



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 66 OF 2007

MUGO NDEMERO.....PLAINTIF
F

VERSUS

EDWARD MUGANDA NGARE.....DEFENDANT

J U D G M E N T

The Plaintiff herein filed the originating summons herein on 11.05.07. He is claiming Title Land Parcel No. **EMBU/KITHUNTHIRI/NTHIRI/1458** by way of adverse possession under **Section 7 of the Limitation of Actions Act**. He claims that he has been in possession and physical occupation of the said plot since 1978.

In the alternative, he is seeking a declaration that the defendant was registered as proprietor of the said parcel on his behalf and in trust for the plaintiff.

In his supporting Affidavit dated 9.5.07 he deposes that he entered the plot in question after the same was shown to him by his father who according to the plaintiff was the owner of the same.

He realized that the land was registered in the name of the defendant in 2001 when he was reported to the area chief.

In his replying affidavit dated 13.06.07, the defendant denies that the plaintiff has lived on the plot uninterrupted for a period of 12 years. He deposed that he has been interrupting the plaintiff regularly and annexed the proceedings before the chief and elders held on 26.09.2001 and also court proceedings from Siakago Court where the plaintiff had been charged with forcible detainer and convicted. The matter proceeded by way of *viva voce* evidence with the plaintiff testifying and calling 2 other witnesses. The Defendant also testified and called his father as his witness. From the evidence adduced, it is not disputed that the father (DW2) bought land from the plaintiff's father PW2 way back in 1971. Both plaintiff and the defendant were minors then. According to PW2, the land was virgin land and was vacant. After demarcation, the said plot was given Title No. 1458. DW2 said that he utilized the land for some time and left it in 1978. He also testified that he gave the same to his son the defendant herein. The same was registered in the defendant's name on 11.07.81 but the title Deeds were not issued until 2002. According to the defendant he was working away from home and so he left the land under the watchful eye of his father (DW2). He and DW2 testified that the plaintiff forcefully moved into the land in 2001 and DW2 reported the matter immediately to the chief and elders and that is what culminated into the arbitration proceedings of 26.09.2001.

The plaintiff was ordered to move out but he did not. Several notices were served on him but he did not move out and so the matter was reported to the police causing him to be charged with the offence of forcible detainer. He was convicted in 2006 and did not file any appeal against the said conviction. He nonetheless filed this suit thereafter.

According to the plaintiff however, he moved to the plot in 1978 after the same was given to him by his father. In essence therefore, when he was going into the land in question, he was doing so on the belief that it belonged to his father and not to the defendant. He said that he realized that the land belonged to the defendant in 2001 when they started asking him to vacate the land.

Both counsel filed written submissions in support of their case. There are two versions of the evidence as to when the plaintiff moved into the suit property. If he moved into the property in 1978 as he claims, then he had definitely lived there for more than 20 years before the defendant moved in to assert his rights. If on the other hand he moved in in 2001 as claimed by the defendant and his father, his claim would be inchoate and a claim pegged on adverse possession would not lie. This issue in my view is the primordial and most important one which should be determined first.

If the court finds as a fact that the plaintiff entered into the land in 1978, then the issue of possession for over 12 years will have been established. That will give the court the basis to determine whether the said possession was adverse to the defendant's rights over that land. If on the other hand, the court finds that the plaintiff occupied the said land in 2001, then the suit will have to crumble at that point and there will be no need to proceed to determine whether the said possession was adverse or not.

The fact of possession is actually a question of fact. Did the plaintiff move into the land in 1978 as he claims or in 2001 as the defendant claims"

The question I have had to ask myself is why if indeed the plaintiff occupied the land in 1978, the defendant's father took no action yet they live in the same area" Why did he have to wait until 23 years later in order to take action" Why also did the plaintiff have to wait for all these years until he was even dragged to court and convicted for forcible detainer before he could file his claim" After considering the two sides which are diametrically opposed, I am of the persuasion that the defendant herein is the one who was telling the truth. Had the plaintiff taken possession of the land in 1978, DW2 would have taken action immediately. The only reason he took action in 2001 September is because that is the time the plaintiff moved into the plot. I say so because even the Title Deed for the said plot had not been issued then and so if he was waiting for the Title Deed, he would have taken action later i.e. after 23.06.2002.

Based on this argument, the plaintiff has not proved that he was in continuous and uninterrupted possession and actual occupation of the said plot for more than 12 years in order to acquire prescriptive rights over the said property. Without the said possession, then as stated earlier, the issue of Adverse possession does not arise.

The other issue that I wish to discuss here which was not raised by either counsel, is if the plaintiff's own admission that when he moved into the plot he did so because he believed it belonged to his father and the same was pointed out to him by his father. Even if this court had found that the plaintiff had moved into the land in 1978 as he claims, would his occupation amount to adverse possession" It is trite law that possession per se even for over the 12 years does not necessarily amount to adverse possession. As stated by **K.J. RUSTOMJI** in his book on the **Law of Limitation and Adverse Possession, Vol. II, 5th Edition at pages 1366-1367.**

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous...A mere adverse claim to the land for the period required to form the bar is not sufficient. To make a possession adverse,

there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupants' use, done publicly and notoriously".

The catch word here is "true owner". This quotation was cited with approval by the **Court of Appeal in Civil Appeal No. 8 of 1990 at Kisumu.**

In this case, the "hostility" or "adverseness" must be to the true owner of the parcel of the property and not an assumed owner. In this case, the true owner of the parcel was the defendant, yet according to the plaintiff when he entered the land, it was on the belief that it belonged to his father. He only learnt that the same was in the name of the defendant in 2001. From his own testimony therefore, the hostility or adverseness to the true owner of the property came into existence in 2001 when the defendant took him to the chief and the elders claiming ownership of the plot.

A claim for adverse possession would therefore not lie. Whichever way I look at it therefore, the plaintiff's claim under adverse possession cannot possibly hold. I am satisfied that he has not proved his claim against the defendant on a balance of probabilities as required by law. His claim must therefore fail. The same stands dismissed with costs to the defendant.

W. KARANJA

JUDGE

Delivered, signed and dated at Embu this 8th day of December 2010

In presence of:- Mr. Gachugi for Ms. Njeru for plaintiff. Parties absent.



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