



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. CASE NO. 2754 OF 1995(O.S.)**

**ANTHONY KAMAU MWANGI (Suing as the Personal Representative of the**

**Estate of the late Onesmus Mwangi Kamau).....PLAINTIFF**

**VERSUS**

**MWAURA NUMI.....DEFENDANT**

**JUDGEMENT**

1. In the Amended Originating Summons filed in court on 10/11/2003 which amended the Originating Summons filed in 1995, the Plaintiff sought that the Defendant do transfer L.R. No. Kiambaa/Kanunga/585 (“the Suit Property”) to the Plaintiff failing which the Deputy Registrar of the Court is to be authorised to sign all the necessary documents and acts towards transferring this parcel of land to the Plaintiff. A further order is sought to have the Defendant apply for Land Control Board consent for purposes of effecting the said transfer.

2. In the alternative, the Plaintiff seeks to have the court declare that he acquired interest over the Suit Property and that the Defendant’s interest over the land has been extinguished by adverse possession for a period of over 12 years preceding the institution of this suit. The Defendant denied the Plaintiff’s claim in the Amended Replying Affidavit sworn by Mwaura Numi on 17/12/2003. He denied that the sale of the Suit Property took place.

3. This case unfortunately took inordinately long to be heard and concluded as a result of which both the Plaintiff and the Defendant died as well as Mohamed Noor, a crucial witness in the case. Onesmus Mwangi Kamau, the original Plaintiff in the suit, gave evidence on 4/11/2004 when this case was heard by Ojwang J. Both the Plaintiff and Defendant were substituted in the suit by their son and wife respectively as administrators of their estates.

4. The Plaintiff’s testimony was that the Suit Property was bought by Early African Builders and Repairs which was a partnership in which he was a partner in 1980. He joined Early African Builders and Repairs in 1974. He produced a copy of the certificate of registration showing that this business name was registered on 24/7/1969. He stated that when Early African Builders and Repairs was dissolved in 1981, it was decided that he would be allocated the Suit Property. He produced a copy of the letter dated 26/1/1981 on the notepaper of Early African Builders and Repairs.

5. The letter stated that the board of directors, Mr. Mohamed Noor and Mr. Ebrahim Mwangi met together with Mr. Onesmus Mwangi who was a shareholder on 26/1/1981 and they decided that Mr. O. Mwangi would possess the parcel of land at Kiambaa/Kanunga/585 measuring 0.08 ha which the company purchased from Mr. Mwaura Numi (seller) through instalments in 1974/75. The letter further stated that the title deed number over Kiambaa/Kanunga/585 which Mr. Mwaura handed over to Early African Builders and Repairs after receiving his final balance of Kshs. 11,000/= in settlement of the agreed amount of Kshs. 65,000/=, was passed over to Mr. O. Mwangi to pursue the transfer of the land from the ownership of Mr. Mwaura Numi who had agreed to transfer as indicated in the agreement.

6. The letter authorised Mr. O. Mwangi to make use of the piece of land while awaiting transfer. The letter was signed by both a representative of Early African Builders and Repairs on 26/1/1981 and Mr. Onesmus Mwangi. It was witnessed by Mr. Peter K. Mugo on 26/1/1981. The letter indicated that a copy was sent to Mr. Mwaura Numi for information.

7. He had also produced a copy of the sale agreement bearing the names of Mwaura Numi ID No. 92942 as the seller and Early African Builders and Repairs as the buyer. The agreement dated 9/9/1980 stated that Mr. Mwaura Numi confirmed that he had sold the suit plot to Early African Builders and Repairs and that they had paid him cash in the amount of Kshs. 11,000/= and that he in turn had handed over to them the land certificate and was waiting to transfer the certificate to them. Mwaura Numi signed the agreement and a representative of Early African Builders and Repairs signed on its part. The Plaintiff maintained that the firm entered into an agreement with the Defendant on 9/9/1980 for the purchase of the suit plot at the price of Kshs. 76,000/= out of which the firm paid 65,000/=.

8. It was his evidence that he took possession of the suit plot in 1980 and embarked on various farming activities on it including growing of

perennial crops such as lucerne and bananas as he waited for the Defendant to obtain land control board consent and effect a transfer to him in accordance with the firm's resolution. He stated that the Defendant failed to apply for the land consent or to transfer the land to him.

9. The Defendant's legal representative, Esther Wangui Mwaura gave evidence for the defence. She stated that her late husband confirmed to her that he never entered into any sale agreement with the Plaintiff or any other person at the consideration of Kshs. 76,000/= or other sum and that the alleged agreement was a forgery. Her late husband had denied receiving the sum of Kshs. 11,000/=. He had admitted receiving a friendly loan of Kshs. 7,000/= from one Mr. Mohamed Noor and offered the title deed for the Suit Property as security for the loan which was never witnessed in writing. The defence urged that the Defendant later agreed with Mr. Noor that he would cultivate the Suit Property for seven years to recover his money and that Mr. Noor allowed the Plaintiff to cultivate the land on his behalf. Upon expiry of the 7 years, the Defendant claimed that the Plaintiff undertook to lease the land under his name directly but failed to pay the annual fee which prompted the Defendant to stop him from cultivating the land.

10. When the Plaintiff refused to vacate the land and started claiming ownership, the Defendant lodged a complaint with the elders. The Defendant averred that the clan elders unanimously resolved that the Plaintiff was to vacate the suit plot. It was her evidence that in 2002 the Defendant allowed his son to develop the suit plot and when he commenced the process of construction, the Plaintiff hired goons who demolished the structure the Defendant had put up and brought charges in **Kiambu CRMC Criminal Case No. 213 of 2002** of which she claimed they were acquitted. The Defendant denied that the Plaintiff had been in occupation of the suit plot for 12 years and urged the court to dismiss the suit.

11. The issue for determination is whether the court ought to grant the orders sought in the Amended Originating Summons. Mohamed Noor prepared a witness statement dated 7/5/2014 filed in court on 14/5/2014. When he attended court on 17/6/2014, the Judge hearing the matter could not make out what the witness was saying. The court directed that a witness statement was to be filed. His witness statement was filed in court. During the hearing of the case in 2018 the court was informed that he had sadly passed on. The court notes that the defence had a problem with his witness statement and will not therefore place much reliance on it.

12. The Defendant produced a copy of search done on the Suit Property on 13/6/1995 which showed that Mwaura Numi was registered as the owner of the suit land on 4/2/1974. Esther Wangui Mwaura lodged a caution against this parcel of land on 10/2/1995 claiming to be a licensee. In the course of the hearing, Esther Wangui Mwaura confirmed that the title over the Suit Property had been with Mohamed Noor and that she only learnt that it was not with Mohamed when they found the title in court.

13. The court has considered the evidence adduced. Weighing the evidence of the Plaintiff against that of the Defendant, the court is inclined to agree with the Plaintiff that indeed Mwaura Numi entered into an agreement with Early African Builders and Repairs way back in the 70s. This is supported by the documents produced by the Plaintiff dated 26/1/81 and the agreement dated 9/9/80 one of which is on the notepaper of Early African Builders and Repairs. The letter stated that the suit plot which was bought from Mwaura Numi had been allocated to Mr. Onesmus Mwangi and he was to take possession as he waited for Mwaura Numi to transfer the land to him.

14. The defence did not tender any evidence to support the averment that the title deed over the Suit Property was given to Muhamed Noor as security for a loan of Kshs. 7,000/= and that he was to cultivate the land for 7 years. It was not clear when the seven years started running and why the Defendant did not take possession of the land after the 7 years lapsed if at all that was the agreement between the Defendant's late husband and Muhamed Noor. The Defendant did not explain why her late husband did not get Muhamed Noor to return the title deed over the Suit Property to him after the lapse of the 7 years.

15. The court prefers the evidence of the Plaintiff who stated that Mwaura Numi gave the title deed to Early African Builders and Repairs when he sold the plot to this entity.

16. Parties filed submissions which the court has considered. On possession, the court is convinced that the Plaintiff took possession of the suit land in 1980 and cultivated it until 2002 when there was an altercation between the Plaintiff and the Defendant at the time when the Defendant's son attempted to take possession of the Suit Property. This resulted in the Defendant among other persons being charged in **Kiambu Criminal Case No. 213 of 2002**. The Plaintiff was therefore in possession of the suit land for more than 12 years.

17. On a balance of probabilities, the court finds that the Plaintiff has proved his case and grants an order that the Defendant is to transfer the Suit Property to the Plaintiff within 45 days failing which the Deputy Registrar of this court is authorised to sign the necessary documents to effect the transfer of the Suit Property to the Plaintiff.

18. The Defendant is to obtain the consent from the Land Control Board to facilitate the transfer of the Suit Property to the Plaintiff. The Plaintiff will have the costs of the suit.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of October 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Ms. Nyakio holding brief for Mr. Kamau Mwangi for the Plaintiff

Mr. Bosek holding brief for Mr. Nyachoti for the Defendant

