



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC CASE NO. 53 OF 2018**

**IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT**

**AND**

**IN THE MATTER OF LAND PARCEL KIBAUNI/MUTEMBUKU 435**

**JOSEPHAT MUSYA MUTALIA.....PLAINTIFF**

**VERSUS**

**THOMAS MUMO MWONGELA.....DEFENDANT**

**JUDGMENT**

1. Through an Originating Summons dated 21<sup>st</sup> May, 2018, the Plaintiff/Applicant prays for orders against the Defendant/Respondent for;
  - a) **The Plaintiff/Applicant be declared to have become the legal owner entitled by adverse possession of over 12 years since the year 2004 of land parcel Kibauni/Mutembuku/435.**
  - b) **The said Plaintiff/Applicant be registered as the sole proprietor of the said land parcel Kibauni/Mutembuku/435 in place of the above named Defendant/Respondent in whose favour the land is currently registered.**
  - c) **The last original indentures in respect of land parcel Kibauni/Mutembuku/435 which are held by the Defendant/Respondent be dispensed with.**
  - d) **Costs of this application be provided by the Defendant/Respondent.**
2. The Originating Summons is supported by the grounds on its face and the Plaintiff's/Applicant's affidavit sworn on the same day and a supplementary affidavit sworn on 13<sup>th</sup> June, 2018.
3. The suit is opposed through the Defendant's/Respondent's replying affidavit sworn on 19<sup>th</sup> July, 2018.
4. The suit proceeded by way of viva voce evidence.
5. The Plaintiff/Applicant adopted his statement dated 31<sup>st</sup> November, 2018 as his evidence in chief. He stated that he got into land parcel Kibauni/Mutembuku/435 (*suit land*) through purchase at a consideration of Kshs. 290,000/= which he paid in three installments of Kshs. 202,000/=, 61,000/= and 19,000/=. He produced a copy of the title deed, search certificate and sale agreement as P.Exhibit 1(a), (b) and 2(a) respectively. After signing the agreement, he was shown beacons of the whole land together with the witnesses and he took possession immediately.
6. He started utilizing it by digging terraces, fencing it off with chain link wires, planting perennial crops and constructing a permanent homestead. The Defendant/Respondent surrendered his title deed as a sign that he had sold the whole parcel. However, the Defendant/Respondent frustrated the procurement of the Land Control Board Consent by refusing to attend the board and even sent him a demand letter to collect his purchase price. He produced a demand letter as P.Exhibit 2(b) and receipts for consent application as 3(b).
7. Further, he stated that he had lived on the suit land since 2004 with the full knowledge of the Defendant/Respondent and His family. He produced a letter dated 12<sup>th</sup> June, 2018 and some photographs as P.Exhibit 4 and 5 respectively.

8. On cross examination he stated that prior to purchasing the suit land, he had land in Kavuthu village, Mutembuku sub-location but could not remember its number. He agreed that he was a retired chief inspector of police and was based at the Makongeni police station as the Officer Commanding Station (OCS) before retirement.
9. They entered into the agreement at the Defendant's/Respondent's home and he was shown the boundary as per the survey map of 1986 but did not acquire the survey map. He knew his neighbours and specifically Dr. Paul Ngumbi but the doctor's farm did not neighbour the suit land. He did not see any wire or fence when he was being shown around. He had not seen any area that had been fenced by Dr. Ngumbi. There was a stream passing near the doctor's farm but not near the suit land. He said that the suit land does not cross the stream.
10. Further, he said that the Assistant Chief was not present when he bought the land and that no beacons were mounted after he bought it. He did not engage a surveyor to plant beacons either. The Defendant/Respondent showed him the borders of his land and there were euphorbia trees planted on the boundary. They did not agree on the acreage but the Defendant/Respondent took him round his farm. He agreed that he demanded for the title deed before making further payment. He denied approaching the Land Control Board before buying the land. He said that the Defendant/Respondent put him into possession of the land that he sold to him.
11. He approached the Land Control Board in 2005, 2007 and 2016 but had finished paying the purchase price on 19<sup>th</sup> July, 2005. The Defendant/Respondent was asked by the board whether he had any other land and he answered in the negative. The board declined to give consent. He denied that the Defendant/Respondent informed the board that he had only sold a portion of his land. He denied having made the final payment at Makongeni police station but agreed that he made the second payment at the Police Station on 15<sup>th</sup> July, 2005. At Makongeni, he did not tell the Defendant/Respondent that he had bought the entire parcel of land.
12. He denied having coerced the Defendant/Respondent to sign the transaction. He stamped the transaction on the material day because the Plaintiff/Applicant collected the money from the Police Station. The intention was to show them the venue of the transaction. He denied threatening them but agreed that he was in police uniform. He said that the police stamp was to show where the transaction took place. He denied misusing his office. He agreed that the Plaintiff's/Applicant's lawyer had asked him to collect the purchase price because the board had declined to give consent. He denied trying to take the Defendants/Respondents land through the back door.
13. David Mutune (PW1) adopted his statement dated 30<sup>th</sup> November, 2018 in which he stated that in 2004, the Defendant/Respondent asked him to find a purchaser of the whole suit land and he connected him to the Plaintiff. He drafted the sale agreement at the Defendant's/Respondent's homestead. The Defendant/Respondent was paid Kshs. 202,000/= on the spot and had been given Kshs. 8,000/= to procure the title deed. This amount was included in the purchase price hence the total paid was Kshs. 210,000/=.
14. Further, he stated that the Defendant/Respondent surrendered his title deed as a show of good faith and sincerity. The Defendant/Respondent agreed to transfer the title deed to the Plaintiff/Applicant and the balance was to be paid in two installments. The Plaintiff/Applicant has been occupying the suit land wholly since 2004 and has made extensive development by planting fruit trees.
15. On cross examination he agreed that he was the one who introduced the Defendant/Respondent to the Plaintiff/Applicant but denied being an agent of either of them. He agreed that he did not tell the buyer the size of land that was on sale. They went around the farm before writing the agreement but agreed that in his evidence in chief, he said that they went round the farm after preparing the agreement. He agreed that they did not value the land per acre so as to know the price per acre. He saw three neighbors on the upper part and one on the lower part. The suit land borders the Athi River.
16. He was aware that the Plaintiff/Applicant and Defendant/Respondent approached the land board thrice but could not tell what transpired. He was aware that they did not get consent. He was not paid anything for drawing the agreement. One side of the land had a euphorbia hedge and does not know the neighbors across the river. He agreed not indicating in his statement that the seller had taken him round the farm before he looked for a buyer.
17. Haron Mulinge Mutiso (PW2) adopted his statement dated 02<sup>nd</sup> February, 2018 in which he stated that in 2004, he was called by the Plaintiff/Applicant to witness the purchase of the suit land. The Plaintiff/Applicant bought the whole suit land and they were shown the boundary features in terms of Euphorbia trees. The Plaintiff/Applicant has been on the suit land since 2004 and has developed it extensively. He (PW2) was the one given the work of fencing the land.
18. On cross examination, he said that the Plaintiff/Applicant and Defendant/Respondent were his neighbors. He saw Kshs 202,000/= changing hands on the material day but not the kshs 8,000/=. He didn't know the parcel number of the suit land prior to the material day. The land borders that of his brother Ngola Mwongela, Mrs Ngonga, Mathew Ngombi and a stream on the lower side. The stream is at the rear part of the farm. He wouldn't know if the suit land crossed the stream.
19. Raphael Mwinzi Mutalia (PW3) adopted his statement dated 30<sup>th</sup> November, 2018 in which he stated that in 2004, he witnessed his father (*Plaintiff/Applicant*) buying the whole suit land. They started using it immediately and have developed it extensively by planting fruit trees and building a permanent home. Their occupation has never been interrupted since 2004. The Defendant/Respondent has frustrated the process of acquiring the Land Control Board consent.
20. On cross examination, he said that at the time of writing the agreement, he was a shopkeeper at *Mukuru kwa Njenga*. The parties herein are known to him as they are his neighbors at Mutembuko. He agreed that he has never gone round the Defendant's/Respondent's piece of land.
21. He agreed that on 15<sup>th</sup> July, 2005, when he prepared an agreement at Makongeni Police Station, it was stamped with the Makongeni police station rubber stamp. He agreed that they prepared the agreement from 10.00am to 1.20pm. He indicated that there was no force used because the Defendant/Respondent received the money and they were inside police station. He said that there was nothing wrong in using the rubber stamp. He agreed that the office belonged to the OCS.

22. The Defendant/Respondent adopted his statement dated 29<sup>th</sup> June, 2018 in which he stated that in July 2004, he made a public announcement regarding his decision to sell a portion of the suit land. The Plaintiff/Applicant and his people approached him and he showed them the portion he was selling. They agreed on the purchase price and the Plaintiff/Applicant agreed to make payments on 24<sup>th</sup> October, 2004.
23. On 11<sup>th</sup> October, 2004, he met the Plaintiff/Applicant and his son (PW3) at Mutembuku market and the Plaintiff/Applicant told him to ensure that the title deed was in his (*Defendant's/Respondent's*) name by the time he made the payments. The Plaintiff/Applicant gave him Kshs. 8,000/= to get the title deed and they agreed in writing that the amount would be part of the title deed. They both appended their signatures.
24. On 23<sup>rd</sup> October, 2004, the Plaintiff/Applicant and his people went to the Defendants/Respondents home and were shown the portion on sale which was well demarcated with sisal boundary. The Plaintiff/Applicant paid Kshs. 202,000/= leaving a balance of Kshs 80,000/=. The meeting was attended by the Plaintiff/Applicant and his family, the Defendant's/Respondent's family and elders from the area. He undertook to pay the balance on 15<sup>th</sup> July, 2005. After signing the agreement, the Plaintiff/Applicant requested to go with the title deed but the Defendant/Respondent declined. The two families agreed that the Defendant/Respondent would give the title deed to the Plaintiff/Applicant to represent the payments which had been made.
25. On 15<sup>th</sup> July, 2005, the Plaintiff/Applicant invited the Defendant/Respondent and his wife to Nairobi and they met at Makongeni Police Station. The Plaintiff/Applicant informed them that he wanted to pay the balance. The Defendant/Respondent enquired how he would get his title back in absence of all the people who had attended the meeting at his home. The Plaintiff/Applicant told him to refund Kshs. 210,000/= in exchange for the title deed failure of which he would put him in the cells for obtaining money by false pretence. He also threatened to ensure that the Defendant/Respondent would not come out of the cells alive.
26. The Defendant/Respondent feared for his life and agreed to accept the balance of Kshs. 80,000/=. After that, the Plaintiff/Applicant made calls to people unknown to the Defendant/Respondent who arrived and drafted contents unknown to the Defendant/Respondent. The Defendant/Respondent and his wife were then instructed to affix their signatures without reading the contents. The Plaintiff/Applicant also signed and affixed the stamp of the police station after which the Plaintiff/Applicant paid Kshs. 61,000/=. The Defendant/Respondent and his wife left for home but the money was stolen in the matatu. The Plaintiff/Applicant paid the balance of Kshs. 19,000/= on 21<sup>st</sup> July, 2005 at Syongingu.
27. On 04<sup>th</sup> August, 2005, elders Musyimi Masai, David Mutune and Patrick Muthaa Muhindi informed him that the Plaintiff/Applicant had asked them to sign the agreement of 24<sup>th</sup> October, 2004. Later on, the Plaintiff/Applicant, Defendant/Respondent and PW3 attended the Land Control Board offices at Kalawa and the Defendant/Respondent found out that the Plaintiff/Applicant was claiming that he had bought the whole suit land. The board chairman enquired whether he had another land to which he replied in the negative. He also enquired about his marital status and he answered that he had two wives. The chairman decided that the entire parcel could not be sold to the Plaintiff/Applicant and directed the Defendant/Respondent to refund the purchase price.
28. The Plaintiff/Applicant and his son disagreed with the board's decision. His son proceeded to put a permanent structure and started farming. The Plaintiff/Applicant made several other attempts to obtain consent but his applications were declined. The son resorted to threatening the Defendant/Respondent who in turn reported to the Chief. The Chief advised them to solve their dispute between themselves or approach the Court. The Defendant/Respondent produced 5 documents in Kamba language and their translation as D.Exhibits 1-5.
29. Further, he stated that all he wants is to refund the purchase price of Kshs. 290,000/=.
30. On cross examination, he said that he sold a portion of the suit land to the Plaintiff/Applicant and not the entire land. He denied instructing his Advocate to tell the Plaintiff/Applicant to collect the purchase price from his office. He said that the Plaintiff/Applicant uses half of the suit land. He agreed that he was the one who invited the Plaintiff/Applicant to attend the Land Control Board. He did not understand what the Plaintiff's/Applicant's witnesses testified in Court. He agreed that the Plaintiff/Applicant has been in occupation of the portion he sold to him for 15 years. The chain link in the photos which he filed belongs to the Plaintiff/Applicant. He does not agree that the Plaintiff/Applicant should take the entire parcel of land.
31. Nthoki Mwongela Mumo (DW1) is the Defendant's/Respondent's mother. She adopted her statement dated 20<sup>th</sup> December, 2018 in which she stated that the suit land belonged to her initially. She was aware that her son had only sold a portion of the suit land and witnessed the Plaintiff/Applicant being shown the portion he had purchased. The portion was well demarcated with sisal plant.
32. On cross examination, she reiterated that the Plaintiff/Applicant was shown his portion and the boundary made of euphorbia plants and not sisal plants. She said that the Plaintiff/Applicant has never been in occupation of the suit land and only cultivates on his portion.
33. Judith Mali Thomas (DW2) is the Defendant's/Respondent's wife. Her evidence is similar to that of the Defendant/Respondent on how they met with the Plaintiff/Applicant at Makongeni Police Station and how they were threatened with jail and death if they insisted on the title deed. She also stated that they were coerced to sign a document at the police station and that the board declined to consent and instructed the Defendant/Respondent to refund the purchase price.
34. On cross examination, she said that the suit land is used by the Plaintiff/Applicant and Dr. Muli Ngumbi. She was not aware as how many acres the doctor bought. She agreed that the Plaintiff/Applicant has been in occupation of the suit land for 15 years but denied that he has built on it.
35. The Plaintiff/Applicant submitted that the sale agreement between him and the Defendant/Respondent is valid and is backed by a consideration of Kshs. 290,000/=.

36. On the issue of coercion, he submitted that the question which begs asking is whether the Defendant/Respondent was forced to receive the initial payment of kshs 210,000/= and why he travelled all the way from his home in Kalawa to Nairobi to collect kshs 61,000/=. He wonders why the Defendant/Respondent did not report about the coercion to the authorities. He submitted that the Defendant/Respondent surrendered the title deed to him after an agreement between the two families.

37. Further, he submitted that the acreage sold is clear from the sale agreement. It is also his submission that the agreement meets the requirement of section 3 of the Law of Contract Act. He cites Nairobi **HCCC No. 956 of 1991; Nelson Kivuvani –vs Yuda Komora & Anor** where it was held that;

*“The agreement for the sale of land which contains the name of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties signed and witnessed by two witnesses who signed against their names amount to a valid contract.”*

38. The Plaintiff/Applicant submitted that the sale became void for want of the Land Control Board consent but contends that he has acquired proprietorship through adverse possession. He submits that time for adverse possession started to run six months after 24<sup>th</sup> October, 2004, which was the date when the agreement was made. He also submits that from the evidence, it is clear that he took possession immediately after purchase on 24<sup>th</sup> October, 2004. He relied on **Civil Appeal No. 293 of 2002; Francis Gicharu Kariri –vs- Peter Njoroge Mairu** where the Court of Appeal stated;

*“The Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario. (so the Plaintiffs must show that the company had knowledge of the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration.”*

39. He has also cited the Court of Appeal decision in **Peter Mbiri Michuki –vs- Samuel Mugo Michuki** where the Court stated;

*“It is our considered view that when the Appellant entered into a sale agreement with the Plaintiff in 1964 and received the purchase price for the suit property, the Appellant became a trustee holding the suit property in favor of the Plaintiff. The Plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property...The Plaintiff having been in possession of the suit property, section 13(1) of the Limitation of Actions Act applies as it provides that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run.”*

40. The Plaintiff/Applicant contends that allowing the Defendant/Respondent to get back the land after receiving kshs 290,000/= will amount to unjust enrichment.

41. The Defendant/Respondent submitted that for a claim of adverse possession to succeed, an applicant must fulfill the following conditions;

- a) That he has been on the land for 12 years,
- b) That his possession is without the true owner’s permission,
- c) That the possessor has done acts which are inconsistent with the owner’s enjoyment of the soil.

42. He relied on **Malindi Civil Appeal No. 17 of 2016; Chevron K Ltd –vs- Harrison Charo wa Shutu** where the Court of Appeal held that;

*“At the expiration of the 12 year period, the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his permission was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it.”*

43. The Defendant/Respondent submitted that the Plaintiff/Applicant is on the property with permission of the Defendant/Respondent pursuant to a sale agreement. He also submitted that the Plaintiff’s/Applicant’s possession is not peaceful and uninterrupted as there has been an ongoing dispute that is known at the Land Control Board.

44. Relying on the **Chevron case (supra)**, he submitted that the doctrine of adverse possession presupposes that there has been default and neglect by the registered owner which has allowed the possessor to enjoy quiet, continuous and uninterrupted possession of land. He contends that once the registered owner raises issues with respect to the possessor’s occupation and challenges the same, the possessor’s enjoyment ceases to be quiet and a claim for adverse possession becomes untenable.

45. It is also his submission that a purchaser of land cannot acquire title by adverse possession and relies on **Kisumu Civil Appeal No. 87 of 2015; Albert Fred Ekirapa –vs- Nyongesa Sirari & 2 Others** where the Court of Appeal held that;

*“Based on the evidence, we are ourselves satisfied that the respondent purchased the entire property from Cornelius Omuse and that he took possession of the property upon entering into that agreement. The learned Judge properly excluded the period of occupation of the property by the 1<sup>st</sup> respondent between 1970 and 1996 because a person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not dispossessed the owner and the possession is not illegal.”*

46. Having looked at the pleadings, evidence and rival submissions, it is my considered view that the only issue for determination is whether the Plaintiff/Applicant has acquired land parcel Kibauni/Mutembuku 435 through adverse possession.

47. The title deed shows that the Defendant/Respondent is the registered owner of the suit land which is approximately 5.33Ha. It is not in dispute that the sale agreement between the Plaintiff/Applicant and Defendant/Respondent is null and void for want of the Land Control Board consent. It is also not in dispute that the Defendant/Respondent received the purchase price of Kshs. 290,000/=.

48. The ingredients of adverse possession have been aptly captured by the Defendant/Respondent and while it is clear that the Plaintiff/Applicant has been on the suit land for more than 12 years, his entry was with permission pursuant to the sale agreement.

49. The Plaintiff/Applicant agreed that the Defendant/Respondent frustrated the procurement of the Land Control Board consent three times to wit 2005,2007 and 2016. PW1 was aware that the Plaintiff/Applicant and Defendant/Respondent had attended the land board thrice and PW3 also agreed that the Defendant/Respondent frustrated the consent process.

50. On the other hand, the Defendant/Respondent testified that he found out the Plaintiff's/Applicant's intention of acquiring the whole suit land while at the land board. Since the first land board attendance was in 2005, it evident that the Defendant/Respondent resisted the Plaintiff's/Applicant's intention for almost the entire time that the Plaintiff/Applicant has been in occupation. There is also the demand letter sent by the Defendant's/Respondent's Counsel to the Plaintiff/Applicant in 2018 requiring him to vacate the suit land and collect the purchase price. Accordingly and as rightly submitted by the Defendant/Respondent, the Plaintiff's/Applicant's occupation cannot be said to have been quiet and uninterrupted.

51. The upshot is that the Plaintiff/Applicant has not acquired the suit land through adverse possession and his only remedy is a refund of kshs 290,000/= as per the provisions of section 7 of the Land Control Act. Suffice to say, the Plaintiff/Applicant has not satisfied this Court that he has a cause of action against the Defendant/Respondent.

52. The suit is dismissed with costs to the Defendant/Respondent.

**Signed, dated and delivered at Makueni via email this 29<sup>th</sup> day of May, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant: Mr. G. Kwemboi**