



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISC. APPLICATION NO. 7 OF 2016 (OS)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP. 22 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF SECTIONS 1, 1A, 3 & 3A OF THE CIVIL PROCEDURE ACT, CAP. 21 LAWS OF KENYA AND ORDER 37 RULES 3, 7 & 8 OF THE CIVIL PROCEDURES RULES 2010

AND

ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

PETER NJOROGI KIBIRI

(Suing on his own behalf and on behalf of 17 Others).....APPLICANT

AND

MUGWATHI FARMS LIMITED.....RESPONDENT

JUDGMENT

On or about 12th June, 1979, the applicant and three (3) others namely; Nganga Mbiukia, Njui Gathua and Wainaina Mbote purchased from the respondent a portion of all that parcel of land known as L.R No. 10874/9 measuring 10.43 hectares (less road reserve measuring 0.28 hectares) or thereabouts known as L.R No. 10874/22 (hereinafter referred to as “the suit property”). The applicant and his three colleagues aforesaid who are deceased (hereinafter referred to together as “the original purchasers” where the context so permits) never had the suit property transferred to them. The respondent obtained a consent to transfer the suit property to the original purchasers from Kiambu Land Control Board on 21st June, 1979 and had the instrument of transfer executed in their favour on 17th July, 1979 but the said transfer was never registered. After paying the full purchase price for the suit property, the original purchasers took possession of the property the fact that the same had not been transferred to them notwithstanding. The original purchasers thereafter sold portions of the suit property to third parties who also took possession of their respective portions of the property following an informal subdivision that was carried out by the original purchasers.

The applicant brought this suit by way of Originating Summons on his own behalf and on behalf of the other persons who purchased portions of the suit property from the original purchasers seeking the determination of the following questions;

1. Whether the applicant and the persons on whose behalf he has brought the suit are entitled to be registered as the proprietors of the portions of the suit property in their occupation having purchased the same from the respondent and the original purchasers.
2. In the alternative, whether the applicant and the persons on whose behalf he has brought the suit are entitled to be registered as proprietors of the portions of the suit property that they occupy having been in possession and occupation of the same for a duration of over 12 years thereby acquiring title to the same by adverse possession.

The originating summons was supported by the affidavit of the applicant sworn on 12th January, 2016. In the affidavit, the applicant stated

that with his three deceased colleagues they purchased the suit property from the respondent. He stated that the respondent was put under receivership thereafter and the official receiver was appointed as the liquidator of the company. He stated that although an instrument of transfer of the suit property in their favour was drafted, the process of execution and registration of the same was never undertaken. The applicant stated that despite their best efforts, they had failed to have the transaction completed. He stated that attempts to trace the liquidator of the respondent through the office of the Attorney General and the High Court where the Winding up Cause was filed did not yield any fruit. He stated that the law firm that was handling the transaction on their behalf also closed down.

The applicant stated that the original purchasers took possession of the suit property after purchasing the same. He stated that they subdivided the property and sold portions thereof to third parties on whose behalf the application herein had been brought. The applicant stated that together with persons who purchased portions of the suit property from the original purchasers, they had occupied the suit property for over 12 years and that they were entitled to be registered as owners of the respective portions of the said property in their occupation. The applicant stated that their occupation of the suit property had been peaceful and uninterrupted.

The applicant annexed to his affidavit in support of the application; a copy of the certificate of title No. I.R 23616 for LR. No. 10874/9 in the name of the respondent, a copy of the instrument of transfer dated 17th July, 1979 in favour of the original purchasers, a copy of a letter of consent dated 21st August, 1979, copies of correspondence exchanged between the applicant's advocates on record and the official receiver and the Deputy Registrar of the High Court Milimani Law Court and a draft sub-division scheme.

The respondent was served with the Originating Summons by way of substituted service but did not enter appearance. On 29th November, 2018, the court directed that the Originating Summons be heard by way of oral evidence. At the hearing of the suit, the applicant, Peter Njoroge Kibiri gave evidence as the only witness. The applicant adopted his affidavit sworn on 12th January, 2016 in support of the Originating Summons as his evidence in chief and produced the annexures thereto as exhibits. He told the court that the original purchasers bought the suit property from the respondent in 1972 and took possession thereof. He stated that they engaged a firm of advocates to act for them in the transaction. He stated that the firm of advocates which they had retained closed down their office before the transaction was completed and that their efforts to obtain a title for the suit property had not borne any fruit. He urged the court to order that the suit property be registered in the name of the applicant and the persons on whose behalf he had brought the suit so that they could obtain titles for their respective portions of the suit property. He stated that they sought assistance from the office of the Attorney General and the High Court but did not receive help.

After the close of evidence, the applicant's advocates made closing submissions in writing. I have considered the Originating Summons together with the affidavit filed in support thereof. I have also considered the evidence tendered and the submissions by the applicant's advocates. The issues that arise for determination in this suit are the following;

- (i) Whether the applicant and the persons on whose behalf he has brought the application herein are entitled to be registered as proprietors of the portions of the suit property which they occupy as purchasers of the same from the respondent.
- (ii) In the alternative, whether the applicant and the persons on whose behalf he has brought the application are entitled to be registered as proprietors of the portions of the suit property which they occupy by virtue of adverse possession or prescription.
- (ii) Who is liable for the costs of the application?

The first issue:

The applicant's application (hereinafter referred to only as "the suit") was principally brought under order 37 Rules 3 and 7 of the Civil Procedure Rules. Order 37 Rule 3 of the Civil Procedure Rules gives the court power to determine any question which may arise out of or connected with a contract of sale of land which does not affect the existence of or validity of the contract. I am of the view that this provision of the Civil Procedure Rules was meant only to take care of minor disputes arising out a contract for sale of land. It was not meant to take care of situations like the one before me where the purchaser is seeking specific performance of an agreement of sale. In the circumstances of this case, I am not persuaded that the court can make an order for the registration of the applicant and the persons on whose behalf he has brought the suit as the owners of the suit property by virtue of the agreement of sale that the original purchasers entered into with the respondent in 1979. First, this suit was filed in 2016; 37 years after the date of the alleged agreement between the original purchasers and the respondent. This suit to the extent that it is seeking the enforcement of the alleged agreement is time barred and cannot be entertained by the court. Secondly, the applicant did not place before the court the agreement of sale that the original purchasers entered into with the respondent to enable the court to determine whether the terms thereof were breached by the respondent to warrant an order of specific performance. Finally, the persons who purchased portions of the suit property from the original purchasers on whose behalf the suit herein has been brought had no dealings with the respondent. They were not a party to the agreement which is said to have been entered into between the respondent and the original purchasers. In the circumstances, they cannot seek an order of specific performance against the respondent with which they had no agreement.

For the foregoing reasons, the applicant and the persons on whose behalf he has brought the suit are not entitled to be registered as proprietors of the portions of the suit property in their occupation by virtue of the agreement of sale that the original purchasers entered into with the respondent.

The second issue:

Section 38(1) of the Limitation Actions Act, Chapter 22 Laws of Kenya gives any person who claims to be entitled to land by adverse possession a right to apply to court for an order that he be registered as the proprietor of the land or lease in place of the person registered as the proprietor of such land or lease. Order 37 Rule 7(1) of the Civil Procedure Rules provides that such application shall be made by way of Originating Summons. As an alternative to being registered as the owner of the suit property by virtue of the agreement of sale that the original purchasers entered into with the respondent, the applicant had sought an order that he and the persons on whose behalf he had

brought the suit be registered as proprietors of the portions of the suit property which they occupy through adverse possession. The applicant and the persons on whose behalf he had brought the suit claimed that they had occupied the suit property peacefully for uninterrupted period of over 12 years. The applicant contended that the original purchasers took possession of the suit property in 1979 soon after purchasing the same and thereafter informally subdivided the property and sold portions thereof to the persons on whose behalf the suit herein has been brought. In **Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another [1977] KLR 10** which was an adverse possession claim, Kneller J. stated as follows at page 16:

“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 evasion)The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

In **Wambugu v Njuguna [1983] KLR 172** the court stated as follows:

“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated 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.”

As I have mentioned earlier in the judgment, the respondent did not defend the suit. The averments by the applicant in his affidavit in support of the Originating Summons were not controverted. The averment by the applicant that the original purchasers purchased the suit property from the respondent in 1979 and took possession of the same in the same year was not rebutted. The applicant’s averment that the original purchasers subdivided the suit property informally and sold portions thereof to the other persons on whose behalf the suit had been brought soon thereafter was also not rebutted. The applicant’s contention that they had peacefully occupied the suit property for uninterrupted period of over 12 years was also not rebutted.

From the evidence before the court, I am satisfied that the applicant has established his claim to the suit property by adverse possession. The applicant has placed evidence before the court showing that the original purchasers purchased the suit property from the respondent in 1979 and that the property was not transferred to them. The applicant has also demonstrated that the original purchasers took possession of the suit property and sold portions thereof to third parties on whose behalf the suit herein has been brought. As I have mentioned earlier, the fact that the applicant and the persons on whose behalf he has brought the suit had occupied the suit property for over 12 years as at the time the suit herein was brought was not rebutted. It is my finding that the applicant and the persons on whose behalf he brought the suit have acquired the suit property by adverse possession. I am satisfied that a case has been made out for their registration as the owners of the suit property in place of the respondent who is currently registered as the proprietor thereof.

The third issue:

Costs are awarded at the discretion of the court. In this case, the claim was not defended and no wrong doing by the respondent was established. In the circumstances, I am of the view that each party should bear its own costs of the suit.

Conclusion:

In conclusion, I hereby enter judgment for the applicant against the respondent on the following terms:

1. I declare that the applicant, Peter Njoroge Kibiri and the Sixteen (16) persons whose names are set out in the Authority dated 12th January, 2016 filed in court on 20th January, 2016 pursuant to Order 1 Rule 13(1) of the Civil Procedure Rules have acquired portions of L.R No. 10874/22 being a subdivision of L.R No. 10874/9 (the suit property) in their respective occupation by adverse possession.
2. The suit property, L.R No. 10874/22 being a subdivision of L.R No. 10874/9 shall be transferred by the respondent to the applicant, Peter Njoroge Kibiri to hold in trust for himself and on behalf of the sixteen(16) other persons on whose behalf the suit herein was brought within 30 days in default of which the Deputy Registrar of this court shall be authorized to execute the instrument of transfer to be approved by the court and any other document necessary to facilitate the transfer of the suit property to the applicant.
3. The applicant shall thereafter sub-divide the suit property in terms of the draft sub-division scheme that was annexed to the affidavit in support of the Originating Summons as annexure “NK3” subject to the conditions that may be imposed by the approving authorities.
4. Each party shall bear its own costs of the suit.
5. Parties shall have liberty to apply limited only to the issues arising out of the enforcement or execution of the orders issued herein.

Dated and Delivered at Nairobi this 29th Day of October, 2020

S. OKONG’O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Chege for the Applicant

N/A for the Respondent

Ms. C. Nyokabi-Court Assistant