



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC CASE NO. 44 OF 2017(OS)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP.22)

AND

IN THE MATTER OF ADVERSE POSSESSION

BETWEEN

JOHN MUKUHA MBURU.....PLAINTIFF

VS

CHARLES MWENGA MULWA.....DEFENDANT

JUDGMENT

1. The Plaintiff filed suit by way of Originating Summons supported by a Supporting Affidavit all dated 13/11/14 seeking the following Orders; -

- a) That the Plaintiff be declared to have acquired title to 2.0 Acres out of the Defendant's land parcel No. Loc.17/IGANJO/2041 by adverse possession.
- b) That the Land Registrar, Murang'a be ordered to register a portion of 2.0 Acres out of the Defendant's land parcel No.Loc.17/IGANJO/2041 in the name of the Plaintiff.
- c) That the Defendant to pay the costs of this suit.

The Plaintiffs case

2. The Plaintiff deponed that he bought a portion of 2 acres out of Loc.17/Iganjo/2041 from the Defendant in 1992 at the price of Kshs 45,000/= which was paid in full albeit via several instalments from 1992-1994. The Defendant put him in occupation immediately whereupon he embarked on developing the land by planting 200 trees, digging contours and subsistence farming.

3. That the land was family land and by the time the parties contracted in 1992, the land was registered in the name of the Defendant's brother who was the administrator of his father's estate. That the Defendant became registered as owner of the land Loc.17/Iganjo/2041 and issued with the title on 13/7/95. He stated that the Defendant refused to apply for land consent board to subdivide and transfer the portion of 2 acres to him. The Plaintiff asserted that he has now acquired the right to title over 2 acres by way of adverse possession.

4. During the hearing of the case on 13/11/17 the Defendant and his Advocate were absent. The Court being satisfied that they were duly served with the hearing date (The firm of Nzavi & Company Advocates for the Defendant acknowledged receipt of the hearing notice by affixing their stamp on 23/10/17 -see Affidavit of Service dated 10/11/7) the suit to proceeded for hearing exparte.

5. The Plaintiff reiterated how he had entered into agreement of sale with the Defendant for the purchase of portion 2 acres from the Loc.17/Iganjo/2041.He produced the following documents in support of his case: Agreement of sale in Kikuyu together with its translated version; official search for the LR No. Loc.17/Iganjo/2041. He averred that the agreement for sale was witnessed by the Defendant's father Mulwa Mutua & Peter Muiruri Murigi among others. He stated that he paid the purchase price in full. That he was put in possession by the Defendant in 1993. That the land was part of the larger family land registered in the name of Joseph Musyoka Mulwa the brother of the Defendant. That in 1995 the Defendant became registered as owner. He argued that he has lived on the land since 1993 planting trees, beans and dug trenches/contours on the said land. That he has not vacated the land nor the defendant taken over possession of the suit land from him. That he is entitled to the land by way of adverse possession. He confirmed that the case CMCC 103/2010 - Kigumo was withdrawn.

6. PW 2- Peter Muiruri Mwirigi testified that he was a witness to the agreement of sale between the Plaintiff and the Defendant in 1992 together with the Defendant's father one Mulwa Mutua. He confirmed that the Plaintiff has been carrying out farming activities on the suit property since 1992 to date. Further he stated that though the Plaintiff paid the purchase price in full the defendant has not transferred the suit land to him.

7. At the close of the Plaintiff's case the Plaintiffs' counsel on record Mrs. Kimani sought to fix the matter for the Defendants hearing and the same was scheduled for 18/12/17. On the 18/12/17 the Defendant and his counsel were absent despite evidence of service of hearing notice vide affidavit of service dated 14/12/17. The same was duly acknowledged by the said law firm on 15/1/17 and signed for. This evidenced by the endorsement of the said law firm's stamp. The Plaintiff's counsel proceeded to close the Plaintiffs case and the Defendants case was deemed closed. The Plaintiffs case was therefore largely uncontroverted.

The Defence case

8. The Defendant opposed the Plaintiffs claim of adverse possession. He confirmed that the land Loc.17/Iganjo/2041 measuring seven (7) acres is an inheritance from his father's estate. That the larger portion had been registered in the name of his brother. That for him to get his share of the family land he had to contribute to the costs for subdivision and transfer. That he turned to the Plaintiff for a soft loan and in return would sell him 4 acres of his share of the land. That upon being registered as owner of Loc.17/Iganjo/2041 in 1995, he pursued the Plaintiff with the intention of refunding the money or sell him 4 acres at market rates ruling at that time in which event the soft loan allegedly advanced by the plaintiff would be credited towards the purchase price for 4 acres. The Plaintiff reacted by filing a case at Kigumo CMCC No. 103 of 2010 in which he sought Orders for specific performance. In response to the agreement of sale, he stated that the said purported Sale Agreement did not specify the parcel of land being sold. Further he stated that he is in possession of the entire land Loc.17/Iganjo/2041 and denied the possession/use/development of the land by the Plaintiff. He denied entering into the sale agreement with the plaintiff and that he has not relinquished occupation/possession/use of the land.

9. The Plaintiff's counsel on record chose to file written submissions which I have considered.

10. The issues for determination are:

When did time start running for purposes of adverse possession? Has the Plaintiff been in uninterrupted exclusive possession of the land for over 12 years? Is the suit land identifiable? Did the Defendant have knowledge of the occupation/possession?

11. It is not in dispute that the Defendant is the registered proprietor of the Loc.17/Iganjo/2041, in which the suit land of 2 acres is comprised in. A certificate of official search dated 22/10/14 was attached to support that fact. It is also admitted by the Defendant in Para 3 of his Replying Affidavit and exhibited a copy of title dated 13/7/95 in his name.

12. The Plaintiff has averred that he entered into the land pursuant to a purchaser's right. That in 1992 he entered into an agreement for sale for the purchase of 2 acres from the entitlement of the family land owned by the Defendant. That he was put into possession immediately. That he paid the full purchase price. That the agreement for sale was witnessed by the Defendants father and PW 2 inter alia. The Defendant in Para 4 of his statement has categorically denied the agreement for sale when he stated;

“I did not enter into any agreement with the Plaintiff for sale of any portion of land LR Loc.17/Iganjo/2041 or at all.”

He alluded to the said denial in Para 3-6 of the Replying Affidavit. Indeed in 6 of the said Replying Affidavit he challenged the said Agreement by stating that it did not specify the land being referred to.

13. The Defendant in support of his defence to the Plaintiff's claim annexed the pleadings in CMCC No. 103/2010 at Kigumo and in Para 17 of the counter claim that:

“ the sale agreement was only meant to begin immediately after that acquisition of his own certificate of title and that would have been any time after July 1993.”

This is evidence that the Defendant admitted the fact of the agreement for sale between the Plaintiff and the Defendant. I have examined the agreement written in Kikuyu with its transaction in English and observe that the same is in writing, signed by the parties and witnessed by independent witnesses, one of whom is PW 2 & one Mulwa Mutua who is stated to be the Defendant's father. The agreement therefore satisfied the requirements of section 3(3) of the Contract Act. That notwithstanding the Plaintiffs claim is not based on contract but on adverse possession.

14. The agreement does not state or define the land being sold. It only stated that the Defendant had agreed to sell a piece of land to the Plaintiff. The LR No. is not indicated. The defendant has challenged the said agreement on that basis in Para 7 of his Replying Affidavit. However, when read together with the admission stated in para 13 above, it becomes clear that the 2 acres, the subject of the agreement are comprised in Loc.17/Iganjo/2041. The suit land is therefore identifiable.

15. Is the Plaintiff in continuous uninterrupted exclusive possession of the suit land? It is the Plaintiffs contention that he was put into possession by the Defendant in 1992. That he has since 1992 been in possession - planted trees, cultivated subsistence crops and dug trenches on the land. That he has not relinquished possession to date. The Defendant has categorically denied this in Para 8 of Replying Affidavit. PW 2 confirmed in his evidence in Chief that he is a neighbour of the Plaintiff and that he knows that the Plaintiff has been in possession of the land since 1992 to date.

In Para 18 of his counter claim the Defendant stated as follows;

“ The Defendant further contends that upon the acquisition of the said title the Plaintiff never pursued the matter further instead he started trespassing and cultivating his said parcel of land in total contravention of his freedom of peaceful enjoyment of his property and has persisted in his said actions to date”.

The import of the above averments is that the Defendant knew of the Plaintiffs possession of the suit land; it was upon acquisition, that is to say 1992 or thereabouts. The fact of the Plaintiffs possession of the land is admitted by the Defendant. This represents knowledge.

16. In the case of **Francis Gicharu Kariri vs. Peter Njoroge Mairu Civil Appeal No.293 of 2002(Nairobi)** approved the decision of **Kimani Ruchire vs. Swift Rutherfords & Co.Ltd. (1980) KLR 10** at page 16 letter B, where Kneller J. held that:

“The Plaintiffs have to prove that they have used this land which they claim as of right;nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it by way of recurrent consideration”.

From the analysis of the facts, it is clear that the Plaintiff has been in exclusive, uninterrupted possession as of right from 1992 to date. The fact of the use of the land: planting trees, growing subsistence crops and digging trenches shows sufficient *animus possipendi*, that is to say using the land in total conflict to the rights of the owner was with the knowledge of the Defendant.

17. When does time start running for purposes of calculating adverse possession? Section 7 of Limitation of Actions Act states as follow;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

In the case of **Francis Gitonga Macharia – v- Muiruri Waithaka, - Civil Appeal No. 110 of 1997** the Court of Appeal stated;

“that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent.....However, it must be noted that under Section 7 of the Limitation of Actions Act, the law relating to prescription affects not only present holders of the title but their predecessors. (See **Peter Thuo Kairu – v- Kuria Gacheru, (1988) 2 KLR 111**)”.

It has been established by documentary evidence that the defendant became registered as owner in 1995. This evidence when taken as the time that time started running in favour of the Plaintiff, the period between 1995 to 2014 when the suit was filed is 19 years way beyond the statutory 12 years permitted by law.

18. Was the entry of the Plaintiff permissive? Authorities are rife that state that if the consent of the Land Control Board is not obtained within 6 months in accordance with the Land Control Act Cap 302, then the time begins to run in favour of the person who is in possession. It is that delay to obtain Land Control Board consent that gave rise to a claim of adverse possession. In **Samuel Nyakenogo vs Samuel Orucho Onyaru, (2010) eKLR** the Court stated;

“The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession will then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite period”.

19. In the end I find and hold as follows; time started running in favour of the Plaintiff from 1995 when the Defendant became registered owner of the land. The plaintiff therefore has been in exclusive continuous uninterrupted occupation. He has not relinquished his possession nor the Defendant retaken possession from him from 1993 to date; he used the land in conflict of the Defendant’s title (*animus possipendi*).

20. In conclusion the Plaintiff has established title by adverse possession and grant Orders as follows;

- a) That the Plaintiff is hereby declared to have acquired title to 2.0 Acres out of the Defendant’s land parcel No. Loc.17/IGANJO/2041 by adverse possession.
- b) That the Land Registrar, Murang’a be ordered to register a portion of 2.0 Acres out of the Defendant’s land parcel No.Loc.17/IGANJO/2041 in the name of the Plaintiff.
- c) That the Defendant to pay the costs of this suit.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 8TH DAY OF MARCH 2018.

J G KEMEI

JUDGE