



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 3 OF 2019 (OS)

JAMES ROGERS KURIA.....PLAINTIFF

VERSUS

STEPHEN GACHERU KAMAU.....1ST DEFENDANT

ANN NJERI KAMAU.....2ND DEFENDANT

NAOMI NYAMBURA KAMAU.....3RD DEFENDANT

SELLA WAMBUI KAMAU.....4TH DEFENDANT

JUDGEMENT

1. The Plaintiff took out originating summons against the Defendants on the 30/1/2019 seeking the following orders;
 - a. The Plaintiff be declared to have entitled to three (3) acres out of land parcel LOC.2/KINYONA/750 registered under Land Act (Cap 300 Repealed) by having had adverse possession of the said land over twelve (12) years.
 - b. That the Defendants' title to the said land be declared extinguished and/or invalid null and void and the Plaintiff be registered as proprietor of three (3) acres out of the said land.
 - c. That the Defendants do execute the necessary documents to effect the transfer of three (3) acres of land parcel LOC.2/KINYUNA/750 and in default the Registrar of this Honourable Court do execute the necessary forms on behalf of the Defendants.
 - d. That the costs be provided for by the Defendants.
2. In support of the summons the Plaintiff averred that he has been in possession and occupation of 3 acres out of the suit land since 2006 on an exclusive open continuous and uninterrupted basis. That he acquired the land through purchase and has carried out developments on the same since entry in 2006. That the 1st Defendant failed to obtain the land control board consent within the stipulated time and thus the transaction became void.
3. The title for the suit land was annexed to the Pleadings.
4. The Defendants have opposed the claim of the Plaintiff through the replying affidavit of 1st Defendant who swore the same on his behalf and that of the other Defendants.
5. By a consent order adopted by the Court on the 22/10/19 the parties agreed to maintain status quo on the land pending the hearing and determination of the suit and further that an inhibition be registered on the land.
6. The Plaintiff led evidence and stated that he entered the suit land on the 26/4/07 through a failed/void purchase on account of want of land control board consent. That upon taking possession he fenced the land with a life fence, planted blue gum trees and grazed cows on the land. That he bought the land from the 1st Defendant. That the surveyor demarcated the land in the presence of the registered owners. That the land is registered in the names of 5 persons.

7. That in 2015 the Defendants sought to evict him and undertook to repay him the purchase price. That he reported the complaint at the chiefs office and after deliberations he declined to accept the refunds.
8. PW2- Ndirangu Kariuki stated that the Plaintiff entered the land in the month of April 2007. That the Plaintiff has planted trees and grazes the cows thereon. That the family of the Plaintiff do not live on the suit land however the tea on a portion of the suit land belongs to the 1st Defendant. That the Plaintiff occupies 3 acres and the balance is in the occupation of one Kuria. That he was aware of a dispute relating to the land which was reported to the area chief. That he attended the first meeting called by the chief to resolve the matter but some of the family members of the Defendants did not show up.
9. The Defendant's case was led by 1st Defendant (DW1) who refuted that the Plaintiff occupied the land; planted trees; cultivated the land
10. In cross examination he admitted that the family sold the land to the Plaintiff in 2007 but the sale was not completed because of succession issues in the family. That the consent of the land board was not obtained. He admitted that he does not live on the suit land. That it was his plan to sell his portion of 3 acres of the land to the Plaintiff for which he received the sum of Kshs 1.4 million from the Plaintiff with respect to the sale of the land.
11. DW2 – Samuel Rukungu Mwangi stated that he is a retired chief having served as the chief of Kinyona Location between the years 1996 -2017. That he knows the parties well as well as the suit land that measures 7.5 acres. That the parties are related. He recalled that the Plaintiff filed a complaint at his office claiming that the Defendants wanted to evict him. That on hearing the dispute the Defendants proposed to refund the purchase monies to the Plaintiff but the Plaintiff declined and insisted on the land. He confirmed that no land control board was obtained with respect with the sale. That the Plaintiff did not cultivate the land but grazed cows thereon.
12. Patrick Mukabwa Akala – DW3 stated that he is employed by the 2nd Defendants a shamba boy from February 2019. That he found only Evans Kuria the son of the 2nd Defendant on the land and not the Plaintiff. That the tea on the land is being picked by the 2nd Defendant.
13. I have read the submissions of the parties
14. Was there a sale? The Plaintiff led evidence that he entered into a sale agreement in 2006 with the 1st Defendant. This evidence was admitted by the 1st Defendant when he said that he sold a portion of 3 acres of land to the Plaintiff and received the sum of Kshs 1.4 million. That the sale was however not completed because of succession issues and that no consent was obtained.
15. Based on the evidence above the conclusion of the Court is that there was indeed a sale between the 1st Defendant and the Plaintiff.
16. The issue before me for determination is whether the Applicant is entitled to the ownership of the suit land LR NO LOC 20/KAMBIRWA/1384 by way of adverse possession.
17. Adverse possession is one of the ways which one may acquire title in Kenya. Section 38 of the Limitation of Actions Act (Cap 22) gives the procedure to be followed. In that section a person claiming to have become entitled by adverse possession to land registered may apply to the High Court (read ELC Court) for an order that he be registered as the proprietor of land in place of the person then registered as the owner. Section 7 of the Limitations of Actions Act states that an action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person.
18. A person who seeks ownership of land under adverse possession must *inter alia* prove the following; That he has been in continuous open and interrupted occupation of the land for a period of 12 years..
19. In this case the Plaintiff led evidence that was collaborated by PW2 that he entered the land on the 26/4/2007. It is on record that the suit was filed on the 31/1/2019. In the case of *Mbugua Njuguna v Elijah Mburu Wanyoike & Another*, Civil Appeal No. 27 of 2002 it was held that where the transaction for sale of land terminates by reason of failure to acquire the consent of the Land Control Board, then for purposes of adverse possessory rights, time starts running on the day the claimant is put in possession of the land, and not on the last day when the application for the Board's consent ought to have been made
20. Section 13(1) however, provides that a right of action in recovery of land does not accrue unless the land is in the possession of some person whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession). Tied to this, is section 7 of the Limitation Act which bars an owner of a parcel of land from an action to recover it at the expiry of twelve years. From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.
21. **Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR)**, this Court delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted
22. In the case of **Public Trustee – v- Wanduru, (1984) KLR 314 at 319** Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from

this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.

23. Going by the cited cases above, the Court has observed that the Plaintiff by his own admission entered the suit land on the 26/4/2007 and filed suit on the 31/1/2019. A simple calculation reveals that the period runs to 11 years eight months and therefore falls short of the 12 years statutory period. Even if I was to take that the sale entered on 26/4/2007 lapsed within 6 months when the land control board consent was not obtained, then the time for purposes of calculating adverse would run from the 26/9/2007 and by the 31/1/2019, 11 years and 2 months , again short of the statutory period. However one looks at the time, the Plaintiffs claim was brought before it matured. It is premature.

24. Secondly the Plaintiff's claim would still fail because the title is registered in the names of Virginia Wambui Kamau as tenant for life and trustee for James Mwangi Kamau, Stephen Gacheru Kamau, Ann Njeri Kamau and Sella Wambui Kamau. The Plaintiff has sued the last 4 joint owners leaving Virginia and James Kamau out. There is no evidence adduced as to why the two joint owners were excluded from the suit and yet they are joint owners of the suit land.

25. Further it is trite that a party who seeks title by way of adverse possession must state the land being claimed with certainty. This is because Court orders are not issued in vain. In this case the Plaintiff sought and obtained leave to summon a surveyor to testify but on the last day changed his mind. There was therefore no evidence placed before the Court by the Plaintiff to identify the portion of 3 acres that it was claiming.

26. In the case of *Peter Njau Kairu v. Stephen Ndung'u Njenga & Another C.A. 57of 1997, CA* the Court of appeal held that evidence must be stringent and straightforward because a property owner should be deprived of his title only in the clearest of cases. In the instant case it is the finding of the Court that the Plaintiffs have not proved adverse possession on a balance of probabilities.

27. I am satisfied that the Plaintiff failed to proof his case on a balance of probabilities. It is dismissed.

28. The parties are related. Each to bear their costs of the suit.

29. It is so ordered.

DATED, SIGNED & DELIVERED THIS 14TH DAY OF JANUARY 2021.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Ms Njoka

1st Defendant

2nd Defendant Ndegwa HB Karanja

3rd Defendant

4th Defendant

Kuiyaki: Court Assistant