



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 88 of 2010

PETER GITHINJI THUMBI.....APPLICANT

VERSUS

RICHARD MWAI WACHIRA.....RESPONDENT

J U D G M E N T

The plaintiff's claim is under commenced under originating summons made pursuant to the provision of order XXXVI Rule 3D of the Civil Procedure Rules as they were then but now order 37 rule 7 of the Civil Procedure Rules promulgated in Legal Notice No.151 in the Kenya Gazette Supplement No.65 and the Legislative Supplement No.42 of 10th September 2010.

The plaintiff's claim is fold thus:-

- (a) There be a declaration that the plaintiff has become entitled by adverse possession to 1 acre of land from parcel No.Nyeri/Ndathi/589 registered in the name of the Respondent.
- (b) The court to be pleased to order excision of the said 1 acre and a title be issued notwithstanding the procedural requirements.
- (c) The costs herein be provided for.

The Originating Summons is supported by the affidavit of Peter Githinji Thumbi. The gist of the affidavit is that on the 12th of April 1996, the plaintiff and the defendant entered into an agreement for sale of one (1) acre of land out of the parcel of land known as Ndathi Settlement Scheme/589 whereas the defendant was the registered proprietor of the said parcel of land he was desirous of selling it to the plaintiff who was desirous of buying the same for a consideration of Kenya shillings one hundred and twenty thousand only.

It was mutually agreed between the parties that the plaintiff was to pay the defendant the full of the purchase price of Kenya shillings one hundred and twenty thousand only (120,000) on execution of the agreement. The defendant undertook the part to plaintiff in possession immediately upon execution of the agreement and payment of the purchase price. The plaintiff undertook to pay legal fees for the agreement, survey fees, stamp duty and any other payments due to any authority in order to complete the transaction. In the transaction, the firm of M/s Lucy Mwai & Co. Advocates acted for both the plaintiff and the defendant. The agreement was executed by the plaintiff and defendant and witnessed by one Purity Waruguru in the presence of Lucy Waruguru Mwai an advocate based in Nyeri.

According to the plaintiff, the entire purchase price was paid to the defendant and the plaintiff took possession of the said parcel of land and cultivated and fully developed the same and has been living

thereon ever since. The defendant was supposed to seek consent to subdivide and later transfer the parcel of land measuring 1 acre to the plaintiff but failed to do so. The plaintiff paid the survey fees and set to install water which he paid some amount of Kshs.15,000/= and the same was received by the defendant. The respondent does not seem intent to transfer the land to the plaintiff as they have been through different adjudication concerning the matter.

The defendant filed a memorandum of appearance on the 18th of August 2010 and a replying affidavit on the 8th of September 2010. According to the defendant as shown in the affidavit he is the registered proprietor of land parcel No.Nyeri/Ndathi/589. The plaintiff leased one acre of land from the defendant for a period of 2 years from 12th April 1996 and paid him Ksh.12,000 for the same. After expiry of the two years the plaintiff refused to vacate hence he reported the matter to the D.O. Narumoru who ordered the plaintiff to vacate. The plaintiff placed a caution on the land as a result of which the defendant sued him in Nyeri Chief Magistrate's Court Civil Case No.662 of 2002 which was dismissed on technical grounds. The defendant denies entering into any agreement to sell a portion of his land. He further states in the affidavit that the plaintiff has never lived on the said land as he has his own house and land in Kimahuri but only goes to the land to till.

On the 27th October 2010, the matter came up for mention before Justice J.K. Sergon and direction given that the Originating Summons be treated as the plaint and the replying affidavit be treated as the defence and that the matter be disposed of by oral evidence.

The matter proceeded for hearing on the 27th November 2012 by way of viva voce evidence. In his statement under oath the plaintiff Peter Githinji Thumbi stated that he was a farmer and businessman hailing from Kimahore sub-location, Kabaruru location in Kieni East District of Nyeri county. On the 12th of April 1996, after conversation of sale of land they went to a lawyer by the name of Lucy Waruguru Mwai in company of the defendant's wife Purity Waruguru where he paid the defendant Kshs.120,000/= and did an agreement for the sale of 1 acre of land with parcel No.Nyeri/Ndathi settlement scheme/589. He was allowed to settle, built houses, installed water, planted trees and has been cultivating the land to date. The plaintiff produced a copy of the agreement which was marked P.Exhibit 1. The agreement for connection of water was marked P.Exhibit 2. The cost of water connection was Kshs.15,000/=. After paying a surveyor was identified to demarcate the land and demarcated 1 acre from the 2 ½ acres however the process of transfer was affected by the defendant who refused to go to the board for a consent to transfer. The defendant denied the plaintiff after some time and after arbitration by elders he agreed to refund the plaintiff the money paid for meter connection within seven days after the meeting of the decision but failed to do so. The agreement to refund was marked as P.Exhibit 3.

The plaintiff ultimately sued the defendant for a refund of Kshs.15,000 for meter connection in CMCC No.136 of 1998 at Nyeri and judgment was issued against the defendant to pay Kshs.32,151. The application for execution of decree and decree itself were produced as P.Exhibit 4 and P.Exhibit 5 respectively. The defendant did not pay the amount despite being committed to civil jail for two months. The plaintiff continued cultivating the land, however, he realised that the defendant wanted to sell the land hence he applied for a caution to be placed on the parcel of land. The caution is marked P.Exhibit 6. A suit by the defendant for the removal of caution was dismissed and a suit for transfer of the piece of purchased by the plaintiff against the defendant was also dismissed. The plaintiff has been in occupation throughout while the defendant is the registered proprietor. He prayed for judgment as in the Originating Summons, costs of the suit and the previous decree of Kshs.32,151. The plaintiff denies the allegation that he leased the land.

On cross-examination by the plaintiff, the defendant reiterated that the transaction was done in the presence of many people but when signing the agreement the only witness was the defendant's wife and the same was before Lucy Waruguru Mwai, an advocate of the High Court of Kenya. His wife could not appear as she was expectant. The cross-examination did not shake the plaintiff's testimony.

The defendant testified on oath and stated that he was a businessman selling cabbages at Chaka in Kiganjo. He used to live in Chehe forest in Mathira Karatina until they were chased away by the Government. In 1991, he was settled at Ndathi Settlement Scheme. Due to problems, he decided to lease

one acre of the parcel he was allocated and got the plaintiff who agreed and gave him Kshs.12,000 but they never wrote down any agreement. The plaintiff refused to vacate the parcel of land after the two years. He reported to the D.O who asked the plaintiff to move out but the latter refused. In 1998, the plaintiff sued the defendant for a debt, he was not served and therefore judgment was entered without his knowledge. He only saw a Notice to show cause but denied owing the money claimed by the plaintiff. He was jailed from 24/7/1998 to 16/10/1998. the defendant produced the Notice to show cause and release orders as D.Exhibit 1 and D.Exhibit 2 respectively. The Defendant stated that the plaintiff had fenced the land with posts without barbed wire. The plaintiff put a caution on the defendant's land as a result of which the latter sued but the case was dismissed. The Decree is annexed as D.Exhibit 3. The defendant asked the court to assist in evicting the plaintiff and cost of the suit.

On cross-examination by the plaintiff's lawyer the defendant reiterated that there was no written agreement for the lease. He states categorically that he never intended to sell the land. On the agreement of sale the defendant denied the same though he acknowledged the wife's signature he did not understand the contents. On the issue of the water connection he states that the plaintiff connected meter when the defendant was in jail. He denied the agreement on the use of water. On re-examination by the court the defendant stated that he has been in occupation of the land as from 1991 while the plaintiff has been in occupation of the suit portion from 1996 to date.

The plaintiff called his wife Mrs Purity Waruguru Kagwe a farmer in Ndathi. She stated that the plaintiff rented one acre of their land for Kshs.12,000 for two years. After two years he sued the defendant as a result of which the defendant was put in prison. The plaintiff connected water and constructed two houses in 1998. The defendant sued the plaintiff for putting a caution on the plaintiff's piece of land but the case was dismissed. The plaintiff also sued the defendant when case was dismissed with costs. On cross-examination she stated that the agreement between the plaintiff and defendant was oral between 3 people. She did not know any to process of water connection.

The defendant filed his submissions on the 10th of December 2012 whilst the plaintiff filed his submissions on the 11th of December 2012.

The gravamen of the plaintiff's case as discerned from the pleadings, evidence and submissions is that the defendant agreed to sell the plaintiff the suit land at a consideration of Kshs.120,000 and acknowledged receipt of the same as purchase price upon which the plaintiff took possession and has been in possession and occupation to date. The plaintiff submits that he has proven his case against the defendant for a claim under adverse possession. Moreover that the claim has also been admitted by the defendant.

In JARDIN -VS KIRPAL 1973 EA 232 it was held that in order to prove a claim under adverse possession a plaintiff should establish that not only has he been in adverse possession but be adequate in continuity, in publicity and extent to show that it is adverse to the owner. It must be actual visible, exclusive, hostile, open and

The plaintiff submits that he meets the test in JARDIN and has been in possession for an excess of 12 years.

The defendant on other hand has persisted in the pleadings, evidence and submissions that he has never sold his land to the plaintiff but merely leased it. The plaintiff submits that the filing of a suit for recovery of land stops time from running for purposes of section 38 of the Limitation of Actions Act under which a person may claim to have become entitled by adverse possession. The defendant submits that the plaintiff had done so and therefore adverse possession cannot be invoked. The plaintiff sites the arbitrations before the District Officer Narumoru and suit No.CMCC No.662 of 2008 for caution removal.

I have considered the submissions of counsel for the plaintiff and the defendants' submission including all the cited case. In my view the main issues for determination are as follows:-

(1) Whether there was an agreement for lease of land between the plaintiff and defendant in respect

of parcel of land No.Nyeri/Ndathi/589.

- (2) Whether there was an agreement between the plaintiff and defendant.
- (3) Whether the plaintiff took possession of the property and has continued in possession to date.
- (4) Whether the suits in respect to the suit land between the plaintiff and defendant can be considered as having stopped the time from running.
- (5) In a nutshell, whether the claim of adverse possession has been factually and legally proved.

In my view, the plaintiff has proved that he entered into an agreement for sale of one acre out of land parcel Ndathi settlement scheme/589, with the defendant for a consideration of Kshs.120,000 which he paid and took possession of the said portion and developed the same, connected water, constructed houses and cultivated the same. I am inclined to believe the plaintiff as P.Exhibit 1 and P.Exhibit 2 are clear manifestation that there was an agreement of sale of one acre of land by the defendant to the plaintiff. The allegation by the defendant that he entered into a lease agreement with the plaintiff in respect of the said parcel of land for a period of two years at a consideration of kshs.120,000/= cannot be believed as there was no documents to prove the same. The plaintiff called his wife as the witness to testify that the agreement was a lease. The court observes that such a witness cannot be considered independent. I do find the documents produced by the plaintiff to prove that there existed a sale agreement credible as the plaintiff did not report to the police that his signature, the signatures of his wife and Lucy Waruguru Mwai advocate had been forged.

On the third issue, it was admitted by the defendant that the plaintiff has been in possession to date and therefore I do not need to believe on the same.

This brings the court to the 4th issue as whether the suits in respect to the suitland between the plaintiff and defendant can be considered as having stopped the time from running. I have perused all the documents tendered as evidence in respect of the suit and do find that the arbitration before the District Officer were not proceedings to recover the land in issue. The Nyeri CMCC No.136 of 1998 was for recovery of money paid for meter connection. The defendant had agreed to refund the money as shown by plaintiff's Exhibit 3 but failed to do so and therefore the court ordered that he pays the same plus costs of the suit. This court finds that the suit abovementioned was not for the recovery of the land and therefore did not stop time from running. The suit No.Nyeri CMCC No.662 of 2008 made for removal of caution likewise does not stop time from running as it did not amount to recovery of land as the plaintiff's portion was within the parcel. This suit was dismissed with costs. This suit can be distinguished from Ndatho -vs Humo and 2 others civil Application No.Nai 231 of 1999 court of appeal at Nakuru (Koech, Tunui, shah) as no suit has been filed for recovery of land in respect of Nyeri/Ndathi/589.

In this court's view, whether the plaintiff came into possession by virtue of a sale agreement or a lease agreement is not material in determining adverse possession. However, after taking possession the issue is whether the plaintiff has acquired title by adverse possession under the Limitation of Actions Act. The plaintiff has proved that the land is registered in the name of the defendant. The plaintiff has also proved that he has been in uninterrupted possession from 1996 to date. The defendant has never taken any legal proceedings for the recovery of land other than side It is trite law that assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. There is no peaceable and effective entry or suit for recovery of land.

In conclusion, the plaintiff originating summons succeeds in terms of prayers a, b, c.

Dated, signed and delivered at NYERI this 5th day of February 2013.

**A. OMBWAYO
JUDGE**