



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 379 of 2017(O.S)

(FORMELY NAIROBI ELC CASE NO. 68 OF 1996 (O.S)

DOMINIC NGUGI WAITHIRU.....PLAINTIFF

VERSUS

MILKA WANJIRU MUIGAI.....1ST DEFENDANT

VERONICA WANJIRU MUIGAI.....2ND DEFENDANT

JUDGMENT

1. By an originating summons dated 8th January, 1996, and filed on 12th January, 1996, the Plaintiff namely **DOMINIC NGUGI WAITHIRU** (hereinafter referred to only as P.W.1) through **MWICIGI KINUTHIA** and Company Advocates, has sued the defendants, **MILKA WANJIRU MUIGAI** and **VERONICA WANJIRU MUIGAI** for determination of the following issues:-

- a) Whether or not the Plaintiff has become entitled to 0.35 Acres by Adverse possession in L.R . Githunguri/ Kanjai/1163. (the suit property)*
- b) Whether or not the defendant's title to the said 0.35 Acres has become extinguished in favour of the Plaintiff under Sections 37 and 38 of the Limitation of Actions Act.*
- c) Whether the defendants should transfer to the Plaintiff the 0.35 Acres in the suit property forthwith.*
- d) Costs.*

2. The Originating Summons is anchored on the Plaintiff's Affidavit sworn on **8th January 1996** and a certificate of Official Search dated the 8th day of December, **1995 marked "A"** as well as a drawing **marked "B"** in respect of the suit property. Briefly, the Plaintiff's claim is that prior to the registration of the suit property in the name of the defendant in **May, 1971**, P.W.1 bought **0.35 acres** of the suit property from **DAVID MUIGAI KAMAU (Deceased)** who was husband of the defendants at **Kshs. 7,000/=**. The deceased demarcated the **0.35 acres** with a live fence and placed P.W.1 thereon. That P.W.1 has since planted nappier grass, dug a borehole and even buried the remains of his first wife, **JACINTA WAMBUI NGUGI** on the portion of the property.

3. It is further claimed by P.W.1 that the transaction between P.W.1 and the deceased did not receive consent of Githunguri Land Control Board within the prescribed period of time or at all. To that end, the transaction became void hence P.W.1 claimed that the defendants hold the **0.35 acres** in trust for him under sections **37 and 38** of the Limitation of Actions Act (**Cap 22 Laws of Kenya**)

4. In their statement of defence dated **3rd January, 1997**, the defendants denied the claim by P.W.1 and the jurisdiction of the Court. They termed the suit vexatious, mischievous, a duplex and bad in law since it was seeking similar reliefs in Nairobi **HCC. No. 68 of 1996** which was pending hearing and determination.

5. The defendants were duly served on various dates including **2nd March, 2012, 26th January, 2017** and **23rd October, 2018** as revealed in affidavits of service sworn on **18th April 2012, 3rd February, 2012** and **23rd October, 2018** respectively. The defendants who are represented by Wakahu Mbugua & Company advocates further to Notice of change of advocates dated **6th November, 2018** and formerly by Otieno Okoyo & Company advocates, failed to attend court hence hearing proceeded notwithstanding their absence.

6. I note that on **29th January, 2009**, Kihara Kariuki J (*as the he was*) made reference to **Nairobi HCCC. No. 67 of 1995**, among other suits, following submissions by Counsel on alleged multiplicity of suits. The file referred to is attached to this file. I perused it and discovered that P.W.1 was the Plaintiff therein. The reliefs sought in that suit against Njoka & Kariuki (Kenya) Ltd and Public Trustee (the defendants) included a restraint order in respect of business premises known as butchery on **L.R No. 209/389**. That suit was marked as withdrawn with costs on **11th January 1995**.

7. During hearing of the suit, P.W.1 and **PAUL MBURU KANGI** (P.W.2) as well as **MARGARET WAIRIMU NDIRANGU** (PW.3) adduced evidence. P.W.1 relied on his statement dated **3rd October, 2018** and filed on **5th March, 2012**. He also relied on his lists of documents dated **24th April 2006, 26th May, 2010** and **10th June, 2008** (**P Exhibits A. 1 to 3, P Exhibits B.1 to 4** and **P Exhibits C.1 to 3** respectively).

8. After the hearing, the court permitted **Mr. MWICIGI KINUTHIA** learned counsel for **P.W.1** to make brief Oral Submissions. Counsel submitted that P.W.1 has been in occupation of the suit property for more than 12 years. He relied on the evidence of **P.W.1, P.W.2** and **P.W.3** and urged the Court to enter Judgement with regard to adverse possession for **P.W.1** against the defendants.

9. I have considered the entire Pleadings, testimonies of **P.W.1, P.W.2** and **P.W.3** as well as oral submissions by learned counsel for P.W.1. **In Great Lakes Transport Co. (V) Ltd –Vs- Kenya Revenue Authority (2009) KLR 720**, it was held that issues for determination in a suit generally flow from either the pleadings or such issues as the parties had framed for the court's determination. The four issues for determination in this matter are set out on the face of the Originating Summons.

10. It was the statement of **P.W.1** that in **1971**, the deceased sold to him 0.35 Acres of the suit property at **Kshs. 7,000/=**. That he has since occupied and possessed the portion of land openly, peacefully and without interruption. The **0.35 Acres** clearly featured in his affidavit in support of the originating summons. He stated that he occupied the **0.35 Acres** as of right and that he has acquired title to the land by adverse possession.

11. **P.W.1** stated that whereas he does not live on the portion of the suit land, he cultivates nappier grass thereon. P.W.3 confirmed the testimony of P.W.1 to that effect. **In Kimani Ruchine and another –vs- Suift Rutherford Co. Ltd & Another (1976-80) 1KLR 1500**, the Court of Appeal held that **possession can take different forms such as fencing or cultivation of the land in dispute**.

12. P.W.1 Further testified as follows:

“I have openly , peacefully and continuously possessed the suit land. I claim title to the land by way of adverse possession and costs of the suit” (Emphasis added)

13. It was the evidence of P.W.1 that he buried his 1st wife, **Jacinta Wambui Ngugi** on the **0.35 acres** and he dug a bore hole of 80ft deep on the portion of land as per **P Exhibits B.1 to 4**. Furthermore, P.W.2 and P.W.3 who are his neighbours fortified the evidence of P.W.1 in regard to his open and notorious occupation thereon.

14. The Exhibits (**A.1 to 3, B.1 to 4, C.1 to 3**) and submissions are evident that P.W.1 has been in occupation and possession of the **0.35 acres** of the suit land. There has been no interruption thereof for over 12 years since 1971 and I take into account section 7 of the **Laws of Limitations Act (Cap 22)** on actions to recover land.

15. It was contended by P.W.1 that neither the deceased nor himself obtained consent from Githunguri Land Control board within the prescribed period or at all. Therefore, the sale of the 0.35 acres was rendered void for intents and purpose as noted in **Kahia –Vs Ng'ang'a (2004) 1 E.A 75**. The only remedy for P.W.1 is to recover the purchase price of **Kshs. 7,000/=** he paid under section 7 of the Land Control Act (Cap 302); see **Kariuki- Vs Kariuki (1983) KLR 226**.

16. Be that as it may, P.W.1 claimed that the defendants hold the 0.35 acres in trust for him. Admittedly, trusts including customary trusts are overriding interests under section 28 (b) of the Land Registration Act, 2012.

17. **In Macharia Mwangi Maina and 87 others Vs- Davidson Mwangi Kagiri (2014)eKLR**, the court of Appeal while being guided by the dicta of Madam J.A (as he then was) in **Chase International Investment Corporation & another Vs Lexman Keshra & others (1978) KLR 143 (1976-80),1 KLR 891**, held, inter alia;

“The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price--- is guided by the overriding objectives of this Court and the need to dispense substantive and not technical Justice---”(Emphasis supplied)

18. Moreover, it is trite law that Land Control Board consent is not required for rights acquired by adverse possession under section 7 of the **Limitation of actions Act (Cap 22)**, see **Mwangi and another Vs- Mwangi (1986) KLR 328**.

19. In the premises, I find that the Plaintiff (P.W.1) is entitled to the 0.35 acres of the suit property and defendants title thereto has been extinguished accordingly. The defendants are bound to transfer the 0.35 acres to P.W.1 forthwith. The Defendants' defence is unsubstantiated and has failed to thwart, the Plaintiff's claim which has been proved against the defendants on a balance of probability.

20. A fortiori, I enter Judgement for the Plaintiff against the defendants jointly and severally in terms of issues (**a**) (**b**) (**c**) and (**d**) sought in the Originating Summons dated **8th January, 1996**. Orders accordingly.

Dated, signed and delivered at Thika this 7th day of November, 2018.

G.M.A ONG'ONDO

JUDGE

In the presence of

Mr. Mwicigi Kinuthia learned counsel for Plaintiff

Non appearance for 1st Defendant

Non appearance for 2nd Defendant

Tom and Irene Court Clerks