



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT THIKA

ELC CASE NO. 173 OF 2017

(FORMERLY NAIROBI ELCC NO. 616 OF 2009 (O.S))

JOSEPH WANYANGI MUIRURI.....PLAINTIFF

Versus

KUNG’U KIBUIKA.....1STDEFENDANT

GICHUKI KIBUIKA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit by way of an originating summons dated 30th November 2009 filed on 2nd December 2009 and amended on 1st August 2016 pursuant to court order dated 12th July, 2016 wherein the defendants substituted their father, JACOB KIBUIKA MUIRURI (hereinafter referred to as the deceased). He has therefore sought the following orders;-

- a) **THAT** the plaintiff has acquired title on land reference No **Githunguri/Githiga/1359** by adverse possession under sections 37 and 38 of Limitation of Actions Act.
- b) **THAT** the defendants’ title to the **LR No. Githunguri/Githiga/1359** has been extinguished in favour of the plaintiff under sections 37 and 38 of the Limitation of Actions Act.
- c) **THAT** the defendants’ do transfer the said land to the plaintiff forthwith.
- d) **THAT** the defendants do pay to the plaintiff costs of this suit.

2. The originating summons is premised on the plaintiff’s 22-paragraphed affidavit sworn on 30th November 2009. It is also supported by a copy of receipt issued on 6th August 1991 for Kshs. 27,000/= paid to Settlement Fund Trustee marked JWMI (PEXhibit 1) and a copy of land sale agreement dated 7th February 1992 made between the deceased and the plaintiff in respect of the suit land, LR NO. GITHUNGURI/GITHIGA/1359 and marked as JWM II (PEXhibit 2)

3. The gist of the plaintiff’s case is that in or about January 1984, the plaintiff and the deceased together with their two (2) brothers got from their uncle a piece of land LR NO. GITHUNGURI/GITHIGA/582 which they subdivided resulting to, among other parcels, the suit land measuring approximately one (1) acre owned by the deceased. That the deceased left his portion of the land for the plaintiff as he shifted to Kitiri Settlement Scheme in Nyandarua County.

4. The plaintiff averred that in or about August 1991, the deceased’s land at the said Kitiri Settlement Scheme was to be sold by Settlement Fund Trustee for his failure to repay loan advanced to him by the said Fund Trustees. That as a result, the deceased sold the suit land to the plaintiff as shown on P Exhibit 2 and the plaintiff paid the outstanding loan with the Fund Trustee for and on behalf of the deceased as reflected on P Exhibit 1. The deceased failed to transfer the suit land to the plaintiff as he claimed that the plaintiff had paid low purchase price for the land. The deceased then attempted to refund the purchase price to the plaintiff but the latter refused to receive the refund. On 29th June 1999, the plaintiff lodged a caution against the register of the suit land.

5. The plaintiff also averred in his further affidavit sworn on 3rd March 2010 that he forgot to attach a copy of the abstract of title to the suit land to his affidavit sworn on 30th November 2009. Accordingly, he attached the aforesaid abstract of title (PEXhibit 3). The plaintiff claimed that he has been in open and peaceful occupation of the land for over seventeen (17) years thus precipitating the present suit.

6. On 8th November 2010, Mr. G.M. Muhoro learned counsel for the plaintiff filed an application by way of chamber summons dated 5th November 2010 wherein he sought the substitution of the deceased who died on 12/3/2010 with his sons who are the present defendants

namely Kung'u Kibuika and Gichuki Kibuika. On 11th February 2011, Mbogholi Msagha, J allowed the application accordingly. The suit was transferred from Nairobi Environment and Land Court to Thika Environment and Land Court on 2nd February 2017.

7. The defendants were duly served with the amended originating summons together with the supporting documents and mention notices as shown on affidavits of service sworn on 17th April, 2014 and 2nd November 2018 respectively. On that strength, hearing of this suit proceeded on 3rd December 2018 whereby the plaintiff (PW1) testified, relied on his supporting affidavit and produced P Exhibits 1 to 3 herein.

8. On 3rd November 2018, this court ordered the plaintiff's counsel to file submissions on or before 6th December 2018. Counsel filed no submissions in this matter.

9. I have considered the amended originating summons and the evidence of PW1. In the spirit of the decision by the court of Appeal in **Galaxy Paints Co. Ltd – vs- Falcon Grounds Ltd (2000) 2EA 385**, I embrace issues or questions 1 to 4 for determination as framed on the face of the amended originating summons.

10. The plaintiff (PW1) averred that he paid Kshs. 27,000/= to Settlement Fund Trustee, on account of the deceased who had failed to repay loan advance to him by the said Settlement Fund Trustees. That the deceased sold to him the suit land at Kshs. 13,000/=. Notably, P Exhibits 1 and 2 are in absolute support of his sworn statement.

11. PW1 further averred that the deceased who was the original defendant herein, disappeared after PW1 paid Kshs. 27,000/= on his account as shown on PExhibit1. That the deceased failed to transfer the land to him hence P Exhibit 2 was rendered void under Section 6 (1) of the Land Control Act (Cap 302); see also Kariuki –v- Kariuki (1983) KLR 227.

12. It is trite law that when a purchaser in a controlled transaction is permitted to be in possession of the land by the vendor pending completion of the transaction, the intended sale becomes void, and the permission to occupy the land is terminated by operation of the law. Any continued occupation thereon becomes adverse from the time the transaction becomes void; see the Court of Appeal decision in the case of **Samwel Miki Waweru –v- Jane Njeri Richu ((2004) eKLR.**

13. It was the contention of PW1 that he has occupied the suit land openly, peacefully and without any interference from the defendants for over seventeen (17) years. He testified, inter alia;

“I have been on the suit land for over 12 years. The defendant has no right to the suit land.”

14. It was the plaintiff's firm assertion that he has been in open and peaceful occupation of the suit land since 7th February 1992. Evidently, the plaintiff's possession of the land is open and notorious as there has been no discontinuation of possession of it by the defendants hence there is ouster of the defendants from the land followed by adverse possession by the plaintiff.

15. Moreover, the transaction between the deceased and the defendant created a constructive trust in favour of PW1 who paid the purchase price as shown on PExhibits 1 and 2. Clearly, PW1 has gained legal, and equitable interest in the suit land.

16. In the case of **Macharia Mwangi Maina and 87 others –v- Davidson Mwangi Kagiri (2014) eKLR**, the Court of Appeal observed that a constructive trust relating to land subject to the **Land Control Act (Cap 302 Laws of Kenya)** is enforceable. In the instant case, the doctrine of equity being one of the national values and principles of governance under **Article 10 (2) (b) of the Constitution of Kenya, 2010**, applies very handy in favour of the plaintiff.

17. My considered view is that the suit land is registered in the name of the deceased. The plaintiff has been in open, exclusive and notorious occupation of the land since 1992. There has been ouster of the defendants from the suit land followed by adverse possession of the land by the plaintiff as recognized by the Court of Appeal in **Wilson Kazungu Katana and 101 others –v- Salim Abdallah Bakshwein and another (2015) eKLR.**

18. The net result is that the plaintiff's claim is unchallenged, solid and steadfast. He has proved his claim against the defendants jointly and severally on a balance of probability.

19. Accordingly, I enter judgment for the plaintiff against the defendants jointly and severally in terms of orders 1, 2, 3, and 4 sought on the face of his amended originating summons dated 30th November 2009, filed on 2nd December 2009 and amended on 1st of August, 2016.

20. Orders accordingly.

DATED AND SIGNED AT MIGORI THIS 28TH DAY OF APRIL 2019:

G.M.A. ONGONDO

JUDGE

DATED, SIGNED AND DELIVERED AT THIKA THIS 14TH DAY OF JUNE , 2019.

L. N. GACHERU

JUDGE