

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Suit 187 of 1999 (O.S.)

MURAYA KURIA..... PLAINTIFF/APPLICANT
VERSUS
JAMES MAINA MUGENDA..... DEFENDANT/RESPONDENT

JUDGMENT

This suit is brought by way of an Originating Summons filed on 2nd February 1998 under Order XXXVI Rule 3D, Order XXXIX Rules 1 2 and 3 of the Civil Procedure Rules and Sections 38 and 39 of the Limitation of Actions Act. In it the Plaintiff, Kuria Muraya prays for orders of this Court, to wit:

- a) That the Plaintiff be declared proprietor of Land Parcel No. LOC 14/KIRURI/T.26 situate in Muranga District**
- b) That the Plaintiff be registered as proprietor of the said piece of land in place of the Defendant James Maina Mugenda and accordingly, the Land Registrar, Muranga be directed to transfer the said land to the Plaintiff**
- c) That the Defendant be restrained from entering, wasting, damaging or in any way alienating the said piece of land until the final determination of the suit.**
- d) That the Defendant do pay the costs of the suit.**

As deponed in his Supporting affidavit sworn on 17th December 1998, the Plaintiff claims to have bought the suit land from one Joram Mugenda who, according to the Plaintiff died before he could transfer the property into the Plaintiff's name. The said Joram Mugenda is shown in a copy of the Green Card attached to the Supporting Affidavit and marked exhibit "MK1" as having been registered as proprietor of the suit land on 1st November 1962. The said extract of title shows also that on 23rd May 1989 and 22nd September 1989 Obadiah Muchiri Kagoiya and James Maina Mugenda were both registered proprietors by transmission successively on the respective dates.

The Plaintiff claims to have been cultivating the suit land since 1962 without interruption by anyone whatsoever and to have developed the land by fencing, planting tea, bananas napier grass as well as building a permanent house thereon.

The Plaintiff's present occupation of the suit premises is not disputed. However the Plaintiff's contention that he has been in possession since 1962 is challenged by the Defendant who says that the former took possession in 1987. It is clear from the extract of title annexed to the Plaintiff's Supporting Affidavit to his Originating Summons that the Defendant acquired the suit land through succession in 1989. The Plaintiff did not challenge the same and in 1991 the Defendant filed a suit, namely, SPMCC NO. 268 OF 1991 in Muranga, in which he sought an order of eviction of the Plaintiff from the suit land. The matter was then referred to the Muranga District Land Tribunal which after taking evidence found in favour of the Plaintiff and recommended that he be evicted from the land. The proceedings of the tribunal, its award and the letter returning the matter and award to the Muranga Court was produced in evidence herein and is marked "Ex. D.2". In an attempt to challenge the said proceedings in Muranga and award the Plaintiff went to the extent of distorting the facts all together and testified that the proceedings had been taken out by him against the Defendant herein and that the order made therein was not for eviction but that he buys some other land and gives the same to the Defendant.

This piece of evidence cannot stand up against a written record which must be taken to represent the true legal position as regards the Plaintiff's occupation of the suit land. The Plaintiff did not produce any

evidence to support his claim that he bought the land from the Defendant's father in 1962. He says he knew of the deceased's death in 1964 but did nothing to have his purported purchase legalized by way of specific performance or at least acknowledged by the Estate. The Plaintiff also failed to call any witness evidence to support his claim that he had lived on the suit land since 1962, or that he has developed the same as claimed. The Defendant, on the other hand, testified that the Plaintiff only began putting up a permanent structure on the suit land in the year 2003. He has produced in evidence and had the same marked "ex. D.1" a copy of his advocates letter dated 14th April 2003 objecting to the Plaintiff's intended construction. This piece of evidence was not challenged at all.

Having considered the evidence adduced before me and studying the submissions by Counsel for the parties herein as well as considering the authorities submitted by them, I find that the Plaintiff has not, on the balance of probabilities, proven his claim in adverse possession of the suit land. The first issue for determination as agreed by the parties herein in the statement filed on 2nd February 2000 is therefore answered in the negative. There being no proof of a sale between the Plaintiff and Defendant's father issue No. 2 is also answered in the negative. Issue No. 3 is answered in the positive and No. 4 has not been proven. As regards Issue No. 5 I find that the Defendant's title to Land Ref. No. LOC 14/KIRURI/T.26 has neither been extinguished, nor does he hold the same in trust for the Plaintiff. I find that in view of the above he is entitled to vacant possession of the suit land.

Accordingly I have no hesitation in dismissing this suit with costs to the Defendant and I do so order.

Dated and Delivered at Nairobi this 21st day of October, 2005.

M.G. Mugo

Judge

In the presence of:

Mr. Wanjii for the Plaintiff

N/A for the Defendant