



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 58 OF 2014 (OS)

LUKA KIMANI ARITHI.....PLAINTIFF

VERSUS

IBRAHIM MUTUNGI M'ITONGA.....DEFENDANT

JUDGMENT

1. In the Originating Summons filed in court on 24.4.2014, the plaintiff has sought for the determination of the following questions:

- (i) Whether the plaintiff has been in open, continuous and exclusive possession of a quarter (0.25) Acre or thereabout of land comprised in L.R No. Igoji/Kinoro/1643 for over 12 years.
- (ii) Whether the plaintiff has become entitled to the said quarter (0.25) Acre of and comprised in or otherwise described as L.R No. Igoji/Kinoro/1643.
- (iii) Whether the plaintiff should be registered as the owner of said quarter (0.25) Acre of land comprised in or otherwise described as the suit land.
- (iv) Whether the defendant should be ordered to transfer the said quarter (0.25) acre comprised in the suit land or otherwise described as L.R No. Igoji/Kinoro/1643 to the plaintiff.
- (v) Whether the deputy registrar and/or executive officer of this honourable court should be empowered to sign all the necessary documents to transfer the said quarter (0.25) acre of land comprised in or otherwise described as L.R No. Igoji/Kinoro/1643 to the plaintiff in default of the defendant so signing.
- (vi) Whether production of the original title deed in respect of the suit land being L.R No. Igoji/Kinoro/1643 should be dispensed with for purposes of transfer of the same to the plaintiff.
- (vii) Whether the defendant should pay the plaintiff's costs thereof.

2. Defendant filed a memorandum of appearance and a replying affidavit whereby he had urged the court to find that there is an ongoing similar case before the magistrate's court.

3. On 5.2.2019, the court on its own motion directed that the matter be heard on 6.5.2019 whereby the court was to effect service. On 6.5.2019, the matter proceeded ex parte as the counsel holding brief for defence advocate declined to participate in the proceedings.

4. Plaintiff has relied on his sworn affidavit of 21.2.2014 to support his case, where he has deponed as follows;

- (i) That he entered into a sale agreement with the defendant herein for the sale of the whole of L.R No. Igoji/Kinoro/1643 measuring 0.25 acre or thereabout and pursuant to which he took possession thereof in December, 1999 upon paying the entire consideration of Kshs.42,200 as agreed.
- (ii) That L.R No. Igoji/Kinoro/1643 which is the suit land herein was registered in the name of the defendant as evident from the copy of search certificate marked "LKA 1".
- (iii) That defendant refused to obtain land control board consent for the transfer but that notwithstanding, the plaintiff continued occupying and using the whole parcel of land openly and continuously from December, 1999 to date.

(iv) That the plaintiff has been in open continuous and exclusive possession of the suit land measuring (0.25) acre or thereabout since 1999 when he (the plaintiff) completed paying the consideration.

(v) That plaintiff's possession of the land has been adverse to the title of the registered proprietor as he has not been paying any rent or license fees.

(vi) That plaintiff has become entitled to be registered as the legal proprietor of the suit land by adverse possession.

(vii) That the plaintiff further urges the court to empower the executive officer to sign all relevant documents to effect the registration of the portion of the suit land in his name, in the event that the defendant refuses to sign and to dispense with production of the original title deed for purposes of transfer of the suit land to himself.

5. Plaintiff avers that in 2008, he had sued defendant in Meru CMCC No. 69 of 2008 but that he withdrew that case.

6. In support of his claim, plaintiff has produced as exhibits a copy of the search certificate in respect of the suit land.

7. The question for determination is whether plaintiff has met the requisite criteria of an adverse possessor. For one to succeed in a claim of adverse possession he must demonstrate that he is in actual possession or control of the suit land for the statutory period, the occupation by the claimant must contain what is known as "*animus possidendi*" which is the occupation with a clear intention to exclude the owner and any other persons and the occupation must be maintained under some colour of right or title. The occupation by the claimant on the suit land must be non-permissive, that is to say without the consent of the owner and finally, the acts of the adverse possessor must be inconsistent with the owner's enjoyment of the suit land.

8. Plaintiff has stated that he has been in occupation of the suit land since 1999. The land measures 0.25 acres. The search certificate shows that defendant is the registered owner of the land.

9. An inhibition was lodged on 5.5.2008 pursuant to orders in a civil suit. This is a clear indication that defendant had not permitted plaintiff to occupy the suit land.

10. 20 years have now gone by from the time plaintiff occupied the land. I am therefore inclined to find that on a balance of probability plaintiff has proved his case.

11. I therefore find that all the questions put forth by the plaintiff are answerable in the affirmative and I proceed to grant orders as follows:

(1) It is hereby declared that plaintiff has become entitled to the whole suit parcel No. L.R Igoji/Kinoro/1643 by way of adverse possession.

(2) An order is hereby issued for plaintiff LUKE KIMANI ARITHI to be registered as the owner of land parcel IGOJI/KINORO/1643 instead of defendant IBRAHIM MUTUNGI M'ITONGA.

(3) The deputy registrar of this court or the executive officer is hereby authorized to sign all the requisite documents to effect transfer of land parcel no. Igoji/Kinoro/1643 from defendant to plaintiff.

(4) Any orders of inhibition or injunction that may be subsisting in respect of the suit land are hereby discharged in order to give effect to the implementation of this judgment.

(5) As to costs, I direct that each party bears their own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 10TH DAY OF JULY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kirimi holding brief for Mwenda Mwarania for plaintiff

Muchiri holding brief for Kaimenyi for defendant

HON. LUCY. N. MBUGUA

ELC JUDGE