



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 12 OF 2014

AFRICAN BROTHERHOOD CHURCH REGISTERED TRUSTEES...PLAINTIFF

VERSUS

SILAS NGUTIKU M'KIRIMUNYA.....1ST DEFENDANT

ENOS MUNENE MUNGANIA.....2ND DEFENDANT

JUDGMENT

Introduction

1. In this suit commenced by originating summons dated 22nd January 2014, the plaintiff averred in his supporting affidavit that he bought land parcel no. Abothuguchi/Katheri/3930 from the 1st defendant in the year 2000 and immediately took possession of the same by putting up a church building. He attached a photograph of the building as "SMM II". The plaintiff also attached copies of minutes of the plaintiff society marked "SMM 1". The plaintiff also averred that the 1st defendant caused the land to be subdivided to give rise to parcel no. 3930 and they paid subdivision fees on his behalf and he undertook to reimburse the same. He also attached the letter of undertaking and mutation form as SMM III.

2. They later obtained consent to transfer the land which is also attached and marked SMM Iv. The plaintiff further deponed that the 1st defendant was a staunch member of their church and they trusted him that all was going to be well and did not even present the documents for registration. Sometime in August 2013, the 1st defendant relocated to Isiolo and they even bid him farewell. In subsequent visits to the 1st defendant, they realized that he had developed some cold feet towards them and they suspected that something was wrong. They decided to conduct a search at the lands office and true to their suspicion, they learned that the suit property had been transferred to the 2nd defendant in March 2013. The plaintiff averred that the defendants have started sending threats of eviction from the land and are apprehensive that the defendants might make good their threats.

3. In a replying affidavit sworn on 5th September 2014 the 1st defendant denied the plaintiffs claim and stated that he invited Pastor Ayub Kathurima of African brotherhood church to his home for periodic meetings with his family and immediate neighbours and that as the response appeared positive from the members, he erected a temporary structure next to his house where prayers could be conducted. He stated that at no time did his prayer membership (church) acquire land and that after pastor Ayub Kathurima was ex-communication on 10.11.2008, the prayer group was disbanded. He attached a copy of the said letter marked SNM 1. He stated that in another letter dated 28/8/2012, the chairman Fredrick Kinyua was also ex-communicated by Rev. S. Mung'ori and left him alone in the church. He then left for Isiolo and handed over the church items and report to Rev. Mung'ori on 26.9.2013. The 1st defendant deponed that in March 2004, he subdivided his land parcel no. Abothuguchi/Katheri/1768 into three portions as follows;

(i) Abothuguchi/Katheri/3928

(ii) Abothuguchi/Katheri/3929

(iii) Bothuguchi/Katheri/3930

4. On 22.2.2013 he sold the suit property to Enos Munene Mungani at an agreed price of Kshs.350,000/= and executed a sale agreement which he attached as "SNM 5" he stated that his wife Julia Kagwiria Ngutiku consented to the sale as required by law and also witnessed to the aforesaid sale.

5. As regarding the application form to the land control board dated 4.1.2008, the 1st respondent stated that he never signed such a form and

that the purported signature appearing there is not his and has even reported the matter to police for investigations.

6. The 1st respondent further deponed that he has never entered into any agreement with the plaintiff for the sale of L.R No. Abothuguchi/Katheri/3930 and no consideration has ever been paid or promised to be paid to him at all.

2nd respondents replying affidavit

7. The second respondent filed a replying affidavit on 10.10.2014 and deponed that he was the registered owner of land parcel no. Abothuguchi/Katheri/3930 and was issued with a title deed on 14.5.2013. The 2nd respondent deponed that he bought the suit property from the 1st respondent on 22.2.2013 at a consideration of Kshs.350,000 through the firm of Kiogora Arithi. The 2nd respondent also stated that he bought the suit property on a willing seller willing buyer basis and that there was a caution lodged by the wife of the vendor Julia Kagwiria Ngutiku which was later withdrawn to pave way for the sale transaction to proceed to its logical conclusion.

Plaintiff's case

8. The plaintiff called Reverend Stanley Mung'ori M'Anyoni who is in charge of African Brotherhood church Meru. He referred to his verifying affidavit in support of the originating summons sworn on 22.1.2014. He was also referred to the minutes of the plaintiff association dated 8/7/2000 and marked SMM 1 and the transfer documents duly executed by the parties marked SMMS II, SMM III and SMM IV respectively. The documents were produced as P. Exhibits 1, 2, 3 and 4 respectively. He stated that the transfer documents were not presented for registration owing to the relationship between the plaintiff and the 1st defendant. The plaintiff also stated that they have been in uninterrupted peaceful and quiet possession of the suit land since the year 2000 to date.

Defendant's case

9. The first defendant Silas Ngutiku M'Kirimunya referred to his replying affidavit sworn on 8th September 2014 which he adopted in its entirety. The same was produced as D. Exhibit No. 1.

10. The 2nd defendant also testified on oath and referred to his replying affidavit sworn on 8th September 2014 which he produced as Defence Exhibit No. 2.

Plaintiff's submissions

11. The plaintiff submitted that from evidence adduced, they have been in continuous and uninterrupted possession of the suit property for a period of over 12 years. The plaintiff also submitted that the 1st defendant secretly sold and transferred the suit property to the 2nd defendant.

Defendant's submissions

12. The defendants submitted that no evidence was adduced by the plaintiff confirming either in part or full payment of the purchase price of Kshs.180,000/= the defendants also submitted that there was no sale agreement produced as required in law. The defendants finally submitted that the plaintiff failed to establish their case on the required standard. The defendant cited the following authority's in defence to the plaintiffs claim.

(i) M'Mbaoni M'thaara vs James Mbaka (2017) eKLR

(ii) Gabriel Mbui vs Mukindia Maranya (1993) eKLR

(iii) Christopher Kioi & another vs Winnie Mukolwe & 4 others (2018) eKLR

(iv) Peter Mbui Michuki vs Samwel Mugo Michuki (2014) eKLR

Disposition

13. The plaintiff in this case is using adverse possession as a vehicle to champion the right of entitlement to the suit property. In the case of **Wambugu vs Njuguna (1983) KLR 172**, the court of appeal laid down the following guiding principles:-

(a) The general principle is that until the contrary is proved possession in law follows the right to possess.

(b) 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 purpose for which he intended to use it

(c) The limitation of actions Act, in adverse possession contemplate 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 disposed or has discontinued his passion 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.

(d) Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin to run at the time the license is determined. Prior to the determination of the licence, the occupation is not adverse but with permissions. The occupation can only be either with permission or adverse; the two concepts cannot co-exist....

(e) The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.....

(f) Adverse possession means that a person is in possession in whose favour time can run.....

(g) Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchases pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can only become adverse once the contract is repudiated.

(h) 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 as deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment”.

14. The evidence by plaintiff in this case is that she bought the suit land from the 1st defendant for a valuable consideration. She produced a copy of minutes held by the plaintiffs association, a letter of consent from the land control board, an application form for consent to the land control board, a transfer form, a pin certificate and a green card. these are documents required in the transfer of land and the plaintiff has not produced any agreement of sale as required under the law of contract section 3 which provides as follows:

“3 No suit shall be brought upon a contract for the disposition of an interest in land unless:-

(a) The contract upon which the suit is founded:-

- Is in writing

- Is signed

- By all the parties thereto and

(b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party”

15. Though the plaintiff alleges that he bought the suit land and even paid the purchase price in full, she has avoided to enforce the purported agreement presumably for the obvious reason that such right is not enforceable in law as there is no valid contract for the disposition of such an interest in land. The plaintiff is now circumventing the law by purporting to enforce his right under the doctrine of adverse possession. As observed by the superior court in the case of Wambugu vs Njuguna (supra) the rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land. The position obtained in this case is that the plaintiff was permitted by the 1st defendant to occupy the suit land and even went ahead to build a structure which they used to conduct their church service. In the absence of a valid agreement recognized in law, that permissiveness of the plaintiff by the 1st defendant to occupy the suit land does not become adverse before the end of the period during which the possessor is permitted to occupy the land in question.

16. In the upshot I find the plaintiff has not established his claim on the required standard. The same is hereby dismissed with each party to bear their own costs.

17. It is so ordered.

READ, DELIVERED AND SIGNED AT MERU IN THE OPEN COURT THIS 28TH DAY OF FEBRUARY, 2019.

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E.C CHERONO - JUDGE

In the presence of:

1. Kananu C/A