

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 848 OF 1990

MBURU KARANJA.....PLAINTIFF

VERSUS

MOSES N. MUNGAI.....DEFENDANT

JUDGMENT

In this originating summons the plaintiff Mburu Karanja seeks a declaration of entitlement by adverse possession of a piece of land registered in the name of the defendant under the Registered Land Act (Cap 300) little No.Loc.16/ndunyu-chege/100.

He also seeks an order that he be registered as the sole proprietor of that land in place of Moses Mungai the defendant. In his evidence he told the court that on 26th June 1967 he entered into a sale agreement with the father of defendant Mungai Runo in which he purchased the suit land and paid Shs.1308/= which sale was witnessed by Mwangi Kiarie and Kuria Gicheru but the said Mungai Runo died before he transferred suit land to him.

He further told the court that although he never settled on the suit land, he had been cultivating it since then and he has planted macademia trees, ovacado trees and bananas. He said when the father of the defendant sold him the suit land, he moved to Kinangop and that is why the transfer delayed and he never came back to effect the transfer. The defendant was registered as the owner of the suit land after the death of his father and he never informed him when he obtained Letters of Administration. On cross examination, he admitted that in 1981 he had sued the defendant claiming the ownership of the suit land but the suit was dismissed. He also admitted in 1987 he was sued by the defendant in Thika Senior Resident's Court in Civil Suit No.117 of 1987 and was ordered to vacate the suit land. He called one witness PW2 Mwangi Kiarie who told the court that he was one of those elders who witnessed the signing of the sale agreement between the plaintiff and the father of the defendant in 1967 and that the plaintiff has been cultivating the suit land.

The defendant Moses Njoroge Mungai in his evidence told the court that he is the registered owner of the suit land which earlier belonged to his father. He denied that the plaintiff has been in occupation of the suit land uninterrupted since 1967. He further told the court that in 1981 the plaintiff sued him in HCCC NO. 2172 OF 1981 claiming the suit land and his suit was dismissed. And in 1987 he sued the plaintiff in Thika Senior Resident Magistrate's Court No.117 of 1987 in which the plaintiff was ordered to vacate the suit premises but instead of obeying the court order he filed that suit in 1990.

It is not uncommon for claimants of land to put their case in the alternative, that is to say by pleading the agreement under which they entered the land and then asking for an order based on adverse possession. The present case is one such a case. The plaintiff claims that he entered the suit land through a sale agreement dated 26th June 1967 signed between him and the father of the defendant. This being a transaction involving agricultural land, it was subject to the Land Control Board consent which according to the plaintiff was not secured and therefore the agreement became void for all purposes under the provisions of the Land Control Act.

The plaintiff's claim is based on adverse possession and therefore as to how he came into occupation and took possession is not material. To prove a claim under adverse possession all that he has to do is to establish that he came into occupation and took possession and that he has been in continuous possession exclusively and without interruption for a period of 12 years. The defendant's case however is that there has not been any dispossession of the defendant by the acts of the plaintiff. Acts of use are not enough to

take the soil out of the defendants and their predecessors in title and to vest it in the plaintiff. A title by dispossession, the former owner acts must be done which are inconsistent with his enjoyment of the soil for the purposes of which he intended to use it. The plaintiff has not shown when he went into occupation and took possession.

He has failed to show that he has been in continuous possession exclusively and without interruption for a period of 12 years. In 1981 he filed a suit in court against the defendant claiming the suit land which suit was dismissed. In 1987 the defendant filed a suit being Thika Senior Resident Magistrate's Court Civil Case No.117 of 1987 which suit was decided in favour of the defendant who was the plaintiff in that suit and he the plaintiff was ordered to vacate the suit land. He did not appeal against that decision but instead he filed this suit after about 3 years later

The plaintiff having failed to prove that he has acquired title to the suit land through adverse possession, his claim cannot succeed. The suit is dismissed with costs.

Dated and delivered at Nairobi this 20th April 2005.

J.L.A. OSIEMO

JUDGE