



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 146 OF 2015

JAMES MUITA WANGONDU.....PLAINTIFF

-VERSUS-

NAOMI WANJIRU WACHIRA.....1ST DEFENDANT

(Suing as administratrix of the estate of MOSES WACHIRA KIMOTHO - DECEASED)

DAVID KIMOTHO WACHIRA.....2ND DEFENDANT

JUDGMENT

BACKGROUND

1. By an Originating Summons dated 12th May, 2015 and filed herein on 14th May 2015, James Muita Wang'onde (*hereinafter "the Applicant"*) prays for orders:

(a) That a declaration do issue that the Applicant has acquired title to the parcel of land L.R. No. Nyeri/Mweiga/943 by adverse possession.

(b) That the register to the suit land be rectified by registration of the Applicant as the proprietor of the land L.R. No. Nyeri/Mweiga/943 in place of David Kimotho Wachira; and

(c) That costs be provided for.

2. The summons which is supported by an affidavit sworn by the Applicant is premised on the grounds that the suit property is a sub-division of L.R. No. Nyeri/Mweiga/479 which was originally owned by one Moses Wachira Kimotho who is now deceased. It is the Applicant's case that vide a sale agreement dated 8th April 2000, he purchased 1 acre of the said parcel of land from the deceased and was subsequently put into exclusive possession, use and occupation of the same.

3. The Applicant avers that the deceased passed away before he could transfer the suit property but the Applicant has remained in possession thereof to-date. Following the death of the deceased, his widow, the 1st Respondent instituted Nyeri High Court Succession Cause No. 122 of 2002 upon which she proceeded to distribute the suit land to her son who is the 2nd Respondent herein.

4. Naomi Wanjiru Wachira sued as the administratrix of the Estate of the late Moses Wachira Kimotho

(the 1st Respondent) is opposed to the grant of the orders sought. In her Replying Affidavit sworn and filed herein on 25th August 2015, the 1st Respondent asserts that the Applicant's claim over the suit property is misconceived and an abuse of the Court process.

5. The 1st Respondent avers that if there was any sale of the land, which she denies, the same was null and void or want of Land Control Board consent. The 1st Respondent further avers that the Applicant had never entered the suit land during her husband's lifetime and that after she filed the Succession Cause, the estate was distributed and the suit land went to the 2nd Respondent.

6. The 1st Respondent accused the Applicant of fraudulently amending the Grant to introduce other beneficiaries including himself and thereafter using the same to enter into the land.

7. David Kimotho Wachira (the 2nd Respondent) is similarly opposed to the grant of the orders sought by the Applicant. In a Replying Affidavit also sworn and filed on 25th August, 2015, the 2nd Respondent reiterates the averments made by his mother (the 1st Respondent) and avers that he had previously filed Nyeri CMCC No. 325 of 2010 wherein the Applicant was restrained from entering the land among other orders.

8. The 2nd Respondent further avers that the Applicant's claim has been raised, ventilated and dismissed by both the High Court and the Magistrates Court and urges the court to similarly dismiss the same with costs.

THE APPLICANT'S CASE

9. The Applicant testified as the sole witness in his case. Testifying as PW1, he told the Court he is a farmer and that in the years 2000 he purchased the suit property for Kshs.80,000/- from the late Moses Wachira Kimotho. PW1 told the Court he took possession of the land and started cultivating it. The seller however died later the same year.

10. PW1 testified that after the death of the seller, his widow, the 1st Respondent herein, filed a succession cause and included the suit property as one of the assets of the deceased. The property was then distributed to the 2nd Respondent.

11. PW1 told the Court that earlier on, the 2nd Respondent had filed Nyeri CMCC No. 325 of 2010 seeking his eviction from the suit property but the case was dismissed in 2011.

12. On cross-examination, PW1 conceded that they had not gone to the Land Control Board by the time the husband to the 1st Respondent passed away. He told the Court he had been granted possession upon payment of the purchase price.

THE RESPONDENTS' CASE

13. The 2nd Respondent David Kimotho testified as the first witness for the defence case. Testifying as DW1, the 2nd Respondent told the Court he is a security guard in Nanyuki and that he obtained the suit property through transmission after they went through succession proceedings for his father's estate.

14. DW1 testified that in the year 2009, he had filed a suit against the Applicant seeking eviction orders and that the orders were granted. He told the Court that the Applicant did not enter the suit premises in the year 2000 as he had claimed and that he only came to the property in 2009 when DW1 sued him.

15. On cross-examination, DW1 told the Court he was unaware that the Applicant had purchased the suit property. He told the Court that though the Applicant still occupied the land, the trees thereon which include Macadamia and Cyprus trees were planted by DW1's family.

16. The 1st Respondent – Naomi Wanjiru Wachira testified as DW2. She told the Court the Applicant is her neighbor while the 2nd Respondent is her son, relying on her Replying Affidavit as filed on 25th August, 2015 in response to the Originating Summons, DW2 testified that the suit property was transmitted to the 2nd Respondent after succession proceedings for the estate of her late husband.

17. On cross-examination DW2 testified that she was unaware the Applicant had purchased the land from her husband. She further told the Court that she was unaware that the Grant issued to her was cancelled because she had not involved the Applicant in the succession cause.

18. DW2 told the Court the Applicant had entered the land in 2009. Though the Applicant was still on the land, the Applicant had not installed water and DW2 was unaware of any crops planted thereon. DW2 told the Court that when the criminal case was ongoing, the Applicant had planted nappier grass which she harvested after she won the case.

DETERMINATION

19. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the rival submissions and authorities placed before me by the Learned Advocates for the parties.

20. The Applicant craves a declaration that he has acquired title to the suit property known as L.R. No. Nyeri/Mweiga/943 and that he is entitled to be registered as the owner thereof under the doctrine of adverse possession.

21. It is the Applicant's case that vide a Sale Agreement dated 8th April 2000, he did purchase 1 acre of the said parcel of land from one Moses Wachira Kimotho (*now deceased*) and was subsequently put into exclusive possession, use and occupation of the same. The Applicant told the Court that the seller who is the husband of the 1st Respondent passed away shortly after the sale and before he could effect transfer of the property to the Applicant who remained in possession thereof to-date.

22. The Applicant further told the Court that following the death of the vendor, his widow, the 1st Respondent herein, instituted Nyeri High Court Succession Cause No. 122 of 2002 in which she listed the suit property as part of the estate and proceeded to distribute the same to her son who is the 2nd Respondent herein.

23. The two Respondents who are a mother and her son however disputed the facts relied upon by the Applicant. It was their case that there was no such a sale agreement between the Applicant and the deceased. It was further their case that if there was such an agreement, then the same was null and void for the failure by the vendor and the purchaser to obtain Land Control Board consent.

24. The Respondents further told the Court that contrary to the Applicant's contention that he took possession of the suit property shortly after execution of the sale agreement in the year 2000, the Applicant had only entered the suit land in the year 2009 consequent to which the 2nd Respondent filed Nyeri CMCC No. 325 of 2010 seeking the eviction of the Applicant from the suit property. According to the Respondents the Court had granted them orders restraining the Applicant from being on the suit property.

25. From the material placed before me however, it was not entirely true that the Court issued any orders restraining the Applicant from the suit property. A perusal of the Judgment delivered by the Honourable K. Cheruiyot (RM) on 25th August, 2011 reveals that the Court did find that the Applicant had a right to occupy the land on account that he had purchased the same and proceeded to dismiss the 2nd Respondent's suit with costs to the Applicant.

26. It was also not easy to believe the Respondents' contention that the Applicant had only entered the

suit land in February, 2009. It was clear that shortly after he husband's death, the 1st Respondent instituted Nyeri High Court Succession Cause No. 122 of 2002 and was issued with Letters of Administration on 4th July, 2003. Subsequent to the issuance of the said Letters of Administration, the Respondents proceeded to process title for the suit property which Title Deed was issued in the name of the 2nd Respondent on 14th October, 2004.

27. When the Applicant learnt of the existence of the title, he proceeded on 11th January, 2008 together with two other individuals who were said to have been sold other adjacent pieces of land by the late Moses Wachira Kimotho to seek for the revocation and/or annulment of the grant of the Letters of Administration issued to the 2nd Respondent. Upon hearing that application and in a Ruling rendered on 10th February 2009, Makhandia J. (*as he then was*) allowed the application and revoked the grant on the ground that the same was obtained fraudulently by making a false statement and/or concealment from court of something material to the cause.

28. At Page 14 of the said Ruling, the Learned Judge concluded as follows:

“The Respondent knew of the Applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her Petition of Letters of Administration Intestate. She also ignored them completely when she applied for the confirmation of the grant. In her distribution proposal, she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with the full knowledge of the respondent. Since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years.”

29. Those findings by my senior brother that the Applicant and two other people to whom the deceased sold the land had as at 10th February, 2009 been in continuous and uninterrupted occupation of the land since it was sold in the year 2000 have neither been vacated nor set aside. Even if this court had power to disturb those findings (*and I do not pretend to have any*) I did not find any basis to doubt the same.

30. While I am in agreement with the Respondents that the sale agreement dated 8th April 2000 became void some six months after the execution thereof for want of consent from the Land Control Board, it was evident to me that the continued and uninterrupted occupation thereof by the Applicant could only be construed to have been adverse to the Respondents.

31. From the proceedings of the Nyeri CMCR No. 1178 of 2010 wherein the 1st Respondent was charged with the offence of malicious damage to property, it was clear that the Applicant had been using the land and had planted maize and nappier grass thereon.

32. While it is true that the 2nd Respondent had filed Nyeri CMCC No. 325 of 2010 seeking the eviction of the Applicant from the land, I did not think the same had the effect of interrupting the computation of time for adverse possession as the court went on to affirm the Applicant's entitlement to be on the suit land. As at the time of filing this suit, some 14 years had lapsed since the occupation of the land by the Applicant.

33. In the premises, I was persuaded that there is merit in the Applicant's Originating Summons dated 12th May, 2015 and that the Applicant has proved his case to the required standard.

34. Accordingly, I hereby make the following orders:

(a) *A declaration is hereby issued that the Applicant has acquired title to the parcel of land known as Nyeri/Mweiga/943;*

(b) *The Register of the said parcel of land number Nyeri/Mweiga/943 be rectified forthwith by the*

registration of the Applicant as the proprietor thereof in place of David Kimotho Wachira; and

(c) Each Party to bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 10TH DAY OF MARCH, 2022.

In the presence of:

The 1st Defendant present in person

No appearance for the Plaintiff

No appearance 2nd Defendant

Court assistant – Kendi

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J. O. OLOLA

JUDGE