



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC MISC APPLICATION NO. 48 OF 2018

(FORMERLY HCC 244 OF 2012)

LUCY WAMBUI MACHARIA.....PLAINTIFF

VERSUS

KIBIRO NJUGUNA.....DEFENDANT

J U D G M E N T

1. The plaintiff by an amended originating summons dated 11th March 2015 filed in court on 12th March 2015 brought under Order 37 Rule 3 and 14 of the Civil Procedure Rules 2010, Section 1A & 3A of the Civil Procedure Act Cap 21, Sections 13, 37 and 38 of the Limitation of Actions Act, Section 7 (i) of the Land Act, Sections 28(h) and 68 of the Land Registration Act sought inter alia for the determination of the following question by the court:

Whether the plaintiff applicant has a right of ownership over land parcel number LR 12249/156(I.R NO. 45170) by virtue of the doctrine of adverse possession.

2. The originating summons was supported by the supporting affidavit sworn by the plaintiff dated 13th July 2012. The plaintiff averred that on 18th March 1991, she entered into a sale agreement with the defendant for the purchase of land parcel No. LR 12249/156 (I.R 45170). She further averred that she paid the entire purchase price to the defendant who handed over to her the original title deed. The plaintiff averred that she took possession of the suit property from 18th March 1991 and had remained in uninterrupted possession for over twenty years before the institution of the instant suit.

3. She averred that she was ready to pay the legal fees and stamp duty for the transfer but the defendant had not signed the transfer forms. She averred her possession of the suit land was adverse to the interest and rights of the registered owner and sought to be declared as the owner thereof on account of being an adverse possessor.

4. The plaintiff in support of her application annexed the certificate of title of the suit property and a copy of the sale agreement dated 18th March 1991 entered between herself and the defendant who was the registered owner of the suit property. The purchase price was Kshs. 85,000/= which the plaintiff stated she paid in full.

5. The originating summons was served by way of substituted service with the leave of court following an application by the plaintiff as the defendant could not be physically traced. The defendant did not enter appearance and filed no response to the originating summons. The originating summons was therefore not defended and the court on 28th September 2021 gave directions that the originating summons be determined on the basis of the affidavit evidence and written submissions. The plaintiff filed her submissions and authorities in support of their submissions on 1st November 2021.

6. The plaintiff in her submissions submitted that she had been in occupation of the suit property from 1991 when she purchased the same from the defendant. She submitted that this was evidenced by the attached copy of the title and the sale agreement. She stated she had been in the suit property for over thirty years and that her occupation and possession had been peaceful and uninterrupted. She relied on various cases notably *Wambugu -vs- Njuguna (1983) KLR 173; Jandu -vs- Kirplal & Another (1975) EA 225; Mtana Lewa -vs- Kahindi Ngala Mwangandi (2015) eKLR Wilson Njoroje Kamau -vs- Nganga Muceru Kamau (2020) eKLR and Mbira -vs- Gachuhi (2002) EA 137*. In the case of *Mbira vs Gachuhi (supra)* the court stated as follows:-

“...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory period without interruption...”

7. After reviewing the pleadings, the evidence and the submissions the issue for determination is whether the plaintiff has acquired the suit property by way of adverse possession. From the evidence on record, the plaintiff entered into an agreement to purchase the suit property vide the agreement dated 18th March 1991 for the consideration of Kshs. 85,000/= which the plaintiff stated she paid in full and entered into possession and occupation of the suit property.

8. The averments by the plaintiff were not challenged as the defendant did not appear and/or file any response. In consequence the court accepts the plaintiff's averments and the evidence as truthful as there was no rebuttal of the same.

9. The Court of Appeal in the case of **Francis Gicharu Kariri -v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi)** while considering what constitutes adverse possession cited with approval the holding in the case of **Kimani Ruchire -v- Swift Rutherfords & Co. Ltd., (1980) KLR 10 at page 16 letter B**, where Kneller J. stated that:-

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it by way of recurrent consideration.”

10. In the present suit, the plaintiff entered into a sale agreement with the defendant on 18th March 1991, paid the full purchase price of Kshs. 85,000/= was handed the original certificate of title and she was permitted to take possession of the suit property. The plaintiff's possession was open, peaceful and continuous with no interruption upto the time she filed the present suit on 17th July 2012.

11. The plaintiff having paid the full purchase price as per the agreement of sale, her possession of the suit property was as the owner thereof and became adverse to the interest and rights of the registered owner. In the case of **Wambugu -vs- Njuguna (1983) KLR 173** the Court of Appeal held inter alia:-

“ 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 claimant's possession is deemed to have become adverse to that of the owner after payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”

12. In the premises I am satisfied the plaintiff has on a balance of probabilities proved her case and is entitled to be declared as owner of land parcel **LR No.12249/156** by reason of having acquired title of the same by virtue of adverse possession. I accordingly enter judgment in favour of the plaintiff in the following terms:-

- (i) The plaintiff is declared to have acquired title over land parcel LR 12249/156 (LR 45170) by virtue of adverse possession.**
- (ii) The Land Registrar is hereby ordered to cancel the registration of Kibiro Njuguna as the owner of land parcel LR 12249/156 (LR 45170) and in place thereof to register Lucy Wambui Macharia as the owner.**
- (iii) Each party to bear their own costs of the suit.**

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 10TH DAY OF FEBRUARY 2022.

J M MUTUNGI

JUDGE