



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 432 OF 2017

NGENDA INVESTMENT RURAL SACCO LTD.....PLAINTIFF

VERSUS

SURAJ KUNVAR PRATAPSINGH PARMAR.....1ST DEFENDANT

PRAVINSINGH PRATAPSINGH PARMA.....2ND DEFENDANT

(Sued as administrators of Pravinsingh Prabhatsing Parmar)

J U D G M E N T

1. The plaintiff commenced the present suit by way of an originating summons (OS) dated 18th October 2017. The Plaintiff/applicant, Ngenda Investment Rural Sacco Ltd claimed to be entitled to land parcel **Nakuru Municipality Block 10/63**

(“the suit property”) by virtue of being beneficial owners as purchasers and having adversely possessed the suit property for a period in excess of 12 years. The Applicant sought the determination of the following questions by the Court:-

- 1. Whether the applicant has acquired **Nakuru Municipality Block 10/63** by reason of adverse possession against the 1st and 2nd respondent?*
- 2. Whether the applicant should be registered as the proprietor of all that parcel of land known as **Nakuru Municipality Block 10/63** on the ground that since 2002, the Applicant has been openly and peacefully enjoyed occupation for over twelve (12) years preceding the presentation of summons?*
- 3. Whether the 1st and 2nd respondent should execute a transfer an all acts necessary to convey the said title to the applicant as the rightful proprietor and enable it to be registered as such and in default the Deputy Registrar to be authorised to sign the relevant documents on behalf of the respondent?*
- 4. Whether the applicant can be declared the lawful purchaser by virtue of the sale agreement on the sale of the land?*
- 5. Whether the applicant is entitled to the cost of the application?*

2. The originating summons was supported on the grounds set out on the body of the application and on the affidavit sworn in support by Dickson K Boiywo, chairman of the plaintiff/applicant. Inter alia the plaintiff/applicant averred that they had been in possession and occupation of the suit land for a period in excess of 12 years from 2002; that their possession was adverse to the interest and title held by the 1st and 2nd defendants; that their possession had been open, peaceful, continuous and uninterrupted; and that they had effected extensive developments on the suit property. The Applicants averred that on account of having adversely possessed and occupied the suit property for over twelve years immediately before the institution of the suit, they had become entitled to be registered as the owners of the land as the defendants title had become extinguished in their favour.

3. The Applicants in support of their application annexed a copy of the sale agreement dated 10th June 2002 entered into between themselves and the administratrix of the estate of Pratapsingh Prabhatsingh Parmar (deceased) who was the registered owner of the suit property. The purchase price as per the sale agreement was Kshs2.9 Million. The full purchase price was paid partially in cash at the execution of the agreement and the balance by way of a banker’s cheque for Kshs.2,227,500/= dated 10th June 2002 exhibited as “**DKB5**”. The copy of certificate of lease exhibited as “**DKB6**” and a copy of certificate of official search dated 28th June 2016 showed that Pratapsingh Prabhatsingh Parmar was registered as the owner of the suit property on 10th August 1984 and was issued the certificate of lease on 22nd July

1994. The plaintiff/applicants averred that although the vendors were to ensure the transfer of the property to the Applicant's name was processed this was not done and that it was only at the Municipal Council Offices and at Kenya Power that changes were effected and that the transfer at the Lands office was never effected.

4. The originating summons was served upon the respondents by way of substituted service with leave of the Court following application by the applicants after they had failed to trace the Respondents to serve them physically. The Respondents did not enter an appearance and filed no response to the originating summons. The originating summons was therefore not defended and the Court on 22nd September 2020 gave directions that the originating summons be determined on the basis of the affidavit evidence, documents tendered in support and written submissions. The plaintiff/applicants filed their submissions and the authorities in support of their submissions on 7th October 2020.

5. I have reviewed the pleadings and the evidence tendered in support of the originating summons through the affidavit sworn in support and I have considered the documentary evidence adduced and the following facts emerge:-

(i) That the plaintiff/applicants entered into an agreement to purchase the suit property vide a sale agreement dated 10th June 2002 for the consideration of Kshs.2.9 million.

(ii) That the plaintiff/applicants paid the full purchase price of Kshs.2.9 million at the time the agreement was entered into and took possession of the suit property.

(iii) That the formal processing of the transfer in favour of the plaintiff/applicants was not completed even though ownership details were changed at the Municipal Council Offices as evidenced by the rates demand notices which are in the plaintiff/applicants name.

(iv) The plaintiffs have been in continuous and uninterrupted possession of the suit property from June 2002 when they entered into the sale agreement.

6. The averment by the plaintiff were not challenged and/or rebutted as the respondents failed to appear and/or file any response. In the premises the Court was obliged to accept the evidence adduced on the part of the plaintiff as truthful. The plaintiff's claim is founded on the doctrine of adverse possession and not on the contract of sale. The plaintiffs merely rely on the sale agreement to illustrate when and under what circumstances they entered into possession of the suit property. In the circumstances the singular issue for the court to determine is whether the plaintiff/applicant has proved that they were in adverse possession of the suit property for the requisite period of twelve years that is necessary for them to have done in order to acquire title to the land.

7. In the case of *Wambugu -vs- Njuguna (1983) KLR172* the Court of Appeal *inter alia* held under holdings 2, 3 and 8 as follows:-

2. In order to acquire by the statute of limitation 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 are acts which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.

3. 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.

8. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.

8. In the present suit the plaintiff entered into the sale agreement with the respondents on 10th June 2002 and on the same date paid the full purchase price of Kshs.2.9 million. The respondents executed some blank transfer of lease forms, handed over possession of the original certificate of lease to the plaintiff and at the same time permitted the plaintiff to take possession of the suit property. Upon payment of the full purchase price to the Respondents, the plaintiff's occupation of the suit property was as the beneficial owner. The Respondents discontinued their possession of the suit property and the plaintiff's possession of the property as from 10th June 2002 became adverse to the interests of the registered proprietor. The plaintiff's possession has been open, peaceful and continuous and without any interruption from the respondents and consequently as at 15th November 2017 when they instituted the present suit, they had acquired title to the suit land by way of adverse possession and are accordingly entitled to be registered as owners in place of the registered owner.

9. In the premises it is my determination that the plaintiff has proved their case on a balance of probabilities and I give judgment in their favour and make the following orders:-

1. It is hereby declared that the plaintiff has acquired title to land parcel Nakuru Municipality Block 10/63 by reason of adverse possession for a period of twelve years.

2. That the plaintiff, Ngenda Investment Rural Sacco Ltd, is ordered to be registered as the owner of land parcel Nakuru Municipality Block 10/63 in place of Pratasingh Prabhatsingh Parmar (deceased).

3. That the Deputy Registrar of this Honourable Court is hereby authorised to execute all the necessary and appropriate

documents in place of the registered proprietor to give effect to this judgment.

4. There will be no order for costs in regard to the suit considering the defendants never appeared.

Judgment dated signed and delivered at Nakuru virtually this 17th day of December 2020.

J M MUTUNGI

JUDGE