



**Gitui v Kihuto (Environment & Land Case 10 of 2018)
[2022] KEELC 2335 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2335 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 10 OF 2018
LN MBUGUA, J
MAY 18, 2022
FORMELY NYERI ELC. CASE NO. 85 OF 2015**

BETWEEN

JOSEPH KIHARA GITUI PLAINTIFF

AND

CHARLES KINYUA KIHUTO DEFENDANT

JUDGMENT

Background

1. The background to this suit is that Land Parcel No. 11969/123 situated in Marsabit Township in Marsabit County was at all material times registered in the name of the Plaintiff. The Plaintiff contends that in year 2005, Defendant expressed an interest to buy the land, thus the Plaintiff gave him his original title to the suit land. No sale transaction took place, but Defendant still retained the title and declined to surrender the same back to the Plaintiff. Vide a Plaint dated 30.7.2012, the Plaintiff sought the following orders:
 - a) That the Defendant be ordered to surrender to the Plaintiff the original title document of L.R. No. 11969/123 Marsabit Township.
 - b) That in default thereof the original title document of L.R. No. 11969/123 Marsabit Township be declared obsolete and a new title document to be re-issued to the Plaintiff without surrender of the old title.
 - c) That the Defendant be condemned to bear the costs of this suit.
2. The Defendant filed a statement of defence along with a Counter-claim dated 27.8.2012, where he prays for the following orders:



- a) That the Plaintiff's title L.R. No. 11969/123 Marsabit has become extinguished by reason of the Defendant having been in open, continuous and uninterrupted occupation of the said parcel of land for a period exceeding twelve years before the commencement of this suit.
 - b) That the Plaintiff be ordered to execute all relevant documents to effect transfer of the said property in favour of the defendant and in default, such documents to be signed by the Executive Officer of this honourable court.
 - c) Such further order or relief as this honourable court may deem fit to grant in the circumstances of this suit.
3. On 19.12.2018 Plaintiff's case was marked as withdrawn while the counter-claim was to proceed. PW1 is Charles Kinyua Kihuto who adopted his statement dated 27.8.2012 as his evidence. He contends that in year 1999 his wife Jackline Muthoni Kinyua (PW2) informed him that her brother who is the Plaintiff intended to dispose off the suit property. Thereafter, the two litigants met, entered in to deliberations relating to the suit land and settled at the consideration of Ksh. 400,000/=.
 4. There was no written agreement but it was agreed that the Defendant would pay the purchase price in installments. DW1 immediately paid an initial sum of Kshs 50,000 and thereafter on 14.1.2000 he paid a sum of Kshs. 39,000 to the Plaintiff through the Plaintiff's son known as Paul Kihara Gitui. That on 20.4.2000 or thereabout, the Plaintiffs demanded the balance of the purchase price. The the Defendant was not able to immediately pay the purchase price but he eventually paid the entire Purchase price of Ksh.400,000 together with an additional Ksh. 10,000 demanded as interest.
 5. That after payment of the purchase price, the Plaintiff surrendered the original certificate to the Defendant and on January or February of year 2000, the Defendant occupied part of the building of suit property. The Defendant contends that his occupation of the said property has been for a period of over 12 years.
 6. DW2 is one Jackline Muthoni Kinyua, she adopted her statement dated 10.12.2012 as her evidence. She is the wife of the Defendant and a sister to the Plaintiff. She contends that her brother owned the suit plot and wanted to sell the same in year 1999. DW2 is the one who informed her brother that the Defendant would be interested in buying the property. That is how the Defendant and the Plaintiff met and agreed on a purchase price of Kshs. 400,000/=. DW2 avers that the sum of Kshs. 50,000/- was paid during December 1999, that Shs 120,000 was paid before April of year 2000, that the sum of Kshs 200,000 was to be paid after Defendant secured a co-operative loan from Sheria Sacco and the balance of 30,000 was paid in July year 2000.
 7. DW2 avers that they took over the suit premises in May of year 2000. She contends that her and her husband have been in open uninterrupted occupation of the suit property from 16.5.2000.
 8. The Plaintiff adopted his statement dated 30.7.2012 as his evidence. He contends that a three-bedroom residential house stands on the suit land. He confirms that he is a brother-in-law of the defendant who is married to his (plaintiff's) sister. He avers that it was year 2005 when the Defendant approached him with a purpose of buying the suit land. That the Defendant requested for the original title documents purportedly for verifying the ownership of the plot. In good faith, the Plaintiff surrendered the title deed to the Defendant and the Defendant never came back for purposes of negotiating the purchase price.
 9. He is emphatic that he never entered into any agreement for sale of the suit property with the Defendant and he never received any consideration. He never gave Defendant vacant possession of the



premises thus Defendant occupies the premises by virtue of being a husband to Plaintiff's sister and the latter occupies the land as a licensee of the plaintiff as the two are siblings.

Determination

10. Since the case of the Plaintiff was withdrawn, the key issue arising for determination is whether the Defendant has acquired title to the suit land by way of adverse possession. To this end, the court has considered the pleadings of the parties, evidence adduced, the rival submissions as well as the relevant legal framework.

11. The definition of adverse possession was articulated in *Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others* [2018] eKLR, where the Court explained the conditions to be met for one to prove an entitlement in adverse possession. The court proceeded to quote various authorities which explain the entitlement and I wish to borrow fully from the decision and capture it as hereunder;

“The requirements for Adverse Possession in Kenya has also been set out in the case of *Mbira –v- Gachuhi* (2002) IEALR 137 in which the court held that:

..... 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 prescribed period without interruption....”

Also see; *Mtana Lewa –v- Kabindi Ngala Mwangandi*- COA Malindi(2015) eKLR and *Paul Mwangi Gachuru vs. Kamande Nguku* (2017) eKLR .

12. The provisions of Section 107 of the *Evidence Act* stipulates that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person”

13. It was therefore incumbent upon the Defendant to proof that he had acquired land through the doctrine of Adverse Possession. The Defendant has stated that they entered the land in February of year 2000, his wife mentions May year 2000 as the date of entry. Either way it is apparent that any such occupation was with the permission of the Plaintiff pursuant to the alleged land sale agreement.

14. As clearly set out in various case law, it is not enough for a claimant through the doctrine of adverse possession to assert that he has been in open, continuous and uninterrupted occupation of the land for a period of over 12 years. Such occupation must be without permission of the registered owner of the land.

15. In the case of *Gerard Murithi vs Wamugunda Muriuki and another* (2010) eKLR the court while making reference to the case of *Wambugu vs Njuguna* (1983) KLR page 173 held that there are certain principles which must be met in the claim of adverse possession, one of which is that;

“Where a claimant claims the right to land under an agreement and in the alternative seeks adverse possession the rule is: The claimant possession is deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price”.



16. Neither the Defendant nor his wife DW2 has given a plausible account as to when the last payment was paid. Considering that this suit was filed in July 2012, the court cannot be left to assume that such payment was made before July year 2000. This far, the claim fails.
17. Another point of concern is the element of exclusive possession. The Defendant has stated the “ I took possession of the said property sometime in January or February 2000 and occupied part of the building being on the said leasehold property...”. The Defendant further states that at some point, the plaintiff had put a tenant to occupy a portion of the suit land. It is therefore apparent that even if the Defendants had occupied the land, the Plaintiff appears to have retained some control over a part of the land. Thus the element of exclusive possession is missing.
18. It is not lost to this court that defendant made an admission that he has kept the title to the suit land in his custody to date. Was he hoarding the title?. What can be concluded is that if there was any such occupation, it was not quiet.
19. In the final analysis, I find that the Defendant has not met the criteria of an adverse possessor and the Counter-claim is dismissed. Seeing that the parties are relatives, each party is to bear their own cost of the main suit and the Counter-claim.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF MAY, 2022.

LUCY N. MBUGUA

JUDGE

DELIVERED AT MERU THIS 18TH DAY OF MAY, 2022.

HON. C.K. NZILI

JUDGE

In the presence of:-

Joseph Kihara in person - the Plaintiff

Mrs. Mwiti for the Defendant

Court Assistant: Kananu

