



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 672 OF 2013 (O.S)

FREDRICK MURIUKI KABITA.....PLAINTIFF

VERSUS

CIIRA NDINWA.....DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff vide an Originating Summons dated 28th May 2009 sought the following orders:

- 1. That the Respondent/Defendant right title and interest in the piece of parcel of land on the portion respectively physically occupied by the Applicant measuring one acre and situated in Kirinyaga District Area and comprised in the title to the said piece of land known as L.R. No. MUTIRA/KANYEI/292 and registered under the provision of Registered Land Act (Cap. 300) Laws of Kenya at the Lands Registry at Kerugoya.***
- 2. That the plaintiff's possession of the said land be declared Adverse with effect from 1988 when the Applicant had occupied the said land from a period well over twelve (12) years excusing adverse possession thereof.***
- 3. That the Plaintiff/Applicant be declared to have acquired absolute right to and title and interest in the suit land by operation of law under the provision of Section 38 of Limitation of Actions Act Cap. 22 Laws of Kenya.***
- 4. That there be an order for the rectification of the Register of land and the Applicant/Plaintiff be registered as the absolute proprietor of the suit land in place of the Defendant/Respondent.***
- 5. That costs of these proceedings be provided for.***
- 6. That such further or other orders be made as the interest of justice may be required.***

On 6th August 2009, the defendant through the firm of Ann Thungu & Co. Advocates filed a replying affidavit denying the Plaintiff's claim and sought to have the suit dismissed with costs.

PLAINTIFF'S CASE

The Plaintiff stated that he has continuously had and enjoyed an in-interrupted occupation of a portion of one acre out of land parcel No. MUTIRA/KANYEI/292 (hereinafter referred to as the suit land) for a period in excess of twelve (12) years immediately proceeding the filing of this suit. He also stated that he has been in continuous occupation of the suit land since 1988 when he moved into the suit land which is registered in the name of the Defendant/Respondent. It is the plaintiff's case that the defendant's rights over the suit land have been extinguished by operation of law and that the register be altered, land sub-divided and the portion of one acre in his occupation be registered in his name. He produced a certified copy of the register of title, confirming that the suit land is registered in the name of the defendant. He also produced a sketch map of the area he occupied as Plaintiff's Exhibit No. 2. The plaintiff testified that the defendant sold him a portion of land measuring one acre from land parcel Number MUTIRA/KANYEI/292 at a price of Ksh. 30,000/=. They entered into a sale agreement on 4/5/1988. He paid a down payment of Ksh. 10,000/=. He later paid the balance of Ksh. 18,100/= which was acknowledged by the defendant. He produced the acknowledgement receipts as Plaintiff's Exhibit 1(a), (b), (c), (d) & (e) respectively. Upon taking possession of the said one acre, the plaintiff stated that he cultivated maize, beans, tomatoes etc.

DEFENDANT'S CASE

The defendant testified on oath and stated that he is the registered owner of land parcel No. MUTIRA/KANYEI/292 having been given by

his clan namely Ugaciku. He stated that he lives on the suit land with his wife Faith Mabuti and their six children and their families. He stated that he settled on the suit land in the year 1980 but before then, he was living in Mukinduri. He said that in order to transfer their children from Mukinduri to Kiangungu Primary School was expensive and they agreed with his wife to lease out one acre to the Plaintiff Fredrick Muriuki for one season to get school fees. The Plaintiff paid him Ksh. 240/= for two seasons being 12 months. He stated that thereafter, the plaintiff used to give him money and made him sign documents telling him they were lease agreements and he would retain them so that his wife would not see them. He stated that the Plaintiff used to take him to the firm of Kibicho & Co. Advocates to sign some documents. He stated that the Plaintiff's occupation of his land is not adverse as he allowed him permission to occupy the same while looking for his money. He said that he did not disclose to his wife every time the defendant gave him money.

DW2 was Faith Mabuti. She is the wife of the Defendant. She stated that they settled on the suit land in the year 1980. Previously, they lived in Mukinduri and in order to transfer their children from Mukinduri to Kiangungu Primary School was expensive and they agreed with her husband to lease one (1) acre to Fredrick Muriuki, the Plaintiff herein to get school fees. The Plaintiff paid them Ksh. 240/= for two seasons being 12 months. She stated that after the lease expired, she asked the Plaintiff when he was vacating and he told him that they had an agreement with her husband. Sometime in 1988, the plaintiff's brother one John Muriithi informed her that he overheard a rumour to the effect that his brother the plaintiff herein stating that that he was buying their land. She went to Land offices at Kerugoya where she was advised to register a caution over the suit land.

ISSUES FOR DETERMINATION

- 1. Whether the Applicant has acquired over one (1) acre of land parcel number MUTIRA/KANYEI/292 by Adverse possession?***
- 2. Who will bear the costs of this suit?***

ANALYSIS AND DETERMINATION

ISSUE I

I have considered the viva voce evidence by the plaintiff and the defendant. I have also considered the documents adduced by the parties and the submissions by their counsels. The Plaintiff's claim is hinged on the doctrine of adverse possession. He produced a sale agreement dated 4th May 1988 as Plaintiff's Exhibit No. 1. From the said sale agreement, the Plaintiff bought one (1) acre out of the Defendant's parcel of land Number MUTIRA/KANYEI/291 measuring a total of 2.58 Acres. The purchase price is Ksh. 30,000/= and the Plaintiff paid a down-payment of Ksh. 10,000/= leaving a balance of Ksh. 20,000/= which was to be paid after sub-division and transfer of the one acre to the Plaintiff. From the acknowledgment receipt produced and marked P. Exhibit (b), (c) (d) & (e), the Plaintiff stated that he paid the Defendant a further sum of Ksh. 18,100/= on various dates between the year 1988 and 1990. A simple arithmetic indicates that out of the agreed purchase price of Ksh. 30,000/=, the Plaintiff has so far paid a total of 28,100/= leaving a balance of 1,900/=. For the doctrine of Adverse possession to apply in respect of land subject to a sale agreement which has become null and void, the period of limitation did not begin to run until the last instalment was paid. The Plaintiff in this case has not completed paying the balance of the purchase price. According to his own documents produced in support of this case, the Plaintiff has only paid a sum of Ksh. 28,100/= leaving a balance of Ksh. 1,900/= outstanding. In that regard, the period of limitation did not begin to run until the last instalment is paid. That position was aptly restated in the case of ***SOSPETER WANYOIKE VS WAITHAKA KAHIRI (1979) K.L.R 236*** where it was held thus:

“Dismissing the action, that as payment of the purchase price by instalments, after the date of the agreement recognized the defendant's title to the land the period of limitation for adverse possession did not begin to run until the last instalment was paid (10 March 1969) the plaintiff's action for declaration (commenced on 14th December 1977) was pre-mature; furthermore the action filed in 1974 had interrupted the period of adverse possession”.

I agree with the position of the law in that decision which I find at all fours to the instant case. I also find that the Plaintiff has not paid the last instalment of Ksh. 1,900/= to make the agreed total purchase price of Ksh. 30,000/=. His claim for Adverse possession based on null and void contract of sale is pre-mature as the same has not crystallized. I also note that a claim for adverse possession cannot sustain where the person asserting that right is in possession with the consent or permission of the owner or in (accordance with) the provisions of an agreement of sale or lease. A party seeking a right by way of adverse possession over title to land belonging to a known proprietor based on an agreement must demonstrate that he/she has complied with the terms and conditions of the alleged agreement as set out under the Law Society of Kenya including payment of the agreed consideration within the completion period and filling the requisite statutory applications such as the Land Control Board where the land in question is an Agricultural land. In the instant case, the claimant was allowed to pay the purchase price of Ksh. 30,000/= by instalments. He has produced acknowledgment receipts totaling Ksh. 28,100/= leaving an outstanding balance of Ksh. 1,900/=. It is trite law that where a purchaser has entered into a land before fulfilling the terms of the agreement, his occupation of the land is subject to the vendor terminating the agreement for breach. Such a person thus continues occupying the land as a licensee, subject to the vendor terminating the contract. Where a purchaser has not paid the full purchase price, time for adverse possession does not begin to run, and that it will only be deemed to start running after the full purchase price is paid. The case of ***SAMSON B. KHWATENGE VS PHILLIP W. SILUNGI (2018) e K.L.R*** puts the point succinctly where it was held as follows:

“It is trite law a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provision of an agreement of sale or lease or otherwise

..... the above principles of law apply in this case since the entry was with the permission of the owner. Secondly, the full purchase price was not paid and consequently no time for adverse possession could run”.

I agree with the position as succinctly put in that decision. Again in the case of ***SISTO WAMBUGU VS KAMAU NJUGUNA (1983) K.L.R 172***, the Court of Appeal held as follows:

“Where the claimant is in exclusive possession of the land with leave and licence of the Appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist. The respondent occupied the suit land originally under an agreement for sale of land being a licence from the appellant, although the respondent’s possession was exclusive and continuous but was not adverse, it only became adverse after the licence was determined”.

I concur with the position of the law as restated in the above decision which is also binding on me.

ISSUE NO. 2

Having found that the Plaintiff’s claim for adverse possession is not sustainable for being pre-mature, it therefore follows that his claim fails and the same is hereby dismissed. Following the dismissal of this suit, it follows that costs shall also follow the event. In the upshot, I order this suit to be dismissed with costs to the defendant. It is so ordered.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 8th Day of May, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Ngigi Gichoya for the Plaintiff
2. Mr. Igati Mwai holding brief for Ann Thungu
3. Mbogo – Court clerk