



**JOAKIM NGUGI KIARIE.....PLAINTIFF**

**VERSUS**

**G.Z. ULYATE & 6 OTHERS.....DEFENDANTS**

**CONSOLIDATED WITH HCCC NO. 568 OF 1990**

**AGRI-HARDWARE (E.A) LTD.....PLAINTIFF**

**VERSUS**

**JOHN MUKIRAE & 8 OTHERS.....DEFENDANTS**

**CONSOLIDATED WITH HCCC NO. 507 OF 1981**

**JONN MUKIRAE }**

**DANIEL NJOROGE }.....PLAINTIFFS**

**VERSUS**

**L .WILSON }**

**MATHEW ALEXANDER BLACK }.....DEFENDANTS**

**CONSOLIDATED WITH HCCC. NO. 879 OF 1989**

**PATRICK GITAU MBUGUA & 3 OTHERS.....PLAINTIFF**

**VERSUS**

**MATHEW ALEXANDER BLACK.....DEFENDANT**

**JUDGMENT**

These suits are consolidated. The dispute herein relates to a parcel of land known as LR No. 336/17(hereinafter referred to as the suit premises) situate at Baba Dogo Nairobi. This dispute has a long history and the pleadings herein have had to be re-arranged to facilitate the writing of this judgment. This

has been a challenge but I believe the material before me comprising of the pleadings, the documents filed by the parties and oral evidence adduced are sufficient to address the issues before the court.

The plaintiff in High Court Civil Case No. 1029 of 1982 moved the court by way of Originating Summons which was subsequently amended and dated 13<sup>th</sup> July, 1988 seeking orders that he be registered as the proprietor of the suit premises aforesaid absolutely. He also sought an order that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants be restrained by injunction from trespassing or otherwise interfering with his possession of the suit premises. He also sought costs of the suit.

The basis of the aforesaid orders is that he had been in actual occupation and possession of the suit premises for more than 12 years and therefore claims the same on the basis of adverse possession.

The plaintiffs in High Court Civil Case No. 507 of 1981 claimed that they purchased the suit property from Mrs. L. Wilson and therefore claimed an order for specific performance of the sale agreement dated 4<sup>th</sup> March, 1965 and, in the alternative that they be registered as proprietors by way of adverse possession having been in possession for a period in excess of (12) twelve years.

In High Court Case No. 568 of 1990 the plaintiff bought the suit premises from the plaintiffs in High Court Civil Case No. 507 of 1981. However, the title was subsequently cancelled after the vesting order in favour of the plaintiffs in High Court Civil case 507 of 1981 was cancelled and set aside. The plaintiff therefore in this suit that is HCC NO. 568 of 1990, filed a claim of ownership by way of sale.

In High Court Civil Case No. 879 of 1989 the plaintiffs sought an order by way of Originating Summons dated 23<sup>rd</sup> February, 1989 that they be registered as proprietors of the respective plots they possessed and occupied on the suit premises absolutely. They also sought an order that the defendants be barred from ever claiming title to the suit premises by virtue of the Limitation of Actions Act. Further, the defendants should execute transfer and do all necessary acts to convey the said titles to the plaintiffs and in default, the Deputy Registrar be authorized to sign all the necessary papers on behalf of the defendants. They also sought the costs of the suit.

The plaintiff in High Court Civil Case No. 1029 of 1982 gave evidence and called two witnesses. In HCCC No. 879 of 1989 the first plaintiff Patrick Gitau Mbugua gave evidence on behalf of the other plaintiffs while in HCCC No. 507 of 1981 Daniel Njoroge Wanyoro gave evidence on behalf of both plaintiffs. No one appeared in respect of High Court Civil Case No. 568 of 1990.

From the record, the plaintiff in HCCC No. 568 of 1990 has not shown any interest whatsoever in that case and my assessment of that conduct is that, interest may have been lost due to protracted litigation in this matter and the only order that commends itself is that, that suit should be and is hereby dismissed for want of prosecution. The provisions of Order 17 Rule 4 of the Civil Procedure Rules are also applicable in the circumstances. There shall be no order as to costs as such an order will be an exercise in futility going by the pleadings presented.

I consider it necessary to address the position of the parties in High Court Civil Case No. 507 of 1981 at this stage. In that, case the plaintiffs are said to have entered into an agreement with the defendant dated 4<sup>th</sup> March, 1965. This was for the sale of the suit premises herein whereupon they paid Kshs. 30,000/= of the total price of Ksh.60,000/=. They received a vesting order which was registered against the title but subsequently cancelled. It is their case that, the balance of the purchase price was deposited in court. From the documents and the pleadings, the defendant therein left the country in 1970. The defendant was not the owner of the suit premises neither was she the administrator of the estate of the registered owner. She therefore had no capacity to transfer any interest in that particular piece of land. Even if she executed that agreement, she had no authority to do so and no title could pass from her to the plaintiffs. Therefore, no specific performance can be ordered based on that agreement in favour of the plaintiffs. That prayer must fail.

The two plaintiffs never moved onto the suit premises and so they never took possession or occupied the

same. There is no basis therefore, to lay any claim by way of adverse possession. That suit must be dismissed and it is so ordered. Again to make an order for payment of costs will be an exercise in futility. The best I can do is to order that, if the balance of the purchase price, that is, Kshs. 30,000/= is still held by the court, the same should be refunded to the plaintiffs.

Having said so, the only two cases that now remain are HCCC No. 1029 of 1982 and HCCC No. 879 of 1989. There are competing interests by the parties herein in respect of the suit premises. All parties claim to be entitled to the suit premises by way of adverse possession. Learned counsel for the parties have filed their submissions which I have read.

The plaintiff in High Court Civil Case No. 1029 of 1982 Joakim Ngugi Kiarie in his evidence said he moved onto suit premises in 1964 and was a teacher in the nearby Baba Dogo Primary school . On moving onto the land, he was welcomed by one Mrs. Wilson who, from the evidence, was introduced to him by P.W. 3 Mwangangi Kitivo. When Mrs. Wilson was leaving for Australia in 1970, she left him with instructions to continue paying rates. Mrs. Wilson never returned and he has never met the owner of the land.

The documents filed herein show that the records at the City Council of Nairobi reflected the name of Mr. Joakim Ngugi on behalf of the estate of the owner G.Z. Ulyate. This is contained in the plaintiffs list of documents produced by consent of the parties. When the plaintiff Mr. Ngugi defaulted, he was sued by the City Council of Nairobi for the amount due. Summons to that effect were produced in evidence by consent. There was also a letter of demand dated 2<sup>nd</sup> September, 1986 addressed to Mr. Joakim Ngugi by the City Treasurer demanding arrears of rates in respect of Plot No. 336 /17 amounting to Kshs. 100,580/=. These documents, prima facie, show that Mr. Joakim Ngugi was either the recognized agent of the estate and or occupier of the suit premises. There is evidence that it was subsequently agreed that the City council of Nairobi withholds action until this case is determined.

According to this witness, the house he occupied was burnt down in 1980 and neighbours helped him to put another house. He has produced a newspaper cutting to prove the burning of his house. It is his evidence that the defendants then started moving in and started putting up houses claiming the said piece of land. They also started selling part of that land. There is also evidence that Mr. Kiarie reported the dispute to the District Officer and he produced a letter dated 16<sup>th</sup> August, 1989 addressed to the Chief Ruaraka/Kasarani Location and copied to him. This letter relates to the Plot No. 336, the suit premises herein. It referred to Gitau and others versus J. Kiarie and it reads as follows,

**“A dispute is in court on the above land. Could you make sure no constructing is being done on this land as a matter of urgency. Any new construction coming up must be phased out by demolition immediately. Please adhere strictly to the contents of this letter”**

**Signed**

**H.N Hassan**

**District Officer**

**Northern Division**

**Kasarani**

**cc**

**J. Kiarie- Complainant”.**

There is evidence also that Mr. Joakim Ngugi Kiarie moved the court to restrain the defendants and in particular Patrick Gitau Mbugua from continuing with any construction on the suit premises pending the determination of this suit. A consent order was recorded to that effect by Visram J on 18<sup>th</sup>

January, 2001. Mr. Mbugua breached the order and was subsequently committed to civil jail at the instance of the plaintiff.

There is a dispute as to when the defendants moved onto the suit premises. It is their case as set out in their pleadings contained in HCCC No. 879 of 1989 that, they moved onto the suit premises in 1964 just like the plaintiff Mr. Joakim Ngugi Kiarie. In fact it is their case that they, together with Mr. Joakim Ngugi Kiarie, are entitled to the suit premises jointly and severally. However, according to P.W. 2 Michael Muswanii Muli who lived with Mr. Joakim Kiarie Ngugi from 1976 and also the P.W. 3 Mwangangi Kitivo, it is not true that the defendants moved onto to the land at the same time with the plaintiff.

P.W. 3 in particular was more specific that he did not know Patrick Gitau, he only saw him in Court. The evidence of Mr. Daniel Njoroge Wanyoro who gave evidence in this court in respect of High Court Civil Case No. 507 of 1981 is also instructive. He told the court that the defendants Patrick Mbugua and others moved onto the land in 1988.

Patrick Gitau Mbugua D.W. 1 denies that he was cited and committed for contempt of court. However, the rulings on the record are against him in that respect. He has also said that he did not breach the court order but, with the same breath gave evidence to say that he caused the land to be subdivided. He also started paying rates to the City Council of Nairobi in his name and others. This would mean that he assumed ownership of the land without any court order.

Part of his evidence also reads as follows,

**“We have rented out the developed area”**. In my view this is a conduct of a person who is bent on, not only breaching the court order, but also building up evidence to justify a pre-drawn conclusion, and that is, he is entitled to the land in question.

In the course of the trial I watched the parties testify. I observed their respective demeanour. Whereas Mr. Kiarie P.W. 1, Mr. Michael Muswanii Muli P.W. 2 and P.W. 3 Mwangangi Kitivo displayed utmost humility, Mr. Patrick Gitau Mbugua appeared in my view evasive. It will be recalled that this case was adjourned severally but at no time did he offer to bring forward the police abstract to show that his identity card had been lost. This is because his age had been put into question. He had not been seen at the suit premises by Mr. Ngugi and his witnesses until the 1980's, that notwithstanding he still insisted that he moved there in 1964. He also disobeyed the court order which was clear and un-ambiguous. On the other hand Mr. Joakim Ngugi has continued to obey the court order to this day. The records speak for themselves. In my judgment, this is a party (Mr. Patrick Gitau Mbugua) who may be prepared to go to any length to justify his position.

Proof of a case of this nature is on a balance of probability. A party claiming land on the basis adverse possession has to prove that he has used this land which he claims as of right. There must be evidence of no force, no secrecy and no evasion. They must also show exclusive and uninterrupted possession before the filing of a claim, **see Kimani Ruchine & Another V Swift, Rutherford Co. Ltd & another (1980) KLR 10**. A party must also establish that the owner has lost his right to the said parcel of land or has discontinued possession thereof. **See Littledal V Liverpool College (1900) 1 Ch 19 at Pg 21**.

Going by all the material presented before me, I am persuaded that the plaintiff in High Court Civil Case No. 1029 of 1982 i.e. Mr. Joakim Ngugi Kiarie has presented a case that justifies the orders he seeks. His possession and occupation of the suit premises was adverse to the title holder. Competition in respect of that occupation is nonexistent. The defendants should therefore be restrained from interfering with that position. I find he i.e. Mr. Joakim Ngugi Kiarie should be registered as the proprietor thereof.

There is evidence that there are several occupiers on the suit premises which may have been invited by the defendants herein. I know from the history of land disputes in this country that forceful removal or demolition may lead to dangerous consequences. I advise that it is at this stage that arbitral proceedings may be called upon.

For now I give judgment in favour of the plaintiff in High Court Civil Case No. 1029 of 1982 Mr. Joakim Ngugi Kiarie against all defendants jointly and severally with costs of the suit. High Court civil case No. 879 of 1989 is hereby dismissed with no order as to costs.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of August, 2012.*

**A. MBOGHOLI MSAGHA**

**JUDGE**