



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
ELC CASE NO. 681 OF 2011 [S.O]

RUGA GITUKU alias NDONGA WAMBUGU.....PLAINTIFF

= VERSUS =

CHARLES GACHAU WACHIRA sued as legal representative
of the Estate of the late TARASICIO THUMBI.....1ST DEFENDANT

MUCHUKU KARIUKI.....2ND DEFENDANT

DAVID GITHAIGA NYANJI sued as legal representative
of the Estate of the late NYANJI THUMBI.....3rd DEFENDANT

REUL KIIRU KABARIKO.....4TH DEFENDANT

MURIITHI MAINA.....5TH DEFENDANT

PHYLLIS WANGU KAHARA sued as
legal representative of the Estate of the
late FRANCIS KAHARA.....6TH DEFENDANT

TERESA WAMUYU GITHUKU sued as
legal representative of the Estate of the
late GITHUKU GATIHA.....7TH DEFENDANT

KIHIU KIRUMA.....8TH DEFENDANT

WATIRI CHEGE sued as
legal representative of the Estate of the
late CHEGE KABIRO.....9TH DEFENDANT

DANIEL WACHIRA GICHUKI sued as

legal representative of the Estate of the

late SIMON GICHUKI.....10TH DEFENDANT

CHRISTINA WANGECHI MUCHIRI sued as

legal representative of the estate of the

late MUCHIRI GAKURU.....11TH DEFENDANT

JUDGEMENT

INTRODUCTION.

1. The Plaintiff is one of twelve partners who came together and purchased a property on LR No. 36/111/1113 at Eastleigh in Nairobi (suit property). The suit property was registered in the names of the twelve partners in or around April 1968 as tenants in common in equal shares. Some of the partners have since passed on. The Plaintiff brought an originating summons against the surviving partners and legal representatives of the deceased partners seeking orders that he has acquired the suit property by adverse possession.

2. The partners had other properties in Nairobi and other parts of Central Kenya but it is only the suit property which is the subject of this suit.

PLAINTIFF'S CASE.

3. The Plaintiff's case is that the suit property was bought in 1968 by twelve partners then operating under Gikondi Katiba Bus Service. He lived in the suit property until 8th November 1986 when the other partners offered to sell the suit land to him. The negotiations for sale broke down on 27th November 1989. The Plaintiff continued to stay on the suit property. In 2003, he filed Nairobi HCCC No.409 of 2003 in which he sought to be declared as having acquired the suit property by adverse possession. This case was however withdrawn later because there was no supporting affidavit in support of the originating summons.

4. In 2011, he filed the present suit in which he contends that since the negotiations for sale of the suit property broke down in 1989, he had been staying on the suit property peacefully, without permission of the other partners for a period of over 12 years and as such, he has acquired the land by way of adverse possession.

5. The Plaintiff further testified that he has done substantial development on the suit property. In 2003, the other partners purported to give him a notice to terminate tenancy. He contends that he has never been a tenant in the suit property and that his stay on the suit property has been open and peaceful and without any permission from the defendants. He therefore contends that in all fairness, the Court should declare that he has acquired the suit property by way of adverse possession and should accordingly be registered as the owner of the suit property.

DEFENDANTS CASE.

6. The defendants case is that after they purchased the suit property in the 1960's, they put in tenants who were paying rent. The Plaintiff was identified as a caretaker who used to collect rent and give it to the other partners. The tenants in suit property moved out in 1981. The Plaintiff took over the suit property as a tenant and started remitting rent to the other partners. In 1986 the partners offered to sale the suit land to the Plaintiff at a proposed price of Kshs.300,000/=. As negotiations went on, the partners changed their

mind and communicated to the plaintiff through letter dated 27th November 1989 that they were no longer interested in selling the suit property to him.

7. The partners advised the plaintiff to start paying new rent of Kshs.6,000/= per month with effect from 1st October 1989. Despite the breakdown of negotiations on 27th November 1989, the partners still showed willingness to sell the suit property to the plaintiff at a higher price than had proposed early on but the plaintiff declined. He instead filed a suit against the defendants in 2003. He obtained injunctive orders barring the defendants from interfering with his possession of the suit property. This suit was however withdrawn and the current one filed. The defendants deny that the Plaintiff was not their tenant as claimed by the Plaintiff.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION.

8. There is no contention that the Plaintiff was one of the partners who had been registered as owners of the suit property as tenants in common in equal shares. The Plaintiff's case is premised on the offer of sale of the suit property made to him on 8th November 1986 and which offer was withdrawn on 27th November 1989. The Plaintiff's case is that he was never a tenant of the defendants at any given time. According to his claim, his stay on the suit property became adverse to the interests of the defendants on 27th November 1989 when the negotiations for sale broke down. That his stay after that has been peaceful, open and notorious and without any interruption or permission by the defendants until when he filed, the present suit.

9. In his submissions filed in court on 13th April 2017, the Plaintiff submits that there are four possible timelines from which the period for purposes of a claim for adverse possession can be calculated. These are 1970, 1971, 1989 and 2003. He states that in 1970, he took actual possession and occupation. Subsequent to this year, he states that he continued to have actual as well as constructive possession of the suit property. The law is clear that a party is bound by his pleadings and evidence. As I said hereinabove, the Plaintiff's claim is premised on 27th November 1989, when negotiations broke down. In his own evidence in chief, he testified that prior to 1989, he was a caretaker of the suit property and he was the one collecting rent. It is therefore clear that computation of time for purposes of adverse possession if any can only start after November 1989.

10. The minutes of 8th November 1986 in which the partners agreed to sell the suit property to the plaintiff are clear that the Plaintiff was paying rent. The Plaintiff cleared rent arrears of Kshs.56294.40 by giving sitting allowances of Kshs.6294.40 and giving cash of Kshs.50,000/-. This was after paying the manager, the sweeper and paying for electricity.

11. On 27th November 1989, the defendants wrote a letter to the plaintiff communicating their intention of withdrawing the proposed sale of the suit property to him. The Defendants informed the plaintiff that the new rent was Kshs.6,000/= per month with effect from 1st October 1989. The Plaintiff cannot therefore deny that he was a tenant. There is evidence that the Plaintiff was collecting rent from tenants in the suit premises. When the tenants moved out in the early 80's he came in as a tenant and was paying rent. He cannot therefore seek adverse possession for the period he was a tenant.

12. As late as 1996, there is evidence that the plaintiff was keen on purchasing the suit property. The minutes of 12th July 1996 show that parties had deliberated on whether the plaintiff was keen on giving any amount over and above 600,000/=. The plaintiff in his evidence in chief stated that the price had gone up to 600,000/= but the partners were not keen on selling the suit property to him. This evidence is an admission that the plaintiff had acknowledged the right of ownership of the defendants. He cannot therefore turn around and claim adverse possession. In the case of **Samuel Katana Nzunga & 102 others Vs Salim Abdalla Bakhwein & another(2013)eKLR** the Court stated as follows:-

“ a claimant has to demonstrate adverse possession over the land, comprising of two broad common law elements; the fact of single exclusive physical possession accompanied by the animus possidendi (an intention to possess the land to the exclusion of all other persons,

including the owner). The intention must be manifested unequivocally, not necessarily in a hostile manner, to indicate an intention to dispossess the owner. Thus, any form of acknowledgement of the true owner's title will operate to negative such intention. (See Megarry & Wade, the Law of Real property; 6th Edition Sweet and Maxwell)".

13. The Plaintiff's insistence to purchase the property even when the price had been increased to Kshs.600,000/= was a clear acknowledgement of the true owner's title and this operated to negative any intention to have exclusive possession of the suit property and dispossess the owners thereof. On 6/10/1999, a meeting was held and the property was in attendance. The issue of sale of the suit Plaintiff was still the agenda. The Plaintiff who had been unable to attend two previous meetings that year was informed that the partners had now increased the price to kshs.3,500,000/= . The Plaintiff objected to the price. This further shows that he was still willing to purchase the suit premises were it not for the price. He went on to pay the partners present Kshs.5,500/= as sitting allowance. If he was not a tenant, he would not have paid kshs.5,500/= to partners as sitting allowance. During all the meetings, the issue of rent arrears was raised. Credit was given to the plaintiff as for instance the amount of Kshs.5,500/- paid on 6/10/1999 was removed from the arrears owed leaving a balance of Kshs.61,450/=.

14. From the analysis of the evidence herein above, the issue to be determined is whether the Plaintiff has been in adverse possession of the suit property as to warrant an order to be issued that he be registered as owner of the suit property. It is clear that the plaintiff's suit filed in 2003 would not have seen the light of the day even if it were not withdrawn. Dispossession of the true owner of possession is an important element in determining whether a party has acquired a property by way of adverse possession. As shown herein, the plaintiff had acknowledged the true owners title by agreeing to purchase the suit property and engaging in negotiations as late as October 1999.

15. The plaintiff is a co-tenant of the defendants. In the case of **Ahmed Abudulkarim & another Vs Member for lands and Mines & another (1958) EA436 at 441 the East African** Court of Appeal held that it is well settled that as between tenants in common, there must be some overt act amounting to ouster before possession of a co-tenant becomes hostile.

16. The word " Ouster" is defined in Black's law Dictionary 9th edition as the wrongful dispossession or exclusion of someone (esp a co tenant) from property. The evidence adduced shows that the plaintiff has never ousted the co-tenants from the suit property. He had been a tenant until 1st February 2003 when the defendants issued him with a notice to terminate his tenancy. This is when he rushed to court and filed Nairobi HCCC No. 409 of 2003. He obtained injunctive order restraining the defendants from interfering with the suit property. These injunctive orders remained in force until the suit was withdrawn in 2011 paving way for filing of the present suit. At no moment had the Plaintiff ousted the defendants. His suit filed in 2003 was ill conceived.

17. The Plaintiff having failed to show any acts of ouster of his co-tenants and the fact that he was a caretaker and later a tenant, his claim to adverse possession cannot be maintained.

CONCLUSION

18. Form the analysis herein above; it is clear that the Plaintiff has failed in his suit. The Plaintiff's suit is hereby dismissed with costs to the defendants.

Dated, Signed and delivered at **Nairobi** on this **3rd** day of **October, 2017**.

E.O.OBAGA

JUDGE

In the presence of :

Mr Wawire for Plaintiff

M/s Mungai for M/s Chege for defendants

Court Assistant: Hilda

E.O.OBAGA

JUDGE