



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 522 OF 2011(OS)

SAMUEL NDUNGU MBOTHU.....PLAINTIFF

(Suing as the Administrator of the Estate of

Moses Mbothu Chaure – Deceased)

VERSUS

GEORGE MBURU GITHINJI.....1ST DEFENDANT

PETER WAITA NJENGA.....2ND DEFENDANT

JUDGMENT

1. The dispute in this suit relates to Land Title Number Lari/Kireita/T.172 measuring approximately 0.23 acres **(the suit property)**. At the time of initiating the suit in 2011, the land was registered in the name of Githinji Gatembu. During the pendency of this suit, in August 2013, it was transferred to Peter Waita Njenga (2nd defendant).

2. Through an originating summons dated 10/8/2011 and subsequently amended on 14/5/2015, the plaintiff seeks the following orders:-

a) That the plaintiff as the Administrator of the Estate of Moses Mbothu Chaure (deceased) is entitled to be registered as proprietor of the whole of Title Number Lari/Kireita/T.172 in place of the current registered owner, Peter Waita Njenga and the former registered owners, namely Githinji Gatembu (now deceased) and George Mburu Githinji pursuant to the provisions of Section 38 of the Limitation of Actions Act (Chapter 22 Laws of Kenya) on grounds that the deceased and his family have built a permanent house on the land and have remained in open peaceful and uninterrupted occupation thereof to date which is a period exceeding (12) years preceding the presentation of this summons.

b) That an order do issue to register the plaintiff, as the administrator of the estate of Moses Mbothu Chaure (deceased), as the proprietor of the whole of the aforesaid land being Title Number LARI/KIREITA/T.172 in place of Peter Waita Njenga and the former registered deceased proprietor or his successors in title thereof George Mburu Githinji.

c) That costs of this originating summons be borne by the defendants.

3. The originating summons was supported by an affidavit sworn on 10/8/2011 by the plaintiff. The originating summons was opposed by defendants through an affidavit sworn on 13/10/2011 by the 1st defendant.

The Plaintiff's Case

4. The Plaintiff in his supporting affidavit sworn on 10/8/2011 stated that on 13/11/1960, his deceased father, the late Moses Mbothu Chaure, took possession of the suit property pursuant to a sale agreement between him and Kiare Githinji Gatembu. A copy of the sale agreement dated 13/11/1960 was annexed to the affidavit. The plaintiff contended that his father constructed a 3 bed room wooden residential house which he let out and received rental income until 2001 when he passed on. The plaintiff stated that parties to the sale agreement never obtained the requisite land control board consent and that the deceased registered proprietor neglected to transfer the suit property to the plaintiff's late father. Consequently, the sale became void upon expiry of a period of six months from the date of the sale agreement.

5. The plaintiff averred that upon the death of his father, he and his siblings continued to collect rent from the suit premises as beneficiaries of their late father's estate. He contended that since 1960, his deceased father and later, he and his siblings have been in open, quiet, uninterrupted possession of the suit property. Further, the plaintiff stated that upon the death of his father, he pursued Githinji Gatembu to

have the suit property transferred to him as the administrator of his late father's estate and that Githinji Gatembu demanded that a further consideration of Kshs 40,000/- be paid to him. Githinji Gatembu subsequently passed on before the plaintiff could make the payment. The plaintiff further contended that he endeavored to pay the demanded additional consideration through a banker's cheque to the widow of Githinji Gatembu, Mercy Waruguru Githinji (deceased) which cheque was rejected. The plaintiff averred that having occupied and utilized the suit property for over 50 years, the registered proprietor's title was extinguished by adverse possession and therefore, that the suit property should be registered in his name as the administrator of the estate of his deceased father, Moses Mbothu Chaure.

6. Through a further affidavit sworn on 14th May 2015, the plaintiff stated that pursuant to an intestate succession, the 1st defendant as the administrator of the estate of Githinji Gatembu (deceased) caused the suit property to be transferred into his name with the aim of defeating the ends of justice in this suit. He added that during the pendency of this suit, the first defendant filed Limuru PMCC No 137 of 2013 seeking his forceful eviction and the eviction of his tenant, Hannah Wangui Kimemia. He contended that the 1st defendant also caused a caution lodged by the plaintiff to be lifted and he proceeded to fraudulently transfer the suit property to the 2nd defendant. A copy of a certificate of official search dated 3rd September 2013 was exhibited, showing that the current registered proprietor was the 2nd defendant.

7. The plaintiff contended that in September 2013, the 1st defendant descended upon the suit property and demolished the house constructed by his late father and forcefully put the 2nd defendant in possession with an intention of interfering with their possession of the suit premises.

Case of the Defendants

8. The defendants opposed the originating summons through their joint replying affidavit sworn on 13/10/2011. They contended that they were not administrators of the estate of the late Githinji Gatembu. They further stated that they were not aware of any deal or transaction between their late father and the plaintiff's father. They further averred that if indeed there was a land sale agreement between their deceased father and the plaintiff's father, there was ample time for the completion of the sale. They denied knowledge of any neither rented premises nor tenancy on the suit property. They similarly denied the allegation that there were mediations pursuant to which a cheque of Kshs 40,000 was prepared to facilitate transfer of the suit property to the estate of the plaintiff's father. They contended that their late mother was senile and immobile in his final days and did not have the Physical capacity to deal with issues relating to the suit property. They urged the court to dismiss the application.

Hearing and Submissions

9. At the hearing on 18th May 2017, parties agreed to proceed on the basis of affidavit evidence and written submissions. The court directed parties to file and exchange written submissions. When the matter came up for mention on 19th July 2017 to confirm the filing of submissions, only the plaintiff had complied and filed submissions dated 18th July 2017.

10. In his submissions, the plaintiff reiterated the facts as pleaded and submitted that as at the time of filing this suit, the late Moses Mbothu Chaure and his family had occupied and utilized the suit property for over 52 years. Counsel submitted that the registered proprietor's title was extinguished by adverse possession upon expiry of 12 years from 13th November 1960. The plaintiff submitted that the transaction was entered into before the Land Control Act was enacted and that the law then required consent to be obtained within 3 months.

11. The plaintiff further submitted that his late father's rights over the suit property stem from the peaceful, open and uninterrupted possession of the suit property for a period of 52 years and that during that period, they exercised rights as owners which were adverse to those of the registered proprietor. He contended that his father acquired title to the suit property by way of adverse possession. It was argued that although his late father's entry into the suit property was initially derived from a contract, his late father subsequently became an adverse possessor upon the coming into operation of the Land Control Act.

12. The plaintiff relied on the case of Samuel Miki Waweru v Jane Njeri Richu Nairobi CA No 122 of 2001 where the court stated that where a purchaser takes possession pending completion of a transaction which becomes void for lack of consent from the land control board, continued possession if not illegal, becomes adverse from the time the transaction becomes void. Further reliance was placed on the case of Isaac Maina Kamau v Rahab Wangare Gaciengo & another Nakuru HCCC No. 34 of 2015 for the submission that the occupation of a plaintiff who initially derived his claim from a contract which becomes void for lack of a land control board consent becomes hostile and time starts running after the expiry of six months.

13. In further submissions, the plaintiff stated that the 1st defendant's assertion that fresh talks in the year 2002 where an additional consideration of Kshs 40,000/- was agreed upon interrupted the running of time was incorrect. Counsel submitted that as at the year 2002, a period of 40 years of continuous uninterrupted possession had lapsed entitling the plaintiff to a vesting order. He further submitted that the discussions did not lead to a new agreement but was a continuation of the old agreement and the plaintiff remained in exclusive possession.

14. The plaintiff relied on the case of Kimani v Kibogoro (1990)KLR 49 where the court stated that even a decree establishing a proprietor's right to the suit land will not, without successful execution, interrupt adverse possession. The court was also referred to a passage from Kevin Gray's, Elements of Land Law, 2nd Edition page 297. The plaintiff argued that further attempts by the defendants to interrupt their possession in 2013 was inconsequential. The plaintiff cited the case of Wanjiku Kinuthia & another v Stephen Kinooro Kamau & Another HCCC No 2360 of 1995 where the court issued a vesting order in favour of the plaintiff despite the property having been transferred by one of the defendants a day after the filing of the case.

Issues and Determination

15. The twin issues to be determined in this suit are firstly, whether the defendants are properly joined in these proceedings; and secondly, whether the late Moses Mbothu Chaure who died on 24/1/2001 had acquired adverse title to land Title Number Lari/Kireita/T.172 prior to his death. I will deal with the two issues in the order in which they are framed.

16. The amended originating summons has two defendants; George Mburu Githinji and Peter Waita Njenga. On 23/11/2015, the plaintiff filed a further affidavit to which he annexed an affidavit sworn by George Mburu Githinji. The said affidavit was filed in Limuru SPCC No. 137/2012. At paragraph 4 and 5 of the said affidavit, George Mburu Githinji deposed thus:

(4) That previously the land parcel belonged to my later father namely Githinji Gatembu who died on 10th October 2005 intestate (annexed herewith are copies of ownership documents marked “GMG2”)

(5) That prior to registration and acquisition of ownership documents, I had petitioned for letters of administration to the estate of my late father which succession cause was finalized and I was issued with letters of administration thereof. (Annexed herewith are copies of ownership documents marked “GMG3”).

17. Besides this, Samuel Ndungu Mbothu swore an affidavit on 14/6/2013 to which he annexed copy of the title in respect of the suit property, indicating that on 28/8/2012, George Mburu Githinji was registered as proprietor of the suit property.

18. Similarly, an official search annexed to the affidavit of Samuel Ndungu Mbothu sworn on 14/5/2015 indicates that on 15/8/2013 Peter Waita Njenga became proprietor of the suit property.

19. From the above materials, there is sufficient evidence showing that George Mburu Githinji is the administrator of the estate of the late Githinji Gatembu. There is also sufficient evidence that in 2012 he caused the land to be transferred into his name. Thirdly, there is adequate evidence that in 2013 George Mburu Githinji transferred the suit property to Peter Waita Njenga. Consequently, in my view, the two defendants were necessary parties to this suit and were the proper persons to respond to the originating summons herein. Consequently, my finding on the first issue is that the defendants herein, George Mburu Githinji and Peter Waita Njenga are properly sued as defendants herein.

20. The second issue is whether the late Moses Mbothu Chaure who died on 24/1/2001 had acquired adverse title to the suit property, Land Title Number Lari/Kireita/T.172, prior to his death. The plaintiff contends that the late Githinji Gatembu sold the suit property to the late Moses Mbothu Chaure and gave vacant possession of the suit property to the latter. The latter was in possession of the suit property, enjoying peaceful, quiet and uninterrupted possession from 1960 to 2001 when he passed on. The plaintiff contends that although possession was granted pursuant to a land sale agreement, in the absence of compliance with the formal requirements, what ensued in favour of the late Moses Mbothu Chaure was the title of an adverse possessor and that adverse title crystallized prior to his death. The plaintiff further contends that upon the demise of the late Moses Mbothu Chaure, his estate continued to be in possession of the suit property.

21. I have carefully gone through the defendants’ evidence in response. They have not challenged the fact that the late Moses Mbothu Chaure was in uninterrupted possession of the suit property from 1960 up to 2001 when he died. All they say is that they are not aware of any sale agreement between the late Githinji Gatembu and the late Moses Mbothu Chaure.

22. Besides, evidence has been presented to show that the plaintiff has been in possession of the suit property. On 9/5/2013, during the pendency of this case, the 1st defendant filed Limuru SPMCC No. 137 of 2013 seeking an order of eviction against the plaintiff herein together with the plaintiff’s tenant who was on the suit property. The 1st defendant contended in Paragraphs 5 and 6 of the plaint thus:

(5) That at all the times relevant to this suit, the 1st defendant has been in illegal and lawful (sic) occupation as being the 2nd defendant’s tenant.

(6) The 2nd defendant has been claiming ownership of the subject property on adverse possession.

23. It is now a settled principle of law that where a purchaser is permitted to take possession of land pending completion of the sale transaction by way of formal transfer, and the purchaser remains in peaceful, quiet and uninterrupted possession for a period of twelve years, the purchaser properly acquires title to the suit property under the doctrine of adverse possession. (See Court of Appeal decisions in **Samuel Miki Waweru v Jane Njeri Richu (2007)eKLR** and **Sammy Likuyi Adiemu v Charles Shamwati Shisikani (2014)eKLR**.)

24. Having considered the evidence placed before the court, the court is satisfied that the late Moses Mbothu Chaure took quiet and peaceful possession of the suit property in 1960 pursuant to a sale agreement between him and the then registered proprietor, Githinji Gatembu. The court is further satisfied that the late Moses Mbothu Chaure had uninterrupted possession of the suit property from 1960 to 2001 when he died. It therefore follows that, at the time of Moses Mbothu Chaure’s death, his adverse title to the suit property had already crystallized and the suit property properly formed part of his estate. In law, the subsequent transfers of the suit property, which were undoubtedly triggered by the present originating summons, did not alter the adverse title of the late Moses Mbothu Chaure’s estate. Those subsequent transfers were all in vain. The net result is that the plaintiff as administrator of the estate of the late Moses Mbothu Chaure is entitled to be registered as proprietor of the suit property in that capacity.

25. In light of the above findings, the court is satisfied that the plaintiff has proved his case on a balance of probabilities. Consequently, the amended originating summons herein is allowed in terms of prayers 1 and 2. The plaintiff shall have costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF JULY 2018.

B M EBOSO

JUDGE