



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO.156 OF 2010**

**MAGETA ENTERPRISES..... PLAINTIFF**

**VERSUS**

**TILAK COMPANY LIMITED.....DEFENDANT**

**JUDGMENT**

By an originating summons dated 5<sup>th</sup> August, 2008, the applicant (plaintiff), Mageta Enterprises Limited sought the following questions to be determined:

- i) whether the plaintiff has been in adverse possession of NAKURU MUNICIPALITY BLOCK 11/195 (the suit property)
- ii) whether the plaintiff is entitled to be registered as the proprietor of the suit property;

In reply, one of the directors of the respondent (defendant) company, Tilak Company Limited, Zaina Mukami Chelanga averred that this court has no jurisdiction to entertain this matter in terms of **section 4(1)** of the **Limitation of Actions Act**, namely that the plaintiff cannot recover the suit property three years after the alleged breach of the sale agreement; that a certified extract of the title to the land in question is not annexed to the application; that the plaintiff is guilty of material non-disclosure with regard to the payment of the purchase price; that the plaintiff occupied the suit property as a tenant after failing to pay the purchase price; that time began to run after the 7<sup>th</sup> November, 2001, a period of 7 years hence the claim of adverse possession is not available; that the plaintiff was in occupation of the suit property with the consent of the true owner of the property; that the plaintiff can only sue for the refund of the money paid towards the purchase of the suit property; that the defendant has persistently demanded payment of rent from the plaintiff. Although the defendant was served with the hearing notice by way of advertisement in a newspaper there was no attendance hence the *ex parte* hearing.

Presenting his evidence, P.W.1 Kenneth Maweu Kasing'a, a director of the plaintiff maintained that he entered into a written sale agreement in which the defendant agreed to sell to the plaintiff the suit property at Kshs.6.5m. The same day that agreement was executed, the parties agreed, once again, in writing to reduce the purchase price to Kshs.4.5m. As this was happening, the plaintiff had taken possession with P.W.1 its director, occupying the suit property. The plaintiff commenced repairs and renovation of the suit property simultaneously with payments.

According to the plaintiff's witness (P.W.1) the final payment of the purchase price was on 20<sup>th</sup> July, 1996. P.W.1 explained that the suit property was not transferred to the plaintiff because of the death of the late Ishmael Chelanga, the defendant's director; that the plaintiff has been in peaceful occupation of the suit property for over 12 years since the last payment was made.

I have considered the above evidence. The defendant did not call evidence in support of the affidavit in reply. The Lease produced in evidence as P. Exh.12 as well as the certificate of official search confirm that the suit property is registered in the name of Tilak Company Limited, the defendant herein. It is also clear that the issue of the existence of a sale agreement of the suit property between the defendant and the plaintiff is not in dispute. Further, it is common ground that the plaintiff has been in possession of suit property.

The questions for determination may be summarized as follows:

- i) whether the plaintiff paid the sale price;
- ii) whether the sale price was reduced from the original Kshs.6.5m to Kshs.4.5m;
- iii) whether the plaintiff was in possession as a tenant or as a purchaser;
- iv) whether the defendant has, in breach of the sale agreement, failed, refused and/or neglected to transfer the suit property to the plaintiff; and
- v) whether the plaintiff is entitled to claim the property by adverse possession.

The plaintiff led evidence to the effect that the purchase price was paid as follows:

- i) Kshs.2,000,000/= - on 6<sup>th</sup> November, 1995 (upon execution of the agreement)
- ii) Kshs.800,000/- on 4<sup>th</sup> May, 1996
- iii) Kshs.500,000/= on 13<sup>th</sup> May, 1996
- iv) Kshs.1,200,000/= on 20<sup>th</sup> July, 1996.

No evidence in rebuttal of the above assertion was presented by the defendant. It follows that the plaintiff proved payment of Kshs.4.5m. Similarly, the evidence that the original agreement was varied on the same day as regard the purchase price adjustment from Kshs.6.5 to Kshs.4.5m has not been challenged. Exh.2 is an addendum to the original agreement, executed by both parties. Being an addendum, in my view, it was not necessary to be witnessed. There is also the issue of the figure of Kshs.6m indicated in the 2<sup>nd</sup> agreement as the original purchase price instead of Kshs.6.5m. No explanation was offered of this discrepancy. However, it was the plaintiff's case that they agreed that the sale price would be Kshs.4.5m. The seal of the defendant company is affixed on the latter agreement.

The agreement was executed on 6<sup>th</sup> November, 1995. On 26<sup>th</sup> July, 1995, a few months earlier, the plaintiff (P.W.1) wrote to the defendant (PEXh.3) asking to be allowed into the suit property for purposes of repairs and general clearing as the sale transaction was underway. In that letter, it was suggested that before the execution of the sale agreement, the plaintiff could pay rent for the period P.W.1 would be in occupation. It is not clear what the defendant's response was, suffice to state that there is no evidence that the plaintiff took possession as a tenant. Indeed there is no evidence at all of the existence of a tenancy relationship. The only exhibit produced (PEXh.1) – the sale agreement – points to the intention of the defendant to sell the suit property.

It has been averred by the plaintiff that having paid the balance of Kshs.1.2m and the completion period having been agreed upon, a transfer was not effected as the director of the defendant, Mr. Ishmael Juma Chelanga died. It is not disclosed in the pleadings or in evidence when he died but it is the plaintiff's case that they have been in possession of the suit property for over 16 years. It has also been submitted for the plaintiff that twelve (12) years elapsed between the date of the last payment and the date of the institution of the suit, giving rise to the plaintiff's claim to ownership of the suit property by adverse possession.

In support, counsel for the plaintiff relied on two authorities, namely, **Wambugu Vs. Njuguna** (1983) KLR 172, and **Hosea Vs. Njiru & others** (1974) EA 526. Specifically in the former, counsel relied on the 8<sup>th</sup> holding that:

**“8. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to**

**have become adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.”**

It is settled law that to constitute adverse possession, it must be demonstrated that the owner has lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. See **Littledale Vs. Liverpool College** (1900) 1 Ch 19, where Lindley MR, also explained what constitutes dispossession. He said:

**“The next question, therefore, is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh Vs. Jack said at 273, that to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”**

There can be no doubt that, on the basis of the agreement of 6<sup>th</sup> November, 1995, the plaintiff’s possession, which was exclusive, was initially lawful in the sense that he entered into possession with the permission of the defendant pursuant to a valid agreement. That permission appears to have ended upon payment of the last instalment on 20<sup>th</sup> July, 1996, when time began to run. It will be recalled that the completion date was extended from 31<sup>st</sup> December, 1995 to 21<sup>st</sup> July, 1996 – See PExh.6.

To emphasise the status of the plaintiff, I can do no better than to quote Hancox, JA (as he then was) in **Wambugu Vs. Njuguna** (Supra) at pg. 180:

**“The plaintiff was allowed in possession as purchaser pending completion; and he was allowed to stay there because he was a purchaser. If he had been a mere trespasser no doubt the vendors would have brought proceedings.”**

The plaintiff upon taking possession and upon completion of the payment of the purchase price used the suit property as his. At no time did the defendant demand any rent payment or seek to evict them,. The defendant has made no claim against the plaintiff. Obviously the plaintiff could not bring any action to recover the suit property under the agreement due to the clear provisions of **section 4(1)** of the **Limitation of Actions Act**. But the plaintiff was not precluded from seeking relief in the manner it was done.

For these reasons, judgment is entered in favour of the plaintiff with costs. It is declared that the plaintiff is entitled to be registered as the proprietor of parcel No.NAKURU MUNICIPALITY BLOCK 11/195 in place of the defendants.

**Dated, Delivered and Signed at Nakuru this 17<sup>th</sup> day of June, 2011.**

**W. OUKO  
JUDGE**