



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 210 OF 2013

SOLOMON RUKWARO MWANGI alias

RUWARO MWANGI.....PLAINTIFF

-VERSUS-

ESTHER MUMBI MURAGE.....1ST DEFENDANT

PETER MAINA MURAGE.....2ND DEFENDANT

JUDGMENT

1. On **17th October, 2013** the plaintiff herein, Solomon Rukwaro Mwangi, took up the summons dated **16th October, 2013** for determination of the following questions:-

- (i) Whether he has acquired title by adverse possession to the whole of L.R No. Nyeri/Mweiga/382 (the suit property);**
- (ii) Whether the Land Registrar Nyeri should be ordered to rectify the Register of the suit property and register him as the proprietor in place of the defendants;**
- (iii) Whether the defendants should be ordered to sign and surrender all the requisite documents necessary to effect transfer into his name and in the event they default the executive officer of the court be ordered to sign the same.**
- (iv) What is the order as to costs?**

2. The application is supported by the affidavits of the plaintiff and Mary Margaret Wanjiku Mwangi, sworn on **16th October, 2013** and opposed through the affidavits of the defendants (Esther Mumbi Murage and Peter Maina Murage) filed on **25th May, 2015**.

3. As can be discerned from the pleadings filed in this suit, the applicant's case is that he has become entitled to the suit property as his occupation has been adverse to that of the current proprietors (the Respondents) and their predecessor in entitlement to the suit property, Wilson Murage (deceased).

4. The plaintiff claims to have been in occupation and use of the suit property since 1964 when the same was allotted to him by the Settlement Fund Trustees (SFT) to date and blames the defendants' predecessor in entitlement to the suit property, Wilson Murage, for having fraudulently obtained title to the suit property.

5. It is the applicant's case, that he discovered that Wilson Murage had illegally caused himself to be registered as a proprietor of the suit property on or about **19th September, 1974**.

6. Upon discovering the illegal registration of the suit property in favour of Wilson Murage, the applicant complained to the area District Officer and later filed suits in court to no avail.

7. Owing to his occupation of the suit property which he describes as having been continuous, open, notorious and uninterrupted against the title held by Wilson Murage the plaintiff contends that the title of Wilson Murage had become extinguished by his adverse possession of the suit property by the year 1986.

8. Through their replying affidavits, the defendants admit that the plaintiff had been in use and occupation of the suit property for a long period of time but contend that the occupation was not adverse to that Wilson Murage (their predecessor in entitlement) because the applicant's occupation of the suit property was on account of permission given by Wilson Murage.

9. The defendants led evidence to the effect that there was good relationship between Wilson Murage (hereinafter referred to as Wilson) and the plaintiff before Wilson asked the plaintiff to vacate the suit property sometime in or about 1988; that the plaintiff occupies only a small portion of the suit property and that the plaintiff's possession of the suit property was not adverse to the title held by Wilson because the plaintiff's entry into the suit property was with the permission of Wilson and because of the suits the plaintiff had instituted in respect of the suit property.

10. The defendants further contend that the plaintiff's claim is superfluous as it seeks adverse possession against their deceased predecessor in entitlement, Wilson, yet they have not been sued as the administrators of the estate of Wilson.

11. On 27th May, 2015 directions were taken to the effect that the originating summons be converted to a plaint and the replying affidavits to defence, the affidavits be treated as witness statements and documents be treated as list of documents. Further, directions were taken to the effect that the hearing be by way of *viva voce* evidence.

EVIDENCE

The Plaintiff's case

12. When the matter came up for hearing, the plaintiff who testified as P.W.1 reiterated his contention that his occupation of the suit property had become adverse to the title held by Wilson.

13. Mary Margaret Wanjiku Mwangi (P.W.2) informed the court that she has been in occupation of the suit property since 1982 when she got married by the applicant's son, Simon Mwangi (now deceased); that she occupies about 5 acres of the suit property and that the plaintiff's family members occupy about 30 acres.

14. P.W.2 acknowledged that the suit property was subject matter of a dispute before the Land Disputes Tribunal. She informed the court that the Tribunal ordered that the plaintiff gets 30 acres and the family of Wilson gets 20 acres.

The Defence case

15. The 1st defendant who testified as D.W.1 acknowledged that the suit property was allotted to the plaintiff but explained that the plaintiff was unable to meet his obligations to SFT.

16. D.W.1 informed the court that because the plaintiff was unable to meet his obligations to SFT, he approached her husband, Wilson, to assist him in meeting his obligations to SFT. Her husband paid the loan and as a result the suit property was transferred to him in 1974.

17. It is the evidence of D.W.1 that the plaintiff was involved in the transfer of the suit property to her husband.

18. D.W.1 reiterated the contention that the plaintiff took possession of the suit property after it was transferred to Wilson and began staying there with the permission of Wilson.

19. D.W.1 admitted that it is the Rukwaros (the plaintiff's family) who lived in and utilized the suit property and that they have never lived in the suit property.

20. After Wilson died, D.W.1 reached out to the Rukwaros to settle the dispute in accordance with the wishes of her husband but the Rukwaros refused-D.W.1's husband had offered to transfer 5 acres of the suit land to the plaintiff's family.

21. D.W.2, Peter Maina Murage, acknowledged that there were disputes concerning ownership of the suit property between their family and that of the plaintiff and explained that the dispute culminated in a decision by the Land Disputes Tribunal that the suit property be shared between the plaintiff's family and their family-the plaintiff's family was to get 30 acres and theirs 20 acres.

22. Like D.W.1, D.W.2 contended that the plaintiff entry into the suit property was with the permission of Wilson-he explained that the plaintiff's family was supposed to take care of the suit property on behalf of Wilson.

23. Pointing out that it is his father, Wilson, who was paying for the suit property in 1972; D.W.2 disagreed with the plaintiff's claim for adverse possession arguing that the plaintiff's family would not be in occupation of the suit property if his father had not paid for it.

24. In cross examination, D.W.2 stated that he is aware that it is the plaintiff who balloted for the suit property; that he is aware that SFT gave the applicant four cows to assist him in paying for the loan and that the applicant challenged the transfer of the suit property to his father. He was, however, not aware whether the cases were concluded.

25. Like D.W.1, D.W.2 admitted that they have never lived in the suit property.

26. At the close hearing, parties to this dispute filed submissions which I have read and considered.

Analysis and determination

27. From the pleadings filed in this matter and the submissions filed in respect thereof, I find the issues for determination to be:-

- (i) Whether the registration of Wilson as the proprietor of the suit property was illegal or unlawful?**
- (ii) Whether the occupation and possession of the suit property by the plaintiff was by consent or permission of Wilson?**
- (iii) Whether plaintiff can sustain a case for adverse possession against the defendants when they have not been sued as administrators of the estate of Wilson or trustees of the estate of Wilson?**
- (iv) What orders should the court make?**

28. With regard to the first issue, the evidence adduced in this case shows that the plaintiff had instituted another suit to wit Nyeri HCC No. 33 of 1993-Solomon Rukwaro Mwangi v. Wilson Murage in which he *inter alia* contended that Wilson started meddling with the affairs of the suit property by making unauthorized enquiries from SFT and making unauthorized payments in respect thereof.

29. In that suit the plaintiff contended that Wilson used fraudulent methods to have the suit property transferred to him.

30. The evidence adduced in this suit is to the effect that Wilson died on 22nd April, 2006 and was not substituted within the time stipulated in law for his substitution and at all.

31. By dint of the provisions of **Order 24 Rule 4** as read with **Sub-rule 1** and **3** of the Civil Procedure Rules (CPR), the suit against Wilson abated after one year lapsed without his substitution. In that regard see the said provisions of the law which provides as follows:

“ 24 (1) where one or two or more defendants dies and the cause of actionsurvives or continues, the court on application made in that behalf shall cause the legal representative of the deceased to be made a party and shall proceed with the suit.

2.

3. where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.”

32. By dint of the provisions of **Section 8** of the Civil Procedure Act (CPA) as read with the provisions of **Order 24 Rule 7** of the CPR, the applicant lost his right to urge his claim against Wilson Murage based on the alleged fraud after he allowed Nyeri HCC No.33 of 1993 in which he urged that ground to abate. In that regard, see the above cited provisions of the law which provide as follows:-

“Where a plaintiff is precluded by the rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action” (Section 8 of CPA) and

“Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.” Order 24 Rule 7 of CPR).

33. Even assuming that the plaintiff was within his right to urge his case on the basis of the alleged fraud, misrepresentation and illegality in the transfer of the suit property to Wilson Murage, I find the pleadings filed in this matter to be incapable of forming a basis of prosecuting the plaintiff's case on the basis of the alleged illegality or fraud in the registration of the suit property in the name of Wilson. This is so because, under **Order 2 Rule 9** of the CPR, the plaintiff was required to not only plead the alleged illegality and/or fraud in registration of the suit property but also to provide particulars of the alleged illegality and fraud. In this regard see the cited provision of the law which provides as follows:-

“Subject to Sub rule 2, every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-

- (a) Particulars of misrepresentation, fraud, breach of trust, willful default or undue influence which the party relies on.**

34. Also see the case of Vijay Morjaria v. Nansingh Madhusingh Darbar & Another (2000)eKLR (Civil Appeal No. 106 of 2000 where the Court of Appeal (Tunoi JA as he then was) stated:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

35. At the pain of repeating myself, the pleading in this case fell far short of the above standard as the plaintiff merely alleged that the title held by Wilson was obtained by fraud or illegality without providing the particulars of the alleged fraud as by law required.

36. Moreover, the evidence adduced in this case to wit the plaintiff's denial of involvement in the transfer of the suit property and the letters exchanged between officials of the Ministry of Lands concerning the transfer of the suit property are incapable of proving any illegality or fraud in the transfer of the suit property to Wilson as the alleged illegality or fraud in the transfer of the suit property to Wilson needed to be proved at a higher standard than on a balance of probability though not beyond reasonable doubt. In this regard see the case of **Denis Noel mukhulo Ochwada & Another v. Elizabeth Murungari Njoroge & Another (2014)e KLR** where the Court of Appeal stated:-

“As regards standard of proof of fraud, the law is quite clear. In R.G. Patel v. Lalji Makanji (supra), the former Court of Appeal for Eastern Africa stated thus:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

37. In view of the foregoing, a return a negative verdict to the first issue.

38. With regard to the second issue, whether the plaintiff's occupation of the suit property was with the permission of Wilson, it is common ground that the suit property was first allotted to the plaintiff.

39. From the evidence adduced in this matter, to wit, advice of payments addressed to the plaintiff for the period 1966 to 1969 as read with the letter of offer, I entertain no doubt that the plaintiff took possession of the suit property way before Wilson became the registered proprietor of the suit property. Based on that state of affairs, I find and hold that the initial entry of the applicant was neither with the permission nor consent of the Wilson.

40. On whether the plaintiff's continued occupation and possession of the suit property after Wilson became the registered proprietor of the suit property was with permission or consent of the Wilson, I find the evidence adduced in this case to be incapable of proving that fact. This is so because the evidence adduced in this matter merely shows that there was good relationship between the family of the Wilson and that of the plaintiff even after the plaintiff got to know that Wilson had obtained title in respect of the suit property. Trouble only began in or about 1988 after Wilson started asserting his right to the suit property.

41. The upshot of the foregoing is that the defendants have not proved that the entry and occupation of the suit property by the plaintiff was by consent or permission of Wilson.

42. The foregoing notwithstanding, the pleadings filed in this suit raise an issue as to whether the defendants have been sued in their capacity as administrators of the estate of Wilson or in their own capacity as the registered proprietors of the suit property. That issue is pertinent especially with regard to the capacity to defend the estate of Wilson and because at the time this suit was filed, the suit property was already registered in the names of the defendants. An issue therefore arises as to whether at the time of filing of the suit, the defendants ought to have been sued in their own capacity or in their capacity as administrators of the estate of Wilson.

43. In my view, succession proceedings in respect of the estate of the deceased having concluded as at the time the current suit was filed, the defendants cannot reasonably be said to have been sued as administrators of the estate of Wilson because the estate had ceased to exist upon conclusion of its administration.

44. It my considered view that the only avenue through which the plaintiff could urge his claim against the title held by Wilson (which title had ceased to exist upon transmission of the suit property to the defendants) was by leading evidence capable of showing that he had gained proprietary rights to the titled held by Wilson and that the transmission of the suit property to the defendants was subject to his said proprietary rights which avenue he did not pursue.

45. Being of the view that the plaintiff's claim for adverse possession in the manner crafted is incapable of being sustained against the defendants, I find the claim to be bad in law and dismiss it.

46. This being a family dispute, parties shall bear their own costs of the suit.

Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 26th day of April, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the plaintiff

Mr. Kimunya for the defendant

Court assistant - Esther