



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 2117 OF 1995

SAMMY MAINA GACHIRU PLAINTIFF

VERSUS

MAINA KARUMBA & 2 OTHERS DEFENDANT

J U D G M E N T

The application filed herein on 5th July, 1995 by originating summons pursuant to Order XXXVI rule 7 of the Civil Procedure Rules seeks determination of the following questions namely;

- (1) Whether the plaintiff has lined on land parcel number 81/Kaganda 269 since 1966!
- (2) whether the defendant has been living in Laikipia District prior to and after had consolidation and has therefore never lived on the suit land!
- (3) whether in the course of such possession actual and real the plaintiff has planted 450 coffee trees and 2000 tea bushes and also built a permanent stone building!
- (4) whether by so doing as in (3) above the plaintiff has made the suit land his home to the exclusion of the defendant!
- (5) whether the defendants' rights and title to land Loc 8/Kaganda/269 has been extinguished by the operation of law on adverse possession!
- (6) whether the Land Registrar Muranga should delete the name of the defendant from the Register of Loc 8/Kaganda/269 and in its place put the name of the plaintiff herein.
- (7) whether the plaintiff has acquired title to Land Loc 8/Kaganda/269 by operation of law on adverse possession and,
- (8) whether the defendant should be made to bear the costs of this suit.

The application was supported by an affidavit deposed to by the applicant and filed herein together with the same.

It depones that the applicant entered in to the suit land in 1966 after entering into an oral sale agreement for the whole land at Kshs.2000/- that he paid the whole purchase price and commenced to occupy the said land to the exclusion of the respondent herein; that he had lived on the said land, planted about 450 coffee trees, 2000 tea bushes, bananas, various fruit trees and also wood fuel as well as subsistence crops; that there is a house thereon valued at Kshs.900,000/- that the defendant had recently shown some interest

on the land but that the applicant had indicated to him that the former had no rights over it; and that the applicant had been in exclusive quiet and uninterrupted possession openly and as of right for a period of more than 12 years over the suit land as against the defendant and he believes that the defendant's right to the said land has been extinguished and he, the applicant has acquired title to the land by way of adverse possession.

A replying affidavit filed in court by the respondent on 17.7.95 it was pointed out that though the respondent was the registered proprietor of the suit land, the same was owned jointly by the respondent and his brother Thuo Karumba.

The respondent denied selling the land to the applicant in 1966 because by that time the applicant was a young boy in Kiaguthu Secondary School, that in any case the respondent could not sell the land as it is jointly owned; that, he, the respondent used to live on the piece of land until 1968 when he and his brother left for Laikipia but that since going there he has been visiting the parcel of land in question on several occasions; that he is aware the applicant had built a house on the parcel of land but that after discussion with elders, it was decided that he transfers 0.1 acre of the suit to the applicant while the latter would transfer to him 0.1 acre of his land to the respondent as compensation of his house.

That the applicant has been given the option of purchasing the suit land but that he could not raise the purchase price.

It appears before this suit had been filed in court, the respondent had sold this land to Jamson Maina Kuria and Hezron Mwangi Kamwea who were on 7th September, 1995 joined to this suit as second and third defendants hence the amended originating summons filed in court on 20th April, 1996 - see agreement of 22.3.95.

The case was heard in court on 5th July, 2000, 19th July 2000, 11th October, 2000 and 18th October, 2000 with the plaintiff repeating as nearly as possible the facts he deposed to in the supporting affidavit and repeated that he wanted this land transferred to him since he bought it in 1966 and has lived thereon for over 30 years.

He said he had built 9 semi permanent house on the land in 1978 and a permanent one in 1982.

During cross-examination the applicant admitted during 1966 he was about 16 to 17 years old at Kiaguthu Secondary School and that he started working as a teacher (untrained) in Baringo District from 1970. That he was transferred to his home district in 1978.

The plaintiff called one witness Gibson Macharia Gachuru who came to confirm that the former bought the suit land from the respondent and that the transaction took place in his house land mawe near railway quarters in Nairobi and that Kshs.2000/- was paid by the applicant to the respondent for the land.

The respondent testified today that he had sold his land to the applicant or allow him to use his said land. That though he had migrated to Rumuruti during 1966, he has visited this land twice but did not find anybody using the same.

That in 1988 he went to Kaganda and found the applicant had put up his house on the suit land and asked why he had done so, he said he had in fact built his house on his father's land.

That one matter was discussed by family members who asked the applicant to remove his house from the respondent's land to his own land but that the former did not do as he was ordered.

The respondent testified that he had sold the land to the second and the third defendants and that the applicant had his father's land to move to.

The respondent called one of the purchasers of the land Jamson Maina Kuria the second defendant to confirm that he had the third respondent land purchased the suit land from the said 1st respondent.

The applicant filed this claim under Order XXXVI of the Civil Procedure Rules to claim the suit land by way of adverse possession; but in the supporting affidavit he raised the issue of sale and/or purchase of the same, thus raising a contractual ... (see paragraph 2 and 3 of the supporting affidavit).

If the applicants claim were hinged on a sale agreement, the certain conditions have to be complied with mainly obtaining of the Divisional Land Control Board within 3 months of the making the agreement, the agreement of sale, in writing with necessary witnesses. And if this was the case, then this suit would have been filed in court by way of plaint - within 12 years of the making of such agreement - see Section 7 of the Limitation of Actions Act.

The applicant adduced no evidence of the agreement in writing for this purchase and/or that he obtained the requisite Land Control Board consent for this transaction. The of course there having been no suit filed within 12 years of this agreement, if at all, the question of claiming the suit land under an agreement of sell does not arise.

Then there is this claim under adverse possession. Here too there are certain conditions to be satisfied, namely entering into possession of the suit land adversely to the true owner's title, without his knowledge or consent and then remaining thereat continuously and uninterrupted for 12 years or more.

See Sisto Wambugu v. Kamau Njuguna (1983) 1 KAR 217.

In this case, though, the applicant testified that he went into possession of the suit land with the consent of the 1st respondent or the account of the purported purchase agreement thus constituting him a mere licensee. Moreover, even if the applicant had gone into possession of this land in an adverse position, the fact that in early 1995 the 1st respondent raised his claim over the suit land before the applicant filed these proceedings broke the continuous possession and by the time the suit was filed in July, 1995, the period required to give rise to adverse possession had not passed.

Though the applicant denied even seeing the 1st respondent over the disputed land since taking possession thereof in 1966, I am convinced this is not true. The applicant himself agreed that during 1966 he was a student at either Ralph Bonel or Kiaguthu Secondary School, and the question of him buying the 1st respondents' land at Kshs.2000/- was unlikely.

The fact respondent testified that he had wanted to sell the suit land to the applicant who was unable to raise the required price but while the applicant partly acceded to this he said he could not buy the land which he had not bought.

He even agreed that elders who arbitrated over this issue and ordered that the 1st respondent allocates him 0.1 acre to accommodate where he had built his house and in return the applicant had to compensate him with similar acreage from his land which I presume it L.R. No.8/Kaganda/268. If all this was going on in 1988 or earlier and before the applicant filed this suit, then I do not understand his argument that he has been occupying this land uninterrupted for 12 years and more.

Even this Muranga Senior Resident Magistrates Civil Case number 277 of 1995 which was filed almost simultaneously with the present suit which the applicant was aware of should have rung a bell in his mind that all was not well with the land he considered his by virtue of adverse possession given that that suit was filed before the present one!

After having heard parties testify in this case and considered the circumstances. I am satisfied that the application was not proved on a balance of probabilities that he is entitled to the land otherwise known as No. 8/Kaganda/269 by virtue of adverse possession.

This suit is dismissed with no order for costs.

Delivered this 13th day of November, 2000.

D.
JUDGE

K.

S.

AGANYANYA