



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 45 OF 2017**

**LAWRENCE MUIRURI NJUGUNA - PLAINTIFF**

**VS**

**CHARLES MWENGA MULWA - DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed Originating Summons on 13/11/14 seeking to be declared as having acquired title to a portion of 4.0 acres out of the Defendant's land LR. No.LOC.17/IGANJO/2041 by adverse possession.
2. In his supporting affidavit the Plaintiff deposed that between 1995-1996 entered into several sale agreements with the Defendant who agreed to sell to him a portion of 4.0 acres of his land LOC.17/IGANJO/2041. Further that pursuant to that agreement the Defendant granted him possession of the 4.0 acres in 1995 for which he has been in occupation till now. He avers that he has developed the land by planting 500 trees and subsistence crops. It is his averment that the Defendant has persistently refused to obtain Land Control Board consent for purposes of transferring the land to him.
3. In opposing the claim, the Defendant through his Replying Affidavit filed on 19/11/15 denied that he sold the land to the Plaintiff. Instead he averred that he borrowed the money from the Plaintiff to enable him fund his contribution of subdivision expenses relating to his share of 7 acres of the family land. He depones that both were to agree upon the conclusion of the subdivision process whether to refund the money or sell the portion of land to the Plaintiff. That on acquisition of the title in his name, he sought the Plaintiff for the discussions whether to refund the money or top up the monies to enable him purchase the suit property in vain. That the Plaintiff refused and instead filed a suit at CMCC NO 102 of 2010 Kigumo. Without denying the Sale Agreements, he retorted that they do not specifically define the land.
4. He deponed that he is in possession of the entire land and denied any occupation/use by the Plaintiff.
5. At the trial the Plaintiff testified and called one witness. The Plaintiff adopted the contents of his written statement and stated that he entered the land vide a sale agreement in 1995 between him and the Defendant in the presence of others, the Defendant's father included. He bought the 4.0 acres at 112,000/= which he paid in various instalments. That the Defendant put him in possession in 1996. That he has constructed a 3-bedroom stone house together with a toilet and a bathroom and planted 500 trees as well as subsistence crops. That his occupation has been open and uninterrupted for over 19 years and the Defendant has never asked him to vacate. On cross-examination he stated that the 4 acres on the ground is verifiable. That the Defendant obtained title on 13/7/95 and the sale agreement was entered on 30/5/95 but the payments were spread to 4/11/96. That the land originally belonged to the Defendants family but his share of 7 acres was registered in his name on 13/7/95 and produced a copy of the title. He denied that the money paid was to the Defendant for succession process/subdivision expenses nor that it was refundable. He confirmed that the land was surveyed on instructions of the Defendant and his 4 acres

was pointed out to him on the ground. That there are beacons on the ground to demarcate the 4 acres. That the 4 acres is identifiable.

6. The Plaintiff 2<sup>nd</sup> witness John Waweru Macharia testified that he is the Plaintiff's neighbor and that he witnessed the sale agreement of the land by the Defendant to the Plaintiff. That the 4 acres was sold at 112,000/= which was paid in 10 instalments and was a witness of 8 of such payments. That the Defendants father was present at the signing of the sale agreement. He stated that the Plaintiff has built a house planted trees, maize and that the Plaintiff has been in occupation for over 22 years.

7. The Defendant on his part testified and confirmed receiving money from the Plaintiff but insisted it was a refundable soft loan. That he borrowed the cash to fund the subdivision of transfer of 7 acres to himself from the larger family land. That on conclusion he and the Plaintiff was to agree whether to sell the land to him or refund the cash. If the sale was to be agreed then the Plaintiff was to pay more money. He denied giving the Plaintiff possession of 4 acres. He denied selling the land to the Plaintiff. He stated that he does not know who occupies the land. However, on cross-examination he confirmed that he entered into a sale agreement with the Plaintiff in 1995. He averred that there is a house on the land as well as trees but he does not know who planted them. He confirmed that the balance 3 acres is not occupied/utilized. Though he claims the money was to be refunded, he concedes that the issue of refund is not in the sale agreement. In re-examination, he confirmed the agreement between the Plaintiff, Defendant and his father. That the Plaintiff did not seek his consent to build a house on the suit land. That at the time of the agreement the land had not been transferred to his name but was done later.

8. DW2 Mr. Joseph Nzioka Musyoki briefly testified that the Defendant, the registered owner of LOC.17/IGANJO/2041 is his brother. He stated that he was not aware that he had sold the land to the Plaintiff nor that the Plaintiff was in possession of the same. That the family land was originally registered in his name and on the instructions of his father transferred 7 acres to the Defendant which was his share of the family land. That the Defendant was issued with title in 1995. On cross-examination he confirmed that the Defendant does not live on the suit land neither does he have any developments on the land. He stated that he has never gone back to the land since he transferred it to the Defendant.

9. Parties have filed written submissions. Mrs R.K. Kimani the learned counsel for the Plaintiff submitted that the Plaintiff has been in open and uninterrupted possession of the land. The Defendant had actual knowledge of the Plaintiffs occupation which occupation has not been broken. That the Defendant has lost his right to the land either by being dispossessed or having discontinued his possession of it. The Defendant has not adduced evidence to show that he has disposed the Plaintiff or that the Plaintiff has handed over possession to him. The Plaintiff has been in possession for a period of over 12 years and his claim for adverse possession has matured. He relied on the following cases; -

- a) Francis Gicharu Kariri –v- Peter Njoroge Mairu Civil Appeal No.293 of 2002
- b) Kimani Ruchire –v- Swift Rutherfords & Co. ltd (1980)KLR.10 at pg 16 letter B, Kneller J.
- c) Samuel Nyakenogo –V- Samuel Orucho Onyaru, (2010)eKLR

10. The Defendant submitted that the Plaintiff has not proved his case on a balance of probabilities in that he had exclusive and uninterrupted possession for over 12 years. He relied on the cases of Titus Mutuku Kasure –vs- Mwaani Investment Ltd & Others, Civil Appeal No. 45 of 2012 and Sarah Nyambura Kungu-vs- David Njuguna, Civil Appeal No. 20 of 1988.

11. The defendant stated that the sale agreements alleged to be relied and entered on 30/5/95 are not stamped and therefore inadmissible in evidence. That the Plaintiff has not concluded payment of the purchase price in the sum of Kshs. 7000/= and therefore he is guilty of fundamental breach of contract. Relying on the case of **Edward Mugambi vs Jason Mathiu (2007) eKLR** he submitted that the sale agreements should not be given any evidential weight because they are tainted with breach. Further that the Plaintiff does not live on the land and has not proved on a balance of probability that he developed the suit land. That no evidence was tendered before the Court in form of photographs of the alleged

developments to ascertain if he indeed has built a house nor planted trees. Further that the sale agreement does not specify the suit land that was being sold. In any event at the time of the alleged sale agreement the Defendant did not have any land in his name as exhibited by the Defendants title which was registered on 13/7/95 while the Sale Agreement is entered into on 30/5/95.

12. The key issue is whether the Plaintiff has proved adverse possession and has the plaintiff proved continuous occupation of the suit land and has he acquired title?

13. It is not in dispute that the suit land No. LOC.17/IGANJO/2041 is registered in the name of the Defendant. A copy of the title registered on 13/7/95 is evidence of the ownership. It is also not in dispute that there exists on record an agreement for sale that was entered into by the Plaintiff, Defendant and the Defendant's father in respect to sale of 4 acres in LOC.17/IGANJO/2041 at the price of Kshs. 28,000/= each to the Plaintiff. The Defendant has tried albeit unsuccessfully to convince the Court that the money was a soft loan to enable him fund the subdivision/transfer 7 acres of his share of the family land to himself. The evidence adduced by the Plaintiff and the PW2 clearly discredits the account of the Defendant. The Defendant has admitted that the Sale Agreement did not make any mention to any refunds of the money. It would appear that the Defendant had changed his mind in transferring the land along the way to push for more money as shown by his refusal to obtain the Land Control Board to facilitate transfer of land to the Plaintiff.

14. The sale agreement on record is in writing signed by the parties and witnessed by witnesses. That sale agreement meets the provisions of section 3(3) of the Contract Act which state;

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

The Defendant has challenged the Agreement on the ground that the same is inadmissible on account of lack of stamp duty. The position in law is that such an agreement is voidable. The same can be validated by payment of stamp duty and penalties. That being the case, this case turns not on validity or otherwise of the agreement of sale but on the requirements of adverse possession. The Plaintiffs claim is premised on adverse possession and not on contract. In the case of **Kimani Ruchire –v- Swift Rutherfords & Co. Ltd (1980) KLR 10 at page 16 letter B**, Kneller J. held that;

“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). So the Plaintiff must show that the company 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.”

The real test in determining adverse possession is stated in the **Samuel Nyakenogo v Samuel Orucho Onyaru, (2010) eKLR**:

“The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession will then be whether or not the title holder has been disposed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite period.”

In **Titus Mutuku Kasuve –vs- Mwaani Investment Ltd & Others, Civil Appeal 2004 1 KLR 184** the court held that;

“.....for an order that he be registered a proprietor in place of the registered proprietor and in order to be entitled to the 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 the discontinuation of possession by the owner on his own volition.”

In **Sarah Nyambura Kungu-vs- David Njuguna, Civil Appeal No. 20 of 1988** the bench comprising of Justice Gichuhi, Apaloo and Gichure held that;

“Adverse possession only arises in case of continuous uninterrupted occupation of the land for over 12 years.”

15. Section 7 of the Limitations of Actions Act Cap 22 states that 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 38(1) states that 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.

16. Although the Sale Agreement did not specify when possession would be given, it is the Plaintiffs evidence that he was put into possession in 1995. This information has been corroborated by the PW 2 who testified that though he does not remember the exact time that the Plaintiff took possession, he is aware that he occupied the land after the sale. That the Defendant has claimed that he has possession and occupation of all the 7 acres of land. On cross-examination he admitted that he lives elsewhere and that the land has trees growing thereon and also that there is a house which he neither planted nor built. The Plaintiff's evidence has been corroborated by PW 2 who stated that though he does not live on the land he has planted 500 trees and constructed a 3 bedroomed stone house which is occupied by his granddaughter. This is evidence of occupation as well as disposition of the title holder from the suit land. It is the Plaintiffs evidence that he has had open uninterrupted possession and utilization of the land since 1995 to date, a period of over 12 years. That the Defendant has not taken any action to take possession from him or to dispossess him. No contrary evidence was adduced by the Defendant to support this.

17. On the Defendants claim that the suit land is not identifiable on the ground, that evidence has been controverted by the Plaintiff who states that the land was surveyed by a surveyor brought by the Defendant and he was showed the beacons on the ground. The Defendant did not tender any evidence to challenge that evidence. On his denial that the suit land was not given possession to the Plaintiff; that the suit land is not occupied by the Plaintiff, it is the view of this Court that the Defendant is not stating the truth. There is on record a counter claim in the suit CMCC No. 102/2010 Kigumo where the Defendant has sued for trespass and damages from the Plaintiff. In paragraph 17 the Defendant states as follows;

“ The Defendant further contends that upon the acquisition of the said title the Plaintiff never pursued the matter further instead he started trespassing and cultivating his said parcel of land in total contravention of his freedom of peaceful enjoyment of his property and has persisted in his said actions to date.”

The Defendant acquired his title on 13/7/95. It is his pleading that the Plaintiff trespassed on to the land upon acquisition of the title and has persisted in his actions (occupation & cultivation) to date. The suit was filed in 2010 and based on the Defendants own pleading by 2010 the Plaintiff had been in occupation for 15 years well in excess of 12 years statutory period. It therefore means by the time this case was filed the Plaintiff had been in occupation for 21 years.

18. This demonstrates that the Defendant had discontinued his occupation of the suit land for over 12 years. Equally it also shows that the Plaintiff has by his conduct (open interrupted occupation & utilization of the land) demonstrated the appropriate *Animus Possipendi* to dispossess the Defendant and use the land in a manner that is hostile and contrary to that of the Defendant.

19. Further in his oral testimony he admitted that the balance of 3 acres is not occupied. The fact of existence of trees on the land is testament of the fact that the Plaintiff has been on the land for a longer time than the Defendant would want to persuade the Court.

20. Having analysed the evidence, the rival submission & affidavits and the relevant law, I am persuaded that the Plaintiff has proved adverse possession on a balance of probabilities and in accordance with Section 37(a) of the Limitations of Actions Act the Plaintiff has acquired title in 4.0 acres in the suit land LOC.17/IGANJO/20 against any person registered as proprietor, the defendant included.

21. In the end I make the following orders;-

a) That the Plaintiff be declared to have acquired title to 4.0 Acres out of Defendant's land parcel No. LOC.17/IGANJO/2041 by adverse possession.

b) That the Land Registrar, Murang'a be ordered to register a portion of 4.0 Acres out of the Defendant's land parcel No. LOC.17/IGANJO/2041 in the name of the Plaintiff and in default the Deputy Registrar is hereby ordered to execute all the appropriate documents necessary to effect the transfer to the Plaintiff.

c) That the Defendant to pay the costs of this suit.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 7<sup>TH</sup> DAY OF DECEMBER, 2017.**

**J.G. KEMEI**

**JUDGE**