



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 155 OF 2013 (O.S)

MARURI GICHURE.....PLAINTIFF

-VERSUS-

MAINA MUHINJA.....DEFENDANT

JUDGMENT

1. Maruge Gichure (the applicant herein) took the summons dated 24th July, 2013 claiming to have become entitled to the parcel of land known as **LOC.19/RWATHIA/555** (the suit property) by adverse possession.
2. It is the applicant's case that he has been in use and occupation of the suit property since March 1992.
3. According to the applicant, he took possession of the suit property pursuant to an agreement for sale executed between him and the respondent on 7th March 1972.
4. The applicant contends that the respondent agreed to sell the suit property to him at Kshs. 730/= Pursuant to the agreement, he paid Kshs. 380/= leaving a balance of Kshs. 350/=.
5. Following the agreement, the applicant took possession of the suit property and developed it by constructing a house thereon, planting 600 coffee plants and cultivating food crops (maize and beans) thereon.
6. It is the applicant's case that after execution of the agreement, the respondent left for an unknown place only to return in 2013.
7. After he returned, the respondent summoned him at the chief's office to discuss the suit property. After listening to their respective cases, the elders ordered him to return the land to the respondent but because he was dissatisfied with the decision of the elders, he brought this suit for declaration that he had become entitled to the suit property by adverse possession.
8. Contrary to the applicant's contention that he sold the suit property to him, the respondent deposed that he left the suit property with the applicant on consideration of Kshs. 130/= which the applicant had advanced to him.
9. According to the respondent, the applicant was to hold the land until he repaid the money.
10. Upon receipt of the money, the respondent went to Nairobi to look for a job and settled at Subukia where he lives to date.
11. In 2013, the respondent returned ready to refund the money he had borrowed from the applicant but the applicant's son, Duncan Gichure Maruru, refused his father to take the refund, claiming that the respondent had sold the land to his father.
12. The respondent admitted that he has never dealt with the suit property since 1973.
13. According to the respondent the applicant admitted that he did not sell the land to him.
14. Both parties produced agreements allegedly executed between them.
15. The respondent availed the area assistant chief who corroborated his testimony that the applicant conceded that he had not sold the suit property to him.

16. The respondent produced the award/decision of the elders.

Analysis and determination

17. As pointed out herein above, the applicant got possession of the suit property pursuant to an agreement executed between him and the respondent. Whereas the applicant claims that the agreement was for sale of the suit property, the respondent maintained that it was merely a lending agreement.

18. There being no dispute that the applicant has been in use and occupation of the suit property uninterruptedly and peaceably for more than the period stipulated in law for acquiring title to land by adverse possession, his claim turns on whether or not the agreement pursuant to which the applicant obtained possession of the suit property was for sale of the suit property or it was merely a lending agreement. This is so because the dealing between the applicant and the respondent, being a controlled one under **Section 6** of the Land Control Act, Cap 302 Laws of Kenya, time for purpose of the applicant's claim for adverse possession, if at all, began to run after six months lapsed without the consent of the Land Control Board being obtained by the parties thereto. In this regard see the case of **Samuel Miki Waweru v Jane Njeri Richu – Civil Appeal No. 122 of 2001 (unreported)** where the Court of Appeal held:

“In our view, where a purchaser of land or a lessee of land in controlled transaction is permitted to be in possession of the land by the vendor or lessor pending completion and the transaction, thereafter becomes void under section 6 (1) of the Land Control Act for lack of consent of the Land Control Board, such permission is terminated by the operation of law and the continued possession, if not illegal becomes adverse from the time the transaction becomes void”.

19. The foregoing will, however, not be the case if the agreement between the parties herein was merely a lending one.

20. What was the nature of the agreement executed between the applicant and the respondent, was it for sale of the suit property or a money lending agreement?

21. Concerning this question, it is noteworthy that the applicant did not avail any witness to vouch for the contention that the transaction entered into between him and the respondent was for sale of the suit property and not a lending one as contended by the respondent.

22. In fact other than swearing an affidavit where he deposed that the agreement entered into between him was for sale of the suit property, for reasons not disclosed to the court, the applicant did not tender any oral evidence in support of his claim despite having had an opportunity to do so. Instead of availing himself to tender evidence in support of his claim, the applicant donated power to his son to testify on his behalf.

23. On his part, the respondent availed himself before court and adduced evidence in support of his claim that the transaction entered between him and the applicant was a lending one as opposed to one for sale of the suit property. In Support of his case, the respondent also availed the area chief who informed the court that the dispute between the applicant and the respondent was brought to his office to arbitrate. Both parties were accompanied by two elders each who after considering the cases of the parties, resolved that the transaction between the applicant and the respondent was not one for sale but a lending one (the applicant was to give the land back to the respondent upon refund of the Kshs. 130).

24. The chief also informed the court that the only surviving witness to the agreement allegedly executed between the applicant and the respondent disowned it. He further informed the court that the applicant confessed that he did not buy the suit property.

25. The court heard that as a result of the foregoing, the elders resolved that the respondent refunds the applicant Kshs.7800/= being the kshs. 130 borrowed multiplied by 60, a decision that the applicant's son, Gichuri Maruri, is said to have advised his father not to honour.

26. It is noteworthy that the said account by the area chief was not in any way controverted by the applicant.

27. From the testimony of the respondent and that of the area chief and the uncontroverted evidence tendered in respect thereof, I find and hold that the agreement entered into between the applicant and the respondent was one for lending as opposed to one for sale. I also find that the entry and occupation of the suit property by the respondent was with the permission of the respondent and as such incapable of forming the basis of the applicant's claim for adverse possession. In this regard see the case of **Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR)**.where the Court of Appeal held:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

28. The upshot of the foregoing is that the applicant's claim has no merit and is dismissed with costs to the respondent.

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

L N WAITHAKA

JUDGE.

In the presence of:

N/A for the plaintiff

Mr. Waruinge for the defendant

Court clerk - Esther