



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

At Nyeri

ELC CASE NO. 677 OF 2014 (O.S)

GATHONI WAHOME PLAINTIFF

-VERSUS-

1. KABUCHI RWARIO

2. JAMES KANJA KABUCHU

3. JAMES MAINA MUTHII

4. PETER MUREBU KIAMBUI DEFENDANTS

JUDGMENT

Introduction

The facts of this case can be summarised as follows:-

1. The suit property to wit **Kiine/Kiangai/640** was registered in the name of Kanja Kabuchu way before the 2nd defendant was born. In this regard see **Dexbt-1** (the 2nd defendant's birth certificate), which shows that the 2nd defendant was born on 9th January, 1967. Also see the green card in respect of the suit property which shows that the suit property was registered in the name of Kanja Kabuchu on 10th April, 1963.
2. According to the testimony of the 1st defendant, who is the 2nd defendant's father, the name Kanja Kabuchu and James Kanja Kabuchu refer to one and the same person to wit the 2nd defendant herein.
3. When this matter came up for hearing, the 1st defendant explained that during demarcation, he registered the suit property in the name of the 2nd defendant (who was unborn!) because the law, at the time, did not allow one to be registered as a proprietor of more than one parcel of land (he had another parcel of land registered in his name).
4. Sometime in mid or late 1960s, the 1st defendant entered into a verbal agreement with the plaintiff's husband for sale of the suit property.
5. Pursuant to the said agreement, the plaintiff's husband and his family entered the suit property and began developing it (constructed their home thereon and planted many tea bushes).
6. Whereas the plaintiff claims that her husband paid the purchase price amounting to Kshs. 1350/- for the

entire parcel of land, which then measured 3 acres, the 1st defendant denies having received any payment from the plaintiff or her husband.

7. The foregoing notwithstanding, the 1st defendant informed the court that he had the intention of transferring the suit property to the plaintiff's husband which intention did not materialize because the land was not registered in his name (he could not obtain consent to transfer the land to the plaintiff's husband).

8. The 1st defendant conceded that when the plaintiff's husband passed on in 1971, he was buried on the suit property and that he did not raise any objection to the plaintiff's husband being buried on the suit property.

9. The 1st defendant further conceded that the plaintiff had quiet and peaceful enjoyment of the suit property until 1986 when the 1st defendant summoned her and offered to sell the suit property to her at Kshs. 120,000/=.

10. According to the plaintiff, she rejected the offer by the 1st defendant because she was already the owner of the suit property.

11. On his part, the 1st defendant informed the court that the plaintiff accepted the offer but owing to commitments she had (she was paying school fees for her children), she could not raise the purchase price.

12. Sometime in 1990, there was a change of particulars of registration of the suit property from Kanja Kabucu to James Kanja Kabuchi, the 2nd defendant herein, who had since attained the age of majority. In the same year, the 1st defendant caused the suit property to be sub-divided into two parcels of two acres and one acre respectively and sold the parcel measuring one acre to a third party. The action of the 1st defendant prompted the plaintiff to file this suit to protect her interest in the remaining portion of the suit property.

13. In the original suit filed on 26th July, 1991 the plaintiff, *inter alia*, sought a declaration that she had become entitled to parcel number Kiine/Kiangai/ 1643 (a resultant sub-division of the suit property) and that the 2nd defendant held the said parcel of land in trust for her.

14. In support of her claim the plaintiff had deposed as follows:

- a. That the 2nd defendant is the registered proprietor of land parcel Kiine/Kiangai/1643 which is a resulting number from Kiine/Kiangai/640;
- b. That the 2nd defendant was so registered as the proprietor of land parcel Kiine/Kiangai/640 on 10th April, 1963.
- c. That she occupied the suit property in 1965 after paying the 1st defendant Kshs.1350/= being the full purchase price for the suit property (averment paraphrased);
- d. That the first defendant is the father of the 2nd defendant;
- e. That she has been in adverse, continued and uninterrupted actual occupation and exclusive possession of the suit property until 24th October, 1990 when the 2nd defendant sub-divided the suit property into two portions of 1 acre and 2 acres and thereafter sold the portion of one acre.
- f. That she was left with the 2 acre portion now registered as land parcel Kiini/Kiangai/1643;
- g. That since 1963 she had acquired an overriding interest over the said parcel of land;
- h. That when she took possession of the said land parcel, it was a bush without development;

- i. That she has built three permanent houses on the land where she lives with members of her family and planted 3000 tea bushes, 100 bananas, 30 eucalyptus trees, napier grass and other crops.
- j. That since 1965 neither the 1st defendant nor the 2nd defendant or their agents interrupted or interfered in any way with her possession.

15. In reply to the plaintiff's claim, the 2nd defendant swore the affidavit (Replying Affidavit) filed on 15th August, 1991 in which he deposed as follows:

- i. That the parcel of land Kiine/Kiangai/640 which had ceased to exist was registered in his name;
- ii. That he did not allow the plaintiff to enter into his land and even if his consent was sought it could not be legally given because in 1965 he was a minor;
- iii. That on attaining the age of majority, he sub-divided the suit property into 2 parcels and sold one acre therefrom;
- iv. If plaintiff had a genuine claim to the suit property she should have objected to the sub-division and sale which was done openly (averment paraphrased);
- v. That the agreement to sell the suit property to the plaintiff and the consent to enter, occupy and develop the suit property was not done by himself; that the agreement to sell and consent to enter, occupy and develop the land was done when he was a minor and that no one sought his consent when he attained the age of majority;
- vi. That in view of the conduct of the parties from the time of occupation of the suit property to the time of filing the suit is untenable;
- vi. The 2nd defendant wonders why the plaintiff who allegedly bought 3 acres is not claiming the one acre which he sold to a third party;
- viii. That the plaintiff who all along knew that she entered the suit property when he was a minor, did not object when he subdivided and sold a portion of the suit property.
- ix. That the plaintiff's suit ought to be dismissed because it does not disclose any cause of action or establish aspects of adverse possession.

16. In reply to the plaintiff's claim, the 1st defendant had deposed as follows:

- a. That it is strange why he has been made a party to the suit yet the suit property is registered in the name of the 2nd defendant (averment paraphrased);
- b. That given the fact that he is not the registered proprietor of the suit property, the claim against him is misconceived, vexatious and on account of misjoinder;
- c. That although the plaintiff's husband entered the suit property as a purchaser, he did not pay the purchase price;
- d. That it had been mutually agreed between him and the plaintiff's husband that he would vacate the suit property and that the tea bushes planted thereon would be in the name of the 2nd defendant;
- e. That upto 1970 when the plaintiff's husband passed on, the plaintiff's husband could not advance a claim for advance possession because his possession had not been continuous or uninterrupted (he knew he would leave the suit property any time);
- f. That he called the plaintiff, in the presence of her husband's nephew, his brother and wife, and

gave her a chance to buy the suit property for Kshs. 120,000/=;

g. That the plaintiff agreed to buy the land but could not pay because she had a son in school (could only pay after her son completed school);

h. Because he urgently needed money and the plaintiff was unable to buy it, he decided to sell one (1) acre to another person;

i. That the suit property was sub-divided and transferred after getting all the necessary consents and that the plaintiff did not object the sub-division and transfer;

j. That he has never received any consideration from the plaintiff's husband or the plaintiff in respect of the suit property;

k. He wonders why the plaintiff who claims that she was entitled to the entire suit property is not claiming the one (1) acre which he sold;

l. That despite the developments the plaintiff has effected on the suit property, she knew that she would leave the suit property;

m. That in view of the foregoing, the plaintiff's claim for adverse possession is untenable;

n. That the suit ought to be struck out because the plaintiff had filed another suit against him.

17. In a rejoinder, the plaintiff through her supplementary affidavit sworn on 2nd September, 1991 deposed as follows:

i. That it is true that she entered into the suit property with her husband Wahome Gaitirira, deceased;

ii. That her husband passed on in 1971 and was buried in the suit property without objection from the defendants;

iii. That at the time they entered the suit property in 1965, they paid the 1st defendant Kshs. 1350/- as purchase price for the 3 acres (the entire parcel of land);

iv. That upon payment, they entered the suit property and began developing it by planting cash and subsistent crops.

v. That because no consent of the land control board was obtained in respect of the transaction, her occupation of the suit property which was open and continuous since 1965 has been adverse to that of the defendants;

vi. She denies the 1st defendant's allegation that he offered to sell the land to her at Kshs. 120,000/= and reiterates her contention that they had paid the entire purchase price for the suit property in 1965.

vii. That the 1st defendant was joined in the suit because he was involved in the dealings on which the suit is premised;

viii. That since 1965, she has never entertained the thought of leaving the suit property which all along she has considered as her home and where she has buried her husband;

ix. That it is true that she had filed another suit at Kerugoya Law Courts to wit Kerugoya SRMCCC No. 69 of 1991 which she withdrew immediately after filing this suit;

x. That division of the suit property was done by the 2nd defendant without her knowledge (secretly);

xi. That after the land was sub-divided and a portion thereof sold she filed a caution to restrict dealings with the suit property;

xii. That despite having deposed that when they entered the suit property he was a minor, the 2nd defendant has not disclosed when he was born.

18. During the pendency of this suit, the 2nd defendant caused parcel number Kiine/Kiangai/1643, which is the subject matter of this suit, to be sub-divided into Kiine/Kiangai/2345 and Kiine/Kiangai/2346 and transferred the sub-divisions thereof to third parties to wit Peter Maina Muthii and Peter Murebu Kiambui, the third and the fourth defendants herein.

19. Owing to the changed circumstances, the suit was amended to *inter alia* include the persons to whom the suit property was transferred as parties to this suit.

20. In reply to the issues raised in the amended originating summons, the 3rd and 4th defendants have deposed that the orders sought cannot issue against them as they are innocent purchasers of the suit property without knowledge of the plaintiff's interest therein.

21. The 2nd defendant passed away on 29th March, 2009, during the pendency of this suit, and has since not been substituted as by law required.

22. At the close of hearing, the parties filed submissions which I have read and considered.

SUBMISSIONS

Submissions by the plaintiffs

23. In the submissions filed on behalf of the plaintiff, an overview of the cases of the respective parties is given and submitted that the plaintiff has proved on a balance of probabilities that she has been in occupation of the suit land since 1965.

24. Arguing that by the time this suit was filed the plaintiff had been in open, continuous, exclusive and notorious occupation of the suit property for 26 years, counsel for the plaintiff submits that by the time this suit was filed, the plaintiff had become entitled to the suit property by adverse possession.

25. According to counsel for the plaintiff, time for purposes of adverse possession began to run in favour of the plaintiff after the period for seeking consent of the land control board to sell the property to the plaintiff passed without the consent having been obtained.

26. Concerning the contention that the time for adverse possession did not start running at the time the plaintiff took possession of the suit property because the registered proprietor of the suit property was a minor, the plaintiff's advocate based on a certificate of birth filed by the 1st defendant showing that the 2nd defendant was born on 9th January, 1967 submitted that because the law did not allow for registration of land in favour of an unborn person, the suit property had a known owner, probably the 2nd defendant's grandfather, presumably after whom the 2nd defendant was named.

27. Terming the evidence of the 1st defendant to the effect that the suit property was registered in the 2nd defendant's name before he was born false, counsel for the plaintiff submitted that registration of the land in the name of an unborn person would not only have been unlawful (contrary to **Section 113** of the Land Registration Act) but also unconstitutional.

28. Terming the transfer effected by the 2nd defendant in favour of the 3rd and 4th defendants fraudulent and tainted with illegality, counsel for the plaintiff points out that in 1991 the plaintiff filed a caution to

restrain dealing with the resultant subdivision of the suit property, Kiine/Kiangai/1643. He also contended that the 3rd defendant had knowledge about the case and the plaintiff's interest in the suit property.

29. He further pointed out that the caution that the plaintiff had filed was fraudulently removed by the second defendant. To attest to that fact, he referred to proceedings in Kerugoya PMCC No. 28 of 2001 (**Pexbt 7**) and in particular the orders of the lower court setting aside the orders for removal of caution and ordering the cancellation of all the titles issued subsequent to the withdrawal of the plaintiff's caution.

30. Maintaining that the 3rd defendant was aware of the suit in the lower court, counsel for the plaintiff points out that the 3rd defendant has exhibited the plaint filed in the lower court in his further list of documents dated 15th July, 2016.

31. Concerning the further agreement executed between the 2nd and the 3rd defendant on 27th March, 2002 he pointed out that it was executed after the property in question had been transferred to the 3rd defendant thus irregular.

32. Based on the decision of **Peter Thuo Kairu v. Kuria Gacheru (1988) 2 KAR** where the the Court of Appeal held that the law relating to prescription affects not only present holders of title but their predecessors in title, counsel for the plaintiff submits that the 3rd and 4th defendants' interest in the suit property is subject to the plaintiff's interest therein.

33. Counsel for the plaintiff further referred to the case of **Githu v. Ndeete (1984)KLR 776** where it was held that mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons adverse possession.

34. Counsel also referred to the case of **Kasuve v. Mwaani Investment Limited & 4 others (2004) 1 KLR** where it was held:

“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 and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition.”

Submissions by the 1st defendant

35. On behalf of the 1st defendant, it is submitted that the occupation of the plaintiff could not have been hostile to the registered owners interest because he had the permission of the 1st defendant to occupy the suit property and that the plaintiff could not claim adverse possession during the period of the 2nd defendant's disability.

36. Concerning the contention that the suit property must have been registered in the name of the 2nd defendant's grandfather, it is submitted that the contention does not add up in view of what is obtaining in the pleadings.

37. It is maintained that time for adverse possession did not run during the period of the 2nd defendant's disability.

38. It is pointed out that the 2nd defendant passed on on 29th March, 2009 and was not substituted within the time provided in law. As a result, the suit against him abated by operation of law as held in the case of **Kenya Farmers Cooperative Union v. Charles Murgor (deceased) T/A Kaptabei Coffee Estate 2005 eKLR** that:

“in such an event the court has no jurisdiction to hear and determine a suit that has abated until it is revived as provided by law.”

39. Concerning sale of the suit property to third parties during the pendency of this suit, it is submitted

that the second defendant was entitled to sell his land.

40. Arguing that the claim against the most important party to this suit has abated, counsel for the 1st defendant urges the court to dismiss the suit with costs to the defendants.

Reply by the plaintiff

41. In a rejoinder, counsel for the plaintiff submits that the suit has not abated because there are other defendants.

42. On when time began running in favour of the plaintiff, counsel for the plaintiff maintained that as the law did not provide for registration of land in the name of a none existent person, the suit property must have been registered in the name of a living person. In that regard, he contended that the registered proprietor of the suit property must have been the 2nd defendant's grandfather after whom the 2nd defendant was born. For that reason, he maintained that time for purposes of adverse possession began to run from 1965 when the plaintiff took possession of the suit property.

43. Concerning the contention that the plaintiff went into the suit property with the permission of 1st defendant, counsel for the plaintiff urges the court, if it buys that explanation, to order that the plaintiff be compensated for the developments as per the valuation report tendered in court (**Pexbt 8**). In this regard it is pointed out that both the 1st and 2nd defendant acknowledged that the developments on the suit property were effected by the plaintiff.

Submissions by the 3rd defendant

44. On behalf of the 3rd defendant, it is submitted that entry of the plaintiff into the suit property was by direct consent/authority of the 1st defendant and that there is no evidence that her entry was as a purchaser for valuable consideration.

45. On whether the plaintiff has become entitled to the suit property by adverse possession, it is submitted that because time for purposes of adverse possession could not run against the 2nd defendant when he was under disability (was a minor), which disability ceased either in 1981 or 1985; by the time this suit was filed, the time for raising a claim for adverse possession had not accrued in favour of the plaintiff.

46. It is also submitted that the plaintiff's occupation of the suit property was interrupted by the 1st defendant in 1990 when he caused the original parcel of land to be subdivided and a portion thereof sold to a third party.

47. Terming the 3rd defendant a bona fide purchaser for value without notice of fraud or any irregularity of the title held by the 2nd defendant, counsel for the 3rd defendant submitted that the 3rd defendant holds a clean title to Kiine/Kiangai/2345 and 2346.

48. Concerning the contention that the 3rd and 4th defendants were warned against buying the suit property by the plaintiff, it is submitted that there is no evidence that the caveat was published at Kirinyaga Land registry or other public places.

49. With regard to the contention that the sub-divisions and transfers of L.R Kiine/Kiangai/2345 and 2346 were ordered cancelled so that the land may revert to L.R Kiine/Kiangai/1643, it is submitted that no such order was exhibited by the plaintiff and that orders made in Kerugoya PMCC No. 28 of 2001 were not directed at the 3rd defendant.

50. Maintaining that no evidence capable of controverting the assertion that the 3rd defendant is an innocent purchaser for value without notice has been tendered, counsel for the 3rd defendant urges the court to dismiss the case against the 3rd defendant with costs.

Analysis and determination

51. From the pleadings filed in this matter and the submissions, I find the issues for determination to be:

1. Whether the death of the 2nd defendant without being substituted affected the plaintiff's claim?
2. Subject to the outcome of (1) above, whether the plaintiff has made up a case for issuance of the orders sought or any of them?
3. What orders should the court make.

51. On **Whether the death of the 2nd defendant without being substituted affected the plaintiff's claim**, it is important to review the legal effect of abatement of the 2nd defendant's suit without substitution as by law required.

52. The effect of death of a party to a suit and in particular a defendant is provided for under **Order 24 Rule 4** of the Civil Procedure Rules which provides as follows:-

“(1) Where one or two or more defendants die and the cause of action does not survive or continue against the surviving defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) ...

(3) where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.”

53. In the case of **M'Mboroki M'arangacha Vs Land Adjudication Officer Nyambene & 2 others [2005] eKLR**, it was held:

“... it is clear that such an application seeking that a legal representative be made party in the place of the deceased Plaintiff, must be made within one year. In default of bringing the said application as I understand the rule, the surviving suit shall abate so far as the deceased Plaintiff is concerned. The language used by the legislature is mandatory as the words used are “the suit shall abate.” It is my understanding and view therefore the abatement of the suit is automatic and does not... need an order of the court to abate the suit.” (Emphasis supplied)...

Reverting to this case, it is my view and finding that the trial Deputy Registrar should have taken a firm stand found in and in conformity with the provision of Order 23 Rule 4(2) whose clarity she did not doubt. That is to say, she should have declared a clear decision on the abatement of this suit. In the court's further finding, her, such failure to declare the abatement of the suit, did not in any way survive or revive the suit which had already abated. **The only act of the Plaintiff's legal representative which would revive the suit would be an application for such revival under the present Order 24 Rule 7(2) of the Civil procedure Rules, which states as follows: -**

“The Plaintiff or the person claiming to be the legal Representative of the deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff, may apply for an order to revive a suit which has abated or set aside an order or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit

...Finally, an issue arose during the arguments before me as to whether or not it was necessary for the Appellant to file the application for the declaration of abatement of the suit if the suit had indeed abated. My view, as already expressed above, is that **the suit, by**

operation of Order 23 Rule 4(2), automatically and mandatorily abated at the beginning of the first day after the expiration of one year after the death of the deceased. Thereafter, the suit was as dead as a dodo...” (Emphasis supplied).

54. In the circumstances of this case, It is common ground that the 2nd defendant passed on on 29th March, 2009 without being substituted within the time stipulated in law and at all. That being the case, the case against him became subject of the provisions of **Order 24 Rule 4(3)** aforementioned.

55. As pointed out in the case of **M’Mboroki M’arangacha Vs Land Adjudication Officer Nyambene & 2 others** (*supra*) and the case of **Kenya Farmers Cooperative Union v. Charles Murgor (deceased) T/A Kaptabei Coffee Estate 2005 eKLR** cited by counsel for the 1st defendant, the effect of abatement of the suit against the 2nd defendant without substitution was to render the suit none existent.

56. Whereas it is true that the plaintiff’s claim survived as against the other defendants, given the fact that the plaintiff’s claim can only be urged against a registered proprietor of land and the remaining defendants not being the registered proprietors of the suit property, I find and hold that the plaintiff cannot sustain her claim for adverse possession against the remaining defendants who are not the registered proprietors of the property she claims. However, the above determination should not be construed as a determination that the plaintiff has no legitimate claim as against the remaining defendants, especially the 3rd defendant who claims to have gained interest in the suit property during the pendency of this suit.

57. A review of the evidence adduced in this case shows that the process leading to the issuance of the title held by the 3rd defendant was found to be irregular.

58. Whereas the defendant claims to be an innocent purchaser of the suit property without notice of the plaintiff’s interest in the suit property, I find his claim to be subject to the plaintiff’s claim thereto, which claim, unfortunately, owing to the demise of the 2nd defendant without substitution, this court is, unfortunately, unable to determine.

59. In my view, in the special circumstances of this case, where the plaintiff took possession of the suit property before the 2nd defendant was born and bearing in mind that the law did not permit registration of land in the name of a non existent person, I am inclined to agree with the belated observation by the plaintiff’s counsel that the suit property must have been registered in a person other than the 2nd defendant. Be that as it may, since the plaintiff did not urge such a case before the court, or pursue any case against the person so registered as a proprietor of the suit, the law does not allow her to urge such a claim when she had not pleaded it. See **Order 2 Rule 6** of the Civil Procedure Rules which prohibits parties from departing from their pleadings. The rule provides as follows:

“No party may in any pleading make any allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.”

60. Whereas the evidence adduced in this suit shows that the 1st defendant was the main actor and the cause of all the trouble the plaintiff has found herself in, I am afraid that no orders can issue against him in the case as presented. If the plaintiff wanted to hold the 1st defendant accountable for his action, in my view she should have urged a claim against him based on his representation that he had authority to deal with the property when he had not. That way, may be the court would have basis for making orders against him.

61. In my view, no orders can issue against the 1st defendant. This is so, despite the evidence on record showing that he was the main actor and the cause of the plaintiff’s woes.

62. The upshot of the foregoing is that the plaintiff’s claim is found to be unsustainable as against all the defendants. However, owing to the special circumstances of this case, I order that each party bears their own costs of the suit.

Dated, signed and delivered in open court at Nyeri this 29th day of May, 2017.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Rurige h/b for Mr. Muchira for the plaintiff

Mr. Mwaura h/b for Mr. Kahiga for the 3rd defendant

Mr. Kebuka for the 2nd defendant

N/A for the 4th defendant

Court clerk - Esther