



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HIGH COURT CIVIL CASE NO. 34 OF 2013

ISAAC MAINA KAMAUPLAINTIFF

VERSUS

RAHAB WANGARE GACIENGO1ST DEFENDANT

NAOMI WAMBUI GACIENGO2ND DEFENDANT

JUDGMENT

1. The Plaintiff **Isaac Maina Kamau**, moved this court by way of Originating Summons dated 19th September, 2012 and filed on 20th September, 2012. He seeks the following orders:
 - a. That the title to parcel No. Njoro/ Ngata Block 4/133 (Rumwe) (hereafter referred to as the suit land) measuring 7.093 Ha registered in the name of Harun Gachiengo Kamau (Deceased) be declared to have become extinguished and that the plaintiff be declared to have acquired title thereto by virtue of adverse possession having been in peaceful, open, uninterrupted and exclusive possession thereof for a period exceeding 12 years.
 - b. That the plaintiff be registered as Proprietor of the suit land having acquired the title by virtue of the doctrine of adverse possession thereof since 31/12/1998
 - c. That the defendants be ordered to apply for requisite consent and execute documents in favour of the plaintiff within seven days (7) of service of the order failing which the Deputy Registrar of this honourable court be authorised to execute the same.
 - d. That the defendants be ordered to release and /or return the original title deed to the Land Registrar Nakuru for the same to be cancelled and in its place the Land Registrar to issue a title in favour of the plaintiff in respect of parcel No.Njoro/Ngata Block4/133(Rumwe).
 - e. That costs of this suit be borne by the Defendants who have occasioned this action.
2. The Originating Summons was supported by affidavits sworn by the Plaintiff and Daniel Gachiengo on 19th September, 2012. The plaintiff in his affidavit deponed that he entered into an agreement with one Harun Gachiengo Kamau (hereafter referred to as the deceased) for the purchase of Njoro/Ngata/Block4/133(Rumwe) (hereafter referred to as the suit land) for consideration of Kshs. 990,000 of which the deceased acknowledged receipt witnessed by his son Daniel Kamanja Gachiengo. Following the execution of the agreement and in accordance with the

- terms therein, the plaintiff immediately occupied the suit land awaiting transfer, developed the same extensively and has enjoyed uninterrupted use and possession ever since. Although the deceased was to obtain consent from the Land Control Board to facilitate the transfer, he died before this was done.
3. The defendants were appointed joint Administrators of the deceased estate on 11th April, 2002 and they have never taken out any legal proceedings against the defendant to evict him from the suit land which he has held adversely against their interests for 23 years.
 4. In his affidavit Daniel Gachiengo deponed that he is a son of the deceased who had on 13th October, 1988 entered into a sale agreement with the plaintiff whereby the deceased sold to him the suit land for Kshs. 990,000/=. Payment was duly acknowledged by the deceased and he (Daniel) witnessed the agreement.
 5. The plaintiff immediately took possession of the suit land and his father undertook to procure the Land Control Board consent by 31st December, 1998. His father died on 2nd September, 2000 before procuring the land board consent but none of his family members have ever taken any legal action against the plaintiff to evict him from the suit land.
 6. The 1st Defendant did not oppose the originating summons. She filed a Replying affidavit sworn on 6th June, 2013 in which she deponed that she was a wife to the deceased and one of the Administrators of the estate of the deceased. She stated that it was true that the deceased had sold the suit land to the plaintiff who immediately took possession and has been in occupation ever since. The plaintiff had even allowed her to cultivate one acre of the suit land and he related well with the entire family of the deceased. She further deponed that she had no intentions of frustrating the plaintiff's occupation or his acquisition of title to the suit land and had tried to find a solution to the problem but the 2nd defendant, her co- wife, had remained uncooperative. She urged the court to protect her against any adverse order as to costs.
 7. The 2nd defendant filed a replying affidavit sworn on 5th November, 2013 in which she deponed that she was a wife to the deceased and the 1st defendant was her co-wife. She was categorical that the suit land belonged to the deceased and he had never sold it to any one during his lifetime. That the 1st defendant was working in cohorts with the plaintiff and her son Daniel Gachiengo to avert justice thereby denying her legal rights and interest to the suit land.
 8. On 7th June, 2013 directions were taken by counsels for the plaintiff and 1st defendant that the originating summons would be disposed off by way of affidavit evidence. Counsel for the 2nd defendant was absent.
 9. While making their submissions, all counsels reiterated what was contained in the affidavits of their respective clients. In addition, Counsel for the plaintiff submitted that the 2nd defendant's affidavit was full of contradictions and although the 2nd defendant had alleged that there was collusion between the plaintiff, the 1st defendant and her son, she had not commented on how the signatures in the agreement were forged nor had she raised an issue in the family division if she believed something was wrong with the succession cause.
 10. Counsel for the 2nd defendant submitted that adverse possession cannot be claimed through a sale agreement and insisted that the suit property still formed part of the estate of the deceased and that possession by the plaintiff was not peaceful, open and uninterrupted.
 11. I have carefully considered this matter and the affidavits filed by the rival parties. To my mind, the only question that emerges for determination is whether the originating summons is properly grounded on the conditions for Adverse possession.

Analysis

12. Adverse possession is defined as a **method of gaining legal title to real property by actual, open hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by state law.**
13. In Kenya, the **Limitations of Actions Act, Cap 22** prescribes the period of time for one to

acquire adverse possession to be 12 years. **Section 38 (1)** of the **Act** then provides that a person who is entitled by adverse possession may apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as the proprietor. The plaintiff herein seeks such an order.

14. For a claim for adverse possession to succeed the plaintiff must meet at least five basic conditions namely; open and notorious use of the property, continuous use of the property for the prescribed period, exclusive use of the property, actual possession of the property, and non-permissive, hostile or adverse use of the property.

The Court of Appeal in **Francis Gicharu Kariri Vs Peter Njoroge Mairu CA No293 of 2002 (Nairobi)** (unreported) approved the decision of the High Court in the case of **Kimani Ruchire Vs Swift Rutherford & Co Ltd (1980) KLR 10 at page 16 letter B**, where **knetter J. held** that:

“ The plaintiffs have to prove that they have used this land which they claim as of right Nec vi, Nec clam, Nec precario (no force, no secrecy, no persuasion). So, the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavour's to interrupt it or by way of recurrent consideration”.

15. The affidavit in support of the originating summons and sworn by the applicant states in part:

“1.....

- 2. That on 13/10/1988, I entered into an agreement with one Harun Gachiengo Kamau for sale of all that piece of land known as Plot No. Njoro/Ngata Block 4/133.....**
- 3. That I paid to Harun Gachiengo Kamau the entire purchase price of Ksh.990,000/= and he acknowledged receipt thereof in the sale agreement which was witnessed by his son Daniel Kamanja Gachiengo.**
- 4. That in terms with the sale agreement, I took immediate possession of the said land and started to use and develop same as owner thereof awaiting transfer of the same which was agreed to be on 31/12/1988.**
- 5. That it was term of the agreement for sale that the said Harun Gachiengo (deceased) was to obtain consent from land Control Board to facilitate the transfer of the title in my name which he had not dome until he died in the year 2000.**

6.

7. That I have been in peaceful occupation and uninterrupted possession of the suit land since 13/10/1988 todate for a period of 23 years. (Annexed and marked IMK '3' is a certified extract of the title)”.

16. From the above extract, it is clear that the adverse party entered the suit land with permission emanating from a contract between himself and the deceased. It is on this basis and after payment of the requisite consideration that he entered and settled on the suit land. The parties to the agreement and in particular the plaintiff initially derived his claim to the suit land from the terms of the contract and as such the entry lacked the element of possession being hostile. However, when the deceased failed to obtain the land board consent within the stipulated period of six months the sale agreement became void for all purposes under **Section 6 (1) of the Land Control Act Cap 302** which provides;

"Each of the following transactions -

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b)

(c)

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act."

In essence after the six months expired, occupation by the applicant was no longer based on a contract and therefore became hostile and time started running.

17. The plaintiff in his affidavit stated that he moved onto the suit land in 1988 immediately after executing the sale agreement, settled and started cultivating the land and has made extensive developments therein. This is not controverted by either the 1st or 2nd defendant. In my view the plaintiff has proved that he dispossessed and discontinued the deceased the use of the suit land from 1988 and subsequently the defendants when they became administrators of the estate of the deceased. I find that the Plaintiff has thus satisfied the elements of open and notorious use of the land, continuous and uninterrupted use of the land for the prescribed period, exclusive use of the land, actual possession of the land and non-permissive, hostile or adverse use of the land.

18. see **Wambugu vs Njuguna (1983) KLR 173**, where the Court of Appeal is stated as having held as follows:

"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 of the requisite number of years."

19. The 2nd defendant in her replying affidavit denies that there was a sale agreement entered into between the plaintiff and the deceased. She however does not challenge the authenticity of the sale agreement exhibited or explain under what circumstances the plaintiff has been in occupation of the suit land for 23 years. I find that the 2nd defendant's argument has no merit.

20. For the above reason, I do find that the plaintiff has proved his case that his action as against the defendants had accrued as contemplated under **Section 38** of the **Limitation of Actions Act**.

21. In the circumstances, I hereby allow the plaintiff's originating summons dated 19th September, 2012 and declare that;

- a. **The title to parcel No. Njoro/ Ngata Block 4/133 (Rumwe) measuring 7.093 Ha registered in the name of Harun Gachiengo Kamau (Deceased) has become extinguished and the plaintiff has acquired title thereto by virtue of adverse possession having been in peaceful, open, uninterrupted and exclusive possession thereof for a period exceeding 12 years.**
- b. **That the plaintiff be registered as Proprietor of the suit land having acquired the title by virtue of the doctrine of adverse possession thereof since 31/12/1998**
- c. **That the defendants do apply for the consent from the Land control board and execute documents in favour of the plaintiff within thirty days (30) of service of the order failing which the Deputy Registrar of this honourable court to execute the same.**

d. That costs of this suit be borne by the 2nd defendant.

Dated signed and delivered in open court at Nakuru this 9th day of May day 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Kairu holding brief for Mr Kaburu for the plaintiff

Ms Manyara holding brief for Wachira Mbutia for 1st Defendant

N/A for 2nd Defendant

Emmanuel Maelo : Court Assistant

L N WAITHAKA

JUDGE