



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 4 OF 2012

(Formerly Nyeri HCCC NO. 48 OF 2009)

(Formerly Nairobi HCCC 528 OF 2001)

MOSES MWANGI KARANJA.....PLAINTIFF

-VERSUS-

DAVID MACHARIA GAKUYA.....DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 29th March, 2001 and amended on 5th June, 2001 and further amended on 22nd July, 2005 the plaintiff herein, Moses Mwangi Karanja, brought this suit seeking judgment against the defendant, David Macharia Gakuya, for the following reliefs:

- (i) A declaration that he has legally become entitled to ownership of land parcel No. Loc. 3/Gichagiini/283 (hereinafter referred to as the suit property) by adverse possession;**
- (ii) A declaration that the defendant holds the suit property in trust for him;**
- (iii) A declaration that the entries made in the register for the suit property on 16th May, 2000 in favour of the defendant were fraudulently done and that the said entry should be cancelled forthwith and the same substituted with his names;**
- (iv) That he is entitled to be registered as the proprietor of the suit property under Kikuyu Customary trust;**
- (v) That the Registrar of the High Court, do sign the necessary papers to effect transfer and registration of the suit property in his favour;**
- (vi) That the defendant be condemned to pay the costs of the suit.**

2. It is the plaintiff's case that he bought the suit property from Macharia Wanjihia (deceased) in or about 1966 and 1967; that he has enjoyed peaceful use and occupation of the suit property since that time and that he developed the suit property by planting more than 10,000/= tea bushes thereon.

3. The plaintiff explains that the deceased passed on in 1989 before transferring the suit property to him and blames the defendant, (a relative of the deceased) for having hatched a scheme to get the suit property registered in his name. In that regard, he explains that the defendant changed his name to that of the deceased and using the changed name, illegally and fraudulently and without any colour of right caused the suit property to be registered in his name.

4. The plaintiff maintains that the registration of the suit property in favour of the defendant was done fraudulently and illegally with the aim of depriving him of his entitlement thereto by outright purchase and/or adverse possession. He gives the following as the particulars of fraud committed by the defendant:

- (i) Purporting to change his name to that of the deceased;

(ii) Purporting that he had a name similar to that of the deceased;

(iii) Purporting to have been the original owner of the suit property;

(iv) Illegally causing his name to be entered in the register for the suit property when he knew that the original owner had passed on;

(v) Failing to apply for and obtain letters of administration for the estate of the deceased and causing the suit property to be registered in his favour without obtaining a grant of administration with a view of blocking him from being registered as the rightful owner of the suit property.

5. On account of the fact that he has been in uninterrupted, peaceful use, occupation and possession of the suit property for over 20 years, the plaintiff contends that he has become legally entitled to ownership of the suit property by adverse possession.

6. For the foregoing reasons, the plaintiff urges the court to rectify the register of the suit property by cancelling the name of the defendant and substituting it with his name.

7. In reply to the plaintiff's claim, the defendant filed a statement of defence and counter-claim (amended) in which he denies the allegation that the deceased sold the suit property to the plaintiff and that the plaintiff has been in full, effective and uninterrupted use of the suit property for over 20 years and denies having committed any acts of fraud.

8. The defendant explains that there have been previous proceedings in respect of the suit property to wit, Nairobi HCCC No. 1757 of 1986 and Nairobi HCCC No.1067 of 2000 and terms the plaintiff's suit time barred, fatally defective and incompetent.

9. In his counter-claim, the defendant contends that his registration as the proprietor of the suit property is indefeasible and contends that the plaintiff's occupation of the suit property is without any lawful and/or justifiable cause.

10. Terming the plaintiff's occupation of the suit property an encroachment and/or interference with his right of use and enjoyment of the suit property, the defendant urges the court to:

(i) Dismiss the plaintiff's suit with costs to him;

(ii) Permanently restrain the plaintiff, his agents, servants, representatives and/or any other person claiming under him from encroaching, using, occupying and/or interfering with the suit property;

(iii) In alternative and without prejudice to prayer (ii) above, the plaintiff, his agents, servants and/or representatives be ordered to forthwith vacate the suit property if they have entered it or be forcibly evicted;

(iv) Costs of the suit;

(v) Any other or further relief the court may deem fit and just to grant.

EVIDENCE

The plaintiffs case

11. P.W.1 **Mwangi Kinuthia**, informed the court that he was one of the 17 people who witnessed the sale agreement executed between the plaintiff and the deceased, the only surviving witness. He was, however, unable to identify his signature in the copy of the agreement shown to him. He stated that the buyer was the plaintiff while the seller was Gakuya Gachau (deceased). He also stated that he was present when the plaintiff paid the final purchase price.

12. He stated that he does not know the defendant. The court heard that the plaintiff is still in occupation of the suit property and that he developed it by planting tea bushes.

13. According to P.W.1, there was alcohol during the signing of the agreement executed between the plaintiff and the deceased. He stated that has never seen the defendant on the suit property. The 1st agreement was entered into on 11th August, 1966 and the second one on 6th March, 1967. His name appears in the 2nd agreement.

14. The plaintiff who testified as P.W.2, informed the court that he bought the suit property from the deceased. He informed the court that the original agreement between him and the seller was oral. Later on, they entered into a written agreement.

15. He informed the court that the first agreement (oral) was made in 1963 while the written one was made in 1966. The agreement of 1966 was followed by an acknowledgement of payment in 1967.

16. He took possession of the suit property in 1963 and planted over 10,000 tea bushes. Since that time, he has worked on the suit property uninterrupted.

17. According to the plaintiff, the defendant began claiming the suit property 23 years from the time he took possession that is to say in 1986.
18. Maintaining that he bought the suit property from its previous owner and that he had witnesses, the plaintiff produced the bundle of documents he filed on 17th October, 2008 as **Pexbt 1** and the supplementary bundle he filed on 10th October, 2012 as **Pexbt 2**.
19. Referring to the searches he conducted concerning the suit property, the plaintiff informed the court that the search conducted in May 1986 showed that the proprietor of the suit property was Macharia Wanjihia; that as of 4th June, 2000 the proprietor was David Macharia Gakuya and that as of 4th May, 2012 the proprietor was David Macharia Gakuya.
20. Terming the registration of David Macharia Gakuya as the proprietor of the suit property mysterious and illegal, the plaintiff stated that he does not know how the defendant got registered as the proprietor of the suit property.
21. The plaintiff maintained that the defendant has never occupied the suit property and urged the court to cancel the title held by the defendant and order that he be registered as the proprietor of the suit property.
22. On cross examination, the plaintiff maintained that he bought the suit property from Macharia Wanjihia who was also known as Gakuya Wagachau.
23. The plaintiff admitted that they did not go to the land control board, but stated that he believes that the suit property is his because he has stayed there for a long period of time.
24. The plaintiff acknowledged having filed a case in 1986 over the suit property and explained that it was dismissed for want of prosecution. The court heard that the plaintiff had filed that suit because the area chief had given a letter to the defendant to acquire the suit property.
25. The court further heard that neither the defendant's father nor the defendant's relatives claimed the suit property.
26. In re-examination the plaintiff stated that the identity card shown to him was obtained way after he had bought the land, in 1968. He pointed out that the defendant is the grandson of the deceased.
27. P.W.3 **Moses Chege Kamau**, informed the court that the plaintiff has been in use and occupation of the suit property since 1963. He stated that the deceased sold the land to the plaintiff but the defendant was unknown to him. He got to know the defendant in court.

The defence case

28. The defendant who testified as D.W.1, informed the court that he is a son of the seller of the suit property, Gakuya Gachau. He explained that he was given the suit property as a gift during demarcation.
29. He stated that the suit property was registered in the name of Macharia Wanjihia and that because he is the first born in his family, he was named after his grandfather. However, during registration for E.A.C.E in 1976, he omitted the name Wanjihia in his certificate. That omission made him swear an affidavit for confirmation that he was also known as Macharia Wanjihia in 1986.
30. He stated that the plaintiff leased the suit property from his grandfather as opposed to buying it. He informed the court that the deceased told him that he did not sell the suit property to the plaintiff.
31. According to the defendant, the plaintiff breached the lease agreement by planting tea bushes on the suit property. Consequently, his grandfather terminated the lease which existed between him and the plaintiff.
32. The court further heard that despite the plaintiff having been asked to vacate the suit property, the plaintiff refused to vacate saying he could only do so if asked to vacate by the registered proprietor and upon being compensated for the developments he had effected on the suit property.
33. The defendant informed the court that the plaintiff was aware that he was the registered proprietor of the suit property despite having been a minor at the time of registration.
34. The defendant further informed the court that he could not pursue the property even after he became of majority age because he was financially challenged.
35. When he became financially stable, he started the process of recovering the property. That happened in 1986.
36. The court heard that after the plaintiff learnt about his endeavours, he went to court and filed Nairobi HCCC No.1757 of 1986(OS) which was dismissed for want of prosecution.
37. The court further heard that before filing the suit, the plaintiff filed a caution to restrain dealing with the suit property, which was removed after the suit was dismissed for want of prosecution and the suit property registered in his name.
38. The defendant pointed out that after he obtained title to the suit property, the plaintiff filed Nairobi HCCC No.1067 of 2000 (OS) which

was by consent of the advocates for the parties withdrawn paving way for filing of the current suit.

39. Explaining that he is oppressed financially, the defendant urged the court to dismiss the plaintiff's suit and allow his counter-claim.
40. In cross exam, the defendant stated that he was born in 1954 and named Macharia Gakuya. He acquired the name David upon being baptized in 1970. His father's name is Samuel Wanjihia Gakuya.
41. He maintained that he was given the suit property by his grandfather because the others had already been given pieces of land. When his father was approached to take the land, he declined because his elder brother, Gachau Gakuya, had not been given any land-He had differed with his father.
42. The defendant denied the contention that his grandfather was also known as Gakuya Gachau and instead stated that his grandfather was known as Macharia S/O Gachau alias Gakuya S/O Gachau.
43. Explaining that Wanjihia was his father, the defendant maintained that the suit property was registered in his name while he was a minor.
44. In 1986 he went to the land control board to confirm that he was the owner of the suit property. He denied having given false information to the board.
45. Concerning the allegation that he changed his name in order to perpetuate fraud in the registration of the suit property in his name, he stated that he did not change his names but only confirmed that he was also known by the other name.
46. He stated that he has been on the suit property severally but admitted that he has never used force to remove the plaintiff from the suit property.
47. He also admitted that the plaintiff has developed the suit property by fencing and growing tea crops thereon and that he has stayed in the suit property for over 30 years.
48. D.W.2 **Kanu Gakuya**, son of the deceased, informed the court that the suit property belonged to Macharia Wanjihia and that he gave it to the defendant.
49. Like D.W.1, D.W.2 stated that the deceased leased the suit property to the plaintiff as opposed to selling it.
50. In cross examination, D.W.2 confirmed that they have never worked on the suit property and that he was not present when the lease between his father and the plaintiff was done. He also confirmed that the defendant's mother and brothers have never set foot on the suit property.
51. The foregoing notwithstanding, D.W.2 maintained that the suit property was registered in the name of the defendant when he was a minor.
52. D.W.3 the **Muranga Land Registrar**, produced the green card in respect of the suit property.
53. At close of hearing, parties to this suit filed submissions which I have read and considered.

Plaintiff's submissions

54. On behalf of the plaintiff a brief overview of the cases of the respective parties is given and the following identified as the issues for determination:
 - (i) Whether the entries made in the register for the suit property on 16th May, 2000 in favour of the defendant were fraudulently done?
 - (ii) Whether the defendant holds the suit property in trust for the plaintiff?
 - (iii) Whether the plaintiff is entitled to be registered as the proprietor of the suit property?
55. With regard to the 1st issue, it is submitted that the evidence tendered in court shows that the suit property was registered in the name of Macharia Wanjihia and that at that time the defendant was only 7 years old; that at that time the defendant was known as Macharia Gakuya. In 1986, with the help of the area chief, the defendant changed his name and got registered as the proprietor of the suit property.
56. It is pointed that registration was cancelled on the same day and a caution registered in favour of the plaintiff.
57. The suit property was eventually registered in the defendant's name on 16th May, 2000.
58. Maintaining that the registration of the defendant was fraudulent, it is submitted that there is evidence from the plaintiff, his witnesses and agreements produced in court that the initial registered owner, Wanjihia was the same person known as Gakuya Gachau. The fact that

Macharia Wanjihia was also known as Gakuya Gachau is said to be borne out by the agreements of 1966 and 1967 which interchangeably refer to Macharia Wanjihia and Gakuya Gachau as the seller of the suit property.

59. Pointing out that the first attempt by the defendant to transfer the suit property to himself was made when the person who sold the suit property to the plaintiff was still alive, the plaintiff wonders why the defendant did not involve the seller in that transfer.

60. The defendant is accused of having taken advantage of the fact that no identification documents were retained by the land registry when the suit property was registered in 1961.

61. Arguing that the Land Registrar doubted the veracity of the documents used in the defendant's initial bid to transfer the suit property to himself, the plaintiff points out that the registration effected in favour of the defendant was cancelled on the same day.

62. Based on **Section 26(1)** of the Land Registration Act, 2012 which does not extent protection to a registered proprietor of land where the registration is vitiated by fraud or misrepresentation to which the proprietor is proved to be a party or where the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme, the plaintiff urges the court to cancel the registration effected in favour of the defendant.

63. At the time of writing this judgment, the defendant had not filed his submissions despite having been accorded an opportunity to do so.

Analysis and determination

64. From the pleadings filed in this suit and the submissions, the main issue for determination is whether any of the parties to this suit has made up a case for being granted the orders sought.

65. With regard to this issue, I begin by pointing out that it is common ground that the plaintiff has been in use and occupation of the suit property for a long period of time.

66. Although the plaintiff's contention that on account of his long period of occupation of the suit property he has become entitled to be registered as the proprietor of the suit property by adverse possession, this is challenged by the defendant. The defendant in his testimony before the court admitted that there were no attempts to remove the plaintiff from the suit property until 1986 when he began taking measures to regain the suit property from the plaintiff.

Departure from pleadings

67. Despite the fact that the defendant had not in his pleadings pleaded that the occupation of the suit property by the plaintiff was on account of permission or lease arrangement that allegedly was entered into between his grandfather and the plaintiff, in his evidence, the defendant tried to unprocedurally raise issues not raised in his statement of defence or counterclaim, to wit, the assertions that the plaintiff's occupation of the suit property was pursuant to a lease agreement entered into between his grandfather and the plaintiff and that the plaintiff violated the terms of the lease by planting tea bushes in the suit property.

68. With regard to those assertions, it is noteworthy that based on the law on pleadings, the defendant cannot be allowed to rely on such assertions as they constitute a departure from his pleadings, contrary to the provisions of **Order 2 Rule 6** of the Civil Procedure Rules. In this regard, see the case of **Dakianga Distributors (K) Ltd v. Kenya Seed Company Ltd (2015) e KLR** where the Court of Appeal stated:

"...A useful discussion on the importance of pleadings is to be found in *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

Sir Jack Jacob in an article entitled **"The Present Importance of Pleadings"** published in (1960) **Current Legal Problems** and which article was quoted with approval by the Supreme Court of Malawi in ***Malawi Railways Limited v Nyasulu* [1998] MWSC 3** states of the importance of pleadings:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice..."

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

69. Whilst the plaintiff had not pleaded that he got registered as the proprietor of the suit property while a minor, during trial, he asserted that the suit property was registered in his name while he was a minor. Because the defendant had not pleaded that the suit property was registered in his name while he was a minor, he is, similarly, estopped from urging his case based on that assertion.

70. Although I am not obligated to consider the defendant’s contention that the plaintiff’s occupation of the suit property was on account of the alleged lease agreement between the plaintiff and the defendant’s grandfather, it is noteworthy that the defendant did not produce any evidence whatsoever to prove that the plaintiff’s occupation of the suit property was on account of the alleged lease agreement.

71. There being no evidence of payment of rent by the plaintiff to either the defendant or his grandfather and given the long period of time the plaintiff had been in use and occupation before the defendant attempted to interfere with his use and occupation of the suit property, I find the defendant’s testimony to the effect that the occupation of the suit property by the plaintiff was on account of the alleged lease agreement to be incredible.

72. On the other hand, I find the evidence of the plaintiff to the effect that his occupation was on account of the sale agreement executed between him and the defendant’s grandfather to be believable.

73. Although issues abound as to whether the defendant was actually the registered proprietor of the suit property, given the assertion of the defendant and his witnesses that the defendant was actually the initial registered proprietor of the suit property, I will accord the defendant the benefit of doubt and proceed to consider the case before me on the basis that the defendant was registered as the proprietor of the suit property while still a minor.

74. Based on that presumption of fact and on the provisions of **Section 7** of the Limitation of Actions Act (LAA), Cap 22 Laws of Kenya, the defendant lost his right to bring an action for recovering the suit property from the plaintiff after the end of 12 years from the date on which the right of action accrued to him.

75. By dint of the provisions of **Section 13** of LAA, time for purposes of adverse possession against the defendant did not run for the period between 1954 and 1972, when the defendant was a minor. It however, began to run after the defendant became of majority age that is to say after 1972. In this regard see the case of **Gabriel Mbui v. Mukindia Maranya (1993) e KLR** where it was stated:-

“As a general rule, time does not run against a person under some legal disability.”

76. According to the evidence adduced in this matter, no action was taken to remove the plaintiff from the suit property up to 1986 by which time the plaintiff’s right to move the court for registration as the proprietor of the suit property had accrued.

77. By dint of the provisions of **Sections 7, 9, 13, 17 and 38** of the Limitation of Actions Act, **Cap 22** Laws of Kenya as read with **Section 30(f)** of the Registered Land Act, Cap 300 Laws of Kenya (now repealed), the subsequent registration of the defendant as the proprietor of the suit property did not vitiate the plaintiff’s right to move the High Court under **Section 38** the Limitation of Actions Act for registration as the bona fide owner of the suit property. In this regard see the case of **Mtana Lewa v. Kahindi Ngala Mwangandi (2015) eKLR** it was held:

“In terms of sections 7, 9, 13, 17, 37 and 38 the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years, that such possession has been open and notorious to the knowledge of the owner, that the possession has been without permission of the owner; and that the third party has asserted a hostile title and disposed the true owner;

Further that section 37 and 38 of the LAA stipulate that if the land is registered under one of the registration acts then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court order vesting the land in him.”

78. Also see the case of **Gatuhi Murathe v. Gakuru Gathimbi (1998) e KLR** it was observed:-

“The learned judge relied on Section 30(f) of the Registered Land Act which makes registered land subject to overriding interests of rights acquired by adverse possession. This statutory provision would be applicable if it is shown ...that the respondent had been in twelve continuous and uninterrupted years of adverse possession of the suit land.” (Emphasis supplied).

79. Having determined that the plaintiff’s right to be registered as the proprietor of the suit property had accrued at the time the suit property was registered a fresh in the name of the defendant, I find and hold that the plaintiff has made a case for being granted the orders sought which I hereby grant as follows:

- (i) A declaration that he has legally become entitled to ownership of land parcel No. Loc.3/Gichagiini/283 by adverse possession;
- (ii) A declaration that the defendant holds the suit property in trust for the plaintiff;

(iii) A declaration that the entries made in the register for the suit property on 16th May, 2000 should be cancelled forthwith and the same substituted with the plaintiff's name;

(iv) A declaration that the plaintiff is entitled to be registered as the proprietor of the suit property;

(v) An order directing the Registrar of this court, to sign the necessary papers to effect transfer and registration of the suit property in favour of the plaintiff, if the defendant fails to do so; and

(vi) Costs of this suit.

80. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 26th day of February, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. Kimunya for the plaintiff

David Macharia Gakuya – defendant

Court assistant - Esther