



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
MISC CIV APPLI 67 OF 1997**

IN THE MATTER OF S.38 OF LIMITATION OF ACTIONS OF ACT

AND

IN THE MATTER OF THE REGISTERED LAND ACT

FRANCIS NGIGE MUCHIRI.....PLAINTIFF

VERSUS

JOSEPH MAINA KINGORI.....1ST DEFENDANT

ERIC KAGEMA KIGOTHO.....2ND DEFENDANT

NATIONAL BANK OF KENYA LTD.....3RD DEFENDANT

JUDGMENT

The plaintiff first filed this matter on 21st April, 1997 by way of an originating summons and the suit was as against the first and the second defendants and Kenya Commercial Bank Ltd as the third defendant. The application was supported by an affidavit sworn by the plaintiff on the same day as aforesaid. On 24th June, 1997 an amended originating summons was filed wherein the third defendant was now the National Bank of Kenya instead of Kenya Commercial Bank. The amended originating summons was supported by a supplementary affidavit sworn by the plaintiff on 24th June, 1997. The originating summons as well as the amended one were both brought under Order XXXVI Rule 3C(i) of the Civil Procedure Rules. The originating summons had the following prayers:-

“1. THAT this honourable court be pleased to declare that the applicant, the lawful owner of the land covered by 160 coffee trees between the old Nakuru/Bahati road and the applicant’s title number Bahati/Bahati Block 1/1545, consisting of 0.3596 acres through adverse possession.

2. THAT this honourable court be pleased to declare that the applicant is the lawful owner of all that piece of land covered by 900 coffee trees between titles numbers Bahati/Bahati Block 1/1545, Bahati/Bahati Block 1/1571, Bahati/Bahati Block 1/1594 and the old Nakuru Bahati Road consisting of 0.9430 acres through adverse possession.

3. THAT the costs of this application be granted to the applicant.”

In the affidavit sworn by the plaintiff in support of the original originating summons, he deposed that he bought the land comprised in title number **Bahati/Bahati 1/1545** (hereinafter referred to as Parcel No. 1545) in April, 1984 from one Mary Wairimu and took possession of the same in the same month. The land certificate thereof was issued to him in July, 1985. Prior to its purchase, the said Mary Wairimu had

allowed the plaintiff to cultivate the land in 1983, he stated. The plaintiff further deposed that at the time of issue of the land certificate the Registry Map showed that the land in question was neighbouring the old Nakuru/Bahati Road. He said that in May, 1985 he planted coffee on Bahati/Bahati Block 1/1545 upto the edge of the road and fenced the land and planted trees around the fence. He further deposed that he had stayed on the land and developed the same since 1983 without anybody making any adverse claim until sometime in April, 1997 when a valuer from Kenya commercial Bank Ltd. went to the land and claimed that 0.9430 acres covered by the said coffee plants was property of the second defendant who had charged the same to Kenya Commercial Bank Ltd.

The plaintiff further stated in his affidavit that on 27th March, 1996 a team from the District Surveyor's office went to the said land and claimed that 0.3596 acres covered by his coffee plants and bordering the road had been curved out in favour of the first defendant. He claimed that the defendants were strangers to him and had never been in possession of the land which he claimed to have occupied for more than twelve years.

When the plaintiff filed the amended originating summons, he swore a supplementary affidavit wherein he stated that subsequent to the filing of the original originating summons it came to his knowledge that it was the National Bank of Kenya Ltd that was intending to sell the suit property. I believe that was the reason why he filed the amended originating summons and supported the same with a supplementary affidavit and stated that:-

“I swear this affidavit to supplement the one I swore on 21/4/97.”

Sometimes in 1999, the first defendant filed and argued an application seeking to strike out the amended originating summons on the grounds that a certified copy of the extract of the title to the land in question had not been annexed to the application as required under the provisions of Order XXXVI Rule 3D(2) of the Civil Procedure Rules. That preliminary objection was dismissed and the court held that on 20th May, 1998 a consent order had been recorded that viva voce evidence be adduced by the parties to the dispute and therefore the first defendant was not going to be prejudiced in any way by the plaintiff's failure to attach a certified copy of the extract of title.

The third defendant stated in its replying affidavit that Parcel No. **Bahati/Bahati Block 1/1594** (hereinafter referred to as Parcel No. 1594) was registered in the name of the second defendant and he had lawfully charged the same to the third defendant to secure a loan advanced to him and having failed to repay the loan, the bank was entitled to exercise its statutory power of sale over the property to recover the unpaid loan balance and the outstanding interest thereon. On the other hand the first defendant stated that he was the registered proprietor of **Bahati/Bahati Block 1/1503** (hereinafter referred to as Parcel No. 1503)

On 3rd June, 2003 the court directed the Nakuru District Land Registrar to visit land parcel Nos. 1/1545 and 1503 and ascertain the actual boundary between the two. That was done in the presence of both the plaintiff and the first defendant and the Land Registrar filed a report dated 27th June, 2003 (D.Exh.B) and stated that as per the Registry Index Map, Parcel No.1/1503 was extending upto the main road and that parcel No. 1545 had encroached into parcel No. 1503 which was registered in the name of the first defendant while parcels Nos. 1544 and 1545 were registered in the name of the plaintiff. The Land Registrar stated in cross examination that there were coffee trees on the disputed area which were said to belong to the plaintiff and the first defendant admitted that the coffee trees had been planted by the plaintiff but on his land.

The plaintiff testified that prior to purchasing parcel No. 1545, he bought a copy of the area survey map from PW2, Mr. Eliakim Olweny, a licenced Land Surveyor who did the survey exercise of the area in 1983. He said that the said land surveyor verified that the parcel of land which he purchased from one Mary Wanjema was as per the area survey map (P. Exhibit 8) which was produced by PW2 who stated that parcel No. 1545 was made up of two pieces, the upper part being a bigger one compared to the lower one and the two were separated by a small access road. The surveyor confirmed that the said parcel of land extended upto the Nakuru-Subukia Road.

In cross-examination, the surveyor agreed that he never signed the survey map due to an oversight. He said that he submitted the map to the Director of Surveys and it was approved and later submitted to the Lands Registry and title deeds were prepared and issued in conformity with the same. That notwithstanding, Mr. Olweny had no evidence to show that P. Exhibit 8 was the approved survey map which he forwarded to the Director of Surveys or a true copy thereof.

However, the evidence of Mr. Olweny was completely destroyed by the evidence of DW3, Peter Mwanja Ndonge and DW4, Mr. Joseph Mathenge, Deputy Director of Surveys. DW3 was a surveyor in the Provincial Survey Office at Nakuru. He told the court that when a private surveyor does work, he compiles a field sheet and takes it to the Director of Surveys for checking and approval. If it is approved, there is an endorsement to that effect on the field sheet after which a certified copy is sent to the District Land Registrar. The Provincial Surveyor collects the original from the Director of Surveys and a print is left in the office of Director of Surveys.

DW3 confirmed that the survey work for the area in question was undertaken by Mr. Olweny but he said that he was not aware of the map that was produced by him as P. Exhibit 8. The witness said that there was no evidence that P. Exhibit 8 had ever been submitted to the Director of Surveys. The map was different from the ones which were in their office and which DW3 produced as Defence Exhibit C(i) and Defence Exhibit C(ii). The witness further testified that if further sub-divisions were done on a particular portion after approval of a field sheet by the Director of Surveys had been given, there were some forms which had to be completed and sent to the Provincial Surveyor's office so that the area map could be amended. And in the event that a parcel of land was subdivided and it was realised that the changes could not be reflected in the original map, insets are prepared.

According to the maps that were produced by DW3 and the map that was produced by PW2, (P. Exhibit 8) there was noticeable difference in the shape and size of parcels numbers 1503 and 1545. In P. Exhibit 8, parcel No. 1503 does not go up to the main road, it is parcel No. 1545 which goes up to the main road. That was not the case as far as D. Exhibit C(i) showed.

Cross-examined by Mr. Githui for the plaintiff, DW3 stated that when field sheets are submitted to the Director of Surveys, he cannot amend them, amendments, if any, could only be done by the licenced surveyor. He further stated that the field sheets are the primary data from the field and if there were no queries, the field sheets and the approved map had to be the same. He said that P. Exhibit 8 could not have been the final field sheet presented to the Director of Surveys for approval. It was at best a proposal.

DW4, the Deputy Director of Surveys gave evidence and stated that a licenced surveyor submits field sheets to the Director of Surveys for processing of Registry Index Maps (R.I.M.) and if there were no queries the maps are submitted to the Chief Land Registrar for preparation of titles. The maps are submitted together with the area list. This witness said that P. Exhibit 8 which was produced by Mr. Olweny was not a field sheet, it was a tracing. He produced the field sheet for BAHATI/BAHATI BLOCK 1 which was received from Mr. Olweny, D. Exhibit 7 and the map that was made from the field sheet, D. Exhibit F 1 and it was obvious that they were not the same as P. Exh.8 with respect to parcels numbers 1545, 1571 and 1594. There was alteration of boundaries between the three plots, parcel No. 1503 was reduced in area and 1545 had been increased in area while 1594 has its area reduced. The witness produced an area list, D. Exhibit G, which had been prepared to support the Registry Index Map. He further told the court that the report that was prepared by the District Land Registrar, Nakuru, (DW2) for parcels Nos. 1503 and 1545 showed their sizes as per the area list aforesaid. The Deputy Director of Surveys said that his office had never been notified of any boundary changes affecting the said plots.

When he was cross examined by Mr. Karanja for the first defendant, DW4 said that the tracing was different from the field sheet and that Mr. Olweny did not notify the office of Director of Surveys of any changes and that the tracing, P. Exh.8 was not an acceptable document. According to the tracing, parcel No. 1545 was increased in size but that was not officially done. The records that were held by the Land Registrar, Nakuru and by the office of Director of Surveys were the same but the tracing produced by Mr. Olweny was different.

The first defendant told the court that he purchased Parcel No. 503 in 1992 but did not start cultivating it immediately. He said that he started cultivating the same in 1996 but he found that the plaintiff had encroached into his land. Between 1992 and 1996 the first defendant did not visit the land because he was working in Mombasa, he said, and added that in 1992 there were no coffee trees on his land. He became aware of the plaintiff's encroachment into his land in 1996 when he realised that the plaintiff had planted coffee, maize and beans on his parcel of land. He said that the plaintiff had crossed over into his parcel of land such that he no longer had access to the Nakuru Subukia Road. He went and reported the matter to the area chief and the dispute was eventually referred to the District Surveyor who established that the plaintiff had encroached into the first defendant's parcel of land. The District Surveyor established the correct boundary following which the first defendant fenced off his land but after one week, the plaintiff went to the land and removed the fence and the posts and thereafter filed the present suit. The first defendant denied that the plaintiff had been in occupation of the disputed portion of land for over 12 years and said that between 1992 and 1994/95 he was not in occupation of the land.

In cross-examination by the plaintiff's counsel, the first defendant said that when he purchased the land, all the beacons were clearly visible and the land was extending upto the road. The first defendant was not claiming the plaintiff's coffee that was growing on the parcel of land which he claimed to be his but was only interested in the land itself. He said that the plaintiff's claim over the disputed parcel of land began in 1995 and the plaintiff had even filed a suit against the first defendant, **RMCC No. 1193 of 1995** claiming the parcel of land.

The third defendant testified through one Mr. Richard Rotich, an officer-in-charge of Recoveries department who told the court that the owner of Parcel No. 1594 was the second defendant who had an account with the bank and the original title had been charged to the bank to secure the said borrowing. The charge was dated 5/5/92. The bank wanted to sell the property because he had defaulted in his loan repayment. He denied that the bank wanted to sell the plaintiff's land in question.

The plaintiff's claim to the disputed property is based on adverse possession. He claimed that he had been in such possession of the two parcels of land as described in the originating summons and the amended originating summons for a period in excess of twelve years. The plaintiff leased parcel number 1545 in 1983 from Mary Wairimu Wanjama. The original parcel of land that was sub-divided to give rise to *inter alia*, the parcels of land in dispute was owned by a land buying company known as Ngwataniro-Mutukanio company-Bahati and the survey work thereof was undertaken by PW2, J.E.W. Olweny, licenced Land Surveyor. From the evidence that was tendered in court, it became clear that the survey map which was produced in court by Mr. Olweny, P. Exhibit 8, was not the correct one. The right one was D. Exhibit F and F(i) which were produced by DW4, the same having been prepared by Mr. Olweny and forwarded to the Director of Surveys for approval and were duly approved. The plaintiff obtained the false survey map from Mr. Olweny and relied on the same in entering into the transaction for purchase of parcel No. 1545. It was obvious that the said false survey map contained serious errors as compared to the genuine field sheet and the approved map. The details of the misrepresentations in P. Exh. 8 were clearly stated by DW3 and DW4 whose evidence I have already summarised hereinabove. I did not understand why such an experienced Licenced Land Surveyor as Mr. Olweny could produce P. Exhibit 8 and assert that it was the original map or a true representation of the one that he drew and forwarded to the Director of Surveys for approval while from the evidence of DW3 and DW4 that could not possibly have been so. The plaintiff may have been misled into believing that P. Exhibit 8 was the correct survey map for the area in question and therefore showed the proper sizes, shapes and location of the portions of land that he claimed in his application.

Turning back to the plaintiff's transaction with Mary Wairimu Wanjama in respect of parcel of land No. 1545, although in his affidavit in support of the originating summons he stated that he bought the same in April, 1984, in his testimony before the court he stated that the sale agreement thereof was drawn on 20th May, 1985 although he had leased the property sometimes in 1983. The first triangular shaped parcel of land in dispute that is fronting the old Nakuru-Subukia Road and adjacent to parcel No. 1545 and 1503 as per the plaintiff's annexure FNM "B" to the originating summons did not rightly form part of parcel No. 1545 but was a portion of parcel No. 1503. This is as per the original field sheets prepared by Mr. Olweny and duly approved by the Director of surveys – D. Exh. F. The first owner of parcel No. 1503 was Peter

Kairu, from whom the first defendant purchased the same. From the evidence on record, it was clear that Parcel No. 1545 was wrongfully extending to both Parcels Nos. 1503 and 1594.

According to the submissions by the plaintiff's advocate, from 1983 when the plaintiff leased parcel No. 1545 upto 1992 when the first defendant purchased parcel No. 1503 from Peter Kairu the plaintiff was in adverse possession of the disputed triangular shaped portion of land as against the interest of Mr. Kairu. The plaintiff's counsel further submitted that although the first defendant bought portion No. 1503 in 1992, he did not move in until 1996 and even then, that did not interrupt the running of time since the first defendant did not move to court to seek to evict the plaintiff if he believed he was a trespasser occupying a portion of his land. The plaintiff's counsel submitted that for purposes of adverse possession, interruption of time could only occur in two ways.

(a) by filing of suit for eviction against a trespasser.

(b) eviction of a trespasser by extra judicial means.

Counsel therefore urged the court to compute time from 1983 and find that the plaintiff had proved his claim over the land based on adverse possession.

In my view, from 1983 when the plaintiff leased parcel No. 1545 upto 20th May, 1985 when he purchased the same, the plaintiff was not in adverse possession of the land in question as against Mr. Peter Kairu, the former owner of parcel No.1503. His right to occupy the land, whether it rightly belonged to the lessor or not, was based on the lease and he was not therefore in adverse possession. In **KASUVE VS MWAANI INVESTMENTS LTD & 4 OTHERS** [2004]1 KLR the Court of Appeal held that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive Possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition.

In **WAMBUGU VS NJUGUNA** [1983] K.L.R. 172 the Court of Appeal held that where a claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion.

If the plaintiff had failed to honour the terms of the lease, he would not have been entitled to continue in occupation by the lessor. In 1983, the lessor herself had not acquired any right over the land by way of adverse possession either as against the first defendant or the second defendant or their predecessors in title. Time therefore began to run on 20th May, 1985 when the plaintiff purchased the land in question. That being the case, the limitation period of 12 years as per Section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya could not be said to have expired until after 20th May, 1997.

This suit was filed on 22nd April, 1997 when the court filing fees was paid and not on 21st April, 1997 when the papers were stamped in court and so it was filed prematurely. The plaintiff cannot therefore succeed in his claim no matter how close he came to beating the time limit, assuming all other relevant factors were in his favour.

That notwithstanding, the plaintiff's claim on the first portion of land was founded on fraud because it was clear from the evidence of DW3 and DW4 that the disputed area as per the approved survey map was part of parcel number 1503 but Survey Map P. Exhibit 8 had deliberately been amended so that it would appear as though it was part of parcel number 1545. The District Land Surveyor, Nakuru (DW2) and a land surveyor from the Provincial Survey Office, (DW3) testified that they visited the area in dispute and established that parcel No. 1545 had encroached into parcel No. 1503. The two witnesses as well as the Deputy Director of Surveys rubbished P. Exhibit 8 that was relied upon by the plaintiff to establish his claim.

From the very clear evidence of the three witnesses and in particular the evidence of the Deputy Director of Surveys who, on court's direction, was called to testify as an impartial witness to shed light on the matter, it was crystal clear that P. Exhibit 8 was a forgery and was a far cry from the true document that

was prepared and forwarded to the Director of Surveys by Mr. Olweny. It was rather surprising that Mr. Olweny could assert that he was the one who drew it even when it did not bear his signature as required due to an oversight, according to him. When Mr. Olweny was shown a copy of the true map compiled by the Director of Surveys from his map which he had submitted, he was quick to dismiss the other map and said that there must have been fraud and insisted that the other map was not genuine, only P. Exhibit 8 was genuine. However, if there was any fraud, and I believe there was, it involved preparation of P. Exhibit 8 and not the other way round. This is because the area map that was in the office of the Director of Surveys, the map that was in the Provincial Surveyor's office, Nakuru and the map that was in the District Lands Registry, Nakuru were all the same and they bore evidence that they were compiled from Olweny and Associates Licenced Land Surveyors' field sheets. In particular, D. Exhibit F had Mr. Olweny's signature and that was the one which he had forwarded to the Director of Surveys for approval and had been duly approved.

With regard to the plaintiff's second claim for the other triangular shaped parcel of land between parcels numbers 1545, 1571, 1594 and the old Nakuru-Subukia 30 metre wide Road, the claim was also based on the fraudulent P. Exhibit 8. According to the official survey maps, that portion was part of parcel number 1594 but according to the evidence of PW2, and according to P. Exhibit 8, that triangular shaped parcel of land was part of No. 1545. According to the evidence of Mr. Olweny, the brace shown on P. Exhibit 8 as joining the parcel number 1545 and the claimed portion of land below it indicated that the two were owned by the same person. However, that was not actually so and all the other area survey maps prepared by Mr. Olweny showed otherwise. Even the Report and Valuation on Bahati/Bahati Block 1/1594 prepared by Legeno Real Estates on instructions of the third defendant, (D. Exhibit M) showed that the disputed parcel of land was part of 1594. Only P. Exhibit 8 had Parcel No. 1571 next to Parcel No. 1594. All the other maps showed that Parcel No. 1571 was in a different location, very far from the disputed properties.

According to the evidence of the plaintiff, the second portion of land which he was claiming was also part of parcel No. 1545 which was previously owned by Mary Wanjama and so when in 1985 he purchased that property, even that portion of land that rightly was part of 1594 but was fraudulently shown in P. Exhibit 8 as being included in 1545 also became his.

In law, fraud cannot be the basis of a claim on land under the doctrine of adverse possession, a claimant must be in possession of the land openly and as of right, see **KASUVE VS MWAANI INVESTMENTS LTD & 4 OTHERS** (supra). It was incumbent upon the plaintiff to take all reasonable steps to ensure that the parcel of land which he was purchasing from Mary Wanjama as per the sale agreement corresponded to the actual size of the land on the ground and was in tandem with the official land survey documents. And as stated earlier, whatever rights that the plaintiff acquired over the parcel of land that he purchased, they accrued from 20th of May, 1985 when the sale agreement was executed and not earlier. A period of twelve (12) years from that date therefore runs upto 19th May, 1997 and so this suit having filed on 22nd April, 1997 could not sustain a claim over the suit premises based on adverse possession even in the absence of fraud in purported acquisition thereof. I am therefore unable to uphold the plaintiff's claims over the two parcels of land by way of adverse possession.

Mr. Karanja raised some issues regarding the propriety of the originating summons in his submissions. Firstly, he argued that the same was wrongly brought under the provisions of Order XXXVI Rule 3C(I) which is used in applying for extension of limitation period while the same should have been brought under Order XXXVI Rule 3D(1)(2) and 3. He also stated that the originating summons was incompetent because it was supported by a supplementary affidavit only which did not give any proper basis for the claim.

Further, Order XXXVI Rule 3D(2) required that the summons be supported by an affidavit to which a certified extract of the title to the land in question had been annexed which the plaintiff did not do. He cited a decision of the Court of Appeal in **KWEYU VS OMUTO** [1990] K.L.R. 709 wherein an appeal was dismissed inter alia on a similar ground.

However, as concerns this last issue, I realised that the same had been argued before Rawal,

Commissioner of Assize (as she then was) and a ruling was delivered in favour of the plaintiff. There was no appeal preferred against that decision and therefore I cannot deal with the same issue again, it is ***res judicata***.

With regard to the other objections, I uphold the same but as they do not go to the root of the matter and therefore did not prejudice the first defendants in any way, oral evidence having been adduced and all the necessary documents produced, I will overlook those procedural defects. I also agree with Mr. Kiburi that originating summons should comply in form with the provisions of Order XXXVI Rule 7. Where the summons is in respect of a matter that is to be argued inter partes, proper questions for determination ought to be framed.

All in all, and for the reasons as stated herein, I find that the plaintiff has failed to establish his claim and I dismiss the same with costs to the defendants. With regard to his coffee trees and other plants which he had planted on the two parcels of land which he was claiming, none of the defendants had any claim to the same. He should therefore remove them or perhaps consider selling the same to the first and the second defendants respectively in the event that they are interested in the same. The land boundaries in the area under dispute should be re-adjusted to conform to the approved survey plan.

DATED, SIGNED & DELIVERED at Nakuru this 15th day of July, 2005.

D. MUSINGA

JUDGE

15/7/2005