



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 157 OF 1998

JAMES MUTINDA MONI PLAINTIFF

VERSUS

TOM MUTHIANI MUMO DEFENDANT

J U D G E M E N T

The plaintiff, James Mutinda Moni filed this suit against the defendant, Tom Muthini Mumo, on 10.7.1998 by way of originating summons under Order 36 Civil Procedure Rules and Section 38 of Limitation of Actions Act, section 3A Civil Procedure Rules.

The originating summons sought the following prayers:

1. An order that the portion occupied by the plaintiff which measures 2 acres and marked by sisal plants be surveyed and registered in the names of the plaintiff out of parcel No. Wamunyu/Kyawango/153.
2. The plaintiff be registered as the proprietor of the said land by the Land Registrar Machakos.
3. That the defendant be ordered to execute all the necessary transfer documents to effect transfer to the plaintiff and in default the Deputy Registrar of this court do execute the same and have the land transferred to the plaintiff.
4. Costs be to the plaintiff.
5. Any other relief the court deems fit to grant.

The originating summons was supported by the affidavit of the plaintiff in which he depones that the Land Wamunyu/Kyawango/153 is owned by the defendant; that by an agreement dated 15.10.1985, the plaintiff agreed to buy and the defendant agreed to sell 2 acres out of the said Wamunyu/Kyawango/153 to the plaintiff at a consideration of Kshs. 6,000/- which was paid in full. The plaintiff has been in occupation of the said piece of land since 15.10.1985 continuously and exclusively and uninterrupted to date. The defendant has refused to have that portion of land transferred to the plaintiff which has prompted the plaintiff to file this suit.

The defendant filed a replying affidavit dated 7.9.1998 in which the defendant admitted having entered into a sale agreement on 15.10.1985 with the plaintiff but no consent of the Land Control has ever been sought as per provisions of Land Control Act and hence the sale became a nullity and that he is willing to refund the purchase price to the plaintiff.

On 17.1.2001 directions were taken by the court to the effect that the originating summons was to be treated as a suit by way of plaint and parties were to call viva voce evidence. Six witnesses were called in support of the plaintiff's case. P.W.1, the plaintiff recalled having entered into the sale agreement with the defendant on 15.10.1985 in the presence of Gideon Thyaka (P.W.2) Mutiso Mumo (P.W.3). He produced the sale agreement (Ex.1) made in Kikamba language and translated into English. It was signed by the seller, buyer and the witnesses present. He paid Ksh. 2,000/- on the same date and the last instalment was paid on 3.5.1986. He took possession of the said portion of land on the same date which he has occupied and cultivated, uninterrupted since and without objection from the defendant. P.W.2 and 3 confirmed having been witnesses to the sale agreement of 15.10.1985. P.W.4 a former Ministry of Agriculture technician was invited on 3.5.1986 to ascertain the acreage of the land sold to the plaintiff which he found to be 2 acres and sisal plants were planted.

In his evidence in court the defendant concedes to having entered into an agreement for sale of 2 acres of land with plaintiff from his land Wamunyu/Kyawango/153 at an agreed price of Ksh. 6,000/-. He said the first instalment was paid in 1986 when Exhibit No.3 was made and that the agreement was backdated to 1985. It is his evidence that his wife of D.W.2 never consented to the sale and even went to her home in protest to the sale and that he later forced her to sign the agreement after it had been made. They later went to the Board but were told to take the wife and children. He admitted having received the last instalment in 1986. P.W.1 admitted that the plaintiff had been in use of the land since May 1986. D.W.2 the wife of the defendant testified that she had objected to the sale of land and left for her home but D.W.1 went to persuade her to return and upon return forced her to sign the sale agreement Exhibit No.1. She is willing to refund the purchase price to the plaintiff. From the evidence on record, it is not in dispute that the plaintiff purchased 2 acres of land from the defendant on 15.10.1985. P.W.2 and 3 were present. The defendant does not dispute the agreement, save that he was shaky of when it was entered into.

Exhibit NO.1 speaks for itself. The agreement is dated 15.10.1985 and can not be altered by defendants oral evidence. D.W.2 admitted having signed the agreement Exhibit No.1.

The originating summons indicates that the subject suit land is Wamunyu/Kyawango/423. It is evidenced by the Abstract of title produced as Plaintiff Exhibit No.5 which is in the names of the defendant Muthiani Mumo. It was registered on 24.7.1973. The sale agreement which the defendant admits having entered into is in respect of plot No. 153. In his evidence D.W.1 tended to deny that the plot quoted by the plaintiff was the correct one but plot Wamunyu/Kyawango/423.

It however transpired that during the pendency of this suit the plaintiff has transferred some land to one Sammy Nzioka as evidenced by Defence Ex. 3 a title deed which was registered on 19.10.1998 and the number was changed to 423. Whereas the initial size of the defendants land was 7.4 hectares as evidenced by the abstract of title obtained on 7.7.1998, the title deed now shows that defendant's land is 6.5 hectares and has therefore reduced by 0.9 hectares. Defendant says he has only one piece of land and only gave passage to the said Sammy Nzioka. This court finds that plot 153 is the one now changed to plot 423.

It is evident that the plaintiff paid the purchase price of Ksh. 6,000/- by instalments.

The defendant acknowledged that he received the last instalment in 1986 though he could not recall the date. The court will take it that last instalment was paid on 3rd May 1986. P.W.1 said he made the last payment on 3.5.1986 when 2 acres were carved out of the defendant's shamba for the benefit of the plaintiff following the agreement. The court will accept that date as the one the last payment was made since the defendant cannot say when.

The land in question is agricultural land. It was imperative upon the parties to obtain the consent of the Land Control Board to validate the transaction. It is admitted by both parties that to date no consent of the Land Control Board has been obtained. D.W.2 said she is not willing to have it obtained as she was coerced into the sale agreement. D.W. 1 also says that his family is not willing to part with the land but are willing to refund the money received by him in respect of the said land. The land Control Act has been amended. By then it provided as follows:

Section 6(1) each of the following transactions, that is to say

(a) The sale, transfer, lease, mortgage, exchange, petition, or other disposal of or dealing with any agricultural land which is situated within a Land Control Board.

(b)

(c) is would for all purposes unless the Land Control Board for the Land Control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

(2) An agreement to be a party to a Controlled transaction becomes void for all purposes

(a) At the expiration of three months after making of the agreement, if application for that appropriate Land Control Board's consent has not been made within that time. Or

(b) If application for the appropriate Land Control Board consent has been made and consent has been refused.

(3) If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void by virtue of sub section (1) or under any agreement that becomes void by virtue of sub section (2) of Section 6, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid but without prejudice to section 22.

From a reading of this section, the parties were under an obligation to obtain the Land Control Board consent within 3 months of the payment of the last instalment. It was not clear when the last instalment was paid but D.W.1 did accept that it was paid in 1986. The court has found above that it was paid on 3rd May 1986. the period within which obtaining of consent was as from 3.5.1986 to 3.8.1986. After August 1986 the agreement was void and the seller could have paid back the sale price or the buyer would have asked for a refund as per Section 7 of Land Control Act. None of this happened and it is admitted by both parties that P.W.1 who had entered the suit land and started to till it remained on the land to date. It is only when he wanted to construct a house on the land that the defendant moved the court for an order of injunction issued by the court on 9.12.1998. It is noted that that move only came about when the plaintiff had already moved to court on 10.7.1998. From the evidence of P.W.1, 2, D.W.1 and 2 the plaintiff has enjoyed an uninterrupted possession of the said land since he occupied it in October 1985. He continued to do so when he sale agreement became void till 1998 when this suit was filed.

The question is therefore whether the plaintiff has acquired possession of the said land by adverse possession. In the case of **WAMBUGU V. NJUGUNA 1983 KLR 174** the Court of Appeal held and I quote finding No 8 of the judgement.

“Where a claimant pleads the right to land under an agreement and in the alternative seeks an order bas ed on subsequent adverse possession the rule is: The claimant’s possession is deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occup ation for at least 12 years after such payment.”

In the present case as per the above quoted authority I have cited time started to run when the last payment was made which as earlier found must have started to ran on 4.5.1986.

The court considered the authorities cited by both counsels that is **KAGUA VS CHACHIGI 1982 KLR 231; PARKLANDS PROPERTIES LTD VS. PATEL KUSI KLR 53.** It was held in the case of KAGUA V. GACHIGI (SUPRA) that for a claim of adverse possession to succeed it is material that the person has to have been in exclusive possession for 12 years. Counsel for defendant argued that this was a permissive possession and does not amount to adverse possession. In the case of **WAMBUGU V. NJUGUNA (SUPRA)** it was held that for one to be in permissive possession, the possession does not

become adverse before the end of the period during which the possessor is permitted to occupy the land. In the case before us there is no evidence that the plaintiff was allowed to occupy the land for a particular period. Permissive possession does not arise.

Having found that the period ran as from 4.5.1986 after payment of last instalment on 3.5.1986, 12 years expired on 4.5.1998.

In his submissions the defence counsel contends that a notice was issued by the plaintiff on 7.4.1998, replied to by defendant on 13.5.1998 and that plaintiff then rushed to court on 10.7.1998. As earlier noted above, 12 years expired on 4.5.1998 and so by the time the defendant replied to the plaintiffs letter on 13.5.1998 contending that sale agreement was null and void for lack of consent, the 12 years had lapsed.

Though the agreement was void, the fact that the agreement was made is admissible to show the undoubted fact that the plaintiff was allowed into the land with the consent of the defendant and they continued to conduct themselves in that respect till 1998 when the plaintiff demanded that the necessary consents be obtained. The plaintiff has shown that he has been in exclusive, uninterrupted possession for over 12 years, he is not entitled to a refund as envisaged under Section 7 of Land Control Act.

That should have been done before 4.5.1998. The plaintiff has on a balance of probability shown that he has been in occupation of the 2 acres of land which forms part of former Wamunyu/Kyawanga/153 now registered as Wamunyu/Kyawango/423 and has therefore acquired that land by adverse possession.

The court orders that the said portion of 2 acres be registered in the plaintiff's name.

The defendant to execute the necessary documents to effect the transfer of the piece of land to plaintiff and failing which the Deputy Registrar of this court will execute.

Machakos Land Registrar to carry out the registration of plaintiff as owner of 2 acres out of Wamunyu/Kyawango/423. Plaintiff will have costs of the suit.

Dated, read and delivered at Machakos this 21st day of October 2004.

R. V. WENDOH

JUDGE