



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 607 OF 2005

CHARLES KINYANJUI KANG'ETHE
.....**PLAINTIFF**

VERSUS

GEORGE GACHANJA MWANGI.....
.....**DEFENDANT**

JUDGMENT

1. **CHARELS KINYANJUI KANG'ETHE** the Plaintiff herein filed his Amended Plaintiff on 17th April 2008 and sought the following orders; a declaration that by virtue of the doctrine of sanctity of title he is the legal and registered proprietor of the land known as **Limuru/Kamirithu/T.212**, a mandatory injunction compelling the Defendant and/or anyone else claiming authority from the Defendant to completely vacate the suit premises, a permanent injunction restraining the Defendant whether by himself, his servants, agents and/or anyone acting under his instructions from encroaching, trespassing, building and/or in any way interfering with the Plaintiff's proprietary rights and exclusive possession use and enjoyment of the suit premises, mesne profits together with interest at court rates, punitive and exemplary damages, damages for wrongful detainer, costs of the suit plus interest at court rates until payment in full and any other or further order that the Honourable court may deem fit to grant.

2. The Defendant **GEORGE GACHANJA MWANGI** filed his defence and counterclaim on 9th May 2008 denying all the averments in the Amended Plaintiff in toto and putting the Plaintiff to strict proof. In his counterclaim he averred that he had been in actual and uninterrupted possession and occupation of the suit premises since 1983 whereon he had erected a residential house. That at the time of his taking possession and occupation of the suit land the same were unalienated trust land registered in the name of the Native Land Trust Board and unknown to him the Town Council of Limuru conspired with one Joseph Kimani Munyaka and fraudulently alienated the suit land to the latter in 1996 in exchange of some other land. The Defendant added that the said Joseph Kimani Munyaka then transferred the suit land to this Plaintiff at no consideration and this was a fraudulent act and therefore the said Joseph Kimani Munyaka did not acquire a good title capable of being transferred to the Plaintiff. In those circumstances he prayed that the suit be dismissed with costs and there be judgment as prayed in the counterclaim. The defence to counterclaim denied in toto everything contained in that counterclaim.

3. The agreed issues were filed on 30th January 2009 being whether the Plaintiff is the registered proprietor of the suit land and whether he purchased the same from one Joseph Kimani Munyaka. Whether one Eunice Njeri Muchendu had at the time of transfer of the suit land constructed a two roomed stone house and leased the same to the Defendant and whether one Joseph Kimani Munyaka purchased the said house from the said Eunice Njeri Muchendu. Whether the Defendant had refused to vacate the suit premises despite demand and whether such refusal amounted to an act of continuing trespass and unjust interference with the plaintiff's proprietary rights. Whether the Defendant had sued Joseph Kimani Munyaka and the Municipal Council of Limuru and whether that suit was dismissed for want of prosecution. Whether the Defendant had been charged, tried and convicted of the criminal offence of forcible retainer contrary to Section 91 Penal Code and fined. Whether the counterclaim based on fraud and adverse possession is sustainable and whether the claim on adverse possession is sustainable. Was the suit land available for alienation by the Defendant and was there any conspiracy to deprive him of the same. Whether the Plaintiff title to the suit land is good and who bears the costs of the suit.

4. This judgment will answer those issues on the material availed to the court. The Defendant and his counsel though served with a Hearing Notice did not attend court at the hearing of the case. The Plaintiff attended, gave his evidence in addition to calling two other witnesses who similarly gave evidence in support of his case. Various exhibits were produced.

On his part the Plaintiff gave evidence that he was the registered proprietor of the suit land and produced a copy of the Title Deed explaining that the original thereof was held as security by Barclays Bank of Kenya Limited in respect of some financial assistance advanced to him. He showed in evidence an official search from the Ministry of Lands evidencing that indeed the suit land was so charged to secure some Kes. 400,000/=.

The Plaintiff produced a Sale Agreement dated 9th May 1996 which evidenced that he bought the suit land from one Joseph Kimani Munyaka. Similarly he produced a copy of the Title Deed earlier issued to the said Joseph Kimani Munyaka, his vendor.

On his part Joseph Kimani Munyaka giving evidence as PW2 confirmed the Plaintiff's evidence that it was he, Joseph Kimani Munyaka who sold the suit land to the Plaintiff after he lawfully obtained the same from the Limuru Municipal Council. On the suit land stood a 30x10 ft stone structure that had been constructed by one Eunice Njeri Muchendu (PW3) and which PW3 had rented to the Defendant. PW2 added that he had paid PW3 some Kes. 30,000/= for that stone house. Once PW2 got the suit land he asked the Defendant to move out he, Defendant, asked that he be allowed upto November 1999. Come that time the Defendant refused to move out. The Defendant was then reported to the area Assistant Chief who asked him to vacate, later the District Officer and the Municipal Council of Limuru asked him to vacate but he would not burge. Letters from the offices mentioned above were produced in evidence. Finally PW2 had the Defendant prosecuted in a criminal case for forcible retainer and the Defendant was convicted and fined Kes 5,000/= or in default serve time for four months.

On her part **Eunice Njeri** giving evidence as PW3 said that she got into the suit land through her brother who although had no title to land lived on the land. The witness constructed a two roomed stone house on the suit land and started renting it out to various tenants the last of whom was the Defendant herein. The Limuru Municipal Council wanted their land back and PW3 was advised by her brother to return the same as he did not own it. She complied. The Defendant paid her rent and PW2 paid PW3 some Kes 30,000/= for her house. She, PW3 described the Defendant as a mere tenant. PW3 said that she gave evidence against the Defendant at the Magistrate's court and he was convicted and sentenced accordingly. That judgment was produced in court.

5. Counsel for the Plaintiff made his submissions and relied on some authorities.

In the absence of evidence from the defence the Plaintiff's case stands unchallenged. An assessment of the evidence shows that the Plaintiff holds title to the suit land. PW2'S evidence showed how the Plaintiff got the suit land and PW3 evidence sealed the fate of the ownership of the house that the defendant lived

in on the suit land. There was no evidence, documentary or otherwise to prove the averments in the defence and counterclaim. The decree issued in HCCC No. 719/2002 wherein the Defendant had sued PW2 and another for cancellation of title was produced in evidence. It evidenced that the said suit was dismissed for want of prosecution by the Defendant. There was no evidence to prove the alleged fraud and conspiracy. And there was no evidence availed to prove ownership vide adverse possession and so the allegations in the defence and counter claim must remain mere allegations unproved as they stand.

6. It is noteworthy that the Defendant did not allege any fraud against the Plaintiff and any fraud alleged against PW2 as the previous registered owner of the suit land stood unsubstantiated and hence unproved. There was evidence tendered that the Plaintiff acquired title over the suit land at a consideration and it cannot be possible that the Plaintiff is a fraud cover for anyone. At any rate the provisions of **Section 143 (2) of the Registered Land Act** come to the Plaintiff's aid by providing that the register would not be rectified to affect the title of a proprietor who acquired land for valuable consideration unless it is shown that such proprietor had prior knowledge of or caused an omission fraud or mistake that would lead to the rectification of the register. And further the Plaintiff could possibly have had no business finding out how PW2 acquired the suit land that he later sold to him. This is by virtue of the provisions of **Cap 300 RLA Section 39** thereof which does not make it the business of a buyer or lessor to enquire or ascertain the circumstances or the consideration for which the proprietor or one before him acquired title.

7. It is trite that adverse possession would begin to run from the date of registration and each and every transfer effected on land. The Plaintiff herein acquired title on 17th May 1996 and the Defendant brought his counterclaim on adverse possession on 9th May, 2008. That was too early in time for the period of twelve years allowed by law had not lapsed – **GATHURE –VS- BEVERLY (1965) EA 514** and also **KAMAU –VS- KAMAU (1984) KLR 539** and **FRANCIS GITONGA MACHARIA –VS- MUIRURI WAITHAKA CA NO. 110/1997** are instructive on this point. The defence has nothing to stand on in support of the claim for adverse possession.

8. There is sufficient proof vide the Title Deed produced in evidence that the Plaintiff became the registered proprietor of the suit land on 17th May 1996. There is abundant evidence showing that as at that date the Defendant was on the suit land as a tenant of PW2 paying a monthly rent of Kes. 300/=. There is further evidence that the Defendant has prevented the Plaintiff from the use of his land. The Defendant has continued to use such land despite numerous demands for him to vacate and despite being found to be a trespasser by a competent court in a criminal case. The Plaintiff prays for damages for the use of his land by the Defendant. Mesne profits has been described as damages for trespass to land see **INVERUGIE INVESTMENTS –VS- HACKETT (1995) 3ALL ER 842** and further see **KENYA HOTEL PROPERTIES LTD –VS- WILLESSEN INVESTMENT LTD CA No. 149/2007**.

The Defendant was tried and convicted of forcible retainer of the suit land and that judgment was shown to this court. He has persisted in his refusal to vacate the suit land since that conviction. The Plaintiff prays for punitive and exemplary damages against the Defendant for his conduct. I am satisfied that the Plaintiff has earned the same. Punitive and exemplary damages are awarded in Kenya as established in **OBONGO & ANOTHER –VS- MINICIPAL COUNCIL OF KISUMU (1971) EA 91**.

In the following circumstances:-

(i) where there is oppressive, arbitrary or unconstitutional action by the servants of the government; and

(ii) where the Defendant's action was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff

and I find that (ii) above is what has happened in this case.

In the result my analysis of the facts and evidence in this case and consideration of the relevant law, bring

me to the inescapable conclusion that the Plaintiff has proved his case on a balance of probability and he is entitled to the prayers sought in the Plaint. Consequently I grant prayers a,b and c of the Amended plaint. I also grant mesne profits at the rate of Kes 300/= per month from 17th May, 1996 together with interest at court rates until payment in full. Against a Defendant who proceeds in blatant disobedience of the law such as this Defendant I find that punitive and exemplary damages are payable and I assess and grant the same to the tune of Kes. 100,000/=. The counter-claim is dismissed as being unproved. The Plaintiff will have the costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2012.

**P.M. MWILU
JUDGE**

In the presence of:-

.....Advocate for Plaintiff

.....Advocate for Defendant

..... Court Clerk

**P.M. MWILU
JUDGE**