



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYERI**

**ELC CASE NO.229 OF 2013 (O.S)**

**PAUL MACHARIA WAGUNYA..... PLAINTIFF**

**VERSUS**

**MWANGI MACHARIA WAGUNYA)**

**JAMES GACHUNGU KARIUKI ).....DEFENDANT  
S**

**JUDGEMENT**

**Introduction**

1. The plaintiff **Paul Macharia Wagunya**, took up the originating summons dated **12th November, 2012** for determination of the following questions:-

- 1) Whether he should be registered as the proprietor of all that parcel of land known as Loc.8/Matharite/1580 (hereinafter referred to as the suit property) by adverse possession?
- 2) Whether the defendant's title to the suit property has been extinguished by his adverse possession thereof?
- 3) Whether he should be registered as the proprietor of the suit property in place of the defendant?
- 4) In alternative to (1) to (3) above, whether the defendants should be ordered to pay him the market value of the suit property and the developments he has effected thereon amounting to Kshs.1,619,800.
- 5) Whether the defendants should be ordered to bear the cost of the suit?

2. The originating summons are supported by the affidavit of the plaintiff (applicant) sworn on **12th November, 2013**. In that affidavit, the applicant has deposed that the 1st defendant sold to him a portion of the parcel of land known as Loc.8 Matharite/118 (hereinafter referred to as the original parcel of land) measuring 1.11 acres at Kshs.36,651. They executed the sale agreement on **7th January, 1987**. Following execution of the sale agreement, he paid Kshs. 24,500/= and took possession as agreed in the sale agreement executed between them.

3. It is the applicant's case, that on or about 2008, the 1st defendant caused the original parcel of land to be subdivided into 3 portions one of them being the suit property herein. He contends that the suit property is the portion he has been in occupation since 1987. He blames the 1st defendant for transferring the suit property to the 2nd defendant as opposed to him as agreed in the sale agreement executed between them.

4. The plaintiff contends that by 2008, when the 1st defendant caused the suit property to be sub-divided and the portion he has been in possession transferred to the 2nd defendant, he had been in occupation of the portion for 21 years. That being the case, he argues that the 1st defendant's title in respect thereof, had been extinguished long before the 1st defendant transferred the property to the 2nd defendant.

5. Terming the transfer to the 2nd defendant illegal and unlawful, the plaintiff argues that the 2nd defendant did not acquire good title to the suit property.

6. The plaintiff explains that upon taking possession of the suit property, he planted tea bushes and has been in cultivation of the same since that time and that he has established a clear marked boundary using hedge and trees. Further, that the suit property is his homestead wherein he has erected two houses. The plaintiff has also deposed that he has planted various crops and pasture on the portion. It is his case that the value of suit property together with the developments effected thereon is Kshs. 1, 620,000/=.

7. He points out that he filed a dispute at the Kahuro Land Dispute Tribunal to stop the 1st defendant from transferring the parcel to the 2nd defendant. An award was given in his favour and adopted as judgment of the court in Muranga Principal Magistrates Court, Land Dispute Case No. 51 of 2009. An order in respect of the judgment was issued on **29th June, 2012** but the applicant was unable to execute it because the suit property had already been transferred to the 2nd defendant.

8. Reiterating his contention that by the time the 2nd defendant got registered as the proprietor of the property he had become entitled to it by adverse possession, he urges the court to declare that he is entitled to the suit property by adverse possession.

9. In alternative to the prayer for declaration that he is entitled to be registered as the proprietor of the suit property by adverse possession, the applicant prays that the defendants be ordered to compensate him at the prevailing market value of the suit property plus the developments thereon being Kshs. 1, 620,000/=.

10. In support of the application, the applicant has annexed the following documents to his affidavit:-

- i. Sale agreement dated 7th January 1987 as **PMW-1**;
- ii. Title deed as **PMW 2**;
- iii. Certificate of search as **PMW-3**;
- iv. Share certificate from Githambo Tea Factory Co. Ltd as **PMW-4(a)**;
- v. KTDA fertilizer application –**PMW-(4b)**;
- vi. Valuation report in respect of the suit property and the developments thereon as **PMW-5**;
- vii. Award obtained from the Kahuro Land Disputes Tribunal as **PMW-6**;
- viii. Application for adoption of the award in Muranga PMC Land Dispute Case No.51 of 2009 as **PMW-7**;
- ix. Order issued on 23/11/2012 in Muranga PMC Land Dispute Case No. 51 of 2009.

11. In reply, the 2nd respondent filed the replying affidavit sworn on **18th December, 2013** wherein he has deposed as follows:-that he knows the applicant as a grandson of the 1st defendant. He denies having had knowledge of the agreement executed between the plaintiff and the 1st defendant. He argues that he bought the suit property free from any encumbrances on the title to the property and wonders why the plaintiff did not lodge a caution to prohibit dealings with the title to the suit property.

12. He explains that the plaintiff entered into an agreement with the 1st defendant to the effect that he (the plaintiff) was to acquire a bigger portion out of the estate of Kaburu Wagunya (deceased); that the Law Society's conditions of sale applied to the agreement executed between the plaintiff and the 1st defendant and that contrary to the allegation by the plaintiff, the suit property has not been freely held because its title has an encumbrance in favour of Equity Bank.

13. Terming the suit filed at the tribunal an after thought, the 2nd respondent contends that the plaintiff approached the Tribunal after the property had been sub-divided and new titles issued.

14. Maintaining that the plaintiff's possession was interrupted by his entry in 2008 and pruning of tea bushes, he asserts that the plaintiff's occupation is not adverse to that of the defendants. In this regard, the 2nd respondent refers to the various cases or disputes between the plaintiff and the defendant to wit, the protest filed in the estate of Kaburu; the case filed at the tribunal; Murang'a PMCC No. 150 of 2010; the criminal charges preferred against him; his entry into the suit property and pruning tea bushes and setting of boundaries.

15. The 2nd respondent has further argued that the plaintiff has not approached the court with clean hands. He blames the plaintiff for having prosecuted the case filed at the Land Disputes Tribunal without informing them. The plaintiff is also blamed for having failed to disclose to the court that he was compensated by getting a bigger share of the estate of Kaburu.

16. Arguing that if the applicant has suffered any injustice, he is the cause of the injustice, the respondents argue that the plaintiff should not be compensated for any injustice. The plaintiff is also faulted for having denied the 2nd defendant an opportunity to enjoy the fruits of his labour.

### **Submissions**

17. Advocates for the respective parties filed written submissions, which I have read and considered. In the submissions, the advocates have basically reiterated the contentions in the affidavits sworn in support and in opposition to the application. Besides reiterating the contentions in the pleadings, counsel for the plaintiff has provided a long list of cases which he argues supports the plaintiff's case.

18. Counsel for the respondent asserts that the plaintiff's claim against the defendant's is unmaintable because the title which is the subject matter of the suit was issued on 21st April, 2008. That being the case, counsel argues that the mandatory period of 12 years cannot apply to that title. The element of quiet and peaceful possession is also said to be unproven because of the various cases brought in respect of the suit property.

### **Analysis and determination:**

19. In determining the plaintiff's claim for adverse possession, I begin by pointing out that **Order 37 Rule 7** of the Civil Procedure Rules requires that an application under **Section 38** of the Limitations of Actions Act be made by originating summons. **Sub-rule 2 of Rule 7** requires that the application be supported by an affidavit to which a certified extract of title to the land in question has been annexed.

20. The foregoing provisions of the Law make it clear that a claim for adverse possession can only be brought against a registered proprietor of the land. In this regard see the case of **Beatrice Syokau Gatumbu v Kenya Airports Authority & 2 Others [2012]eKLR** where **Lenaola J.**, observed:-

**“The period of time for which title to real property is acquired through the doctrine of adverse possession is provided for under Section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya. Section 7 of this Act reads:-**

***“An action may not be brought by any person to recover land after the end of 12 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....***

The issue of time has also been settled by case Law where it has been held over and over again that **time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In the case of Tayebali Adamji Alibhai – Vs – Abdulhussein Adamji Alibhai (1938), 5 E.A.C.A 1, it was held that in respect of a registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is *prima facie* entitled to possession and, therefore, entitled to take action against any intruder to the land. This was later on quoted with approval in the case of Peter Wanyoike Gathure – Vs – A. Beverly (1965) E. A at Pg. 514 where it was held:-**

**(i) That certificates of ownership issued under the Land Titles Ordinance must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interest than those mentioned therein.**

**(ii) That no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of the certificate.** (emphasis supplied).

21. In applying the above principles, which I totally agree with, to the circumstances of this case, the defendant's respective titles having been issued in 2004 and 2008 respectively and the current suit having been filed in 2013 (nearly 9 and 5 years respectively from the time the defendants obtained title to the suit property), I find the plaintiff's claim for adverse possession to be unmaintainable against the defendants.

22. With regard to the plaintiff's alternative claim, having read and considered the evidence adduced in this case and in particular, the sale agreement executed between the plaintiff and the 1st defendant, I have no doubt in my mind that the 1st defendant is in breach of the terms of that agreement. Since the agreement incorporated the Law Society's Conditions of Sale to it, any party desiring to opt out of it for breach of its terms was obligated to issue a notice to the other to remedy the default. It is only after such a notice is issued and the default is not remedied within the time stipulated therein (21 days) could the 1st defendant lawfully opt out of the agreement.

23. Whereas the 2nd respondent argues that the plaintiff was compensated by taking a larger share of Kaburu's estate and that the plaintiff had entered into an agreement to the effect that the plaintiff would be compensated through the alleged larger share, there being no evidence adduced in support of that assertion, I find the same to be incapable of displacing the obligations created under the agreement executed between the plaintiff and the 1st defendant.

24. Being satisfied that the 1st defendant entered into the 2nd agreement well aware of his obligations under the agreement executed between him and the plaintiff and noting that he even undertook to indemnify the purchaser against any claims which might arise in the execution of the agreement executed between him and the 2nd defendant, I find and hold that no prejudice will be suffered by the 2nd defendant, if judgment is entered in favour of the plaintiff in terms of prayer 4 and 5 of the Originating summons.

25. In awarding prayer 5 in accordance with the valuation conducted by the plaintiff as opposed to that conducted by 2nd respondent, I took note of the fact that the valuation by the 2nd defendant was conducted in 2008 while that of the plaintiff was conducted in 2013. The valuation of the plaintiff captures the current developments in the suit property.

26. The upshot of the foregoing is that the application has merit and is allowed in terms of prayers 4 and 5.

**Dated, signed and delivered in open court at Nyeri this 23rd day April, 2015.**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

Paul Macharia Wagunya - plaintiff

No appearance for the 1st defendant

James Gachungu Kariuki – 2nd defendant

