



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 45 OF 2018

JOSEPH NGAREH KANYERIA.....PLAINTIFF

VERSUS

SARAH WANDIA NJOGU (Sued in her capacity

as the Legal Representative of the Estate of

NJOGU KIBAKA (Deceased).....DEFENDANT

JUDGMENT

BACKGROUND

The Plaintiff instituted this suit vide an Originating Summons dated 24th July 2018 seeking the following orders:

(a) That the registration of the current owner of land parcel Number MWEA/MUTITHI/STRIP/926 be cancelled from the register and the said parcel of land be registered in the name of the Plaintiff.

(b) The Plaintiff be awarded costs of this suit.

The plaintiff's claim is based on **Section 38 of the Limitation of Actions Act as read with Order 37 Rule 7 CPR and Section 28 (b) and 29 of the Land Registration Act**. The Originating Summons is supported by an affidavit of the plaintiff sworn the same date.

On 3rd September 2018, the defendant filed a replying affidavit opposing the plaintiff's claim.

PLAINTIFF'S CASE

The plaintiff stated that he entered into the suit land pursuant to an agreement of sale dated 20th November 2005 through which he paid Ksh. 180,000/= to Njogu Kibaka (deceased). The plaintiff also stated that he has been in possession of the suit land for more than 12 years and is therefore entitled to be declared as the proprietor of land parcel No. MUTITHI/STRIP/926 by adverse possession. On being cross-examined by Mr. Muchira, Advocate for the defendant, the plaintiff stated that the agreement is written in Kikuyu mother-tongue and that he was the one who wrote it. He also stated that the sale agreement does not indicate the registration particulars of the land he was buying. He stated that the sale agreement does not indicate that he was buying land parcel No. MUTITHI/STRIP/926. He also stated that there is no indication of the particulars of the seller e.g. his I/D Card etc. The purchase price is indicated as Ksh. 180,000/=. It does not indicate the money paid and the balance outstanding. He stated that he paid a down-payment of Ksh. 174,000/= leaving a balance of Ksh. 6,000/= which he allegedly paid later. However, he does not remember the date he paid the balance. He said that he paid the defendant Sarah Wandia and her son but there was no receipt or acknowledgement note.

DEFENDANT'S CASE

The defendant stated that the late Njogu Kibaka is her late husband. Her late husband had a parcel of land in Mwea measuring two (2) acres. She does not know how to read or write and therefore she does not know the registration particulars of the land. She denied having sold the said parcel of land in 2005 or at all. She stated that they used to cultivate the land and keeping the tools in the house of the plaintiff. At one point, they leased the suit land to the plaintiff for five (5) years for Ksh. 50,000/= at Ksh. 10,000 per acre. At the expiry of the five (5) years, the plaintiff refused to move out. In the process, her husband passed on. Her son went to the suit land with trees seedlings to plant but he was chased by the wife of the plaintiff. One Peter Karanja went to the chief to take letters of administration. He came with someone by the name Muturi. Karanja took a letter from the area chief and went to her brother in-law saying that he wanted to assist them to take out succession proceedings. She was also told by someone in Gichugu that Karanja was in a position to assist take out succession proceedings. When he came to Court for confirmation of the grant, she was told that she had seven (7) children. She told the Judge that she had four (4) children

and she gave the names. She was told that Karanja Wambui and Muturi were also indicated as her children. She told the Judge that they were not part of her children. The Court gave a ruling which she attached to her list of documents as Succession Cause No. 48/12 and delivered on 19/11/2012. She stated that when they were proceeding with the succession case, she came to learn that there was a house built on the suit land. She stated that she did not give permission for it to be constructed and/or occupied. She stated that she had the title to the suit land until Karanja asked her to surrender so that it can be changed into her name. She was told to go and check after six (6) months. She stated that it was not her late husband who gave the plaintiff title to the suit land. She sought to have this suit dismissed with costs.

PLAINTIFF'S SUBMISSIONS

The plaintiff submitted that he entered into the suit land in the year 2005 as a purchaser and produced a sale agreement dated 20th November 2005 and the translation thereof. He submitted that no consent of the Land Control Board was sought and obtained and that his occupation became adverse to the interests of the registered owner after the lapse of six (6) months from the date of the agreement. He further submitted that he is not seeking to enforce his interests as a purchaser, but of an adverse possessor after the expiry of six (6) months from the date of agreement and entry into the land on 20/11/2005. The plaintiff also submitted that whereas it is true that the sale agreement dated 20/11/2005 did not indicate the number of the parcel of land which was purportedly being bought, did not indicate the Identity Cards for the parties or their witnesses and did not indicate the purchase price or the currency thereof, that does not in any way make the said agreement non-compliant with the law. He submitted that the Court only needs to look at the intentions of the parties and the subject matter involved. The plaintiff cited the following cases and authorities:

- (1) *Mtana Lewa Vs Kahindi Ngala (2005) e K.L.R.*
- (2) *Felix Kipchoge Limo Langat Vs Robinson Kiplagat Tuwei (2018) e K.L.R.*
- (3) *Paul Mwangi Gachuru Vs Kamande Nguku (2017) e K.L.R.*
- (4) *Kipketer Togom Vs Isaac Cipriano Shingore (2012) e K.L.R.*
- (5) *Land Control Board Cap. 302 Laws of Kenya.*

DEFENDANT'S SUBMISSIONS

The defendant submitted that land parcel No. MWEA/MUTITHI/STRIP/926 is registered in the name of Njogu Kibaka (deceased) and that she holds the grant of letters of administration to the Estate of the said Njogu Kibaka which are yet to be confirmed. She submitted that the agreement of sale produced by the plaintiff left a lot to be desired in that the alleged agreement of sale dated 20/11/2005 did not indicate the number of the parcel of land which was purportedly being bought. The defendant further submitted that the said agreement of sale did not indicate the Identity Card of the parties or their witnesses. The purported agreement did not also indicate the purchase price or the currency thereof. It did not indicate how much money was paid on 20/11/2005. It only indicated the balance of Ksh. 6,000/=. The defendant also submitted that the pleadings by the plaintiff did not indicate whether or not the alleged balance of Ksh. 6,000/= was paid and on being cross-examined, the plaintiff alleged that he paid the balance to the defendant after the death of the registered proprietor on a date he could not remember. On that ground, the defendant cited the case of *Sospeter Wanyoike Vs Waithaka Kahiri (1979) K.L.R. 236*. The defendant also cited *ELC Case No. 75 of 2012 (Bungoma) Between Samson B. Khwatenge Vs Philip W. Silungi*. She submitted that she was not paid the alleged sum of Ksh. 6,000/=.

In conclusion, the defendant submitted that the plaintiff's suit was prematurely filed and that the plaintiff has not acquired title to land parcel number MWEA/MUTITHI/STRIP/926 by adverse possession. The defendant further submitted that it is not clear what portion of the suit land the plaintiff occupies as there were three (3) other persons allegedly in occupation and that the plaintiff has been using all the tricks to obtain the suit land from her as can be seen from a ruling in High Court Succession Cause No. 48 of 2012 delivered on 19/11/2012 where the alleged purchasers PETER KARANJA MARINGA and RAPHAEL MUTURI were fraudulently presented as children of the deceased Njogu Kibaka.

ISSUES FOR DETERMINATION

The issues for determination can be framed as follows:

- (a) Whether the defendant's title to land parcel Number MWEA/MUTITHI/STRIP/926 has been extinguished by adverse possession?**
- (b) Whether the plaintiff has acquired title to land parcel Number MWEA/MUTITHI/STRIP/926 by adverse possession?**
- (c) Who should bear the costs of this suit?**

ANALYSIS AND DECISION

I have considered the viva voce evidence adduced by the plaintiff and the defendant. I have also considered the documents produced in their evidence, the submissions by their counsels and the applicable law. The first issue for my determination is whether the defendant's title to the suit land parcel No. MWEA/MUTITHI/STRIP/926 has been extinguished by adverse possession? From the sale agreement which was produced and which the plaintiff in cross-examination admitted lack fundamental ingredients of a binding sale agreement of land such as the parcel number, the consideration and the Identity Card of the parties and their witnesses, the absence of these fundamental ingredients in a sale of land makes the sale agreement not binding between the parties. It renders it void for all purposes. The agreement must describe the

land being sold and the consideration. These are not mere irregularities. The purported agreement does not indicate that the purchase price was Ksh. 180,000/= and that the seller was paid the sum of Ksh. 174,000/=. The plaintiff has not even produced any evidence showing that he paid the balance of Ksh. 6,000/= and the same was acknowledged by the seller. In a case of adverse possession based on a sale agreement which has become null and void, the period of limitation starts to run from the time the last instalment is paid. That was the holding in the case of **SOSPETER WANYOIKE VS WAITHAKA KAHIRI (1979) K.L.R 36** where it was held as follows:

“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 premature. Furthermore the action filed in 1974 had interrupted the period of adverse possession”.

I agree with the reasoning of the Court in the above decision. The plaintiff has not produced any receipt or acknowledgment note from the defendant for the balance of Ksh. 6,000/= which the defendant had denied having been paid. It was therefore incumbent upon the plaintiff to prove that indeed he paid the defendant the alleged balance of Ksh. 6,000/=. I also note that the plaintiff’s claim is based on the doctrine of adverse possession. The principles upon which a party may succeed in a claim of adverse possession are now settled. In the case of **MISTRY VALJI VS JANENDRA RAICHAND & 2 OTHERS C.A No. 46 of 2015** reported in **(2016) e K.L.R**, the Court of Appeal set out the principles for adverse possession as follows:

(i) Adverse possession is not available to a party who is on the registered owner’s land with his consent or where the entry and occupation was lawful and based on some agreement. In other words where the title of the owner is admitted there can be no claim for adverse possession.

(ii) The occupation of the land must be nec vi, nec clam, nec precario.

(iii) The adverse possessor must prove that through his occupation, the true owner has been dispossessed or his possession discontinued.

(iv) It is equally established that adverse possession does not arise merely by occupation and use.

(v) The filing of a suit for recovery of land or any other recognized assertion of title to the land by owner stops time running for purposes of Section 38 of Cap. 22”.

Again in **ELC Case No. 75 of 2012 (Bungoma) between SAMSON B. KHWATENGE VS PHILIP W. SILUNGI** reported in **(2018) e K.L.R**, Justice S. Mukunya faced with a similar dispute cited with approval the case of **WAMBUGU VS KAMAU NJUGUNA CIVIL APPEAL NO. 10 OF 1982** (unreported) where it was held as follows:

“..... If 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”.

I agree with the position of the law as re-stated in the above decision. The plaintiff has not proved to the satisfaction of this Honourable Court that he has paid the last instalment of Ksh. 6,000/=. The only conclusion that can logically be drawn from the evidence by the parties is that the plaintiff was occupying the suit property as a licensee. The plaintiff has not demonstrated that he also demanded the statutory consent from the seller for purposes of effecting the transfer of the suit property into his own name. No attempts have been shown that the plaintiff filed the application forms for the issuance of consent from the Land Control Board. The purported sale agreement does not even indicate the standard terms and conditions required from both the buyer and the seller such as the completion date and the time required from the seller to supply the requisite statutory consents. These are minimum standard requirements in all agreements for the sale of land. That explains my holding that the sale agreement dated 20th November 2005 is null and void and of no legal effect.

Still on the second issue, I note that a claim for adverse possession cannot crystallize where the person asserting the claim is in possession with the permission of the owner. The plaintiff in his evidence admitted that he took possession of the suit property pursuant to a sale agreement dated 20th November 2005. A claim for adverse possession based on a sale agreement can only crystallize after the purchaser has fulfilled all the terms and conditions of the sale agreement. The plaintiff in the instant case has not complied with all the terms and conditions of the sale agreement I have found to be null and void. As such, the plaintiff’s claim cannot succeed. The upshot of my analysis is that the plaintiff’s claim fails and the same is hereby 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. Plaintiff in person – present

2. *Defendant – present*

3. *Mr. Asimwe holding brief for Mr. Maina Kagio for Plaintiff*

4. *Mrs. Makworo holding brief for P.M. Muchira for Defendant*