REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

MERU MISC EL CASE NO 102 OF 2017

EDWARD MUGAMBI……..1ST PLAINTIFF

JACOB KAIRANYA M'RAIBUNI…..…2ND PLAINTIFF

VERSUS

JASON MATHIU MWONGERA…….DEFENDANT

JUDGMENT

1. In his Originating Summons dated 19th June, 2002, the plaintiffs STATE:-

LET JASONMATHIU MWONGERA the proprietor of L.P NO. GAKAWA/KAHURURA/BLOCK/3/203 within Nyeri District enter appearance within (15) days of service of these summons issued upon the application of EDWARD MUGAMBI KAIRANYA who claims to have obtained by Adverse Possession since 1981 4.89 Ha being the whole of L.P NO. GAKAWA/KAHURURA/BLOCK 3/203 which land is registered in the name of JASON MATHIU MWONGERA.

FOR DETERMINATION OF THE FOLLOWING QUESTIONS:-

1. Is the said L.P NO.GAKAWA/KAHURURA/BLOCK 3/203 measuring 4.89 Ha

2. Is the plaintiff in possession of the whole of it?

3. Has the plaintiff developed the whole of it?

4. Has the plaintiff therefore obtained title to L.P NO. GAKAWA/KAHURURA/BLOCK 3/203 measuring 4.89 Ha by limitation of actions and the doctrine of Adverse Possession?

5. How can the ownership be determined by the court?

6. Is the plaintiff entitled to costs of this suit?

This summons is supported by the affidavit of Edward Mugambi Kairanya and on the grounds that:-

a. The applicant has lived, worked and developed L.P NO.GAKAWA/KAHURURA/BLOCK 3/203. For over 12 years peacefully and uninterrupted.

RELIEF SOUGHT

a. A declaration that the plaintiff has acquired by adverse possession absolute title to L.P No. GAKAWA/KAHURURA/BLOCK 3/203

b. A declaration that the plaintiff is entitled to be registered as proprietor of the suit land in place of the defendant.

c. A declaration that the defendant holds the suit land title in trust of the plaintiff.

d. Costs of this suit.

2. In his evidence PW1, the plaintiff, told the court that he bought the suit land from the defendant in August, 1981. He told the court that he paid 70,000/= and was given possession by the defendant. He gave evidence that he had developed the suit land extensively and had 3 permanent houses on the suit land.

3. PW1 told the court that he had occupied the suit land all along and that the defendant had never interfered with his possession of the land.

4. PW1 gave evidence that he had paid Kshs.17,000/= in cash to the defendant and had also given him a Peugeot car valued at Kshs.50,000/=. He also said that he paid a further Kshs.6,700/= to the defendant. He produced acknowledgments to these transactions.

5. PW1 gave evidence that he bought the land in 1981 before the land was registered in the name of the defendant on 14.3.2002. He further averred that the land was now registered in his name after he obtained exparte orders after the defendant had failed to enter appearance and file a defence.

6. During cross-examination PW1 said that he was supposed to get 13 acres for Kshs.70,000/=. He told the court that the 1st installment he paid to the defendant was Kshs.5,000/=. The 2nd installment was Kshs.12,000/=. Then he gave the defendant a Peugeot car worth Kshs.50,000/=.

7. PW1 denied receiving 3 demand notices to vacate the suit land if he did not pay Kshs.53,000/= to the defendant. Pressed further he told the court that he remembered that he got one demand notice from advocate Imanyara.

8. PW1 agreed that the High Court and the Court of Appeal had dismissed his case. He also agreed that the defendant had on 24.9.1992 filed a suit against him. He did not deny the assertion by the defendant's advocate that he had lost both in the High Court and at the Court of Appeal.

9. PW1 denied that he had fraudulently lifted an inhibition placed against the suit land. He laconically stated that this had been done by an unknown person. He however, incredulously, told the court that he transferred the land to another person because it was his land. This is despite his knowledge that there was an inhibition placed against the land. This was also despite not knowing who had fraudulently removed the apposite inhibition.

10. PW1 during cross examination admitted that this suit's file had been lost for some time. He also agreed that the defendant had given him consent to occupy the suit land.

11. PW1 told the court that his father was staying in one of the three houses and was a farmer growing maize, wheat and beans on the suit land.

12. PW1 also agreed that in Criminal Case No.2610 of 2007, where the defendant's son had been accused of setting fire on PW1's house, he had told the court that he did not stay on the suit land but that his father stayed there. Strangely, however, he disagreed with the proceedings in the Nyeri Criminal Case (op.cit) which insinuated that he was not staying on the suit land.

13. PW2, Cyrus Muturi, gave evidence that he was a farmer at Nanyuki and that PW2 was his neighbor.

He told the court that PW1 moved into the suit land in 1982 and that he cultivated crops such as wheat and maize.

14. PW2 was categorical that PW1 had stayed on the suit land since 1982 and reiterated that he lived on the suit land. He told the court that PW1's father lived on the suit land but when he died he was buried in his other land in Meru South.

15. PW3, Tabitha Kairanya, told the court that she was the mother of PW1. She told the court that PW1 bought the land at a time she could not remember but added that it was during the time the government was being overthrown, presumably in 1982 when there was an attempted coup. She told the court that she lived on the suit land. She also said that before moving to the suit land she lived at Kigane in South Imenti.

16. PW3 was categorical that she did not know the person who sold the suit land to PW1. She was, however, unequivocal that her son took her husband to the suit land during "the coup period."

17. The defence had only one witness, DW1. He told the court that he was 78 years old, a farmer and formerly a primary school teacher. He told the court that he knew PW1 but did not know the 2nd plaintiff.

18. DW1 told the court that on 5.8.1981 he entered into an agreement with PW1 for sale of the suit land to PW1. He told the court that the purchase price was Kshs.70,000/= but PW1 only paid Ksh.17,000/=. He said that after PW1 failed to pay the balance, he wrote 3 demand letters to PW1 but he still failed to pay the balance.

19. DW1told the court that he did not transfer the suit land to PW1. He averred that PW1 had fraudulently transferred the land to himself and then transferred it to Adriano Muthomi on 13.2.2014.

20. DW1 told the court that he filed suit No. SRM Civil Case 74 of 1992 at Nanyuki and won. PW1 filed Meru Civil Appeal No. 39 of 1988 but the Appeal was dismissed. Then he filed Civil Appeal NO. 286 at Nyeri, which Appeal was also dismissed.

21. DW1 told the court that DW1 filed this suit in 2002 and obtained an exparte judgment which was set aside. He told the court that he had many times tried to have PW1 evicted from his land but his efforts were frustrated by the apposite suits between the parties which were at various times in court.

22. DW1 was categorical that 12 years had not expired by the time he gave PW1 notice to vacate his land.

23. In addition to the evidence tendered by the 1st plaintiff and his two witnesses and by the defendant advocates representing the parties filed written submissions.

24. I do opine that though the parties filed written submissions, in coming to its decision a court of law must rely on the evidence availed by the parties in support of their respective propositions.

25. The 1st plaintiff's advocate submits that the 1st plaintiff has occupied the suit land since 5.8.1981, a period exceeding 35 years. He says that the defendant put the plaintiff in possession vide a sale agreement dated 5.8.1981.

26. The 1st plaintiff says that the defendant filed a suit in SRMCC No.74 of 1992 at Nanyuki seeking eviction of the plaintiff. He says that the defendant obtained a decree which was appealed against by the 1st plaintiff vide High Court Civil Appeal No. 39 of 1998 at Meru. The 1st plaintiff lost the Appeal. He then moved to the Court of Appeal, through Civil Appeal No. 286 of 2002, at Nyeri. He again lost his second appeal.

27. The 1st plaintiff in his submissions says that he paid the full purchase price of the land and continues

to say that even if the full consideration had not been paid, the defendant had put the 1st plaintiff in possession for a period exceeding 12 years and, for that reason, the 1st plaintiff was entitled to the relief of obtaining title by way of adverse possession.

28. The 1st plaintiff says that the question of if or not a person who raises a defence of adverse possession in the lower court can go ahead and file a suit predicated upon adverse possession was settled by the High Court. He opines that this issue was decided in the case of **BILHA KANYI W/O GEOFFREY GATHINGU VERSUS KABUCHWA GATHUNGU – COURT OF APPEAL NO.38 OF 2000 AT NAIROBI.**

29. I opine that what is in issue in this case is not whether the 1st plaintiff was rightly pursuing a relief predicated upon adverse possession or not. The issue of if or not this suit is res judicata another suit is not for my consideration in this judgment. These issues were addressed by the Hon. Justice W. Ouko, as he then was, in his ruling dated 13th November, 2007 in Meru HCCA NO.39 of 1998.

30. In his submissions, the 1st plaintiff's advocate said that he was relying on the following authorities.

1. Bilha Kanyi W/o Geoffrey Gathungu (op.cit).

2. Peter Wanyoike Gathure versus Beverly – EALR, 514, CASE NO.138 of 1963, NAIROBI.

3. HOSEA VERSUS NJIRU AND OTHERS (1974) E.A. 526. [CIVIL CASE 963 OF 1970]

4. SALIM VERSUS BOYD AND ANOTHER – H.C.C NO. 12 OF 1969 [EALR]

31. In his submissions, the defendant's advocate gives a conspectus of the circumstances which spawned this case. He says that there was an agreement made by the parties in the Chambers of Gitobu Imanyara & Co, Advocates, on 5.8.1981. He says that the 1st plaintiff despite paying the sum of Kshs.17,000/= did not pay the balance of the agreed purchase price which balance was Kshs.53,000/=. He narrates that the defendant through his advocates wrote 3 demand letters. The first one dated 16.8.1982 demanded payment of Kshs.53,000/= or return of the suit land to the defendant. The 2nd one dated 27.10.1982 gave the 1st plaintiff 7 days to pay or vacate the suit land. The 3rd one dated 6.3.1986 gave the 1st plaintiff 90 days to vacate the land and if he did not do so he would face legal proceedings.

32. The advocate narrates that the defendant sued the 1st plaintiff at Nanyuki in SRMCC NO.74 OF 1992 seeking an order of eviction. The 1st plaintiff lost and appealed vide Meru High Court Civil Appeal No. 39 of 1998 and lost. He then appealed in the Court of Appeal vide CA No.286 of 2002 and lost.

33. The advocate continues to say that while the 1st plaintiff's appeal was pending at Nyeri, the 2nd plaintiff, his father, filed a suit and on 17.12.2002, the 1st plaintiff obtained an exparte judgment and on 4.3.2003 transferred the suit land to himself. However, on 17.5.2006, by consent, the ex-parte judgment was set aside on the application of the defendant where he denied service and the originating summons was ordered to be heard by way of viva voce evidence.

34. The defendant's advocate continues to state, by consent, the parties obtained an order of inhibition inhibiting any dealings with the suit land until this suit is heard and determined. The inhibition was registered on 19.2.2004. He states that on 1.2.2012 the plaintiff mysteriously had the inhibition removed and transferred the suit land to **JULIANO MUTHOMI NDEGE.**

35. In the submissions, the defendant is categorical that the plaintiff does not satisfy the conditions necessary for a claim of a title by way of adverse possession. He says that the 2nd plaintiff was not independently in occupation of the suit land as he was an agent taken to the land by the 1st plaintiff, his son.

36. The defendant says that even if one argues that the 1st plaintiff took possession on 5.8.1981, since the defendant sued the 1st plaintiff for eviction on 23.9.1992, the 1st plaintiff would have been on the land for only 11 years, 1 month and 18 days short of the 12 years required for adverse possession to accrue.

37. The defendant's submissions claim that the 1st plaintiff fraudulently deprived the defendant of his land by illegally removing a court mandated inhibition and proceeded to transfer the land to JULIANO MUTHOMI NDEGE. The defendant asks the court not to condone illegality tainted practices.

38. Regarding when the 1st plaintiff took possession, the defendant submits that he took possession by contract. He states that the then Highest Court in the Land found definitively that the plaintiff had failed to pay full purchase price for **LR. NO. GAKAWA/KAHURURA/BLOCK 3** and therefore he could not claim adverse possession during the time the purchase agreement had not collapsed.

39. The defendant has proffered the following cases in support of his propositions:

1. HOSEA VERSUS NJIRU & OTHERS (1974) EA 527

2. SALIM VERSUS BOND & ANOTHER (1971) EA 551

40. I have carefully considered the pleadings, the evidence, the submissions and the authorities proffered by the parties in support of their respective possessions.

41. At the outset, I opine that the plaintiff's claim predicated upon a purchasers' interest was definitively debunked and closed when his appeals to the High Court ad to the Court of Appeal were dismissed.

42. In his evidence, PW1, asserts that he had occupied the suit land for a period exceeding 12 years since 5.8.1981. He says that he paid the full purchase price for the suit land. I will not delve into this area as the Court of Appeal definitively found that he had not paid the full purchase price for the suit land. Here, I will be concerned with if or not the plaintiff had obtained title to the suit land by way of adverse possession.

43. From the Judgment of the Court of Appeal, Civil Appeal No. 286 of 2002, it is clear that the court made a definitive finding that the plaintiff had been in fundamental breach of his agreement with the defendant. This spawned repudiation of the agreement by the defendant. A pointer as to when time should start running for calculation of time needed for adverse possession to accrue is embraced by a statement contained on the Court of Appeal Judgment(op.cit) which reads;

> ***"Whether the respondent's right of action accrued to him on 16th August, 1982, or on 27th October,1982 or on 6th March, 1986,twelve years had not lapsed by the time the suit was filed on 23rd September, 1992. We agree with Mr Mwirigi, learned counsel for the respondent, that the defence of limitation was for rejection and was rightly rejected."***

44. The sword of Justice cuts both ways. What is good for the goose is good for the gander. The plaintiff in the Court of Appeal wanted to debunk the defendant's case by saying that being a suit predicated upon a contract, it had been barred by dint of the provisions of section 4 of the Limitation of Actions Act which provided that for contracts, the Limitation period was six years. However, the Court of Appeal relied on section 7 of the Limitation of Actions Act to find that by the time the defendant filed his first suit on 23.9.1992, twelve years had not elapsed.

45. This is a finding of fact by the Court of Appeal which this lower court cannot ignore.

46. The evidence of PW2 was that the 1st plaintiff had lived on the suit land since 1982. It's only evidential value was the period of stay the 1st plaintiff had been in possession. It did not give an insight as to when the period needed for adverse possession to accrue should start counting. Ditto the evidence of

PW3, the 1st plaintiff's mother.

47. It is clear to me that by the time the defendant wrote his 3rd letter, through his advocate, the agreement for sale of the suit land had irredeemably collapsed. This letter was written on 6th March, 1986. Time for adverse possession to accrue can only start running from the occurrence of the collapse of the agreement. It is clear that form 6th March, 1986 to 23rd September 1992 when the defendant filed his suit in the Senior Resident Magistrate's Court at Nanyuki, only 6 years and a few months had expired. Even assuming that the time would run from 5.8.1981 when the 1st plaintiff claims he took possession, still by 23rd September, 1992, 12 years would not have elapsed. This, however, would be a phasmagoric scenario as it would assume that the agreement between the parties collapsed immediately after it was activated.

48. Whichever scenario the 1st plaintiff has postulated, he has not shown that he had been in possession of the suit land for over 12 years by the time the defendant filed his first suit in the court of the Senior Resident Magistrate at Nanyuki.

49. The 1st plaintiff seems to unduly rely on the period of time he has claimed to have occupied the suit land.

50. A priori, length of stay alone cannot entitle a claimant to acquisition of title by adverse possession. Though a long stay on the suit land is one of the important ingredients in the determination of whether or not a title can be obtained by way of adverse possession apposite circumstances must be favourable to the dissessor. This point was eruditely elaborated in KWEYU VERSUS OMUTUT [1990] KLR 709 where the Court of Appeal, Gicheru JA opined as follows:

> ***"By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or colour of title") mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously."***

51. There was no colour of right to trigger the counting of time for adverse possession from when the agreement for sale between the plaintiff and the defendant collapsed.

52. This position has definitively been buttressed by the Supreme Court of Kenya in Malcolm Bell versus Daniel Arap Moi and the Board of Governors, Moi High School, Kabarak where at paragraph 43, the Court, inter alia, said:

> ***"The court of Appeal was guided by the holdings in Wambugu V Njuguna [1983] KLR 172, Sisto Wambugu V Kamau Njuguna [1988 – 88] KLR 217; and Samuel Miki Waweru versus Njeri Richu, Civ. Appeal No. 122 of 2001 – in which the Court held that where a purchaser occupies land which is subject to a sale agreement, but with the consent of the vendor, time does not start running for purposes of adverse possession, until the agreement is terminated……"***

53. I answer the questions framed by the 1st plaintiff as follows:

1. It is not controverted by any party that Land Parcel No. **GAKAWA/KAHURURA/BLOCK 3/2013** measures **4.89 Ha.**

2. The plaintiff may be in possession of the suit land but he has not obtained title by way of adverse possession.

3. I am unable to find that the plaintiff has developed the whole of it.

4. The plaintiff has not obtained title to Land Parcel No. **GAKAWA/KAHURURA/BLOCK 3/203** by limitation of actions and by the doctrine of adverse possession.

5. The ownership is determined by the court by considering all circumstances to find if the plaintiff has acquired title by adverse possession. The plaintiff has not acquired title to the suit land by way of adverse possession.

6. The plaintiff is not entitled to costs of this suit.

54. This court finds that transfer of the suit land by the plaintiff to JULIANO MUTHOMI NDEGE is veritably fraudulent and should be quashed and reversed and the suit land be forthwith registered in the name of the defendant.

55. I make the following orders:

1. This suit is dismissed.

2. It is declared that the transfer of the suit land by the 1st plaintiff to himself and to JULIANO MUTHOMI NDEGE was fraudulent and the land registrar in charge of the register for Land Parcel No. GAKAWA/KAHURURA/BLOCK 3/203 is ordered to cancel the name of JULIANO MUTHOMI NDEGE and revert ownership to JASON MATHIU MWONGERA, the defendant.

3. Costs are awarded to the defendant.

56. Taking cue from the Court of Appeal's decision in EDWIN G. K. THIONG'O & ANOTHER (APPELLANTS) AND GICHURU KINUTHIA & 2 OTHERS (RESPONDENTS) CIVIL APPEAL 267 OF 2007, Nairobi – [2015] eKLR, where the court ordered the claimant to vacate the suit land within 6 months of the date the apposite Judgment was delivered, I will make a similar order.

57. The 1st plaintiff and any other person laying claim on Land Parcel No. GAKAWA/KAHURURA/BLOCK 3/203 should vacate the suit land within 6 months of the date of delivery of this Judgment failing which the OCS in charge of the area where the suit land is situated shall facilitate the apposite eviction.

Delivered in open Court at Chuka this 13th day of March, 2017 in the presence of:

CA: Ndegwa

Wilson Mburugu for the defendant

1st plaintiff or his advocate absent

P. M. NJOROGE

NJOROGE