



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC CASE NO. 73 OF 2017**

**JULIUS KIORIA WAMBUGU.....APPLICANT**

**VS**

**CHARLES GICHUHI .....RESPONDENT**

**JUDGEMENT**

1. Charles Gichuhi moved the Court by way of Originating Summons on 24/11/2013 seeking the following Orders;

- a. That the Applicant has by adverse possession acquired land title LOC.9/Kanyenyaini/1611 registered in the names of Charles Gichuhi.
- b. That the Land Registrar Murang'a be ordered to transfer the said land comprised of land title No. Loc.9/Kanyenyaini/1611 to the Applicant.
- c. That the Deputy Registrar of this Court do sign application for land control board. Transfer, documents and any other applications and documents necessary to facilitate transfer of suit land to the Applicant.
- d. That the Respondent to pay the costs of this suit.

2. The Originating Summons are premised on the grounds as follows;-

- a. The Applicant bought this land way back 1993 from Peter Maina Kimani and was put into vacant possession the same year.
- b. The Applicant has substantially developed the land.
- c. The Applicant has been in continuous and uninterrupted possession of suit land for a period in-excess of 12 years.
- d. The original entry to the suit land was lawful.
- e. The Respondent's title has been extinguished by operation of law.

3. Briefly the Applicant deponed in his Supporting Affidavit that he entered into an agreement with Peter Maina Kimani on 19/1/93 for the purchase of the suit land. That it was acknowledged in the agreement that though the land was registered in the name of the Defendant, it was the family entitlement of the said Peter Maina Kimani. That he paid the purchase price in instalments leaving the balance of Kshs. 29,500/=. That he was given possession in 1993 whereupon he developed the land and planted additional tea bushes increasing the number of tea bushes to 2000. That the Defendant had knowledge of the transaction as he informed him after the sale. That the local assistant chief was aware too. And that explains why the said Peter Maina Kimani was not interred on the land as the family knew that he had sold the land to him. That he was buried on his mother's land instead. He contends that the Defendant held the land in trust for his brother Peter Maina Kimani, deceased. That he has been in occupation of the suit property since 1993 to date. He has annexed a copy of search dated 14/5/15 which indicates the registered owner.

4. The Defendant opposed the application and filed a Replying Affidavit on 11/1/17. Terming the suit frivolous he contended that he is the registered owner of the suit property. He deponed that he had permitted his brother Peter Maina Kimani to utilize the land as he himself lived on another land at Kanjuu in Kirinyaga County. He confirmed that his brother was buried in their mother's land as the suit property belonged to him and that explains why he was not buried on the suit land. He contends that it is unknown when the Plaintiff took possession of the land; that he was not a party to the agreement and neither did he have knowledge of it.

5. He raised a counterclaim terming the Plaintiff a trespasser and urged the Court to grant eviction Orders against the Applicant for

interfering with the suit land without his consent.

6. In his reply to defence and Counterclaim the Plaintiff revealed that the Defendant filed a case at the Land Registrar's office at Murang'a Land Registry seeking the removal of the caution on the suit land. The Land Registrar upheld the caution as lawful. He disclosed that in a suit No. CMCC No. 454 of 2015 the Defendant acknowledged his occupation of over 12 years. In this suit the Defendant filed suit seeking the removal of the said caution. He reiterated that the Defendant held the land in trust for his brother. That this was affirmed by the Defendant in the proceedings at the Land Registrar's office at Murang'a. That in any event his Counterclaim is already time barred on account of his occupation of the land in excess of 12 years.

7. At the hearing of the suit, the Plaintiff testified solely. He stated that the Defendant is the registered proprietor of the suit land, which he bought from his brother the late Peter Maina Kimani under an agreement of sale dated 19/1/93. He argued that the land was comprised of the family land as a portion beneficially belonging to the deceased. That he was put in possession of the land by Peter Maina Kimani in 1993 and developed it in earnest planting additional tea bushes. He contends that the Defendant had knowledge of the sale all along. That when he went to the Defendant to pay the last installment of the purchase price of Kshs. 29,500/= the Defendant declined to transfer the land to him.

8. The Plaintiff averred that he lodged a caution in 1994 claiming purchaser's interest on the land. That the caution is still subsisting on the title, the same having been upheld as lawful by the District Land Registrar in 2015. He denied being a trespasser and instead urged the Court to grant the Order that he has established title by adverse possession.

9. Further that he entered into the sale agreement with Peter Maina Kimani and not the Defendant though he knew the title was in the name of the Defendant. He believed that the land was the deceased's entitlement out of the larger family land. That the Defendant filed another case No. CMCC No. 454 of 2015. That the agreement was witnessed by an Advocate and the deceased's wife.

10. The Defendant opposed the case and testified that the land is registered in his name and had allowed his deceased brother to cultivate the land. He averred that he did not know about the transaction. That he got to know from the wife of Peter Maina Kamau after burial that the land had been leased to the Plaintiff. Insisting that he planted the tea in 1969, the Defendant avers that upon inquiry from Kanyeyaini tea factory, he was informed that the factory had no records relating to the Plaintiff in relation to tea deliveries. In brief he states that he was not aware about the sale of the land nor the occupation of the land by the Plaintiff. He disclosed that he filed a case CMCC No. 454 of 2015 involving the same parties and the same subject matter but the case has not been determined. He stated that he did not receive any money from the Defendant for sale or lease of the land. Further that he does not know who is currently picking the tea on the land.

11. On cross-examination the Defendant denied that the Plaintiff is on the land. He stated that the brother had no beneficial entitlement to the land: that the land belongs to him: He stated that the original land was Loc.9/Kanyeyaini/295; that he did not hold the suit land in trust for his brother. He was cultivating the land with his permission. He stated that he did not inquire from his brother Maina the nature of activities he carried out on the suit land. He confirmed that the deceased was buried in his mother's land elsewhere.

12. The parties choose to file written submissions which I have considered.

### **Determination**

13. Is the claim incompetent on account that no abstract of title or copy thereof was annexed to the application? Order 37 rule 2 of the Civil Procedure Act requires an abstract of title to be annexed. The Court notes that directions were taken by the parties in respect to the Originating Summons wherein parties agreed to so deem the said summons as a plaint and Replying affidavit as defence on the 14/2/17. In that way the copy of the certificate of search would suffice because proof would now be on balance of probability. When it is an Originating Summons strict proof on affidavit evidence would be required. The claim in the plaint would be proved on viva voce evidence if it meets the test of proof on a balance of probability. The absence of an abstract cannot therefore invalidate the claim especially where it is common ground by both parties. There is no evidence to controvert the title. In any event a copy of the certificate of official search dated 14/5/15 is annexed.

14. To succeed in a claim of establishing title under adverse possession, the Court of Appeal in **Francis Gicharu Kariri – v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi)** approved the decision of the High Court in the case of **Kimani Ruchire –v – 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 endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.

15. On the issue of whether or not the knowledge of the registered owner is necessary for adversity to be founded, **Kneller J. in Kimani Ruchire supra**, further held that in adverse possession:

“The Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation...”.

16. The question in this instant case is when did the registered owner become aware of the Plaintiff's possession of the land? In the case **Benjamin Kamau Murima & Others – v- Gladys Njeri, - Civil Appeal No. 213 of 1996**, it was held that;

“In determining whether or not the nature of the actual possession of the land in question is adverse, one needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the land in form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived then it is adverse”.

17. In a similar case the Plaintiff was put in possession/occupation of the suit property by a person who had never been the registered proprietor of the property, the Court held in the case of **Mwinyi Hamis Ali – v- Attorney General and Philemon Mwaisaka Wanaka, - Civil Appeal No. 125 of 1997** that:-

“Adverse possession does not apply where possession is by consent and in a Court of law, sympathy takes a second stand as the Court is governed by statutes”.

18. The Plaintiff bought land from Defendant’s brother, and paid monies to him. He admits that he was aware that the person who “sold” the land to him held no title to the land. He also took possession given to him by a person other than the registered owner of the land; all these were done to the exclusion of the knowledge of the Defendant who is the registered owner; the person who sold the land did not have the right to the title or title to the land; the Plaintiff was aware of this. In such circumstances the Court cannot conclude that the Plaintiff’s possession and occupation of the suit land is lawful.

19. That notwithstanding the evidence on record which is believable is that following the death of the Defendant’s brother the wife informed the Defendant that his late brother had leased the suit land to another person, the Plaintiff presumably. With that discovery the Defendant on 14/5/15 caused or carried out a search on the suit land. It is then that he found that the Plaintiff had registered a caution claiming a purchaser’s interest on the suit land. He then sought the District Land Registrar to remove the caution but the District Land Registrar found that it was a case of ownership dispute. To assert title to his land he then filed suit CMCC No. 454 of 2015 seeking the removal of the caution. It is noteworthy that in the case of CMCC No. 454 of 2015 the Defendant does not seek ownership perhaps because he was still the registered owner of the land.

20. In the Court of Appeal decision in **Titus Kigoro Munyi Vs Peter Mburu Kimani CA No 28 of 2014**, the Court observed that

“computation of time for adverse possession could only start when there is actual or constructive knowledge by the registered proprietor that a third party claiming adversity is in possession of the suit property”.

21. The Plaintiff explained in evidence in chief that the Defendant and the local chief were aware of the sale and possession of the land; that the Plaintiff informed the Defendant about the sale and occupation; that he used to see him working on the land; that he held the land in trust for his late brother. The Plaintiff did not lead any evidence to show that the Defendant had any actual knowledge or constructive knowledge about his presence and occupation of the suit land. He also did not lead any evidence to prove trust on the title registered in the name of the Defendant. The requirement of occupation in clear publicity to the registered owner and the whole world is therefore in doubt.

22. The date of knowledge on the part of the Defendant relating to the Plaintiff and the Defendant’s brother’s unauthorized transaction is established to be 2015 or thereabouts. Taking the date of the Defendant’s knowledge in or about the period stated in the preceding sentence it is not mathematically possible that the Plaintiff was in lawful occupation of the suit land for a continuous period in excess of 12 years so as to legitimately lay a claim for adverse possession. The period is under 3 years. 12 years required by law to found a claim on adverse possession has not lapsed. The Defendant did explain in evidence that he had given his brother permission to occupy the suit land and was not aware of the purported sale, payment, possession and or occupation. The Court is therefore satisfied that the Plaintiff has not met the test set out in the case of **Kimani Ruchire** above.

23. Whether the claim of the Defendant for eviction on the grounds that it is time barred. S 4(2) of Limitation of Actions Act CAP 22 sets the basis for which a claim based on limitation can and cannot be raised. The law pegs the claim on knowledge and by extension the actions taken. The Court has found that the Plaintiffs occupation of the suit land was unauthorized by the Defendant and that the Defendant has not had sufficient time in occupation so as to lay a claim for occupation / title by adverse possession. That being so the entry and occupation of the suit land by the Plaintiff is illegal trespass which continues every day in so far as the Plaintiff is in occupation or enters the suit land. There is therefore no bar on the Defendants claim for eviction of the Plaintiff’s claim.

24. In the upshot the Court makes the following orders;

- a. The Plaintiffs case is dismissed.
- b. The Defendants counterclaim is allowed
- c. The Plaintiff is ordered to voluntarily vacate the suit land Loc 9/Kanyenyaini/1611 within the next 90 days from the date of the judgment
- d. In default eviction to issue as per law provided.
- e. A permanent injunction to issue restraining the Plaintiff by himself, servants, agents, relatives and or anybody claiming through him from entering into cultivating or in any way interfering with the Loc 9/Kanyenyaini/1611.
- f. The Plaintiff to pay the Defendant both the costs of the plaint and the counterclaim.

**J G KEMEI**

**JUDGE**