



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 92 OF 2017

KARIUKI MURUNJI - PLAINTIFF

VS

MAGDALENE WAIRIMU WANJOHI - DEFENDANT

JUDGMENT

1. The Originating Summons filed by Kariuki Murunji who sought to acquire title by adverse possession of a portion (2 acres) of Land Parcel No.14/Kairo/2864 registered in the name of Magdalene Wairimu Wanjohi named as the Defendant in the suit.

2. In his Originating Summons filed on 4.15.15 he sought the following orders;-

(i) A declaration that the title of the said MAGDALENE WAIRIMU WANJOHI to a portion measuring two acres or thereabouts out of land parcel no.Loc.14/Kairo/2864 and which portion is well defined and occupied by the plaintiff, has been extinguished by the Plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the Limitation of Actions Act;

(ii) A declaration that the Plaintiff has acquired title to the said portion measuring approximately two acres out of land parcel No. Loc.14/Kairo/2864 by his adverse possession thereof for a period of more than 12 years, i.e. since about 1976 to-date.

(iii) An order do issue requiring and directing the Land Registrar to cause sub-division of land parcel No. Loc. 14/Kairo/2864 in such a manner that the portion of two acres or thereabouts aforesaid is excised from the said land parcel and to register that portion in the name of the Plaintiff KARIUKI MURUNJI in place of Magdalene Wairimu Wanjohi.

(iv) The costs of this suit be borne by the Defendant.

3. The summons are based on the grounds enumerated in detail in the Originating Summons and are supported by the affidavit of the Plaintiff sworn on 2.12.15.

4. The background as given by the Plaintiff in his affidavit evidence as well as his testimony is that he entered the land through an agreement for sale that he signed with Wanjohi Caca on 15.9.15. See agreements marked *KM 2 (a) – KM 2(b)*. He purchased two acres of land being a portion of the large LR No. Loc.14/Kairo 601 at the sum of Kes. 9,000/=. There were 7 witnesses to the agreement, one of whom was the Defendant. The vendor showed him the delineations of the land on the ground and he commenced occupation immediately. In 1976 he obtained a Land Control Board consent and it is at that point that it was pointed out to him that the Wanjohi Caca who sold the land was not the owner. The transaction was

then objected.

5. It transpires that the land was registered in the name of Wanjohi Caca, the son of Njeri. The Patriarch Wanjohi Caca had 3 wives: Wambui, Njeri and Wanjiku. All the 3 wives had sons by the name Wanjohi Caca named after their father. The one who wrongly sold the land to the Plaintiff was Wanjohi Caca (Wambui) purporting to be the owner. The registered owner Wanjohi Caca (Njeri) was alive and he never raised any objection to the Plaintiff occupying the land despite the misrepresentation by his half-brother Wanjohi Caca (Wambui).

6. That the Plaintiff continued to occupy the land quietly and uninterrupted from 1976 to 2015, developed and planted coffee trees on the same. The period is over 37 years. The registered owner Wanjohi Caca Njeri died and the original land acreage of LR No. 601 was 17.5 acres.

7. In 2015, after the death of Wanjohi Caca(Njeri) the family obtained a confirmed grant of administration which paved way for the subdivision of the land Loc.14/Kairo/601 for purposes of distribution to the beneficiaries. The portion of 2 acres occupied by the Plaintiff went to the Defendant. The Defendant is the registered owner of Loc.14/Kairo/2864, which comprise the 2-acre portion occupied by the Plaintiff. See the certificate of official search dated 16.10.15 marked "KM 4".

8. He avers that the Defendant invaded the land in 2015 when she obtained title and immediately filed the Originating Summons. He also filed a Motion and obtained orders restraining the Defendant from interfering with his 2 acre portion until the suit is heard and determined.

9. Isaac Maina Wainaina the Plaintiff's witness who states that he is a neighbour of both the plaintiff and the defendant, confirmed that he knows the Plaintiff as being in occupation of the 2 acres since 1983 when he also bought a portion of LR Loc.14/Kairo/601 from the Caca's. He has also seen the Plaintiff cultivating the land and tending to the tea bushes growing therein.

10. Tabitha Wanja Ndirangu (PW 3) states that the Plaintiff is her father-in-law, she being married to David Maina his son. She confirmed that she and her husband have been farming tea in the suit land with the permission of the Plaintiff since 1985 or thereabouts. She attached a tea grower's licence to support her evidence. Prior to them utilizing the land, the Plaintiff's sister was occupying while doing subsistence farming, with the permission of the Plaintiff. Later on, the witness testified that she rented the tea bushes to a third party to pick at a fee. The fees were payable to her and her husband. This is the third party that was evicted by the Defendant sometime in 2015.

11. The Defendant resisted the claim by way of replying affidavit filed on 13th January, 2016 in which she attacked the sale contract between the Plaintiff and the late Wanjohi Caca Wambui as being null and void as the latter had no capacity to sell nor give consent to the occupation of the suit land. That she is neither the legal representative or administrator of Wanjohi Caca Wambui or his successor in title. That she has been wrongly sued in this case. Interestingly she states that if there was any sale of the suit land the same was extinguished by the subdivision and issuance of new titles to the beneficiaries of the estate.

12. In her evidence under oath, she confirmed that Wanjohi Caca Wambui was her husband. That he purported to sell land that belonged to Wanjohi Caca Njeri to the Plaintiff, when he knew that he was not the registered owner. He also gave the possession of the suit land to the plaintiff on the ground. That the transaction was objected to and fell through. She confirmed that the portion of 2 acres that the Plaintiff has been in occupation is part of the land that was transferred to her upon division and distribution of the larger plot 601. She succeeded her husband's portion of land measuring 5.8 acres from the large 601 which initially belonged to Wanjohi Caca Njeri upon his death. She confirmed that she re-entered the suit land in 2015 and evicted the Plaintiff's licencees who were tending tea bushes. She also confirmed that the Plaintiff's son Isaac Maina had been picking the tea from the suit land and later rented the tea bushes to a third party. She confirmed that she together with others witnessed the agreement especially the payment of Kes. 5600/= being the part payment of the suit land. She testified that she is also called Mandarina, a corruptible way of the name Magdalene in the local dialect. She also attested that the Plaintiff's sister occupied a portion of Land Reference 601 at some point. That it is true that

notwithstanding the agreement of sale being challenged, the Plaintiff continued occupying the suit land portion that he had been showed by her husband till 2015 when she moved into the land to evict them. She however contends that she does not know the exact measurement of the land that was occupied by the Plaintiff.

13. Both parties filed their issues as well as written submissions. The issues which commend themselves for determination by this court are as follows;-

(i) Is the agreement entered in the Plaintiff and Wanjohi Caca Wambui valid?

(ii) When did time start running?

(iii) Is the possession of the suit by the Plaintiff adverse to that of the registered holder including the Defendant?

(iv) Is the Defendant a proper party to the suit? Is she the legal representative of Wanjohi Caca Njeri?

(v) Whether a claim for adverse possession in respect of the portion of the suit land occupied by the Plaintiff can infact be sustained against the Defendant?

14. The sections below are relevant and deal with the issue of land under the Limitations of Actions Act;

Section 17

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

Section 38

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act”

Section 7 of the said Act states as follows’

“An action may not be brought by any person to recover land after the end of twelve 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”

Section 13;

“ (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2)Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3)For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.

15. Section 28 h of the Land Registration Act 2012

“Rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”.

16. The case of **Kasuve vs Mwara investment ltd & 4 others 2004 I KLR 184** states that a Plaintiff in a claim of adverse possession must prove the following:-

“ 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 on his own volition.”

17. Section 7 of the new Land Act 2012 state that “title to land may be acquired through;

- (a) allocation;
- (b) land adjudication process;
- (c) compulsory acquisition;
- (d) prescription;

18. It is not disputed that the suit land was sold by Wanjohi Caca Wambui who was not the registered owner of the larger land Ref. Loc.14/Kairo/601. It is also an admitted fact that the said Wanjohi Caca Wambui allegedly gave possession to the Plaintiff and obtained LCB consent for the transaction. The transaction however collapsed when the same was objected to. It therefore follows that legally the vendor did not have legal capacity to sell the suit land and therefore the transaction was mooted and became null, illegal and void. It was an illegal contract incapable of enforcement. The Plaintiff in his evidence was forthright when he admitted that he “I have occupied the land for more than 12 years after buying in an illegal contract”.

19. The Registered owner of the land as shown in the certificate of official search dated 10.12.13 was Wanjohi Caca Njeri having been registered as the proprietor of Loc. 14/Kairo/601 as at 26.6.62. The imposter Wanjohi Caca Wambui had taken advantage of the similarity of the names in the family among his step brothers and transacted purporting to be the registered owner. The fact of the alleged fraud was indeed recorded in the title 601 on the 12.3.76 as “Case of fraud detected (B.U)”.

20. It is a fact that the Plaintiff took possession of the suit land from 1976 or thereabouts. This was in the

knowledge of the real registered owner Wanjohi Caca Njeri who was alive then. It is in evidence that the Plaintiff occupied the suit land from 1976 – 2015 through his sister, the son (David Maina Kariuki and his wife Tabitha Wanja Ndirangu) and the third party green tea picker who had rented the tea bushes. All these occupiers had the permission and blessings of the Plaintiff.

21. It would appear from the evidence that notwithstanding the illegal sale of the land to the Plaintiff, the registered owner Wanjohi Caca Njeri did not evict the Plaintiff in spite of the occupation being in his full knowledge. He had a right to do so but instead watched silently as the Plaintiff continued to occupy openly, peacefully and without force. It therefore follows that since the entry was through an illegal contract; was without permission of the registered owner of Land reference Number 601. This means that the occupation became adverse to the title of the right owner of Land reference No. 601 from 1988 – 2015. The registered owner did nothing to interrupt or dispose his possession and occupation of the suit land, despite the same being in his factual knowledge. It is clear that the Plaintiff brought his claim under adverse possession and not contract of sale of land, as the said contract of land was void.

22. After the death of Wanjohi Caca Njeri, a confirmed grant of administration was issued to one Samson Kairu Chacha and the land 601 was distributed to his beneficiaries one of which is the Defendant Magdalene Wairimu Wanjohi who got 5.8 acres out of the 17.5 Acres (601). The land, would appear to have been family land given the nature of distributions made in the grant. See grant dated 13.2.14 (Suit case No. 522 of 2013). On sub-division and distribution of the land reference 601, the Defendant was registered as the owner of Plot 2864 which comprises of the suit land (2 acres), hence the Plaintiff's claim. It therefore follows that the title in the two acres inside 2864 was extinguished way back in 1988 and the Defendant holds the same in trust for the Plaintiff. The claim of adverse possession having crystallized was conveyed with the interest in land to the Defendant.

23. In the case of **Githu vs Ndeete 1984 KLR 776** the Court of Appeal stated as follows:-

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession”

The change of ownership of the land from Wanjohi Caca Njeri to the Defendant did nothing to interrupt the actual right of the Plaintiff's adverse possession that accrued way back in 1988.

24. As detailed above the Defendant succeeded land (2864) that was partitioned from the larger parcel 601 in a succession cause No.522 of 2013. The defendant admitted in her evidence on cross-examination that the two acres claimed by the Plaintiff is within 5.8 acres comprised of LR No. 2864, which she is the registered owner. She did inherit the land from the larger land reference No. 601. She also admitted that the 5.8 acres is land that belonged to her late husband Wanjohi Caca Wambui, the land having been family land.

25. In her evidence she also admitted that the Plaintiff had been in occupation through his relatives and children from 1976 to 2015 when she entered the land and prevented them from picking the tea. She is therefore being sued as the registered owner of parcel No. 2864 on which a right of adverse possession accrued to the Defendant back in 1998 or thereabouts. She derived her interest from the portion which had been encumbered by an overriding interest in form of adverse possession. The title of predecessor Wanjohi Caca (Njeri) had been extinguished in 1988 and Wanjohi Caca Njeri was holding it in trust for Plaintiff.

26. Whether or not the Defendant is the legal representative of the late Wanjohi Caca Njeri or Wanjohi Caca Wambui is of no effect in so far as adverse possession is concerned. It is my view immaterial in his case in view of the holding of the Court of Appeal in the case of **Githu vs Ndeete** (supra).

27. It is on record that she entered the land in 2015 to evict the Plaintiff which fact serves to link the suit land on the ground as the land that the plaintiff is claiming. From the evidence on record the suit land has tea bushes which the Defendant admitted in evidence. It has been claimed that the land was not demarcated on the ground and that it is not identifiable. That contention is not necessary true as proved by

the action of the Defendant above. Even though no evidence of survey report of the suit land was produced, the two acres being claimed by the Plaintiff is known on the ground by the parties.

28. From the evidence adduced in this case, the following are my findings;

(1) The registered owner did nothing to interrupt or disposes the Plaintiff of the occupation and possession of the two acres in dispute. The Defendant having witnessed the initial entry and continued occupation was well aware of the possession of the suit land by the plaintiff.

(2) The Plaintiff continued in occupation of the land from 1975/76 to 2015; his occupation was initially without the consent of the registered owner, peaceful open and uninterrupted for almost 40 years. He developed the land by planting tea which is still on the land.

(3) The Plaintiff's title was adverse to the original owner by 1988. From 1998 to 2015 the original owner or successors in title to the original owner were holding the title for 2 acres in trust for the Plaintiff. The alleged assumption of ownership by the Defendant did not interrupt that trust. It continued through the defendant. As the defendant held the title for the 5.8 acres, she also held title in trust for the 2 acres for the plaintiff.

(4) The only conclusion that commends itself to the Court is that the Plaintiff has established his claim of adverse possession over the 2 acres of land on a balance of probability.

In the end this Court grants the orders as follows:-

(i) A declaration that a portion of the title of the said MAGDALENE WAIRIMU WANJOHI measuring two acres or thereabouts out of land parcel no.Loc.14/Kairo/2864 and which portion is well defined and occupied by the plaintiff, has been extinguished by the Plaintiff's adverse thereof for a period of more than 12 years in terms of Sections 17 and 38 of the Limitation of Actions Act;

(ii) A declaration that the Plaintiff has acquired title to the said portion measuring approximately two acres out of land parcel No. Loc.14/Kairo/2864 by his adverse possession thereof for a period of more than 12 years.

(iii) An order do issue requiring and directing the Land Registrar to cause sub-division of land parcel No. Loc. 14/Kairo/2864 in such a manner that the portion of two acres or thereabouts aforesaid is excised from the said land parcel and to register that portion in the name of the Plaintiff KARIUKI MURUNJI in place of Magdalene Wairimu Wanjohi.

(iv) The costs of this suit to be borne by the Defendant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20TH JULY 2017.

J. G. KEMEI

JUDGE