



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO 234 OF 2017(OS)

BENSON MWANGI CHERERE.....PLAINTIFF

VS

CHARLES FRANCIS KIMINDIRI WANDARWA.....DEFENDANT

JUDGMENT

1. This suit was commenced by way of originating summons through which the applicant (referred to as the Plaintiff) sought orders to be declared to have acquired land parcel No LOC 7/GAKOIGO/975 (I shall referred to it throughout the judgment as the suit land) by adverse possession. In the alternative he pleaded for damages for breach of contract calculated at present costs since 2001 plus interest and costs.

2. The originating summons are supported by his supporting affidavit sworn on the 19/6/14.

3. The Plaintiff's case is stated as thus; on the 18/6/2001 the Plaintiff and the Defendant entered into an agreement for sale in respect to the suit land at the price of Kshs 140,000/- upon which he was put in possession in the same year. He has occupied the suit land since then todate, farming openly, continuously and uninterrupted. At the time of entering into the agreement for sale, the suit land was registered in the name of the Defendant's father Benedict Wandurwa Muna, then deceased. The suit land was the share of the Defendants land in the estate of his late father. The Plaintiff avers that he has developed the land by putting up the fence, planted 40 eucalyptus trees, 40 grown mangoes, 40 oranges and 16 passion trees. In 2013 vide Succ Cause No 173 of 2010 the Defendant succeeded his father and was declared the beneficial owner of the suit land as shown on the certificate of confirmation of a grant issued on the 8/5/13. The Plaintiff claims that upon the successful administration of the Defendants father, the Defendant ignored, refused or neglected his plea to have the suit land transferred to him.

4. The application was initially opposed by the Respondent (referred to thereafter as Defendant) via a Replying affidavit sworn on the 4/7/17. In it he averred that the registered owner of the suit land died in 1992 and thus he was not the administrator of the estate and therefore the agreement for sale is null and void ab initio. That the alleged occupation of the suit land by the Plaintiff is illegal on account of intermeddling of the deceased estate. that he had no capacity to enter into the agreement of sale. He disclosed that the suit lands is registered in the name of one Stephen Muraya Kamuri who is registered as owner as at the 26/6/14.

5. On the 17/7/18 directions were taken where the Parties agreed by consent that the facts as stated in the supporting affidavit of the Plaintiff are admitted and that the only issue they urged the Court to determine is the question of law as to whether the possession and occupation of the Plaintiff is adverse to the interests of the registered owner. Equally the facts in the Replying affidavit of the Defendant were admitted leaving the question as to whether the occupation of the Plaintiff of the suit land is lawful. That is the key question before this Court for determination.

6. I have examined the matter alongside the parties written submissions which I have read and considered.

7. The Originating summons as filed as in my considered view fatally defective. Order 37 rule 7 provides as follows;

“(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.

(2)The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

The Plaintiff failed to attach a certified copy of the title to the suit land. The above requirement is mandatory in default of which the summons are rendered incompetent.

8. So much so that if the Plaintiff had complied with the above provision he ought to have known that the suit land is registered in the name of Stephen Muraya Kamuri. The suit was filed on the 19/7/2014 after the third party became registered owner of the land. Even if the Court were to go into the merits of the case and decide in favour of the Plaintiff the likelihood of giving orders that will negatively impact the rights

of the third party is high.

9. In the end the Court finds that this suit is incompetent and is struck out with costs to the Defendant.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 15TH DAY OF NOVEMBER, 2018.

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of:

Kimwere for the Plaintiff

Mwangi Ben HB for Mwaniki Warima for the Defendant

Irene and Njeri, Court Assistants