



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 39 OF 2018 (0S)

IN THE MATTER OF LAND PARCEL NYAKI/KITHOKA/xxxx & SUBSEQUENT SUBDIVISION NO. NYAKI/KITHOKA/xxxx
&xxxx

REGISTERED IN THE NAMES OF WILLIAM PETER MURIUNGI

HENRY KATHIORA MURATHA.....1ST PLAINTIFF

JULIUS BUNDI RIMBERE.....2ND PLAINTIFF

VERSUS

FLORENCE GACHERI MURIUNGI (Sued as the administrator of the

estate of WILLIAM PETER MURIUNGI (Deceased)DEFENDANT

JUDGMENT

1. The Plaintiffs filed an Originating Summons under Section 38 of the Limitation of Actions Act, Order 37 rule 7 of the Civil Procedure Rules and Section 1A & 1B of the Civil Procedure Rules seeking entitlement and registration of the land parcels nos. NYAKI/KITHOKA/2273 & 2274 respectively into their names by way of adverse possession.

2. The defendant filed a Replying affidavit on 3.12.2018 in which plaintiffs' case is denied.

The Plaintiffs case

3. The case of the plaintiffs was advanced by the two plaintiffs. PW1, the 2nd plaintiff Julius Bundi Rimberere relied on the contents of the Originating Summons dated 18.9.2018, the affidavit in support thereof and his further affidavit dated 20.12.2018. He also produced the 7 annexures to their supporting affidavits JBR 1 a & b to JRB5 as their exhibits 1-7. The said documents are;

a) Sale agreement dated 8/06/2002

a. Green card for NYAKI/KITHOKA/xxxx

b. Mutation form

c. Certificate of official search for title no NYKI/KITHOKA/xxxx

d. Certificate of official search for title no NYKI/KITHOKA/xxxx

e. Amended certificate of confirmation of grant in succession no 407 of 2010.

f. Minutes dated 28/7/2016

4. Pw1 avers that he knows the defendant as she is the wife and administratrix of the estate of William Peter Murungi (deceased) who during his lifetime particularly on 8/6/2002 entered into a sale agreement with pw1 for sale of ½ an acre of land which was to be excised from the parent land known as NYAKI/KITHOKA/1973. They paid a down payment of Kshs. 250,000 and took possession cultivating the same and

building a foundation for a storey building and are still in exclusive occupation of the land. Each of the plaintiffs occupies ¼ of an acre which they developed during the deceased's lifetime.

5. They later paid Kshs, 220,000 leaving a balance of Kshs. 30,000 which was to be paid upon transfer and issuance of title. The deceased caused the land to be surveyed, subdivided, registered and the resultant titles were issued with the plan that the 1st plaintiff was to get parcel no. 2573, the 2nd plaintiff no. 2574 and the deceased was to retain 2575. All that was pending was the transfer of the land to the plaintiffs when the deceased passed on. The defendant was privy to the unfolding facts, was kept informed and never raised an issue at the board for sub division.

6. The plaintiffs later learnt that the defendant had secretly applied for letters of administration for her late husband's estate (the seller). They moved the court in the succession matter stopping the distribution of the properties in question pending the determination of this suit.

7. Pw1 avers that they have been in occupation of the suit parcels since 2002 which occupation has been continuous, unhindered, open and notorious.

8. On cross examination, pw1 stated that they were to pay a balance of Kshs. 250,000 which they paid in the presence of defendant on different dates though he has no proof of the said payments. They moved into the land in the year 2002 and the deceased never asked them to leave but he also never gave them the title and that from 1/9/2002 they were staying on the land without his consent. It was the deceased who stated that the Kshs. 30,000 should be paid upon the processing of the title deed and so they were waiting for this process. They learnt about the succession cause after the grant was issued and filed this suit as their claim is for land.

9. On re-examination, Pw1 said that he has been on the land via adverse possession as consent lapsed on 31/8/2002 thus a period of over 18 years. He urges the court to look at the succession file of 407/2010 and see that instead of being given the land it was given to the defendant and her children yet they are the ones in occupation.

10. Pw2, the 1st plaintiff, Henry Kathiora Muratha fully associated himself with the evidence of the 2nd plaintiff. He also relied on his affidavit dated 18.9.2018 as his evidence. He contended that his parcel is 2573 and he took possession of the same when it was in the parent parcel No. xxxx way back in the year 2002 and since then, he has been in continuous occupation of the suit land.

11. On cross examination, pw2 stated that he entered the suit land in 2002 with permission from the deceased until the agreement expired, there was a time limit and the deceased never revoked the consent nor did he tell him that he had revoked consent. The defendant was a witness to the sale agreement and she was the one who took the money, she gave her consent but started complaining about the amount of money. He has paid the balance though he has not presented any evidence to that effect. The balance of Kshs. 30,000 was to be paid out at the time of processing title which was not done.

12. On re-examination he averred that though he entered into the land with consent of the seller, the said consent expired on 31/8/2002 as the title to the land was not availed as agreed. Henceforth, he was on the land adversely. The defendant was complaining demanding the Kshs. 30,000 and instead of giving them the land, she filed the succession cause no. 407/2010 giving the land to herself and her 2 sons. The deceased was in breach of the contract and so are the administrators of his estate.

Defence case

13. When it was the turn of the defence to give evidence, counsel for defendant made an application to rely on the affidavit of 3.12.2018 without calling the said defendant on the witness stand. Counsel for the plaintiffs responded that they had duly filed a further affidavit in response to the aforementioned affidavit of defendant hence they would not object to the application made thereof.

14. Defendant's case as contained in that affidavit of 3.12.2018 is that plaintiffs had admitted having not paid the full purchase price. Thus a claim for adverse possession cannot co-exists with a claim for a purchaser's interest. That time for adverse possession has not begun to run on account that the full purchase price was never paid. Further the entry into the land was with her late husband's consent thus there is no entry hostile to the true owner that would sustain a claim for adverse possession. Mere possession alone does not confer title under the doctrine of adverse possession and the plaintiffs have failed to satisfy the conditions precedent for adverse possession. She denies having applied for the letters of administration in secret.

Submissions

15. The Plaintiffs' filed their submissions dated 30th March 2021 and further submissions dated 8th April 2021 averring that the issue is whether the plaintiffs are in possession of the suit land without the defendants permission and for how long? That there was land control board consent to transfer the suit land in accordance with Section 8(1) of the Land Control Act, which consent is essential in agricultural land failure of it makes the entire agreement void. They have lived on the suit land since 31st August 2002 with no interference from anyone and have applied to be declared adverse possessors. They have established and proven their claim and pray it be allowed with costs.

16. The plaintiffs relied on the following cases; **Samuel Miki Waweru V Jane Njeri Richu [2007]eKLR, In the matter of ascertainment of ownership of parts of L.R NO. 3036/5 [2012]eKLR, David Kiriinya Michael v Jane Rose Kinya [2018] eKLR and Joseph Evans Okwany & Another V Roslida Mbaja Malawo (2018) eKLR.**

17. The defendant submitted that the length of stay cannot entitle a claimant to acquisition of title by adverse possession as the said possession must be adverse. The plaintiffs have not completed payment on the sale agreement, hence they committed a material breach of the agreement. The plaintiffs cannot assert that they have obtained the suit land by adverse possession because they are purchasers. Further, the lack of land control board consent does not apply to the contract itself. She urges the court to dismiss the suit with costs.

18. The defendant relied on the following cases; Samuel Miki Waweru V Jane Njeri Richu [2007]eKLR, James Maina Kinya V Gerald Kwendaka [2018]eKLR, Wambugu V Njuguna (1983) KLR 172, John Ndungu Kipsoi V Samwuel Chepkulul & Another [2018]eKLR, Mtana Lewa V Kahindi Ngala Mwangandi [2015]eKLR, Mageta Enterprises Limited V Tilak Company Limited [2020]eKLR and Gabriel Mbui V Mukindia Manya [1993]eKLR.

Analysis and determination

19. I have read and carefully considered the pleadings, the evidence and submissions made herein. The issue for determination is **whether the Plaintiffs have acquired title to the suit parcels Nyaki/Kithoka xxxx and xxxx by way of adverse possession.**

20. Adverse possession was described in Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

21. The plaintiffs’ claim is that they entered into possession of the land in pursuance to an agreement of sale and have been in possession of the same since the year 2002. In Wambugu v. Njuguna [1983] KLR 172, which was quoted with approval in Wilfred Kegenye Babu v Henry Mose Onuko [2019] eKLR the Court held in part:-

“Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favor 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”

22 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”.

23. The plaintiffs claim to have paid the balance of the purchase price though there is no tangible evidence to that effect. It follows that the claim under adverse possession will have to run from the time the contract became null and void. In the case of Erick Chepkwony Aengwo V Jonathan Rutto Kibiesang [2013]eKLR, the court considered the case of Waweru v Richu 2007 1 EA where it was held;

“That 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.....”.

24. I have scrutinized the agreement made on 8.6.2002 which stipulates that the plaintiffs were to pay the balance of ksh.250 000 on or before 31.8.2002, while the vendor was to avail duly executed forms for transfer of the land on or before the aforementioned date of 31.8.2002. There is no addendum or amended agreement to the one of 8.6.2002. This means that there was no valid agreement subsisting after 31.8.2002. I am therefore in agreement with plaintiffs that the permission to be on the land had lapsed by 1.9.2002.

25. Further, the title to the suit parcels were issued to the deceased on 1.2.2008, and up to the time of his death in year 2009, there is nothing to indicate that the vendor intended to transfer the suit parcels to the plaintiff. It is therefore apparent that indeed the occupation of the land by the plaintiffs was no longer with the permission of the land seller.

26. A perusal of the succession cause file no 407/10 in Meru (as per directions given herein on 23.2.2021) reveals that defendant had way back in year 2010 petitioned to administer the property of her husband in which vide a grant dated 6.3.2017, the suit parcels were awarded to her along with Victor and George Murungi. This again buttresses the point that she too was not recognizing plaintiffs’ interests on the suit land.

27. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, I do opine that the plaintiffs have proven their case, which is allowed in the following terms;

1. HENRY KATHIORA MURATHA and JULIUS BUNDI RIMBERE the plaintiffs herein have become entitled by adverse possession to ¼ acres each of parcels no. NYAKI/KITHOKA/xxxx & xxxx respectively.

2. An order is hereby issued for HENRY KATHIORA MURATHA to be registered as the sole-proprietor of parcel NYAKI/KITHOKA/xxxx & JULIUS BUNDI RIMBERE to be registered as the sole proprietor parcel NYAKI/KITHOKA/xxxx by the Land Registrar, Meru Central District.

3. The Defendant is hereby ordered to execute all the requisite instruments and/or documents to effectuate transfer to the Plaintiffs of Land parcels Nos. NYAKI/KITHOKA/xxxx & xxxx respectively and in default, the Deputy Registrar is hereby empowered to execute the transfer instruments on their behalf.

4. The defendant shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 22ND DAY OF SEPTEMBER, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a notice issued on 3.9.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE