



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C CASE NO. 229 OF 2017

LAURENCY NJERI GATIMU - PLAINTIFF/APPLICANT

VS

SAMUEL MUIRURI KAMWARO - DEFENDANT/RESPONDENT

JUDGEMENT

1. Laurency Njeri Gatimu took out Originating Summons dated 27/2/17 against Samuel Muiruri Kamwaro the appellant in this case. In the Originating Summons the applicant sought the following orders:-

- a) That the applicant has by way of adverse possession acquired land title No. MAKUYU/KIMORORI/BLOCK 3/3706 and be registered in the names of LAURENCY NJERI GATIMU.
- b) That the Land Registrar Murang'a be ordered to transfer the said land comprised of Land title No. MAKUYU/KIMORORI/BLOCK 3/3706 to the applicant.
- c) That the Deputy Registrar of this Court do sign application for land control board. Transfer, documents and any other applications and documents necessary to facilitate transfer of suit land to the applicant.
- d) That the respondent do pay the costs of this suit.

2. The suit property in dispute between the parties is MAKUYU/KIMORORI/BLOCK 3/3706 situated in Makuyu Murang'a County. The property is registered in the name of the Respondent.

3. Upon filing the Originating Summons the Applicant served the same on the Respondent through a Process server. The Respondent acknowledged receipt of service of the Originating Summons and its annexures on 2/3/17 at 8.00 am and appended his signature against it, a copy of the same is on record. The Respondent did not file any response and this prompted the appellant to file request for judgment under Order 10 rule 10 of the Civil Procedure Rules after which the Court gave directions to the applicant to list the matter for formal proof.

4. The matter proceeded undefended. At the hearing of the formal proof, the appellant stated that she entered into possession of the property through an agreement of sale with the appellant dated the 15/11/2003 for the purchase of the suit property. That she paid the purchase price in full as at 15/11/2003. That on the said date, she was put into possession by the Respondent pursuant to the terms of the agreement for sale. That in 2004 she started construction of a permanent house with a water reservoir (well) where she and her family reside.

5. That since 2003 she has been in continuous and uninterrupted possession of the suit land to the exclusion of the Respondent for a period in excess of 12 years and so her right to adverse possession has arisen against the Respondent over the suit property.

6. That at the time of purchasing the suit property, the same was registered in the name of Kamuoro Kimani, father of the Respondent who passed away in 1971. That the Applicant was aware of that fact but nevertheless entered and completed the transaction. The Respondent too held himself out as the ultimate beneficiary of the suit property and assured the Applicant that he had been given the land by his late father even when he was alive. In the said agreement, he undertook to pursue the Succession proceedings in respect of the suit property.

7. At the trial of the case, the Applicant stated that the Respondent has not interrupted her possession on the suit property and that she has not handed over possession of the same to the Respondent that is to say that she has been in continuous possession for over a period of 12 years.

8. I have analysed the pleadings, the agreement of sale as well as the uncontroverted evidence of the Applicant and note that the entry into the land was lawful through contract. It is to be noted that though at the time of entering into the contract, the land was registered in the name of the Respondent's father, and that the Respondent was not appointed as the administrator of the estate. He represented to the Applicant as the beneficial owner of the land. This fact was disclosed to the Applicant. It then follows that the title became adverse to the legal representatives of the deceased owner and his successors. At the time of filing the Originating Summons the Applicant had been in continuous possession for a period of 14 years.

9. In the case of **Francis Gicharu Kariri vs Peter Njoroge Maina** Civil Appeal No. 293 of 2002(NBI) upheld the decision of the High Court in the case of **Kimani Ruchire vs. Swift Rutherford & Co. Ltd. (1980) KLR 10** at page 16 B where Kneller J said:

“The Plaintiffs have to prove that they have used this land which they claim as of right *nec vi nec clam nec precario* (no force no secrecy no persuasion). The Plaintiff must show that the Respondent had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.

In the instant case the record shows that the Applicant was put in possession of the suit property in 2003, constructed a house and move in in 2005 with her family and still resides on the suit land today. This is proof of actual possession of the suit property by the Applicant. It is an action that dispossessed the respondent (*animus possidendi*). The record also shows that the Applicant's possession has been continuous, uninterrupted and without force until now.

10. In the case of **Public Trustee vs Wanduru (1984) KLR 314 at 319, Madam J A** stated that adverse possession should be calculated from the date the payment of the purchase price to the full span of 12 years if the purchaser takes possession of the property because from this date the true owner is dispossessed of possession. In this case the applicant paid the full price on 15/11/003 and was put in possession. Going by the above decision one would argue that the right of adverse possession arose accrued and vested by 15/11/2015 to the applicant. However, the facts of the case are such that Clause g) of the agreement for sale provided that the transfer of the suit property would be effected 14 months from the 15/11/2003, that is to say the 15/12/2004. There is no evidence that the transfer was effected on expiry of that date and it is my considered view that time started running from the 15/12/2004. The title of the respondent became adverse from the 15/12/2016. The applicant filed suit on the 7/2/2017.

11. In **Mwangi & Another vs. Mwangi 1986 KLR 328**, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. The Respondent therefore was holding land in trust for the Appellant as his title to the same was extinguished in 2016. In the case of **Public Trustee vs. Wanduru** (supra) it is stated that a purchaser has an overriding interest under the provisions of Registration of Land Act Cap 300 and the same provisions are comprised in section 28(h) of the present Land Registration Act No 3 of 2012. It

therefore follows that the Applicant in addition to acquiring a right of adverse possession over the suit property, has also acquired overriding interests which are protected in law.

12. Section 7 of the Limitations of Actions Act provides that no 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. The Appellants right accruing on expiry of the 12 years enjoys the full protection of the law and in conclusion I find and hold that the appellant has proved her case on a balance of probability and grant judgement in her favour as follows; -

a) THAT the applicant has by way of adverse possession acquired land title No. MAKUYU/KIMORORI/BLOCK 3/3706 and the same be registered in the names of LAURENCY NJERI GATIMU.

b) THAT the Land Registrar Murang'a be ordered to transfer the said land comprised of land title No. MAKUYU/KIMORORI/BLOCK 3/3706 to the applicant.

c) THAT the Deputy Registrar of this Court do sign all the requisite documents necessary to facilitate transfer of suit land to the applicant.

d) THAT the costs of this suit shall be met by the respondent.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28TH DAY OF SEPTEMBER 2017.

J. G. KEMEI

JUDGE