



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 282 OF 1996**

**JOHN MULWA NZIOKI .....PLAINTIFF**

**VERSUS**

**PHILIP KIBUBA NZIOKA .....1<sup>ST</sup> DEFENDANT**

**JOSEPH MUNYAO KIILU .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. This suit was commenced by way of a Plaint dated 25<sup>th</sup> November, 1996. The Amended Plaint was then filed on 22<sup>nd</sup> October, 2007. In the Amended Plaint, the Plaintiff averred that upto 9<sup>th</sup> September, 1978, land known as L.R. No. 909/424, now known as Machakos Town Block 11/285 (*the suit land*), was owned by the Defendants as tenants in common in equal shares.
2. The Plaintiff has averred in the Amended Plaint that until 9<sup>th</sup> September, 1978, he was a tenant in the suit land in respect of the 1<sup>st</sup> Defendant's share and that he used to pay the 1<sup>st</sup> Defendant the rent as and when it fell due.
3. It is the Plaintiff's averment that by an agreement dated 9<sup>th</sup> September, 1978 made between him and the 1<sup>st</sup> Defendant, he bought the 1<sup>st</sup> Defendant's share in the suit land for Kshs. 50,000; that it was a term of the agreement that the 1<sup>st</sup> Defendant was to collect rent for one (1) year; that since 9<sup>th</sup> September, 1978, he has not been paying rent to the Defendants and that he has since extensively developed the portion of the premises he bought and has been receiving the rent therefrom.
4. It is the Plaintiff's case that the 1<sup>st</sup> Defendant's interest in the land has been extinguished because twelve (12) years have lapsed since 9<sup>th</sup> September, 1979 and that he is entitled to the suit land by reason of adverse possession.
5. The Plaintiff has averred in the Plaint that when the 1<sup>st</sup> Defendant purported to sale his share in the suit premises on 18<sup>th</sup> September, 1996, his title to the land had already been extinguished and that the 2<sup>nd</sup> Defendant is holding the title document for the suit land in trust for him.
6. The Plaintiff is seeking for an order of specific performance directing the 1<sup>st</sup> Defendant to transfer his share in the suit land to him; a declaration that the Plaintiff acquired the suit land from the 1<sup>st</sup> Defendant either through purchase or by way of adverse possession and for general damages.

7. In the Amended Defence dated 2<sup>nd</sup> November, 2001, the 1<sup>st</sup> Defendant averred that he has never entered into an agreement of sale of the suit land with the Plaintiff; that even if he entered into such an agreement, then the same was breached by the Plaintiff and that he refunded to the Plaintiff the purchase price in 1982 and or transformed it into rent.

8. It is the Defendants' case that the Plaintiff has always been a tenant in the suit premises; that vide an agreement dated 11<sup>th</sup> May, 1987, the Plaintiff re-stated his commitment to paying rent in respect of the suit land and that the 1<sup>st</sup> Defendant validly sold his share in the suit land to the 2<sup>nd</sup> Defendant.

#### **The Plaintiff's case:**

9. The Plaintiff, PW1, informed the court that he has been in the suit premises since 1973 and that he rented it out to other people in the year 1996. It was the evidence of PW1 that he became the owner of the premises in 1976 having bought the 1<sup>st</sup> Defendant's half share.

10. Although he purchased the 1<sup>st</sup> Defendant's share in the suit premises, PW1 informed the court that the 1<sup>st</sup> Defendant has never transferred the land to him; that the signing of the agreement dated 9<sup>th</sup> September, 1978 between him and the 1<sup>st</sup> Defendant was witnessed by Kamau advocate and that his share and that of the 2<sup>nd</sup> Defendant is separated with a wall fence.

11. In cross-examination, PW1 stated that he paid to the 1<sup>st</sup> Defendant Kshs. 50,000 through a lawyer. He denied ever signing the agreement of 11<sup>th</sup> May, 1982 which purportedly rescinded the agreement of 9<sup>th</sup> September, 1978.

12. Although PW1 stated that the signature appearing on the 1982 agreement was his, he denied ever signing it; that he filed the suit when the 1<sup>st</sup> Defendant informed him that he was to sell his share to the 2<sup>nd</sup> Defendant and that after buying the 1<sup>st</sup> Defendant's share in the suit land, he put up more buildings.

13. According to the Plaintiff, he has since rented out the building that he claims to be his after he stopped doing business in the premises.

14. The Plaintiff produced in evidence the Sale Agreement of 9<sup>th</sup> September, 1978 and the abstract of title for the suit land.

#### **The Defence case:**

15. The 1<sup>st</sup> Defendant, DW1, informed the court that at all material times, him, together with Joseph Munyao Kiilu, were the common joint proprietors of land known as Machakos Town Block 11/285 (*the suit land*); that by a lease agreement entered into between himself and the Plaintiff, he rented to the Plaintiff half of his share in the suit premises at a monthly rent of Kshs. 2,000 and that by an agreement dated 9<sup>th</sup> September, 1978, the Plaintiff agreed to purchase his share for Kshs. 50,000. However, he only paid him Kshs. 12,000.

16. DW1 informed the court that the Plaintiff did not honour the terms of the agreement dated 9<sup>th</sup> September, 1978 whereafter the agreement dated 10<sup>th</sup> September, 1982 was entered into in which the Plaintiff agreed to continue paying rent, which rent was to be assessed by the Business Premises Rent Tribunal.

17. It was the testimony of the 1<sup>st</sup> Defendant that vide an agreement of 18<sup>th</sup> September, 1996, he sold his share of the property to the 2<sup>nd</sup> Defendant for Kshs. 211,000 whereafter the 2<sup>nd</sup> Defendant gave to the Plaintiff the notice to vacate the suit premises.

18. According to DW1, he entered into another agreement with the Plaintiff dated 6<sup>th</sup> October, 1987 in

which the Plaintiff agreed to continue paying him the rent for the premises and agreed to have the pending suits withdrawn and that the suits were withdrawn and that the Plaintiff became his tenant once more. However, it was the evidence of DW1 that the Plaintiff did not pay him any rent after that agreement and that is when he sold his share to the 2<sup>nd</sup> Defendant.

19. It was the evidence of DW1 that his interest in the suit land was extinguished when he sold his share in the suit land to the 2<sup>nd</sup> Defendant.

20. In cross-examination, DW1 stated that he had sold the land to the Plaintiff in 1978 and that when the Plaintiff was unable to complete the transaction, he rescinded the agreement. That is when the Plaintiff agreed to continue paying the rent. However, according to DW1, the Plaintiff never paid the rent thereafter.

21. The 1<sup>st</sup> Defendant produced in evidence the “consent” agreement of 6<sup>th</sup> October, 1982, the agreement of 11<sup>th</sup> May, 1987, the notice of 8<sup>th</sup> September, 1996 and the consent agreement in Civil Case No. 1198 of 1979.

22. The Land Registrar, Machakos County, DW2, informed the court that the suit land was a leasehold of thirty three (33) years with effect from 1967; that the land was initially owned by the Defendants in equal shares and that the 1<sup>st</sup> Defendant transferred his share to the 2<sup>nd</sup> Defendant in 1998.

23. According to DW2, when the lease expired in the year 2000, the 2<sup>nd</sup> Defendant was issued with a new Lease after he applied for the extension of the same.

24. The 2<sup>nd</sup> Defendant, DW3, informed the court that initially, he owned the suit land jointly with the 1<sup>st</sup> Defendant and that they are the ones who developed it.

25. After developing the suit premises, DW2 stated that they leased their respective portions to third parties, including the Plaintiff, who rented the 1<sup>st</sup> Defendant’s portion.

26. It was the evidence of DW3 that the 1<sup>st</sup> Defendant sold to him his portion of land vide an agreement of 18<sup>th</sup> September, 1996 for Kshs. 211,000 and that he has never had a dispute over the land with the 1<sup>st</sup> Defendant. After purchasing the land, DW3 informed the court that he had the lease for the entire land extended.

27. DW3 informed the court that the Plaintiff has never owned the portion of the premises he is claiming; that the Plaintiff has always been a tenant in the premises and that he has refused to pay him the rent.

28. In cross-examination, DW3 stated that he does not know if the 1<sup>st</sup> Defendant sold his share to the Plaintiff.

### **Submissions:**

29. The Plaintiff’s counsel submitted that the Plaintiff purchased the 1<sup>st</sup> Defendant’s share in the suit land on 9<sup>th</sup> September, 1978; that the 1<sup>st</sup> Defendant acknowledged receipt of Kshs. 50,000 vide a document dated 6<sup>th</sup> July, 1995 and that from 9<sup>th</sup> September, 1979, which was one (1) year after the date of the Sale Agreement, the Plaintiff took possession of the suit land as a purchaser until in 1996 when the 1<sup>st</sup> Defendant purported to sell the said premises to the 2<sup>nd</sup> Defendant.

30. Counsel submitted that the agreement of 11<sup>th</sup> May, 1987 purportedly rescinding the agreement of 1978 is a fabrication and that the 1<sup>st</sup> Defendant conceded that he has never received rent from the Plaintiff since he took over possession of the suit premises in 1978.

31. The Plaintiff's counsel submitted that if indeed the sale of the suit premises to the Plaintiff did not mature in September, 1979, then the Plaintiff's possession became adverse as against the 1<sup>st</sup> Defendant. Consequently, it was submitted, the 1<sup>st</sup> Defendant did not have a title to pass to the 2<sup>nd</sup> Defendant in 1996.

32. The 1<sup>st</sup> Defendant's advocate submitted that the Agreements of 10<sup>th</sup> September, 1982 and 6<sup>th</sup> October, 1987 rescinded the agreement of 9<sup>th</sup> September, 1978 between the Plaintiff and the 1<sup>st</sup> Defendant; that the Plaintiff remained on the land as a tenant and that in the eyes of the law, he remains a rent defaulter.

33. Counsel submitted that having violated the terms of the 1978 agreement, the Plaintiff is not entitled to an order of specific performance; that the Plaintiff's claim of adverse possession against the 1<sup>st</sup> Defendant was overtaken by events when the lease lapsed in 2000 and that the suit must fail.

34. The 2<sup>nd</sup> Defendant's advocate submitted that the attempt by the 1<sup>st</sup> Defendant to sell his share in the suit premises to the Plaintiff in 1978 was effectively rescinded vide an agreement of 10<sup>th</sup> September, 1982 and that after the termination of the initial lease of thirty three (33) years, the Plaintiff never amended his Plaint to include the renewed lease.

35. If the Plaintiff's suit is based on the agreement of 9<sup>th</sup> September, 1978, then, the 2<sup>nd</sup> Defendant's counsel submitted, the suit is time barred by virtue of the provisions of Section 7 of the Limitation of Actions Act and that after the lease expired, the land reverted to the Government and therefore the Plaintiff's suit in respect to the suit land cannot succeed.

#### **Analysis and findings:**

36. It is not in dispute that parcel of land known as Machakos Town Block 11/285 was registered in favour of the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant on 28<sup>th</sup> February, 1974 as tenants in common. Before the said registration, the Defendants had already acquired the said land and put up some structures which they leased to their respective tenants.

37. The Plaintiff leased the 1<sup>st</sup> Defendant's share in the suit land sometimes in 1974. According to the 1<sup>st</sup> Defendant, the Plaintiff used to pay him a monthly rent of Kshs. 2,000. It would appear that the agreement to lease the premises between the Plaintiff and the 1<sup>st</sup> Defendant was oral.

38. According to the Plaintiff, he remained a tenant of the 1<sup>st</sup> Defendant until the year 1978 when he purchased the 1<sup>st</sup> Defendant's portion. Indeed, both the Plaintiff and the 1<sup>st</sup> Defendant agreed that they signed the agreement dated 9<sup>th</sup> September, 1978 which was produced in evidence.

39. The first issue that I should determine is if there was a valid sale transaction between the Plaintiff and the 1<sup>st</sup> Defendant that is capable of enforcement.

40. The Agreement of 9<sup>th</sup> September, 1978 was signed by both the Plaintiff and the 1<sup>st</sup> Defendant before P.M. K. Kamau advocate. The Agreement provided that the purchase price in respect to the 1<sup>st</sup> Defendant's share in the suit premises was Kshs. 50,000. The Plaintiff was to pay Kshs. 12,000 as deposit upon signing the agreement and the balance was to be paid "*in such installments as shall be arranged between the buyer and M/S Kamau & Co. Advocates.*"

41. The Agreement further provided that either the buyer or the seller could change his mind, whereupon the paid deposit was to be refunded. The Agreement also allowed the 1<sup>st</sup> Defendant to collect rent from the tenants for a period of one (1) year after the date of the Agreement and thereafter the buyer was to collect the rent.

42. Other than the Kshs. 12,000 that was paid upon signing the agreement, the Plaintiff did not produce any evidence to show that he paid to the 1<sup>st</sup> Defendant the balance of the purchase.

43. The 1<sup>st</sup> Defendant produced in evidence the copy of the agreement dated 6<sup>th</sup> October, 1982 in which the Plaintiff purportedly agreed to be paying rent of Kshs. 5,000 per month; that the Kshs. 12,000 paid by the Plaintiff to be utilized in offsetting the rent and that HCCC No. 1198 of 1979 be withdrawn. The said agreement further provided that the 1<sup>st</sup> Defendant was at liberty to sell or do anything with the suit premises.

44. Although the Plaintiff agreed that the signature on the Agreement of 6<sup>th</sup> October, 1982 was his, he denied signing the agreement.

45. Another consent agreement was signed on 10<sup>th</sup> September 1982 before J.A. Makau advocate in which Civil Suit No. 1198 of 1979 was withdrawn. In the said consent, the Plaintiff purportedly agreed as follows:

***“3. It is further agreed that in view of the fact that John Mulwa Nzioki (the Plaintiff herein) has failed to honour the purchase agreement made before Ms. Kamau... that agreement is now null, void and invalid and now John Mulwa Nzioki has to pay rent in lieu of purchase which is now cancelled.”***

46. The Plaintiff has not denied that there was HCCC No. 1198 of 1979 between him and the 1<sup>st</sup> Defendant in respect of the suit land. Indeed, the said suit was filed after the 1<sup>st</sup> Defendant’s advocate, G.S. Pall, informed the Plaintiff’s advocate vide the letter dated 6<sup>th</sup> March, 1979, that the Plaintiff was willing to refund the Kshs. 12,000 that the Plaintiff had paid.

47. Having not denied that HCCC No. 1198 of 1979 existed, and having not informed the court if indeed the said suit was heard and determined, the only conclusion I can arrive at is to agree with the 1<sup>st</sup> Defendant that the suit was withdrawn vide the consent agreement of 10<sup>th</sup> September, 1982. In the said consent agreement, the Plaintiff agreed not only to have the pending suit withdrawn, but to also continue paying to the 1<sup>st</sup> Defendant rent, which rent was to be assessed by the Business Premises Rent Tribunal.

48. In view of what I have stated above, and the evidence placed before me, I find and hold that the agreement of 9<sup>th</sup> September, 1978 was rescinded by the consent of both parties vide the agreements of 6<sup>th</sup> October, 1982 and 10<sup>th</sup> September, 1982. The same cannot therefore be enforced by this court.

49. In any event, by the time the Plaintiff filed this suit to recover the suit premises in 1996, a period of twelve (12) years had lapsed from the time when the agreement of 1978 was signed. The Plaintiff was therefore barred by the provisions of Section 7 of the Limitation of Actions Act from recovering the suit land.

50. The final issue that the court is supposed to determine is if indeed the Plaintiff is entitled to be registered as the proprietor of the suit premises by virtue of the doctrine of adverse possession.

51. Under Section 7 as read together with Section 13 of the Limitation of Actions Act, the owner of a property loses the right to claim his property after it is occupied continuously without interruption by an adverse possession for a period of twelve (12) years. Conversely, under Section 38(1), after a period of twelve (12) years of adverse possession, the adverse possessor is entitled to apply to the court to be declared the owner of the land (*See Mtsanganyiko vs. Julius Jumbae Mundu, [2017] eKLR*).

52. For the Plaintiff to succeed in a claim of adverse possession, he has to prove that he has been on the land openly without the consent of the Defendants, peacefully and as of right.

53. Where a party is allowed on the land by the registered owner, either as a licensee or a tenant, he

cannot succeed in a claim of adverse. Indeed, it does not matter that even after being allowed on the land, he defaults in paying the requisite rent.

54. I have already held that the Plaintiff herein signed the Agreements of 10<sup>th</sup> September, 1982 and 6<sup>th</sup> October, 1982 in which the Sale Agreement of 9<sup>th</sup> September, 1978 was rescinded. The Plaintiff, having agreed to withdraw HCCC No. 1198 of 1979 agreed to continue paying rent. He therefore entered the suit land with the consent of the 1<sup>st</sup> Defendant and remained on the said land with his consent.

55. Having entered on the suit land by the consent of the 1<sup>st</sup> Defendant, and the agreement of 9<sup>th</sup> September, 1978 having been rescinded, the Plaintiff cannot be said to have been in adverse possession of the suit land as at the time he filed the suit. The Plaintiff remains a tenant in the suit land. The claim for adverse possession therefore fails.

56. For those reasons, I find that the Plaintiff has failed to prove his case on a balance of probabilities. The suit is therefore dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2<sup>ND</sup> DAY OF MARCH, 2018.**

**O. A. ANGOTE**

**JUDGE**