



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 62 of 2009

SAMUEL MUGO MICHUKI.....PLAINTIFF

Versus

PETER MBIRI MICHUKI.....DEFENDANT

JUDGMENT

By an originating summons dated 6th December 1991 Samuel Mugo Michuki sued Peter Mbiri Michuki claiming to be entitled to ownership and to be declared proprietor of the parcel of land known as Loc.12/Sub Loc.1/T.16 situated at Gakira Market Murang'a District either as a purchaser or by virtue of adverse possession and occupation.

The summons was supported by the affidavit of Samuel Mugo Michuki wherein he deponed that in 1964 he entered into a sale agreement with the defendant herein at an agreed purchase price of Ksh. 200/- (then a lot of money). That he took possession of the said plot in 1964 and in 1970 started to develop the same by building a house for his family. That around 1971 he went together with the defendants to the lands office in Murang'a to start the process of transfer. That since 1970 he had allowed his elder brother Joseph Njuki Michuki to stay on the said land with his family with the knowledge of the defendant.

It was further supported by the affidavit of Njoroge Gikonyo who was contracted by the plaintiff to contract to A a house thereat together with Ephantus Kariuki who confirmed that the plaintiff had been in actual occupation of the said plot.

ON 12TH May 2004 the Defendant filed a chamber summons application to wit that the plaintiff's suit herein be deemed to have abated by reasons of the plaintiffs death on 24th December 2002 which application was subsequently withdrawn with no costs.

By a chamber summons filed on 4th May 2005 one ELIIZABETH WANJIKU MUGO MICHUKI filed an application to be made a party in the suit in her capacity as the legal representative of the deceased plaintiff which application was on 5th February 2005 allowed by consent and on 31st March 2009 Osiemo J. ordered the transfer of the suit from Nairobi High Court to this court.

On 10th December 2009 Chamber Summons was filed by the plaintiff seeking the revival of the suit herein which application was allowed by my brother Justice Sergon on 21st October 2011.

On 18th January 2002 the matter proceeded for hearing before me and it was agreed that the issues for determination be as filed by the defendant on 21st April 2008 and the plaintiff on 29th July 2008 that is

to say for the defendant

- a. Who is the registered owner of the land parcel No. Loc.12/sub Loc.1/T.16?**
- b. Who is in possession of the suit land**
- c. Did the defendant sell he suit land to the plaintiff if so is the sale valid?**
- d. Has the plaintiff ever occupied the suit land and if yes for how long and under what circumstances.**
- e. Is the plaintiff entitled to ownership of the suit land by way of adverse possession.**

From the plaintiff the issues are

- a. Did the plaintiff herein purchase title number Loc.12/Sub Loc. 1/T16 from the defendant about the year 1964 and if so did the plaintiff fully pay the defendant the whole purchase price?**
- b. Did the plaintiff develop the said plot by building the house on or about 1970 and or was built the current house in the plot?**
- c. Has the plaintiff been in physical open uninterrupted and exclusive occupation and possession of the suit premises since 1964 interalia and is the plaintiff entitled to ownership by way of adverse possession?**

At the hearing before me the plaintiff ELIZABETH WANJIKU MICHUKI testified that she is the wife of the late SAMUEL MUGO MICHUKI and that the defendant is a step brother of her late husband that when she was married she stayed in the house constructed at the suit plot with her husband and that when they wanted to pursue the title deed at the lands office they discovered that the land was registered in the names of Peter Njuki whereas it should have read Peter Mbiri Michuki the defendant herein so they did not effect transfer thereof. The defendant thereafter tried to destroy the house constructed on the suit plot causing them to write letters to the D.O and the chief of the area. That her husband was working in Mombasa but every time they visited home they would stay in the house constructed on the suit plot and that anytime they were not on the suit plot they would leave Joseph Njuki Michuki to take care of the same.

That in 1990 when the boundary between Loc.12/Sub Loc. 1/T.16 and Loc.12/Sub Loc. 1/T.17 was being put her late husband asked for the title deed from the defendant who refused and that sometime in 1978 the defendant caused a letter to be written to her late husband to the effect that he had deposited a sum of Ksh. 300/- with his advocates and asked the late husband to give vacant possession of the said plot and she produced the said letter as exhibit no. 1. That in the year 1991 her late husband put a caution on the said plot.

Under cross examination by Mr. Wambugu for the defendant the plaintiff confirmed that her husband had bought the suit property from his brother the defendant and that Joseph Njuki Michuki used to live on his own plot but used to take care of the house built on the suit property she further confirmed that the defendant has since put some structures on the suit property which he rents out.

P.W.2 JOSEPH NGIGI MICHUKI testified that Samuel Mugo Michuki is his step brother – same father but different mothers. That the defendant is his brother. He testified that Loc.12/Sub Loc. 1/T.16 belonged to Samuel Mugo having got it from Peter Mbiri. He testified that the defendant was paid Ksh. 300 for the said plot and that every time he was on leave he would stay in the house built thereat. He testified that there was no dispute over the said plot until when Samuel Mugo Michuki asked for title deed to the same from the defendant.

Under cross examination he confirmed that Joseph Njuki Michuki used to stay in the house build on

the plot and that his children were born at the said plot. That Mugo had paid Ksh. 200 but to enable the defendant effect transfer he paid a further 100/-.

P.W.3 ESTHER WANGARI JOSEPH testified that the deceased was her uncle and the defendant a step brother of her father. Her father owned Loc.12/Sub Loc. 1/t.15 and that when she was about 10 years the deceased built a house and told her father to occupy the said house. That they continued to occupy the said house until it was demolished by the defendant last year. That the said house was built by Njoroge Gikonyo who died last year.

The defendant Peter Mbiri testified that the plot is registered in his name and that he never sold the plot to anybody. He testified that the defendant had given him money to enable him take his wife to hospital. He testified that he had allowed Joseph Njuki Michuki to build in the said plot so as to look after his mother who was sick since his house was small and he had many children. After his mother died he asked him to move from the suit plot and that he is the one who pays rate to the Kangema County Council.

Under cross examination he testified that he constructed on the plot in the year 2003 and that he instructed Wandai advocate to write a letter to his brother since he was claiming to have bought the plot. He confirmed that he demolished the house in 2009 after the case had been dismissed.

P.W.2 Peter Mwangi Michuki testified that Samuel Mugo is his uncle and T.16 belonged to the defendant. He had never heard of the sale of the said plot.

In her submissions the plaintiff has submitted that the deceased Samuel Mugo Michuki bought the suit land from the defendant herein as confirmed by the affidavit sworn by Joseph Njuki Michuki and the affidavit of Ephantus Kariuki.

That Njoroge Gikonyo who constructed the house on the disputed plot also confirmed that in 1970 he was contracted by the accused to build for him a house on T.16. it was further submitted that Joseph Njuki Michuki and his wife Emma Gathoni Njuki lived in T.16 with the permission of the plaintiff Samuel Mugo Michuki and with the knowledge of the defendant. That by a letter dated 18th August 1978 from Karuga Wandai & Co. advocates the defendant wrote a letter to the plaintiff to the effect

“our above named client Mr. Peter Mbiri Michuki has deposited with us Ksh. 300 for our transmission to you because he has changed his mind of selling the land in question.

That he has requested you to vacate his said piece of land as soon as possible...”

It is submitted that if D.W.1 had borrowed money from the plaintiff he would have stated so in the said letter. That the evidence of D.W.1 contradicted the affidavit of Joseph Njuki Michuki deceased who stated that he only stayed in the house on the suit plot with the permission of the plaintiff and the knowledge of the defendant.

It is further submitted that if the claim on sale agreement fails then the plaintiff became entitled to the title and ownership of the suit premises by virtue of adverse possession. That the defendant confirmed that he demolished the house which was on the plot after the court ruled that the suit had abated and that the plaintiff had been in open uninterrupted and exclusive occupation and possession of the suit premises for over 40 years and therefore the court should find so under order XXXVI rule 30 of the Civil Procedure Rules in support thereof the plaintiff has submitted the authorities of

**MBUGUA NJUGUNA v ELIJAH MBURU WANYOIKE & ANOTHER COURT OF APPEAL
CIVIL CASE NO. 27 OF 2002 WILLIAM GATUHI MURATHE v GAKURU GATHIMBI
COURT OF APPEAL COURT APPEAL NO. 49 OF 1996.**

The defendant on the other hand has submitted that there was no evidence tendered by the plaintiff to prove that there was in existence an agreement for sale. That there was no written agreement or

memorandum in writing duly witnessed as is required under the provisions of the law of contract. There is no evidence that the sale if any was sanctioned by the relevant Land Control Board and that if there was nothing would have prevented the plaintiff. On the issue of adverse possession the conditions that must exist before a court declares that a person is entitled to another person's land by way of adverse possession are as follows:

- i. That the claimants initial entry into the land was unlawful.*
- ii. That after such entry the plaintiff was in exclusive and uninterrupted possession of the same for a period of exceeding 12 years.*
- iii. Proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.*

In support thereof the defendant produced the case of **WAMBUGU v NJUGUNA Civil appeal No. 10 of 1982.**

It is further submitted that the plaintiff and the defendant are step brothers born of the same biological father but different mothers. It is also not disputed that one Joseph Njuki Michuki was a step brother of both of the plaintiff and the defendant and that he was in occupation of the suit land from the 1970s to the time of his death when his daughter continued to live thereat and that rates of the property were paid by the defendant to the exclusion of the plaintiff and that it was Joseph Njuki who was in possession and not the plaintiff and therefore he urges the court to dismiss the suit.

From the above evidence it is now for the court to come to a conclusion based on the issues herein.

The first issue for the court to determine is whether there was an agreement for sale between the plaintiff and the defendant herein in respect of the suit land?

To answer this question I have looked at the affidavit of Samuel Mugo Michuki in support of the Originating Summons wherein he states that he entered into possession of the said plot in 1964 and in 1970 he started developing the plot by building a house for his family that at that time the defendant demanded a further Ksh. 100/= as part of the purchase price which was duly paid.

That as at 18th August 1978 the defendant position was that he had changed his mind of selling the land in question and that therefore requested vacant possession from the plaintiff as by the letter from his then advocates KARUGA WANDAI. If it is as stated by the defendant that the plaintiff had only advanced him the sum of Ksh. 300/- to enable him take his sick wife for treatment nothing would have been much easy than for his then advocates on record to state so in their letter of demand.

The defendant has further stated that he had given permission to one Joseph Njuki Michuki to construct the house therein but this has been contradicted by the affidavit of the said Joseph Njuki Michuki who has deponed that the plaintiff in 1964 bought the said plot from the defendant at an agreed consideration of Ksh. 200/- and paid a further sum of Ksh. 100/- and that he had been in occupation of the said plot with the permission of the plaintiff herein.

In the affidavit evidence on record and the oral evidence tendered before me I find as a fact that there was an agreement of sale between the plaintiff and the defendant in respect of the suit property and that on the strength of that agreement the plaintiff took possession and later on the plaintiff brother one Joseph Mugo Michuki took over until the property was demolished by the defendant. If there was no agreement for the sale as stated the defendant could not have written to the plaintiff on the same along the lines of the letter from Karuga Wandai advocates.

Having found as a fact that there was an agreement for sale the other issues is whether the agreement was valid. The defendant has submitted that there is no written memorandum neither was there consent of

Land Board and therefore even if there was the alleged agreement the same is not enforceable.

Was this a transaction which required Land Control Board Consent?

I have noted that this is a plot in Kangema urban centre and is therefore not an agricultural land where the consent of the Land Board is mandatory.

Both the defendant and the plaintiff are or were step brothers and therefore to my mind the requirement of a written memorandum might not be an issue herein as I take the view that at the said time none anticipated that there would be litigation. The evidence on record shows that it is only when it became impossible for the defendant to effect transfer that the plaintiff commenced the proceedings herein.

I therefore find as a fact that there was a valid sale agreement between the brothers herein upon which the plaintiff took possession of the suit property.

I therefore find that the plaintiff having taken possession of the land property by virtue of the agreement referred to herein the other issue is whether the plaintiff is entitled to the said land by virtue of adverse possession. The plaintiff submitted the authority of **MBUGUA NJUGUNA v ELIJAH MBURU WANYOIKE & ANOTHER COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO. 27 OF 2002** in which the appellant had entered the said land by virtue of a sales agreement which was not specifically performed and the Court of Appeal stated that limitation period for purposes of adverse possession begins to run on the day the claimant is put in possession. The court found that the appellant had proved that he was entitled to 4 acres out of the land by adverse possession.

I find that this case is in all forms the current case before this court and is therefore relevant and binding on this court.

There was also the case of **WILLIAM GATUHI MURATHE vs GAKURU GATHIMBI COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO. 49 OF 1996** where the court of appeal again pointed out that the applicant possession only became of adverse when the sale agreement between him and Ayub Nguyai'B' did not materialize and he continued in occupation.

In the present case before me then the plaintiff became adverse as at 1971 when it was discovered that the title was in the name of Peter Njuki and not the defendant herein and therefore at the time of filing the Originating Summons the plaintiff had been in continuous possession for a period of almost twenty years. On the authority of **WAMBUGU vs NJUGUNA COURT OF APPEAL AT NAIROBI CIVIL APPEAL NO. 10 OF 1982** the court held as follows:

“When the claimant is a purchaser under contract of sale of land it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the order would have evicted him. The possession can therefore only become ad verse once the contract is repudiated. In this instance time began to run once the appellant sent a letter to the respondent terminating the agreement.”

If one therefore use this authority then time began to run as at 1978 when the defendant sent a letter to the plaintiff through the firm of KARUGA WANDAI & Co ADVOCATES.

I therefore find that the plaintiff has proved his case on a balance of probability against the defendant and therefore order that the plaintiff be registered as the owner/proprietor of the suit premises in place of the defendant.

This being a family dispute I order each party to meet their own cost.

Dated and delivered at Nyeri this 25th day of October 2012.

**J. WAKIAGA
JUDGE**

Court: Read in open court in the absence of the advocates for the parties but in the presence of the defendant.

**J. WAKIAGA
JUDGE**