



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO 282 OF 2017(OS)

FRANCIS NDIRANGU MWANGI.....1ST PLAINTIFF

ELISHIBA MBAIRE MWANGI.....2ND PLAINTIFF

VS

PETER MAINA KINYANJUI.....DEFENDANT

JUDGMENT

1. By an Originating Summons dated and filed on 7/11/2011 the Plaintiff sought the following orders;

a. That a declaration that the Plaintiffs are entitled to be registered forthwith as the owners of LOC 2/GACHARAGE/860 which the Plaintiffs have been in possession since 1962 to date for more than twelve (12) years lived openly and continuously as of right in adverse possession and that the Defendants title to land parcel number LOC 2/GACHARAGE/860 has been extinguished in favour of the Plaintiffs under Section 37 and 38 of Limitations of Actions Act.

b. That an order that the Defendant do transfer Title Number LOC 2/GACHARAGE/860 to the Plaintiffs and in default the Deputy Registrar be authorized to do so and/or sign all the documents to effect transfer of the Land Parcel Number LOC 2/GACHARAGE/860 to the Plaintiffs.

c. That the cost of the Application be borne by the Defendant.

2. The Originating Summons are supported by the affidavit of the 1st Plaintiff sworn on even date.

3. In the affidavit the 1st Plaintiff avers that his father in 1966 entered into an agreement for sale of the suit land **LOC 2 /GACHARAGE/860** with Kinyanjui Ndukia, the father of the Defendant. At para 4 of the supporting affidavit it is stated that as at the date of death of Kinyanjui Ndukia in 1984 he had been paid the purchase price of Kshs 7000/-.

4. The 1st Plaintiff at para 3 of the affidavit states that his father with permission of the Defendant's said father entered the suit land and took possession thereof in 1962 which was prior to the sale of the suit land. The 1st Plaintiff further deponed at paragraph 5 that his father died in 1986 and left the Plaintiffs on the suit land which they have occupied as their home since 1986.

5. The 1st Plaintiff's further at para 6 and 7 of the affidavit states that upon the death of his father his family and that of the Defendants father agreed that the state of affairs as obtained before the death of the two parents would continue and that the Defendant's family would be paid an enhanced purchase price totaling Kshs 85,000/- in respect to the suit land.

6. The OS and the affidavit in support were properly served on the Defendant. The Defendant on 23/11/2011 filed a Notice of appointment of advocates but did not file any reply to the OS. The OS was heard exparte on diverse dates resting on the 5/7/18. On 4/9/18 the Plaintiffs filed their written submissions. In their submissions supported by case law the Plaintiff asserted their rights to the suit land by way of adverse possession dependent on their occupation openly and uninterrupted commencing 1962 to date.

7. The Court has considered the OS, the supporting affidavits all the documents filed in the prosecution of the case and the evidence and submissions of the Plaintiffs.

8. The issue in the main that requires consideration by the Court is whether the Plaintiffs have established their claim on adverse possession in respect of the suit land. The Plaintiffs claim is based on an agreement of sale between the parents of the parties in 1966. In the affidavit of the 1st Plaintiff it is stated that the Defendant's father had been paid Kshs 7000/- in full being the purchase price of the suit land. He stated as follows;

“That the said Kinyanjui Nduika died in the year 1984 before transferring the suit land to my father despite having received Kshs 7,000/- as purchase price”.

Although the exact date of payment is not stated it ideally must fall in between 1966 when the agreement was entered into and 1984 when the Defendant’s father died. For purpose of this judgment the balance of probability falls in the former.

9. The Plaintiffs have stated that they have lived on the suit land openly continuously peacefully and uninterrupted where they have brought up their families from 1962 to the date of death of their father in 1986. Taking 1966 or even thereabouts to be the date of payment of the purchase price Kshs 7000/- it is clear that 12 years stated in the limitation of actions act as to accrue a claim of adverse possession ended in the year 1988.

10. In **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for adverse possession has to prove in the following terms;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

11. Guided by the above case law interalia for one to succeed in a claim for adverse possession you must show the following; that he has been in continuous and uninterrupted possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner; that such possession was without the permission of the owner and lastly that the Plaintiff has asserted a hostile title to the owner of the property.

12. Section 7 of the Limitations Act provide that an action may not be brought by any person to recover land after 12 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person. It is on record that the family of the Plaintiffs were put in possession in 1962 and their entry is pursuant to a sale.

13. As for the agreement between the families refer to in the affidavit of the 1st Plaintiff the same appears irrelevant for computation of time in respect of the Plaintiffs’ claim. The Court finds so because as at the time the families purported to reach any agreement the contract between the Plaintiffs father and the Defendants father had accrued rights which had been vested on the parties.

14. In the case of **Public Trustee vs Wanduru (1984) KLR 314 at 319, Madam J A** stated that adverse possession should be calculated from the date the payment of the purchase price to the full span of 12 years if the purchaser takes possession of the property because from this date the true owner is dispossessed of possession. A purchaser in possession of the land purchased after having paid the purchase price is a person in whose favour the period of limitation can run.

In this case the Plaintiffs have led evidence that the full purchase price was paid in or around 1966 at the time of the agreement. It would appear that the family renegotiating the purchase price of the land in 1986 purporting to increase it to Kshs. 85,000/- upon which some installments were paid. By that time adverse possession had accrued and vested to the Plaintiffs in 1978.

15. Chanan Singh J, in **Jandu v Kirpal [1975] E A 225, at p 237** and Simpson, J (as he then was), in **Wainaina v Murai and others [1976] Kenya L R 227 at Page 231** were unanimous that the paper owner must have knowledge of the occupation of the adverse possessor and that he has been dispossessed. In this case the Defendant’s father as well as the Defendant had knowledge of the open and exclusive possession of the suit land by the Plaintiffs.

16. In **Mwangi Vs Mwangi (1986) KLR 328** it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. This case established the principle that the rights of a person in possession or occupation are equitable rights which are binding on the land. In the **Public Trustee Vs Wanduru (1984) klr** at page 314 it is stated that a purchaser in possession has an overriding interest under the provisions of the Registered Land Act. The same provisions are included in the current Land Registration Act under section 28. In this case it is stated that in adverse possession the title of a registered proprietor is not extinguished but is held in trust for the person who by virtue of the limitations of Actions Act has acquired title against the proprietor.

17. It is the holding and finding of this Court that notwithstanding the Plaintiff being registered as owner of the suit land, he holds it in trust for the Plaintiffs. He is a mere paper owner.

18. Despite the deaths of the parents of the parties in 1984 and 1986 there was no action taken by the Defendant and or his family to dispossess the Plaintiff. If anything, the Defendant and his family recognized the Plaintiffs right of occupation and continued to further it by requiring the Plaintiffs to make the additional payments on account of the suitland.

19. Even if for argument sake it was to be taken that time started running for purposes of adverse possession in 1985 when the Defendant became registered as owner of the land, then adverse accrued and vested in the Plaintiffs in 1997. The Plaintiffs have neither been dispossessed nor relinquished possession todate.

20. The application is allowed in terms prayed.

21. Final orders;

a. It is hereby declared that Plaintiffs are entitled to be registered forthwith as the owners of LOC 2/GACHARAGE/860 which the Plaintiffs have been in possession since 1962 to date for more than twelve (12) years lived openly and continuously as of right in adverse possession and that the Defendants title to land parcel number LOC 2/GACHARAGE/860 has been extinguished in favour of the Plaintiffs under Section 37 and 38 of Limitations of Actions Act.

b. That an order that the Defendant do transfer Title Number LOC 2/GACHARAGE/860 to the Plaintiffs and in default the Deputy Registrar be authorized to do so and/or sign all the documents to effect transfer of the Land Parcel Number LOC 2/GACHARAGE/860 to the Plaintiffs.

c. That the cost of the Application be borne by the Defendant.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 8TH DAY OF NOVEMBER, 2018.

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of:

Rungare for the 1st and 2nd Plaintiffs

Defendant – Absent

Irene and Njeri, Court Assistants