



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

ENVIRONMENT AND LAND COURT DIVISION

CIVIL SUIT NO. 161 OF 1993

MUGWIKI KIRIMI M'ABURIA.....PLAINTIFF

VERSUS

JULIUS GITONGA (Sued through RUTH KINYA

RUKUNGA and EDWARD KOOME.....DEFENDANT

JUDGMENT

Background

1. This suit has been in the corridors of justice for the last 25 or so years. The plaintiff, Mugwika Kirimi M'aburia filed this suit on 21/4/1993 against the then defendant, Julius Gitonga who is the legal administrator of his late father's estate, one deceased M'Thuranira Mburugu.
2. The plaintiff claims that in the year 1976 he entered into a written agreement of sale of land registration number GITIE/371 (Suit land) comprising of 2 acres with the deceased M'Thuranira M'burugu who was the sole proprietor of the said parcel. The latter gave the actual possession of the land to the plaintiff who paid the purchase price of Kshs.2, 400/-. M'Thuranira had then handed over the original title to the plaintiff while awaiting transfer but the seller died before the transfer was effected. Defendant, Julius Gitonga, who was the administrator of the deceased's estate refused to transfer the said parcel of land to plaintiff and even threatened to sell it to a third party.
3. The defendant filed a statement of defence which was amended on 27/9/1994 and a further amended defence was filed on 14/10/1993. He avers that his deceased father did not sell the Suit Land to the plaintiff. He also claims that plaintiff's suit does not disclose any cause of action against the defendant and in any event the suit is time and statute barred by the provisions of Limitation of actions Act and should be struck out as it was filed without leave of the court. Further, defendant avers that there was no privity of contract between the plaintiff and defendant and the entire suit is a nullity in law.
4. Julius Gitonga had filed a succession cause no.15 of 1992 in Meru High Court in respect of the estate of his deceased father. In that cause, plaintiff had lodged an objection which was heard and dismissed but the court allowed him to file this instant suit against the defendant.
5. Defendant has since died and was substituted on 19/10/2011 with RUTH KINYA and EDWARD KOOME (his legal representatives).

Plaintiff's case

6. Plaintiff Mugwika Kirimi M'aburia testified on oath as PW1 where he adopted his statement dated 26th October 2016 as his evidence in chief. He produced his exhibits marked 1 -7 to be found in his list of documents dated 26/10/2016. Plaintiff avers that he bought the suit land which was 2 acres in 1976 from the initial defendant's father. After the purchase price was duly paid the seller gave him vacant possession of the land where he has built houses and done extensive development comprising of mature trees, livestock, bananas, piped water, flour mill and other developments.
7. Plaintiff contends that him and the seller attended the land control board for consent which was issued in his favour and the seller surrendered the title deed to him. The proprietor of the land however became sick and died before transfer was effected. Later the son, who is the initial defendant (Julius), agreed with the other family members that they will file a succession cause to enable them distribute the estate and transfer the suitland to him. Plaintiff allegedly financed the filing of the succession cause with Kshs. 10,000/- which he gave Julius Gitonga but there was nothing written in acknowledgement of the said amount. After sometime plaintiff came to learn that his name was omitted from the cause. He requested the initial defendant to transfer the land to him but the latter refused. Plaintiff avers that it took long to file the case because the seller of the suit land died.

8. **PW2 Samson Marangu** adopted his statement dated 26th October 2016 as his evidence in chief. He stated that the plaintiff herein is a brother to his father. The plaintiff in 1976 came to his home and asked him to accompany him to Thurania Mburugu's home so that he could hear what they would say about the land he was intending to sell to the plaintiff. They found Thurania in the company of three men known as Kabari, M'Mwiga, the assistant chief Cyprian, his young children and wife. The discussion began and Thurania informed them of his intention to sell the 2 acres in Gitie to the plaintiff and he stated the sale price. The sale agreement was then executed at an advocate's office. Thereafter, plaintiff took possession of the suit land.

Defence case

9. **DW1**, is one **Ruth Kinya Rukunyi**, wife of Julius Gitonga, the initial defendant who died on 27th February 2009. She adopted her statement dated 30th January 2017 as her evidence in chief. Her evidence is that her husband (Julius) was appointed administrator of the estate of Thurania Mburugu when the latter died. The High Court distributed the estate and the Suit Land was transferred to one Joseph Kinyua Mukiri (a purchaser). She is aware that her husband sold the Suit Land but the land has not been transferred to him (the purchaser) because there are orders of inhibition which were registered against it. Her husband never mentioned to her about the sale of the Suit Land to the plaintiff.

10. **DW2 Isaac Nkumbuku Mungania** adopted his statement dated 30th January 2017 as his evidence in chief. He stated that he is a neighbor to the family of the late Julius Gitonga having grown together as friends. He testified that Thurania Mburugu was very well known to him. In 1992 the initial defendant told him that he wanted to file a succession cause in respect to his father's estate and he inquired from him whether he had the money to file it. Julius had told DW2 that upon the finalization of the succession cause, he would sell part of his father's land comprising of the Suit Land.

Submissions

11. It has been submitted for the plaintiff that plaintiff is the rightful owner of the suit land as he bought the same from M'Thurania Mburugu. It is further submitted that plaintiff complied with the requisite legal formalities by attending the land control board and also by complying with provisions of **Section 3(3) of the law of Contract Act**.

12. The defendants submitted that the plaintiff has not proved his case against the defendant, that plaintiff has not pleaded any fraud on the part of the deceased defendant neither has he based his suit on trust or even adverse possession. Defendant avers that plaintiff's claim for the transfer of land is based on contract and that the claim for the recovery of land ought to have been filed before the expiry of 12 years. In support of this argument, defendant relied on the case of **Divecon Ltd vs Samani [1995-1998] IEA page 48** and **Wilson Kenyega vs Joel Omburugua CA No. 96 of 1998**.

Determination

13. I have carefully considered the evidence adduced herein, the submissions as well as the case law relied on. I frame the issues for determination as follows;

- a) Whether the plaintiff is entitled to L.R. NO. ABOTHUGUCHI/GITIE/371 and whether his claim is time and statute barred?.
- b) Whether the initial defendant (Julius), had legally sold L.R. NO. ABOTHUGUCHI/GITIE/371 to one JOSEPH KINYUA MUKIRI?

14. ***Whether the plaintiff is entitled to L.R. NO. ABOTHUGUCHI/GITIE/317 and whether his claim is time and statute barred?.***

15. The sale agreement in respect of the suit land was between plaintiff and the father of the initial defendant. The agreement was allegedly made on 7th December 1976 and was duly signed before an advocate. The two parties then applied for the consent of the land control board on 16/6/1977 - see plaintiff exhibit 3. The requisite consent was there after obtained on 7/7/1977 – see plaintiff exhibit 4.

16. According to the plaintiff the said Thurania died before effecting the transfer. A death certificate availed by defendant as defence exhibit 1 shows that Thurania Mburugu died on 14/8/1977. This is a confirmation that the seller of the land was unable to complete the transaction as he died soon after the consent of the land board was obtained. With this kind of scenario, certainly the plaintiff was not in a position to enforce the contract.

17. **Section 7 of the Limitation of Actions Act** states as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”.

18. A Right of action means the right to begin and prosecute a legal action in court. This was so defined by Bryan A. Garner, *Black's Law Dictionary* Ninth Edition Thomas Reuters 2009 at page 1438 as:

“1. The right to bring a specific case to court. 2. Right that can be enforced by legal action; a chose in action.

19. Julius Gitonga a son of Thurania Mburugu was appointed as the legal representative of the estate of Thurania Mburugu in succession cause No. 15 of 1992. The time lapse between 1992 to 1993 is clearly less than 12 years. I am of the view that the suit is hence not time

barred as per the provisions of Limitations of Actions Act. It is not lost to this court that the plaintiff had tried to raise an objection in the succession cause where the court had ruled as follows “**objection is dismissed. Objector to lay claim to a portion of the estate for determination**”. This is exactly what the plaintiff did thereafter. He filed this suit to claim a part of the estate of deceased (Thuranira).

20. Rule 41(3) of the Probate and Administration Rules provides that:-

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question.....”.

21. The claim of the plaintiff could certainly not be dealt with in the succession cause and hence it is properly before this court. It is not time or statute barred.

22. In determining whether plaintiff is entitled to the suit land, the court has taken into consideration the averments by the plaintiff that he took over possession of the land in 1976. He has occupied this land to date. He has developed the same. There is no rebuttal from defence side concerning these averments. Defence witness no. 2 confirmed that “**Julius Gitonga and his family do not stay on the suit land**”.

23. If plaintiff has been in occupation of the suit land for the last 31 years or so, then he has certainly acquired beneficial equitable rights over this land.

24. In the Court of Appeal case no **51 of 2015 in Eldoret, Willy Kimutai Kitilit vs. Michael Kibet (delivered on 17.5.18)**, the court made reference to an earlier court of appeal decision of **Macharia Mwangi Maina & 87 others vs. Davidson Mwangi Kagiri (2014) - Nyeri** where it was held that held, *inter alia*, that “**the possession of the land by purchasers was an overriding interest in favour of the purchasers** The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to Land Control Act is enforceable...”.

25. **Section 28 of the Land Registration Act** provides that; “**Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— Trusts ..**”

26. The concern of this court is to administer substantive justice. In this case, I do so by invoking the equitable doctrines of constructive Trust to declare that plaintiff is the rightful owner of the suit land.

The second issue is whether the initial defendant legally sold L.R. NO. ABOTHUGUCHI/GITIE/371 to one JOSEPH KINYUA MUKIRI?

27. By the time Thuranira Mburugu died, he had already given possession of the suit land to the plaintiff even though he was still the registered owner of the land. Having established that the doctrine of constructive trust is applicable herein in favour of the plaintiff, it follows that the estate of deceased held this land in trust for the plaintiff. Perhaps the initial defendant was aware of this for he appears to have entered into an agreement with one Joseph Kinyua to sell the suit land on 4/12/1992 (see defence exhibit 5) long before he had obtained the confirmed grant on 10/3/1993 (see defence exhibit 2).

28. I conclude that the initial defendant did not legally sell the Suit Land to one Joseph Kinyua Mukiri for he had no authority or capacity to do so.

Final orders;

29. The court finds that plaintiff is the rightful owner of land parcel no. Abothuguchi/Gitie/371.

(1) An order is hereby issued for the suit land Abogutuchi/Gitie/371 to be registered in the name of MUGWIKI KIRIMI M'AMBURIA.

(2) In order to give effect to the implementation of this Judgment, the Deputy Registrar of this court is hereby authorized to sign all requisite documents including transfer forms in order to transfer land registration number Abothuguchi/Gitie/371 to the Plaintiff from Thuranira Mburugu.

(3) Any subsisting orders of inhibition are hereby discharged to facilitate the transfer of the land to the plaintiff.

(a) Cost of this suit be paid by the defendant.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 3RD OCTOBER, 2018 IN THE PRESENCE OF:-

C/A: Galgalo/Faith

Miss Soi for plaintiff

Kiogora A. for defendant

Plaintiff

Ruth Kinya

HON. LUCY. N. MBUGUA

ELC JUDGE