



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO 12 OF 2010 (O.S)
IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA
AND
IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA
BETWEEN
SIMON NG'ANG'A NJOROGE.....PLAINTIFF
VERSUS
DANIEL KINYUA MWANGI.....RESPONDENT
JUDGMENT

Introduction

1. **Simon Ng'ang'a Njoro**ge the plaintiff/applicant herein took up the originating summons dated **19th January, 2010** against the defendant/respondent, **Daniel Kinyua Mwangi** for determination of the following questions:-

1. **Whether he has become entitled to be registered as the absolute proprietor of the parcel of land known as parcel No. Nyandarua/Kitiri/5558 (hereinafter referred to as “the suit property”)**
2. **Whether the defendant should be ordered to transfer the suit property to him? If the answer to question 2 above is in the affirmative,**
3. **Whether the deputy registrar of this court should execute the necessary transfer documents if the defendant fails to do so?**
4. **Whether the defendant by himself, his agent and/or servants should be restrained by way of a perpetual injunction from entering, alienating, selling, trespassing or in any way whatsoever interfering with the applicant's quiet and peaceful enjoyment of the suit property?**
5. **Whether the defendant should pay the costs of the suit?**

2. The application is brought under **Order XXX VI Rule 3d** of the old Civil Procedure Rules and

Sections 13, 17 and 38 of the Limitation of Actions Act (Cap 22) Laws of Kenya.

3. The application is premised on the affidavits of the plaintiff where it is deposed that between 1992 and 1993 the plaintiff entered into a sale agreement with the defendant for sale of land parcels **Nyandarua/Kitiri/2478** and **Nyandarua/Kitiri 2465** and **Nyandarua/Kitiri/2485** owned and registered in the name of the defendant; that the defendant purported to subdivide the said parcels into **LR NO.Nyandarua/Kitiri 2465, 2485, 2478, 2481, 2477 and 2480**.

4. It is contended that after selling the aforementioned parcels of land to the plaintiff, the defendant began the process of transferring them to the plaintiff but the transfer process could not be concluded because an interested party had placed a caution on **LR NO.Nyandarua/Kitiri/1506**.

5. Because of the said impediment to the transfer, the plaintiff instituted Naivasha **PMCC NO.269 of 1998** wherein a judgment was delivered in his favour. Subsequently, the plaintiff and the defendant went to the Land Control Board and obtained letters of consent for the transfer of the three parcels of land namely **LR NO.Nyandarua/Kitiri/2878, 2465 and 2485** to the plaintiff.

6. It is contended that, in breach of the plaintiff's expectation that the defendant would transfer the suit properties to him as decreed in Naivasha PMCC No.269 of 1998, the defendant refused to transfer the suit properties to him but instead re-subdivided and consolidated them with a view of defeating his interest there in. In particular, the plaintiff claims that the defendant fraudulently changed **LR NOS. Nyandarua/Kitiri/2478, 2465 and 2485** which he has been occupying from 1996 to **LR.NO. Nyandarua/Kitiri/5558** (the suit property herein) measuring 4.1 hectares.

7. On **21st November, 2009** the plaintiff received a letter from **David K. Gichuki & Co. Advocates**, instructed by **Elijah Mwangi Kinyua** and **John Ngaruiya**, demanding that he vacates the suit property as it belonged to his clients.

8. The plaintiff contends that the said claimants are being used by the defendant to unlawfully interfere with his quiet occupation and use of the suit property.

9. Apprehensive that the defendant may evict him from the suit property and occasion him irreparable injury, the plaintiff brought the suit herein seeking the order listed herein above.

10. In reply, the defendant filed the replying affidavit sworn on **27th January, 2010**. In that affidavit, the defendant has deposed that he sold 10 acres of land reference **Nyandarua/Kitiri 1**; that he transferred to the plaintiff titles No. **Nyandarua/Kitiri/1522** measuring 6 acres and **Nyandarua/Kitiri 1518** measuring one and half (1 ½) acres.

11. Concerning the suit property, the defendant has deposed that it belongs to him and that it has no bearing with what the applicant bought and got.

12. Contrary to the plaintiff's contention that he has been living on the suit property, the defendant has deposed that the plaintiff resides in another area (Engineer town) about 5 kilometers away from the suit property.

13. It is the defendant's case, that the plaintiff has attempted to mislead the court by failing to bring to its attention that he sold portions of the suit property to **Elizabeth Wangari** (½ acre); **Karanja Maina** (1 acre), **Peter Muthithi** (½ acre) and **Esther Nyambura** (½ acre) back in 1993 and also by failing to inform the court that the said purchasers are in occupation of the suit property.

EVIDENCE

The plaintiff's case

14. When the matter came up for hearing on **14th November, 2013** the plaintiff led evidence to the effect

that he entered into several sale agreements with the defendant's for the sale of the parcel of land known as Kitiri parcel No.1. He informed the court that the first sale agreement was executed on **18th May, 1992**. Through this agreement he bought 10 acres of the said property. The defendant handed over 7 ½ acres but refused to hand over 2 ½ acres thereof. He produced the sale agreement in respect of the said transaction as **Pexbt 1**.

15. They entered into a second agreement on **7th December, 1993** for the sale of a further 3 acres of the same parcel of land (Kitiri parcel No.1). He paid the full purchase price being Kshs.120,000/= and took possession of the 3 acres. He produced the sale agreements as **Pexbt 2**.

16. On **5th March, 1994** he bought a further 6 acres of the said parcel of land (Kitiri parcel 1). He produced the sale agreements in respect of that transaction as **Pexbt 3**. In total he bought 19 acres of the said parcel of land, but the defendant only gave him 10 ½ acres.

17. He was given consent for sub-division and transfer of the 10 ½ acres by the relevant Land Control Board. He was, however, unable to get the properties transferred in his name because of a caution lodged by an alleged purchaser of the suit property. Because of that impediment he went to court and obtained an order for removal of the caution in Naivasha **SPM No. 269 Of 1998**. He produced the judgment and the decree in respect thereof as **Pexbt 5** and **6** respectively.

18. The court heard that the defendant re-sub-divided and amalgamated the parcels he had bought into the suit property and later transferred it into his name. To prove this fact, the plaintiff produce the mutation form and a search in respect of the suit property as **Pexbt 7**.

19. The Plaintiff concedes that he was not given Land Control Board consent in respect of the suit property despite having lived thereon since 1996. The court heard that the plaintiff has developed the suit property by fencing it off, planting trees and effecting other developments thereon. To attest to that fact, he produced photographs of the suit property and the developments effected thereon as **Pexbt 8**.

20. The plaintiff reiterated that he took possession of the suit property after execution of the various sale agreements and maintained that he has title for 7 ½ acres but no title for 10 ½ acres.

The defence case

21. In his testimony, the defendant acknowledged that he entered into the first agreement (Pexbt 1) and admitted that although the plaintiff paid for 10 acres he only transferred to him 8 acres.

22. With regard to the other agreements, he denied having executed them.

23. He further admitted that the plaintiff is in occupation of 6 acres belonging to him. However, he denies that the the plaintiff has been in adverse possession of the suit property. In this regard, he contends that the plaintiff has been in occupation of the 6 acres for 10 years. As for the remainder of 4 ½ acres claimed by the plaintiff, he reiterated that the 4 ½ acres are occupied by himself and four persons to whom he sold the 4 ½ acres.

24. The court heard that there had been a protracted dispute over the suit property but the defendant did not sue the plaintiff for recovery of the same. Instead he referred the dispute to the Land Disputes Tribunal, the area chief and the District Officer (D.O).

25. Concerning Naivasha PMCC NO. 269 of 1998 the defendant stated that the suit was in respect of a different property, plot No.1522. The court heard that this is the plot the plaintiff has occupied since 1998. In respect of the suit property, the defendant stated that he has been in occupation of the same since 1991. The court also heard that the defendant neither gave the plaintiff permission to enter the suit property nor filed any case against him in court.

26. Concerning the affidavit sworn in reply to the originating summons, the court heard that it was sworn

by the plaintiff's advocate but with the authority of the defendant, who was aware of its contents.

Submissions:

27. At the close of the case, only the plaintiff filed submissions. He submitted that the agreements executed between the plaintiff and the defendant become void for all purposes six months after they were executed for failure to obtain the consent of the Land Control Board and that for purposes of the plaintiff's claim for adverse possession, time began to run six months after the void agreements were executed.

28. Concerning the defendant's contention that there has been a long protracted dispute over the suit property, it is submitted that there is no evidence of the notices allegedly issued to the plaintiff to vacate the suit property. It is also contended that no legal step was taken to re-claim the suit property.

29. In support of the plaintiff's case reference is made to the following cases:-

- a) **Ramco Investments Limited v. Uni-Drive-In Theatre Limited** (2014)e KLR;
- b) **Wambugu v. Njuguna** (1983)KLR 172;
- c) **Kahindi Ngala Mwangandi V. Mtana Lewa** (2014)e KLR;
- d) **Daniel Kamau Mwangi & 2 others v. John Peter Kinuthia Gateri** (2014)e KLR;
- e) **Kariuki v. Kariuki** (1983) KLR 225;
- f) **Njuguna Ndatho vs. Masai Itumo & 2 others** (2002) e KLR.

In **Wambugu v. Njuguna** (*supra*) the Court of Appeal, *inter alia*, held:-

“1. The general principle is that until the contrary is proved, possession in law follows the right to possession;

2. In order to acquire by statute of limitation of title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or having discontinued his possession of it. The dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

3. ...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 for the requisite number of years.....

7. Where the claimant is a purchaser under a contract of sale of Land, it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the vendors would have evicted him. The possession can therefore become adverse once the contract is repudiated.

8. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimants possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment....” (emphasis supplied).

Analysis and determination:

30. In the circumstances of this case, there is evidence that the defendant and the plaintiff executed three agreements for sell of various portions of the parcel of land known as Land Reference Kitiri parcel 1. Although the defendant has disowned two of the agreements, upon reading and considering the documentary evidence adduced by the plaintiff with respect to those transactions, I find the plaintiff's testimony in respect thereof more believable compared to that of the defendant, which I find to be mere denials.

31. The last of the said sale agreement was executed on **5th March, 1994** and completed on **6th June, 1994**.

32. Having found the plaintiff's testimony concerning the said sale agreements more believable, and taking note of the principle espoused in **Wambugu v. Njuguna** (*supra*) to the effect that where a claimant pleads the right to land under an agreement and in the alternative, seeks an order based on subsequent adverse possession, (like the plaintiff herein has done) the rule is: the claimants possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price and that the claimant will succeed under adverse possession upon occupation for at least 12 years after such payment; I find and hold that, in the circumstances of this case, the plaintiff possession of the suit property became adverse from **6th June, 1994**.

33. There being no evidence that the defendant took the step contemplated in law to regain his right to the 6 acres he admits are occupied by the plaintiff against his interest; and there being no evidence that the defendant and/or the other persons alleged to be in occupation of the four acres (the defendant claims to occupy by himself and other purchasers), I find and hold that by the time the current suit was filed, the plaintiff had been in adverse possession of the suit property for the period of time stipulated under **Section 38** of the Limitation of Action Act, Chapter 22 Laws of Kenya.

34. Concerning the step contemplated in law for purposes of regaining right to property otherwise adversely possessed by another, See **Njuguna Ndatho v. Masai Itumo & 2 others** (*supra*) where the Court of Appeal observed:-

“1. Time which has began to run under the Act is stopped either when the owner asserts his rights or takes legal proceedings or makes an effective entry into the land.

2...The appellant took no active step to evict the respondents lawfully. Mere writing of letters does not, in our view interfere with the possession of the respondents. He moreover, took wrong steps. He caused the respondents to be charged with the offence of trespass after expiry of the 12 year period. The respondents were acquitted. He went to the wrong forum thereafter-namely the District Officer.” (emphasis supplied).

35. In applying the foregoing principles to this case, there being no evidence that the defendant took the steps contemplated in law for regaining entry to the suit property, I reiterate my finding that the plaintiff has established a case for being declared the owner of the portions of the suit property he currently occupies against the interest of the defendant therein.

36. The upshot of the foregoing is that the plaintiff's suit has merit and is allowed as prayed. Costs of the suit are also awarded to the plaintiff.

Dated, signed and delivered at Nakuru this 30th day of January, 2015

L.N. WAITHAKA

JUDGE

In the presence of:

Mr. Chege for the defendant

No appearance for the plaintiff

Court Clerk – Emmanuel Maello