



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT
CIVIL CASE NO.135 OF 2011

EDWARD KARANJA MUNGAI.....PLAINTIFF

VERSUS

CHRISTOPHER NAMISI SIMIYU.....DEFENDANT

J U D G M E N T

The suit herein is commenced by way of Originating Summons and supported by the affidavit of Edward Karanja Mungai. The issues for determination are as follows:-

1. **THAT** the plaintiff having been in continuous and uninterrupted possession and occupation of the suit land parcel LOC.11/MARAGI/2682 for a period in excess of 12 years has become entitled to be registered as the proprietor thereof in the place of the defendant herein by adverse possession.
2. **THAT** the Land Registrar, Murang'a be ordered and directed to delete the names of the defendant and do register the plaintiff as the sole and absolute proprietor thereof.
3. **THAT** the Land Registrar Murang'a be ordered to dispense with the production of the Discharge of Charge and the Title Deed during the registration thereof.
4. **THAT** there be a provision for costs .

Edward Karanja Mungai in his affidavit deposed on the 19th September 2011 states that in or about 1994, he bought from the defendant herein parcel of land No.Loc.11/Maragi/2682 at the agreed price of Kshs.60,000/- for the whole land which was about 0.160 Hectares. He paid the whole purchase price and went into possession immediately after payment.

He states that he is still in actual possession without interruption or break. Prior to the purchase, the land was mortgaged to Barclays Bank of Kenya and the first down payment of Kshs.30,000 was to pay and clear the loan.

The plaintiff and the defendant had agreed that the latter would transfer the property to the former immediately he paid the purchase price.

On the 1/4/1998 the plaintiff paid the outstanding debt of Kshs.39,162.80 to Barclays Bank Murang'a branch and a further Kshs.2,425 in settlement of the lawyers fees.

The plaintiff has invested on the parcel of land though the defendant has not transferred the same to him as agreed. He has lived on, and has been in continues and uninterrupted possession of, the suit land for over 17 years and claims to have acquired right of title thereto by adverse possession.

The defendant was served with the Originating Summons and supporting affidavit as evidenced by affidavit of service sworn on 23/10/2011 by Francis Makau Itule a licensed process server of this court. Despite this service, the defendant neither entered appearance nor filed a replying affidavit.

On the 28/6/2012, the Hon. Justice Wakiaga directed that the matter to proceed by way of formal proof.

On the 22/5/2013, when the matter was brought to court for formal proof **Mr. R.M. Kimani** appeared for plaintiff and was ready to proceed however there was no appearance for the respondent.

The plaintiff **Edward Karanja Mungai** took oath and stated that the defendant, **Christopher Namisi Simiyu** agreed to sell him land parcel No.LOC.11/MARAGI/2682 on the 16/12/1994 which agreement was reduced in writing. The plaintiff produced the sale agreement as **P EXHIBIT 1**.

The plaintiff also produced a certificate of official search indicating that the registered owner of the parcel of land to date is the defendant.

The plaintiff testified further that immediately he bought the land he was put in occupation by the defendant and has been in such occupation and possession since the 17th of December 1994. He has planted **maize, beans, bananas** and other annual crops. The defendant, who then used to live in Murang'a and worked with Barclays Bank stays in Kakamega, has never gone back to the land to claim the same.

Before the sale, the land was charged to Barclays Bank Ltd. The loan has been cleared but the charge has not been discharged. He produced a letter dated 19/6/2000 confirming clearance of the loan.

His advocate wrote to the bank on 26/9/2002 asking Barclays Bank Ltd, Murang'a branch to release the discharge of charge and title deed but the bank declined and advised him to contact the defendant to facilitate the sale transaction. The two letters were produced as **exhibits 4 and 5** respectively.

The plaintiff's claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession has the right to apply to the High Court for an order that he be registered as the proprietor of the land. The person must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years. The plaintiff must prove that he has dispossessed the defendant owner of the property and must openly occupy the property exclusively, keeping out others, and use it as if it were his own.

Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continual (although not necessarily continuous or constant) without challenge or permission from the lawful owner, for a fixed statutory period to acquire title. Where the property is of a type ordinarily occupied only during certain times, the adverse party may need to have only exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely **(a) open and notorious use of the property**. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.

The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about. **(b) Continuous use of the property** – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession.

Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned. (c)**Exclusive use of the property** – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met. (d)**Actual possession of the property** – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

The actions of the adverse party must change the state of the land, as by **clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock** and **constructing buildings** or other improvements. If the property is residential, such actions may include **mowing the yard, trimming trees** and **hedges, changing locks, repairing or replacing fixtures** (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner. (e)**Non-permissive, hostile or adverse use of the property** – The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: **Objective view**—used without true owner's permission and inconsistent with true owner's rights. **Bad faith** or intentional trespass view—used with the adverse possessor's subjective intent and state of mind . **Good faith** view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.

The Specific requirements for adverse possession by the court is a Claim of title or claim of right. The mere intent to take the land as one's own constitutes "claim of right. A claim of right exists if the person believes he has rightful claim to the property, even if that belief is mistaken. A negative example would be a timber thief who sneaks onto a property, cuts timber not visible from the road, and hauls the logs away at night. His actions, though they demonstrate actual possession, also demonstrate knowledge of guilt, as opposed to claim of right, Good faith or bad faith, improvement, cultivation, or enclosure, Payment of property taxes, color of title: A legal document that appears (incorrectly) to give the claimant title,dispossession not under force of arms is a specific requirement for the principle of adverse possession to apply . In such cases dispossessing the owner or after discontinuation of possession by the owner of his own volition the person in adverse possession has a right to acquire title.

Turning to the originating summons I do find that the plaintiff has been in continuous and uninterrupted possession and occupation of the suit land parcel LOC.11/MARAGI/2682 for a period in excess of 12 years and has therefore satisfied the five basic conditions and specific requirements of adverse possession hereinabove stated hence he is entitled to be registered as the proprietor thereof in the place of the defendant herein by adverse possession.

As a result of the foregoing, the Land Registrar, Murang'a should be and **is hereby ordered and directed** to delete the names of the defendant and register the plaintiff as the sole and **absolute proprietor** thereof and, to **dispense** with the production of the **Discharge of Charge** and the **Title Deed** during the registration thereof. Costs of the suit to the plaintiff .

Dated and Delivered at Nyeri this 24th day of May 2013

A .O. Ombwayo

Judge