



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 48 OF 2009

KINUU M'IBUTU.....PLAINTIFF

VERSUS

JOSHUA MUTWIRI NTARANGWI..... DEFENDANT

JUDGMENT

1. Plaintiff filed an Originating Summons against the defendant on 22.4.2009, claiming that he is entitled to 468 square metre of defendant's land parcel No. Nyaki/Mulathankari/736 by way of adverse possession.

2. Plaintiff has averred that in 1984 he bought a parcel of land No. Nyaki/Mulathankari/1143 measuring 0.5 acres from one M'Mugambi M'Mwiria which land was adjacent to parcel No. 736. He then proceeded to fence the land and he developed the same. He even put up a permanent building on the suit land.

3. The owner of the land parcel no. 736 was one Robert Ringera, father of defendant. Plaintiff claims that Robert was aware that plaintiff had taken possession of the 468 square meter of parcel no. 736.

4. The person who sold the land to plaintiff is one Samuel M'Mugambi, who testified as PW2. His testimony is that his original land was parcel No. NYAKI/MULATHANKARI/678 which he subdivided into 3 parcels in 1983. These parcels were no. 1143, 1141 and 1145. It is parcel no. 1143 that he sold to plaintiff.

5. Plaintiff states that he was shocked to learn that the defendant, a son of Robert Ringera had sued him in a tribunal case. In that case the land registrar was apparently called to resolve the boundary dispute. Plaintiff was then informed that he had encroached on the land of defendant.

6. Plaintiff claims that the tribunal did not manage to remove him, and that the land registrar had apparently stated that he had no mandate to remove him (plaintiff).

7. In support of his claim, plaintiff produced the following documents as exhibits:

(i) Copies of land registers and sketch map for land reference NO. NYAKI/MULATHANKARI/1143 and NYAKI/MULATHANKARI/736

(ii) Mutation form.

(iii) Letters of administration dated 23rd Jan 2007 indicating that defendant was the legal representative of the estate of Robert M'Ringera M'Kiriinya.

(iv) Proceedings before the District Land Registrar Meru dated 23rd February, 2006.

(v) Proceedings in Meru LDT Case. No. 19 of 2005.

(vi) Notice of withdrawal of suit in Meru High Court Civil Case No. 22 of 2006.

8. Defendant herein filed a Replying affidavit on 26.5.2009 in opposition to the Originating summons. He also gave evidence and called two witnesses. On defence side, it is averred that the original owner of parcel 736 was Robert Ringera, who was father of defendant (DW 3) and was a sister of Evangeline Gainchii (DW 1) and a brother in law of Elijah M'Iringo (DW 2).

9. It is averred that Robert was working as a teacher in other parts of the country, so he never stayed on the suit land. It is his sister (DW 1) and brother in law (DW 2) who were left to look after the land. DW 3 was working in Nairobi.

10. DW 1 and DW 2 testified that they realized that plaintiff was encroaching on Robert's land by fencing it and planting Kia-pple fence. Plaintiff had then laid a foundation on the suit land. Robert then died. DW 1 & 2 then informed DW 3 about the encroachment. DW 2 stated that he and elders had then advised defendant to file a succession cause and to file a suit before the tribunal.

11. DW 3 Complied and filed the tribunal case of 2005. The tribunal then ordered a government surveyor to rectify the boundary.

12. The surveyor had come to the site with the land registrar and they confirmed that indeed plaintiff had encroached on parcel NYAKI/MULATHANKARI/736. It is after these findings that plaintiff apparently filed high court case No. 2006 which he later withdrew and filed the present case.

13. In support of defence case defendant produced an official search showing that parcel no. NYAKI/MULATHANKARI/736 was registered in the name of Robert Ringera on 25.10.1967 and the land certificate was issued on 13.8.1973.

14. It is not disputed that the land parcel No. NYAKI/MULATHANKARI/736 was owned by one Robert Ringera whose son is the defendant.

15. It is also not disputed that the said parcel of land borders that parcel no. 1143 which plaintiff bought.

16. For a party to succeed in a claim for adverse possession, **“he/she must demonstrate that he has been in exclusive occupation of the land during the period in question, that such occupation has been open and notorious, that the occupation was without permission of the owner and that his occupation has been continuous (without interruption) for a period of over 12 years”**.

17. What has emerged from the evidence herein is that plaintiff built a permanent house on the suit land after buying the parcel no.1143. However, DW 1, the sister of Robert had even warned plaintiff against this construction. Still, plaintiff had gone ahead to build and he also fenced the disputed portion of the land.

18. In her testimony DW 1 had stated that **“Kinuu has been using the land from the time he bought it”**. And during cross examination she further stated that **“Kinuu has been using Roberts land. Kinuu didn't remove me from the land but he came and laid his foundation so I looked for Robert. He laid foundation on Roberts land. The house is still there to date....”**

19. From this evidence, it is apparent that plaintiff has been in exclusive possession of the portion of suit land and that such occupation has been open and notorious.

20. It is also quite apparent that plaintiff has been in occupation of the suit land without the permission of the owner of the land.

21. **Has the plaintiff been in continuous occupation of the suit land for a period of over 12 years"**. It is not disputed that defendant had lodged the tribunal case.

22. Plaintiff in his testimony has stated that **“it is when Joshua Ntarangwi sued me at the land tribunal in 2005 that I learnt of the problem”**.

23. He avers that by then he had occupied the suit land for a period of 21 years without any complaint.

24. Plaintiff has submitted that since 1984 to the time of the filing of the Originating Summons in 2009, 12 years had lapsed and plaintiff's right and claim based on adverse possession had arisen, accrued and vested. Further the plaintiff has submitted that no award was made by the land dispute tribunal and that therefore there was no judgment of any court to support the defendant's claim.

25. Defence on the other hand have submitted that the occupation by the plaintiff of the defendant's father's land was interrupted when the defendant filed the tribunal case, and plaintiff subjected himself to the said tribunal.

26. I have looked at the proceedings before the tribunal and before the land registrar. The final decision of the land registrar was as follows: **“I find that the proprietors of parcel No. 1143, 1144 and 1145 have occupied bigger portions than what is shown in the mutation. They have also marked and maintained a boundary eight and nine metres respectively into plot no. 736. However, since I do not have jurisdiction to give orders for demolition of/or compensation for the encroached portion (since there are permanent buildings/structures), the existing boundary should remain as it is unless ordered otherwise by a court of law”**.

27. It is clear from this decision that the boundary dispute was determined by a body of competent jurisdiction. The only hitch occurred because there were permanent buildings and hence the difficulties in implementation of the decision. All in all it is the institution of the suit that matters and in the present case the defendant had instituted his case before the tribunal.

28. In the case of **Elija Ikaha Ikanjo vs Joseph Ngoina Asutsa (2006) eKLR**, it was held that **“for there to be interruption, the proprietor must evict or eject the trespasser, but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time”**.

29. It follows that even if plaintiff had occupied the suit land for a period of 21 years by the time the tribunal case was lodged in 2005, the filing of the tribunal case did interrupt plaintiff's occupation of the land.

30. Pursuant to provisions of section 38 of the limitations 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**.

31. Plaintiff had not asserted this claim to ownership of the portion of the land in question, by the time he was sued before the tribunal. He therefore doesn't fit the definition of an adverse possessor. What the doctrine of adverse possession recognizes is that the registered owner holds the title to the land as the legal owner but for the occupier as the *cestui que trust* whose legal ownership ripens only upon registration after a court order (**See Bridges Vs. Mees [1957] Ch. 475**).

32. Plaintiff therefore was and remains a trespasser on the suit land no. 736 despite the occupation of the land for a period of 21 years before the filing of the tribunal case.

33. The final orders of the court are that plaintiff's claim has failed the same is dismissed with costs to defendant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 8th MARCH, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Nyenyire holding brief for Rimita for plaintiff present

Kibiti holding brief for Mwangi for defendant present

Plaintiff present

Defendant - absent

HON. LUCY. N. MBUGUA

ELC JUDGE



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