6. It was Mr. Ambwere's further contention that the Applicant became aware when he bought the adjacent parcel of land to the Respondent's that the 96m² of land consisting of the septic tank and other

items did not belong to him and that he was indeed compensated therefore by way of a refund of the purchase price by the vendor who sold the plot to him. It was further contended that negotiations had been going on with the assistance of the previous owner of the Applicant's portion of land to have him move out of the premises. When the negotiations failed, the Respondent had moved to Mombasa High Court and filed ELC No. 270 of 2016 against the Applicant. Finally it was contended that this summons was filed in abuse of the court process and the Respondent did so with the full knowledge of the existence of the case filed in Mombasa.

7. In response Mr. Mwaniki, Learned Counsel for the Applicant urged this court to disregard the submissions of the Respondent and to proceed to hear evidence on the originating summons. Learned Counsel submitted that the issue of timelines and how long his client had stayed in the suit land was a matter of fact and not of law. His client had annexed a topographical survey of the land done in the year 2005 in his supporting Affidavit and it could not therefore be argued from the bar that he had been on the land for less than 12 years. While acknowledging that there had been negotiations between the parties, Counsel informed the court that the same fell through and it was then that each party moved to court to endorse their rights. It was Counsel's position that as and when they filed the Originating Summons, the Applicant was yet to be served, and was therefore unaware of the Mombasa ELC No. 270 of 2016 filed by the Respondents herein.

8. I have carefully studied the pleadings filed herein and listened carefully to the submissions made by the respective counsels in support of and in opposition to the Preliminary Objection raised by the Respondent herein. It is clear from the prayers sought in the Originating Summons that the Applicant seeks to be registered as the owner of all that piece of land described as measuring 4.29m by 22.37 m (i.e. 96m²) belonging to the Respondent by virtue of adverse possession.

9. As I understand it, adverse possession may be said to be a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his/her title for a certain period. The essential prerequisites for this situation to apply is that the possession of the adverse possessor is acquired neither by force or stealth or under the licence or permission of the owner as normally expressed in the Latin Maxim *nec vi, nec clam nec precario*. Such possession must be adequate in continuity, in publicity and in extent.

10. The doctrine of adverse possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

11. *Section 13 of the Limitation of Actions Act* aforesaid further provides that:

(i) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse possession) and, where under sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

12. *Sections 37 and 38 of the Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 of the Limitation of Actions Act provides that:

(i) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, to land or easement 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.”

13. In terms of *Section 38 of the Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land, he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in *Order 37 Rule 7 of the Civil Procedure Rules* as follows:

7(i) An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

(ii) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

14. In *Teresa Wachuka Gathira -vs- Joseph Mwangi Gachira, (Civil Appeal No. 325 of 2003)*, the Court of Appeal emphasized the importance of following the prescribed procedure in adverse possession claims. Because this sort of claim is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. It is only through such an exhibit that the existence and ownership of the suit property can be ascertained by the court.

15. In an effort to comply with *Order 37 Rule 7 (2) of the Civil Procedure Rules*, the Applicant has annexed a copy of what is called the Defendant’s title “collectively” marked as Annexure DMM2. A perusal of the annexed Certificate of Title Number CR. 24754 clearly shows that the land belongs to one MURTAZA AHMEDALI MAMUJEE as at 19th November 1993. Behind the “collective” annexure DMM2 is a document showing that the land or portions thereof were subsequently transferred to M/s New Gate Holdings Ltd and thereafter to Victoria Mere Dzilla, the Respondent herein.

16. I find it interesting that the Applicant’s claim is based on adverse possession yet in all the documents in support of his claim herein, there is no mention of the year he bought the parcel of land which is said to have encroached on the Respondent’s land. The report the Applicant relies on said to have been done 12 years ago by one Edward Kiguru a Land Surveyor does not show when he bought the land. A perusal of the Report marked DMM 1A and 1B shows that the same was done for Ms New Gate Holdings Ltd, the same Company that as we have seen here above subsequently transferred title to the Respondent.

17. In her Replying Affidavit to the Originating Summons, the Respondent has indicated that the Applicant bought his parcel of land on 8th September 2009 (as per annexure VMN3) and that her portion of the land was transferred to her on 26th April 2010. Indeed, Annexure VMN3(b) clearly indicates that Messrs New Gate Holdings Ltd transferred 0.1076 hectares of the Original Certificate No. 24754 to the Respondent on 26th April 2010. Clearly it is not yet 12 years since these transactions.

18. As I have indicated herein, the rule in adverse possession is that the party claiming must have been in possession for over 12 years. It is a general rule that the period starts running a fresh whenever there are changes in the title. Indeed in *Kimani Ruchine & Anor -vs- Swift Rutherford & Co.Ltd and Another(1980) KLR 10*, it was held for example that where cultivation of land is advanced to support the claim to adverse possession, the evidence of the cultivation must be definite as to the area and time.

19. In *Sospeter Wanyoike vs- Waithaka Kahiri(1979) KLR 236*, the defendant who was the registered owner of a parcel of land agreed in 1965 to sell it to the Plaintiff who was in occupation at the time. For some reason however, Land Control Board Consent to the transaction was not obtained and the sale was never formally completed. In 1974 the Plaintiff filed a suit in the Resident Magistrate’s Court claiming to have the land transferred to him. The Magistrate found that the Defendant was the registered owner of the land and that the Land Control Board had not given its consent to the transaction. He accordingly dismissed the suit. On 14th December 1977, the Plaintiff instituted proceedings in the High Court for a declaration that he had become entitled to the parcel of land by adverse possession over 12 years. It was

held that the payments of the purchase price by instalments after the date of the agreement recognized the defendant's title to the land and the period of limitation for adverse possession did not begin to run until the last instalment was paid. Furthermore, the action filed in 1974 had interrupted the period of adverse possession and the claim could not stand.

20. Similarly, as I have found hereinabove, the Applicant and the Respondents have only been neighbours since 26th April 2010 when the Respondent came to own her portion of the suit land. The claim for adverse possession therefore has no legs to stand on.

21. Having so found, I consider the other issues raised by the Respondent in the Notice of Preliminary Objection moot.

22. The upshot of all this is that I strike out the Originating Summons dated 11th October 2016 with costs to the Respondent.

Dated, signed and delivered in Malindi on 3rd day of March 2017.

J. O. OLOLA

JUDGE