



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 395 OF 2002

JOHN NJOROGI MUHUHA.....PLAINTIFF

VERSUS

JOSEPH NJUGUNA MWAURA.....DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit through a plaint dated 20th September 1990 seeking eviction orders against the defendant. The plaintiff contends that he is the registered owner of **Land Title Number Loc 16/Gatura/383** (hereinafter referred to as the **suit property**) on which the defendant has erected temporary structures. It is the plaintiff's case that despite demand and notice of intention to sue, the defendant has persistently refused to vacate the suit property. The plaintiff seeks the following orders:-

- a) That the defendant, members of his family and agents, be evicted from the suit property;*
- b) Costs of this suit;*
- c) Interest thereon at court rates; and*
- d) Any other alternative relief the court may deem fit to grant.*

2. The defendant filed his defence on 26th September 1990 and amended it on 1st March 2000 to include a counterclaim. The defendant contends that the plaintiff's title to the suit property was extinguished on 5th August 1966 when the plaintiff's father sold the suit property to the defendant's father. He states that the plaintiff who is aware of the sale transaction is estopped from claiming any rights in the suit property. The defendant pleads that the plaintiff fraudulently transferred the suit property into his name and has no right to evict him from the suit property.

3. In his counterclaim, the defendant reiterates that the plaintiff's title was acquired fraudulently and was therefore null and void. In the alternative, the defendant pleads that he has been in exclusive possession of the suit property for more than 24 years preceding the institution of this suit and is therefore entitled to the suit property under the doctrine of adverse possession. The defendant seeks the following verbatim orders in his counterclaim:-

- a) A declaration that the purported transfer and or registration of the suit property in the plaintiff's name was illegal, null and void.*
- b) A declaration that the defendant is the lawful owner of the suit property.*
- c) An order requiring the land registrar, Thika, to rectify the register by cancelling the plaintiff's name from the records in respect to the suit property and substitute it with the defendant's name.*
- d) Costs of the suit together with interest at court rates.*
- e) Any other relief the court may deem fit to grant.*

Plaintiff's Evidence

4. At the hearing, the plaintiff testified as PWI. He adopted his witness statement filed on 1st April 2015 as his sworn evidence in chief. He

produced the title deed as PExh. 1. The plaintiff stated that the suit property was given to him by his late father during his lifetime and he subsequently acquired title to it. He denied that the defendant's father bought the suit property from his late father and contended that his title was not tainted with fraud. He denied receiving any money from the defendant as balance of the purchase price and averred that Kshs 3000 received from the defendant was on account of trees sold to the defendant. The plaintiff contended that the defendant's assertion that he had been in long, exclusive and uninterrupted occupation and possession of the suit property was false, stating that there had been litigation over the suit property.

5. In cross examination, PW1 denied knowledge that his father sold the suit property to the defendant. He further denied having had a meeting with the defendant on 7th November 1982. He stated that he took the dispute before the elders who required him to append his signature to minutes of 18th May 1990 which ordered him to transfer the suit property to the defendant. PW1 could not tell when the defendant entered the suit property. He denied demanding an additional Kshs 300,000/- from the defendant. He informed the court that he became the registered owner in 1982 and that his father died in 1969.

6. In re-examination, PW1 admitted that he attended the meeting of 7th November 1982. He contended that his father gave him the suit property in 1963 and that he acquired title to the suit property in 1982. He denied knowledge that his father had sold the suit property to the defendant's father. He averred that he did not carry out succession proceedings in respect of his deceased father's estate.

Defendant's Evidence

7. The defendant (DW1) adopted his witness statement dated 28th November 2011. He stated that he had been residing in the suit property for 51 years. His seven children the eldest and youngest being 46 and 29 years respectively, were born and are reside in the suit property. He averred that the plaintiff's title was extinguished on 6th August 1964 and not 5th August 1966 as indicated in his witness statement.

8. DW1 clarified that paragraphs 4, 5 and 6 of his witness statement referred to a different parcel of land and not the suit property. He made reference to an agreement for sale in his bundle of documents and contended that it indicated that the plaintiff's father sold the suit property to his father. He stated that the balance of the purchase price was paid to the plaintiff after his father's demise. DW1 averred that the plaintiff fraudulently impersonated his father and caused the property to be transferred into his name without carrying out succession. He produced documents numbered 3-18 in his bundle of documents as Defendant Exhibits 1 to 15.

9. During cross examination DW1 stated that his father bought the suit property from the plaintiff's father. He averred that the agreement at page 7 of his bundle of documents was an acknowledgement of this fact by the plaintiff. The evidence of DW1 was that in 1982, the plaintiff demanded an additional consideration of Kshs 1500. He stated that the plaintiff effected the fraudulent transfer in 1982. DW1 confirmed the plaintiff's attendance during a meeting convened by elders on 7th November 1982.

10. In re-examination, DW1 stated that the documents at pages 7, 9, 11, 12 and 13 of his bundle of documents were evidence that the plaintiff's father sold the suit property to his late father.

Plaintiff's Submissions

11. At the close of evidence, parties were directed to file and exchange written submissions. The plaintiff in submissions dated 22nd March 2018 argued that there was no sale agreement between his father and the defendant's father and that the agreements in the defendant's bundle of documents referred to persons who were not parties to this suit with no description of the property which was being sold. It was the plaintiff's submission that there is no evidence that his father received any money from the defendant's father for the sale of the suit property.

12. Counsel for the plaintiff submitted that a will in the defendant's list of documents did not name the defendant as a beneficiary and that the suit property was not listed as part of the defendant's deceased father's estate. The plaintiff submitted that the defendant's father never filed a suit to challenge his title or enforce his rights as a purchaser.

13. He argued that time began to run in favour of the defendant in 1982 for purposes of adverse possession and stopped running in 1990 when he filed this suit. The plaintiff relied on Section 38(1) of the Limitation of Actions Act and the case of Francis **Gitonga Macharia vs. Muiruri Waithaka NRB CA No. 110 of 1997** cited in **Nahashon Muriithi Jeremiah v Nelson Mwangi Kingoro Kerugoya ELC No. 818 of 2013(OS)** for the proposition that time for purposes of adverse possession began to run after registration of the property in his name in 1982 and lapsed in 1990 when he filed this suit.

14. The plaintiff argued that he asserted his ownership by filing this suit in 1990 before the lapse of the period of 12 years. He relied on the case of **Titus Kigato Munyi v Peter Mburu Kimani Kerugoya ELC suit No. 63 of 2013** and Section 38 of the Limitation of Actions Act and Order 36(3)(D) of the Civil Procedure Rules to argue that the counterclaim was fatally defective. Lastly, it was submitted that the defendant who claimed that the suit property was bought from his late father failed to join his deceased father's estate rendering the suit defective for non-joinder.

Defendant's Submissions

15. In response, the defendant filed submissions dated 23rd February 2018 in which he argued that the purported transfer of the suit property by the plaintiff to himself was fraudulent, null and void and acquired contrary to his overriding interest. The defendant contended that his father placed a caution on the suit property on 21st May 1968 to protect his interest.

16. While stating that the plaintiff's father died after selling the property to the defendant's father, counsel submitted that the plaintiff did not take out letters of administration and was not the administrator of his late father's estate. It was submitted that no confirmed grant had been produced to show how the plaintiff transferred the suit property to his name and argued that the transfer was procured fraudulently. The

defendant submitted that the plaintiff misrepresented himself as his father, Paul Njoroge Muhaha, who was then deceased and that the transfer constituted intermeddling with the plaintiff's father's estate. Counsel questioned the credibility of the plaintiff's testimony which he argued was contradictory.

17. In further submissions, the defendant contended that at the time of institution of this suit, he had been in continuous occupation of the suit property for more than 12 years. The defendant stated that he was given the suit property as a gift by his late father upon purchase on 5th August 1966 and had been in possession since then and had put up permanent houses. The defendant relied on Section 7 of the Limitation of Actions Act and the case of **Chevron (K) Ltd vs. Harrison Charo Wa Shutu (2016) eKLR** in which the court stated that a proprietor's title becomes extinguished by operation of law at the expiry of 12 years. Reliance was also placed on Section 38 of the Limitation of Actions Act and it was submitted that the plaintiff was time-barred from claiming ownership of the suit property.

18. The court was also referred to the decision in **Gulam Mariam Noordin vs. Julius Charo Karisa, Malindi CA No. 26 of 2015** for the proposition that the court had powers to make appropriate orders flowing from a finding that the respondent's occupation was adverse to that of the appellant whose title had been extinguished. The defendant who stated that he had been in occupation for more than 24 years when the eviction suit was filed against him relied on the case of **Kahindi Ngala Mwangandi vs. Mtana Lewa(2014)eKLR** and **Chevron's case(supra)** for the submission that 24 years was a long time to disentitle the plaintiff from disturbing his legal entitlement to enjoy the suit property together with his family.

19. Lastly, the defendant cited Section 26 of the Civil procedure Rules and the cases of **R v Rosemary Wairimu Munene ex parte Ihururu Daily Farmers' Cooperative Society Ltd JR No. 6 of 2014** cited in **Cecil Karuru Ngayu vs. Barclays Bank of Kenya & another (2016)eKLR** and **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & others(2014)eKLR** and argued that the plaintiff should bear the costs of this suit for wasting judicial time and occasioning him prejudice.

Determination

20. I have considered the plaint, defence and counterclaim. I have also considered the parties' respective evidence and submissions. Similarly, I have considered the relevant legal framework and applicable jurisprudence on the key questions in this suit.

21. It is common ground that the suit property is registered in the plaintiff's name. The plaintiff procured registration in his name on 8/9/1982. The plaintiff's title has been challenged by the defendant who contends that the title was obtained fraudulently. It is not contested that the suit property was previously registered in the name of the plaintiff's father, Njoroge P Muhaha on 11/1/1963. It is also not contested that the defendant has been and is in possession of the suit property. What is contested are the parties' respective claims of title to the suit property. Two key issues fall for determination in this suit. The first issue is whether the plaintiff holds a valid title to the suit property. The second issue is whether the defendant has acquired title to the suit property under the doctrine of adverse possession. I will deal with the two issues in the order in which they are itemized

22. The suit property was on 11/1/63 registered in the name of Njoroge P Muhaha under the Registered Land Act (now repealed). From the evidence presented before this court, the said Njoroge P Muhaha was the plaintiff's father who died in 1969. Subsequently, in 1982, without undertaking succession, the plaintiff, purporting to be also known as Njoroge P Muhaha caused the suit property to be registered in his name. There is no evidence that the plaintiff carried out succession prior to the registration of the suit property in his name. The plaintiff confirmed in his oral evidence that his father died in 1969. Similarly, he confirmed that he did not carry out succession when he obtained registration of the suit property in his name.

23. Secondly, more than twice in his oral testimony in court, the plaintiff was categorical that he did not know when the defendant entered the suit property. He also confirmed that Njoroge P Muhaha is his late father who died in 1969. He further stated that he did not know if his late father sold the suit property to the defendant's father in 1963.

24. The defendant's case and evidence is that the suit property was sold to his late father by the plaintiff's father in 1963 and possession was given to the purchaser who gave him the suit property as a gift in 1966. The Defendant has resided in the suit property since 1966. Subsequent to the demise of both litigants' fathers, the plaintiff sought and was given additional monies by the defendant. At the behest of the plaintiff elders adjudicated over the dispute and determined that the suit property belonged to the defendant.

25. Two significant disclosures are evident from the evidence placed before this court. The first disclosure is that the title held by the plaintiff was not procedurally obtained. It was obtained in 1982 long after the death of Njoroge P Muhaha and it was procured without any succession proceedings. The second significant disclosure is that the defendant has had uninterrupted possession and occupation of the suit property for 51 years that preceded the hearing of this suit in November 2017. He has developed the property and raised his family there. When the present suit was initiated against the defendant 1990, the defendant had had exclusive and uninterrupted possession and occupation of the suit property for 27 years. As of today, the defendant has had possession and occupation of the suit property for 52 years.

26. In light of the above, it follows that the title held by the plaintiff is not a valid protected title. It is a document that was obtained fraudulently without succession proceedings. Secondly, the defendant having had uninterrupted possession of the suit property since 1966, he has acquired title to the suit property under the doctrine of adverse possession. His adverse title to the suit property crystallized in 1978 upon expiry of 12 years.

27. In his counterclaim, the defendant prayed for an order directing the Land Registrar to strike out the plaintiff's name and substitute it with the defendant's name. In my view, the first limb of that plea would lie because the court has made a finding that registration of the suit property in the name of the plaintiff was procured unprocedurally and or fraudulently. I will however not order entry of the defendant's name in the register because the framework on registration pursuant to the doctrine of adverse possession is set out under Section 38 of the Limitation of Actions Act. There is no good reason why that framework cannot be utilized by the defendant. The court having found that the defendant has acquired title to the suit property under the doctrine of adverse possession, it is upon the defendant to take out an originating summons for an appropriate order under Section 38 of the Limitations of Actions Act.

Disposal Orders

28. In light of the above findings, I make the following disposal orders:

a) The plaintiff's suit herein is dismissed for lack of merit

b) The defendant's counterclaim against the plaintiff is allowed in the following terms:

i. It is declared that the transfer and/or registration of Land Title Number Loc. 16/Gatura/383 in the name of the plaintiff, John Njoroge Muhuha, is illegal, null and void.

ii. The Land Registrar, Thika, is hereby directed to rectify the register by cancelling the name of John Njoroge Muhuha from the register of the said land Title Number Loc.16/Gatura/383.

iii. It is declared that Joseph Njuguna Mwaura is the beneficial owner of the suit property, Title Number Loc. 16 Gatura/383 having acquired title thereto in 1978 under the doctrine of adverse possession

iv. The plaintiff shall bear costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 2018.

B M EBOSO

JUDGE

In the presence of:-

John Njoroge Muhuha present in person

June Nafula - Court Clerk