



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CIVIL CASE NO. 154 OF 2010

GEOFFREY THIONG'O KAMAU.....PLAINTIFF

-VERSUS-

FRANCIS NJOROGE MWANIKI.....DEFENDANT

JUDGEMENT

The Plaintiff filed an Originating Summons in court on 30/3/2010 claiming to be entitled to an acre out of the land known as L.R. No. Loc.16/NDUNYU Chege/305 by prescription or adverse possession. He sought a determination of several questions including whether he has been in occupation of an acre of the suit land on the Eastern side bordering parcel no. 343 (described as the new parcel no. "C" in the mutation form dated 19/3/1986) for over twelve years openly, without force or interruption by the Defendant; whether the Defendant's title to this land has been extinguished; whether the Plaintiff is entitled to be registered as the proprietor of one acre out of Loc.16.Ndonyo Chege/305 on the ground that the he has been openly and peacefully in occupation of this land for over 20 years preceding the presentation of this suit; whether the Defendant should execute the transfer and do all acts necessary to convey the title of an acre out of Loc. 16/Ndonyo Chege/305 to the Plaintiff to enable the Plaintiff be registered as proprietor and in default the Deputy Registrar of the High Court is to be authorised to sign the necessary documents on behalf of the Defendant; and lastly who should pay the costs of this suit.

2. In the Plaintiff's supporting affidavit, he depones that he bought the suit land from the Defendant in 1984 and proceeded to occupy and develop the land. He averred that he had been occupation of the land for over 20 years without interference from the Defendant and that he had performed his obligations under the sale agreement. He planted tea bushes and carried out extensive development on the land.

3. He filed **HCCC No. 16 of 2007 (O.S)** at Nairobi and on serving the Defendant, the Defendant attempted to enter the suit land. He later withdrew that suit. He produced a copy of the decree issued in **Thika CMCC No. 152 of 2005** which was filed by the Defendant, and which was dismissed for being out of time.

4. The Defendant opposed the Plaintiff's claim arguing that the orders sought ought not to issue. He produced a copy of the consent recorded on 3/6/2008 which provided that the Plaintiff would remain out of the suit land pending the hearing and determination of **Civil Suit No. 16 of 2007 (O. S)**.

5. The hearing of the suit proceeded before the late Justice Onguto in 2014. The Plaintiff testified. He produced a copy of the sale agreement he entered into with the Defendant in 1984. The Agreement was witnessed by the Defendant's brother, George Mwangi Mwaniki who also gave evidence. He paid Kshs. 36,000/= being the agreed consideration and was shown the piece of land. They engaged a surveyor who did the survey work and subdivision, demarcating the Plaintiff's portion. He claimed that he took possession of the land in December 1984.

6. The Defendant declined to sign the mutation forms hence the subdivision process could not be completed. He stated that he had planted coffee, tea, avocados, trees and other crops on the land. He maintained that he had been in occupation of the land except for some time in 2007, 2010 and 2011 when there was some disturbance on the land. The Defendant had never used force to evict him but lodged a complaint and used the local authorities to pursue the matter. He produced a copy of the search and green card showing that the Defendant was the registered owner of the land. He stated that the sale agreement did not indicate when he was to take possession of the one acre he purchased from the Defendant. He stated that he paid the full purchase price and that the Defendant used to go to his house to collect the balance.

7. The Plaintiff filed a suit in 1987 in the Thika Resident Magistrates Court for specific performance and obtained a prohibitory order which he registered against the Defendant's title. He claimed the Defendant's family attacked them on the land and the Defendant's son was charged in a criminal case in 2007.

8. The Plaintiff called Juma Waweru to give evidence. Mr. Waweru was employed by the Plaintiff from 1987 to 2002 as a farm hand. He knew that the Plaintiff was the owner of the land and that there were no skirmishes on the property during the time when he worked there. The Plaintiff also called Geoffrey Chege Ndung'u who confirmed that the Plaintiff carried out farming activities on an acre of the suit land.

9. The Defendant gave evidence. He stated that he allowed the Plaintiff to cultivate the land for one season after executing the sale agreement in December 1984. The years shown on paragraphs 7 and 8 of the Defendant's witness statement filed in court on 7/5/2012 were obliterated. It is not clear whether the Defendant had altercations with the Plaintiff in 1985 or 2005. The Defendant confirmed that he sought the intervention of the area Chief and the local Administration Police to resolve the matter.

10. He maintained that the Plaintiff abandoned the premises after the consent was filed in **HCCC No. 16 of 2007 (O.S)**. The Defendant confirmed that he was selling the Plaintiff an acre of land and that he paid him 31,000/= in cash. He also confirmed that the Plaintiff took possession in 1985. He did not refund the Plaintiff the sum of Kshs. 31,000/= which he claimed was to be treated as rent. He did not give the breakdown of how the rent was computed or the period for which he was charging the rent.

11. The Defendant's brother also gave evidence. He stated that the suit property is registered in his brother's name who holds it in trust for their family since they inherited the land from their late father. He was aware that his brother attempted to sell the suit land in 1984 and maintained that the Plaintiff did not pay the full purchase price. He stated that over the years there were many disputes occasioned by the Plaintiff's attempts to take possession by force which the Defendant repulsed. He confirmed that the Plaintiff lodged a caution against the land in 1986.

12. The land measures 3.64 acres and only a portion of it was being sold to the Plaintiff. He confirmed that he witnessed the sale agreement in which his brother was selling an acre out of the land. He saw his brother receive payment of Kshs. 31,000/= in the advocates office. He also confirmed that the Plaintiff was shown the portion that he was to occupy and started to cultivate it in January 1985 and planted many things on it. He confirmed that the Plaintiff had workers in the land but denied that the Plaintiff had been on the land continuously.

13. The Defendant died on 25/10/2017 after the hearing of the case was concluded before judgement was delivered. Limited grant of letters of administration were issued to Susan Njeri Njoroge and Peter Muchiri Njoroge who filed an application to be substituted as the legal representatives of the Defendant's estate. Parties filed a consent on 27/6/2018 allowing the substitution of the Defendant.

14. The question for determination is whether the court should grant the orders sought by the Plaintiff. It is not in dispute that the Plaintiff entered into a sale agreement with the Defendant. The Defendant admitted that the Plaintiff took possession of the land in 1985 and lodged a caution in 1986 claiming purchaser's interest. The Defendant contended that he only allowed the Plaintiff to cultivate the land for a season in 1985. The Defendant also denied being paid the balance of Kshs. 5,000/= by the Plaintiff. The Defendant relied on the case of **Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau [2013] eKLR** where the conditions to be met by a party claiming adverse possession were restated by Ombwayo J. These include open and notorious use of the property, continuous use of the property, exclusive use of the property, actual possession of the property and non-permissive or hostile possession adverse to the owner. The Defendant urged that the Plaintiff had not met these conditions.

15. The court is satisfied that the Plaintiff took possession of the land upon execution of the agreement in December 1984. The court prefers the evidence of the 2nd Plaintiff's witness who gave evidence that he was a farm hand and worked on the suit land between 1987 to 2002. The Defendant relied on the order given on 3/6/2008 which the Plaintiff disputed and denied being aware of.

16. The court has also looked at the decree issued by the Chief Magistrates Court at Thika on 27/6/2006 in the suit filed by the Defendant. It indicates that the Defendant sought to evict the Plaintiff from the parcel of land known as Loc.16/Ndonyo Chege/305 or any part thereof and also sought a permanent injunction to restrain the Plaintiff or his agents from entering upon, dwelling or interfering with that piece of land. The suit was filed in 2005. This shows that the Plaintiff must have been in occupation of the suit land which is why the Defendant filed that suit. The suit was dismissed for being out of time. The Court is persuaded that the Plaintiff has been in continuous use of the suit land from 1985 until 2007 which adds up to 12 years. The Plaintiff farmed on the suit land exclusively without the permission of the Defendant.

17. The court is satisfied that the Plaintiff has proved his case on a balance of probabilities. The Plaintiff is entitled to be registered as the proprietor of an acre out of Loc.16/Ndonyo Chege/305. The Defendant's legal representatives are directed to execute a transfer and do all acts necessary to convey the title of one acre out of Loc.16/Ndonyo Chege/305 to the Plaintiff failing which the Deputy Registrar of the Environment and Land Court is authorised to sign all the necessary documents on behalf of the Defendant. The Plaintiff is awarded the costs of the suit.

Dated and delivered at Nairobi this 6th day of December 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Wathuti holding brief for Mr. Gichuhi for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendant