



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**E.L.C NO. 323 OF 2017(OS)**

**JAMES MAINA KINYA.....PLAINTIFF**

**VS**

**GERALD KWENDEKA a.k.a**

**GERALD MICHAEL KWENDEKA..... DEFENDANT**

**JUDGMENT**

1. The Applicant filed an Originating Summons under Section 17 & 38 of the Limitations of Actions Act Cap 22 and under section 7 (d) of the Land Act; Order 37 rule 7 of the Civil Procedure Rules seeking the following Orders;

- a. A declaration that the title of the said Gerald Kwendeka a.k.a Gerald Michael Kwendeka to the leasehold interest in land LOC.20/KAMBIRWA/1577/14 has been extinguished by the Plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the Limitation of Actions Act;
- b. A declaration that the Plaintiff has acquired the leasehold interest in land parcel LOC.20/KAMBIRWA/1577/14 by his adverse possession thereof for a period of more than 12 years i.e. from at least 1996 to-date.
- c. An Order do issue requiring and directing the Land Registrar Murang'a to register the Plaintiff James Maina Kinya as the lessee of land parcel No. LOC.20/KAMBIRWA/1577/14 in place of Gerald Kwendeka a.k.a Gerald Michael Kwendeka and in place of any other person succeeding the Defendant.
- d. The costs of this suit be borne by the Defendant.

2. The summons are premised on the grounds cited in the application and particularly in the Supporting Affidavit of the Applicant dated 27/3/17.

3. It is deponed by the Applicant that the Defendant sold the suit property to him in 1983 at the purchase price of Kshs. 70,000/=. That on taking possession, he developed the land extensively however the Defendant refused or failed to transfer the suit property to him whereupon he filed suit Nyeri HCCC No 30 of 1988 and obtained Judgement against the Defendant for specific performance. An Order authorizing the Deputy Registrar to execute the documents in favour of the Applicant dated 18/9/96 is enclosed in support. As it would happen, the Order was never executed and the same became statute barred 12 years after the date of Judgement hence the current application seeking title by adverse possession. A certificate of official search dated 17/3/17 shows the Defendant as the registered owner of the suit property.

4. From the record the service of summons was effected on the Defendant on the 4/4/17 as evidenced by the affidavit of service dated 6/4/17. On the 11/5/17 the Defendant instructed a law firm by the name and style of E K N LLP who filed a memorandum of appearance on 18/5/17 on behalf of the Defendant.

5. On the 22<sup>nd</sup> May 2017, the Defendant filed a replying affidavit in which he deponed that in his quest for elective politics in 1983, he borrowed Kshs 70,000/= from the Plaintiff on the understanding that he would repay on completion of the campaigns. He averred that due to his poor financial position at the time, he allowed the Plaintiff to collect rent from the rented premises towards recovery of the alleged debt. That the Plaintiff evicted the tenants and took possession and occupation of the suit property contrary to their mutual understanding.

6. In response to the Court Orders issued by the High Court in 18/9/96, the Defendant averred that the same were obtained fraudulently. Further that the said Order was not served on him despite both parties residing in the same location. That the said Order was neither executed nor sufficient reasons given for the same. Maintaining that the Plaintiff has been in occupation of the suit property through threats, he urged

the Court to dismiss the originating summons with costs.

7. When the matter came up for hearing on 26/9/17 the Defendant and his Advocate were absent in Court despite evidence of service of the aforesaid hearing notice. The case was then adjourned to 17/10/17 when likewise, the Defendant and his Counsel were conspicuously absent despite evidence of service of the hearing notice. The hearing then proceeded *exparte*.

8. At the hearing, the Plaintiff testified solely. By and large he adopted his evidence as contained in the supporting affidavit. Though he stated that he did serve the Defendant with the Court Order in Nyeri HCCC No. 30 of 1988, he did not adduce any evidence to support the averment. He stated that at the time of taking possession of the suit property, the same was undeveloped. That indeed it is he who developed the suit land and therefore the contention by the Defendant that he allowed him to collect rent was untenable in that regard.

9. The evidence of the Plaintiff was therefore uncontroverted by the Defendant.

The Plaintiff through his Learned Counsel on record Mr. Gichuki Waiganjo filed written submissions on 3/11/17. The Defendant on the other hand chose not to file despite being served with the mention notice for 7/12/17 to confirm filing of written submission.

10. It is not in dispute that the Plaintiff's claim is based on adverse possession and not contract. It is deponed by the Plaintiff that though the transaction started by way of purchase, his claim is anchored on a claim of adverse possession.

11. The Plaintiff submitted that the land was sold to him in 1983. He paid the full purchase price of Kshs. 70,000/= and was put in possession by the Defendant after the purchase; that the Defendant refused to complete the contract and the Plaintiff filed a case in Nyeri HCCC No. 30 of 1988 and obtained judgement against him for specific performance. That on 18/9/96 he obtained an Order mandating the Deputy Registrar to execute all documents necessary to effect transfer of the suit land to him. That for some unspecified reason he did not execute the decree and 12 years lapsed. That notwithstanding that he is still in possession until now. That he has acquired the leasehold title by adverse possession.

12. The Plaintiff contends that the Defendant was aware of the proceedings in Nyeri HCCC No. 36 of 1988 as seen by the contents of para 14 & 15 of the replying affidavit whereby the Defendant alluded to the said proceedings when he accused the Plaintiff of fraud in procuring the said orders.

13. In response to the Defendant's assertions that the Order dated 18.9.96 was fraudulent, the Plaintiff submitted that to the contrary the Defendant has failed to give particulars of the fraud alleged in his replying affidavit or at all proof them during the hearing of the case. He also contends that the said Order was not appealed against or set aside.

14. The Plaintiff submitted that section 4 (4) of Limitations of Action Act Cap 22 applies to judgments and therefore a judgement must be executed within 12 years. He averred that given that the Order was granted on 7/5/96 and the Plaintiff had upto 7/5/2008 to execute the Judgement in his favour. That by the time of filing suit on 31/3/17 a period of 20 years had lapsed. That he had however continued in occupation without interruption and without force. That for purposes of Limitations of Actions Act, time started running from the time he paid the purchase price in 1983. However, that the Nyeri HCCC No. 30 of 1988 stopped the time from running. That the period 1996-2008, the Plaintiff had in his favour a judgement which he failed to execute. He however continued in occupation. Further that after the Court Order become statute barred, the Plaintiff continued to be in occupation of the suit land. The Defendant did not evict him.

15. While citing the case of **Koinange Investments and Development Company Ltd vs Ian Kahi Ngethe & 3 others (2015) Eklr** the Plaintiff contended that section 4(4) of the Limitation of Actions Act applies to judgements and therefore a judgment must be executed within twelve years, after which it will be statute barred.

16. The Plaintiff has further submitted on the issue of whether or not this case is Resjudicata. He contends that the **HCCC No. 30 of 1988** was based on contract where the Plaintiff sought specific performance while the instant case is grounded on adverse possession. He opined that Res judicata can only arise where the cause of action is similar to the cause of action in the earlier suit.

17. In concluding his submissions, the Plaintiff contends that he entered into occupation of the suit premises in 1983 on the basis of contract and his occupation continued to date openly without force and without interruption. That 12 years from 1996 lapsed in 2008 and that the title of the Defendant had been extinguished by 2009 in favour of the Plaintiff.

#### **Determination**

18. The Plaintiff has in his submissions invited the Court to consider whether or not this matter is resjudicata. The matter was not pleaded but I will address it more because resjudicata is a bar to jurisdiction of the Court. Section 7 of the Civil Procedure Act states as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

19. It is not in dispute that there was a case HCCC No. 30 of 1988 filed by the Plaintiff against the Defendant in respect to the same suit property. The question one would pose is whether the current suit is resjudicata given the existence of the 1988 case. In the 1988 suit the Plaintiff sought Specific performance pursuant to a contract of sale of land upon which he was put in possession. The matter was determined in favour of the Plaintiff through an arbitral committee and the award/decision adopted by the Court by way of its judgement granted on 7/5/96. That judgement lapsed and the Plaintiff was unable to effect the transfer of the suit property in his name.

20. The current suit though seeking ownership is based on Limitation i.e. adverse possession. The issue for determination in the current suit is whether or not the Plaintiff has established ownership by way of adverse possession admittedly the Plaintiff in both suit was/is pursuing a right of ownership with the divergence being the issues of specific performance pursuant to a contractual claim and while the present suit is based on a legal claim. In conclusion therefore, the causes of action in both cases are different and I see no bar to the jurisdiction of this Court in determining the matter before it.

21. The key issue for determination is whether or not the Plaintiff has acquired title by way of adverse possession. If yes when did time start running for purposes of determining these rights and finally whether or not the Plaintiff is entitled to the prayers in the originating summons.

22. It would appear from the record that the Plaintiff and the Defendant entered into a memorandum of agreement dated 30/5/83 to sell the suit property to the Plaintiff at the sum of Kshs. 70,000/=. It is the Plaintiff's case that on completion of the purchase price he was put into possession of the suit property in 1983. That thereafter on refusal of the Defendant to transfer the suit property to him, he filed suit against the defendant in 1988 seeking specific performance. This is the contractual aspect of a time claim by the Plaintiff against the Defendant. The matter was then referred to the Town Planning Markets and Housing Committee of the Murang'a County Council (then) for arbitration. From the record the committee on hearing both parties resolved the matter in favour of the Plaintiff. On the 7/5/96 the High Court delivered judgement in the following terms;

a. That the Deputy Registrar of this Court is hereby authorized to execute all applications, transfers and any other documents in place of the Defendant which shall be necessary to transfer the plot number LOC.20/KAMBIRWA/1577/14 to the Plaintiff.

b. The Plaintiff shall have the costs of this application against the Defendant.

23. The said judgement remained unexecuted for over 12 years and by 2008 it expired by dint of section 4(4) of Limitation of Actions Act which states as follows;

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent Order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.” [emphasis mine].

24. The question that begs an interpretation is whether or not the proviso above governs judgements as well as execution of the same. My reading of the above is that the provision covers both execution of judgment and during all these periods the Plaintiff continued in uninterrupted occupation.

25. I have considered the replying affidavit by the Defendant filed on 22/5/17 in response to the Originating Summons. The Defendant has attempted to challenge the sale of the suit property by stating that the Kshs 70,000/= was a soft loan to enable him fund a political campaign. That both parties entered into an agreement that the Plaintiff could collect rent from the houses on the property until the Plaintiff satisfies the full debt of 70,000/=. It is on record that the arbitral committee determined that the Plaintiff developed the suit property. His averments therefore are directly inconsistent with the findings of the arbitral committee. It is however clear that possession was given to the Plaintiff. This is the basis of the Plaintiffs claim in this suit.

26. It is also manifestly clear that the Defendant had knowledge of the judgment which he claims to have been fraudulently obtained. No evidence was tendered by the Defendant before this Court to support that averment. There is also no evidence that the Judgement was appealed against or set aside or stayed (whilst it was in force). The proceedings of the arbitral committee are however on record. Needless to say, the Defendant chose not to controvert the evidence presented by the Plaintiff at the hearing or respond to the claim of the Plaintiff in any substance.

27. It is not in dispute that the Plaintiffs claim in the Originating Summons is based on adverse possession. What is adverse possession? The Limitations of Action Act Cap 22 does not define adverse possession. It commences in wrong and is aimed against a right of the true owner. The person alleging a right of title on adverse possession must show by clear and unequivocal evidence that his possession was not permissible, open, with the knowledge of the true owner and excluded the true owner from the enjoyment of his property.

28. The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

29. Has the Plaintiff proved adverse possession? In the case of **Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001**, the Court of Appeal delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in **Jandu v Kirpal [1975] EA 225** possession does not become adverse before the end of the period for which permission to occupy has been granted.

**In Wambugu vs Njuguna (1983) KLR 172** the Court held;

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.

The record shows that the Plaintiff entered into the suit property pursuant to a memorandum of agreement signed on 30/5/83 and in hot pursuit to a purchaser's right as a bonafide purchaser for value. The entry in 1983 was therefore permitted by the Defendant. It is the Plaintiffs case that on payment of the full purchase price, he was put in possession by the Defendant. That he developed the suit property extensively and in the arbitral proceedings stated that he had spent Kshs. 180,000/= as at 1996.

In the case of **Public Trustee vs. Wanduru, Madan J A** stated as follows; -

“... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”.

In the instant case the Plaintiff was put in possession in 1983 when he completed payment of purchase price. It therefore follows that time started running for purpose of limitation from 1983 when he was granted possession on payment of the purchase price.

30. Did the filing of HCCC No. 30 of 1988 stop time from running? Once time begins to run for purposes of limitation it will continue to do so unless the true owner brings an action to recover the disputed land. *Re Berson* (1914) 2 Ch. 68 page 76. The action must be brought to recover the disputed land. The true owner must seek to retake possession or specifically raise the claimant's right to possession. In this case the suit filed by the Plaintiff in 1988 was for specific performance asserting title pursuant to a contract of sale. It was met by the Defendant denying the sale of the property to the Plaintiff. It is trite law that time stops running the moment a suit is filed by the title owner. In this case time would have stopped running had the defendant filed an independent suit or a counterclaim in the suit of the Plaintiff. He did not so. In the circumstances therefore, I find that time was running continuously notwithstanding the suit of the plaintiff.

31. In the case of **M'ikiara M'rinkanya & Another V Gilbert Kabeere M'mbijiwe, Civil Appeal 124 of 2003 [2007] eKLR**, the Court held that

‘...From the above analysis, it is clear that a judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in section 7 of the Act. If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of **Lougher v Donovan [1948] 2 All ER 11**, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in section 4 (4) of the Act would be inconsistent with the law of adverse possession...

...as regard recovery of judgment debts, the construction of Section 4 (4) of the Act by local courts barring recovery after 12 years, is as shown in **Lowsley V Forbes [1999] 1 AC 329**, consistent with construction given by English Courts to Section 2 (4) of the Limitations Act 1939 and its predecessors for over 100 years that a judgment debt becomes statute barred after 12 years.’

32. In respect to the instant case the defendant did not attend court and tender any evidence to show when the plaintiff is expected to have fully recovered Kshs. 70,000/- upon which the defendant's permission for the plaintiff occupation of the suit premises would have ceased. The evidence of the plaintiff is consistent in that he asserts that he purchased the land took possession and his occupation has not been disturbed by the defendant by laying a claim in respect thereof.

33. In my view, the nature of rights conferred by the Judgment of the court was in respect to a contractual agreement conferred by contract. In effect the plaintiff enjoyed both court sanctioned determination as to substantive rights in addition to the possessory rights under the realm of adverse possession during the subsistence of the judgment. Adverse possession that commenced in 1983 lay inert and was not displaced during the subsistence of the judgment.

34. It is on record that the Plaintiff has been in continuous open and uninterrupted possession of the suit land. There is no evidence to suggest that the Defendant sought or retook possession or the Plaintiff relinquished possession to the Defendant. Given that time stated running in 1983 it is clear that the Plaintiff has established that he has been in factual possession for 34 years. It is also on record that the Defendant has not challenged the possession leaving the Plaintiff to openly publicly occupy the suit property uninterrupted. The fact that the Plaintiff has extensively developed the suit property is a demonstration of animus possidendi, (intention to possess) to the exclusion of the defendant. He is also using or occupying the land in contrast to the title (hostile) usage to the right of the title own (Defendant). The open continuous and hostile occupation has not been broken from 1983, a period in excess of 12 years. It has been admitted by the Defendant that the Plaintiff collects rent from the property and has excluded him from possession. This demonstrates exclusive control of the suit property by the Plaintiff which is an essential ingredient in establishing adverse possession.

35. However, in the instant case the 1988 suit did not stop time from running for purposes of Limitation in favour of the Plaintiff. It is my considered view that even the impugned judgement which was delivered on 7/5/96 and expired on 7/5/2008 did not stop time from running for purposes of adverse possession. Both the suit and the impugned judgement was not consequent or pursuant to any action by the Defendant asserting owners interest in the suit land. In any event that judgment lapsed by operation of law.

36. For that reason, the Plaintiff's claim for adverse possession succeeds as prayed.

37. Each party to bear their own costs.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31<sup>ST</sup> DAY OF MAY 2018.**

**J G KEMEI**

**JUDGE**