



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 115 OF 2014

NYAGA RUNGU.....PLAINTIFF

VERSUS

STANLEY NYAGA KUVUTA.....DEFENDANT

JUDGEMENT

1. By an originating summons dated 30th October 2013 brought under **Order 37 Rule 7 of the Civil Procedure Rules, Sections 37 & 38 of the Limitation of Actions Act (Cap. 22) and all enabling provisions of the law**, the Plaintiff sought the following reliefs:

a. A declaration that the Plaintiff is entitled to be registered forthwith as the owner of land parcel No. Evurore/Kathera/57 which parcel of land the Plaintiff has been in adverse possession since 1995 to date which is more than 12 years immediately preceding the presentation of this suit and which he has used openly and continuously as of right and in adverse possession and without any interruption from the Defendant or his predecessors in the above title and that the Defendant's title to the said land has been extinguished in favour of the Plaintiff under section 37 and 38 of the Limitation of Actions Act Laws of Kenya.

b. An order that the Defendant do transfer Land Parcel No. Evurore/Kathera/57 to the Plaintiff and in default the Deputy Registrar be authorized to do so and/or sign all the necessary documents to effect the transfer of the same to the Plaintiff.

c. An order for costs and interest thereon of this application.

2. The said originating summons was supported by the affidavit sworn on 30th October 2013 by the Plaintiff. It was contended that by a sale agreement made on 8th February 1995 the Defendant agreed to sell *Title No. Evurore/Kathera/57* (hereafter the *suit property*) to the Plaintiff at an agreed consideration of Kshs.40,000/-. It was stated that the Plaintiff took possession of the suit property immediately and developed it by building houses and cultivating crops thereon.

3. The Plaintiff further stated that the Defendant thereafter refused to transfer the suit property to him in consequence whereof there followed various suits before the Land Disputes Tribunal (hereafter the *Tribunal*) the Magistrates Court at Siakago and the High Court at Embu. The Plaintiff further considered that he had acquired adverse possession of the suit property on account of adverse possession since he had been in open, continuous and exclusive possession for a period exceeding 12 years.

4. The Defendant filed an undated replying affidavit on 29th April 2014 denying the Plaintiff's claim on several grounds. First, it was contended that the Plaintiff had failed to pay the full purchase price. Second, it was contended that the said agreement for sale was null and void for want of consent of the relevant Land Control Board. Third that the Plaintiff was in occupation of the suit property merely as a licensee pending completion. Fourth, that Plaintiff did not have exclusive possession of the suit property since the Defendant also occupied and used a substantial portion thereof. Finally, it was contended that the Plaintiff's possession had been interrupted severally through legal proceedings before the Tribunal, the Magistrates Court at Siakago, and the High Court at Embu.

5. The Plaintiff filed his witness statement and statements of two other witnesses to support his case. The Plaintiff also filed a further witness statement dated 25th April 2019 in support of his case. The Defendant similarly filed his witness statement and the statements of two other witnesses in support of his defence to the action.

6. When the suit was listed for hearing on 29th October 2019 the advocates for the parties recorded a consent to the effect that the originating summons should be canvassed on the basis of the documents, statements and affidavits on record without calling any witnesses. It was further agreed that the Plaintiff was the one in possession of the suit property. The parties further agreed to file and exchange their written submissions within 60 days. The record shows that the Plaintiff's submissions were filed on 23rd December 2019 but the Defendant's submissions were not on record by the time of preparation of the judgement.

7. The court has considered the pleading, affidavits, statements and documents on record in this matter. The court has also considered the consent recorded by the parties on 29th October 2019 and the submissions on record. The court is of the opinion that the main question for determination herein is whether or not the Plaintiff has demonstrated his claim for adverse possession.

8. The legal requirements for proving adverse possession were restated in the following cases; **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

9. In the case of **Kasuve Vs Mwaani Investments Ltd and 4 Others** (supra) the elements of adverse possession were summarized as follows:

“...and 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 and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

10. The 1st aspect for consideration is whether the Plaintiff has been in continuous, exclusive possession of the suit property in a manner adverse to the interest of the owner. The parties are agreed that the Plaintiff is the one in possession in terms of the consent recorded at the hearing hereof. The court has examined the entire material on record in this matter. The court is satisfied that the Plaintiff has been in possession of the suit property for a considerable period of time. The Plaintiff appears to have taken possession of the suit property in 1995 upon the making of the sale agreement dated 8th February 1995. The Plaintiff's entry must have been with the permission of the Defendant and such permission was given pending completion of the sale transaction.

11. There is adequate evidence before court that although the parties endeavored to obtain the consent of the Land Control Board to sanction the transaction such consent was never obtained. In the event, the said transaction was rendered null and void within the meaning of the **Land Control Act (Cap. 302)**. In those circumstances, the Defendant's permission or consent terminated upon the lapse of six (6) months from 8th February 1995. Henceforth, the Plaintiff's possession became hostile and adverse to the interest of the Defendant. In the case of **Situma Vs Cherongo [2007] KLR 85**, it was held, *inter alia*, that:

“In Samuel Miki Waweru Vs Jane Njeri Richu – Civil Appeal No. 122 of 2001 (unreported), this court held in part;

“In our view, where the purchaser of land or a 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 law and the continued possession, if not illegal becomes adverse from the time the transaction becomes void.”

In this case, the agreement for sale became void six months from date of the agreement – that is on or about 11th September, 1971 and the limitation period for purposes of adverse possession began to run on or about 12th September 1971.

12. The other aspect for consideration is whether or not the Plaintiff's possession was interrupted by the various legal proceedings between the parties. Interruption of possession is significant in that it stops time from running under the **Limitation of Actions Act**. In the case **Githu Vs Ndeete** (supra) the court addressed the issue of interruption as follows:

“Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. See *Cheshire's Modern Law of Real Property*, 11th Edition at p. 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act...”

13. The material on record indicates that the proceedings before the Tribunal and the magistrates court were filed by the Plaintiff to enforce the agreement for sale dated 8th February 1995. Those proceedings were not filed by the Defendant to vindicate his property rights. On the other hand, the judicial review proceedings filed by Defendant were instituted to quash the award of the Tribunal on the basis that it had no jurisdiction to entertain the dispute in the first place. Consequently, the court agrees with the Plaintiff's submissions that none of those proceedings were for recovery of the suit property by the Defendant. The court is thus of the opinion that the Plaintiff's possession was never interrupted by the Defendant in the legal sense.

14. The court is aware that the instant suit is a claim for adverse possession and not a suit for enforcement for the sale agreement dated 8th February 1995. The Defendant's response and evidence was substantially directed at discrediting the sale agreement and trying to demonstrate that it was null and void hence unenforceable. The business of the court is a claim for adverse possession is to consider whether or not the elements of adverse possession have been demonstrated. A claimant does not have to pay the full purchase price, or any consideration at all, in order to succeed. The consent of the Land Control Board is also not a necessary ingredient of adverse possession.

15. The upshot of the foregoing is that the court finds and holds that the Plaintiff has demonstrated his claim for adverse possession. Consequently, the court makes the following orders for disposal of the originating summons dated 30th October 2013:

a. A declaration be and is hereby issued that the Defendant's title to Title No. Evurore/Kathera/57 has been extinguished and that the

Plaintiff has become entitled to be registered as proprietor of Title No. Evurore/Kathera/57 by virtue of adverse possession under Section 38 of the Limitation of Actions Act (Cap. 22).

b. The Defendant shall forthwith transfer Title No. Evurore/Kathera/57 to the Plaintiff in default of which the Deputy Registrar of the court shall sign and execute all necessary documents to effect the transfer of the same to the Plaintiff.

c. Each party shall bear his own costs.

16. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **30TH DAY** of **JANUARY, 2020**

In the presence of Mr. Kathungu for the Plaintiff and Ms. Maina holding brief for Mr. Eddie Njiru for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

30.01.2020