



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC 60 OF 2018(OS)

MICHAEL GATHU MACHARIA..... 1ST PLAINTIFF

MACHARIA MUHORO.....2ND PLAINTIFF

VS

JOHN THIGE MAINA.....1ST DEFENDANT

ROBINSON MWANGI MAINA..... 2ND DEFENDANT

PETER CHEGE MAINA.....3RD DEFENDANT

JUDGMENT

1. The Plaintiffs/Applicants filed suit against the Defendants/Respondents vide an Originating Summons on the 23/7/18 seeking the determination of the following matters;-

- a. That the Plaintiffs are entitled as proprietors of all that parcel of land being 1 acre out of land parcel No LOC13/KARUNGE/2954 (suit land) on the ground that since 16/8/2003 the Plaintiffs have been in possession and occupation of 1 acre of the above parcel for a period of 12 years preceding the presentation of the summons in Court.
- b. That the Defendants title to the said piece of land being 1 acre out of the suit land is extinguished under section 17 of the Limitations of Actions Act.
- c. That the Plaintiff be registered as the proprietor of all that parcel of land being 1 acre out of the suit land.
- d. Alternatively, the Plaintiffs be awarded the value of the suit land at the prevailing or present market rates to be paid by the Respondents.
- e. The costs of the suit to be provided for.

2. The application is grounded on the supporting affidavit of the Plaintiffs and the grounds annexed thereto.

3. It is their case that vide an agreement of sale dated the 16/8/2003 the Plaintiffs purchased 1 acre of the suit land from the representatives of the original owner of the original land at the cost of Kshs 360,000/-. That the suit land was a resultant subdivision of the original land namely LOC13/KARUNGE/869/13 which measured 1.7 acres. That the Plaintiffs were put in possession of the 1 acre which they occupied to date and made several developments thereon. The Plaintiffs are claiming adverse possession and in the alternative a refund of the purchase price at the prevailing market value.

4. The Plaintiffs sought the following orders;

- a. A declaration that the Plaintiffs have acquired 1 acre out of the parcel of land LOC 13/KARUNGE/2954 by way of adverse possession.
- b. Transfer of 1 acre of land out of the LOC 13/KARUNGE/2954 to the 1st Plaintiff and presentative orders be issued before the said transfer alternative compensation at the present market value.
- c. Cost of the suit and interest on the debt owed.

d. Any other relief this honorable Court may deem fit to grant.

5. On the 5/9/2018 the Defendants authorized the 2nd Defendant to prosecute the suit, swear affidavits and generally conduct the proceedings on their behalf.
6. The Replying Affidavit dated the 4/9/18 was filed by the 2nd Defendant on his own behalf and that of the 1st and the 3rd Defendants. In it he deposed that there is no cause of action existing in favour of the Plaintiffs who are on a fishing expedition. That the sum total of the Plaintiffs affidavits so far is that the possession and occupation of the suit land was permitted hence adverse possession is unfounded. That according to the affidavit of the 2nd Plaintiff the last payment was made on the 10/1/2011 in the sum of Kshs 10,000/- which turns out to be barely 7 years ago thus adverse possession could not have accrued by the time the suit was filed by the Plaintiffs. Either the Defendants conclude that the prayer for compensation is already time barred bad in law and should be dismissed. In any event they argue a claim of adverse possession is incompatible with an alternative claim for compensation.
7. They added that the Plaintiffs are in illegal occupation of the suit land and should be evicted and the suit dismissed.
8. At the hearing of the case, the PW1- Michael Gathu Macharia testified and adopted the contents of his Supporting Affidavit dated the 23/7/18 and the list of documents filed on the 4/12/18 and marked PEX No 1-15.
9. He informed the Court that he purchased 1 acre of the land in 2003 at the costs of Kshs 360,000/- after which he paid 300,000/- and was put in possession in the same year, which possession he is been to date. That he has planted avocados, macadamia and trees on the 1-acre land. That the Defendants have refused to transfer the title of the land to him despite the succession proceedings having been completed in respect to the estate of their grandfather who was the original proprietor of the original suit land before subdivision giving rise to the suit land parcel No 2954.
10. In cross examination he stated that upon purchase he was allowed to take possession and farm on the land as he was promised the title after the conclusion of the succession proceedings. That he occupies 1 acre out of parcel LOC13/KARUNGE/2954 to date. That he paid the last purchase price in the year 2005. That he ended up paying more than the purchase price and at the end of the transaction he had paid about Kshs 514,000/- for the land. He admitted that the payment of Kshs 10,000/- was towards the expenses in relation to the succession proceedings by the Defendants. He produced the agreement of sale dated the 16/8/2003 and stated that the sellers of the land were Margaret Wanjiku Mwangi Esther Wangari, Maina and Jackson Maina. That the purchase price was paid through their agents/representatives namely Francis Maina and later Jackson Waweru Maina on behalf of the sellers who had beneficial interest in the land.
11. In respect to the alternative claim of compensation at market values, the witness informed the Court that he has not presented any valuation report to demonstrate the market values of the land he is claiming. That he discovered that the Defendants were the registered owners of the suit land in 2018 and filed the suit land. That all along he occupied the land with the expectation that the title would be transferred to him after the conclusion of the succession proceedings.
12. He added that upon the conclusion of the succession proceedings he was not removed from the suit land and neither has he been removed since he took possession in 2003.
13. PW2- Samuel Waweru took the stand as the 2nd witness and adopted his witness statement dated the 12/9/19 as his evidence in chief. He informed the Court that he has known Margaret Wanjiku, Esther Wangari and Jackson Waweru Maina since 1999. That they sold to him the 1 acre, the subject of this suit in 1999 at the price of Kshs 200,000/-. At the same time, they informed him that Succ cause No 31 of 1996 in the estate Ngunjiri Githuku was ongoing and they needed money to pay for the legal fees and expenses hence the reason why they sold the land to him. That on the 22/3/2002 the 1 acre land was surveyed and hived out of the original land which measured 5 acres. He was put in possession and commenced farming activities thereon. Later after the conclusion of the succession proceedings in 2001, the sellers took long to transfer the land to him. On his demand, he was refunded Kshs 284,000/- and left the land to the Plaintiffs the incoming purchasers. The Plaintiffs refunded the money to him on behalf of the sellers. He confirmed that the Plaintiffs took over possession of the land in 2004.
14. PW3- Edward Mwangi Maina testified and stated that he is a cousin to the Defendants. That Esther and Wanjiku are his aunts. That it was a family decision to sell the 1 acre of land to finance the succession proceedings in respect to the estate of their grandfather who was the registered owner of the original suit land. He was aware that the PW2 had purchased the land but later another buyer was introduced who would pay more money. These were the Plaintiffs. The 1st buyer was refunded his money and the Plaintiffs upon payment of the purchase price was given possession of the 1 acre in 2004. In the meantime, the family had disagreed on how the original land should be subdivided. Initially the land was subdivided into 3 plots but later rectified and subdivided into 5 parcels. That he received the purchase price from the Plaintiffs on behalf of the family. That the Kshs 10,000/- paid by the Plaintiffs in 2011 was in respect to the subdivision expenses.
15. Further the witness informed the Court that the Plaintiffs have not been removed since occupying the land in 2004. That in 2013 or thereabouts after being asked to vacate the land by the Defendants he sought the intervention of the chief but he has never vacated the land.
16. DW1 – Robinson Mwangi Maina took the stand and testified on his behalf and that of the co-Defendants. He adopted his witness statement dated the 14/10/19 as his evidence in chief. In his written statement he stated that the original land LOC 13 /KARUNGE/869 belonged to Ngunjiri Githuku, deceased. That the land was subdivided into 3 parcels; 2954, 2955 and 2956. Esther Wangari Maina was registered as the owner of LOC13/KARUNGE/2954. The succession cause in respect to the estate of Githuku deceased was completed in 2009.
17. He stated that he is one of the registered owners of the parcel LOC13/KARUNGE/2954 with the 1st and 3rd Defendants having inherited it from Esther Wangari Maina. The original land belonged to his grandfather namely Githuku, deceased. That they acquired the land through transmission. That upon his death the original land was subdivided by the deceased's children. That the Plaintiffs were put into possession of

the land by Esther Wangari Maina, Wanjiku Mwangi and Jackson Waweru Maina. That the 1st Plaintiff purchased the land on behalf of the 2nd Plaintiff. He confirmed that the Plaintiffs are in cultivation of the 1 acre and that they tried to remove him through the local chief in 2017 in vain. That he is still in occupation of the land.

18. In cross examination he informed the Court that the land is demarcated on the ground and the 1 acre is identifiable. Although he stated that he was not present when the purchase price was paid, he stated that the 3rd Defendant received the payments secretly without their knowledge. Referring to the agreement dated the 16/8/2003 he admitted that the three persons disclosed dealt with the land on behalf of the family. That the 1st Plaintiff has been peacefully tilling the suit land to date. He however pleaded with the Court to evict the Plaintiff from the land as he was but a trespasser.

19. At the close of the hearing the parties elected to file written submissions which I have read and considered.

20. Having considered the pleadings, the evidence adduced at the hearing, the written submissions and all the materials presented before me and to my mind the key issue is whether the 1st Plaintiff has established title by way of adverse possession.

21. It is not in dispute that the suit land is registered in the names of the Defendants as shown on the official search dated the 27/6/2018. It is also not in dispute that the 1st Plaintiff is in occupation and possession of 1 acre out of the suit land. The question then is whether his occupation and possession is adverse to the title held by the Defendants.

22. It is the 1st Plaintiff's case that he purchased 1 acre from Margaret Wanjiku, Esther Wangari and Jackson Waweru Maina on the 16/8/2003 and was subsequently put into possession and allowed to cultivate the land pending the transfer of the title for the 1 acre to his name. That upon conclusion of the succession proceedings the Defendants became registered as owners of the suit land through transmission. That he has been in peaceful uninterrupted open possession of the suit land since 2003 to date.

23. The Defendants on the other hand have denied the Plaintiffs claim on several fronts. Firstly, that the occupation of the Plaintiffs was with the permission of the representatives of the family and therefore adversity does not arise. Secondly that the last purchase price of Kshs 10,000/- was paid in 2011 and therefore time has only run for 7 years which is less than the 12 years statutory period to qualify for adverse possession.

24. The essence of adverse possession under the Limitation of Actions Act, cap 22 Laws of Kenya, is that the registered proprietor of land is prohibited from bringing an action to recover land after 12 years from the date when the cause of action accrued. Upon the expiry of that period the proprietor's title to the land is extinguished by operation of the law and any person who has been in occupation of the land peacefully, openly and as of right for the prescribed period is entitled to bring an action in the High Court to be declared the owner of the land. See the relevant provisions of sections 7, 13 and 38 of Limitations of Actions Act.

25. The Land Registration Act recognizes rights acquired through prescription or adverse possession to be overriding interests which need not be noted on the register. This agrees with the decision of the Court in the case of **Mwangi & Another –v – Mwangi, (1986) KLR 328**, where it was 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. Adverse possession is thus more about the equitable interest of a party in possession than a substantive declaration as to the legal right or validity of ownership.

26. The case of **Wambugu v Njuguna (1983) KLR 172** where the Court of Appeal stated that in order to acquire land by virtue of the statute of limitation, the claimant must show that the owner has lost his right to the land upon being dispossessed or by the owner discontinuing possession by his volition. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land.

27. In the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** the Court held that;

‘...The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment twelve years before the filing of suit. What is a significant interruption depends upon the nature of the land. Brief and ordinary absences, while the adverse possessor goes to town, is gone overnight, or is away working or on vacation, for instance, would surely not break any adverse possession. If the land, by its nature, is suitable and normally used for reasonable pursuits, then seasonal use may be continuous enough. The test is whether the adverse possessor used the land as a true owner would. But breaks caused by the owner's intermittent possession, for a few days or weeks every now and then, are likely to defeat both exclusivity and continuity of possession.’

28. Equally in the case of **Kweyu v Omuto, Court of Appeal, Civil Appeal No. 8 of 1990** the Court held that;

‘...In deciding the issue of adverse possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of facts.’

29. My reading of this case is that the 1st Plaintiff entered the suit property pursuant to a sale agreement in 2003 as a bona fide purchaser for value. The entry in 2003 was with permission of the Defendants as Vendors. The Defendants have argued that the entry was with the permission of the sellers. It is a principle of law that possession with the consent of the owner cannot establish adverse possession. It is not in dispute that the 1st Plaintiff entered the suit land pursuant to a purchaser's right after paying consideration to the sellers. The Defendants have not disputed that the purchase price was not paid. At the point of selling the land the sellers only interest was the balance of the payment of

the purchase price. The interest in the land is held by the purchaser because he has given a consideration for the land. The interest is personal to the buyer and is adverse to the interest of the seller. It is adverse because the purchaser's interest is acquisition of the property and the seller's interest is the recovery of the purchase price. The permission to occupy is in recognition of the consideration and change of interest in the land. The two interests have different causes of action enforceable by any of the parties in the manner that relates to it. For example, the purchaser can sue for specific performance and the seller the recovery of the balance purchase price. The title therefore being held by the Defendants/estate of the original owner at this point was being held in trust for the purchaser pursuant to a purchaser's right.

30. It is the finding of the Court that the occupation of the land by the 1st Plaintiff was not with the permission of the seller but adverse to the title of Defendants.

31. In the case of **The Public Trustee Vs Wanduru, (1984) KLR 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 off 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.

32. The 1st Plaintiff in his evidence stated that he paid the purchase price in the sum of Kshs 360,000/- in 2005. This evidence was corroborated and supported by PW2 and PW3 who stated that the purchase price was paid in 2004. The Defendants have argued that the last installment of the purchase price was paid in 2011. The 1stPlaintiff has admitted this payment but explained that this amount was in respect to the subdivision expenses and was over and above the purchase price disclosed in the agreement dated the 16/8/19. This evidence has been supported by the testimony of PW3 who stated that the Ksh 10,000/- was to facilitate the process of subdivision of the land. It is borne of evidence that the land had been subdivided initially into 3 parts but later rectified to 5 portions and this explains perhaps why the 1stPlaintiff was being required to pay for the subdivisions. I have perused the agreement of sale aforementioned which disclosed that the land being sold was 1 acre at the purchase price of Kshs 360,000/-. The agreement further discloses that the 2nd Plaintiff (purchaser) had undertaken to meet the costs relating to the transfer and other incidentals such as subdivision of the 1 acre of the land being sold. PW1 and PW3 informed the Court that the total payout by the Plaintiff rose to Kshs 514,000/- which comprised of expenses relating to succession proceedings, subdivision and the refund to the 1st purchase namely Mr. Waweru (PW2) who confirmed in evidence that he was refunded Kshs 284,000/- by the 1st Plaintiff.

33. It is therefore the finding of the Court that the purchase price was paid in 2005 and the amount of Kshs 10,000/- was part of the costs undertaken by the Purchaser to meet in the agreement.

34. Going by the decision of Madan J in **The Public Trustee Vs Wanduru(supra)** cited above, it is the finding of the Court that time started running for purposes of calculating adverse possession from 2005 and therefore adverse possession accrued and vested in the 1stPlaintiff in the year 2017.

35. The testimony of the Plaintiff was that he entered the land in 2003. PW2 who had purchased the land earlier attested to this when he stated that upon being refunded the purchase monies by the 1st Plaintiff, he left the land for the incoming purchaser in 2003. PW3 – the cousin of the Defendants who acted as the agent of the sellers confirmed this evidence too. F N Kihara the chief of Karunge Division in a letter dated the 26/3/16 stated that the Plaintiffs have been utilizing the land for over 15 years. See PEX No 14 produced by the 1stPlaintiff. DW1 admitted in his evidence that the Plaintiffs have been in occupation of the land since 2003 and that they have not taken any action to remove him from the land. The 1stPlaintiff has neither handed over possession nor has he been dispossessed.

36. It is a principle of law that the mere change of ownership of land which is occupied by another person under adverse possession, does not interrupt such person's adverse possession. This is true of the case at hand. It is borne of evidence as disclosed in the official search dated the 27/6/18 that the land became registered in the names of the Defendants on the 15/3/18. That being so it did not affect the rights of title by way of adverse possession that accrued and vested to the 1st Plaintiff as at 2017. They therefore held the title in trust for the 1stPlaintiff. They acquired a title that is already encumbered with an overriding interest in form of adverse possession.

37. The Court of Appeal in **Francis Gicheru Karini vs Peter Njoroge Mairu (Civil Appeal No. 293 of 2002 (NRB) UR)** - approved the High Court decision in **Kimani Ruchine vs Swift Rutherford & Co. Ltd (1980) KLR 10** as per Kneller J. stating:

‘...The Plaintiffs have to prove that they have used this land which they claim as of right. *Nec vi, Nec Clam, Nec Precario* (no force, secrecy or persuasion) ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.’

38. It goes without saying that the occupation of the 1st Plaintiff of the land was open continuous uninterrupted and with the knowledge of the Defendants.

39. Also see the case of **Titus Kigoro Munyi v. Peter Mburu Kimani (2015)eKLR** where it was observed:

“It must be noted that under Section 7 of the Limitation of Actions Act, the law relating to prescription affects not only present holders of the title but their predecessors. (See **Peter Thuo Kairu – v- Kuria Gacheru, (1988) 2 KLR 111**).”

40. It is the finding of the Court that the 1st Plaintiff has established title by way of adverse possession.

41. In view of my holding in Para 40 I see no reason to determine the alternative claim of compensation. Even if I was to entertain the same, it would still be dismissed as the 1stPlaintiff did not adduce any evidence at the hearing. The Plaintiff failed to provide any evidence that

would guide the Court.

42. Final orders;

- a. A declaration be and is hereby made that the Plaintiffs have acquired 1 acre out of the parcel of land LOC 13/KARUNGE/2954 by way of adverse possession.
- b. The Defendants are ordered to subdivide the suit land and transfer 1 acre to the 1st Plaintiff forthwith.
- c. Each party to meet the costs of the subdivision and all other incidentals for their portions.
- d. In default the Deputy Registrar of the Court is ordered to execute all the documents necessary to effect the orders as above.
- e. In view of the COVID -19 Pandemic and in line with the practice directions issued in the Kenya Gazette Notice No 3137 published on the 17/4/2020, I order that there by a suspension/stay of execution for a period of 60 days from the date of this judgement.
- f. The cost of the suit is in favour of the Plaintiffs.

43. It is so ordered.

DATED,SIGNED & DELIVERED VIA EMAIL THIS 12TH DAY OF MAY 2020.

J. G. KEMEI

JUDGE