



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 44 OF 2017 (O.S)

ELIUD KIAMA KABUCHWA.....PLAINTIFF

VERSUS

FRANCIS MURAGE KITHUNGU.....DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff brought this suit vide an Originating Summons where he sought the following orders:

(a) That the plaintiff be declared to have become entitled by adverse possession of over 12 years to 1 acre out of those parcels of land known and described as L.R. No. MUTITHI/KABIRIRI/11/222 and MUTITHI/KABIRIRI/11/23 which are sub-divisions of L.R. No. MUTITHI/KABIRIRI/11/172 measuring approximately 0.791 Hectares.

(b) That the plaintiff be registered as the sole proprietor of 1 acre out of those parcels of land known and described as L.R. No. MUTITHI/KABIRIRI/11/222 and L.R. No. MUTITHI/KABIRIRI/11/223 which are sub-divisions of L.R. No. KABIRIRI/11/172 measuring approximately 0.791 Hectares.

(c) The Land Registrar, Kirinyaga County do register the plaintiff as the absolute proprietor of 1 acre out of those parcels of land known and described as MUTITHI/KABIRIRI/11/222 and L.R. No. MUTITHI/KABIRIRI/11/223 which are sub-divisions of L.R. No. KABIRIRI/11/172.

(d) That the defendant be ordered to pay the costs of the suit herein to the applicant.

(e) That the Court do issue further or better relief as may be just and expedient.

The defendant filed a replying affidavit on 15th May 2017 opposing the plaintiff's claim.

PLAINTIFF'S CASE

The plaintiff stated that in the year 2003, they agreed with the defendant that he was going to sell him one acre out of L.R. No. MUTITHI/KABIRIRI/11/172 at a price of Ksh. 150,000/=. On 21/10/2003, they entered into a sale agreement and paid the defendant the purchase price in full which he acknowledged. He produced the sale agreement and acknowledgment slip as Plaintiff's Exhibit No. (a) & (b) respectively. Immediately after executing the said agreement, the plaintiff assumed possession of one acre. However, it later came to the plaintiff's knowledge that the defendant has sub-divided the subject land parcel No. MUTITHI/KABIRIRI/11/172 into two portions namely L.R. No. MUTITHI/KABIRIRI/11/222 and MUTITHI/KABIRIRI/11/223. The plaintiff further stated that there was no sub-division done on the ground and that there is no way of identifying the two parcels of land on the ground. He produced the search and green cards as Plaintiff's Exhibits No. 2 (a) 2 (b) and 2 (c) respectively. The plaintiff also contends that after some few months of signing the sale agreement, the respondent seemed to have reneged on the agreement as he refused to co-operate on attending the Land Control Board to consent to transfer despite his constant demands. He further stated that the defendant has always asked him to vacate the suit land. He stated that he has been in open, exclusive continuous and uninterrupted possession of the land for a period not less than 12 years since 21st October 2003. He stated that on 6th February 2017, he received a letter from the respondent's advocate demanding that he vacates the land. On 8th February 2017, he instructed his lawyers to respond to the defendant's demand letter.

PW2 was Edward Waruhiu Nyamu who stated that he knows the plaintiff and the defendant in this case. He also knows the suit land parcel No. MWERUA/KABIRIRI/11/172. He said that Eliud Kiama Kabuchwa, the plaintiff herein bought a portion of the suit land from the defendant, Francis Murage Kathungu. He said that prior to purchasing the said land, the seller had approached him to buy but he did not have money. He stated that Eliud Kiama Kabuchwa has been on that land since 2003 to date.

DEFENDANT'S CASE

The defendant confirmed that they entered into an agreement of sale of land with Eliud Kiama Kubuchwa (plaintiff) which they concluded. He said that initially, Eliud Kiama Kabuchwa had leased land from him but later agreed to sell him the land. The buyer entered into a portion of land which he had sub-divided to his daughters. He said that they went to the Chief and paid the plaintiff his money. He stated that they did an agreement on the refund. He instructed his lawyer to write a demand letter. He produced the agreement for the refund and the demand letter in his evidence. On cross-examination, the defendant admitted that the plaintiff paid him the full purchase price and took possession of the land. He stated that they disagreed with the plaintiff after he entered into a portion he had sub-divided to his daughters.

ISSUES FOR DETERMINATION

The single issue for determination in this case is whether the applicant has acquired one acre from the respondent's parcel of land described as MUTITHI/KABIRIRI/11/222 and 223 which are sub-divisions of L.R. No. MUTITHI/KABIRIRI/11/172 by adverse possession.

ANALYSIS AND DETERMINATION

I have considered the evidence adduced by the plaintiff and his witness. I have also considered the evidence by the defendant together with all the documents relied by the parties in support of their respective positions. The plaintiff's claim is hinged on adverse possession. It is not in dispute that the plaintiff and the defendant in this case entered into a sale agreement for one acre from land parcel No. MUTITHI/KABIRIRI/11/172 at a price of Ksh. 150,000/=. The plaintiff stated that he paid the defendant the full purchase price and immediately took possession of the portion sold from 21st October 2003 to-date. The defendant admitted on cross-examination that the plaintiff paid him the full purchase price and took possession of the land. The plaintiff stated in his evidence that after he paid the purchase price and took possession of the suit land, the defendant reneged on his side of the agreement by failing to co-operate in securing the consent to transfer from the Land Control Board. **Section 22 of the Land Control Act Cap 302** provides as follows:

“Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by Section 6 of this Act, and any person – (a) pays or received any money; or (b) enters into or remains in possession of any land, in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment”.

My interpretation as regards that section of the law is that in continued occupation of land without consent of Land Control Board which is required to be obtained within six months of the date of agreement renders any such occupation by a purchaser illegal and unlawful and therefore adverse to the interest of the vendor. From the evidence adduced by the plaintiff, the sale agreement was executed by the parties on 21/10/2003 and the plaintiff paid the full purchase price on 25/11/2003.

In the Court of Appeal case of *Peter Mbiri Michuki Vs Samuel Mugo Michuki (2014) e K.L.R.*, the Court stated as follows:

“Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of Public Trustee Vs Wachuru (1984) K.L.R 314 at 319 Madan J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. By 1971, the appellant had not transferred the suit property to the respondent. In 1978, if any permission or licence to enter the suit property had been given by the appellant, the same was terminated by the letter dated 18th August 1978 from Karuga Wandai & Co. Advocates. From 18th August 1978, onwards, the continued occupation and possession of the suit property by the plaintiff was adverse to the appellant's title. Computing adversity from 18th August 1978, we are satisfied that the plaintiff's claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard when the Originating Summons was filed on 7th February 1991”.

In the instant case, the plaintiff paid the full purchase price on 25/11/2003. A simple arithmetic indicates that the minimum requirement of 12 years period crystallized on or about the 24th November 2015 when the plaintiff was in adverse possession.

Again in the case of *Mwangi & Another Vs Mwangi (1986) K.L.R 328*, the Court held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.

I agree with the decision entirely. The evidence adduced by the defendant in my view did not dislodge the plaintiff's claim. The first agreement produced by the defendant is an agreement done in the Chief's office for a refund of Ksh. 136,000/=. I agree with the plaintiff that the said amount was for the refund paid for the lease of ½ acre piece of land for 8 seasons done through the defendant's daughters. I also agree that the refund was not for the sale of one acre which is the subject of this suit. The second agreement produced by the defendant is also another lease agreement between the plaintiff and his daughters. That is not connected with the sale agreement, the subject of this suit. I find these documents not relevant and therefore not of any help to the defendant.

Considering the totality of the evidence availed by the parties and their witnesses in this case and applying the legal principles as espoused in the cited cases, it is clear that the plaintiff has proved his case on a balance of probabilities and has brought himself within the confines of the doctrine of adverse possession. In the result therefore, the suit brought by way of Originating Summons dated 30/3/2017 and filed the same date succeeds and I hereby enter judgment as follows:

(1) The applicant is hereby declared to have become entitled to one acre (1) of those parcels of land known and described as L.R. No. MUTITHI/KABIRIRI/11/222 and L.R. MUTITHI/KABIRIRI/11/223 which are sub-divisions of L.R. No. MUTITHI/KABIRIRI/11/172 measuring approximately 0.791 Hectares by adverse possession.

(2) The applicant be and is hereby registered as the sole proprietor of one (1) acre out of those parcels of land known and described as L.R. MUTITHI/KABIRIRI/11/222 and L.R. MUTITHI/KABIRIRI/11/223 which are sub-divisions of L.R. MUTITHI/KABIRIRI/11/172 measuring approximately 0.791 Hectares.

(3) The Land Registrar, Kirinyaga County do register the applicant as the absolute proprietor of one (1) acre out of those parcels of land known and described as L.R. MUTITHI/KABIRIRI/11/222 and L.R. No. MUTITHI/KABIRIRI/11/223 which are sub-divisions of L.R. MUTITHI/KABIRIRI/11/172 measuring approximately 0.791 Hectares.

(4) The respondent to pay the costs of this suit to the applicant.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 21st February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:

1. Mr. Asimwe holding brief for Magee for Plaintiff
2. Mr. Ndana holding brief for Kinyua Kiama for Defendant
3. Okatch – Court clerk