



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 18 OF 2019 (OS)

JOSEPH KIAMA GACHUNGI.....APPLICANT

VERSUS

WILFRED GITHINJI WAMAI (Sued as the administrator of the estate of

TABITHA WANJIRU MWITHIMBU alias WANJIRU M'MWITHIMBU).....DEFENDANT

JUDGMENT

1. Vide the Originating Summons dated 20.3.2019, the plaintiff is claiming entitlement to 2 acres out of land parcel no. KIRIMARA/KITHITHINA/BLOCK 1/71 by way of adverse possession. The defendant has opposed the suit through his replying affidavit filed on 15.7.2019.
2. The plaintiff adopted the contents of his affidavit dated 20.3.2019 as his evidence. He contends that on 9th May 2000, he entered into an agreement with deceased Tabitha Wanjiru to purchase 2 acres which was to be excised from parcel KIRIMARA/KITHITHINA/BLOCK 1/71 at a consideration of Kshs. 195,000. That he paid Kshs. 130,000 leaving a balance of Kshs. 65,000 which was to be paid upon issuance of land control board consent.
3. That he took possession of the property upon execution of the agreement. The whole land consists of 10 acres but his claim is limited to the two acres. The portion of the land in question was pointed out to him by Tabitha and surveyor of which he fenced the same. He has extensively developed the land where he has permanent and semi-permanent buildings thereon.
4. On 15th May 2000, the deceased applied for consent for sub-division but she died before transferring the land to him. He averred that the contract became null and void due to lack of land control board consent and his occupation has been open, continuous and uninterrupted for a period of over 18 years. The plaintiff further stated that one DORIS NKIROTE KIMATHI had filed a suit and placed a restriction on the suit land.
5. The defendant in opposition to the suit adopted the contents of his affidavit sworn on 12.6.2019 and his statement dated 19.11.2019 as his evidence. He avers that he was appointed as the administrator of the deceased's estate and he has not been able to execute his role due to the restriction placed on the land by one DORIS NKIROTE KIMATHI. He further avers that the plaintiff occupies two acres of the suit land, though the agreement states that he was to occupy 0.5 acres. He also clarifies that the portion of the land occupied by the plaintiff is the one fronting the Nanyuki road.
6. I have considered the pleadings, the evidence tendered and the respective submissions of the parties. The issue for determination is whether or not the Applicant/plaintiff has acquired title to a portion of the suit land (precisely 2 acres) by way of adverse possession.
7. The applicant has given an account of how he came to occupy a portion of the suit land. That this was pursuant to an agreement of sale of 9.5.2000. The defendant does not seem to oppose this contention. His issue is that the agreement had stated that the plaintiff was to occupy 0.5 acres only and that court cases and the restriction by one Nkirote prevented him from distributing the suit land.
8. In **Wambugu v. Njuguna [1983] KLR 172**, which was quoted with approval in **Wilfred Kegonye Babu v Henry Mose Onuko [2019] eKLR** the Court held as follows:-

“where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated”

9. The Court further held:

“Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant’s possession is deemed to have been adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”.

10. In the present case the purchaser never paid full purchase price, as such, his claim under adverse possession will have to run from the time the contract became null and void.

11. In the case of **Erick Chepkwony Aengwo V Jonathan Rutto Kibiesang [2013]eKLR** the court, while making reference to the case of **Waweru v Richu 2007 1 EA** stated as follows;

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. It was further held that a purchaser of land under a contract of sale, not subject to the Land Control Act, who is in possession of the land with the permission of the vendor pending completion, cannot lay a claim of adverse possession of such land at any time during the period of validity of the contract, unless and until, the contract of sale has first been repudiated or rescinded by the parties, in which case adverse possession starts from the date of termination of the contract. It was also held that where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor, pending completion, and the transaction thereafter becomes void under Section 6(1) of the Land Control Act for lack of consent of the Land Control Board, such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”

12. The sale agreement is dated 9th May 2000. The application for consent was promptly made on 15.5.2000. However, no consent seems to have been obtained thereafter. The consent availed by the plaintiff is for subdivision of the land and is dated 9.12.1999. It follows that the transaction became void in November 2000, which is six months from the date of the agreement. Thus time runs as from November 2000.

13. During cross examination the defendant had stated as follows;

“I know Joseph Kiama. It is true that plaintiff occupies two acres on the suit land. Joseph stays on the suit land and he occupies two acres”.

14. Given that time started running in year 2000, it is clear that the applicant has established the element of factual possession of two acres out of the suit land for a period of 21 years.

15. The plaintiff has rightly submitted that the property of the deceased vested upon the defendant. To this end, reference was made to the provisions of **“Section 2(1) of the Law Reform Act**, where it is provided that;

“Subject to the provisions of this section, on the death of any person after the commencement of this act, all causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of his estate”.

The defendant has admitted that he is the administrator of the estate of the deceased and that the suit land is vested in him.

16. Regarding the issue whether a claim of adverse possession can be made against the property of a deceased person, I make reference to the case of **Mate Gitabi vs. Jane Kaburu Muga and 3 Others Nyeri Court Of Appeal Civil Case No. 43 of 2015**, which I cited in **Phyllis Wanjiru Kamau v Wilson Gichuhi Gachagwe & 2 others [2019] eKLR**, where it was stated as follows;

“He continued to occupy the land openly, without secrecy, without violence and without permission. He did so in a manner inconsistent with and wholly adverse to the right of the estate of the deceased, his heirs and all those claiming under him. In this regard, it little matters that the 1st Respondent did not take out letters of administration until 2003, or that she did not get to be the registered owner until 2004, both events being more than thirty years since the appellant took adverse possession of the land or dispossessed the 1st Respondent...”

17. From the foregoing, it is clear that the defendant has properly been sued. Applying the legal principles as outlined herein, I do opine that the plaintiff has proven his case. I proceed to give the following orders;

1) A declaration is hereby made to the effect that plaintiff has acquired ownership of two (2) acres out of land parcel no. L.R. No.KIRIMARA/KITHITHINA/BLOCK 1/71 through adverse possession.

2) An order is hereby issued for the plaintiff to be registered as the proprietor of two (2) acres to be excised from Land parcel no. L.R. No. KIRIMARA/KITHITHINA/BLOCK 1/71.

3) The land amounting to two acres is to be hived from the portion of land No.KIRIMARA/KITHITHINA/BLOCK 1/71 which is fronting the Nanyuki road.

4) The defendant WILFRED GITHINJI WAMAI who is the legal representative of the estate of TABITHA WANJIRU

MWITHIMBU alias WANJIRU M'MWITHIMBU is hereby directed and authorized to sign all requisite documents to facilitate the aforementioned registration and in default thereof, the Deputy Registrar of this court is hereby authorized to sign such documents.

5) Any order of inhibition, injunction, caution or restriction that may be subsisting in respect of land parcel No.KIRIMARA/KITHITHINA/BLOCK 1/71 is hereby discharged in order to facilitate the implementation of this Judgment

6) Each party is to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 21ST DAY OF APRIL, 2021 IN PRESENCE OF:

C/A: Kananu

Ms. Wachira for applicant

HON. LUCY. N. MBUGUA

ELC JUDGE