

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1769 OF 1980

KAGUA.....APPELLANT

VERSUS

GACHIGI.....RESPONDENT

JUDGMENT

The plaintiff sues the defendant for eviction from Ngenda/Kimuyu/844 in Kiambu District. The plaintiff stated that he is the registered proprietor of that piece of land and that the defendant, without any reasonable or probable cause and without the consent of the plaintiff, occupies the same piece of land.

The defendant in his defence denies the allegations in the plaint and further says that he made a verbal agreement in 1967 for the plaintiff to sell him one acre of that parcel of land for Kshs 5,000 and he paid Kshs 1,620 after which the plaintiff gave him vacant possession of the land and that he has been in possession ever since. The defendant also stated that in May, 1976, an agreement also was duly drawn up and executed and the plaintiff acknowledged receipt of the sum of Kshs 1,620, the balance to be paid before November 30, 1976. On June 21, 1976, Land Control Board forms were executed but the plaintiff has failed to take the necessary action to get the consent. The defendant also states that by virtue of his adverse possession of the land, he has become entitled to it. He counterclaims for an order directing the plaintiff to transfer the land to him and for a declaration either that the plaintiff holds the land on trust for him or for a declaration that the defendant is entitled to the land by virtue of adverse possession under the Limitation of Actions Act (Cap 22). It is not necessary to go fully into the evidence in this matter as the issues are joined in proceedings. The plaintiff has admitted that he allowed the defendant onto the land by virtue of a verbal agreement in 1976 and the defendant produces that agreement which says that the sum of Kshs 1,620 had been paid.

Neither the verbal agreement nor the written agreement have received Land Control Board consent and both are therefore rendered void. The defendant cannot therefore claim the land on the basis of contract. Although these agreements are void, the fact that they were made is admissible to show the undoubted fact that the defendant was allowed into the land with the consent of the vendor and that they conducted themselves, right up until 1976, on the basis of that consent. According to the defendant, it was not until it was time to go to the Land Control Board that the plaintiff became difficult and this happened sometime between 1976 and 1980 when he was first told to get off the land. Whether or not the possession of the defendant became adverse between 1967 and 1976 matters not because the period is less than twelve years. Even assuming that the possession became adverse when the contract became void which I do not think to be the case, only nine years ran before the possession was regularized by the second contract in which the parties clearly show that they were in agreement and that the defendant was indeed in possession of the land with the consent of the plaintiff. Any adverse possession then ceased and could not be revived (Section 13(2) Cap 22).

In several recent cases, this court has tried to relieve such cases by implying a trust in the plaintiff for the defendant. In the case of *Githuchi Farmers Co Ltd v Gichamba and Another* [1973] EA p 8 the creation of a trust is said also to be a controlled transaction for which the consent of the Land Control Board is required. The Court of Appeal has also recently decided that it is wrong to imply a trust in such circumstances. In any event, it is quite clear that the defendant has had the use of the land for very many years on faith of the agreement that he was going to buy it for Kshs 5,000 but has only paid Kshs 1,620. I, for my part, would not therefore consider that the defendant has been prejudiced or that it would be necessary to declare the trust even if I could do so. In all the circumstances, it is clear that the land is

admitted to be registered in the name of the plaintiff and the defendant has no title to it and must leave it. The evidence from the plaintiff is quite clear that Kshs 1,620 has been paid to him but says that he has repaid that money to the defendant and the defendant denies it. Under the Land Control provisions, the defendant is entitled to have any money he paid under the contract. I am not satisfied that the plaintiff has repaid. There is no evidence of repayment or witness to it and I therefore propose to order that the plaintiff repay to the defendant the sum of Kshs 1,620.

Judgment for the plaintiff with costs. The defendant to remove himself as prayed from the suit premises but this order is not to take effect until the plaintiff has paid to the defendant the sum of Kshs 1,620 against which sum may be set the amount of costs above referred to. There is a further condition that the defendant is not required to remove himself until six months after the date on which the above sums are settled.

Dated and delivered at Nairobi this 11th day of October, 1982.

K.D POTTER

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AG JUDGE