



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 38 OF 2014**

**JACK KAGUO GITHAE ..... PLAINTIFF**

**-VERSUS-**

**ZEPHAN KAREITHI & CO. LTD.....1<sup>ST</sup> DEFENDANT**

**TABITHA WANJIKU KAREITHI .....2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL**

**FOR THE COMMISSIONER OF LANDS.....INTERESTED PARTY**

**RULING**

1. By a plaint dated **11<sup>th</sup> March, 2014** and filed on an even date, the plaintiff, instituted this suit seeking to compel the defendants to execute transfer documents in respect of the parcel of land known as **LR. No. Aguthi/Gatitu/ 667/101** (the suit property) in his favour, failing which the deputy registrar of this court be authorized to execute the documents; an order that the suit property be registered in his name and the land registrar Nyeri be ordered to register the transfer and issue a fresh lease to him for 99 years with effect from 1<sup>st</sup> January, 1994.

2. The plaintiff's suit is premised on the ground that he bought the suit property from the defendants, took possession of it and developed it by building permanent buildings thereon and planting trees. The plaintiff accuses the defendants of violating the terms of the sale agreement executed between them. In particular, the plaintiff accuses the defendants of failing to execute transfer documents in his favour. The plaintiff further contends that he has become entitled to the suit property by adverse possession.

3. The defendant who is a director of the 1<sup>st</sup> defendant, through the statement of defence and counter-claim filed on **29<sup>th</sup> April, 2014**, has averred that she was not a party to any intended sale of the suit property. Terming the sale agreement referred to in the plaint a forgery and arguing that the said agreement is not binding on the 1<sup>st</sup> defendant, for want of company seal, the 2<sup>nd</sup> defendant contends that the plaintiff has no rights to the suit property.

4. Concerning the plaintiff's claim for adverse possession, the 2<sup>nd</sup> defendant contends that the claim is unmaintainable because the plaintiff's occupation has not been uninterrupted and that the doctrine of adverse possession does not apply to the suit property because it is leasehold. The 2<sup>nd</sup> defendant further contends that she is wrongly sued as the suit property belongs to the 1<sup>st</sup> defendant, which is a distinct legal entity from its directors.

5. In the counter-claim, the 2<sup>nd</sup> defendant reiterated the averments contained in the statement of defence and contends that the plaintiff's continued occupation of the suit property is illegal. For those reasons, the defendants seek judgment against the plaintiff for:-

- i. Dismissal of his suit;
- ii. An order of eviction against the plaintiff from the suit property.
- iii. Costs of the suit and interest at court rates.
- iv. Any other or further relief this honourable court may deem fit to grant.

6. The plaintiff filed a reply to the defence and a defence to counter-claim through which he maintains that his occupation of the suit property

constitutes an overriding interest to the title held in respect of the suit property under **Section 28(e) and (h)** of the Land Registration Act, (LRA) 2012. He also maintains that he has become entitled to the suit property by adverse possession.

7. When the matter came for hearing on 2<sup>nd</sup> October, 2018 the plaintiff suit was dismissed for want of prosecution and the interested party discharged from the proceedings as no adverse orders were sought against it. The defendants then proceeded to prosecute their counter-claim.

8. The 2<sup>nd</sup> defendant, who testified as D.W.1 informed the court that the plaintiff approached her to lease the suit property, paid her rent for two months and stopped. Despite the fact that the plaintiff ceased meeting his obligations under the lease agreement, she took no steps to remove him from the suit property.

9. The court heard that after the plaintiff took possession of the suit property, he added some buildings to it and has stayed there for a long period of time. The court further heard that the 2<sup>nd</sup> defendant who is the sole surviving director of the 1<sup>st</sup> defendant has never occupied the suit property.

10. At close of hearing, counsel for the defendants filed submissions which I have read and considered.

11. The sole issue arising from the counter-claim and the submissions filed in respect thereof is whether the defendants have made up a case for being granted the orders sought against the plaintiff.

12. Concerning that issue, having carefully read and considered the evidence adduced by the 2<sup>nd</sup> defendant concerning the circumstances upon which the plaintiff entered the suit property, the conduct of the parties, which conduct is by dint of the provisions of **Section 3** of the Evidence Act, Cap 80 Laws of Kenya and the law applicable to the circumstances of this case and in particular **Sections 107** of the Land Registration Act, 2012, **Section 28** and **30** of the Registered Land Act, (RLA) Cap 300 Laws of Kenya (now repealed) and **Section 7** of the Limitation of Actions Act, (LAA) Cap 22 Laws of Kenya, I am of the considered view that the defendants lost their right to evict the plaintiff from the suit property after the time stipulated in law for taking action against a person in wrongful possession of land elapsed without any action being taken to remove the plaintiff from the suit property.

13. If the evidence adduced by the 2<sup>nd</sup> defendant is anything to go by, the defendants' right to evict the plaintiff from the suit property accrued a month after the plaintiff failed to pay rent in respect of the oral lease agreement they allegedly entered into. The 2<sup>nd</sup> defendant admitted that she took no action to remove the plaintiff from the suit property even after he defaulted from meeting his rent paying obligations to her and the 1<sup>st</sup> defendant.

14. By dint of the provisions of **Section 30** of RLA,(repealed) which is by dint of the provisions of **Section 107** of the LRA, 2012, applicable to the title hereto, the plaintiff's occupation of the suit property constituted an overriding interest to the title held by the 1<sup>st</sup> defendant.

15. Under **Section 7** of the LAA, Cap 22 Laws of Kenya, the defendants lost the right to bring action with a view of removing the plaintiff from the suit property after 12 years lapsed without them taking any action to remove the plaintiff from the suit property.

16. As pointed out above, the defendants' right to remove the plaintiff from the suit property accrued a month after the plaintiff defaulted from his rent paying obligation to the defendants. Admittedly, no action was taken to remove the plaintiff from the suit property for a period way above the period stipulated in law for recovering land. If the 2<sup>nd</sup> defendant's evidence is anything to go by, the plaintiff continued living in the suit property for about 30 years without interference from the defendants.

17. By dint of the provisions of **Section 7** of the Limitation of Actions Act, Cap 22 Laws of Kenya, the defendants lost their right to recover the suit property after twelve years lapsed without them asserting their rights in the suit property against the plaintiff. In that regard see the said provision of law which provides as follows:-

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, that person”**

18. The upshot of the foregoing is that the defendants have not made up a case for being granted the orders sought. The plaintiff's occupation of the suit property constitutes an overriding interest to the title held by the defendants.

19. The upshot of the foregoing is that the counter-claim fails and is dismissed.

20. Orders accordingly.

**Dated, signed and delivered in open court at Nyeri this 18<sup>th</sup> day of February, 2019.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. King'ori for the plaintiff

Mr. Nganga for the defendant

Court assistant - Lydia