



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 200 OF 2017

JOHNSON KARANI RIGU - PLAINTIFF

VS

JOSEPH KINYI MWANGI - DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendant on the 23/12/12 seeking orders for;
 - a. An order for eviction against the Defendant from the suit property No. LOC10/MUKANGU/1075, permanent injunction restraining the Defendant from land parcel LOC10/MUKANGU/1075 (suit land).
 - b. Costs of the suit
 - c. Any other or better relief this honourable Court may deem fit to grant.
2. The Plaintiff's case is that at all material times to this suit he is the registered owner of the suit land having purchased it in 2012 from Benson Macharia Mwangi, the brother of the Defendant. He avers that the suit land was a subdivision of the original land LOC 10/MUKANGU/840 registered in the name of Mwangi Njoroge, the father of Benson Macharia Mwangi and the Defendant. That on the 22/8/12 he fenced the suit land but the fence was destroyed at night by the Defendant, his agents and or servants causing him loss and damage.
3. On the 3/4/13, the Defendant filed a statement of defense in which he denied the Plaintiff's claim. He averred that to the contrary the Plaintiff moved onto his land, the suit land and started planting trees without his consent and authority, which led to his reporting the matter at Kahuro Police Station.
4. The Defendant filed a Counterclaim in which he averred that he has been residing with his family on the suit land since 1990. That he was allocated the land by his father namely Mwangi Njoroge. He maintained that if any transfer was effected to the Plaintiff then it was a fraudulent. He sought the following orders;
 - a. That the Court declares the Defendant as the rightful and legal owner of the property identified as LOC 10/MUKANGU/1075 through Adverse Possession.
 - b. The Court nullifies the alleged transfer of the suit land to the Plaintiff.
 - c. The Court restrains the Plaintiff, his servants, agents, assigns and successors in title from transferring trespassing and or interfering with the Defendant's occupation of the suit land.
 - d. Any other relief that the Court deems fit to grant.
5. At the hearing, the Plaintiff testified. He relied on his witness statement dated the 19/12/12. He informed the Court that he entered into an agreement for sale with Benson Macharia Mwangi on the 6/3/12. That he visited the suit land whereupon the said seller, Benson Macharia Mwangi, pointed the land to him. Though the land was fallow, it had temporary houses on one side of the land. Upon making enquiries from the parents of the seller and the Defendant, he was assured that the land belonged to Benson Macharia Mwangi. That all the processes were carried out including obtaining Land Control Board Consent to transfer leading to the registration of the title in his name on 16/3/12. He fenced the suit land on 22/8/12 and planted a life hedge but the fence was uprooted at night by the Defendant and or his agents. That the wife of the Defendant uprooted the plants in his presence when she turned hostile. He reported the damage of the fence to Kirogo Police station on 24/8/12. He averred that he has never taken possession of the land. At that point, he decided to file the suit herein.

6. He informed the Court that he was aware of SPMCC No 127 of 2010 in which Benson Macharia Mwangi sued the Defendant and obtained an injunction against him barring the Defendant from selling anything on the land. He stated that the Court declined to issue eviction orders against the Defendant on account of want of jurisdiction. On cross-examination by the Defendant's Counsel on record, the Plaintiff stated that he carried out due diligence before acquiring the suit land. That he had knowledge of the suit between the seller and the Defendant touching on the land in question. He testified that save for the seller there were other people who lived on the suit land including the Defendant. That the suit land was part of a large family land, which had been subdivided, and this particular one was given to the seller Benson Macharia Mwangi. He stated that the father of the seller and the Defendant even confirmed the ownership of the seller of the land before he purchased it.

7. The Defendant testified and stated that his father gave him the land in 1997. He maintained that he has had a dispute with his brother Benson Macharia Mwangi over the land since 2010. The case was decided in 2012 and the title was registered in the name of the Defendant on the 16/3/12 and the case was determined on the 27/6/12. He maintained that the title of the Plaintiff was obtained fraudulently. He averred that he and his family live on the suit land. He confirmed that the Court in CMCC 127 of 2010 ruled that the suit land belonged to Benson Macharia Mwangi who was adjudged to have had a valid title. He informed the Court that he has never been evicted from the land. He refuted claims of land in Nanyuki.

8. The Plaintiff submitted that LOC 10/MUKANGU/840 measuring 12 acres was owned by Mwangi Macharia, the father to the Defendant. He subdivided the said land into 6 plots (LOC 10/MUKANGU/1074-1079) and gave his children, the seller of the land included. That the Defendant was given land in Nanyuki instead. The Defendant's brother Benson Macharia Mwangi sold the suit land to the Plaintiff. Prior to this case, the Defendant had been sued by his brother Benson Macharia Mwangi for eviction from the said land. That though the Court granted an injunction, it did not issue orders for eviction on the ground that it did not have jurisdiction to do so. The Court however established that the Defendant's brother held a valid title over the suit land and that the Defendant was a trespasser. The Plaintiff urged the Court to hold that the Defendant is still a trespasser just as the lower Court found in its determination.

9. The Plaintiff submitted that the Defendant had been sued for eviction from the original land LOC10/MUKANGU/840 by his own father namely Mwangi Macharia in SPMCC No 324 of 2008. The Court issued an order dated the 11/6/2010 permanently restraining the Defendant from cultivating constructing or in any manner interfering with the father's use and quiet possession of the original suit land. It is the Plaintiff's submissions that the Defendant's father passed away before the orders were executed. That notwithstanding the Defendant has continued to stubbornly remain on the suit land without any justifiable cause. He urged the Court to be guided by Order 6 Rule 1 to call for the record of the lower Court for its own inspection.

10. The Plaintiff submitted that he is a purchaser for value and is entitled to the protection of the law. That the agreement of sale was witnessed by the father of the Defendant hence it was done openly and supported by him. That the Plaintiff was assured by the seller and his father that the Defendant would vacate the suit land. The Plaintiff was fortified by the fact that other parties who had purchased other parcels of the subdivisions from the other brothers had taken occupation and settled thereon.

11. The Plaintiff submitted that the Defendant's assertion that he acquired the suit land in 1997 is baseless. That the Defendant has not led evidence to show that the seller of the land held it in trust for him. He argued that the Defendant's presence on the land is in contempt since orders in MURANG'A CMCC NO. 127/10 included an injunction. Entertaining his further occupation is akin to embracing contempt. In any event, his father witnessed the agreement of sale. He urged the Court to dismiss the Defendant's Counterclaim.

12. The Defendant submitted that the Plaintiff proceeded to purchase land from the Defendant's brother, namely Benson Mwangi Macharia despite the discovery of the existence of the legal tussle between the seller and the Defendant. He was also faulted for ignoring the fact that there was no vacant possession on account of the structures on the land occupied by the Defendant.

13. On the issue of Adverse Possession, the Defendant submitted that his father gave him the land in 1987 whereupon he took possession and settled his family, fenced, built a house and occupied openly, notoriously and peacefully without the permission of Benson Mwangi Macharia or the Plaintiff for a period of 23 years. He submitted that their father gave not all his brothers land and that indeed a solid portion of the land was reserved for them. Further, he submitted that by the time the case No SPMCC No 127 of 2010 was filed by his brother Benson Macharia Mwangi against him, he had occupied the suit land for over 23 years and therefore title to the land had passed to him by way of Adverse Possession. It was his position that no orders of eviction were issued against him in this case. That the Plaintiff has never taken possession of the suit land. He relied on the case of **M'Mbaoni M'Thaara Vs James Mbaka (2017) EKLK** in support of his submissions.

14. He charged that since the said case was determined on 27/6/12, and the title was registered in the name of the Plaintiff on the 16/3/12, 3 months before the judgment was issued, the said title was irregularly and fraudulently obtained by the Plaintiff. That the impugned title is subject to impeachment vide Section 26(1) of the Land Registration Act. Relying on the case of **Elijah Makeri Nyagwara Vs Stephen Mungai Njuguna & Anor (2013) EKLK**, he opined that the said title is irregular, unprocedural and untenable. That in this case the Plaintiff was aware of the facts that make the title a nullity when he purchased land that was subject to a dispute in Court.

15. It is also his submission that the Plaintiff acted in bad faith and has come to equity with tainted hands. It is his case that the title ought to be impeached.

16. Having considered the pleadings, the evidence of the parties, the written submissions and the materials placed before me in Court, the issues that fall for determination are;

- a. Whether the Defendant has established any right to title by way of Adverse Possession?
- b. Whether the Plaintiff acquired a good title free from all encumbrances?

c. What orders should the Court make?

d. Who meets the costs of the suit?

17. It is not in dispute that the suit land is registered in the name of the Plaintiff as shown in the copy of title adduced in evidence. It is also commonly acknowledged that the Defendant is in occupation of the suit land.

18. Did the Defendant establish any right to title by way of Adverse Possession? To qualify in this claim the Defendant must prove that there has been quiet possession which has been uninterrupted and continuous for over 12 years. Occupation has been with the knowledge but without the consent of the registered owner. There must be an intention to displace the registered proprietor's possession and exclusive rights of property thus clear evidence of animus possidendi (intention to occupy).

19. **In the case of Samuel Nyakenogo v Samuel Orucho Onyaru, (2010) eKLR:**

‘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 will then be whether or not the title holder has been disposed 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 period.’

20. In **Titus Mutuku Kasuve –vs- Mwaani Investment Ltd & Others, Civil Appeal 2004 1 KLR 184** the Court held that;

“.....for an order that he be registered a proprietor in place of the registered proprietor and in order to be entitled to the land by Adverse Possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition.”

21. In this case, the Defendant has led evidence that his father gave him the land in 1987 whereupon he took possession and established his family home. He averred that the original land belonged to his grandfather, which devolved to his father upon his death. He refuted claims of the Plaintiff that the suit land belonged to his brother, the vendor herein. He averred that it is not true that their father gave his brothers land and that indeed some portion of the land was available for their distribution. He did not clarify whether this one was part of the said portion. The Plaintiff in response stated that he held an absolute title that he acquired from the Defendant's brother who had sued him successfully in SPMCC No 127 of 2010 and obtained an injunction to prevent him from destroying, and selling the suit land. That the Court determined that the seller held a valid title to the suit land and indeed passed such valid title to the Plaintiff. The Defendant has averred that by the time the suit was filed in 2010 he had been in uninterrupted, exclusive, open and notorious occupation of the suit land for over 23 years.

22. I have examined the evidence on record and it is not disclosed when the title was registered in the name of Benson Macharia Mwangi. Going by the averment of the Defendant, if indeed it is true that his father gave him the land in 1987, then it means that his father permitted his occupation. He was therefore a licensee on his father's land, from which the suit land was exercised from. There is on record an order issued on the 11/6/2010 SPMCC No 324 of 2008 in a case pitting his father against the Defendant. It is not disclosed what the claim of the father was in this case however a permanent injunction was issued against the Defendant over the original land LOC10/MUKANGU/840 from interfering with the use and quiet possession of this land. For the Court to issue such orders, the Defendant's father was determined to be the owner of the suit land. This order effectively extinguished the licence of the Defendant over the suit land.

23. In **Wambugu – v- Njuguna (1983) KLR 172 at holding 4**, this Court held:

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.

24. The Court can easily infer that if the Defendant's possession was permitted from 1987, the fact of filing the suit by the then original owner, Mwangi Njoroge, the Defendant's father, shows that the consent/licence had been withdrawn. It would then mean that Adverse Possession started running from 2008 and 12 years would be 2020, which time has not matured. The filing of the suit SPMCC No 324 of 2008 interrupted the accrual of Adverse Possession effectively stopping time from running. This interruption ran from 2008 to the year 2010 when the suit was determined. In the year 2010, another interruption set in with the case of SPMCC No 127 of 2010. This interruption lasted from 2010-2012. In all these cases, the Defendant was not evicted. The instant case was filed by the Plaintiff in 2012.

25. It is the view of the Court that Adverse Possession has not crystallized nor vested in favour of the Defendant. This claim is therefore dismissed.

26. Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

27. The Plaintiff has placed before this Court evidence of ownership of the suit land by way of title issued in his name on 16/3/12. I have also perused the agreement of sale which was executed on 6/3/2012. There was a clause where parties agreed that balance of the purchase price would be paid/agreed upon after determination of civil suit in Murang'a CMCC No 127/2010. This may be interpreted as a completion clause .

28. I have perused the judgment of the Court in SPMCC No 127 of 2010, which was issued on the 27/6/12. It was a condition of the agreement of sale that the completion would be after the determination of the suit. I have perused the title in the name of the Plaintiff that shows that it was registered in the name of the Plaintiff on the 16/3/12, 3 months before the determination of the case. This follows that the suit land was transferred during the pendency of the above suit. The question would be whether the title was transferred in contravention of the doctrine of *lis pendens*? This common law doctrine states that the presence of a suit suspends any transaction of the subject matter. The intention is to preserve the subject matter so that the decree holder has something to crystalize his victory. I note that no rights were determined in favour of the Defendant in this case. Indeed he was enjoined from carrying out certain activities and interfering with the then registered owners land. One would argue that in as much as the transfer was contra the doctrine of *lis pendens*, no evidence has been adduced to show that there existed any injunction or prohibition prohibiting the then owner from transferring the suit land in the manner that it did that is to say before the completion of the suit.

29. In the submissions of the Plaintiff, he introduced a second case in SPMCC No 324 of 2008 where the parties were Mwangi Njoroge (Defendant's father) Vs Joseph Kinyi Mwangi (the Defendant). In this case the Court ordered and permanently enjoined the Defendant from cultivating, using, constructing and, in any manner, interfering with the Plaintiff's use and quiet possession of the suit land. The Defendant did not controvert this evidence. Again no rights were determined in favour of the Defendant. He was permanently enjoined from the land on account that the land is owned by the Defendants father then.

30. The Court finds that no evidence was led by the Defendant to show that the orders in both suits were appealed set aside or varied.

31. The Defendant has argued that the land was transferred in bad faith, during the existence of a suit but nowhere in his evidence that it was transferred in violation of any rights adjudged in his favour. One might actually argue that the Defendant's Counterclaim is resjudicata because he ought to have brought his whole case in the SPMCC No 127 of 2010.

32. The Court finds that the irregularities, if any, in the manner that the title was transferred to the Plaintiff do not go to the root of the title. Under section 26 of the Land Registration Act, the Plaintiff's title shall not be defeated except as provided for under the said Act. Under section 25 the proprietor enjoys rights subject to such rights and liabilities stated under section 28 of the Act. It is commonly admitted by the Plaintiff that the land was not free from encumbrances such as occupation by the Defendant. Given the holding of the Court in the preceding paragraphs, I find nothing to impeach the title of the Plaintiff.

33. From the foregoing therefore the Plaintiff holds title to the suit land and enjoys the proprietary rights that go with it. The Defendant having failed to proof Adverse Possession, the Court finds no valid reason why he should remain in occupation of the suit land. It is the finding of this Court that eviction should ensue.

34. Final orders

- a. The Counterclaim is dismissed.
- b. The Defendant is ordered to vacate the suit land voluntarily within the next 60 days from the date of this Judgment.
- c. In default an order for eviction against the Defendant from the suit property No. LOC10/MUKANGU/1075, and a permanent injunction restraining the Defendant from land parcel LOC10/MUKANGU/1075 (suit land) shall issue on expiry of b) above.
- d. The said eviction must be carried out in strict compliance with section 152 of the Land Act.
- e. The Plaintiff shall have the cost of the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 21ST DAY OF FEBRUARY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Plaintiff – Present in person. Advocate is absent.

Munene HB for Kuria for the Defendant

Irene and Njeri, Court Assistants