



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 146 OF 2010

RONALD MWANGI NJUGUNA.....PLAINTIFF/APPLICANT

VERSUS

WANYOIKE GITONGA.....DEFENDANT/RESPONDENT

JUDGMENT

1. The plaintiff is the registered owner of land parcel **Title No. Bahati/Kabatini Block 1/2281** having been so registered on the 13th May 2010 in his favour.

In his statement of claim dated 29th June 2010 and filed on 29th June 2010, the plaintiff states that when he bought the said land parcel on 12th November 2009 the defendant was staying thereon as a tenant and upon giving him notice to vacate, the defendant failed to do so leading to the filing of this suit on the 19th June 2010.

He seeks an eviction order and a permanent injunction to restrain the defendant, his servants and relatives from entering, cultivating or in any other way interfering with the subject land parcel.

2. The defendant filed a statement of defence and counterclaim. He denied that the plaintiff was the legal owner of the said land parcel and further denied that the plaintiff bought the land on the date indicated and that even if he bought the said land, the seller had no proprietary interest to pass to the plaintiff as the same long determined in law and was of no legal effect.

3. In his counterclaim, the defendant reiterated being the lawful and or beneficial owner of the subject land parcel and therefore entitled to all proprietary interests and rights over the same as the son of the late Gitongu Karanja purchased and took possession of the land from one Muthama Kamau in 1977 and has been in occupation of the suit land since then.

He prays for declaration that the suit land is his lawful inheritance and the plaintiffs title is illegal, unlawful and null and void as the previous title had determined in law.

He further seeks an order of nullification and cancellation of the plaintiffs title deed over the suit land, and rectification of the register by the Land Registrar, Nakuru.

4. In reply to the defence and counterclaim, the plaintiff reiterated his ownership right over the suit land and states that the defendant was only a tenant of the previous owner, Muthama Kamau. It is his averment that the defence and counterclaim and the reliefs sought are unavailable to the defendant and prays for dismissal of the counter claim with costs.

5. Each of the parties filed their respective list of documents. For the Plaintiff the following documents were filed on 19th January 2011.

- 1. The Title deed of title No. Bahati/Kabatini Block 1/2281**
- 2. Certificate of official search dated 29th March 2010**
- 3. A Sale Agreement dated 12th November 2009**
- 4. Letter of consent dated 25th March 2010**
- 6. Demand letter dated 25th May 2010**

The Defendant filed his list of documents on the 20th April 2014. These are:

- 1. Copy of Sale agreement dated 16th December 1997**
- 2. Photographs of suit property in 1997**
- 3. Photographs of the burial site and homesteads.**
- 4. Copies of plaint and defence in Nakuru HCCC No. 227 of 1999 Muthama Kamau vs Karanja Gitonga & 5 Others.**

6. The plaintiff's evidence

The plaintiff Ronald Mwangi Njuguna testified that he did not know the defendant, that he bought the suit land from one Muthama Kamau vide a Sale Agreement dated 12th November 2009 for a sum of Kshs.1.5 Million. He produced the sale agreement as exhibit. It was his testimony that prior to the agreement he had inspected the land and searched the title after which he applied and obtained Land Control Board consent on the 25th March 2010, and upon registration a title deed was issued in his name. He stated that he did not take immediate possession of the land as there were people on the land as tenants of the original owner and upon giving them notice to vacate, they failed laying a claim of ownership on the said land parcel. He testified that he later learnt that the defendant's father, mother and brother are buried on the land parcel.

7. Upon Cross Examination the plaintiff stated that he did not know of an existing case over ownership of the suit land not aware of an agreement for sale of the same on 16th December 1997 to one Gitonga Karanja by Muthama. He Reiterated that if the defendant was on the land from 1977 then he was a tenant. He further stated that the 1977 agreement was not signed nor was there a land Control Board to sell and transfer.

8. Defence evidence was urged by four witnesses.

DW 1 was the defendant Wanyoike Gitonga. He testified that he and his family have lived on the suit land Since 1977 and that his late father Stanley Gitonga Karanja died on 24th September 1995 and his mother Mary Njoki Gitonga also died and both were buried on the suit property.

He stated t by an **agreement dated 12th December 1997** his late father bought the land from Muthama Kamau and paid the purchase price of Kshs 6000/=. He further averred that his family members were witnesses over the sale. He stated that the land undeveloped in 1977 and upon taking possession the defendant and his siblings constructed houses and have since been in constructive occupation, cultivating and using the land peacefully upto 1999 when Muthama sought to evict them filed a case in **HCCC 227 of 1999** but which case was dismissed for want of prosecution.

Upon cross examination the defendant stated that his father nor Muthama signed the 1977 sale agreement nor was there any Land Control Board consent for the transfer of the land. He stated that he sought cancellation of the title Deed as it fraudulently obtained and further that there is a succession case filed in court in respect of the same land parcel.

9. **DW2** Nathan Jeremiah Nandwa is a neighbour of the defendant for the last 42 years. It was his testimony that the defendant's father Gitonga Karanja settled in the suit land in 1977 and lived there with his family peacefully and left them thereon in 1995 when he died. He testified that he did not know the plaintiff and despite the title deed being issued in his favour of the plaintiff on 13th May 2010, he was not the owner as nobody ever claimed ownership since 1977.

10. **DW3** is the sister of the defendant. She reiterated DW1's evidence and that they have lived on the suit land since 1977 and never paid rent to anybody nor were they tenants since their father bought the suit land in 1977 from Muthama Kamau. It was her evidence that Muthama was not the owner of the land although he obtained a title to the same.

11. **PW4** Morris Mwangi, an Executive Assistant of the High Court produced case file **HCCC No. 227 of 1999** between Muthama Kamau the defendant in this case and his brothers and sisters. He confirmed that the subject of the dispute is the suit land in this case and that the suit was not heard on merit but was dismissed for want of prosecution.

12. Upon conclusion of evidence parties filed written submissions. From the above evidence and the parties' pleadings, the following material facts are not in dispute.

1. That by an agreement executed between the plaintiff and one Muthama Kamau dated 12th November 2009, the plaintiff purchased the land in dispute title No. Bahati/Kabatini Block 1/2281 from Muthama Kamau who was then the registered owner.

2. That the defendant and his family were in actual occupation and use of the land since 1977 by authority of the said Muthama Kamau who had authorised and allowed the defendant's father Gitonga Karanja (Deceased) to take possession and use the said land upto 1999 without any interruption or dispute as to its ownership, when a case was filed for eviction by the said Muthama Kamau.

3. That Nakuru HCCC No. of 1999 filed by Muthama Kamau challenging ownership of the suit land by the defendant's father was dismissed for want of prosecution, and by this time the defendant's family had been in open occupation and use of the suit land for 22 years.

13. Issues that arise from the pleadings and evidence tendered by the parties and their witnesses in my considered view for the determination by the court are:

(1) Whether the late Muthama Kamau had a legal title and proprietary interest in the suit land on the 13th December 1985 when he obtained a title deed in this favour to the exclusion of the defendant's family that he had allowed to openly occupy and use the suit land since 1977, a period of 22 years.

(2) Whether the late Muthama Kamau could sell and pass a lawful interest over the suit property to the plaintiff in 1999.

(3) Whether the rights of the registered owner Muthama Kamau were extinguished and determined in law in view of the defendant's occupation and use of the suit land for 22 years.

(4) Whether the defendant had acquired proprietary interest in the suit land by adverse possession and whether the defendant's family were tenants of the registered owner, Muthama Kamau.

(5) Whether the plaintiff is entitled to the prayers sought in the plaint.

The above issues are largely interrelated and will therefore be addressed simultaneously upon the evidence adduced.

14. The plaintiff's submissions are that he is a purchaser for value of the suit property as evidenced by the sale agreement entered into on the 12th November 2009 which is in compliance with **Section 3(3) of the Law of Contract Act**. That a Land Control Board consent to transfer the suit land duly obtained with the stipulated time of six months and no objection was filed with the board by the defendant or anybody else, that prior to the purchase, the plaintiff carried out due diligence on the suit land and ascertained that the defendants were tenants with no proprietary rights or interest in the land. To buttress the above it cited **Nak HCCC No 129 of 2005 Chege Mutua vs Amos Kagwai & Another, Nak HCCC No. 60 of 2004 Elijah Somoweibe Kasura vs Leken de Koyo & Another, Nak HCCC No. 253 of 2005 David Ole Tukai vs Francis Muge & 2 Others** among others. The import of the above decisions are that there having been a contract of sale between the registered owner and the purchaser followed by a consent by the Land Control Board to transfer the property, then the purchaser acquired absolute ownership subject only to matters stated in **Section 28 (a) and (b) and 30(b) of the Registered Land Act** (Now repealed) and as the defendants claim is not based on the said exceptions to **Section 27(a)** that is the overriding interests on the land the plaintiffs title cannot be defeated. It was submitted that overriding interests as envisaged under **Section 28 of the Repealed Act** above do not take precedence over the proprietorship interest of the registered owner nor do they entitle the beneficiary as lessee or otherwise to challenge the titles.

15. In his highlights Mr. Karanja submitted that the case must be decided only on the facts, pleadings and the law and reiterated that the defendant did not plead fraud in his defence and counterclaim.

It was his submission that the alleged sale of the suit land by the registered owner to the defendant's father in 1985 was void as the alleged agreement was not signed nor Land Control Board consent obtained. Citing the case **Mbira vs Gachuhi (2002) EA 137**, he submitted that possession given as a result of an agreement between a registered owner and the possessor cannot give rise to adverse possession.

He further submitted that a declaration of ownership by inheritance can only be established in a succession case and not by claim for adverse possession.

16. The plaintiffs Advocate Mr. Waiganjo reiterated in his highlights of submissions that the plaintiff was fully aware when he purported to purchase the suit land that the suit land was occupied and in particular by the defendants family and not as tenants, and his failure to undertake due diligence that was his duty he cannot claim to have bought the land free from encumbrances and overriding interests.

He submitted that the seller Muthama Kamau held the suit land in trust for the defendant and his family acquired title by adverse possession.

17. I have looked at the alleged sale agreement dated the 16th December 1977 between the late Muthama Kamau and the late Gitonga Karanja.

It was not signed by both seller and purchaser.

It was however witnessed by five witnesses all family of the parties.

Section 3(3) of the Law of Contract Act Chapter 23 Laws of Kenya

requires that a sale agreement must be signed by the parties and witnessed. Notwithstanding the omission to sign, the seller Muthama Kamau allowed and gave to the defendants father and family including the defendant authority to enter into and take possession and use of the suit land since the date of the unsigned agreement. This fact is not in dispute. It therefore follows that the defendant father and family entered into the suit land with full knowledge and authority of the owner, and continued in such open occupation and use by his family and defendant upto 1999 when the said Muthama Kamau purported to evict them from the suit land by virtue of the case stated above. The case was dismissed for want of

prosecution.

18. It is also not in dispute that the said Muthama Kamau never occupied the suit land but in 1985, eight years after allowing the defendants father and family to take possession of the land obtained registration of title in his favour and even after he did not remove the defendant family from the suit land despite the registration that gave him legal ownership of the suit land.

In the case **Mwenja Ngure vs Sammy K. Seroney & 3 Others** the court held that such title was not subject to challenge except on grounds of fraud or misrepresentation. In the present suit there no issue of either fraud or representation raised by the defendant going by the pleadings in both the plaint the defence and counterclaim.

The circumstances in the above case were very close and comparable to the present case. The plaintiff purported to acquire the land when he knew the plaintiff in occupation by conspiring to acquire title documents without knowledge of the plaintiff and attempting to dispose off the same secretly. The court dismissed the plaintiffs claim.

19. The defendant brought his counterclaim within the plaint. The plaintiff submits that the defendants counterclaim cannot succeed as it was not brought by of an Originating Summons being based on adverse possession under the Limitations of Action Act. See Case **John Nyingi Muchiri vs John Kaya Mutahi and Others HCCC No. 583 of 1996**. The court while acknowledging that a claim for adverse possession ought to be brought by way of originating summons it observed that if brought by way of plaint provisions of **Order 37 Rule 8 of the Civil Procedure Rules** gives jurisdiction to the court to continue proceedings brought by originating summons as if they had been brought by way of a plaint in an appropriate court and proceed to hold that there existed no jurisdiction for the reverse to continue proceedings began by plaint as though they had been brought by an originating summons.

Just like the present suit the court held that as the claim was not entirely based on adverse possession but also on a purchase and evidence of having purchased the suit land and occupied the same for over twelve years before the alleged trespass, it was properly before the court. The defendant's counterclaim is therefore competently brought within the existing suit by way of plaint.

20. I must hold relying on the facts pleadings and evidence that in my considered opinion the defendants claim by his counterclaim was based on both purchase and adverse possession. It would have been improper to bring a separate suit when there existed the suit by plaint. It is also my finding that the plaintiff purchased the suit land well aware that the same was in actual possession and use by the defendant and his family.

It was the plaintiffs duty to do due diligence to ascertain the status of the defendants occupation and use before the purchase. It was his testimony that before he purchased the suit land he inspected the same and houses and other structures on the land and even graves. This would have raised an alarm as to the actual status as to ownership before he purchased it but this he ignored.

I do not believe his testimony that he believed the defendants family were mere tenants. In any event it was also clear to him that the vendor Muthama Kamau was not in actual possession and occupation of the suit land at the time of the purchase and indeed from 1977 when the defendants father and family took possession.

21. The question then arises as to who between the plaintiff as the registered owner and the defendant is the legal owner with proprietary interest over the suit land. Evidence adduced that the defendant's family claim is ownership by virtue of Adverse possession for 22 years without any interruption upto 1999 when a suit was filed against them and which suit was dismissed for want of prosecution.

The title deed held by the plaintiff not a first registration, and therefore subject to challenge. I have stated above that the plaintiff had a duty to do due diligence to confirm that the seller had a valid title to pass to him upon purchase. He failed to discharge that duty. By 12th November 2009 when the late Muthama

Kamau purported to sell the suit land to the plaintiff the said title determined in law and he had no proprietary interest in the said land, the defendant's family having taken possession and developed the same over a long period of time.

By pleading that the title held by the seller had long determined in law and of no legal effect the Defendant made the plaintiff aware that he would raise issues of law concerning the validity of the title to the plaintiff.

22. **Section 7 of the Limitations of Actions Act** states:

“An action may 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 is first accrued to some person through whom he claims to that person.”

The title to the suit land registered to the former owner – Muthama In 1985. He sold the land and a new title registered in the plaintiffs favour on the 15th May 2010. That is 25 years period since the Defendants family took possession and occupation of the suit land.

During the 25 years the former owner Muthama did not challenge the occupation by the defendants family save by the suit **HCCC No. 227 of 1999** which was dismissed for want of prosecution. That suit was therefore of no legal effect, and in my view it did not break the period of active occupation and in any event it was 14 years after Muthama had obtained his title in 1985 and therefore within the 12 year period envisaged in **Section 7 of the Limitations of Actions Act**.

23. Given the circumstances it is clear in my mind that the title to Muthama that he obtained in 1985 had indeed determined in favour of the

defendants family who had been in occupation and possession for 22 years and 14 years after he obtained registration and therefore that Muthama had no legal title as it had determined.

Section 30 of the Land Registered Act (now repealed), states that land is subject to overriding interest as may be for the time subsists and affect the same without being noted on the register. These include

Section 30(8)– rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of Actions or by prescription 30(g) the rights of a person in possession or actual occupation of the land to which he is entitled in right only of such possession or occupation ,save where inquiry is made of such person and the rights are not disclosed”

24. It is evident that by the time the former owner Muthama Kamau purported to sell the suit land to the plaintiff, the land overriding interests by the defendants family as it already acquired title by of advance possession and prescription.

In the case **Kairu vs Gacheru Civil Appeal NO. 42 of 1987** it was held:

“the law relating to prescription affects not only present holders of title but that predecessors (Under Section 7 of the Limitations Act).”

The learned Judge Apaloo J.A (as the then was) , observed:

If the period the respondent was in a adverse possession against Mwangi were to be excluded and the period of limitation reckoned only when the appellant became registered proprietor, an owner of land whose title was in danger of being lost by prescription can better his lot by simple device of alienating the land just a day before the 12 year period ran out .But it is elementary that a grantor of land cannot grant better title than he has.

The appellant t Mwangi's Title subject to the rights of a prior purchaser in adverse

possession. That the law relating to prescription affects not only present holders of title but their predecessors in title as shown by Section 7 of the Limitation of Actions Act. (emphasis mine)

25. The above observations capture well the circumstances under which the plaintiff became the registered owner of the suit land. It is my finding that the plaintiff acquired the said title from the previous owner (Muthama) subject to the Defendants family rights as purchasers in advance possession.

The said Muthama no valid or better title to pass over to the plaintiff.

The term “**prescription**” as contained in Black Law Dictionary 8th Edition is

“the acquisition of title to a thing (especially an intangible thing such as the use of real property) by open and continuous possession over a statutory period.....”

26. I have stated above that the Defendant's family occupation and use of the suit land was open and continuous from the year 1977 for 22 years by the time this suit was filed. This doctrine of prescription and better known as adverse possession affects the registered owners as well as their predecessors.

That means that Muthama who was the registered owner before passing title to the plaintiff was too subject to prescription. He (Muthama) could therefore not pass a valid title to the plaintiff.

In its entirety I find that the plaintiff has failed to establish that he holds a valid title to the suit land to the exclusion of the Defendant who I have found to be entitled to ownership of the suit land by advance possession and/or prescription.

27. For the above reasons the plaintiff's suit is dismissed with costs and the Defendant's counterclaim is allowed. A declaration is thus issued that the suit land is the property of the late Karanja Njoroge and the defendant by virtue of being his heir in title together with his entire family (heirs). It is further declared that the Title Deed registered in the plaintiff's favour on the 13th May 2010 is null and void as it has determined in law. Following therefore the Nakuru County Land Registrar is directed to cancel the said title deed **Title No. Bahati/Kabatini Block 1/2281** in favour of the plaintiff and rectify the register in favour of the defendant to hold it in trust for the defendant and his family.

28. Costs of the suit shall be borne by the plaintiff.

Dated, signed and delivered in court this 10th Day of November 2016

JANET MULWA

JUDGE