



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 347 OF 2013

JOSEPH BORO NGERA.....PLAINTIFF

VERSUS

**LUCY WANGUI KINUTHIA (Suing in her capacity as the legal Representative
of the estate of SAMUEL NGUGI KINUTHIA).....DEFENDANT**

JUDGMENT

(Suit by defendant seeking a declaration of ownership of land and lifting of a caution registered by the defendant; plaintiff making a separate claim for adverse possession; evidence showing that the defendant's deceased husband sold the suit land to the plaintiff in the year 1977; plaintiff taking possession of the land and being in possession since then; lease issued to the seller in the year 1983; seller fully paid; plaintiff being in continuous uninterrupted possession; no evidence that defendant or any of the family of the deceased have ever been in possession; claim by defendant dismissed; counter suit for adverse possession succeeds)

PART A : INTRODUCTION AND PLEADINGS

1. Through a plaint filed on 25 April 2003, Lucy Kinuthia, the administrator of the estate of Samuel Ngugi Kinuthia (deceased), filed suit in the Chief Magistrate's Court at Nakuru, against Joseph Ngera, vide which she pleaded that her late husband was the owner of the land parcel Nakuru Municipality Block 17/35 (hereinafter referred to as "the suit property"). She pleaded that she conducted a search on this title in the month of March of 2003, and found that Mr. Ngera has placed a caution. She has pleaded that she made efforts to contact Mr. Ngera so that she can find out what sort of interest he had but the defendant refused to divulge his interest. In the suit, she has sought orders for a declaration that the suit property now belongs to the administrator of the estate of the deceased and an order for the caution to be lifted. Mr. Ngera, as defendant, filed a statement of defence, vide which he pleaded that he purchased the suit property from the deceased in the year 1977 and has been in occupation since then and that the caution has been in existence since the year 1985.

2. On 16 June 2004, Mr. Ngera filed an Originating Summons in the High Court of Kenya at Nakuru, vide which he pleaded that he has been in continuous possession of the suit property for a period in excess of 12 years and is therefore entitled to the said property by way of adverse possession.

3. By consent of the parties, the two suits were consolidated, and with the creation of the Environment

and Land Court, the suit was transferred to the said court and registered as Environment and Land Court Case No. 347 of 2013. Mr. Ngera was treated as plaintiff whereas Mrs. Kinuthia was treated as defendant.

PART B : EVIDENCE OF THE PARTIES

4. In his evidence, Mr. Ngera testified that he knew the deceased well. He testified that in the month of July 1977, the deceased sold to him the suit property and they wrote an agreement on 26 July 1977. At that time, the deceased only held an allotment letter for the land which he gave to Mr. Ngera. Mr. Ngera produced this original allotment letter as an exhibit. The agreement for sale was drawn in the offices of M/s Mindo & Company Advocates and he produced a copy of it as an exhibit. He testified that the purchase price was of Kshs. 35,000/=. On the date of the agreement, he deposited the whole of this sum with Mr. Mindo Advocate. The seller was immediately paid the sum of Kshs. 25,000/= and he was to be paid the balance after obtaining consent from the Commissioner of Lands. He testified that he took possession immediately and has continued being in possession to date. He fenced it with barbed wire and cedar posts and deposited some building materials. He stated that he also has a caretaker on the suit property. Despite the agreement, he never got title to the land. Mr. Mindo was the first to follow up on the title and thereafter, he handed the file to Mr. Maraga Advocate. It appears as if the problem was that the land had arrears of land rates and land rent. Mr. Ngera produced various letters to this effect and letters showing that these land rates and rents were paid by himself through the offices of Mr. Maraga. The lease to the title was prepared in favour of the seller and forwarded to him (the seller). Mr. Maraga then drew a transfer of the leasehold title to a company owned by Mr. Ngera, but the lease was never signed by the seller. In the meantime, Mr. Ngera placed a caution on 2 May 1985. It is this caution that the estate of the deceased was lifted. He testified that the vendor thereafter died on 2 March 1999 and before his demise, he never tried to take possession of the land.

5. He testified that in the year 1985, a man of Asian origin came to him and informed him that he intended to buy the land from the deceased. Mr. Ngera showed him his documents and the man backed off. He stated that the deceased was paid the balance of Kshs. 10,000/= by Mr. Mindo. He testified that he is the one who paid all outgoing on the property including a sum of Kshs. 29,000/= that was demanded. He had to make these payments or else the plot would have been repossessed by the Government and the lease would not have been prepared. He testified that the deceased was to obtain consent to transfer which he never did, and according to their agreement, failure to obtain consent would lead to nullification of the agreement. He stated that he has been on the land without force and his possession of it is open.

6. In cross-examination, he affirmed that he knew the deceased very well and they were good friends. Mr. Mindo was also a mutual friend. He noted that their agreement stated that the sum of Kshs. 10,000/= was to be paid after consent was obtained from the Commissioner of Lands, but the deceased went for the money and was paid by Mr. Mindo, despite not obtaining consent. He stated that at some point, a Mr. Barngetuny came to the land and put up a fence of iron sheets. He looked for him and paid him off. Apparently, a second title for the same land had been prepared which led to a criminal case No. 207 of 2017. He stated that he is the one who instructed and paid Mr. Maraga, despite some letters written by Mr. Maraga, stating that he is acting for the deceased. He stated that the lease to the deceased was issued on 9 June 1983.

7. On her part, Lucy Wangui Kinuthia, testified inter alia that she knew Mr. Ngera as a friend to her late husband. After his demise, she filed a succession cause and the grant was confirmed. The suit property was distributed to the sons of the deceased. Despite getting the confirmed grant, she could not trace the title deed and she gazetted it as lost on 1 February 2002. On expiry of the notice in the Gazette, she went to get another title and it is then that she was informed that she cannot get a title because of a caution. She observed that the caution was placed by Mr. Ngera and since he was a person that was known to her, she went to see him at his shop. She inquired about the caution and Mr. Ngera informed her that he had purchased the property and finalized everything. He referred her to Mr. Mindo. She did not go to Mr. Mindo, since he had moved offices to Nyeri, but instead asked a mutual friend to plead her case to Mr. Ngera. He did not succeed as Mr. Ngera informed her that he had already purchased the land and had finished paying for it. It is then that she decided to file suit.

8. She stated that her husband had planted K-apple on the land but had not put up a fence and that it is a place that she had kept on visiting. She said that it was not Mr. Ngera who put up the fence, but that it was put up by some people that she did not know, and that it is the same people who deposited building materials. She testified that she has never seen a caretaker on the land. She stated that she was not aware of the agreement that Mr. Ngera claims to have had with her late husband and that she only got a copy from her advocate. She affirmed that the caution was registered in the year 1985 at a time that her husband was alive and healthy. He started getting sickly in the year 1991/1992. She stated that Mr. Ngera has never come to her regarding the transaction and did not ask her if she had filed a succession cause. She testified that she wants the property so that she can transfer it to her children and is ready to refund Mr. Ngera his Kshs. 35,000/=. She wondered how Mr. Ngera can state that he has been using the plot yet it is vacant and that people are shown the plot to purchase for the reason that it is vacant.

9. In cross-examination, she testified inter alia that she never saw the lease to the property and that her husband never informed her of the sale. She agreed that there are building materials on site but did not know who deposited them. She was also aware that the land is fenced but she did not know who fenced it. She stated that she visited the land between the years 1983 and 1999 and saw the K-apple fence and the building materials. She stated that the agreement states that it will be null and void if consent is not issued and the money refunded without interest.

PART C : SUBMISSIONS OF COUNSEL

10. In her submissions, Ms. Nancy Njoroge, learned counsel for Lucy Kinuthia, inter alia submitted that the agreement stated that the balance of Kshs. 10,000/= was payable upon the vendor obtaining consent of the Commissioner of Lands. She pointed out that no consent has ever been obtained and that the deceased never signed any transfer forms. She also pointed at the agreement, as stating that if no consent is obtained, the agreement will be null and void and the purchase price refunded without interest. She further submitted that the balance of Kshs. 10,000/= was never paid and that there is no correspondence from Mr. Ngera asking the deceased to transfer the land. On the claim for adverse possession, she submitted that on his own admission, Mr. Ngera testified that strangers have been attempting to sell the plot and wondered how this could happen if he was in occupation. She submitted that Mr. Ngera has never been in possession as claimed. She relied on the cases of **Purple Rose Trading Company Limited vs Bhanoo Shashikant Jai (2014) eKLR** and **Gatobu M'Ibuutu Karatho vs Christopher Muriithi Kubai (2014) eKLR** to push across the point that parties are bound by their contracts.

11. On his part, Mr. Lawrence Karanja, learned counsel for Mr. Ngera, inter alia submitted that his client has met the threshold to be declared owner of the suit property by way of adverse possession. He submitted that his client entered the suit land in the year 1977 as a purchaser for value. He submitted that the deceased did collect the balance of the purchase price and was therefore a fully paid vendor against whom time for adverse possession could start running. He relied on the case of **Public Trustee vs Wanduru (1984) KLR 314**. He agreed that no consent to transfer was ever obtained and therefore the agreement became null and void in the year 1983 when the lease to the deceased was issued. He submitted that from that moment, the occupation of his client became adverse to that of the registered owner. He submitted that possession does not have to be actual and physical and relied on the case of **Peter Mbiri Michuki vsw Samuel Mugo Michuki (2014) eKLR**. He submitted that the possession of the suit land by his client was open and continuous and that he possessed the required *animus possidendi* by resisting the lease of the deceased and resisting any other person who tried to assert ownership of the suit property. He was of the view that the title of the deceased has been extinguished by adverse possession.

PART D : ANALYSIS AND DECISION

12. I have considered the matter. I opt to start with the claim for adverse possession, for if I am to sustain it, then automatically, the case of Lucy Kinuthia must fail.

13. It is trite law, for which I need not cite any authority, that to succeed in a claim for adverse possession, one needs to demonstrate that he has been on the claimed land *nec vi, nec clam, nec precario*, meaning that he has been on the land without violence, without secrecy and without permission. The

possession of the claimant must be continuous and uninterrupted for a period of at least 12 years and such possession must be accompanied by the necessary *animus possidendi* or intention to acquire and keep the land as one's own.

14. In our case, I do not think that it is in dispute that Mr. Ngera and Mr. Kinuthia had a sale agreement on 26 July 1977 vide which Mr. Kinuthia sold the suit land to Mr. Ngera. The purchase price was of Kshs. 35,000/= and there is no doubt that the sum of Kshs. 25,000/= was paid immediately. The balance of Kshs. 10,000/= was to be paid upon the vendor obtaining the consent to transfer from the Commissioner of Lands. If consent was not obtained, the agreement was to be null and void and the purchase price refunded free of interest. In his evidence, Mr. Ngera stated that he did deposit the sum of Kshs. 10,000/= with Mr. Mindo and Mr. Kinuthia received it. Despite this, Mr. Kinuthia never transferred the land to him but instead tried to sell it to other people including a man of Asian origin. It is then that Mr. Ngera placed the caution claiming a purchaser's interest.

15. Having listened to the witnesses and having seen their demeanour, I have no reason to doubt the evidence of Mr. Ngera. I thought that he came across as a forthright and honest witness. I believe his evidence that Mr. Kinuthia was paid the balance of Kshs. 10,000/=. But even if I do not believe that evidence, there is overwhelming documentary evidence that Mr. Ngera paid money that ordinarily would be paid by the owner of the property, including Kshs. 1,175/= paid on 3 July 1980 as Government conveyance fees; Kshs. 7,780.50/= in land rates paid in the year 1981; Kshs. 600/= for survey, again paid in the year 1981; stamp duty of Kshs. 73/= paid on 17 March 1983; Kshs. 40/= paid for a rates clearance certificate on 28 July 1980. These alone are more than Kshs. 9,600/= and Mr. Ngera also mentioned payment of other monies which one would of course expect to pay for preparation of the lease documents. There must have been land rents paid; fees for rent clearance certificates and other miscellaneous expenses. All these are monies ordinarily paid by the vendor which I have no reason to doubt that Mr. Ngera paid on behalf of the seller, for he is the one who kept all the receipts. Even if you do not take into account the Kshs. 10,000/= deposited with Mr. Mindo, and even if you assume that the same was never paid to Mr. Kinuthia, there was a more or less equivalent sum which Mr. Ngera would have been entitled to set-off against the balance of Kshs. 10,000/=. Whichever way one looks at the matter, Mr. Kinuthia did receive the benefit of the balance of Kshs. 10,000/= and must be considered as a fully paid seller latest in the year 1983.

16. I also believe the evidence of Mr. Ngera that he took possession of the land immediately upon purchase. He did not enter into possession as a licensee of the registered owner. He entered it with intention to keep and acquire it, for the reason that he had purchased it. I have no reason to disbelieve the evidence of Mr. Ngera that it is him who has continuously been in possession of the land. In fact, I have absolutely no evidence before me that Mr. Kinuthia or his family continued in possession of this land. Indeed, Mrs. Kinuthia herself confessed that she did not know who deposited building materials or who placed a fence on the land. If she or any of her family were in possession of this land, they would have known who deposited building materials and who fenced the land. One would have expected them to resist any attempts at fencing or depositing of building materials, if indeed they were in possession of the land and if they regarded the said land as still being owned by them. Instead, no complaint was raised by them that a stranger has deposited building materials and has fenced the property. Save for stating that she intermittently visits the suit property, Mrs. Kinuthia gave absolutely no evidence of any sort of possession or occupation of the land. She has neither developed the land nor even kept a caretaker on it. She stated that she has sons who she wishes to distribute this property to, but none of them appear to have ever been keen to take possession of the land. On the other hand, Mr. Ngera testified that he has been in possession. In fact, he did state that at some point some persons came to fence the land and he warded them off. If he was not in possession he would not have known of the fencing of the land and the third parties would have settled on the land. He has also continuously been warding off fraudsters keen to sell the land to unsuspecting members of the public. No such action has been undertaken by Mrs. Kinuthia or any member of her family.

17. As submitted by Mr. Karanja and as affirmed in the case of in the case of ***Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR***, possession does not have to be actual but can be constructive. From the evidence tabled, it is clear to me that Mr. Ngera has been the one taking care of the land and has

placed a caretaker on it. That to me is sufficient enough to be deemed to be possession of land. I have no evidence that Mr. Ngera's possession has ever been interrupted and that he has ever been dispossessed of this land at any time. His possession has not been secretive but has been open to all. Neither did he use any force to enter the land, and neither has he used any force to keep away any of Mr. Kinuthia's family from the land.

18. In my view, the claim for adverse possession must succeed. I hold that Mr. Ngera is entitled to the suit property through the doctrine of adverse possession. That being the case, the claim by the estate of Mr. Kinuthia for a declaration that they are entitled to ownership of the suit land automatically fails. So too their claim to have the caution lifted. The suit by the estate of Mr. Kinuthia is hereby dismissed with costs. I also award costs to Mr. Ngera for his suit for adverse possession.

19. Given the above, I now make the following final orders:-

(i) That it is hereby declared that Mr. Joseph Boro Ngera, is entitled to ownership of the leasehold title comprised in the land parcel Nakuru Municipality Block 17/35, by virtue of the doctrine of adverse possession.

(ii) That it is hereby declared that the title of Samuel Ngugi Kinuthia through his estate is hereby extinguished and I hereby direct that Mr. Joseph Boro Ngera be registered as proprietor of the leasehold title comprised in the land parcel Nakuru Municipality Block 17/35 in place of Samuel Ngugi Kinuthia, and he be issued with the leasehold title to the said property.

(iii) That the claim by the estate of Samuel Ngugi Kinuthia for a declaration that they are entitled to the land parcel Nakuru Municipality Block 17/35 and for an order lifting the caution therein, hereby fails and is dismissed.

(iv) That Mr. Joseph Boro Ngera will have the costs of the two suits herein to be paid by the estate of Samuel Ngugi Kinuthia.

20. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 31st day of October 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In the presence of : -

Mrs. E.G. Mwangi holding brief for Mr. L.M Karanja for the plaintiff.

Ms. Nancy Njoroge for the defendant

Court Assistant: Carlton Toroitich

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU