



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 739 OF 1996

WAYI MUTHINJA.....PLAINTIFF

VERSUS

JOHN NJOROGI MURAGE.....DEFENDANT

JUDGMENT

This Originating Summons is for determination of the question whether plaintiff is entitled to Land Title No. Komothai/Gathugu/972 by adverse possession. The Originating Summons is supported by the plaintiffs affidavit. The defendant filed a replying affidavit on 5.6.96 denying that plaintiff is entitled to the land by adverse possession. It is common ground that:

(i) The suit land was part of original Title No. Komothai/Gathugu 40.

(ii) Plaintiff was registered as proprietor of the original land Komothai/Gathugu 140 during land demarcation for himself and in trust for his three brothers – one of them Murage Muthinja, the defendant's father.

(iii) The defendants family moved to Rift Valley in 1940's leaving plaintiff in occupation of the land.

(iv) In about 1977 the family of defendant agreed to sell the share belonging to the family to the plaintiff at a price of shs 10,000 and about shs 8000 was paid to defendants mother in 1977 and shs 1000 to defendant in September 1977.

(v) Defendants father died in 1979 and according to the plaintiff, he asked defendant to transfer the land to him in 1977 but defendant refused.

(vi) In 1979, plaintiff sub-divided the original land parcel No. Kamothai/Gathugu/40 and transferred a portion which was registered in the defendants name as title no.Kamothai/Gathugu/972 which is 0.44 Hectares. Plaintiff transferred that land to defendant as share of defendants father and the defendant was to hold that land for himself and in trust for his brothers. Defendant was registered as proprietor of the sub-division Kamothai/Gathugu/972 on 26.5.79 and a land certificate was issued on 10.4.80 which plaintiff kept.

(vii) On 7.8.90, plaintiff filed a suit against defendant HCCC No. 4192/90 (O.S) for specific performance of the agreement of sale. That suit was withdrawn on 13.3.96 and the present suit was filed on 25.3.96 The originating summons is supported by a short affidavit in which plaintiff deposes in the material parts as follows:

“1 ...

2. That I was initially the registered proprietor of all that parcel of land known as Komothai/Gathugu/40
3. That I held part of this parcel on trust for one John Njoroge Murage
4. That in 1979 I sub-divided the said parcel and transferred parcel number Komothai/Gathugu/972 to the defendant herein
5. That during the process of sub-division, the defendant agreed to sell the said parcel to me and immediately after the said subdivision I continued occupying the suit land.
6. That regardless of the defendants receipt of the whole of the purchase price being Kshs 10,000 defendant has refused to transfer the said parcel to me
7. That from 26th May, 1979 I have continued to cultivate to piece of land openly and as of right and I believe that I am entitled to it by way of adverse possession.
8. The defendant does not occupy any part of the suit land at all.”

Defendant states that he is registered as trustee for his brothers and sisters. Plaintiff concedes this, for he states that, he transferred the land to defendant to hold it as a share of his father and that defendant was supposed to share the land with his brothers.

This is not a suit for specific performance of the Agreement of sale of 1977. In any case, it is conceded that the parties did not seek the consent of Land Control Board.

Moreover the 1979 sale was by the family of Murage Muthinja (father of the defendant) and not by the defendant himself . That agreement of sale was subsequently superseded by the transfer by plaintiff of Murage Muthinja's Share to the defendant in 1978.

This suit is a claim of land by adverse possession. The defendant became the registered owner of the suit land on 26.5.79 when plaintiff voluntarily transferred the land to the defendant to hold in trust for his brothers. Before 26.5.79, plaintiff was holding the land as trustee for Murage, Muthinja and therefore could not have been in adverse possession of the land before 26.5.79.

Time started running from 26.5.79 and plaintiff recognizes this in paragraph 7 of the supporting affidavit.

Firstly, by 7.8.90 when plaintiff filed HCCC NO. 4192/90 (O.S) claiming the land from the defendant, the 12 years limitation period had not expired if time is computed from 26.5.79 as it should be.

Secondly, plaintiff has been occupying the undivided share of defendants for many years as a trustee. After the share was transferred to the defendant on 26.5.79 plaintiff continued to occupy the land. Defendants says that after the land was transferred to him, the family allowed plaintiff to keep the Title Deed and continued occupying the land. Plaintiff testified that he was occupying the land because he bought it and not because he was given permission by defendants family to occupy it. He at the same time testified that after he paid in full purchase price in 1977 he asked defendant to transfer the land but defendant refused.

It is evident that plaintiff has been occupying the whole land since registration. He admits that he was occupying the undivided share of defendants father as a trustee. When did occupation as a trustee cease and when did occupation as adverse possessor begin?

This is a close family. Even when the plaintiff sub divided the land and portion of the defendant's father was excised and registered in the name of the defendants defendant did not vacate the possession and

hand over possession to the defendant. Plaintiff continued keeping the Title Deed for the land.

Considering all the circumstances of this case including the close family relationship, the long occupation of the undivided share of defendants father by plaintiff as a trustee and the fact that sub division and excision of defendants share did not result in any change in the physical occupation of the land, I find the defendants evidence credible that plaintiff continued to occupy the land with the permission of the family even after the share of defendants family was excised. There is no evidence to show that plaintiff was an adverse possessor of the land at any time after the defendants title was created.

Thirdly, plaintiff concedes that he transferred the land to defendant to hold in trust for his brothers. Defendant is the youngest of his brothers. In that case plaintiff should have sued all the beneficiaries of the land registered in the name of the defendant.

Lastly, it is apparent that plaintiff is pursuing the land as a purchaser and not as adverse possessor. This is how he shaped his case. He called two witnesses to support the fact that plaintiff bought and paid for the land. He says that he is in occupation of the land because he bought it.

By this suit, he is indirectly pursuing recovery of Land as a purchaser. The agreement of sale is unenforceable and was superseded by transfer to defendant.

For the foregoing reasons, I find that plaintiff's case has no merit.

It is dismissed with costs to defendant.

E. M. Githinji
Judge
18.9.2002

Mr. Wanjau holding brief for Kamere present

Mr. Kiama Njau present

Plaintiff absent – represented by Edith Wanjiru