



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO.272 OF 2017 (O.S)

(Formerly Nairobi ELC Case No.807 of 2015 (O.S))

FELICITY MUTETE MUTULA.....APPLICANT

VERSUS

JAMES NDAMBUKI.....RESPONDENT

JUDGEMENT

1. The Applicant and the Respondent are sister and brother. In or about the year 1997, the Respondent approached the Applicant with an offer to sell to her land parcel number Makueni/Kivani/1054 (hereinafter referred to as the suitland) for a purchase price of Kshs.180,000/= which the Applicant paid in full. She then took possession of the suitland in the same year. She carried out some development and attempts to have the Respondent transfer the suit property to her did not bear fruits.

2. By her Originating Summons dated 20th August, 2015 and filed in court on 21st August, 2015 the Applicant who claims adverse possession of the suitland, sought the following orders: -

(i) A declaration of ownership rights over Land Reference No. Makueni/Kivani/1054.

(ii) An order for the Respondent to surrender documents of title of the Land Reference No. Makueni/Kivani 1054 to the Applicant.

(iii) An order to the Deputy Registrar to issue documents of ownership in the names of the Applicant or Land Reference No.Makueni/Kivani 1054.

(iv) Costs of this summons.

3. The Originating Summons is supported by the supporting and further affidavits of the Applicant sworn at Nairobi on 20th August, 2015 and 30th May, 2017 respectively.

4. In Paragraphs 3, 4, 5 and 6 of her supporting affidavit, the Applicant has deposed that she purchased and took possession of the suitland from the Defendant in 1997, that she has been in possession, has constructed and cultivated on it for the last 17 years, that she is advised by her advocate on record, which advice she verily believes to be true and correct that she has acquired ownership of the property by way of adverse possession since she has been occupying it for more than 12 years and that she is further advised by her Advocates on record which advice she verily believes to be true and correct that she is entitled under the law to quiet possession and enjoyment over the property.

5. In paragraphs 3, 4, 5, 6, 7, 8, 9, 10 and 11 of her further affidavit, the Applicant has deposed that she purchased the suitland from the Respondent in October, 1997, that he sold the land to her at a price of Kshs.180,000/=, that she made the 1st payment of Kshs.50,000/= to the Respondent from ATM machine at Standard bank, Moi Avenue, that the 2nd payment of Kshs.50,000/= was paid to the Respondent from the same Standard Bank, Moi Avenue, that the 3rd payment of Kshs.40,000/= was paid to Mr. Muinde Katuu whom she escorted to Machakos and took possession of the land immediately, that on adverse dates in 1998 and 1999 she requested for a transfer as agreed with the Respondent but he kept on pushing the dates forward, that on 03rd January, 2000 she left Nairobi with her son, one Mutula Junior for the purpose of signing the sale agreement which had 1999 as the year of printing and sale price, that the Respondent did not only refuse to sign but he cancelled both the date and sale price on the agreement and that she has constructed and cultivated on the suit property for the last 19 years.

6. The Respondent has opposed the Originating Summons through his replying affidavit sworn on 18th November, 2015 and filed in court on 01st December, 2015. In paragraphs 3, 4, 5, 6, 9 and 10 of his replying affidavit, the Respondent has deposed that it is not true that the

Applicant has acquired title to the Respondent's Land Reference No.Makueni/Kivani/1054 by adverse possession as alleged in the Originating Summons and the affidavit in support thereof, that at all material times, the Respondent was and is still the registered owner of all that parcel of land known as Makueni/Kivani/1054 measuring approximately 2 hectares located at Makueni District with a copy of title deed annexed as "JN-1", that he never at any time in 1997 sold or entered into a sale agreement with the Applicant for the sale of the aforesaid suit property nor did he at any time receive any sum of money as consideration for the sale of the suit property to the Applicant, that the Applicant did not at any time take possession, cultivate or start any construction of the aforesaid suit property lawfully with the consent of the Respondent but has instead been making claims of having purchased the property without providing any evidence, that the Applicant has no right over the property and is therefore not entitled under law to quiet possession or enjoyment over the property as she has not acquired any ownership over it through lawful purchase or by way of adverse possession and that in March, 2015 the Applicant had the intention to enter into his land and carry out cultivation on it, which exercise would have caused damage to the trees, vegetation and grass and would have caused irreparable damage to the property.

7. Hearing of the Originating Summons proceeded by way of viva voce evidence. During the hearing, the Applicant adopted the deposition in her supporting and further affidavit as her evidence. She produced a copy of the judgement in Makueni PMCC No.163 of 2011: Titus M. Musyoki vs. James Ngui Ndambuki as P.Exhibit No.1. The Defendant in the aforementioned case is the Respondent herein who confirmed in the aforementioned proceedings that the Applicant was in possession of the suit property. She went on to produce a report dated 08th September, 2014 from the Ministry of Environment and Natural Resources showing that the suitland is properly maintained as P.Exhibit No.2(a). She also produced a receipt issued to her by the Ministry and dated 12th September, 2014 as P.Exhibit No.2(b). She produced a demand letter issued to the Respondent as P.Exhibit No.3.

8. The Applicant was not cross-examined for the reason that neither the Respondent nor his advocate were in court on 23rd May, 2018 despite the said hearing date having been fixed by consent.

9. The Applicant called Titus Muinde (PW1) and John Mathuva (PW2) as her witnesses.

10. Muinde (PW1) adopted his statement dated 30th May, 2017 as his evidence. His statement is to the effect that in or about 1997 he was asked by the Applicant to deliver an envelope containing money to the Respondent. That he left Nairobi for Kikima Market where he handed the envelope to the Respondent.

11. John Mathuva Ndunga (PW2) relied on his recorded statement dated 30th May, 2017 as his evidence. His evidence was that in 1997 the Respondent who had just retired from teaching went to see the Applicant. The Applicant called him to confirm that the Respondent was out to sell land to her upon which both the Applicant and the Respondent agreed on the purchase price.

12. Like the Applicant, Muinde (PW1) and Ndunga (PW2) were not cross-examined.

13. The Applicant's Counsel rested her case and sought for time to file and serve submissions. The matter was fixed for mention on 05th July, 2015 when the Notice of Motion application dated 21st June, 2018 and filed in court by the Respondent was allowed by consent of the parties so that the Applicant would be recalled for cross-examination.

14. The case was fixed for hearing on several occasions on the grounds that the Respondent was indisposed. However, on 19th November, 2019 the Applicant's Counsel successfully applied for the Respondent's case to be deemed as closed. As such, the Respondent did not adduce any evidence in support of his replying affidavit and/or defence.

15. The Applicant's Counsel framed three (3) issues for determination namely: -

(a) Whether there was a sale agreement between the parties.

(b) Whether the Applicant has adverse possession of the suit property.

(c) Whether the lack of the Land Control Board's consent vitiates the Applicant's adverse possession.

16. On whether there was a sale agreement between the parties, the Applicant's Counsel submitted that under the proviso in section 3(3) of the Law of Contract Act, which was applicable prior to the amendment of 6th June, 2003, a contract for sale of land need not be in writing if the purchaser has in part performance taken possession, or being already in possession continues to possess property. The Counsel added that despite the contract between the parties not being in writing, the Applicant took possession of the suit property in 1997 and continues to have actual possession. In support of his submission, the Counsel relied on the case of **Peter Mbiri Michuki vs. Samuel Mugo [2014] eKLR** where the Court of Appeal held that: -

"24. Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1st June, 2003. The trial court found that the sale agreement between the parties was an oral agreement made in 1964 between the appellant and the plaintiff. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract. '

25. We find that notwithstanding the fact that the sale agreement made by the parties in 1964 was not in writing, the plaintiff/respondent had to satisfy the trial court that he either, took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property, he continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned judge that the plaintiff/respondent proved that he had actual and or constructive possession of the suit property since 1964 and the possession was open, uninterrupted and continuous till the filing of the Originating Summons by the Plaintiff in 1991. It is our view that **Section 3 (7) of the Law of Contract Act** makes exception to oral contracts for sale of land coupled with part performance. We find that **Section 3 (3) of the Law of Contract Act** came into effect in 2003 and does not apply to oral contracts for sale of land concluded before **Section 3 (3) of the Act** came into force. The proviso to **Section 3 (3) of the Law of Contract Act** applies in this case and we hold that the sale agreement between the appellant and the plaintiff did not violate or offend the provisions of the **Law of Contract Act.**"

17. The Counsel pointed that since the contract between the parties was made in 1997, the authority cited applies herein. As such, the Counsel submitted, there was a valid contract between the parties upon which she immediately took possession of the suit property.

18. On whether or not the Applicant has adverse possession of the suit property, the Counsel referred the Court to **Black's Law Dictionary 9th Edition** where adverse possession is defined as,

"The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open, and notorious" or "The doctrine by which title to real property is acquired as a result of such use or enjoyment over a specified period of time."

19. The Counsel went on to submit that the Applicant's evidence was that she took possession of the suit property immediately in 1997 and has enjoyed uninterrupted possession since then. The Counsel went on to refer to the judgement in Makueni Principal's Court CMCC No.163 of 2011 between Titus M. Musyoki vs. James Ngui Ndambuki (the Respondent herein) (P.Exhibit No.1) where the Respondent confirmed in his evidence that the Applicant was in possession of the suit property proving that he was aware of the Applicant's occupation prior to the matter being filed. The Counsel reiterated that the Applicant has enjoyed quiet, open and uninterrupted possession of the suit property since 1997 based on her claim of right and occupation as a bona fide purchaser for value.

20. It was further submitted that at the time of filing the Originating Summons on 21st August, 2015, twelve (12) years had lapsed and the Applicant's right and claim based on adverse possession had accrued and vested. The Counsel cited the case of **Public Trustee vs. Wanduru Ndegwa [1984] eKLR** where the Court of Appeal held that: -

"Of course, calculated from the date of payment of the purchase price on March 16, 1967 and on the basis of it, the full span of twelve years' adverse possession and more had already run when the suit was filed on April 2, 1979. The true owner ceased to be in possession on March 16, 1967. His possession was discontinued on that day. Discontinuance of possession occurs where the person in possession goes out and another person takes possession if that possession is continuous and exclusive (as the learned judge found it to be so in this case) 28 Halsbury 4th Edition paragraph 769. Under section 9 of the Act the right of action accrues on the date of dispossession or discontinuance."

Section 7 of the Act provides:

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

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 under section 10(1) of the English Limitation Act, 1939 (closely akin to our section 7) as against the vendor: Bridges v Mees (1957) 1 Ch 475 at 484; referred to with approval by this court in Mwangi Githu v Livingstone Ndetete and Others, CA No 24 of 1979 (unreported)."

The Court went on to state;

"What the land control legislation prohibits without consent is an agreement, a transaction or a dealing in agricultural land which comes about as a result of a volitional act between parties themselves. The ownership of land of whatever type is also mutable by operation of law, eg by succession or by adverse possession. The provisions of the Land Control Act have no application where the claim to title of agricultural land is by operation of law such as by adverse possession. It is not an agreement, a transaction or a dealing in agricultural land."

21. The Counsel further referred to the case of **Peter Mbiru Michuki vs. Samuel Mugo Michuki [2014] eKLR** where the Court of Appeal held that a purchaser in possession of land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run even where the suit property is not transferred to the purchaser. That the fact that a loan was taken out on the property by

the Respondent did not affect her possession. The Counsel further referred to **Peter Mbiri Michuki's** case (supra) where the court held;

*“The dicta in **Mwangi & another –v– Mwangi, (1986) KLR 328**, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. In **Public Trustee – v- Wanduru, (1984) KLR 314 at 324**, it is stated that in adverse possession, the title of a registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the Limitation of Actions Act, has acquired title against the proprietor. In the instant case, the plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land. **Section 18** of the **Limitation of Actions Act** provides that subject to **Section 20(1)** of the **Limitations Act**, the **Act** applies to equitable interests in land ... and accordingly a right to action to recover the land ... accrues to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land. **Sub-Section 18 (4)** provides that where land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, a right of action to recover the land accrues during such possession to any person in whom the land is vested as trustees or to any other person entitled to a beneficial interest in the land or the proceeds of sale.*

36. 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 favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property.”

22. The Counsel further referred to the case of **Public Trustee vs. Wanduru Ndegwa [1984] eKLR** where the Court of Appeal distinguished the position of a vendor and a purchaser as follows: -

“The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession.

*The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in *Bridges v Mees, [1957] 1 Ch 475*; and Simpson J (as he then was) in *Hosea v Njiru Ors, [1974] EA 526 (K)*.”*

23. Arising from the above, the Counsel submitted, the Applicant's claim for adverse possession is sufficiently established.

24. On whether the lack of Land Control Board's consent vitiates the Applicant's possession, the Applicant's Counsel submitted that without prejudice to the Applicant's deposition in paragraph 5 of her supporting affidavit where she has stated that she has been informed by her advocate on record that she has acquired ownership of the property by way of adverse possession since she has been occupying it for 12 years, her claim was not founded on oral contract for sale and as such, the land control does not apply. The Counsel cited **Public Trustee vs. Wanduru Ndegwa [1984] eKLR** per Chesoni AG JA (as he was then) that;

“ it is irrelevant whether or not the consent of the Land Control Board was sought and/or obtained.”

25. Arising from the above, the Counsel submitted that the lack of consent from the Land Control Board does not impair the Applicant's claim and as such, she is entitled to the prayers sought in the Originating Summons.

26. I have read the Originating Summons together with the supporting and further affidavit as well as the replying affidavit by the Respondent. I have also considered the evidence adduced by the Applicant and her witnesses and the submissions filed by her Advocate on record. There is no doubt that the Applicant and the Respondent did enter into an oral agreement in or about the year 1997 for the sale of land parcel number Makueni/Kivani/1054. The Applicant after paying the purchase price and pursuant to the agreement took possession of the aforementioned parcel of land. As was correctly submitted by the Applicant's Counsel, it was not necessary for the contract to be in writing as provided by the proviso to Section 3(3) of the Law of Contract Act prior to its amendment on 06th June, 2003 as the agreement was entered into in the year 1997. The Applicant paid the purchase price in full, took possession and has continued to be in possession ever since based on her uncontroverted evidence.

27. There is no doubt that the parties herein did not secure consent from the relevant Control Board and from the evidence, the Respondent is to blame for it. The Applicant made attempt for her and the Respondent to obtain consent from the Land Control Board but the latter was disinterested. Lack of consent cannot be a ground for vitiating the Applicant's claim for adverse possession.

28. From the evidence on record, the Applicant has been in possession of the suitland from 1997 up to and including 21st August, 2015 when this suit was filed in court. The Respondent cannot be heard to deny this fact in that in Makueni Principal Magistrate's Court CMCC No.163 of 2011 whether he was the Defendant, he confirmed in his evidence that the Applicant was in possession of the suit property as can be seen from the copy of judgement marked P.Exhibit No.1. There is no evidence to show that the Respondent ever appealed against the said judgement and his replying affidavit in the instant suit therefore portrays him as a liar who is not hesitant to approbate and reprobate so long as the circumstances suit him.

29. I am satisfied that the Applicant has enjoyed quiet, open and uninterrupted possession of the suit property based on her claim of right and occupation as a bona fide purchaser for value and there is no reason why this court cannot proceed to enter judgement in her favour. The Applicant's evidence and that of her witnesses remain uncontroverted. It meets the requirement of the law of adverse possession in Kenya which requires one to have enjoyed quiet, open and uninterrupted possession of the suit property for 12 years as prescribed under the

Limitation of Actions Act chapter 22 of the Laws of Kenya.

30. The upshot of the foregoing is that the Applicant has satisfied this court that she has on a balance of probabilities a cause of action against the Respondent. In the circumstances, I hereby proceed to enter judgement for her and against the Respondent as hereunder: -

- a. It is hereby declared that ownership rights over Land Reference No. Makueni/Kivani/1054 be vested on the Applicant.**
- b. The Respondent is hereby ordered to surrender documents of title of the Land Reference No. Makueni/Kivani 1054 to the Applicant.**
- c. The Deputy Registrar is hereby ordered to issue documents of ownership in the names of the Applicant or Land Reference No.Makueni/Kivani 1054.**
- d. Costs of this summons.**

Signed, dated and delivered at Makueni via email this 22nd day of May, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi