



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 59 OF 2014

(CONSOLIDATED WITH ELC NO. 81 OF 2014)

NJIRU KINDU.....PLAINTIFF

VERSUS

MACAKI MACAL.....1ST DEFENDANT

MISHECK NJERU MACAKI.....2ND DEFENDANT

JUDGEMENT

1. By an undated plaint filed on 5th May 2006 the Plaintiff herein sought the following reliefs against the 1st and 2nd Defendants;

a) The Plaintiff be declared the legal owner of land parcel Number Nthawa/Gitiburi/1486 by virtue of having occupied the same exclusively, openly and continuously for a period of over twelve (12) years and 2nd Defendant be ordered to transfer land parcel Number Nthawa/Gitiburi/1486 to the Plaintiff.

ALTERNATIVELY

b) The 1st Defendant be ordered to transfer four acres out of land parcel number Nthawa/Gitiburi/1252, and both Defendants do jointly and severally compensate the Plaintiff for all the developments carried out on land parcel number Nthawa/Gitiburi/1486, which developments should be assessed by an agricultural officer.

ALTERNATIVELY AND WITHOUT PREJUDICE

c) The Defendants be ordered to refund the total purchase price received by them, and to refund all the sums expended by the Plaintiff in the sale, survey and all other expenses and to jointly and severally compensate the Plaintiff for all the developments carried out on land parcel Number Nthawa/Gitiburi/1486, which developments should be carried out by an agricultural office.

d) That the Defendants do pay interest on the above.

e) The costs of this case.

f) Any other relief this honourable court deems fit to grant.

2. The basis for seeking the said reliefs was that the Plaintiff had entered into a sale agreement dated 1st November 1978 with the 1st Defendant whereby the latter was to sell and transfer Title No. Nthawa/Gitiburi/1486 (hereinafter known as the "suit property") to the Plaintiff at an agreed consideration of Kshs 1200/- per acre. It was further pleaded that for various reasons, the 1st Defendant was unable to effect a transfer of the suit property which was at all material times registered in the name of the 2nd Defendant who is a son of the 1st Defendant.

3. It was also pleaded that the consent of the Land Control Board (hereinafter the "LCB") never granted for the transaction since the 2nd Defendant was a minor at the time the sale agreement was made. Despite various efforts for the 1st Defendant to compensate the 2nd Defendant with alternative land to enable the latter to transfer the suit property to the Plaintiff, they did not bear fruit.

4. The Defendants herein entered an appearance and filed a joint statement of defence dated 19th June 2006. They pleaded that the sale agreement dated 1st November 1978 was illegal since the suit property was registered in the name of a minor. The rest of the defence

consisted of general denials of the other allegations contained in plaint.

5. The record indicates that sometime in August 2013, the 2nd Defendant herein sued the Plaintiff herein in Embu HCCC No 59 of 2014 (formerly Kerugoya HCCC No 646/13) seeking his eviction from the suit property on the basis that he (the 2nd Defendant) was the registered proprietor of the suit property which he contended the Plaintiff had trespassed upon. The record further indicates that the said suit was by consent of the parties consolidated with the instant suit. However, on 28th September 2017, Mr Andande for the Defendants informed the court that he wished to abandon that suit since the Plaintiff had vacated the suit property.

6. When the suit was listed for hearing before me on 28th September 2017, the advocates for the parties informed the court that they were agreed on the facts of the case and that only matters of law were in dispute. They, therefore, agreed to dispose of the suit through written submissions and on the basis of the documents on record. It was further agreed that the Plaintiff would file his submissions together with a valuation report within 30 days whereas the Defendants were to file and serve theirs within 14 days upon service. However, by the time of preparing the judgement none of the parties had filed their submissions.

7. Although the parties informed the court that they had agreed on all factual issues and that only legal issues were in dispute, they did not file a statement of the agreed factual matters. They did not also file an agreed statement of the legal issues in controversy. The record also shows that no agreed statement of issues of any sort was filed. Instead, it is only the Plaintiff who had filed his version of the issues for determination on 25th May 2017 in preparation for trial.

8. In the circumstances, the court will have to frame the factual and legal issues for determination in the normal manner. In my opinion, the main issues which arise for determination in this suit are as follows;

- a) The status or the legal validity of the sale agreement dated 1st November 1978.
- b) Whether the Plaintiff is entitled to adverse possession of the suit property.
- c) Whether the Plaintiff is entitled to an order for the 1st Defendant to transfer to him 4 acres out of title No. Nthawa/Gitiburi/1252.
- d) Whether the Plaintiff is entitled to compensation for the value of the developments on the suit property.
- e) Whether the Plaintiff is entitled to a refund of the purchase price paid and all other sums expended on the abortive sale transaction.
- f) Who shall bear the costs of the suit.

9. The 1st issue is on the validity of the sale agreement dated 1st November 1978 between the Plaintiff and the 1st Defendant. It is common ground that at the material time the suit property was registered in the name of the 1st Defendant who was a minor then. It is also common ground that the consent of the LCB was not granted for that transaction within the period of six (6) months as required under section 6 of the Land Control Act (Cap 302) or at all.

10. In the circumstances, it is clear that the 2nd Defendant was not a party to the sale agreement dated 1st November 1978. Even if he had been made a party thereto, he could not have been a competent party for want of legal capacity to contract. Such a contract would have become voidable at the option of the 2nd Defendant upon attaining the age of majority. As it turned out, he did not want to be bound by it upon attaining the age of majority.

11. The legal position in Kenya in relation to controlled transactions in respect of which the consent of the LCB has not been obtained is well settled. The lack of consent makes the transaction void for all purposes in accordance with the provisions of section 6 of the Land Control Act (Cap 302). See Kariuki Vs Kariuki [1983] KLR 225; Wamukota Vs Donati [1987] KLR 280; Karuri Vs Gitura [1981] KLR 247; Simiyu Vs Watambamala [1985] KLR 852; Munyoro Vs Muraqe [1988] KLR 180; and David Sironqa Ole Tukai Vs Francis Arap Muge & 2 Others [2014] eKLR.

12. The 2nd issue relates to adverse possession. The legal requirements for proving a claim of adverse possession are fairly settled in Kenya. These requirements have been well articulated in various cases such as Wambugu Vs Njuguna [1983] KLR 172 and Kasuve Vs Mwaani Investments Ltd. In the case of Kasuve Vs Mwaani Investments Ltd (supra) the requirements were summarized as follows;

“...and in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Saikwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for part of the land...”

13. It would appear that upon the 2nd Defendant filing Embu HCCC No. 59 of 2014 for eviction, the Plaintiff vacated the suit property. That is why Mr Andande for the Defendants informed the court that the said suit had been overtaken by events because the Plaintiff had already vacated hence there was no need to proceed with the claim for an eviction order. In those circumstances, the Plaintiff could not be said to have satisfied the legal requirement of continuous and uninterrupted possession when he discontinued possession of his own volition. The claim for adverse possession must, therefore, fail.

14. The 3rd issue is whether the Plaintiff is entitled to an order for the 1st Defendant to transfer to him 4 acres out of Title No.

Nthawa/Gitiburi/1252 (hereinafter known as “parcel No. 1252”). The evidence on record indicates that the property which was the subject of the sale agreement dated 1st November 1978 is the suit property (ie parcel No. 1486) and not parcel No. 1252. It is also on record that even though the 1st Defendant had expressed willingness to transfer 4 acres out of parcel No. 1252 to the Plaintiff, the consent of the LCB was never obtained in respect thereof. In those circumstances, there is no legal basis upon which the 1st Defendant may be compelled to transfer a portion of parcel No. 1252 to the Plaintiff. The answer to this issue is, therefore, in the negative.

15. The 4th issue is whether the Plaintiff is entitled to compensation for the value of developments effected on the suit property. There is some evidence that the Plaintiff made some substantial developments on the suit property. The only question for determination is whether, as a matter of law, the Plaintiff is entitled to compensation for such developments whereas the underlying transaction became void for all purposes under the provisions of the Land Control Act. This issue was considered by the Court of Appeal in the case of *Kariuki Vs Kariuki* (supra) where *C.B Madam J.A* (as he then was) held as follows;

“With respect, I do not agree. No general or special damages are recoverable in respect of a transaction which has become void for want of consent. The only remedy open to a party to a transaction which has become void under the Act is that he can recover any money or consideration paid in the course of the transaction under section 7 of the Act. See also the decision of this Court in *Cheboo Vs Gimnyigei* (Kisumu Civil Appeal No. 40 of 1978) in which a majority of this Court disagreed with the view expressed by Madam J.A that compensation for improvements was recoverable in addition to the money or other consideration paid in the course of a transaction which has become void under the Act. Had the Act so intended, it would have so provided. See also *Karuri Vs Gituru and Others* (Nairobi Civil Appeal No. 25 of 1980) which is to the same effect.”

16. I fully concur with the said decision on the question of compensation for developments. In my view, when the sale agreement became void for want of LCB consent, it became criminal for the Plaintiff to continue occupying the suit property under the provisions of **section 22** of the **Land Control Act**. The court cannot, therefore, be called upon to come to the aid of a person who was involved in such illegal occupation of land under a void transaction. See *Mapis Investments (K) Ltd Vs Kenya Railways Corporation [2005] 2KLR 410*.

17. The 5th issue is whether the Plaintiff is entitled to refund of the purchase price paid and all other sums expended on the abortive sale transaction. As was held in the case of *Kariuki Vs Kariuki* (supra), the purchaser of a parcel of land is only entitled to refund of the purchase price paid. That is the statutory remedy which is specifically provided for under section 7 of the Land Control Act (Cap 302). I do not think the Plaintiff is entitled to any other remedy. The 5th issue is, therefore, answered in the affirmative regarding the refund of the purchase price of Kshs 25,800 paid to the 1st Defendant and Kshs 5000/- paid to the 2nd Defendant. However, no other sums expended on the transaction are recoverable.

18. The 6th and final issue relates to costs of the suit. The general rule is that costs follow the event as provided for under **section 27 of the CPA (Cap 21)**. The successful party is entitled to costs of an action unless, for good reason, the court orders otherwise. The court considers that the Plaintiff has only partially succeeded in this claim. He shall, therefore, be awarded one half (1/2) of the costs of the suit.

19. The following is the summary of the court’s findings and holdings on the issues for determination herein;

- a) The sale agreement dated 1st November 1978 became null and void for all purposes for want of consent of the Land Control Board.
- b) The Plaintiff is not entitled to the suit property on account of adverse possession.
- c) The Plaintiff is not entitled to an order for the 1st Defendant to transfer to him 4 acres out of *Title No. Nthawa/Gitiburi/1252*.
- d) The Plaintiff is not entitled to compensation for value of the developments on the suit property.
- e) The Plaintiff is entitled to a refund of the purchase price paid on account of the suit property in the sum of Kshs 20,800 from the 1st Defendant and Kshs 5000 from the 2nd Defendant together with interest at court rates from the date of filing suit till payment in full.
- f) The Plaintiff is entitled to one half (1/2) costs of the suit.

20. The upshot of the foregoing is that judgement is hereby entered for the Plaintiff for the refund of Kshs 20,800 as against the 1st Defendant and Kshs 5000/- as against the 2nd Defendant together with interest thereon at court rates from the date of filing suit until payment in full. The Plaintiff shall have one half (1/2) costs of the suit.

21. It is so decided

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 5th day of APRIL, 2018

In the presence of the Plaintiff in person and Mr Andande for the 1st and 2nd Defendants.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

05.04.18