



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC.641 OF 2017(OS)

IN THE MATTER OF TITLE NO.TINGANGA/CIANDA BLOCK 1/676

JAMES KAHORO MAGU.....PLAINTIFF

-VERSUS-

RAPHAEL KINYANJUI GICHINGA (Sued as the

Administrator of the estate of GICHINGA NJOROGE GITHIRI.....DEFENDANT

JUDGEMENT

By an *Originating Summons* dated 30th June 2017, the Plaintiff herein *James Kahoro Magu* has sought for determination of various questions namely:-

- 1) *Has the Plaintiff acquired Title to the said parcel of land known as Title No.Tinganga/Cianda Block 1/676 by reason of adverse possession thereof since the year 1998?*
- 2) *Was the Defendant's title to the said parcel of land known as Title No.Tinganga/Cianda Block 1/676 extinguished upon expiry of a period of Twelve(12) years since the Plaintiff took possession thereof in the year 1998?*
- 3) *Does the Defendant hold title of the said parcel of land in trust thereof for the Plaintiff?*
- 4) *Is the Plaintiff entitled to an order of this Honourable Court that he be registered as the proprietor of the said parcel of land known as Title No.Tinganga/Cianda Block 1/676?*
- 5) *Who, as between the Defendant whose title was extinguished, and a person authorized by this Honourable Court, should execute the transfer and in what form, if any is necessary of the said parcel of land known as Title No.Tinganga/Cianda Block 1/676 to effectuate the registration of the Plaintiff as the proprietor thereof.*
- 6) *Who shall bear the costs of this Originating Summons?*

The *Originating Summons* is supported by the affidavit of the Plaintiff who averred that he suit property herein *Tinganga/Cianda block 1/676* is presently registered in the name of *Gichinga Njoroge Githiri* as is evident from the copy of the *official search JKM-2* and copy of the *title deed JKM-3*. However, the said *Gichinga Njoroge Githiri* is deceased and the Defendant herein *Raphael Kinyanjui Gichinga* is the administrator of his estate. He also averred that in the year 1998, he entered into a *Sale Agreement* with the said *Gichinga Njoroge Githiri* for sale and purchase of the suit property, *Tinganga/Cianda Block 1/676* as is evident from *annexure JKM-4* and he took possession of the said property. It was his further averment that the purchase price was agreed at *Kshs.230,000/=* wherein he paid the first instalment of *Kshs.200,000/=* upon signing of the said sale agreement and the balance of *Kshs.30,000/=* was paid and received by *Gichinga Njoroge Githiri* on 5th December 1998 as per *annexure JKM-5*. He contended that the Defendant did not obtain the requisite consent from the Land Control Board, but the Plaintiff took possession of the suit land and has been using it to date. He further contended that he has fenced the said land, built two roomed semi-permanent houses and has been cultivating the said land for subsistence. Further that he has connected tapped water and electricity utilities to the said plot. Therefore he has been in *continuous, open, exclusive, undisturbed* and *uninterrupted occupation, use and enjoyment* of the said premises without permission of the registered proprietor *since 1998*.

He alleged that the Defendant has refused to transfer the said suit property to his name and the Defendant has now demanded for a further

sum of **Kshs.2 Million** in order to complete the said transaction. However the Plaintiff has been advised by his advocate on record that since he has occupied and utilized the land for over 19 years, the Defendant's title over the suit property has been extinguished by virtue of **adverse possession** upon **expiry of 12 years**. He further contended that he is entitled to be registered as a proprietor of the said suit property by virtue of long occupation and thus **prescriptive right**. He urged the Court to issue orders that will facilitate the transfer of the said premises to the Plaintiff. He urged the Court to allow his claim.

The **Originating Summons** was served upon the Defendant on **13th July 2017** by **David Kiama Muicho**, the **Process Server**. However the Defendant failed to enter appearance nor file his response despite service of the **Originating Summons** upon him.

The **Originating Summons** proceeded for formal proof on **8th November 2017**, wherein the Plaintiff gave evidence for himself and called no witness.

PW1 adopted his witness statement wholly as his evidence in court and further averred that the claim is over **Tinganga/Cianda Block 1/676**, which he purchased on **28th August 1998** and took possession of the same. He reiterated that he entered into sale agreement with the father of **Raphael Kinyanjui Gichinga**, for purchase of the suit property at **Kshs.230,000/=**. He also testified that he paid **Kshs.200,000/=** upfront and further **Kshs.30,000/=** in **December 1998**. He produced the exhibits in court being **sale agreement, Exhibit 1** and **acknowledgement of receipt of money Exhibit 2**. He further testified that he has constructed two houses on the suit property and has also connected water and electricity thereon. He produced the **Bills as exhibit 4** and **original title deed as Exhibit no.3**. It was his contention that despite paying of the full purchase price, taking of possession of the suit property and construction of two houses thereon and a cow shed, the vendor did not transfer the suit property to him and it is still in the name of **Gichinga Njoroge Githiri**, as is evident from the **official search Exhibit No.5**. He also testified that he has tried to pursue the said transfer through **Raphael Kinyanjui Gichinga**, who is the son of **Gichinga Njoroge Githiri** and administrator of his estate but he said **Raphael** demanded for payment of **extra Kshs.2 Million** as he claimed the land has appreciated in value. However, it was his contention that he paid all the full purchase price and has been in possession **since 1998** and there are no basis for payment of **extra Kshs.2 Million**. He urged the Court to allow his claim entirely.

The Plaintiff further filed written submissions on **8th December 2017**, and submitted that he has utilized the same for **more than 19 years** and the Defendant's rights were extinguished by adverse possession upon expiry of **12 years**. The Plaintiff relied on various decided cases among them the case of **Samuel Miki Waweru...Vs...Jane Njeri Richu, Civil App.No.122 of 2001**, where the Court held that:-

“In our view, where the purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor or lessor pending completion and the transaction thereafter becomes void under Section 6(1) of the Land Control Act for lack of consent of Land Control Board, such permission is terminated by the operation of the law and continued possession if not illegal becomes adverse from the time the transaction becomes void....The Respondent has for many years been continuously openly and of right using a clearly demarcated portion of the land on which she has planted coffee, a permanent cash crop, built a semi-permanent house and granary with interruption”.

He further relied on the case of **Njuguna Njuki...Vs...Richard Njenga, Nairobi ELC No.920 of 2013(OS)**, which cited with approval the principle established in the case of **of Hosea...Vs...Njiru (1974) EA pg.526**, where the Court held that:-

“On payment of purchase price by a purchaser in occupation, his occupation becomes adverse to that of the vendor. The Plaintiff's possession becomes adverse on the date which the last payment of the purchase price was made”.

This Court has now carefully considered the instant **Originating Summons** and the annexures thereto. The Court has also considered the evidence adduced in court by PW1 and the exhibits produced therein. The Court has further carefully considered the written submissions, cited authorities and relevant provisions of law and the Court makes the following findings:-

There is no doubt that the Plaintiff herein entered into a **sale agreement** with one **Gichinga Njoroge Githiri** for purchase of **LR.No.Tinganga/Cianda Block 1/676**. There is no doubt that the purchase price was **Kshs.230,000/=** and the purchaser paid a sum of **Kshs.200,000/=** upon execution of the sale agreement on **26th August 1998**. The Plaintiff alleged that he has been in possession of the suit property since then and has constructed two semi-permanent houses thereon and has been utilizing the suit property for subsistence farming. The Defendant did not file any response and therefore the above allegations have not been controverted.

There is no doubt that the Plaintiff made the final payment of the purchase price on **5th December 1998**, as per the **acknowledgement note Exhibit 2**. The Plaintiff therefore did complete payment of the purchase price. It is evident that in the sale agreement, it was agreed that the vendor was to apply for the **Land Control Board Consent** as soon as was practicable. However, the Plaintiff has alleged that the same was not done. Further there is no doubt that the suit property is still registered in the name of **Gichinga Njoroge Githiri**, as is evident from the **Certificate of official search Exhibit No.6**. Therefore even after purchase of the suit land and possession of the same, the suit land has not yet vested to the Plaintiff because the transfer was never effected.

It was alleged that **Gichinga Njoroge Githiri** is **now deceased** and the Defendant herein who is his son, is the administrator of the estate of **Gichinga Njoroge Githiri**, who has refused to transfer the suit property to the Plaintiff unless he pays an **extra Kshs.2 Million** on allegation that the suit property has **now appreciated in value**. If the guiding tool for the sale and purchase of the suit property was the sale agreement dated **26th August 1998**, then as stipulated therein the Plaintiff has completed payment of the purchase price.

It is also evident from the sale agreement, a **Consent of Land Control Board**, was to be obtained by the Vendor. However, the same was not done. Therefore without the consent from the Land Control Board, the sale was **voided** after **6 months** as stipulated **by Section 6(1)** of the

Land Control Board Cap 302 Laws of Kenya which provides:-

“Each of the following transactions:-

a) **The sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a Land Control area;**

b)

c)

is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect to that transaction in accordance with this Act.

However, even after the sale became void due to lack of Consent from the Land Control Board, the Plaintiff continued to be in possession and has remained in possession to date. As was held in the case of Isack Maina Kamau...Vs...Rahab Wangare Gachiengo & Another, Nakuru HCCC No.34 of 2015;

“After the six months expired, occupation by the Applicant was no longer based on contract and therefore became hostile and time started running”.

Similarly in this matter, after the vendor failed to obtain the consent from Land Control Board and six months expired, the Plaintiff's occupation of the suit property was no longer based on the sale agreement entered on 26th August 1998, but that occupation became hostile and time started running.

The Plaintiff has alleged that he has been in occupation from the **year 1998 to date**. Therefore, the Plaintiff's occupation of the suit property has become adverse to the vendor. The occupation of the Plaintiff is **over 19 years** from the date of occupation therefore the Plaintiff's occupation is adverse and the Defendant's right over the suit property has been extinguished by virtue of adverse possession. It is evident that the Plaintiff's occupation of the suit property has for many years been **continuous, open** and **without any interruption** from the Defendant. Therefore the Plaintiff's occupation became adverse to the Defendant and/or vendor from the time the transaction became void for lack of Land Control Board Consent. See the case of Wambugu...Vs...Njuguna (1983)KLR 173, where the Court of Appeal held that:-

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or had discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years”.

The Plaintiff has alleged that since he took possession of the suit land in 1998, the Defendant has not disturbed him and is aware of his possession. Therefore it is evident that the Defendant herein has been dispossessed of the suit property.

Further in the case of Kimani Ruchire...Vs...Swift Futeher & Co. Ltd, 1980 KLR 10 at page 16, the Court 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 endeavor to interrupt it or by way of recurrent consideration”.

It is evident that the Plaintiff has been in continuous occupation of the suit property and so he is entitled to be registered as the proprietor of the suit property by virtue of adverse possession.

Further, the Defendant is holding the suit property through constructive trust in favour of the Plaintiff. See the case of Macharia Mwangi Maina & 87 Others...Vs...Davidson Mwangi Kagiri (2014) eKLR, where the Court held that:-

“the Respondent created a constructive trust in favour of all individuals who had paid the purchase price for respective plots and the trial court erred in failing to note that the Consent of the Land Control Board was not required where a trust was created over agricultural land”.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved on the required standard of balance of probabilities that he is entitled to the claim sought. In response to the questions sought for determination by the Plaintiff, the Court finds that:-

a) **The Plaintiff has acquired title to the suit property Tinganga/Cianda Block 1/676 by virtue of adverse possession.**

b) **The Defendant's right and title to the said property Tinganga/Cianda Block 1/676 has been extinguished upon expiry of 12 years since the Plaintiff took possession in 1998.**

c) **The Defendant is therefore holding the suit property in trust for the Plaintiff (constructive trust) and the Plaintiff is entitled to**

be registered as a proprietor of the suit property Tinganga/Cianda Block 1/676.

d) The Defendant is directed to sign all the necessary documents to facilitate transfer of the suit property to the Plaintiff within a period of 30 days from the date hereof. Failure to do so, the Deputy Registrar of this Court is authorized to sign and execute all the necessary transfer documents of the suit property Tinganga/Cianda Block 1/676 to effectuate the registration of the Plaintiff as the proprietor thereof.

e) Further, the Plaintiff is entitled to costs of this suit.

It is so ordered.

Dated, Signed and Delivered at Thika this 9th of April 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff

No appearance for Defendant

Esther - Court clerk.

L. GACHERU

JUDGE

Court – Judgement read in open court in the absence of the parties.

L. GACHERU

JUDGE

9/4/2018