



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC SUIT NO. 81 OF 2012

MBIJIWE MARANGU MUCHIRI.....PLAINTIFF

VERSUS

KABIRICHU JOSHUA.....1ST DEFENDANT

JAPHET KAIMENYI NDATHO.....2ND DEFENDANT

FRANCIS KABURU MARETE.....3RD DEFENDANT

J U D G M E N T

BACKGROUND

1. The Suit Land is parcel No. Abothuguchi/ Lower Kaongo /514 which initially belonged to 1st Defendant (registered as proprietor on 18:02:1977). The land measures 2 $\frac{3}{4}$ acres. 1st Defendant sold the land to 2nd Defendant in 1987, while 2nd Defendant in turn sold a portion of the land 1 $\frac{1}{4}$ acres to 3rd Defendant on 01:03:12. Plaintiff however claims that he bought the land in 1975 from 1st Defendant and he is the one who has been in exclusive occupation of the land.
2. Plaintiff avers that he has become entitled to the land by way of Adverse Possession.

EVIDENCE

3. The first Defendant did not defend the suit and Judgment was entered against him on 26:10:15.
4. 3rd Defendant has an authority to appear for 2nd Defendant (filed on 15:06:12). 3rd Defendant is the one who has filed a Replying Affidavit denying Plaintiff's claim.
5. 6. Plaintiff claims that on 04:06:1975, a written agreement was made between him and 1st Defendant. The agreement was produced as Plaintiff Exhibit 1 but the same is not legible.
6. Plaintiff avers that he took exclusive possession of the land, that he resides there, and that he has been in quiet possession of the same to date.
7. He claims that the sale of land to him by 1st Defendant did not materialize because 1st Defendant declined to apply for consent from land Control Board.

8. Plaintiff had then learnt that 1st Defendant had sold the land to 2nd Defendant who in turn sold the land to 3rd Defendant. He avers that 2nd Defendant has never dispossessed him of this land.

9. In support of his case, Plaintiff has produced a green card (P-Exhibit 2) which indicates that he (Plaintiff) did caution the Suitland on several occasions.

10. The defence of 2nd and 3rd Defendant is that when 2nd Defendant purchased the land, he later sold a portion of it to 3rd Defendant. In his affidavit of 5.06.12, 3rd Defendant claims that him and 2nd Defendant are the owners in possession of the land.

11. 2nd Defendant has averred that when he bought the land, he only found a woman known as Kamene in 1987. He was then informed by 1st Defendant that the latter is the one who had allowed the woman to stay on the land and she eventually left in 1993. It is thereafter that 2nd Defendant apparently found a structure and Plaintiff was claiming the land on basis of being a husband of the woman called Kamene.

12. 2nd Defendant states that when he sold 1 ¼ acres of land to 3rd Defendant, he remained with 1 1/3 acres.

13. Apparently there was hostility from Plaintiff when 2nd and 3rd Defendants were bringing in surveyors to have the land Subdivided.

14. 2nd Defendant avers that Plaintiff occupies and utilizes ¼ of an acre while 3rd Defendant states that plaintiff is not using all the land.

15. In support of their case, the two Defendants have produced as Exhibits the Sale Agreement of 23:02:12 between the two Defendants and a copy of title deed for Parcel Abothuguchi/L-KAONGO/ 514 issued on 1/3/12. The land measures 1.1. Hectares and it is in names of both Defendants.

DETERMINATION

16. I have considered all the arguments advanced herein as well as the Submissions of the parties.

17. The issues to determine are whether Plaintiff has been in peaceful, open, exclusive possession of the suit property and without interruption for a period of over 12 years and whether such occupation has been adverse to the title of the owner of the land.

18. The evidence of DW 1 (2nd defendant) is that when he sold the land to DW 2 (3rd defendant), Plaintiff was on the land. The words used by DW 1 are; **“he (Plaintiff) was still there”**. He had earlier on after 1993 reported to the Chief about Mbijiwe. This evidence shows that Plaintiff had been on the land for quite some time.

19. 2nd Defendant does admit that he bought the land in 1987. However, he doesn't state whether he took possession of the land, but he says there was a woman called Kamene.

20. The green land availed by Plaintiff however shows that Plaintiff had lodged the first caution on 03:05:1977. The entry there in reads:-

“Caution in favour of M'Mbijiwe Muchiri of Box 104 Meru claiming purchaser interest”.

21. This is a clear manifestation of plaintiff's interest in the suit land long before the coming into the picture of the 2nd defendant. Plaintiff's claim that he had entered the land pursuant to the botched Sale Agreement between him and 1st Defendant in 1975 is hence plausible.

22. I am inclined to find that Plaintiff's occupation on the suit land was without permission of the original

owner as from the time the agreement failed, which can be computed to be Six months from time of the agreement of 04.06.1975 as no consent from Land Control Board was obtained. It follows that Plaintiff had dispossessed the original owner (1st Defendant) of the suit land.

23. It is quite clear that 2nd Defendant did not take over possession of this land. He doesn't state as to what he did with the land from 1987 to 1993 when he was reporting the matter to Chief. In his own testimony DW 1 has stated that :

“Myself, I have never built on that land. None of my family members stay on that land...”

24. It follows that DW1 (2nd Defendant) did not assert his rights of ownership to the land even by the time 3rd Defendant was buying the land. Even by the time 3rd Defendant was buying the land, Plaintiff's claim for Adverse Possession had matured.

25. DW 1 has admitted that Plaintiff stays on the Suitland with his wife and one child. It follows that this is where Plaintiff has put up a home. His occupation of the land is hence open and notorious.

26. The fact that Plaintiff has filed cautions on the land is a clear indication that his occupation was also hostile to the owner of the land.

27. I am in agreement with Plaintiffs Submission that the mere change of ownership of land which is occupied by another person under Adverse Possession does not interrupt such persons Adverse Possession's claim, see –*Lenola Nerima Karani Vs. William Nanyamo [2012] Eklr.*

28. Final orders are as follows:

1. It is hereby declared that plaintiff has acquired ownership and title to the entire parcel of land ABOTHUGUCHI/LOWER KAONGO/514 by adverse possession.

2. It is hereby ordered that the Register to the land parcel no. ABOTHUGUCHI/LOWER KAONGO/514 is to be rectified by removing the names of the 2nd and 3rd defendants there in and replacing the same with the name of MBIJIWE MARANGU MUCHIRI (the plaintiff).

3. An order is hereby issued for the 2nd and 3rd defendants to execute all the relevant documents to facilitate the transfer of the land ABOTHUGUCHI/LOWER KAONGO/514 from the two defendants to the plaintiff, and in default, the executive officer of this court is hereby authorized to execute such transfer documents in respect of the aforementioned parcel of land.

4. As to costs, blame appears to lie on the 1st defendant. Plaintiff is awarded costs of the suit as against 1st defendant only.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 21st FEBRUARY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Mutunga holding brief for Riungu for plaintiff present

Gatari Ringera for defendants (2nd and 3rd) absent

HON. L. N. MBUGUA

ELC JUDGE