



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 156 OF 2018

JOHN MUTURA KARIUKI.....PLAINTIFF

VERSUS

STEPHEN N. KAGOMBE.....DEFENDANT

JUDGMENT

The instant suit is a consolidated with **Milimani ELC 1021 of 2016** in which by a Plaint dated **23rd August 2016** the Plaintiff herein filed this suit against the Defendant seeking for the following orders:-

a) An order compelling the Defendant to execute transfer and facilitate registration of land parcel No. Ndarugu/ Karatu/ 442 in favour of the Plaintiff

b) Costs of the suit.

In his statement of claim, the Plaintiff averred that his family members have been in actual possession of the suit property since **1965**, after its purchase by their late Father **Kariuki Muhia Mwangi**, on **7th May 1965**, vide a sale agreement by the Vendor . That the Defendant has failed to transfer the suit property upon obtaining letters of Administration. That prior his death, the Plaintiff's father had placed an encumbrance against the suit property having paid the purchase price in the presence of two witnesses. Further that the Defendant intended to have the placed restriction withdrawn with no justification.

The suit is contested and the Defendant filed a Defence and Counter Claim dated **16th February 2017**, and sought for the following orders;

1. The Cautions lodged against Title No. Ndarugu/ Karatu /442 on 7th March 1979 and 18th April 1985 be and are hereby removed.

2. The plaintiff, his servants or agent be and are hereby evicted from land Parcel No. Karugu / Karatu /442.

3. Costs.

In his Defence, the Defendant denied all the allegations made in the Plaint and averred that the suit property had been given to **Benard Githumu Kiarie** by **William Kagombe Kiarie** with authority to utilize the same and take care of it. It was further contended that the Plaintiff's brother **Mr. Francis Mwangi** secretly and without the Defendant's knowledge entered onto the suit property and planted tea bushes and that upon the demise of **Francis Mwangi Kariuki**, the Plaintiff has unlawfully assumed possession and has in spite of demand refused to vacate the suit property. The Defendant further averred that the Plaintiff's father and brother unlawfully placed an encumbrance on land they had no right to protect.

That the Plaintiff's suit is fatally defective and ought to be dismissed for lack of **Land Control Board Consent**. Further that there is no valid agreement of sale to be enforced and hence the Plaintiff's suit lacks merit.

The second suit is the instant suit filed vide an **Originating Summons** dated **12th April 2017**. The Plaintiff herein sought for the following orders ;

1. THAT JOHN MUTURA KARIUKI who has been in adverse possession actual occupation and user of L.R NO. NDARUGU/KARATU/442 since 1965 be declared the absolute owner of NDARUGU/KARATU/442 and be registered as the owner thereof.

2. THAT Stephen N. KAGOMBE being the Administrator of the Estate of WILLIAM JOHN KAGOMBE KIARIE be ordered to

transfer NDARUGU/KARATU/442 to John MUTURA KARIUKI as the beneficial owner thereof by virtue being the adverse possessor thereof.

3. THAT the Deputy Registrar of this Honourable Court be authorized to sign all requisite documents/ papers on behalf of STEPHEN N. KAGOMBE to facilitate the transfer of NDARUGU/KARATU/442 to the Plaintiff/ Applicant.

4. THAT the costs of this SUMMONS be borne by the Respondent/ Defendant.

In his supporting Affidavit, the Plaintiff averred that they have been in continuous, uninterrupted and exclusive possession of the suit property since **1965**, and their occupation has never been challenged. He further averred that he has been advised by his Advocate which advise he believed to be sound that he has become the absolute owner of the suit property, pursuant to the provisions of the Limitations of Actions Act.

The Originating Summons is contested, and the Defendant filed a Replying Affidavit sworn on **11th July 2017**, and averred that the sale agreement is a forgery and that his deceased father only sold trees to **Kariuki Muhia** in **1965**. He further averred that on **12th February 1979**, his deceased father filed **Kiambu SRMCC No. 14 of 1979**, in which he denied selling the suit property and further wrote to Court in **1980**, and complained on the invasion of the suit property by the Plaintiff's father. That in **1978**, his father offered to sell the suit property to **Kariuki Muhia**, but that the offer was not accepted. He denied that **Mr. Kariuki Muhia** has lived on the suit property.

The matter proceeded by way of *viva voce* evidence wherein the Plaintiff gave evidence himself and called no witness. The Defendant gave evidence for himself and called no witness.

PLAINTIFF'S CASE

PW1 John Mutura Kariuki adopted his witness statement dated **28th November 2018**. It was his testimony that his father died in **1988**, and that he was not related to the Defendant. He produced the Letters of Administration as Exhibit 1. That his father had filed a case in Court and he produced his bundle of documents as Exhibit 2. He also produced the Sale agreement dated **7th May 1965**, between his late Father and the Defendant's late father as Exhibit 3. He testified that his family have lived on the suit property since **1965** and cultivated on the same.

Further that he was born in **1972**, at Kieni Gatundu North and that their ancestral home is in Miiri. He denied that his father lived in Uplands. He acknowledged that from the Sale agreement, the Pen is different from the body of the agreement as there is red signature by a different pen. It was his further testimony that his father did not sign the agreement nor thumbprint it. Further that the alleged witnesses have not signed the document. He testified that the consideration was **Kshs.900/=** and that the same was paid via **10 sheep** and each of the sheep was **Kshs.80** and that would be **Ksh.800/=**. It was his further evidence that the Signature on the Sale Agreement is different from the signature on the Plaintiff. Further that there were two cautions registered on the land, by **Kariuki Muhia** claiming purchasers interest. That there was an Originating Summons No. **1519 of 1978**, filed by his father and the case is still pending. It was his further testimony that his father died in **1988**, and he was buried in Miiri.

Further that his brother and mother planted the tree bushes though he could not recall the year. That he had a house in the suit land though he does not live on the said suit land. However, his mother lives on the said land though the land has not been divided amongst them. That when he was born, his parents lived on the suit land and they still live there as a family.

DEFENCE CASE

DW1 Stephen Nganga Kagombe the Defendant herein adopted his witness statement dated **16th February 2017**. He further adopted the Replying Affidavit dated **15th July 2017** as his evidence. He produced the list of documents as Exhibit 1 and other Exhibits in the list of documents as Exhibits 2 to 10. It was his testimony that he had noted some anomalies on the Original Sale Agreement and that the signature does not belong to his father. That he was certain of that as he had a signature which his father had appended in his Identity Card and that the signature on all his letters are similar to the signature on his Identity Card.

Further that the writing on the Sale Agreement is different on the top from the one on the body and that the pens are also different. That there are no signatures for the alleged witnesses. He further testified that on the suit property, there are tea bushes and temporary structures and that the said structures are occupied by a person taking care of the tea bushes. It was his further evidence that the Plaintiff was brought up in Kieni Forest, attended Kieni Primary School and that he has never lived on the suit property and that his parents were never buried on the said suit property. That the Plaintiff's brother one **Francis Mwangi Kariuki**, secretly planted tea bushes after the death of his father in **1991**, and that during his father's lifetime, he had not allowed the Plaintiff to use the suit property.

Further that he is the Administrator of the Estate of **William Kagombe**, and that his father lived in Nyandarua before he passed on in **1991**. He further testified that his mother died in **2016**, in **Bahati Nakuru County** and was buried in Nyandarua. He acknowledged that none of his siblings live on the suit property and that they left the suit property in **1964**, as his father left the land under the care of his brother. He also acknowledged that there are tea bushes on the suit property and that a care taker lives on the suit property but that they did not plant the tea bushes. That the caretaker is not an employee and that the structures were built by the Plaintiff's father. He further acknowledged that he has never taken any steps to evict anyone from the suit property and that he had authority to deal with the land after he got the letters of Administration.

It was his testimony that **ELC 1021 of 2016**, was filed by the family of the late **Kariuki Muhia** and **Case No. 268 of 2017**. He acknowledged that he has never filed a case against **Kariuki Muhia**, but that his father filed a case against him in **1979** asking for the removal of the caution against the suit property. That Bernard Githumu, was the caretaker of the suit property until **1991** but was not living on the suit property.

After the close of *viva voce* evidence, the Parties filed written submissions which the Court has carefully read and considered. The court too has considered the relevant provisions of the law and finds the issue for determination are:-

i. Whether the Plaintiff has proved a claim of adverse possession.

ii. Who should bear the costs of the suit

i. Whether the Plaintiff has proved a claim of adverse possession.

The Plaintiff averred that his father had bought the suit property from the Defendant's father in 1965 and their family thereafter moved onto the suit land. That they have lived on the suit land, since then. However, the Defendant has denied these allegations and averred that his father only sold to the Plaintiff's father the trees that were on the suit property. He further alleged that the Sale Agreement that has been produced by the Plaintiff is a forgery as his father never signed the said sale Agreement. He also stated that the sale agreement was never signed by the Witnesses and therefore the same is not **valid** given that the parties also never attended the **Land Control Board** to seek for **consent**.

It is not in dispute that the Defendant's deceased father is the registered owner of the suit property. Further the court has perused the documents produced as exhibits in Court and has noted that the Plaintiff produced a sale agreement that indicates that he bought the suit property by providing payments in terms of sheep. However, the Court also notes that the Sale Agreement dated **7th May 1975**, violates the provision of **Section 3(3)** of the Law of Contract that requires the agreement to be attested to by the witness. Further the Court also notes that there is a different Sale Agreement produced in evidence by the Defendant which indicates that his father was only selling the trees to the Plaintiff's father. However, the Plaintiff is seeking for orders of Adverse possession and in deciding whether or not to grant the orders of Adverse possession, the Court is guided by **Section 7 of the Limitation of Actions Act which 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.’

Further the Court is guided by **Section 38 (1) and (2) Limitation of the Actions Act that provides as follows:**

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in [section 37](#) of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by **Justice Sergon** in the case of **Gerald Muriithi ...Vs...Wamugunda Muriuki & Another (2010) eKLR** while referring to the case of **Wambugu ...Vs...Njuguna (1983) KLR page 172** the where the Court of Appeal held as follows;

‘1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.

From the above, it is not in doubt that for the Plaintiff to be able to succeed on a claim adverse possession, he must be able to prove dispossession, discontinuance of possession for a continuous period of **12 years** and further that the dispossession occurred and the Defendant had knowledge of such dispossession.

It is not in doubt that the Plaintiff is claiming as an Administrator of the Estate of **Kariuki Muhia Mwangi** and that he is further suing the Defendant as an Administrator of the Estate of **William Kagombe**. The Plaintiff has claimed that his family took possession of the suit property in **1965**. These allegations have been denied by the Defendant who has averred that the Plaintiff's father never took possession. It is not in doubt that there were other suits separately filed by the parties. One was filed by the Plaintiff's father seeking to have the Defendant's father transfer the suit to him and another was filed by the Defendant's father seeking to have the caution lodged by the Plaintiff's father removed.

The Court having perused the exhibits notes that the Defendant father in his letter dated **22nd April 1978**, acknowledged that he was trying to sell the suit property to **Bernard** and **Kariuki**, who had both lodged cautions claiming purchasers interest. However, from the said evidence, the Court notes that there is no evidence that the Plaintiff's family ever took possession of the suit property in the year **1965**. Further there have been cases that have been filed both in **1978** and **1979**. While the Plaintiff acknowledged that the case filed by his father was never conclude, the Court further notes that his father died in **1988**, and without evidence that he was ever substituted in the suit, it then follows that the same had abated. Further, the Defendant's father also filed a suit in **1979**. The Court as seen the letter dated **28th May 1986**, by the

Chief informing the said **William Kagombe (deceased)**, that his matter was to be heard on the **24th June 1986**. Again, it is not clear whether the said suit was ever determined, but as testified by the Defendant his father died in **1991**, and it could only mean that without substitution, then the suit abated in **1992**.

This Court notes that there is no evidence that the Plaintiff's family ever occupied the suit property between the year **1965** and the year **1991** when the Defendant's father died. Further the fact that there were suits pending in Court during that period, it cannot be said that the Plaintiff's were in continuous and uninterrupted occupation of the suit property during that period with the knowledge of the Defendant or his father.

However, the Defendant testified and has submitted that he only learnt that the Plaintiff and his brother had planted tea bushes and were in occupation of the suit property in the year **2000**, when he got the letters of Administration of the Estate of his father. It is trite that the Administrator of the Estate of a deceased holds all the rights and privileges that appertain to the Estate of the deceased. In essence the Administrator acts as the deceased and ought to carry out all the functions that the deceased would have been required to take up.

The Defendant having had knowledge that the Plaintiff's family was in possession of the suit property and that the Plaintiff and his family had planted tea bushes, he did not take any action against them or ask them to move out. Further the evidence of the Plaintiff that his mother lives on the suit property, has not been controverted. It is therefore clear that from the year **2000**, the Plaintiff's family had been in occupation of the suit property. The Defendant in his evidence acknowledged that he has not tried to evict the Plaintiff and his family from the suit property nor filed any suit against them. Further having gone through the exhibits, the Court notes that the plaintiff filed the instant suit when the Defendant sought to assert his rights by seeking for the removal of cautions. In his letter dated **12th July 2016**, the Land Registrar, sent a Notice of intention to remove the caution dated **12th July 2016**, and in his letter the Defendant was copied and referred to his letter dated **17th June 2016**. Therefore, it is not in doubt that the Defendant sought to assert his rights in the year **2016**. Having known of the Plaintiff's occupation and possession of the suit property in the year **2000**, it could then mean that the time within which he was allowed to assert his rights lapsed in the year **2012** upon the lapse of **12 years**. Seeking to assert his rights in **2016**, after a period of over **12 years** means that the Defendant is barred by **Section 7 of the Limitation of Actions Act**.

For a party to succeed in a claim of adverse possession, the person must satisfy the Court that he/ she has been in **Continuous and uninterrupted** possession without the consent of the owner of the land; that his/her interests were **inconsistent** to the interests of the true owner of the land. The possession has to be **Open and notorious**. The possession has to be **actual**, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of Limitation to claim back the land. The possession has to be **Exclusive**, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

As already held above, the Plaintiff's family has been in occupation of the suit property from the year **2000**. The Defendant sought to assert his rights after **12 years** had already lapsed. Therefore, the Court finds that the occupation of the suit property by the Plaintiff has been **continuous, open and uninterrupted** and with the **knowledge** of the Defendants.

The Plaintiff also needed to prove that they had dispossessed the Defendants of the said land and the Defendant had been dispossessed without his consent and has enjoyed such quiet possession for a period of **12 years**. See the case of **Wambugu ...Vs... Njuguna (1983) KLR 172** where the Court of Appeal stated as follows relying on the decision in **Littledale...Vs... Liverpool College (1990) I Ch. 19**:

“The next question therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh v Jack said at 273, that to defeat a title by dispossessing the former owner acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it”

In order for a party to prove adverse possession, the party needed to show that the owner had been dispossessed of it or the owner's possession had been discontinued and the party had used the property to the adverse interests of the owner even if the same had been bought. See the case of **Samwel Nyakenogo ...Vs... Samwel Orucho Onyaru [2010] eKLR**, where the Court of Appeal held as follows:

“For about 19 years, the respondent was in exclusive possession of the portion of the land bought from the deceased openly and as of right, and during all this time, the respondent's said possession was not interrupted by the registered proprietor, the deceased. In our view, the purported application for letters of administration in respect of the deceased land West Kitutu/Mwakibagendi/28 which was confirmed on 15th June, 1999 did not interrupt the respondent's adverse possession of the portion he bought from the deceased.”

From the above analysis of available evidence, it clear that the Plaintiff was in continuous possession and has been using the Suit property to the adverse rights of the Defendant. Consequently, the court finds that the Plaintiff has proved his claim for Adverse Possession.

ii) Who is to bear costs of the suit?

The Court has discretion to award costs as provided by **Section 27 of the Civil Procedure Act** grants the Court discretion to award or not to award costs of the suit. Ordinarily, costs do follow the event and is normally awarded to the successful litigant. The Plaintiff being the successful litigant is entitled to costs of the suit

Having now carefully considered the pleadings herein, the annexures thereto and the written submissions, the court finds that the Plaintiff has proved his case on the required standard of balance of probabilities.

For the above reasons, the Court enters Judgment for the Plaintiff against the Defendant as prayed in the Plaint dated **23rd August 2016** and

the court allows the **Prayer No. 1** of the **Plaint** dated **23rd August 2016** and **Prayers No. 1, 2, 3** of the **originating summons** dated **12th April 2017** with costs.

It is so ordered.

Dated, signed and Delivered at Thika this 25th day of June 2020.

L. GACHERU

JUDGE

25/6/2020

Court Assistant - Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

By Consent of :

M/s Mwaura holding brief for Mr. Mwaura Shairi for the Plaintiff

No Consent for the Defendant

L. GACHERU

JUDGE

25/6/2020