



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**LAND CASE NO. 81 OF 2014 (OS)**

**FRANCIS KIMATHI MUTONGA.....PLAINTIFF**

**VERSUS**

**M'RITHAA M'ETHURI *alias* RITHAA ITHURI.....DEFENDANT**

**JUDGMENT**

**The Plaintiff's Case**

1. The plaintiff filed the instant Originating Summons dated 22<sup>nd</sup> May, 2014 praying the court for determination of the following questions:-

**(1) Whether the plaintiff has been in continuous, exclusive and uninterrupted possession and occupation of a portion of one acre of LR NO: NKUENE/NKUMARI/568 for a period of over 12 years.**

**(2) Whether the said occupation has been adverse to the registered owner and whether the defendant's ownership and title over one acre LR NO: NKUENE/NKUMARI/568 has been extinguished by dint of sections 37 and 38 of limitation of actions Act (22) Laws of Kenya.**

**(3) Whether the Plaintiff has now acquired absolute ownership of one acre out of LR NO: NKUENE/NKUMARI/568.**

**(4) Whether an order that the plaintiff should be registered as the proprietor of one acre out of LR NO: NKUENE/NKUMARI/568.**

**(5) Whether the defendant should be ordered to excise one acre out of LR NO: NKUENE/NKUMARI/568 and transfer the same to the plaintiff.**

**(6) Whether the defendant should pay the costs of the suit.**

**The Plaintiff's Case**

2. In the supporting affidavit annexed to the Originating Summons, the plaintiff deposes that he entered into an oral agreement with the defendant for sale of one acre (hereinafter referred to as the suit land) out of the defendant's **LR NO. NKUENE/NKUMARI/568** in **1999** for **Kshs 70,000** and that he paid the entire consideration and took possession of the 1 acre and has been in exclusive and undisturbed possession thereof for **15** years; that he has extensively developed the 1 acre; that the defendant sought the Nkuene Land Control Board consent for survey of his land into four portions including one measuring 1 acre; that however the defendant failed to effect the subdivision at the land registry so that new registers could issue and that the defendant is still the registered owner of the entire parcel; that recently the defendant came with a surveyor and attempted to excise from the land without consulting the plaintiff a **40** by **80** feet for sale to another buyer who had entered into a sale agreement with the defendant's late son, Kimathi Rithaa; that the plaintiff reported this incident to the area chief who convened a meeting to deliberate on the dispute on **24/4/14** but however the defendant still refused to transfer to him his 1 acre of land.

**The Defendant's Response**

3. The defendant filed a replying affidavit on **14/7/14**, in which he stated that he is the owner of **LR NO: NKUENE/NKUMARI/568**; that in **1999**, the plaintiff lent him **Ksh 17,000** to enable him obtain medical treatment for his wife; that the consideration for this loan was a lease over his land in favour of the plaintiff for **15** years, after which the same would revert back to him; that at the end of **15** years he requested the plaintiff to leave the land which he declined to do even after a formal demand was written through his advocate; that the plaintiff was allowed the use of only half an acre but he took one acre and he does not even reside there.

4.The defendant denied having sold the land to the plaintiff and states that as he is the one who permitted the plaintiff to be in occupation, that occupation cannot be adverse. He accuses the plaintiff of not being candid and denies having attended any land board to seek consent to subdivide or change names as alleged by the plaintiff.

5.A Supplementary Affidavit of the plaintiff was filed on the **4/9/14**. In it, he deponed that he did not lease the land for 15 years as alleged by the defendant and that no lease has been exhibited by the defendant.

#### **Evidence of the Plaintiff**

6.The plaintiff testified on **26/6/18**, he stated that he got to know the defendant was selling him land in **1999**. He stated that he bought 1 acre and paid all the consideration in year **2000**. However he started work on the and in 1999 and has been in occupation since then. He produced a copy of consent and application for consent from the Land Board as **PEx-1** and **PEx-2** respectively. He produced a copy of the mutation form as **PEx-3**, and the green card for **LR NO: NKUENE/NKUMARI/568** as **PEx-4**. He stated that when they met at the Chief's Office on **24/4/14**. The defendant admitted the sale but later on declined to complete the transfer. Minutes of the chief's office meeting were produced as **PEx-5**. He testified that nobody else has ever entered the land since 1999. He stated that the consideration he paid to the defendant was applied to school fees and land survey fees.

7.Upon cross examination by Mr. Nyagaka he admitted that at the time of the agreement the defendant's wife was alive; that the agreement was not reduced into writing because he trusted the defendant; that he still has a copy of the defendant's personal identification number (PIN) and copy of title; that they are not neighbours and that he lives about 1 kilometre away from the; that the defendant was excising portions of the land for his children, Kaugu and Kimathi, and the balance would remain in his name; that at one instance he gave the defendant's wife **Kshs. 17,000** for medical purposes, the defendant **Kshs. 5,000** and the defendant's son Kimathi **Kshs. 5,000**; that Kimathi is now deceased; that it was the defendant who asked him to give his son Ksh 5,000; that he also paid **Kshs. 16,000** to the defendant's son Kaunga in 2004; that the defendant owes him **Kshs. 16,000** which he paid as a hospital bill; that the defendant is the one who obtained all the parcel numbers upon subdivision and that the plaintiff remained with the title deed as the transaction was not completed as agreed. He stated that he does not pay any rent.

8.On re-examination, he stated that he was scheduled to take **parcel number 2063** measuring **0.4** ha as reflected in the mutation and that the defendant has not reported any fraud on his part to the police. He insisted that the defendant signed the Land Control Board application form.

9.That marked the close of the plaintiff's case.

10.The defendant did to appear in court to testify and no witnesses testified in his favour.

#### **The Plaintiff's Submissions**

10.The Plaintiff filed his written submissions on **26/7/2018**, he cited the case of *Chevron versus Harrison Charo Wa Shutu 2016 eKLR*. He relied on **Sections 7** and **38** of the *Limitation of Actions Act* and urged that the Act bars any action for recovery of land after 12 years from the date of the occurrence of the cause of action and entitles a claim for adverse possession.

#### **The Defendant's Submissions**

11.The defendant filed his written submissions on **15/8/2018**. He urged that the plaintiff's claim is one of breach of contract and not adverse possession. My understanding of the defendant's submission is that since **6** years are over, the computation of time for the purpose of determining the question of adverse possession should be considered with effect from the year **2005**.

#### **DETERMINATION.**

##### **Issues for determination**

12.The issues that arise for determination in this suit are as follows:

*(a)Has the plaintiff established the essential components of adverse possession?*

*(b)What orders should issue.*

*(a)Has the plaintiff established the essential components of adverse possession?*

13.It is not in dispute that the defendant and the plaintiff entered into some kind of transaction vide which the defendant took possession of one acre of the defendant's land and that he is still in possession to date and that that is the land in respect of which the plaintiff now seeks to be declared owner by way of adverse possession.

14.No lease was cited in the demand letter written by the defendant's advocates to the plaintiff dated **28/5/2014**. As correctly pointed out by the plaintiff's counsel that letter alleges trespass.

15.No report was ever made to the authorities, even after the institution of this suit and the laying bare of all documentation the plaintiff relies on, that the plaintiff obtained the consent to subdivide the land illegally.

16. The replying affidavit of the defendant includes a statement denying that he ever went to the Land Board but it does not state whether he signed the documents used to obtain the consent. It is observed that the defendant does not even disown the thumbprint that appears on the application for land Control Board Consent and the mutation. JK Ikiara, Licensed Surveyor, who signed the mutation, was not called in evidence to state who instructed him.

17. It is the conclusion of this court that the circumstantial evidence in this case points to the defendant as the person who authorized the subdivision of the land.

18. Ordinarily while land is being leased, there is no need to effect such a permanent change as subdivision.

19. The documents produced by the plaintiff showed that the land was subdivided into four portions. These were Nos. 2063, 2064, 2065 and 2066. Of these, one, No. 2063, which the plaintiff claims was meant to be transferred to him, measures 0.40 ha which translates into approximately 0.988 acres.

20. This court concludes that there must have been a sale transaction vide which the plaintiff was put into possession of the suit land and that it could not have been a lease transaction.

21. The production of minutes of the meeting convened by the Chief were not challenged by the defendant.

22. I find no truth in the allegation that there was an oral lease agreement between the plaintiff and the defendant.

23. Possession, for the purpose of success to the claimant in a claim for adverse possession must be proved to have been peaceful, continuous, open, exclusive and undisturbed possession of the suit land.

24. The possession emanating from a sale must also be viewed through the prism of time lapse in order to establish if it can result in a declaration for adverse possession.

25. There was no written agreement for the sale. The plaintiff avers that the last payment made in 2004 at the behest of the defendant in the form of a hospital bill for Cyprian Kaunga, the defendant's son was not part of the consideration. From his evidence at the cross examination stage, he stated as follows:

*“I also paid Kshs.16,000/= in 2004. M'Rithaa came and asked me to pay his hospital bill. He has my debt of Kshs.16,000/=”.*

26. This evidence was brought out by the defendant's counsel and was not controverted. This court must take the year 2000 as the year when the plaintiff completed paying the consideration.

27. In the case of *Civil Appeal No. 73 Of 1982 Between Public Trustee and Wanduru Ndegwa eKLR*, the court stated as follows:

*“The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession.*

*The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in Bridges v Mees, [1957] 1 Ch 475; and Simpson J (as he then was) in Hosea v Njiru Ors, [1974] EA 526 (K).”*

28. Going by the position set out in *Civil Appeal No. 73 Of 1982 Between Public Trustee and Wanduru Ndegwa eKLR*, the period to be considered by this court for the purposes of establishing if title had accrued to the plaintiff by way of adverse possession is to be computed from the date of payment of the full purchase price and taking of possession. This date was stated by the plaintiff to be sometime in the year 2000. It was not controverted by the defendant. By the time of the filing of the Originating Summons the plaintiff had therefore been on the suit land for more than the statutory period of 12 years.

29. I do not find any evidence from the defendant, either oral or by way of affidavit, to show that the plaintiff did not have open peaceful and uninterrupted possession of the suit land during that period.

## **CONCLUSION**

30. In conclusion this court finds that the plaintiff has proved his claim against the defendant on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendant and issue the following orders:

**(a) A declaration that the plaintiff has been in continuous, exclusive and uninterrupted possession and occupation of a portion of one acre of LR NO: NKUENE/NKUMARI/568 for a period of over 12 years.**

**(b) A declaration that the defendant holds title over one acre LR NO NKUENE/NKUMARI/ 568 in trust for the plaintiff;**

**(c)A declaration that the Plaintiff has acquired absolute ownership of one acre out of LR NO: NKUENE/NKUMARI/568 by way of adverse possession;**

**(d)An order that the plaintiff should be registered as the proprietor of one acre out of LR NO: NKUENE/NKUMARI/568.**

**(e)An order that the defendant shall excise one acre out of LR NO. NKUENE/NKUMARI/568 and transfer the same to the plaintiff and in default the Deputy Registrar shall execute all documents necessary for excision of a portion of one acre and its transfer to the plaintiff.**

**(f)That each party shall bear its own costs of the suit.**

It is so ordered.

**Dated, signed and delivered at Meru this 1<sup>st</sup> day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**ENVIRONMENT AND LAND COURT, KITALE**