



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 42 of 2001

KERINI SAGANYA MAIRURA PLAINTIFF

VERSUS

MECHA MARITA alias DAVID MECHA NJOROGE DEFENDANT

JUDGMENT:

By an originating summons filed on 4th April, 2001, the plaintiff prayed for a declaration that he is the absolute owner of a parcel of land measuring approximately 1^{1/2} acres forming part of land title number **NYARIBARI MASABA/BONYAKONI/835**, hereinafter referred to as “**the suit land**”, having purchased the same from the defendant in 1974 and having occupied it peacefully, openly and uninterrupted since 1972. He also prayed for an order that the defendant do execute all necessary documents for subdivision and transfer of the suit land to him failing which the Deputy Registrar of this court be empowered to execute the same. The plaintiff further prayed for an injunction to restrain the defendant, his family members and legal representatives from interfering with and/or dealing with the suit land in any way.

In an affidavit sworn by the plaintiff in support of the originating summons, he deposed that he bought the suit land from the defendant in 1974 and took possession of it immediately. However, the defendant refused and/or failed to appear before the area Land Control board to obtain the necessary consent for sub-division and sale of the suit land.

The defendant filed a replying affidavit and stated that he had agreed to sell the suit land to the plaintiff but his father objected to the said transaction. It was then mutually agreed that the defendant refunds the plaintiff the purchase price that had been paid. Thereafter, the plaintiff requested the defendant to allow him to lease the land for ten years to cover the purchase price instead of refunding it, a suggestion that was agreed to by the defendant. That being the case, the issue of going to the area Land Control Board did not arise, the defendant contended.

When this suit came up for hearing on 5th February, 2009, the defendant did not attend court. His advocates, M/s Nyariki & Co. Advocates and M/s Sagwe & Co. Advocates had been served with a hearing notice on 25th November, 2008 but neither the advocates nor the defendant attended court. An affidavit of service is on record.

The plaintiff testified and produced as an exhibit a certified extract of the Original register for **NYARIBARI MASABA/BONYAKONI/835** which measures 2.2 Hectares. It is registered in the name

of the defendant. The defendant was so registered on 12th February, 1970. According to a sale agreement that was produced as P. Exhibit 2, on 16th November, 1974, the defendant sold to the plaintiff a parcel of land measuring 1^{1/2} acres of the aforesaid parcel of land at a price of Kshs. 4000/=. The transaction was witnessed by H. Kebwaro Keraka and Pastor P.B. Mairura. The plaintiff paid the full purchase price. However, the defendant refused to attend the area Land Control Board for the necessary consent. In 1976 he planted blue gum trees thereon. In 1978 he planted tea bushes on the suit land. He has 400 tea bushes. He produced an advice slip from Kenya Tea Development Authority for November 2008.

The plaintiff added that in 1995 the defendant trespassed upon his parcel of land and planted trees thereon. On 1st March, 2001 the defendant through M/s Nyariki & Company Advocates wrote to the plaintiff and demanded that he vacates the suit land. A copy of the said letter was produced as P. Exhibit 4. The plaintiff refused to comply with the said demand and instead moved to court. The plaintiff asserted that by 1995 when the defendant trespassed upon the suit land, he had been in occupation for over twenty (20) years. He urged the court to find that he had acquired prescriptive rights over the suit land. From 1972 when he moved into the land upto 2001 when he filed this case, the plaintiff had been in occupation of the suit land for about 29 years.

I have considered the evidence on record. According to the plaintiff, he purchased the suit property in 1972 but the defendant stated in his replying affidavit to the plaintiff's affidavit in support of the originating summons that he had agreed to sell the land to the plaintiff but his father (the defendant) refused. Thereafter the parties agreed that the plaintiff was to lease the suit land for ten years to recover the purchase price that had been paid, the defendant stated.

The plaintiff did not agree with the defendant's assertion and maintained that he purchased the suit land from the defendant but the latter refused to attend the area Land Control Board meeting for consent to sub-divide and transfer the land.

It is not in dispute that the said transaction was subject to the provisions of **Section 6 of the Land Control Act**. Upon expiry of six months from the date of the sale agreement, the transaction became null and void. It is trite law that where consent of the Land Control Board is not obtained the parties are restored to *Status quo ante* and continued occupation of the land by the intended purchaser becomes adverse to the interest of the registered proprietor. See **JACOB MICHUKI MINJIRE –VS- AGRICULTURAL FINANCE CORPORATION**, Civil Appeal No. 61 of 1982 (unreported).

The plaintiff testified that even after the defendant refused to avail himself before the area Land Control Board he (the plaintiff) continued to occupy the suit land. Even if it were to be assumed that the defendant's contention that it was agreed that he leases the suit land to the plaintiff for a period of ten years from 1974, the lease would have expired in 1984 or thereabout. The plaintiff's possession became adverse and time began to run after expiry of that period of ten years. See **SISTO WAMBUGU –VS- KAMAU NJUGUNA [1983] KLR 172**. By the year 2001 when the plaintiff filed this suit, he had been in uninterrupted possession of the suit land for over 12 years.

In the circumstances, the plaintiff has acquired the suit land by way of adverse possession. The defendant should therefore execute the necessary sub-division and transfer papers of the suit land, that is, a parcel of land measuring approximately 1^{1/2} acres of land title **NO. NYARIBARI MASABA/BONYAKONI/835** in favour of the plaintiff. If the defendant fails to do so within thirty (30) days from the date hereof, the deputy registrar of this court shall execute all the necessary papers so as to give effect to this judgment.

The defendant, his servants and/or agents are hereby restrained from interfering with the plaintiff's quiet possession and occupation of the said parcel of land. The plaintiff shall have the costs of this suit.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF APRIL, 2009.

D. MUSINGA

JUDGE.

30/4/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Momanyi for the Plaintiff

N/A for the Defendant

Court: Judgment delivered in open court.

D. MUSINGA

JUDGE.