



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 94 OF 2016

EMMANUEL NJOGU MUCHINA.....PLAINTIFF

VERSUS

JUDY NJERI MICERE.....DEFENDANT

JUDGMENT

Background

The plaintiff vide an originating summons dated 24th June 2016 sought the following questions for determination:

- 1. Whether the plaintiff has had quiet possession of 1 acre out of that parcel of land known as and described as KIINE/SAGANA/3362, a sub-division of the original Land Parcel No. KIINE/SAGANA/443 since 1997.*
- 2. Whether the plaintiff has had quiet possession of one (1) acre out of Land Parcel No. KIINE/SAGANA/336 now sub-divided into Land Parcel No. KIINE/SAGANA/4136 and 4137 since determination of Arbitration Case No. 3 of 2009 Judy Njeri Macere Vs Emmanuel Njogu Muchina Law Court on 28th September 2011.*
- 3. Whether the plaintiff continued to have quiet possession of one acre out of Land Parcel No. KIINE/SAGANA/3362 now sub-divided into Land Parcel No. KIINE/SAGANA/4136 and 4137 even after the outcome in Murang'a PMCC No.43 of 2006 Emmanuel Njogu Muchina Vs Judy Njeri Macere.*
- 4. Whether the plaintiff has acquired one (1) acre out of Land Parcel No. KIINE/SAGANA/4136 and 4137 by way of Adverse Possession having been in occupation of the same since March 1997 and since 18th March 2004 when the defendant got registered in KIINE/SAGANA/3362.*
- 5. Whether the plaintiff should be registered against one (1) acre out of Land Parcel No. KIINE/SAGANA/3362 now sub-divided into Land Parcel Nos. KIINE/SAGANA/4136 and 4137 and having acquired the same vide Adverse Possession.*
- 6. Who bears costs of this suit?*

By a replying affidavit filed on 15th August, 2016 the Respondent denied the Plaintiff/Applicant's claim.

Plaintiff/Applicant summary of Facts

The Plaintiff, Emmanuel Njogu Muchina took the witness stand on 15.05.2019 and stated on oath that the defendant and her sister one Milkah Muthoni sold him two (2) acres of a parcel of land known as KIINE/SAGANA/443. According to him, each of the two were to contribute one (1) acre. They entered into a written sale agreement on 13.1.97. By then the titles in respect of the land being sold was in the name of one Tabitha Waruguru (deceased).

It was a term of the agreement that each was to contribute one acre. It was a further term of the agreement that the vendors were to do succession of the Estate of the said Tabitha Waruguru and thereafter transfer the one acre each. He stated that the defendant and her sister did succession and each succeeded and obtained title deeds. When he bought the land, he took possession and started utilizing the portion given.

He even constructed a house. According to him, the defendant got title to her portion measuring 13 acres on 18.3.2004 and that she has refused to take him to the Land Board so that he can be given a portion of one acre she bought from her. He stated that he had sued the defendant at Murang'a Magistrate's Court in PMCC No. 43 of 2006 where he had sought orders *inter alia* for transfer of 2 acres out of Land Parcel No. KIINE/SAGANA/443. The plaintiff further stated that the suit was struck out and he filed an Appeal in the High Court at Nyeri

and the appeal was also dismissed on 24.5.2018. He also stated that the defendant took him to the Land Disputes Tribunal where tables turned against her and the tribunal ordered her to give him his land. The defendant lodged an appeal to the Provincial Land Disputes Appeals Committee in Nyeri where the decision was overturned. Even with all these attempts to have the defendant give him his land and the defendant resisting every effort and refusing to transfer the same, he has remained in the disputed land since he took possession. The plaintiff said that the defendant's sister Milka has given him the one acre he bought from her but the defendant has refused to transfer the remaining one acre to make a total of two (2) acres. However, he stated that he is living in the two acres with his family and that he has given his sons portion to build in the two acres. He wants this court to order the defendant to give him the one acre he bought.

Defendant's summary of Facts

The Defendant gave sworn testimony and stated that it was one Milka Muthoni Ngigi who was selling land to the plaintiff as reflected also in an agreement dated 30th March 1997 that the plaintiff herein would bury the remains of his wife in the portion that would be registered in the name of Milka Muthoni James after succession. The defendant also testified that at the time the plaintiff took possession, the land in dispute was still in the name of the deceased and therefore Adverse Possession would not arise.

The defendant also stated that the plaintiff was given possession with consent and as such the possession was not hostile or adverse. She stated that the plaintiff was a licensee as he admitted in his evidence on oath that he was given possession voluntarily and that he had no problem with anyone until the court case started. The defendant further stated that after succession, L.R. KIINE/SAGANA/443 was partitioned and she was registered as proprietor of Land Parcels No. KIINE/SAGANA/3362 on 18th March 2004 and that it was then that she discovered that the plaintiff had encroached on a small portion of her land. She stated that it was after she asked the plaintiff to move from her land in 2006 when he filed a case in Murang'a being PMCC No. 42 of 2006 which was decided in her favour. The plaintiff was aggrieved and filed an Appeal in Nairobi being HCCA No. 11 of 2008.

The defendant thereafter commenced proceedings to evict the plaintiff from the suit land through a Land Dispute Tribunal Case No. 3 of 2009 (Wang'uru). The elders ordered her to transfer one (1) acre to the plaintiff. She then moved by way of Judicial Review Misc. Application No. 15 of 2004 where the award was quashed. The defendant then filed PMCC No. 89 of 2016 (Wang'uru) seeking for eviction of the plaintiff from her land. The suit was consolidated with the instant suit and deemed as a counterclaim.

Legal Analysis and Determination

I have considered the pleadings in this suit which is the running file and the pleadings in PMCC No. 89 of 2016 (Wang'uru) which was consolidated with this case. I have also heard the evidence adduced by the parties and the material produced and relied on by both sides. I have also considered the submissions by counsels. The plaintiff's claim is based on the doctrine of Adverse Possession while the defendants claim is for a declaration that the plaintiff is an unlawful occupier of Land Parcel No. KIINE/SAGANA/3362 and an order for his eviction. The defendant is also seeking an order for mesne profits and costs of the suit. Before identifying the issues for declaration in the consolidated suits, the following are not in dispute.

1. The plaintiff took possession or portion of the suit Land Parcel Number KIINE/SAGANA/443 (now sub-divided) on the strength of a sale agreement dated 13th January, 1997.
2. The plaintiff bought a portion of 2 acres from the land referred in paragraph (1) above.
3. At the time of the purported sale, the Land Parcel No. KIINE/SAGANA/443 was registered in the name of deceased person namely TABITHA WARUGURU MICERE.

Issues for Determination

The following can be gleaned from the pleadings of the parties as the possible issue for determination in this consolidated suit.

- 1. Whether the plaintiff has acquired a portion of one (1) acre from the defendant's Land Parcel Number KIINE/SAGANA/3362 by Adverse Possession.***
- 2. If the answer to paragraph (1) above is in the negative, whether the plaintiff should be evicted from the defendant's Land Parcel No. KIINE/SAGANA/3362?***
- 3. Who will bear the costs of this suit***

1. Whether the plaintiff has acquired a portion of one (1) acre from the defendants Parcel of Land No. KIINE/SAGANA/3362?

In the case of *LOISIA LETOLUAI VS KAMOGI (2020) e KLR*, cited by counsel for the defendant, the court held as follows:-

26. "It is trite law that to prove that adverse possession of 12 years, the burden is on the person claiming to be entitled to the land by Adverse Possession to prove not only the period but also that possession was without the owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are, inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. The elements of Adverse Possession that Respondent has to prove and which have been denied include, open, exclusive and hostile possession of the land claimed....."

The plaintiff in his evidence stated that on or about 13th January 1997, he entered into an agreement with the defendant and her step-mother

one Hannah Keru Micere (now deceased) whereby they both agreed to sell to him one (1) acre each out of their share in Land Parcel Number KIINE/SAGANA/443 (now sub-divided). It is the plaintiff's evidence that the said parcel of land No. KIINE/SAGANA/443 was registered in the name of one Tabitha Waruguru Micere who was deceased and that the purpose of the purported sale by the defendant and Hannah Keru Micere (now deceased) was to get money for succession of the estate of the registered owner, Tabitha Waruguru Micere (deceased). Applying the elements of Adverse Possession, it is clear from the evidence that the possession by the plaintiff of the suit property is not hostile as the plaintiff was given possession on the strength of a purported sale agreement dated 13th January, 1997. The possession by the plaintiff is therefore with permission and not hostile. That ground alone in my view disqualifies the plaintiff from the claim of Adverse Possession. I find it a waste of judicial time to go into the other elements of Adverse Possession. Suffice to add

that when the plaintiff and the two vendors purported to enter into a sale agreement dated 13th January, 1997, they knew that the property was registered in the name of a deceased person namely Tabitha Waruguru Micere (deceased). Selling the property of a deceased person is a criminal offence as was held in the case of *GITAU and 2 OTHERS VS WANDAI & 5 OTHERS (1989) KLR 23* where **Tanui J**, (as he then was) stated as follows:-

“According to Section 45 of the Law of Succession Act, Cap 160 intermeddling with the property of a deceased man consists of taking possession, disposing or otherwise intermeddling with any free property”.

I agree with the decision by the Learned Judge. The plaintiff in his evidence stated that he has lived in the suit property from 1997 (24 years) and has done developments on the suit property. If the manner in which the plaintiff took possession of the land was unlawful, this court cannot sanitize such unlawful activities.

(2) Whether the plaintiff should be evicted from the deceased's Land Parcel Number KIINE/SAGANA/3362?

I have stated hereinabove that the plaintiff has not proved his claim of Adverse Possession over the defendant's Land Parcel No. KIINE/SAGANA/3362. To the contrary, his actions of taking possession of a property belonging to a deceased man is tantamount to a criminal offence punishable in law. The plaintiff cannot therefore seek protection from a court of law which is charged with the duty of safeguarding the very same law.

The upshot of my analysis is that the defendant's counter-claim succeeds and the same is allowed. Consequently, I enter judgment in the following terms:-

- 1. The plaintiff's Originating Summons dated 24th June, 2016 is hereby dismissed with costs.*
- 2. A declaration that the plaintiff is unlawfully occupying Land Parcel No. KIINE/SAGANA/3362.*
- 3. An order for eviction of the plaintiff, EMMANUEL NJOGU MUCHINA from the defendant's Land Parcel Number KIINE/SAGANA/3362.*
- 4. The plaintiff to pay the defendant mesne profits assessed at Kshs. 100,000/= plus interest from today till payment in full.*
- 5. The costs of the suit and the counterclaim to be borne by the plaintiff.*

JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 18TH DAY OF JUNE, 2021.

.....
E.C. CHERONO

ELC JUDGE

In the presence of:-

- 1. Ms Makazi holding brief for Wangechi Munene for Plaintiff*
- 2. Ms Githaiga for the Defendant*
- 3. Kabuta – Court clerk.*