



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 317 OF 2009 (O.S)

JAMES KAREGI KIRATHE.....PLAINTIFF

-VERSUS-

JOSEPH KAMAU TORO.....1ST DEFENDANT

TORO & TEAM LIMITED.....2ND DEFENDANT

JUDGEMENT

1. The plaintiff commenced this suit vide his originating summons dated 10th September 2009. He later amended the summons on 17th April 2015. In the amended summons, the following reliefs are sought:

1. Whether the plaintiff is entitled to be registered as owner of all that piece of parcel of land occupied by the plaintiff known as Plot No. Sub Division 3733/Section 1/Mainland North (Title No. Cr 17929) by virtue of adverse possession.

1A. Whether the plaintiff is entitled to be registered as owner of all that piece of land occupied by the plaintiff known as Plot No. Sub Division 3733/Section 1/Mainland North (Title No. CR 17929) by virtue of being a purchaser for value and interest.

2. Whether the 1st Defendant's title or right to all that piece or parcel of land known as Plot No. Sub Division 3733/Section 1/Mainland North (Title No. Cr 17929) and his claim to the same was extinguished and barred by virtue of section 17 of the Limitation of Actions Act.

3. Whether the transfer of all that piece or parcel of land known as Plot No. Sub Division 3733/ Section 1/Mainland North (Title No. Cr 17929) by the 1st defendant to the 2nd defendant was a sham, fraudulent and was merely intended to defeat the plaintiff right to an order of adverse possession and therefore invalid.

4. Whether at the time of transfer of all that piece or parcel of land known as Plot No. Sub Division 3733/Section 1/Mainland North (Title No. Cr 17929) by the 1st defendant to the 2nd defendant was effected the plaintiff's right to the property by adverse possession had accrued.

4A .Whether at the time of transfer of all that

Parcel or piece of land known as Plot No. Sub Division 3733/Section 1/Mainland North (Title No. Cr 17929) by the 1st defendant to the 2nd defendant was effected the plaintiff was the owner and/or Sole Proprietor of the property by virtue of having purchased the same from the 1st defendant and therefore the transfer was null and void calculated to defeat the plaintiff's proprietary rights.

5. Whether the transfer of all that parcel or piece of land known as Plot No. Sub Division 3733/Section 1/Mainland North (Title No. Cr 17929) cannot be registered in the name of the plaintiff by way of adverse possession and by the virtue of the fact that he purchased the same from the 1st defendant.

6. Who should bear the costs of this suit?

2. The summons was opposed by both the defendants via the replying and further replying affidavits of Jacob Andrew Toro. Mr Toro

deposed that the plaintiff is and was always a tenant and therefore cannot claim the property under adverse possession or purchase. That the claim herein is frivolous and vexatious.

3. Once the pleadings closed, parties proceeded to adduce evidence. The plaintiff called two witnesses while the two defendants called one witness. The plaintiff testified as PW 1 and called her daughter as the second witness.

4. The plaintiff opened his evidence by stating that at all material times he was an employee of ALICO currently staying at Nyali Umoja estate – Mombasa. PW 1 testified that he came to work in Mombasa in 1987 and he was to take over the residence of their executive director Joseph Kamau by way of purchase. That he was given a loan of Kshs 508809 in 1997 and part of this money being Kshs 301814= was paid out to Joseph Toro towards purchase of the suit house. He denied paying monthly rent of Kshs 5000= per month for the suit premises.

5. PW 1 continued that he entered the suit house on the understanding that the house belonged to him. That beside the Kshs 379814, he has never paid the 1st defendant any other money and that the 1st defendant has never returned to reclaim the house. PW 1 stated further that he carried improvements & general repairs in the house between 1987 – 2007 at a cost of Ksh 1,811,000=. That he was not stopped from doing these improvements. PW 1 testified that the 1st defendant's son came to Mombasa in February 2009 and they welcomed him. This son asked for Kshs 400,000 from the plaintiff but he was not given. Instead his daughter (PW 2) assisted him (1st defendant's son) with Kshs 5000. That this is when the drama started as a notice of distress for rent was issued stating rent outstanding at Kshs 360,000= being demanded. That the Auctioneers were instructed by Andrew Toro.

6. PW 1 denied being given rent receipts for the period January – December 2003 while reacting to documents in the 1st defendant's list. He could also not confirm that he issued the two cheques dated 9.4.1989 and 16.4.09. PW 1 also disowned the signatures on the complimentary slips marked as *JAT 5, 9, 11 & 12*. That he registered a caveat in 2007 when he realised a lot was happening. That he did not have the property transferred to him because it was charged to HFCK by the 1st defendant. He asked the Court to assist him get possession.

7. In cross – examination, PW 1 stated that as at 2009, the property was already transferred to Toro T. Limited. When he came to Mombasa, Joseph Toro welcomed him to the suit house and it was a complete house. The sale was vide oral agreement. That Pex 1, a letter dated 26.2.1988 does not say payment is for buying the house. When he entered the house, he knew it was on mortgage and J. Toro was servicing the loan.

8. In cross – examination by 2nd defendant, he said he took over the agency of Mr. Toro. He did not know that the money was to be paid to HFCK to offset the loan. He said the handwriting on the complementary slips looked like his but they may have been doctored. He had not seen them before. In re – examination, PW 1 said they had no tenancy agreement. That he had not been shown any loan. At page 5, of his statement, Mr Toro asked for rent several times. He admitted issuing the cheques but they were not in respect of rent. That the notice to vacate dated 30.11.1989 was issued because the company delayed in paying the 1st defendant. He was directed to where Mr Toro lived and he went there upon arrival in Mombasa. He came to Court because of the proclamation documents demanding rent. That from 1987 – 2009, it didn't occur to him that he was a tenant that could be distressed. He maintained that he acquired the house through purchase.

9. Loice Wanjiku Kirathe testified as PW 2. She is the daughter of the plaintiff. She joined her father in Mombasa at the suit house after she finished school. In June 2009, they received a visitor who was introduced as a friend of his father and he wanted to buy a policy. Later PW 1 asked him to send the friend Kshs 5000= via mpesa as that guest was stranded and that he would refund the money. After 2 days someone dropped to them a receipt for payment of house rent. In July 2009, they received a proclamation for distress for rent. That she never saw anyone demanding for rent previously. That when she got in the house in 1987, she was young and would not know whether his father was paying rent. She wondered why the rent was only Kshs 5000=.

10. In cross – examination by 2nd defendant, PW 2 said her father informed her of securing the house through mortgage. That concerning the cheques issued by her father, she was told PW 1 had to make payments awaiting funds from ALICO. That PW 1 never made payments directly to HFCK. In re – examination, PW 2 said she has not been shown any evidence that her father was paying rent. This marked the close of plaintiff's case.

11. Dr Jacob Andrew Toro gave evidence for the 1st defendant. His evidence was adopted by the 2nd defendant. The following is what he had to say about the plaintiff's case. He is the son of the 1st defendant, administrator of his estate and a director of the 2nd defendant. Dr Toro adopted the witness statement of his late father dated 11.9.2012 together with the documents filed as his evidence. He showed the Court the original title deed and produced a copy of it as Dex 2. DW 1 stated that the plot is developed with a 3 bedroomed bungalow. That it was purchased through mortgage from HFCK in 1986.

12. It is the defendant's case that the plaintiff has been a tenant in the suit premises from December 1987 and there was never any purchase between him & the deceased. DW 1 stated that the plaintiff paid rent faithfully from 1987 – 2003 apart from the two occasions he issued the bounced cheques (on 16.4.1989 and 9.4.1989). The bounced cheques were produced in evidence as Dex 3 and copy of the letter replacing the bounced cheques as Dex 4. The witness also referred to a memorandum written to his father enclosing the cheque of Kshs 20,000 as rents for May – August 1989 which was marked as MFI – D.5. Further Dr Toro produced as Dex 6 copies of memos written by the plaintiff to the deceased apologising for late payment of rents and as Dex 7 a letter dated 30/11/1989 asking the plaintiff to vacate. The defence witness stated that the plaintiff was being issued with receipts and produced in evidence as Dex 11 copies of the receipts appearing at pages 16 – 28 of the documents.

13. According to Dr Toro, the monies paid by ALICO was for compensation of agency development fee to his father and not purchase of the house. DW 1 stated that his father faithfully serviced the mortgage and a discharge of charge was entered in the register on 4th June 2009. That in February 2009, the witness was sent to come and inspect the house and value it. The valuation was done and a report prepared (MFI D 13). That he informed the plaintiff of the rent arrears. That the plaintiff's daughter made a payment & via mpesa on 5.6.2009 (Dex 4). On 19.6.2009, the witness instructed auctioneers to levy distress for rent from 2004 (Dex 15). That the plaintiff still owes rent from 2004 to date. He urged the Court to dismiss the claim with costs, order him vacate the premises and pay all the rent arrears.

14. In cross – examination, Dr Toro stated that he had not produced the cheques which bounced in 1991 and or the tenancy agreement. That the letter dated 26.2.1988 stated that the money was for compensation to the 1st defendant but does not say it is for agency development fee. That the monthly rent was Kshs 5000 and receipts in page 16 – 27 were issued by his late father in the year 2003. He was aware of the improvements done on the property and which were done with the consent of his father. He does not know how much the improvements cost but there was always a perimeter wall. That the house was as it was then except the paint work. He denied the sum of Kshs 5000 paid to him was for his transport as he is a man of means. That as per the valuation report, the open market value of the property is Kshs 9 Million but as per the transfer form, the declared value is Kshs 500,000= . That Dex 7 was signed by 1st defendant inserting his initials which is different from his signature in full. In re – examination, DW 1 stated that the plaintiff has never demanded for the house because of the improvements he made.

15. DW 2 was No 235252 Inspector Vincent Chilongo who is a document examiner. He carried out examination of signatures on the two cheques and several complimentary slips on ALICO letterhead. He concluded the documents were made by the same person. He produced his report as Dex 17. In cross – examination, DW 2 stated that it was not important for them to obtain current signatures of the plaintiff before doing the examination. That the signatures on “**D**” & “**C**” were similar to those on documents marked “**I**” and “**J**”. This marked the close of the defendants’ case.

16. The parties filed written submissions which I have read and considered before writing this judgment. The following three questions arise for determination:

i) Whether the plaintiff purchased the suit property.

ii) Whether the plaintiff is entitled to the suit property under the doctrine of adverse possession.

iii) Who bears the costs of the suit?

17. There is no dispute that the plaintiff entered the house in December 1987. The question is did he take the occupation as a purchaser or as a tenant? The plaintiff pleaded that he entered as a purchaser and that he made payment through a loan obtained from their mutual employer ALICO in February 1988. According to the letter dated 26.2.1988 from Mr Fred Oweggi, the plaintiff was given Kshs 399,814.20 out of which Kshs 301814.20 was to be paid to Mr Joseph Toro (1st defendant) as compensation. That plaintiff also stated that he paid Kshs 78,186 separately for the furniture. That the 1st defendant was therefore paid the entire purchase price of Kshs 380,000= for the suit property.

18. Section 3 of the Law of Contract Act provides that for sale of immovable property, the agreement must be in writing, signed by the two parties and their signatures witnessed. Secondly there must be a consideration paid. In the instant case, the agreement was not in writing so there was nothing to be signed. The 1st defendant states that the money paid was for compensation or his development of the Agency. The question is if the sale was through an oral agreement, did the plaintiff prove the existence of such to controvert the 1st defendant’s position?

19. For an oral contract to be binding between two or more parties, there must be an offer which offer must be accepted (offer & acceptance). There must also be a consideration and the subject matter of the contract must not be illegal or violate public policy. The parties transacting must also be competent. Was there an offer made by the 1st defendant to the plaintiff? The plaintiff does not say he knew the 1st defendant (deceased) before coming to Mombasa. Instead he stated that the negotiations were made by his boss. That he agreed to come to Mombasa on condition that a house and a car was provided. He did not tell the Court whether a car was provided to him by ALICO. From his evidence, this Court does deduce that if any offer was made to the plaintiff, that offer was made by his employer ALICO and not the 1st defendant. Secondly there is no evidence presented to this Court that he accepted any offer from the defendant. It is not clear what the purchase price/consideration was. The money paid to the 1st defendant is referred to in the forwarding letter as compensation. To compensate is defined by the Concise Oxford dictionary as, “*to make amends for the loss or injury, to offset a disability or frustration by development in another direction. To provide something good as a balance against something bad or good.*”

20. Under section 107 and 108 of the Evidence Act, anyone who desires a Court to make a finding on the existence of certain facts is under an obligation to prove their existence. This burden rested upon the plaintiff. There was no member of his family or friends present when they were transacting with the 1st defendant. He did not call any of his colleagues to corroborate his evidence that the 1st defendant was not entitled to any compensation for the Agency and that the money paid was towards purchase of the suit plot. The agreement if any was also not in conformity with the provisions of section 3 of Cap 23. The plaintiff thus failed to discharge the burden.

21. I have looked at the plaintiff’s submissions on the sub heading of purchase and the findings in the case law of **Peter Mbiri Mchuki vs Samuel Michuki (2014) eKLR** which discusses the doctrine of adverse possession to be completely at variance with both the plaintiff’s pleadings and evidence. In summary, I find that there was no sale of the suit property to the plaintiff.

22. The second question, is whether the plaintiff is entitled to the suit property by way of adverse possession. There is no dispute that the plaintiff has been in possession of the suit premises for a period of over 12 years. Has the possession been adverse to the intended use the 1st defendant wanted to put the property to? The plaintiff denied that he was a tenant of the 1st defendant. The 1st defendant on his part produced a bundle of receipts issued in the year 2003 for rents received from the plaintiff. In a letter dated 26.4.1989, the plaintiff wrote to the 1st defendant confirming replacing the two cheque Nos. 371941 & 371942 with Kshs 10,000= which had been returned unpaid. These two cheques were replaced with cheque No 371947 enclosed in the letter dated 25.4.1989.

23. The plaintiff in his evidence stated that he was welcomed into the house by the 1st defendant (permission). There is evidence that he paid rents (the cheques and the receipts produced). The evidence presented to Court is that the plaintiff’s initial entry in the suit house though there is no tenancy agreement was on licence or permission of the 1st defendant. In the case of **Wambugu vs Njuguna (1983) KLR 173** it was held that the acts of dispossession must be inconsistent with the enjoyment of the owners of the soil for the purpose of which he intended

to use it. In the case of **Wanje & Others vs A. K Saikwa & Others (1984) eKLR** the Court of appeal held that a person who occupies another person's land with that other person's consent cannot be said to be in adverse possession because in reality he has not dispossessed the owner and the possession is not illegal (underline mine for emphasis). These two decisions have been repeatedly cited with approval in several recent decisions e.g. the case of **Alfeen Mehdi Mohammed vs Basil Feroz Mohamed & 223 others (2016) eKLR**.

24. The plaintiff has failed to prove when the consent of the 1st defendant allowing him to occupy the house was withdrawn as the defendant continued to demand rent and even allowed him to carry out improvements on the house. Consequently I am not satisfied that his occupation was adverse to the 1st defendant's title. No wonder in his oral testimony he did not adduce any evidence under this claim and only stuck with the evidence relating to the purchase. My finding is that the claim for adverse possession as pleaded in the plaint is not supported by evidence and must be dismissed.

25. What orders are commendable to be issued in the circumstances? This suit was filed when the plaintiff's goods were proclaimed to recover rent arrears. Having failed to prove his case, I find that the defendants are at liberty to recover the arrears of rent at Kshs 5000= from the year 2004 to date. The 1st defendant had not served notice to increase rent so the rent payable is the rate owing at the time of filing of the suit. The plaintiff did not plead special damages in terms of the costs of improvements done to the house thus the same cannot be awarded. I also find that the defendants are entitled to the costs of the suit. In conclusion, the amended originating summons dated 17th April 2015 is hereby dismissed with costs to the defendants.

Dated, signed & delivered at Mombasa this 20th September 2018

A. OMOLLO

JUDGE