REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 125 OF 2015 (AS CONSOLIDATED WITH ELC NO. 126 OF 2015)

JOSEPH KATHURI MUGO ……...….1ST PLAINTIFF

JAMES MUCHIRA NJUE ……..…….. 2ND PLAINTIFF

FAITH GICHUGU MUCHIRA ……..…….. 3RD PLAINTIFF

VERSUS

JAMES GICOBI KARANJA …….. DEFENDANT

JUDGMENT

The Plaintiffs commenced this suit vide an Originating Summons dated 15th October, 2015 whereby they are seeking a determination of the following issues: -

1) Whether the plaintiffs have been in open, continuous, uninterrupted and exclusive occupation, possession and use of 1/2 acre out of land parcel number BAREGWE/THUMAITA/1140 for a period of over 12 years?

2) Whether the defendant's title to land parcel number BARAGWE/THUMAITA/1140 in respect of the 1/2 acre has been extinguished?

3) Whether the plaintiffs have acquired the title to a portion of 1/2 acre out of land parcel number BARAGWE/THUMAITA/1140by way of adverse possession?

4) Whether in the alternative and without prejudice to question 1, 2, and 3 above, a constructive trust and/or proprietary estoppel exists in favour of the plaintiffs in respect of 1/2 acre out of land parcel number BARAGWE/THUMAITA/1140 and therefore a title for the said portion of 1/2 acre out of parcel number BARAGWE/THUMAITA/1140 should issue to the plaintiffs?

5) Who should be ordered to pay the costs of the suit?

The Originating Summons is supported by the Affidavit of Joseph Kathuri Mugo and numerous annexures thereto marked **JMN-1, 2, 3,** and **4** respectively. The defendant filed a Replying Affidavit sworn on 9th November, 2015 in defence to the Plaintiffs Claim. The said Replying claim is further supported with four documents annexed thereto and marked **J.G.K 1, 2, 3**, and **4** respectively.

PLAINTIFFS/APPLICANTS SUMMARY OF FACTS

During the hearing of this case, the plaintiffs called 4 witnesses. Joseph Kathuri Mugo, the first plaintiff/Applicant was the first witness and testified on oath that on 08/02/2003, they entered into a written sale Agreement of land measuring half an acre being parcel number BARAGWE/THUMAITA/1140. The 1st plaintiff stated that after they entered into the sale agreement, he went with a surveyor the following day and took possession and has been in occupation since then. He said that he planted coffee stems, tea bushes and bananas. He referred to one of the documents annexed to the Affidavit in support of the Originating Summons dated 08/02/2014 marked **JKM-3.** The said document is an acknowledgment letter by one Cyrus Ndambiri Nyaga in the sum of Kshs. 10,000/. He further stated that the said Cyrus Ndambiri Nyaga is a brother-in-law to the defendant who sold him the 1/2 acre of land No. **BARAGWE/THUMAITA/1140.** He said that when they went to the lawyer to pay the last instalment, the defendant refused saying it was expensive paying through a lawyer and asked to be paid without passing through a lawyer. He admitted having received a demand letter by counsel for the defendant dated 24/09/2015

The second witness was Faith Gichugu Muchira (PW2) who is the 3rd plaintiff herein. She is the wife of James Muchira Njue, the 2nd plaintiff herein. In her testimony, the witness stated that on 13/11/2002, James Gicobi Karanja, the defendant herein came with his wife to their house and asked whether they were interested to buy 1/2 acre from land parcel number **BARAGWE/THUMAITA/1140**. They answered in the positive and paid the full purchase price. Thereafter, they took possession immediately. The land had a few plantations of coffee stems, Macadamia and tea bushes and they added some. They called a surveyor who did survey and placed beacons. She said that later on, someone by the name of Joseph Kathuri Mugo came and occupied 1/2 acre of the land. She said that the whole land parcel No. **BARAGWE/THUMAITA/1140** is measuring approximately 2 acres and that nobody occupies one acre. She further stated that the owner sold the land and the house he was living and moved to a place known as Kiamathugu.

The third witness was Joseph Ndege Migwi who adopted his witness statement dated 02/11/2016. He stated that sometime in February, 2003 while at his home, he saw some people on the defendant's land. He decided to go and see what was happening. He saw it was the land of the defendant which was being surveyed. Soon thereafter, he saw the plaintiff occupy 1/2 of the land. He became close with the plaintiff as he could get farming tools such as jembes from his home. In the 1/2 acre the plaintiff bought, there were coffee stems, tea bushes, bananas and macadamia trees but the plaintiff added more coffee stems, and tea bushes on land. That since 2003, the plaintiff has exclusively occupied the ½ acre portion of land.

The 4th and last witness was Julius Chomba Mwathi who also adopted his undated witness statement filed in court on 03/11/2016. According to him, James Gicobi Karanja is a neighbour and someone known to him well whom they grew up together. He recalled that sometimes in November 2002, he saw Gicobi's land (defendant) being surveyed and he went to check and he saw a surveyor on the ground carrying out survey exercise and joined in placing the boundary beacons being euphorbia (kariaria) plants. Immediately thereafter, the plaintiff occupied a portion of 1/2 acre where he is cultivating to date. He said that the 1/2 acre occupied by the plaintiffs has coffee stems, tea bushes, macadamia trees and bananas with a small area left for food crops. That since the plaintiffs took occupation of the 1/2 acre in November 2002, there has been no interruption by anybody including the defendant herein.

THE DEFENDANT'S SUMMARY OF FACTS

It was only the defendant who testified and stated that he sold a portion his land measuring approximately 1/2 acre to Joseph Kathuri Mugo at the price of Kshs. 165,000/-. The said Joseph Kathuri Mugo paid him a deposit of Kshs. 23,000/and the balance of Kshs. 142,000/ was to be paid in two instalments of Kshs. 50,000/ on or before 15/06/2003 and the final instalment of Kshs. 92,000/on or before 31/05/2004. He also sold another portion of the same land measuring approximately one (1) acre to James Muchira Njue jointly with Faith Gichugu at a consideration of Kshs. 165,000/. The two paid him a down payment of Kshs. 9000/ leaving a balance of Kshs. 156,000/ which was to be paid before 31st May, 2004. He said that despite the agreement with the plaintiffs, they never honoured their contractual obligation. He denied the allegations that surveyors visited his land and placed beacons for the portion he intended to sell to the plaintiffs. He said that they never went to the Land Control Board for consent to transfer as the plaintiffs did not pay him the balance of the purchase price. When the plaintiffs failed to pay the balance of the purchase price, he leased his land to two people. One day while he was harvesting his macadamia, he was arrested on allegations that it belonged to the plaintiffs. He said that the plaintiffs have never planted any plants or crops and neither have they constructed any structure on the suit land.

PLAINTIFFS WRITTEN SUBMISSIONS

Mr. Maina Kagio Advocate instructed by the Firm of Maina Kagio & Company appearing for the plaintiffs submitted that the plaintiff's occupation was created by operation of the law after a period of six months from the date of the agreement by dint of Sections *6, 7, and 8 as read with Section 22 of the land control Act, CAP302.* He referred to the cases in support of the claim: -

(1) MTANA LEWA VS KAHINDI NGALA (2005) e KLR

(2) PAUL MWANGI GACHURU VS KAMANDE NGUKU (2017) e KLR

(3) SAMUEL MIKI WAWERU V S JANE NJERI RICHU, Civil Appeal NO. 122 of 2001.

As to whether the purchase price was paid in full or not and whether it was paid at once or in instalments, the learned Counsel submitted that the same does not affect the plaintiffs claim and referred to the case of *SAMUEL MIKI WAWERU VS JANE NJERU RICHU (supra).*

DEFENDANT'S WRITTEN SUBMISSIONS

Mr. J. Ndana instructed by J. NDANA & COMPANY ADVOCATES for the defendant submitted that the plaintiffs have not proved their claim for adverse possession to the required standard and cited the following cases in support of his defence;

1) WAMBUGU V NJUGUNA(1983) KLR 1973

2) GABRIEL MBUI V MUKINDIA MARANYA CIVIL CASE NO.283 of 2019 (1993) e KLR

3) DANIEL KIMANI RUCHIRE & ANOTHER V SWIFT RUTHERFORDS CO. LTD & ANOTHER (1976-80) 1 KLR and

4) WANJA V SAIKWA (1984) KLR 1984.

LEGAL ANALYSIS AND DECISION

I have considered the evidence adduced by the parties and their witnesses in this case. I have also considered the documents produced, the submissions by counsels as well as the applicable law. The plaintiffs' claim is hinged on the doctrine of Adverse possession. The plaintiffs are also seeking an alternative order/ determination whether constructive trust and/or proprietary estoppel exist in their favour. The appropriate issues for determination in my view are as follows;-

1) Whether the plaintiffs have brought themselves within the principles governing Adverse possession.

2) Whether the plaintiffs have discharged their obligation in the purchase of suit property.

3) Whether the plaintiffs have acquired the suit properties under the doctrine of constructive trust or proprietary estoppel exist in their favour

4) Who is liable to pay costs?

WHETHER THE PLAINTIFFS HAVE PROVED THEIR CLAIM FOR ADVERSE POSSESSION TO THE REQUIRED STANDARD

A claim for adverse possession is founded under the ***Limitation of Actions Act, Cap. 22 Laws of Kenya***. ***Section 7*** of the Act provides as follows;

> *"7 An action may not be brought by any person to recover land after the end of twelve 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.''*

Section 13 of the same Act is also of relevance and provides as follows;

> *1) A right of action to recover land does not 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 Section 9, 10, 11, and 12 a right of action to recover land accrues on a certain date and no person is in adverse on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.*
>
> *2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.*
>
> *3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3), the land in reversion is taken to be adverse possession of the land".*

The principles governing the law on adverse possession has been discussed in a number of decisions. In the case High Court of ***KIMANI RUCHIRE VS SWIFT RUTHERFORD & CO. LTD (1980) KLR 10,*** **Kneller J. (**as he then was) held as follows;

> *"'The plaintiffs have to prove that they have used this land which they claim as of right; nec vi, nec clam, nec precario -- So the plaintiffs must show that the company had knowledge (or means of knowing actual or constructive) of the possession or occupation. It must not be broken for any temporary purpose or by any endeavous to interrupt it or by any recurrent consideration ..... "*

If the plaintiffs entered the defendant's land which is even contested, then such entry, possession and/or occupation was on the basis of the sale agreements produced as exhibit.

The Court of Appeal also set out the principles for adverse possession was also discussed in the case of MISTRY ***VALJI VS JANENDRA RAICHAND & 2 OTHERS (2016) e KLR*** where it was held;

> *"(i) Adverse possession is not available to a party who is on the registered owner's land with his consent or where the entry and occupation was lawful and based on some agreement. In other words, where the title of the owner is admitted there can be no claim for adverse possession.*
>
> *(ii) The occupation of the land must be nec vi, nec clam, nec precario.*
>
> *(iii) The adverse possessor must prove that through his occupation, the true owner has been dispossessed or his possession discontinued.*
>
> *(iv) It is equally established that adverse possession does not arise merely by occupation and use.*
>
> *(v) The filing of a suit for recovery of land or any other recognised assertion of title to the land by owner stops time from running for purposes of section 38 of Cap. 22".*

I have looked at the sale Agreement entered between the plaintiffs and the defendant dated 13th November, 2002 and 8th February, 2003 respectively. None of them indicate that the plaintiffs were given vacant possession upon execution of the sale Agreement. There were also

no photographs or any other form of physical evidence showing that the plaintiffs are in actual possession or occupation of the suit land. In view of the matters aforesaid, I find that the plaintiffs have not brought themselves within the confines of adverse possession.

WHETHER THE PLAINTIFFS HAVE DISCHAGED THEIR OBLIGATION IN PAYING THE BALANCE OF THE PURCHASE PRICE

The two sale agreement between the plaintiffs and the defendant contain obligations to be performed by each side of the contracting parties. Like all contracts for the disposal of interest in land, the following are some of the features of sale of land agreement: -

a. The names of the contracting parties,

b. the description of the land,

c. the consideration,

d. the mode of payment,

e. the completion date,

f. whether possession/occupation is given upon execution or the completion date,

g. default clauses,

h. whether the sale is inclusive of any developments, etc.

The agreements in this case captured some of these terms and conditions.

The plaintiff/Applicant, Joseph Kathuri Mugo at paragraph 3 of his supporting Affidavit in ELC No. 25 of 2015, deposed as follows: -

"3. THAT on or about the 8th February 2003, we entered into a written Sale agreement with the defendant in respect of 1/2 acre out of land parcel number Baragwe/Thumaita/1140. (Annexed and marked JKM-2 is a copy of the sale agreement for parcel no Baragwe/Thumaita/1140)".

Again, in ELC No.126 of 2015, James Muchira Njue, the 1st plaintiff in his supporting Affidavit at paragraph 4 deposed as follows: -

***"4.* THAT on or about the 13th day of November, 2002, we entered into a written Sale agreement with the defendant in respect of 1/2 acre out of land parcel number Baragwe/Thumaita/1140. (Annexed and marked JMN-2 is a copy of the sale agreement for parcel No. Baragwe/Thumaita/1140)".**

The two paragraphs of the plaintiffs' Affidavits are unequivocal admission that they took possession and occupation of the suit land by consent of the defendant who is the registered proprietor.

The plaintiffs' claim in my view must fail as occupation and possession is not adverse to the owner's title.

I have also looked at the two Sale Agreements entered between the plaintiffs and the defendant also produced as exhibits in this case. The agreement entered between Joseph Kathuri Mugo and the defendant in ELC No. 125 of 2015 dated 8th February, 2003 indicates that the agreed purchase price for the 1/2 acre of land was Kshs. 165,000/=. The plaintiff paid a deposit of Kshs. 23,000/ leaving a balance of Kshs. 142,000/ which was to be paid in two instalments of Kshs. 50,000/ which was to paid on/or before15/06/2003 (now past) and the last instalment of Kshs. 92,000/= was to have been paid on or before the 31/05/2004. There is no evidence of further agreement or Addendum when the balance of the purchase price was being paid. Joseph Kathuri Mugo, the plaintiff in ELC NO. 125 of 2015 stated at paragraph 4 of his Affidavit in support of the Originating Summons sworn on 15/10/2015 that he has paid the purchase price in full and annexed thereto a letter he referred to as a copy of acknowledgment. The said Acknowledgement is hand written in the following words;

"I, Cyrus Ndambiri Nyaga agreed that I have received ten thousand shillings 10,000/= from Joseph K. Mugo. This amount is to clear full amount of our deal of buying the land of James Gichobi Karanja……'

The defendant has denied that Joseph Kathuri Mugo, the plaintiff in ELC NO. 125 of 2015, ever paid him the balance of the purchase price except the deposit of Kshs.23,000/ which he acknowledged in the sale agreement dated 8th February,2003.

In regard James Muchira Njue and Faith Gichugu Karanja, (Plaintiffs in ELC NO. 126/2015), the defendant also denied receiving the balance of Kshs. 156,000/=.

It is trite that the sale of or disposal of any interest in land is a contract governed under the ***Contract Act, Cap. 23, Laws of Kenya. Section 3(3)*** provides as follows:-

"3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless;-

a) The contract upon which the suit is founded;

(i) Is in writing

(ii) Is signed by all the parties thereto; and

(iii) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the auctioneers Act (Cap. 526), nor shall anything affect the creation of a resulting, implied or constructive trust".

The letter referred by Joseph Kathuri Mugo as an acknowledgment receipt and produced in evidence by the defendant in ELC NO. 125/2015 in my view is just but a tiger paper with no evidentiary value.

The person who is said to have received the sum of Kshs. 10,000/ was one Cyrus Ndambiri Nyaga who is not a party in the contractual agreements. The plaintiffs in ELC NO.126/2026, James Muchira Njue and Faith Gichugu Karanja did not also produce any evidence that they paid the balance of the purchase price of the suit property except the deposit of Kshs. 9,000/=.

I agree with the defendant that the plaintiffs did not discharge their obligations by paying the balance of the purchase price within the timelines given or at all as agreed in the two sale agreements.

WHETHER THE PLAINTIFFS HAVE ACQUIRED THE SUIT PROPERTY UNDER THE DOCTRINE OF CONSTRUCTIVE TRUST OR PROPRIETARY ESTOPPEL

It is not in dispute that the suit land herein is agricultural and that the Land Control Act apply. The mandate of the statutory body is to control transactions in relation to dealings in agricultural land. ***Section 6 of the Act*** provides as follows;

6(1) Each of the following transactions that is to say;

a) The sale, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within land control area;

b) The division of any agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the development and use of the land(planning) Regulations (L.N.516/1962) for the time being apply.

c) The issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land within a land-controlled area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

Section 8 of the same Act also provide as follows;

'8(1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto provided that the High Court may, notwithstanding the period of six months have expired, extend that period where it considers that there is sufficient reason to do so, if any, as it deems fit'.

It is clear from the provisions of Section 8 of the Act that the Court is given power to extend time within which to apply for consent of the Land Control Board out of the stipulated six Months period if the applicant gives sufficient reasons for such extension.

That provision is a saving grace for a party to a contractual agreement, who for some reasons beyond his control, could not perform some of her obligations within the agreed timelines.

A remedy of specific performance under Section 8 of the Land Control Act is an equitable remedy which is discretionary in nature. It is based on the existence of a valid and enforceable contract. The Superior Court has rendered herself on the application of this doctrine in numerous decisions. In the case of ***WILLY KIMUTAI KITILIT VS MICHAEL KIBET (2018) e KLR,*** the Court of Appeal stated;

"A contract for the sale of land to which the land control Act applies is not void from inception nor is it an illegal contract. It becomes void when no application for consent of the land control board is made or if made, it is refused and the appeal from the refusal, if any, has been dismissed (see Section 9(2). The land control Act prescribes the time within which the application for consent should be made to the land control board but, does not prescribe the time within which the land control board should reach a decision or the time within which any appeal should be determined. The process from the time of the making the application to the

time of the determination of the appeal, if any, may obviously take time. However, the requirement that an application for the consent should be made within six months of the making of the agreement is an indication that parliament intended that controlled land transactions should be conducted within a reasonable time

The Land Control Act does not, unlike section 3(3) of the Law of Contract Act and Section 38(2) of the Land Act save the operation of the doctrines of constructive trust or proprietary estoppel nor expressly provide that they are not applicable to controlled land transactions. Although the purpose of the two statutes are apparently different, they both limit the freedom of contract by making the contract void and enforceable. In our view and by analogy, they equally apply to contracts which are void and enforceable for lack of consent of the land control board especially where the parties in breach of the land control Act have unreasonably delayed in performing the contract. However, whether the court will apply the doctrines of constructive and proprietary estoppel to a contract rendered void by lack of the consent of land control board will largely depend on the circumstances of each particular case."

The two decisions above reflect the current position of the courts with regards to the voidability of controlled of controlled transactions.

Turning to this case, the two sale agreements dated 8th February, 2003 and 13th November, 2002 provides clear terms and conditions for each party and the timelines within which those obligations were to be undertaken.

Joseph Kathuri Mugo, the plaintiff in ELC NO. 125/2015 paid a deposit of Kshs.23,000/ and was required to pay the balance of Kshs. 142,000/ in two instalments, the last instalment to have been paid on or before 31st May, 2004. The completion period was to take more than 12 months which makes it void for lack of want of consent under ***Section 6 of the Land Control Act.***

Under all circumstances obtained in this case, it would be unjust to apply the equitable relief of specific performance in view of the fact that the plaintiffs have not proved that they are deserving of the relief having failed to perform their contractual obligation of paying the balance of the consideration as agreed. In my view, the plaintiffs have not approached this court with clean hands and therefore, equity cannot aid them.

The Court of Appeal in the case of ***GURDEV SINGH BIRDI & ANOTHER VS ABUBAKAR MADHBUTI, C.A. No. 165 of 1996*** held: -

"It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been under all the obtaining circumstances in the particular case, it is just and equitable to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487 of Halsbury's laws of England----, Fourth Edition, a plaintiff seeking the equitable remedy of specific performance of a contract;

Must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implication, and which he ought to have performed at the time of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on ground that the plaintiff has failed in literal performance, or is in default in some non-essential or unimportant term, although in such cases it may grant

compensation. Where a condition or essential term ought to have been performed by the plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim."

I agree with the findings in the above decision which is also binding on me save to add that the terms of the agreement which this Court found the plaintiffs to have failed to perform include non-payment of the balance of the purchase price which is not only essential but considerable terms which go into the root and substance of the agreement.

The upshot of my finding is that the plaintiffs case lack merit and the same is hereby dismissed. Each party to bear their own costs.

Judgment READ, DELIVERED and SIGNED in open Court at Kerugoya this 18th day of February, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Maina Kagio for Plaintiff

2. Ms Muturi holding brief for Mr. Ndana for Defendant

3. Kabuta – Court clerk.