



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAKURU

ELC CASE NO. 124 OF 2019 (OS)

PETER CHEGE KIRUNGO.....PLAINTIFF

VERSUS

FRANCIS NGENE GICHUI.....1st DEFENDANT

EPHANTUS JANDI MWAITSI.....2nd DEFENDANT

NAKURU WORKERS HOUSING COOPERATIVE SOCIETY LIMITED.....3rd DEFENDANT

PETER KARANJA MWANIKI.....4th DEFENDANT

JUDGMENT

Introduction

1. By an Amended Originating Summons dated 16/3/2021 the plaintiff seeks for judgment against the defendant for:

- a. **The Plaintiff be declared to have become the legal owner entitled by adverse possession having occupied, cultivated and developed the said Parcel of Land continuously and uninterrupted for over twenty-five (25) years since 27th August, 1991 and as the sole proprietor of All That parcel of land comprised in Bahati/Engoshura Block 1/127 situated in Nakuru.**
- b. **The Honourable Court do direct that Nakuru District Land Registrar rectify the Land Register accordingly and the Plaintiff be registered as the sole proprietor of the said parcel of land namely BAHATI/ENGOSHURA BLOCK 1/127 in place of the above named 4th Defendant in whose favor the land is currently registered.**
- c. **The last original Title Deed in respect of BAHATI/ENGOSHURA BLOCK 1/127 which is with the 4th Defendant be dispensed with.**
- d. **Costs of this application be provided for.**

2. The original Originating Summons is supported by an affidavit sworn on the **14th October 2019** by the plaintiff. When the Originating Summons was amended on **16th March 2021** it was supported by another affidavit sworn by the plaintiff on **16/3/2021**. A supplementary affidavit in further support of the originating summons, also sworn by the plaintiff, was also filed on **19/4/2021**.

3. The 1st defendant filed appearance through the firm of Njeri Njagua & Co advocates on **8/11/2019** but failed to file any defence to the claim. However, the firm of Wachira Waiganjo & Co Advocates subsequently filed a notice of appointment 1st, 2nd and 3rd defendants on **30/1/2020** and the same was served upon the plaintiff's advocate's firm on **31/1/2020**. The hearing scheduled for **18/10/2021** was made known to the two advocates' firms by way of service of the hearing notice dated **8/10/2021** and they duly acknowledged by affixing their respective stamps thereon. The affidavit of service filed on **1/10/2021** established that the 4th defendant was served with the amended Originating Summons but he filed no response thereto.

4. I have perused the Originating Summons which is unopposed. The evidence in support of the motion is that the plaintiff bought the land from the first defendant, who had purchased the same from the 2nd defendant earlier, in **1991**, settled thereon and developed it extensively. He and his family have lived peacefully and without secrecy on the land and without any interruption for a period of about **25** years. The defendants have never interfered with his occupation of the suit land. The plaintiff does not pay the defendants any rents or licence fees or

any other consideration. A copy of the green card exhibited in one of the supporting affidavits shows that the title to the suit land is currently registered in the name of the 4th defendant.

5. I have examined the documentary evidence presented by the plaintiff. The 1st defendant is claimed to have sold the suit land to the plaintiff vide an agreement produced as **PEXh 1**. It shows that the 1st defendant's name appeared on the certified area list (**PEXh 3**). However it was not reflected on the green card (**PEXh 4**) which shows that the first registered owner of the suit land on **4/5/2000** was one *Mutheki Muchonjoru* followed by the 4th defendant on **2/2/2001**.

6. The vital question that arises is whether the plaintiff has established that he had the requisite *animus possidendi* to entitle him fully to the relief sought.

7. The plaintiff has given evidence that he has maintained the boundary and the fence to the suit property. He has also maintained the premises therein in habitable standards. The photographs **PEXh 2(a) – (d)** demonstrate the extent of developments erected on the suit land by the plaintiff. The structures appear quite old. Besides living openly on the land the developments the plaintiff has established on the suit premises are testimony to his desire to assert himself against the interests of the registered owner of the land. The plaintiff joined the 1st, 2nd and 3rd defendants to the suit though they were not the registered owners. He also joined the 4th defendant as proprietor. The registration of the 4th defendant as proprietor in the year **2001** found the plaintiff in occupation of the land, yet he has never taken any action to remove the plaintiff from the land. He has also failed to defend this suit despite proof of service by way of a sworn affidavit of service. I consider that failure to defend the suit as evidence of further waiver of the 4th defendant's right and interests in the suit land; however I also consider it to be the case that the registration of the 4th defendant having come after the plaintiff took possession he must have been aware of the land he was registered as proprietor of and that the plaintiff was in possession thereof yet he took no action to remove the plaintiff therefrom.

8. From the evidence before this court I have no doubt that the plaintiff has been in quiet and uninterrupted possession of the suit premises for a lengthy period and that he has established *animus possidendi* against the registered proprietor and the whole world. He treated the suit land as his own property.

9. None of the defendants despite being served opposed the suit. Indeed it would appear that the 1st – 3rd defendant were inclined to enter into a consent with the plaintiff to settle this matter save for a technicality which arose regarding representation and the 4th defendant never filed any response even after being served with the originating summons.

10. Consequently I find that the plaintiff has established his claim on a balance of probabilities and I allow his claim and I issue the following final orders:

a. It is hereby declared that the plaintiff has been in quiet, non-secretive and uninterrupted possession of the premises known as Bahati/Engoshura Block 1/127 for a period in excess of 12 years and he has obtained prescriptive rights over the said land and is thus entitled be registered as the legal proprietor of the land comprised in Bahati/Engoshura Block 1/127 by way of adverse possession;

b. The Land Registrar, Nakuru shall rectify the Land Register accordingly and he shall cancel the registration of the 4th defendant in whose favor the land is currently registered and thereafter register the Plaintiff as the sole proprietor of the said parcel of land namely Bahati/Engoshura Block 1/127 in place of the 4th Defendant, Peter Karanja Mwaniki;

c. In effecting the cancellation and registration as instructed by order no (b) herein above the Land Registrar shall dispense with the production of the last original Title Deed in respect of Bahati/Engoshura Block 1/127 which is with the 2nd and 3rd Defendant be dispensed with;

d. Each party shall bear their own costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 23RD DAY OF NOVEMBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.