



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

LAND CASE NO. 27 OF 2010 (O.S)

STEPHEN MWITHIA M'RUUTI.....PLAINTIFF

VERSUS

JOSHUA MUTHUKU.....ST DEFENDANT

ISABELLA NKINA M'IRERA.....^{2ND} DEFENDANT

LAWRENCE KIRIINYA IBURI.....^{3RD} DEFENDANT

JUDGMENT

INTRODUCTION

1. By an Originating Summons dated **12/01/2010** and filed in court on **22/02/2010** the plaintiff herein sought for orders that he be declared the legal owner of **Land Parcel No. Nyaki/Thuura/2465** by way of adverse possession, and that he be issued with a title deed to the said parcel of land.

2. The Originating Summons is supported by the plaintiff's sworn affidavit dated **12/01/2010**. In that affidavit it is averred that the ^{1st} defendant and the ^{2nd} defendant are the son and widow of **M'Irera Ngaruthi** (deceased) respectively; that on or about the year **1975**, the plaintiff entered into a mutual agreement with M'Irera Ngaruthi (deceased) whereby he agreed to sell to the plaintiff land parcel No. **Nyaki/Thuura/1725**, and he duly paid for it in full. However M'Irera Ngaruthi died on **29th June, 1989** without having transferred the said parcel of land to the plaintiff; that the plaintiff took vacant possession of the suit land wherein he settled and developed it. He entered the said land in open view of everybody on or about **1975**, and that has been his residence ever since; that the ^{1st} and ^{2nd} defendants filed a succession case, **H.C. Succ. Cause No. 52 of 2001** and obtained letters of administration to the estate of the deceased and they subdivided land parcel No. **Nyaki/Thuura/1735** into parcel numbers **2464** and **2465**, and secretly transferred the plaintiff's piece of land (which fell under **2465**) to the ^{3rd} defendant Lawrence Kiriinya Iburi, yet they (the ^{1st}, ^{2nd} and ^{3rd} defendants) knew very well that the plaintiff had purchased and fully paid for the said land parcel; that the ^{3rd} defendant, while claiming that land parcel No. **Nyaki/Thuura/2465** was his, instigated the police to institute criminal proceedings against the plaintiff, vide **Meru Criminal Case No. 3221 of 2002** in which the plaintiff was acquitted of all charges, and that the plaintiff had been in possession of the suit land uninterrupted for a period of over twenty seven (**27**) years until on or about the **13th August, 2002** when the ^{3rd} defendant entered the land and damaged the property therein including cutting down the fence.

3. In the Originating Summons the following questions are sought to be answered:-

(i) Whether the plaintiff has been in actual possession of Land Parcel No. Nyaki/Thuura/2465 uninterrupted, for a period exceeding twelve (12) years.

(ii) Whether the title to Land Parcel No. Nyaki/Thuura/2465 held by N'Irere Ngaruthi (deceased) had not extinguished by the time the ^{1st} and ^{2nd} defendant filed succession proceedings to obtain Letters of Administration.

(iii) Whether the plaintiff had acquired the right of ownership by virtue of adverse possession over Land Parcel No. Nyaki/Thuura/2465.

4. In the sworn replying affidavit dated **15/3/2010** filed on **16/3/2010** in reply to the Originating Summons, the ^{3rd} defendant states that M'Irera M'Ngaruthi was the registered proprietor of **plot number 1684** which was subdivided into Land parcel number **Nyaki/Thuura/1734** and **1735**; that the plaintiff bought number **1734** and the same was transferred to him while parcel **1735** remained in the deceased's name;

that the deceased further subdivided plot number **1735** into plot number **2464** and number **2465**; **2464** was transferred to M'Ikamati M'Ikiunga/ while **2465** remained in the deceased's name and which was the subject of **Meru High Court Succession Cause Number 52 of 2001**; that upon conclusion of the succession cause, the 1st and 2nd defendants, as administrators of the deceased's, estate, sold to him plot number **2465** on **29/4/2002** and he took immediate possession of it; that on **21/8/2002** the plaintiff applied in the succession cause for orders to restrain him from interfering with the land or evicting the plaintiff which application was dismissed on **21/11/2002**; that the plaintiff also filed an application for revocation of grant issued to the 1st and 2nd defendant in the same succession cause which was dismissed with costs on **5/11/2009**; that immediately after he was issued with the title deed he took possession of the suit land and has been in continuous occupation since then till the date of filing of the originating summons and the plaintiff has never been in occupation thereof; he denies that the plaintiff ever purchased the suit land from the deceased.

THE EVIDENCE OF THE PARTIES

The Plaintiffs' Evidence

5. PW1 who is the plaintiff testified on **18/6/2018**. He adopted his statement dated **20/9/2016** as his evidence-in-chief. Briefly his evidence reflects what is in the supporting affidavit annexed to the originating summons: that he bought the land from the deceased; that the land is now registered in the name of the 3rd defendant; that he began the process of purchasing the land in **1966**; that initially he was to purchase 3 acres but he ended up purchasing 2, for which he paid in two installments which were acknowledged by the deceased; that there was another purchaser interested in the remaining; that he took possession in **1975**; that by the time of the demise of the deceased he was still living on the land and had developed it and no one evicted him. He adds that he paid an installment to Mr. David Kirimi, the deceased's son which the son acknowledged on **13/10/95**; that in **2002**, the 3rd defendant informed him that he had purchased the property and chased him out of the property, destroyed the fence and crops thereof. It was after that event that he discovered that the deceased's wife had obtained ownership through a **Meru High Court Succession Cause Number 52/07** and sold the land. At the hearing he produced the agreement **PEX-1** and its typed version **PEX-2**, acknowledgement of receipts of payment of divers dates as **PEX-3(a) - 3(g)**, admitted that he is not in possession any longer having been dispossessed in the year **2002** where upon he filed **CMCC 773/03 Meru**. He sought that the land be restored to him by an order of this court.

6. PW2 M' Arachii M'Rugaru, testified and adopted his statement filed in court on **20/9/2016**. The sum of his evidence is that he has known the plaintiff since childhood and they are neighbours in Thuura and that the suit land belongs to him having been sold to him in **1975**. His evidence is that PW1 first bought 2 acres and later bought three acres to make it a total of **5 acres**. His evidence is that at the time of his death, the deceased had sold his entire property in Thuura and was living in Giaki. He corroborated the plaintiff's evidence that he was evicted by the 3rd defendant in **2002** and that the 3rd defendant has been on the property to date. According to him the plaintiff had used the land for about **30** years.

7. PW3, Grace Mujani, the plaintiff's wife, testified and adopted her statement filed in court on **20/9/16**. Her evidence corroborates that of the plaintiff and **PW2**. She testified that she was present when the plaintiff bought the land and she did not know whether there was an agreement; she did not witness the deceased receive the money; that the plaintiff bought two acres at first and later started paying for some two more acres in **1975**. The couple occupied the land and developed it and the deceased's wife would occasionally collect the purchase price in instalments; that when the deceased died they paid the balance to his brother a Mr. Mburugu and a Mr. David Kirimi, the deceased's son.

8. PW4, Stephen Kigorwe, testified and adopted his statement filed on **20/9/16**. His evidence is that the plaintiff bought the land in **1975** and started living there, he only came to learn that the land was being claimed by the defendant in **2002**. With that the plaintiff closed his case.

The Defendant's Evidence

9. DW1 Joshua Muthuku, the 1st defendant testified on **19/6/2018**. His evidence is that the deceased is his father who had land at Thuura measuring **9** acres; that the plaintiff was sold two acres and he got title for the two acres; that **DW-1** and his brother live at Gachuwa, Kiburine where the deceased had other land but they would occasionally go and obtain farm produce from plot number **2465**; that they had never been prevented from entering that land by any other person and they knew the land to belong to their father. They lodged succession proceedings and sold the land to the 3rd defendant. He produced documents in the succession cause as **DEX-1(a) - 1(d)**. He stated that from **1975 - 2002** the family was still using the land. While under cross examination by Mr. Kaumbi, **DW1** stated that another person whom he did not identify purchased one acre and only three acres were left which were made the subject of the succession cause.

10. DW2, Lawrence Kiriinya Ihuri the 3rd defendant gave sworn evidence on **19/6/2018** and adopted his statement filed on **22/5/17**. He testified that the deceased was husband to his aunt; he acknowledged was registered proprietor of plot number **1684**; that upon its subdivision into 2 parcels the plaintiff bought parcel number **1734** while the rest remained in the deceased's name. The rest of his evidence reflected what is in his replying affidavit dated **15/3/10** which is analysed above. At the hearing, he produced copies of documents filed in the succession case as **DEX-2(a)-(d)**, the sale agreement was produced as **DEX-3** and the title and green card for plot number **2465** produced as **DEX-4a** and **4b** respectively. He admitted that after he got title he found the plaintiffs' wife in possession, cut the fence at a corner to create a gateway and has been using the land to date. Upon cross examination, he insisted that the land was vacant but the plaintiff's wife was present in an adjacent shamba. He admitted that the land was transferred directly to him without going through the beneficiaries first. He admitted that he knew the plaintiff before **2002** as the latter was a councillor in the area; he admitted that he discussed with the plaintiff who informed him before the purchase that there was no land available for sale. However he conducted a search at the lands office and he found the title to be clean. On re-examination, he stated that he found the plaintiff's wife on parcel number **1734**; that the plaintiff's wife never interfered when he was being shown the boundaries by Joshua; that the administrators had not informed him of any prior sale of the suit land to any other person.

SUBMISSIONS

11. The defendants filed their written submissions on **6/8/2018**. I have perused through the record and found no submissions filed on behalf of the plaintiff.

DETERMINATION

Issues for Determination

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

(a) Whether the plaintiff is entitled to the land by way of adverse possession.

(b) What orders should issue?

(a) Whether the plaintiff is entitled to the land by way of adverse possession.

13. This is a suit in which the plaintiff is seeking to be declared a legal owner of **Land Parcel No. Nyaki/Thuura/2465** by way of adverse possession, and that he be issued with a title deed to the said parcel of land. However his claim suffers from one major flaw: he has admitted that he is no longer in possession of the land he is claiming by way of adverse possession.

14. One of the ingredients of adverse possession is peaceful and uninterrupted occupation of the suit land. In the case of **John Nyabuto Vs James Ombaye Orori and Another (2017) eKLR** the court held that if a party has already been evicted he can not sustain a claim for adverse possession. The court in that case held as follows:

“Even if the plaintiff would have predicated his suit on the doctrine of adverse possession, he would have failed. In his pleadings and evidence he makes admission that he and his family were in fact totally evicted from the suit land in 2011. This meant that even if they had been in adverse possession that possession was interrupted and whatever period he had been in possession cannot now count.”

CONCLUSION

(b) What orders should issue?

15. The eviction of the plaintiff in this case admittedly took place in the year **2002** where upon the plaintiff herein filed **CMCC 773/03 Meru**. This suit was filed in the year **2010**. The period of possession ceased before both suits were filed. This claim is therefore incompetent. I hereby dismiss the Originating Summons dated **12th January 2010**.

16. There shall be no orders as to costs.

Dated, signed and delivered at Meru this 1st day of March, 2019.

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE