



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. NO. 91 OF 2014

(FORMERLY KERUGOYA ELC 472 OF 2013)

DAVID IRERI.....PLAINTIFF

VERSUS

M'RINGATA M'NGURUKIA.....DEFENDANT

JUDGEMENT

1. By an originating summons dated 4th July 2007 and filed on 6th July 2007, the Plaintiff sought the following reliefs against the Defendant;

a. A declaration that the Plaintiff is entitled to be registered forthwith as the owner of three (3) acres out of parcel land No. Mugumoni/Thuita/648 which portion of land the Plaintiff has been in adverse possession since 1976 to date which is more than 12 years immediately preceding the presentation of this suit and which he has used openly and continuously as of right and in adverse possession and without any interruption from the Defendant or his predecessors in the above Title and that the Defendant's title to 3 (three) acres out of the said land has been extinguished in favour of the Plaintiff under sections 37 and 38 of the Limitation of Actions of Act Laws of Kenya. (sic)

b. An order that the Defendant do transfer three (3) acres out of parcel of land No. Mugumoni/Thuita/648 to the Plaintiff and in default the Deputy Registrar be authorized to do so and or sign all the necessary documents to effect the transfer of the same to the Plaintiff. (sic)

c. An order for costs and interest thereon of this application. (sic)

2. The said originating summons was supported by the affidavit of the Plaintiff sworn on 4th July 2007 in which it was stated that the Plaintiff had on 4th March 1976 bought about 3 acres from the Defendant's Title No. MUGUMONI/THUITA/648 for a sum of Kshs 6,000/-. It was further stated that the Plaintiff took possession immediately and developed the same. He further stated that he had been in continuous occupation since but the Defendant had refused to transfer the 3 acres to him.

3. The Plaintiff further stated that sometime in 1998 he sued the Defendant in connection with the said portion of land in consequence of which the Meru Land Disputes Tribunal decided in his favour and directed the Defendant to transfer 3 acres to him. However, the award of the Tribunal was overturned by the High Court on account of lack of jurisdiction.

4. The Defendant filed a replying affidavit sworn on 30th July 2007 in opposition to the said originating summons. He stated that he was not the registered owner of the suit property. He further stated that the Plaintiff's mother had wrongfully encroached on the suit property until 1995 when the Defendant offered to sell one acre to the Plaintiff at Kshs 100,000/-. It was, however, not stated whether the Plaintiff or his mother ever paid the purchase price.

5. It would appear from the record that on or about 25th February 2016 the Defendant filed another replying affidavit to the originating summons. In the new affidavit, he disputed that the Plaintiff had been in continuous occupation. He stated that sometime in 1990 he offered the Plaintiff ¼ acre of the land he was occupying at a price of Kshs 100,000/- which the Plaintiff allegedly refused to pay. Later on, he subdivided the suit property amongst his sons and left some portion for himself. He did not specify how much land he gave to his sons and how much remained of the suit property.

6. At the hearing hereof, only the Plaintiff and his witness testified. The Defendant did not attend court either by himself or through his advocate on record. At the hearing hereof, the Plaintiff informed the court that he was a farmer and that he had been residing and farming on the suit property since 1976. He adopted his witness statement dated 25th March 2017 as his sworn testimony. The Plaintiff's said witness statement simply reiterated the contents of his affidavit in support of the originating summons.

7. The Plaintiff also called Njiru Saribatore (PW 2) as his witness. He testified that he knew both the Plaintiff and the Defendant in this case. He stated that he lived on his father's land which bordered the suit property. His evidence was that the Plaintiff settled on the suit property in 1976 and that he had resided there and developed the land by planting tea bushes, coffee trees and erecting houses thereon.

8. I note from the record that even though the Plaintiff filed his own statement of issues dated 5th May 2017, the parties herein had long filed an agreed statement of issues. There is a statement of agreed issues dated 17th November 2008 signed by counsels for both parties. Those are the issues the court will determine for purposes of concluding this suit.

9. The agreed issues as framed by the parties were stated as follows:

- a. Whether or not the Defendant agreed to sell three acres out of Title No. *Magumoni/Thuita/648* to the Plaintiff.
- b. Whether or not the Plaintiff had been in continuous and uninterrupted occupation of 3 acres out of the suit land since 1976 to date.
- c. Whether or not the Plaintiff was entitled to be the registered as owner of 3 acres out of the suit land either as a result of adverse possession or as a purchaser for valuable consideration.
- d. Whether or not the Defendant or in default the Deputy Registrar ought to be authorized to sign all necessary documents to effect the transfer of the 3 acres out of the suit land to the Plaintiff.
- e. Who shall bear costs of this suit.

10. As a preliminary issue, the court finds that the Defendant is the registered owner of the suit property. There is ample evidence on record to that effect. I have perused a certified copy of the Land Registrar (green card) and noted that even though the suit property was subdivided sometime in 1996, entry No. 4 relating thereto was cancelled by virtue of a court order and the original number reinstated. What followed thereafter was an order of inhibition as entry No. 6. There is no indication of further dealings or transfer to third parties.

11. On the 1st issue, the court accepts the evidence of the Plaintiff at the hearing hereof. The Defendant did not appear to challenge it. It must, however, be remembered that the basis of the Plaintiff's claim is adverse possession and not an outright purchase. The probative value of the sale agreement is therefore

limited to showing how the Plaintiff got into possession of the suit premises ie without force or secrecy. It may also be useful in establishing the time from which time would start running for purposes of the Limitation of Actions Act.

12. The court has no difficulty in answering the 2nd issue in favour of the Plaintiff. Even though the Defendant had disputed continuous possession on the part of the Plaintiff in his replying affidavits, he did not attend the trial to offer contrary evidence. The court has no choice but to accept the evidence of the Plaintiff and his witness on this aspect.

13. On the 3rd issue, the court is not satisfied that the Plaintiff should be registered as proprietor of 3 acres out of the suit property as purchaser. This is because it was not demonstrated that all formalities for conclusion of such a sale including the consent of the Land Control Board were obtained. However, on the basis of the evidence on record, the court is satisfied that the Plaintiff is entitled to be registered as proprietor of 3 acres on account of adverse possession.

16. Given that the first 3 issues have been answered in favour of the Plaintiff, it would follow that the 4th issue should be answered in the affirmative. The court shall therefore authorize the Deputy Registrar of the court to sign all necessary documents for the purpose of giving effect to its orders, if the Defendant fails to do the needful.

15. The 6th issue is on costs of the suit. Although the costs of a suit are always at the discretion of the court, the general rule is that costs follow the event. Since the Plaintiff has succeeded in this action, the Defendant shall bear the costs of the suit.

16. The upshot of the foregoing is that the Plaintiff's originating summons dated 4th July 2007 is hereby allowed in terms of prayer Nos 1 and 2 thereof. The Defendant shall bear the costs of the suit.

17. It is so ordered.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **12th** day of **OCTOBER, 2017**

In the presence of Ms Mbwiria holding brief for Mr Joe Kathungu for the Plaintiff and in the absence of the Defendant.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

12.10.17