



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**ELC CASE NO. 299 OF 2015 (O.S.)**

**(CONSOLIDATED WITH SIAKAGO PMCC NO. 22 OF 2015)**

**SAMUEL NGARI KIGORO.....PLAINTIFF**

**VERSUS**

**NJUKI KIGORO.....DEFENDANT**

**JUDGEMENT**

**A. INTRODUCTION AND BACKGROUND**

1. There are two consolidated suits in this matter, that is *Embu ELC No. 299 of 2015 – Samuel Ngari Kigoro V Njuki Kigoro and Siakago PMCC No. 22 of 2015 – Njuki Kigoro V Samuel Ngari Kigoro*. The parties in the consolidated suits are siblings. The latter suit was transferred to the Environment and Land Court at Embu on 30<sup>th</sup> May 2017 and an order for consolidation of the two suits made on 15<sup>th</sup> July 2019. It was directed that *Embu ELC No. 299 of 2015* shall be lead file.

**B. THE PLAINTIFF'S CLAIM**

2. By an originating summons dated 28<sup>th</sup> April 2015 brought under **Section 38** of the **Limitation of Actions Act (Cap. 22)** and **Order 37 Rules 7 and 8** of the **Civil Procedure Rules**, the Plaintiff sought the following orders against the Defendant with respect to *Title No. Nthawa/Siakago/641 (the suit property)*:

- a. That the Applicant be ordered to have become entitled by adverse possession of over 12 years to all that parcel of land known as Nthawa/Siakago/641.
- b. That the Applicant be registered as the sole proprietor of the said land parcel Nthawa/Siakago/641.
- c. That the Mbeere Land Registrar do register the Applicant as the proprietor of Land Parcel Nthawa/Siakago/641.
- d. That the Respondent do pay costs of this suit to the Applicant.

3. The originating summons was grounded upon the supporting affidavit sworn by the Plaintiff on 29<sup>th</sup> April 2015 and his further affidavit sworn on 28<sup>th</sup> June 2019 and the annexures thereto. The Plaintiff contended that sometime in 2001 he bought a portion of 0.27 ha out of the suit property from the Defendant and took possession thereof in the same year. He contended that he had extensively developed the said portion by building a house and cultivating crops such as mangoes, bananas, avocados and apples. It was his case that he had been in open, exclusive and continuous possession of the said portion for a period exceeding 12 years hence he was entitled to be registered as proprietor thereof on account of adverse possession.

**C. THE DEFENDANT'S RESPONSE**

4. The Defendant filed a replying affidavit sworn on 26<sup>th</sup> May 2015 in answer to the originating summons. The Defendant denied the existence of any sale agreement between the parties and put the Plaintiff to strict proof thereof. It was the Defendant's case that he had merely borrowed a sum of Kshs. 23,000/- from the Plaintiff for his wedding arrangements in 2001 and that it was not payment of the purchase price for the suit property. He denied that the Plaintiff had ever cultivated, lived upon or built any house on the suit property. Consequently, he sought dismissal of the originating summons with costs.

#### **D. THE PARTIES' DISPUTE IN SIAKAGO PMCC NO. 22 OF 2015**

5. By a plaint dated 7<sup>th</sup> April 2015, the Defendant (who was the Plaintiff in that suit) sued the Plaintiff (who was the Defendant in that suit) seeking removal of a caution over the suit property. The Defendant contended that he was the registered proprietor of the suit property and that the Plaintiff had without lawful justification or excuse cautioned the suit property. He, therefore, wanted a court order for removal of the said caution and costs of the suit.

6. By a written statement of defence dated 28<sup>th</sup> April 2015 the Plaintiff contended that he was a purchaser for value of a portion of the suit property hence there was lawful justification for lodging the caution. The Plaintiff also pleaded that he had been in occupation for a period exceeding 12 years hence he had acquired an interest in the suit property on account of adverse possession. He further stated that he was in the process of filing a claim for adverse possession before the High Court.

#### **E. SUMMARY OF EVIDENCE AT THE TRIAL**

##### **a. The Plaintiff's evidence**

7. When the consolidated suits came up for trial on 28<sup>th</sup> November 2019 the Plaintiff testified on his behalf as the sole witness. He adopted his witness statement dated 14<sup>th</sup> June 2019 as his evidence-in-chief. He also produced the documents in his list of documents dated 14<sup>th</sup> June 2019 as exhibits. The gist of the evidence was that he purchased a portion of 0.27 ha out of the suit property from the Defendant in 2001 for the sum of Ksh.25,000/-. He claimed to have paid a deposit of Ksh. 23,000/- whereas the balance was to be paid upon transfer.

8. It was the Plaintiff's evidence that he took possession in 2001 and that he had developed his portion of the suit property by planting tobacco, khat (*miraa*), napier grass, avocados, and trees. He further stated that he had built a dwelling house thereon where he resided with his family members. It was his case that the Defendant changed his mind on the sale in 2013 thereby causing him to caution the suit property in order to protect his purchaser's interest.

##### **b. The Defendant's evidence**

9. The Defendant also testified on his own behalf as the sole witness. He adopted his witness statement dated 14<sup>th</sup> June 2019 as his evidence-in-chief. His evidence was that there was absolutely no sale agreement with the Plaintiff for the sale of the suit property and that all he did was to borrow Kshs. 23,000/- from him. It was also his evidence that the Plaintiff entered the suit property only in 2015.

10. During cross examination by the Plaintiff's advocate he denied that the Plaintiff had any house or crops on any portion of the suit property. He also contended that the sale agreement which was produced by the Plaintiff was a complete forgery. He further stated that although he had reported the alleged forgery to the police, the Plaintiff had never been charged with any criminal offence.

#### **F. DIRECTIONS ON SUBMISSIONS**

11. Upon conclusion of the trial on 28<sup>th</sup> November 2019 the Plaintiff was granted 30 days to file and serve his written submissions whereas the Defendant was granted 30 days upon the lapse of the Plaintiff's period to file his written submissions and original documents. However, none of the parties had filed submissions by the time of preparation of the judgment.

12. The court had directed the District Land Surveyor Mbeere to visit the suit property with prior notice to the parties and file a report on the developments, if any, on the suit property within 45 days. When the matter was mentioned on 6<sup>th</sup> February 2020, the surveyor had not filed any report and neither had he visited the suit property. The matter was then stood to 16<sup>th</sup> April 2020 to confirm filing of the surveyor's report.

13. The court did not sit on 16<sup>th</sup> April 2020 due to the prevailing Covid-19 pandemic hence the matter was fixed for further mention on 25<sup>th</sup> June 2020. The surveyor's report was not on record on 25<sup>th</sup> June 2020 hence the court dispensed with the surveyor's report and fixed the suit for judgement on 30<sup>th</sup> July 2020.

#### **G. ISSUES FOR DETERMINATION**

14. The court has noted that the parties did not file agreed issues for determination in the consolidated suits. Accordingly, the court shall frame the issues for determination in accordance with the law. Under **Order 15 Rule 2** of the **Civil Procedure Rules** a court may frame issues from any of the following:

- a. The allegations contained in the pleadings.
- b. The contents of documents produced by the parties
- c. The statements made on oath by or on behalf of the parties.

15. The court has considered the pleadings, affidavits, documents and evidence on record in this matter. The court is of the opinion that the following issues arise for determination in this suit:

- a. Whether the Plaintiff has demonstrated his claim for adverse possession with respect to the suit property.
- b. Whether the Defendant is entitled to an order for removal of the caution.
- c. Who shall bear cost of the consolidated suits.

**a. Whether the Plaintiff has demonstrated his claim for adverse possession**

16. At the trial, the Plaintiff sought to demonstrate that he purchased a portion of 0.27 ha out of the suit property from the Defendant. On the other hand, the Defendant tried to demonstrate that there was no such sale agreement and that the sum of Kshs. 23,000/- he received was merely a loan. The court is of the opinion that such matters are not of much consequence in the claim for adverse possession even though they may be relevant to the claim for removal of caution. All that the Plaintiff is required to demonstrate are the elements of adverse possession as required by law. The existence of a valid sale agreement is not one of the elements of proving adverse possession.

17. The court has considered the pleadings, evidence and material on record on the first issue. The elements of adverse possession were restated in the following cases: **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

18. The elements of adverse possession were summarized in the case of **Kasuve Vs Mwaani Investments Ltd** (*supra*) as follows:

**“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”**

19. In the case of **Wambugu V Njuguna** (*supra*) the test of dispossession was explained as follows:

**“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 whether or not the claimant has proved that he has been in possession for the requisite number of years ... Dispossession of the proprietor that defeats title are acts which are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it ...”**

20. The court has considered the entire evidence on record on the issue of adverse possession. Each of the parties relied upon their own testimonies and did not call any additional witnesses. So, the outcome will largely turn on the credibility of the parties. The court has noted from the material on record that although the Defendant vehemently denied the existence of any sale agreement in his replying affidavit, witness statement, and oral evidence, he was not a truthful and credible witness for at least two reasons. First, in his statement dated 7<sup>th</sup> April 2015 accompanying his plaint in *Siakago PMCC No. 22 of 2015* he stated as follows:

**“The defendant placed a caution against this piece of land claiming the purchaser’s interest (official search hereby attached). The defendant who is my brother attempted to buy this parcel of land. He gave me some money as part payment. He demanded to be refunded his money amounting to Kshs. 35,000/- (thirty five thousand only) which he afterwards refused to receive even before our Assistant Chief.”**

21. It would appear that the Defendant is not a credible witness because in the Siakago suit he clearly conceded knowledge of sale or attempted sale of the suit property. He conceded having been paid some money as part payment of the purchase price. How could he then turn round before the Environment and Land Court and claim that the sum of Ksh. 23,000/- he received was merely a refundable loan? In the opinion of the court the Defendant is not a truthful witness and is not to be believed on any of the issues in controversy in this suit.

22. The second reason for discrediting the evidence of the Defendant is to be found in is the letter dated 8<sup>th</sup> November 2013 from the Chief of Nthawa Location addressed to the Plaintiff. In the said letter, the Chief was summoning the Plaintiff to appear before him for resolution of a complaint lodged by the Defendant relating to the sale of land. The Chief summarized the nature of the complaint as follows:

**“RE: LAND AGREEMENT CASE – PAUL NJUKI K. Vs SAMUEL NGARI KIGORO**

The above named person (your brother) has been to this office and lodged complaints against you.

1. That you entered into a land sale agreement with him early 2001. You gave him Kshs. 23,000/- (Twenty three thousand shillings) as the price of one part of parcel No. Nthawa/Siakago/641.

2. That since the time you turned up insulting him every now and then and even threatened to kill him with a panga.”

Therefore you are requested to report to this office on Monday the 11<sup>th</sup> November 2013 at 10.00 am. hours.

Avail yourself being accompanied with your witnesses whom have been present during the said agreement.

Thank you.”

23. The contents of the said letter are a clear indication that the Defendant was taking the court for a ride by feigning complete ignorance of the sale agreement. Accordingly, the Defendant’s said statement and the Chief’s letter indicative of the Defendant’s lack of creditworthiness. In the premises, the court is inclined to believe the Plaintiff’s evidence on the issue of adverse possession. The court accepts the Plaintiff’s evidence that he has been in open, exclusive and continuous possession of a portion of 0.27 ha out of the suit property. The court also accepts the Plaintiff’s evidence that he has developed the suit property over the years and that the Defendant was dispossessed of the same in the eyes of the law. Accordingly, the court finds and holds that the Plaintiff has demonstrated his claim for adverse possession with respect to 0.27 ha out of the suit property.

**b. Whether the Defendant is entitled to an order for removal of the caution**

24. The Defendant’s claim for removal of caution was predicated on the fact that he was the absolute registered proprietor of the suit property. On the other hand, the Plaintiff had cautioned the suit property claiming a purchaser’s interest. Although the Defendant vehemently denied the existence of a sale agreement at the trial, the court has found that the Defendant is a pathological liar. His own written statement dated 7<sup>th</sup> April 2015 and the Chief’s letter dated 8<sup>th</sup> November 2013 betray the Defendant’s denial.

25. The court finds that the Plaintiff had a lawful justification or excuse to caution the suit property since he had a claim against it. Whether such a claim had good chances of success before a court of law is a different question altogether. The purpose of the caution was to preserve the suit property until the validity of the claim could be conclusively determined at a competent forum. The court is thus of the opinion that the Defendant has not demonstrated a good case for an order for removal of the caution. Additionally, the court has already found and held that the Plaintiff has acquired a portion of the suit property on account of adverse possession. The 2<sup>nd</sup> issue is, therefore, answered in the negative.

**c. Who shall bear costs of the consolidated suits**

26. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, the court is aware that the parties herein are siblings. Accordingly, the court is of the opinion that the appropriate order to make is that each party shall bear his own costs.

**H. CONCLUSION AND DISPOSAL ORDER**

27. The upshot of the foregoing is that the court finds merit in the Plaintiff’s originating summons dated 28<sup>th</sup> April 2015. The court is satisfied that the Plaintiff has proved his claim for adverse possession to the required standard. The court has also found that the Defendant has failed to make out a case for removal of the caution registered against the suit property. Accordingly, the court makes the following orders for disposal of the consolidated suits:

- a. That the Plaintiff’s originating summons dated 28<sup>th</sup> April 2015 and is hereby allowed in the following terms:
  - i. That the Plaintiff has become entitled to be registered as proprietor of all that parcel of land known as *Nthawa/Siakago/641* on account of adverse possession.
  - ii. That the Plaintiff be registered as the proprietor of the said land parcel *Nthawa/Siakago/641*.
  - iii. That the Mbeere Land Registrar do register the Plaintiff as the proprietor of Land *Parcel Nthawa/Siakago/641*.
- b. That the Defendant’s suit in *Siakago PMCC No. 22 of 2015* be and is hereby dismissed in its entirety.
- c. Each party shall bear his own costs.

**JUDGEMENT DATED and SIGNED** in Chambers at **EMBU** this **30<sup>TH</sup> DAY** of **JULY, 2020** and delivered via Microsoft Teams platform in the absence of both parties.

**Y.M. ANGIMA**

**JUDGE**

**30.07.2020**