



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 439 OF 2014

**CORNELIUS WARUTERE KARIANJAHU
PLAINTIFF**

-VERSUS-

JUSTUS KIBUCHI GATURUHU DEFENDANT

JUDGMENT

Introduction

1. Vide a plaint filed on **6th March, 2008** and amended on **8th April, 2008** the plaintiff herein, Cornelius Warutere Karianjahi, brought the suit herein seeking judgment against the defendant, Justus Kibuchi Gaturuhu, for:

- a) An order of eviction from L.R. NAROMORU/BLOCK 2 (MURIRU)/350.**
- b) Costs of the suit and interest.**
- c) Any other relief.**

2. The plaintiff's case is that whilst he is the registered proprietor of the parcel of land known as **L.R. Naromoru/Block 2 (Muriru)/350** (hereinafter referred to as the suit property), the defendant has unlawfully entered and occupied the suit property he is committing acts of waste thereon.

3. Upon being served with summons to enter appearance, the defendant filed a statement of defence and counterclaim. In the statement of defence, the defendant denies the allegations levelled against him and contends that he is the owner of the suit property (L.R. Naromoru/Block 2 (Muriru)/350). The defendant avers that he has been in occupation of the suit property, having bought it from the Weruini Holdings Ltd.

4. In the counter-claim, the defendant contends that the plaintiff was erroneously registered as proprietor of the suit property. The defendant explains that upon discovering the aforementioned error, he visited the land buying company herein, Weruini Holdings Ltd, which summoned the plaintiff for rectification of the error.

5. Explaining that the plaintiff refused to heed the summons by the land buying company, the defendant contends that the plaintiff's parcel of land is Naromoru Block 2 (Muriru)/353 (Ballot No. C38) while his land is Naromoru Block 2 (Muriru)/350 (Ballot No. D61).

6. The defendant further contends that he has acquired title to the suit property by adverse possession (has been in use and occupation of the suit property since 1973).

7. For the foregoing reasons, the defendant urges the court to dismiss the plaintiff's claim and enter judgment in his favour as prayed for in the counter-claim.

EVIDENCE

The palintiff's case

8. When the matter came up for hearing, the plaintiff informed the court that he was a member of the land buying company herein wherein he bought shares. As a member of the land buying company, he balloted and got plot No.C 38 which was later changed to plot No. 350.

The plaintiff informed the court that he later applied and got registered as proprietor of the suit property.

9. The plaintiff further informed the court that plot No.353, which the defendant alleges belongs to him, does not belong to him.

10. In support of his case, the plaintiff produced the following documents:-

- i) Search certificate in respect of the property, as Pexbt 1;
- ii) Share certificate issued to him by the land buying company herein as Pexbt-2;
- ii) The ballot in respect of the suit property, as Pexbt-3;
- iv) Receipt in support of payment for issuance of a title deed, as Pexbt- 4;
- v) Title deed issued to the him, as Pexbt-5; and
- vi) Search certificate in respect of plot No. 353 as Pexbt- 6.

The defence case

11. On his part, the defendant informed the court that the suit property was bought by his father, Gaturuhu Gichuki (deceased). That he has been in use and occupation of the suit property before and after the passing on of his father.

12. Explaining that the plaintiff's land borders the suit property, the defendant told the court that despite having been requested by the land buying company to surrender title to the suit property, the plaintiff has refused.

13. In support of his case, the defendant produced letters written by the land buying company herein dated 10/9/1991, 10/6/1992 and 9/3/1993, as Dexbt 1(a) to (c).

14. In cross examination, the defendant admitted that all the documents he relied on are in the name of his father and that the ballot papers he produced bear No. D61 dated 21st March, 1981.

15. The defendant also acknowledged that the the plaintiff produced a ballot paper issued on the same date bearing No. 350 but maintained that the suit property belongs to his father and that he has become entitled to it by adverse possession.

Submissions

16. On behalf of the plaintiff, a brief overview of the cases of the parties herein is given and submitted

that the defendant's pleadings, the witness statement and oral evidence adduced in court are at variance. In this regard, it is pointed out that contrary to the defendant's pleadings to the effect that he is the one who bought the suit property, the documents produced by him (the defendant) show that it is not the defendant who bought the suit property.

17. Pointing out that the defendant is not the administrator of his father's estate, the plaintiff contends that the defendant's claim, in as far as it is premised on the alleged ownership of the suit property by his father, is unsustainable.

18. The defendant's case is also challenged on the ground that none of the documents produced by the defendant bears a clear number 350.

19. Concerning the defendant's contention that he has become entitled to the suit property by adverse possession, based on the letters produced by the defendant which shows that the dispute over the suit property began in 1991, it is submitted that the defendant's claim for adverse possession is unmaintainable.

20. On behalf of the defendant, a brief overview of the cases of the parties herein is given and submitted that the suit property belongs to the defendant's father. That factor is said to be borne out of the ballot papers and the letters produced by the defendant.

21. Arguing that the land buying company herein is the one which maintains records on who owns the suit property, the defendant submits that by writing the letters he tendered in evidence, the land buying company categorically and conclusively revealed who the owner of the suit property is. It is contended that the plaintiff failed to tender evidence from the company showing that he is the owner of the suit property.

22. Pointing out that the plaintiff was summoned by the land buying company over the dispute herein but failed to honour the summons, the defendant argues that the suit herein was meant for the defendant's quest for justice. The plaintiff is said to have failed to revert the evidence adduced by the defendant which shows that the suit property belongs to the defendant's father.

23. With regard to the claim for adverse possession, it is submitted that the defendant has been in open and uninterrupted possession of the suit property from the time it was bought, hence he has become entitled to the property by adverse possession.

Analysis and determination:

24. From the pleadings filed in this suit, the evidence adduced in support thereof and the submissions by advocates for the respective parties, the following facts are either common ground or have not been controverted:-

1. That the plaintiff is the registered proprietor of the suit property;
2. That the defendant was in occupation of the suit property before the plaintiff obtained title to it and is still in occupation of the suit property.
3. That it is not the defendant who bought the suit property.
4. That the suit property was allegedly bought by the defendant's father who has since passed on.
5. That the defendant does not claim interest in the suit property as a legal representative or administrator of the estate of his father.

25. Issues for determination

a) Whether the registration of the plaintiff as the proprietor of the suit property was effected erroneously?

b) Subject to the outcome of issue (a) above, whether the defendant has become entitled to the suit property by adverse possession?

c) What orders should the court make?

26. With regard to the first issue, it is not in dispute that both the plaintiff and the defendant's father were members of the land company herein. It is also not in dispute that there has been disputes concerning the registration of the plaintiff as the absolute proprietor of the suit property.

27. The history of the dispute herein has been laid bare by the letters produced in evidence by the defendant and acknowledged by the plaintiff in his submissions thus:

“From the time of registration of the plaintiff as the proprietor, dispute over the parcels of land started between the plaintiff and the defendant's father as is evident in defendant's exhibits 1 (a) (b) (c) written in 1991, 1992 and 1993.”

28. In those letters, the land buying company herein acknowledges that the title held by the plaintiff was issued erroneously. For instance, in the letter dated 9th March, 1993 the land buying company herein addressed the Land Registrar Nyeri District as follows:

“RE: CORRECTION OF LAND REGISTER

A. L.R NO.NARUMORU/BLOCK 2-MURERU FARM

D61 NEW 350 GATURUHU GICHUKI GATURUHU

B. C38 NEW 353 CORNELLIUS WARUTERE KARIANJAH

Please refer to our letter to you dated 18th September, 1991 concerning the same subject matter and ignore our letter to you dated 10th June, 1992 because the letter was mistakenly written. Copies of both letters are attached.

We have again gone into the original maps and new maps and have confirmed that Gaturuhu Gichuki Gaturuhu owns land No.D 61 or New No. 350 while Collonelius Warutere owns land No.C 38 or new No. 353 both adjacent to each other.

Mr. Collonelius Warutere should therefore return and surrender the title deed of the land No. 350 which he obtained by error and consequently obtain the title deed for his land No. 353 as shown on pages 21 and 24 of the Land Owners Register.”

29. For undisclosed reasons, the above letter from the land buying company herein was not implemented or acted upon.

30. None of the parties to the dispute herein called the maker of that letter or any official of the land buying company herein to shed light on the circumstances that led to issuance of the letters produced by the defendant. It is also noteworthy that none of the parties deemed it fit to call the Land Registrar Nyeri to shed light on why the letter was not implemented or given effect. Be that as it may, since the authenticity of the letters is not in dispute, I have no reason to doubt their contents, especially as far as proof of the dispute between the defendant's father and the plaintiff is concerned.

31. I note that in his testimony before the court, the plaintiff informed the court that he balloted and got plot No.C 38 which was later changed to plot No. 350. According to the letter cited above, there was change in the numbers the members of the company balloted for. Though the cause of the change has not

been explained, from the letter herein, it is reasonable to infer that the changes were caused by new mapping of the land in question. As a result of the new mapping, the plaintiff's parcel of land became 353 while that of the defendant's father became 350.

32. In the absence of any evidence contrary to that from the land buying company and given the fact that it is the defendant who has all along been in use and occupation of the suit property, I am persuaded that the suit property belonged to the defendant's father. The import of the foregoing determination is that the registration of the plaintiff as the absolute proprietor of the suit property was effected erroneously. The error that led to the registration of the plaintiff is acknowledged and properly explained by the land buying company herein which was the beneficial owner of the suit property.

33. Under **Section 80(1)** of the Land Registration Act, 2012 this court has power to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. The only rider to the exercise of that power is that the rectification should be ordered if it is going to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

34. Having found the registration of the suit property to have been effected by a mistake (registrar was misinformed on who the true owner of the suit property was) and there being evidence that the plaintiff is not the one in possession of the suit property, I am satisfied that a case has been made up for cancellation of the title held by the plaintiff and issuance of orders of rectification of the register to reflect the defendant's father as the owner of the suit property.

35. There being no evidence capable of showing that the defendant is the legal representative of the estate of his father, I decline to make any orders in his favour.

36. Since the title held by the plaintiff was obtained by mistake, I find and hold that it cannot form the basis for agitating the defendant's claim for adverse possession.

37. The upshot of the foregoing is that the plaintiff's suit has no merit and is dismissed with costs to the defendants. The defendant's counter-claim is, on the other hand, dismissed with no orders as to costs.

Orders accordingly.

Dated, signed and delivered at Nyeri this 13th day of September, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Ms Wanjira h/b for Mr. Kamwenji for the defendants

N/A by Mr. Kiminda for the defendant

Justus Kibuchi Gaturuhu – defendant in person

Court assistant - Esther