



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**ELC NO. 284 OF 2015**

**ZACHARIA ONDIEKI.....PLAINTIFF**

**VERSUS**

**PATRICK KURESOI.....DEFENDANT**

**JUDGMENT**

***(Suit by plaintiff seeking the defendant to be permanently restrained from the suit land; plaintiff having title to the suit land; defendant claiming that the title was fraudulently procured and in addition that he is entitled to the suit land by way of adverse possession; defendant not attending court to provide any evidence; plaintiff demonstrating that he holds title to the suit land; no evidence of any fraud or impropriety in the manner that he acquired the title; no evidence to support the claim for adverse possession; plaintiff's suit succeeds and defendant's counterclaim is dismissed with costs)***

1. This suit was commenced by way of a plaint which was filed on 9 April 2009, in the Chief Magistrate's Court at Nakuru. It was later transferred to this court for determination.

2. In his plaint, the plaintiff has pleaded that he is the owner of the land parcel Nakuru/ Ngongongeri / 47, having become registered as proprietor in the year 1997. He has pleaded that he has been in peaceful occupation of the land until the defendant invaded it and started cultivating it in January 2009. It is averred that the defendant has without any lawful cause remained in occupation of the suit land. In the suit, the plaintiff seeks orders to have the defendant permanently restrained from the suit land alongside costs and interest.

3. The defendant filed defence which he later amended on 10 May 2013. He contended that the plaintiff was illegally and fraudulently registered as owner of the suit land and pleaded the following particulars of fraud against the plaintiff :-

(a) *Obtaining title when he knew or ought to have known that he was not allocated/allotted the said parcel of land.*

(b) *Obtaining title when he knew or ought to have known that his name did not appear or was not contained in the area list register.*

(c) *If which is denied, his name is in the area list then the same was inserted upon deletion of that of the defendant.*

(d) *Obtaining title during the existence of a court order barring issuance of title.*

(e) *Obtaining title when he knew or ought to have known that the defendant had been allocated and taken possession of the said parcel of land.*

(f) *Obtaining title to land when the same was not available.*

4. He has pleaded that he has been in occupation and possession of the said land for over 20 years. In his counterclaim, he averred that he is in occupation of the suit land pursuant to the record issued by the Provincial Surveyor and that he has been in open, peaceful, quiet possession of the suit land for over 12 years. He is thus of opinion that he has acquired title to the suit land through the doctrine of adverse possession and he has asked for orders to that effect.

5. The case came up before me for the first time on 21 March 2017 when I gave directions on the filing of pre-trial documents and listed the case for mention on 4 July 2017 to confirm the position. The file was not brought to court on 4 July 2017 and was subsequently mentioned on 4 October 2018. On this day, Ms. Cheruto, learned counsel for the plaintiff, stated that she has filed and served all her documents and was ready for trial. Mr. Okiro, learned counsel for the defendant, also stated that they have complied and following that position parties by consent took the date of 12 March 2019 for hearing. On that day, Ms. Cheruto was present with the plaintiff and was ready to proceed. However, Mr. R.K Langat, counsel holding brief for Mr. Nanda, for the defendant, applied for adjournment, inter alia for the reasons that they had not filed their pretrial documents and that they were unable to reach the defendant to attend the trial. I was not convinced by these

reasons. I noted that the hearing date had been taken by consent about five months earlier, and if there was an issue of compliance, there was sufficient time to do so. I also took note of the fact that the case was now about 10 years old, and I did not think that it would be in the interests of justice to keep the plaintiff waiting any longer. It was also mentioned that counsel could not reach the defendant but I wondered where the defendant has been since this was his case. For those reasons, I declined to adjourn and directed the matter to proceed.

6. The plaintiff testified as the sole witness. He testified that he purchased the suit land from its previous proprietor, one Dinah Kimuge, on 24 March 2006 and title was transferred to him. He averred that he purchased the land above board after obtaining consent to transfer. He cultivated the land in the years 2007 and 2008 but in the year 2009, the defendant came to the land after he had ploughed it. He refuted the claim that the suit land was allotted to the defendant. He mentioned that the defendant is a neighbour. He pointed out that the defendant cannot claim adverse possession as he only came to the land in the year 2009. Cross-examined, he testified inter alia that before he purchased the land, Dinah Kimuge, was the one who was living on it. He was not aware whether the land was previously under a settlement scheme although he was aware that the Government allocated it to some people. He was not aware of any court order that stopped the issuance of any titles.

7. The plaintiff closed his case with the above evidence. It will be recalled that the defendant did not appear at the hearing of the matter and no evidence was offered on his behalf.

8. I invited counsel to file written submissions which they duly did and I have considered these before arriving at my decision.

9. In a nutshell, the plaintiff's case is that he purchased the suit land and has been proprietor since 24 March 2006. He holds title to the suit land. The defendant in his defence and counterclaim alleged that the title of the plaintiff was procured fraudulently and further that he is entitled to the land through the doctrine of adverse possession. Now, the defendant has not called forth any evidence to demonstrate that the plaintiff procured his title by way of fraud. I do note that in his submissions, counsel for the defendant ventured to submit that the plaintiff's title was procured illegally and unprocedurally. Counsel submitted that the plaintiff stated that he purchased the land on 24 March 2006 whereas the consent of the Land Control Board was issued on 17 January 2006, and he wondered how consent was obtained before the sale. I don't read much in this submission. I do note that what happened on 24 March 2006 is the actual transfer of title to the plaintiff. That is clear from the title deed produced. It is therefore very much in order that consent came before the transfer and I wonder what point counsel for the defendant is trying to put across. He may probably have had a point if it was shown that the consent of the Land Control Board came after the transfer but that is not what we have in this case. Counsel also faulted the plaintiff for not producing the sale agreement as an exhibit, but to me, the sale to him is not in issue here and is not contested by the previous proprietor. It therefore does not adversely affect the plaintiff's case that there was no production of the sale agreement. In addition, counsel faulted the plaintiff for not producing in evidence the transfer form. Again, just as the sale agreement, this is not in issue. What the defendant needed to do if he wished to impeach the title of the plaintiff was to prove the fraud which he pleaded in his defence. He has not brought any evidence to support his allegations of fraud, and on my part, I see absolutely nothing wrong in the manner in which the plaintiff acquired title. In fact, I see nothing wrong with the title of the plaintiff. I have no evidence that the suit land was allotted to the defendant as he has claimed for he has not presented any evidence.

10. On the defendant's claim of adverse possession, this must of course fail for the defendant presented no evidence to demonstrate that he has been in quiet possession of the suit land for a continuous uninterrupted period of 12 years. For want of evidence, this claim fails.

11. I mentioned earlier that I see nothing wrong with the title of the plaintiff. Being the registered proprietor, it is the plaintiff who is entitled to enjoy the rights of proprietorship. This is provided for in Section 24 of the Land Registration Act, Act No. 3 of 2012, which states as follows :-

## **24. Interest conferred by registration**

### ***Subject to this Act—***

***(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and***

***(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.***

12. It will be noted from the above that it is the person who is registered as proprietor who is vested with all rights and privileges appurtenant thereto. This includes the right of ingress and egress and the right of use. The defendant has not demonstrated any right to use or occupy the suit land and it follows that the plaintiff is entitled to the prayer seeking that he be permanently restrained from the said land.

13. In short, the plaintiff's suit succeeds and the defendant's counterclaim fails. The plaintiff deserves the costs of both the main suit and the counterclaim.

14. I now make the following specific orders :-

**(i) That it is hereby declared that as between the plaintiff and the defendant, it is the plaintiff who is the rightful proprietor**

of the land parcel Nakuru/Ngongongeri/47.

(ii) That an order of permanent injunction is hereby issued, stopping the defendant from entering, being upon, using, or in any other way, interfering with the plaintiff's quiet occupation of the land parcel Nakuru/Ngongongeri/47.

(iii) That the plaintiff shall have the costs of the main suit and of the counterclaim as against the defendant.

15. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru 16<sup>th</sup> day of July 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of :-

Ms.Kipruto holding brief for Ms. Cheruto for the plaintiff.

Mr. Nanda present for the defendant .

Court Assistants: Nelima Janepher/ Patrick Kemboi.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU