



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 280 OF 2017

GEORGE GICHOHI KARIUKI.....1ST PLAINTIFF

ZAINA WANJIKU KARIUKI2ND PLAINTIFF

KABIBI KARIUKI.....3RD PLAINTIFF

ANTHONY GITHUA KARIUKI PETER.....4TH PLAINTIFF

VERSUS

FRANCIS WACHIRA MUKAMI1ST DEFENDANT

EDDAH WANGARI WACHIRA.....2ND DEFENDANT

JOHN NJERU WACHIRA.....3RD DEFENDANT

BERNARD MUCHOKI WACHIRA4TH DEFENDANT

STANLEY MAINA WACHIRA5TH DEFENDANT

JUDGMENT

1. Vide an amended Originating Summons dated the 22/3/18 the Plaintiff urged the Court to answer the following question;

a. That Francis Wachira Mukami has been registered owner of a portion of LOC14/KIRU/1508 (suit land) measuring 0.8 ha as trustee of the Plaintiffs and Peter Kariuki Githua (deceased) in Adverse Possession since 2010 under section 7, 37 and 38 of the Limitations of Actions Act Cap 22 Laws of Kenya and section 28(e) of the Land Registration Act No 3 of 2012.

2. The Plaintiffs prayed for judgement against the Defendants as follows;

a. That the plaintiffs are entitled to the prayers 1-7 of the Originating Summons.

b. An order for subdivision and the transfer of a portion of land measuring 0.80 ha or 2 acres out of Fort Hall LOC 14/KIRU/1508 and its subdivision of LOC 14/KIRU/5082-5086 and eviction of defendants.

c. Alternatively, a refund of Kshs 210,000/- together with interest at compound bank rates of 20% p.m. from 1999 to the date of judgement in full.

d. Loss of tea income for a period of 2 years

e. Interest and costs of the suit.

f. An order that in default of the Defendants executing the transfer documents the Deputy Registrar of the court be empowered to sign and the Land Consent be dispensed with.

g. OCPD Kiriaini Police Station and his officers do enforce the orders of eviction of the Defendants from the land measuring 0.8 ha.

h. In the further alternative, award for compensation for the acquired land as valued by the private valuer at paragraph 6 of the Plaintiff.

3. On the 9/10/17, directions were taken in the suit that the Originating summons be deemed as a plaint and the Replying affidavits be deemed as defense and the parties were allowed to comply with Order 11 in readiness for the hearing of the suit.

4. The Plaintiffs aver that the suit land Fort Hall LOC 14/KIRU/1508 is registered in the name of the 1st Defendant. The claim of the Plaintiffs is anchored on Adverse Possession.

5. The Defendants through the 1st Defendant denied the Plaintiff's claim vide the Replying affidavits sworn by 1st and 4th defendants dated the 1/3/16.

6. The Plaintiffs led evidence and called two witnesses. PW1 – Stephen Gikonyo Githua informed the court that the 1st Defendant guaranteed a loan for Hon Kimondo Kiruhi with Kenya Commercial bank in the 1990s using the suit land as security. The borrower defaulted and requested the bank to allow the guarantor to repay the loan, which the bank accepted. He sought assistance from Peter Githua Kariuki who repaid the money to the bank to redeem the security. That in return it was agreed between the 1st Defendant and the said Peter Githua Kariuki that the former would sell the latter 2 acres of land out of the suit land. It was his evidence that the 1st Defendant partitioned the land into two portions. That Kariuki was put in possession and he planted tea bushes on one acre of the land. That the family of Kariuki have been picking tea from 1999 till 2015 when the 1st Defendant subdivided the land and registered it in the names of his wife and children and stopped the Plaintiff from accessing the land.

7. PW2- Anthony Kariuki Peter stated that he is the son of Peter Githua Kariuki. That his father died on 5/7/1999. That he is the co-administrator of the estate of his father with the 2nd Plaintiff.

8. That on request by the 1st Defendant his father agreed to settle the loan outstanding at the bank on behalf of the 1st Defendant to redeem his land, which was a security for the loan, advanced to a Mr. Kimondo and guaranteed by the 1st Defendant. That it was agreed that the 1st Defendant would sell and transfer 0.8 hectares of land to his father as a condition for the payment of the loan. That his father paid Kshs 210,000/-. In pursuance to the said promise, the 1st Defendant subdivided the suit lands into two portions measuring 0.8 has and 1.38 ha. That 0.80 ha was to be transferred to his father.

9. It was his testimony that his parents were put in possession of the 2 acres by the 1st Defendant in 1998 whereupon they planted 4500 tea bushes which they have been picking from 1998 to 2015 when the 1st Defendant subdivided the land and registered the 5 resultant titles in the names of his wife and children, fenced off the land and denied access to the Plaintiffs.

10. That pursuant to the oral agreement to sell the land, which was breached by the 1st Defendant, he sought title by Adverse Possession inter-alia other reliefs as stated in the originating summons. He confirmed that the Plaintiffs are not in occupation of the suit land and that they abandoned the picking of the tea as well. He stated that there was no contract of sale neither the Land Control Board consent to transfer the suit land to his father.

11. DWI – Francis Wachira Mukami testified on his behalf and that of the other Defendants. In brief, he stated that he is the registered owner of the suit land, which he has subdivided into 5 plots and registered in the names of the 2nd to 5th Defendants. That in 1985 he guaranteed a loan to one Hon Kiruhi Kimondo, now deceased from Kenya Commercial Bank Limited in the sum of Kshs 97,500/-. The borrower defaulted and the bank set out to exercise its statutory power of sale. The said borrower asked the bank that he be allowed to repay the loan to secure the release of his title, which was duly accepted. He then approached Peter Githua Kariuki, his 1st cousin to bail him out. Mr. Kariuki advanced him Kshs 97,500/-. In return, he allowed the deceased to pick tea from a portion of one acre on the suit land.

12. He denied that there was neither a sale nor agreement to sell the land to Kariuki and no survey was carried out on the land. The deceased neither claimed any land from him in his lifetime. That the claims arose after his death. He denied any claims based on Adverse Possession and contended that the family of the Plaintiffs occupied the suit land with his permission, which he gave Mr. Kariuki. That they were licensees on the land. That the claim for compensation by the Plaintiffs amounts to unjust enrichment as they have been picking teas and deriving revenue from the land for many years.

13. At the close of the hearing parties elected to file Written Submissions, which I have read and considered.

14. Having carefully analyzed the pleadings, the evidence of the parties, the submissions and the authorities where supplied, the key issues that fall for determination are;

- a. Whether there was a sale between the father of the Plaintiffs and the 1st Defendant.
- b. Whether the Plaintiffs have proved Adverse Possession in respect to the suit land.
- c. Whether the Plaintiffs have proved fraud on the part of the 1st Defendant in subdividing the suit land into 5 portions.
- d. Whether the Plaintiffs are entitled to compensation.
- e. Should the Defendants be evicted from the suit lands?

f. Who meets the costs of the suit?

15. The parties to the suit are related. The 3rd Plaintiff is the mother of the 1st, 2nd and 4th Plaintiffs while the 1st Defendant is the father and husband of the 3rd -5th Defendants and 2nd Defendant respectively. The father and husband of the Plaintiffs was called Peter Githua Kariuki who was the stepbrother of the 1st Defendant. Hon Kimondo Kiruhi is the brother in law of the 1st Defendant.

16. There are undisputed facts in this suit to wit;

- a. That the deceased passed away in July 1999.
- b. That the family continued picking tea on the suit land until 2015.
- c. That the deceased helped the 1st Defendant redeem his land.
- d. That the amount paid off by the deceased was not paid back.

Whether there was a sale between the father of the Plaintiffs and the 1st Defendant.

17. The new section 3(3) of the Law of Contract Act came into effect on 1st June 2003. Prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, the subsection read as follows:

“(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it; Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) Has in part performance of the contract taken possession of the property or any part thereof; or

(11) Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract”.

18. In this case, the Plaintiffs have asserted in their evidence that there was an oral agreement between their father and the 1st Defendant to sell him, 0.8 has of land as compensation for redeeming the suit land from the bank loan. The 1st Defendant has categorically denied any agreement oral or written between the parties and has asserted that he permitted the father of the Plaintiffs to pick the tea on his land as a way of gratitude to him as he was a relative. The Plaintiffs have relied on a draft Land Control Board consent allegedly signed by the 1st Defendant to state that the land was subdivided into two portions. I have perused the said documents, which is unsigned on the part of the purchaser. No evidence was adduced to show that indeed the Land Control Board consent to subdivide and sell the portion to the Plaintiff's father was obtained. It is the Courts view and finding that the Plaintiffs have not proved any sale of the land either in oral or written form. They have failed to discharge the duty of proof.

Whether the Plaintiffs have proved Adverse Possession in respect to the suit land.

19. For Adverse Possession to mature into title to land the following conditions must be fulfilled:

- a. The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;
- b. The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
- c. The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- d. The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of limitation to claim back the land.
- e. The possession has to be *exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.
- f. Possession must be without the permission of the owner.

20. For a party to succeed in summons for adverse possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an adverse possessor, they have to prove they did not have permission to enter into the suit land. The Plaintiff is expected to furnish in Court evidence to prove that the suit land where he/she is claiming Adverse Possession indeed belongs to the Defendant.

21. In the case of **Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001**, the court delivered the following dictum:

“...it is trite law a claim of Adverse Possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in **Jandu v Kirpal [1975] EA 225** possession does not become adverse before the end of the period for which permission to occupy has been granted?”

22. Similarly, in the case of **Malcom Bell v Daniel Toroitich Arap Moi & Another [2012] eKLR** the Court of Appeal held that a claim in Adverse Possession could not be sustained as the Respondents had come into possession of the property through the permission of the deceased father of the appellant. The Court also restated the position that the burden of proof lies with the person asserting Adverse Possession.

23. In this case the Plaintiffs have averred that they have occupied the suit land pursuant to an agreement and or promise to sale of the suit land from 1998 – 2015 and therefore have established title adverse to that of the 1st Defendant. The 1st Defendant has led evidence to show that there was no sale of the land and that indeed the Plaintiffs’ father was put in possession with his express permission out of his gratitude to him assisting in repaying the loan. The Plaintiffs have not adduced evidence to show that the occupation was adverse to the 1st Defendant’s title.

24. This court holds that the Plaintiffs have occupied the suit land with the express permission of the 1st Defendant and therefore no Adverse Possession can be sustained. The claim fails.

Whether the Plaintiffs have proved fraud on the part of the 1st Defendant in subdividing and transferring the suit lands.

25. It is trite that a claim based on fraud must be pleaded particularized and proved. Fraud being a serious quasi-criminal offence cannot be inferred by the Court. In this case, there is no evidence adduced by the Plaintiffs to show that the subdivision and transfer of the suit lands to the Defendants was fraudulent. The Court cannot infer fraud from the pleadings; it must be pleaded particularized and proved in specie.

Whether the plaintiffs are entitled to compensation.

26. The plaintiff amended their originating summons to claim for refund in the alternative of Kshs. 210,000/= and further interests from 1999 to the date of payment. They also pray for loss of income from 2015 (2 years). Section 4 of the Limitation of Actions Act provides that claims under contracts be preferred within 6 years. The estate of the deceased ought to have raised their claim within this period. Any claim pursuant to the arrangement and/or promise to transfer land between the deceased and the 1st Defendant was time barred as at 2005. The Plaintiffs having failed to prove any title by Adverse Possession are not entitled to compensation for teas not picked for the period of two years. In any event, they had an injunction in their favour for that period and it is inconceivable that they may have opted out of the land on their own volition.

27. This claim fails.

Should the Defendants be evicted from the suit lands?

28. The answer to this issue is in the negative given the holding of the court in the preceding paras.

29. In the upshot the Plaintiff’s claim fails and is dismissed.

30. Parties being related, I order that each to meet the costs of their suit.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANGA THIS 25TH DAY APRIL, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Muguku for the 1st – 4th Plaintiffs

Mr Kirubi HB for Mbutia for the 1st – 6th Defendants

Kuiyaki and Njeri, Court Assistants