



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 156 OF 2017

MOSES MUCHIRA NJERU.....1ST PLAINTIFF

STEPHEN MUGO MUTHII MWATHA.....2ND PLAINTIFF

VERSUS

FRANCIS MUREITHI.....DEFENDANT

JUDGMENT

Introduction

1. The Plaintiffs approached this Honourable Court by way of Originating Summons dated and filed on 20th November, 2017 and 21st November, 2017 respectively. The same is brought under *Section 38 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya, Order 37 Rule 7 of the Civil Procedure Rules and Section 28(h) of the Land Registration Act No. 3 of 2012.*

2. In the said summons the Plaintiff are seeking determination of the following issues:

- a. That the applicants be declared to become entitled by adverse possession of over 12 years to Land Parcel Number Mwea/Murinduko/824 registered under Land Registration Act No. 3 of 2012.**
- b. That the applicants be registered as the sole proprietors of Land Parcel Number Mwea/Murinduko/824.**
- c. That the Land Registrar Kirinyaga do register the applicants as proprietors of Land Parcel Number Mwea/Murinduko/824.**
- d. That the respondent be ordered to pay the costs of this suit to the applicants.**

3. On 23rd May 2018, this Honourable Court consolidated this matter with **Wangu’ru SPMCC Case Number 182 of 2017**. In the said case the Defendant herein has sued the Plaintiff’s herein by way of a plaint dated and filed on 1st December, 2017. The Defendant herein sought that the Land Registrar Kirinyaga County be ordered to lift the restriction against his parcel of land Mwea/Murinduko/824.

4. The matter was heard on diverse dates and on 4th March, 2021 by consent of the parties through their advocates on record they agreed to file submissions.

1st Plaintiff’s Case

5. To support the originating summons the 1st Plaintiff swore his Supporting affidavit on 20th November, 2017. During hearing he testified as follows:

6. That Land Parcel Number Mwea/Murinduko/824, herein after referred to as the “suit land”, is currently registered in the name of the Defendant herein.

7. That he bought a one acre out of the suit land from the defendant’s deceased father, Njogu Rubiu Mwangi in the year 1994 upon entering into a sale agreement dated 16/1/94. He produced it as his Exhibit **No. 1**.

8. That he and the vendor completed the sale transaction but he was not given a title deed and the land was not transferred to him.
9. That he took possession of the portion he bought immediately in the year 1994 whereby he has planted miraa, maize, trees, bananas etc. He also testified that he lives on the suit land with his family. He produced the photographs annexed to his supporting affidavit as his **Exhibit No. 2**.
10. That from the year 1994 to date is more than 20 years and had never been asked to vacate that property.
11. That the vendor had a family however they were not living in the suit land and the defendant did not inform him when he was filing succession for the deceased.
12. That he filed a caution after he came to learn that the defendant was claiming that the land belonged to him and wanted to sell it to third parties.
13. He therefore prayed for this Honourable Court to declare that the one acre out of the suit land belonged to him and that he be awarded costs for the suit.

2nd Plaintiff's Case

14. To support the Originating summons, the 2nd Plaintiff swore his Supporting affidavit on 20th November, 2017. During the hearing, he adopted it as his evidence and produced the documents annexed thereto in evidence as Exhibits Nos. 1, 2, 3 and 4. The contents of his affidavit were as follows:
15. That the original owner of the suit land, was Njogu Rubiu Mwangi. The suit land is currently registered in the name of his son Njogu Rubiu Mwangi, the Defendant herein. The defendant was registered as proprietor on 11th October, 2017.
16. In the year 1998, he bought a portion of 0.80 hectares from the deceased and took possession immediately and started cultivating therein. Upon clearing the payment of the purchase price in the year 1999, the deceased obtained Land Control Board consent to transfer.
17. He further stated that in the month of October 2017, the Defendant started bringing people on the suit land with the intention of selling it and on 16th October 2017, he brought a surveyor on the ground who subdivided the land.
18. Further, he stated that the defendant intended to evict him and the 1st plaintiff from the suit land where he has lived with the knowledge of the defendant since 1998.
19. He also stated that he had become entitled to the portion of 0.8ha out of the suit land by way of adverse possession for having lived on the said portion for over 19 years without any interference. He also stated that if evicted he would stand to suffer loss and damage.
20. He therefore prayed for this Honourable Court to allow his Originating Summons and grant the orders sought as it was meted and just.

Defendant's Case

21. The Defendant opposed the Originating Summons by way of a replying affidavit sworn on 16th July, 2018.
22. In the said Affidavit, he stated that upon the demise of his father on 3rd May, 2009, he filed a Succession Cause No. 13B/2016 at Wang'uru Law Courts and was issued with letters of administration which were confirmed on 28th September, 2017.
23. He stated that he is currently the registered proprietor of the suit land measuring 1.94 Ha. which he got through inheritance from his deceased father upon following the relevant legal procedures as stipulated in law.
24. He further stated that after his inheritance, he transferred relevant shares to everybody who had a sale agreement with his father prior to his death and that there was no agreement between the plaintiffs and the deceased.
25. He stated that upon being issued with the suit land's title deed on 18th October, 2017 he filed for removal of the caution on 15th December, 2017.
26. He stated that the plaintiffs had never lived on the suit land and that their claim that they have been living there for the last 23 years was baseless. He insisted that it was him who resided on the suit land as it was given to him by his father.
27. He deposed that the consents entered by the deceased and the applicants was a forgery as it is not signed or registered and therefore their claim for adverse possession was misconceived. He prayed that the Originating Summons be dismissed with costs.

Plaintiffs' Submissions

28. The plaintiffs through their advocates on record filed their submissions dated 20th April, 2021 on 5th March, 2021.

29. They submitted that they had demonstrated that they have used the suit land without force, without secrecy and without persuasion (*nec vi nec claim nec precario*) for the prescribed period of over twelve (12) years without interruption. They relied on the decision of **Mary Njeri & another Vs Samuel Chomba [2020] e KLR** whereby this Honourable Court held that:

“It is now a well settled principle that a party claiming Adverse possession ought to prove that his possession was “nec vi, nec clam, nec precario” which is translated to mean peaceful, open and continuous. The possession should not have been through force nor secrecy and without the authority or permission of the owner. The claimant must show that they have been in continuous possession of the land for 12 years or more and that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.”

30. They further submitted that they had proved their case on a balance of probabilities and prayed that the court grants them the orders as prayed in their originating summons with costs to the applicant.

Defendant’s Submissions

31. The defendant filed his submissions dated and filed on 21st May, 2021.

32. He submitted that the plaintiffs’ claim for adverse possession was premature as he acquired title of the suit land on 18/10/2017 and thus one year had not even lapsed when the suit was filed against him.

33. He also submitted that the agreements brought to court by the plaintiffs were fake and aimed at grabbing land forcefully from the defendant.

34. Further it was submitted that since they did not receive the consent from the Land Control Board then their agreements became null and void. Despite this they remained on the suit land but did not say under what colour of right they continued to be in possession of the suit land.

35. The Defendant further submitted that under Africa Socialism relatives, friends, clansmen, the landless and increasingly purchasers under annulled and avoided agreements and transactions are allowed to remain in possession of one’s land for indefinite lengths of time for as long as the owner does not immediately require the land. Thus he urged the court not to punish the good naturedness and reward law-violators and usurpers.

36. He relied on the cases of **Gabriel Mbui Vs Mukindia (1993) e KLR** and **Richard Wefwafwa Songoni Vs Ben Munyifwa Songoi (2020) e KLR**. He prayed that the claim for adverse possession fails and that his claim to remove the caution be allowed with costs.

Analysis

37. I have read and considered the opposing submissions of the parties herein. The parties did not file their issues for determination, I have therefore deduced the following as the probable issues for determination:

a. When did time start running?

b. Whether the plaintiffs have established that they had acquired the suit property by adverse possession?

c. Whether the caution registered against the suit land should be removed?

d. Who should bear the costs of the suit?

When did time start running?

38. The Plaintiffs testified that they took possession of the suit land in the years 1994 and 1998 respectively. This was upon entering into diverse sale agreements with the defendant’s deceased father.

39. The 1st plaintiff furnished a sale agreement dated 16th January, 1994 as evidence that he entered into an agreement with the deceased. The 2nd plaintiff furnished an acknowledgment slip to prove that there was an agreement between the deceased and himself.

40. From the materials before this Honourable Court, there is no doubt that the 1st plaintiff entered into sale agreements with the deceased. The defendant attempted to challenge the veracity of the Sale Agreements stating that they are forgeries. The defendant cannot be heard challenging the validity of a sale agreement on grounds of fraud without an expert opinion from a document examiner that the parties did not execute the same or that the signature thumb print appearing thereon do not belong to them.

41. The defendant’s counsel on the other hand submitted that the suit herein was premature as it was barely one (1) year since the defendant herein was registered as the proprietor of the suit land. The defendant testified that he had obtained the suit land upon confirmation of grant of his deceased father’s estate.

42. From the Green Card which was produced by PW1 as Exhibit No. 3, indeed the Defendant was registered as proprietor of the suit land on 11th October, 2017 and title deed issued to him on 18th October, 2017.

43. It is also evident from the said green card that the Defendant's was the previous registered proprietor of the suit land.

44. In as much as this suit is not meant to enforce the agreements between the plaintiffs and the deceased, it is noteworthy that from the materials furnished before this Honourable Court that the Land Control Board Consent to transfer the suit land to them was not obtained. This was conceded to by all parties in this suit. It therefore means that the said agreements became null and void upon the lapse of the six months as per **Section 6 (1) of the Land Control Act** with the consequences stipulated in **Section 22 of the Land Control Act**. This is to say that for the 1st Plaintiff, his agreement became null and void on or about 16th July, 1994 and for the 2nd Plaintiff on or about 2nd May, 2000.

45. In the case of **Samuel Miki Waweru Vs Jane Njeri Richu [2007] e KLR**, the Court of Appeal held that:

“Thus, the agreement of sale in this case was terminated for all purposes by the operation of law and the continuation of possession by the respondent thereafter could not be referable to the agreement of sale or the permission of the original owner. It was an independent possession adverse to the title of the original owner. In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6(1) of the Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”

46. Following the above authority, I find that the continued possession of their distinct portions of the suit land by the plaintiff's became illegal from the time their agreements became void by operation of law. It thus follows that time started running on 16th July, 1994 for the 1st Plaintiff and 2nd May, 2000 for the 2nd Plaintiff and not on 11th October, 2017 when the Defendant was registered as the registered proprietor of the suit land. It therefore goes without saying that the submission by the Defendant's Counsel that this suit is premature fails.

Whether the Plaintiffs have established that they had acquired the suit property by adverse possession

47. In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal stated that a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”

48. The 1st plaintiff testified that upon taking possession of 1 acre out of the suit land, he has developed it by planting miraa, maize, trees, bananas etc. He also testified that he lives on the suit land with his family. He produced the photographs annexed to his Supporting affidavit as his Exhibit No. 2. He stated that his occupation was never interrupted even by the deceased during his life time.

49. I therefore find that the 1st plaintiff has been in exclusive possession of the land openly and as of right without interruption. By the time the deceased passed away on 3rd May, 2009, the 1st plaintiff was in occupation of 1 acre out of the suit land for a period of approximately 15 years. It is therefore my view that by the time the deceased died, the right to Adverse Possession of the 1 acre out of the suit land had already crystallized and vested in the 1st plaintiff and was not available for distribution as part of the deceased's estate. This was the position in the case of **Joseph Kamau Gichuki (Suing as the Administrator of the Estate of Gichuki Chege (Deceased) Vs James Gatheru Mukora & another [2019] e KLR** where the Honourable Court held that:

“.... It follows therefore that, as at the time the defendants were issued with a grant of letters of administration in respect of the estate of Mukaria in 1992, their claim over the suit property was already time barred, the deceased having occupied the suit property continuously for over 18 years....I am in agreement with the plaintiff that as at the time the defendants obtained grant of letters of administration in respect of the estate of Mukaria and purported to transfer the suit property to themselves by transmission, the suit property was not available for distribution amongst the beneficiaries of the estate of Mukaria since Mukaria's title over the property had been extinguished under section 17 of the Limitation of Actions Act, Chapter 22 Laws of Kenya and the property acquired by the deceased by adverse possession. The registration of the defendants as the owners of the suit property was therefore unlawful.”

50. Due to the foregoing, I am persuaded that the 1st plaintiff has acquired 1 acre out of the suit land by way of adverse possession.

51. On the part of the 2nd plaintiff, he stated that he took possession of 0.80 hectares out of the suit land in the year 1998 upon entering into an agreement with the deceased's father and began cultivating therein. He also stated he lived thereon and produced a photograph marked as “**SMMM3**” as evidence thereof. I find that the 2nd plaintiff has been in exclusive possession of 0.80 Ha. from land parcel No. Mwea/Murinduko/824 by way of Adverse possession.

52. I therefore find that the 2nd plaintiff has proved his claim through photograph which he produced in his evidence and also the testimony he gave in court. This being the case, I accordingly find that the 2nd plaintiff is entitled to the portion he has been in exclusive possession openly and as of right without interruption. His claim thus succeeds.

Whether the caution registered against the suit land should be removed

53. **Section 71 of the Land Registration Act No. 3 of 2012** provides that:-

“(1) A person who — (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act; (b) is entitled to a licence; or (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.”

54. In **Wangu’ru SPMCC Case Number 182 of 2017**, the defendant stated that the plaintiffs herein had lodged a caution which forbid his use of the suit land.

55. The Plaintiffs herein admitted lodging a caution over the suit land so as to protect their interests as beneficial owners of the suit land as the Defendant had threatened to evict them and sell the suit land.

56. From the evidence adduced herein it is evident that the registration of the caution was justifiable to protect the interests of the plaintiffs who bought distinct portions out of the suit land from the defendant’s deceased father. Upon registering the caution, they filed the suit herein which shows that the same was registered in good faith.

57. I therefore find that the Defendant did not make out a case to warrant the orders sought in **Wangu’ru SPMCC Case Number 182 of 2017**.

Conclusion

From the foregoing, I enter judgment in the following terms:-

a. The 1st Plaintiff has proved his case on a balance of probabilities and therefore the Originating Summon partially succeed as follows:-

i. That the 1st Plaintiff is entitled by adverse possession of over 12 years to 1 acre out of Land Parcel Number Mwea/Murinduko/824 registered under Land Registration Act No. 3 of 2012.

ii. That the 1st Plaintiff be registered as the proprietors of 1 acre out of Land Parcel Number Mwea/Murinduko/824 upon subdivision.

iii. That the Land Registrar Kirinyaga is hereby directed to register the 1st Plaintiff as proprietors of 1 acre out of Land Parcel Number Mwea/Murinduko/824 upon subdivision.

b. The claim by the 2nd Plaintiff is without merit and the same is hereby dismissed.

c. The claim in Wangu’ru SPMCC Case Number 182 of 2017 is without merit and the same is hereby dismissed.

d. Costs of the Originating Summons and that of Wangu’ru SPMCC Case Number 182 of 2017 to be paid to the 1st Plaintiff by the 2nd Plaintiff and the Defendant jointly and severally.

JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 10TH DAY OF DECEMBER, 2021

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HON. E.C. CHERONO

ELC JUDGE

In the presence of-

1. Mr. Magee holding brief for Ms Magara for the Defendant

2. Ms Wanjiru Waweru holding brief for Mrs Makworo for Plaintiff

3. Kabuta - Court clerk.