



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

LAND AND ENVIRONMENTAL DIVISION

ELC CIVIL SUIT NO. 108 OF 2011

IN THE MATTER OF PARCEL L.R.NO. 76364 THINDIGUA KIAMBU

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS

ACT CAP. 22, LAWS OF KENYA

WILLINGTON NJOMO GICHANGA.....PLAINTIFF

VERSUS

LUCY WAMAITHA KIARIE

SAMUEL KIARIE

(FOR AND ON BEHALF OF THE ESTATE OF ONESMUS

MWENJE AND PHYLLIS NYAMBURA KINYANJUI)...1ST DEFENDANT

FAITH MUTHONI CHURU

JOSEPH NDUNGU NJOROGE

LUCY WAMBUI WAWERU

(TRUSTEES OF PCEA THINDIGUA CHURCH).....2ND DEFENDANT

R U L I N G

Before the court for determination is the plaintiffs Notice of Motion dated 1st September 2014 brought under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules. The plaintiff seeks an order that the Defendants their agents and or servants be restrained by this Honourable court from evicting the plaintiff/Applicant from ¼ acre portion of **L.R. NO. 76/364 (orig. NO. 76/32/343 Thindigua Kiambu** until this suit is heard and determined.

The plaintiff's application is supported on the grounds set out on the body of the application and on the supporting affidavit sworn by **Wellington Njomo Gichanga**, the plaintiff herein. The grounds as set out on the face of the application are:-

1. That the applicant is a beneficiary of $\frac{1}{4}$ plot out of **L.R. NO.76/364** after buying the same from the late **Onesmus Mwenje** in 1986.
2. That the applicant has acquired the same by adverse possession.
3. That the second defendant has verbally demanded that the plaintiff do vacate the suit premises and indeed sent criminal investigating officers who have demanded that the plaintiff do record statements with them and leave the property.

The application is further supported on the grounds set out in the supporting affidavit of **Wellington Njomo Gichanga** the plaintiff herein sworn on 1st September 2014. The plaintiff depones that **Samuel Kiarie** (the 1st defendant) **Phyllis Nyambura Kinyanjui** and **Onesmus Mwenje** purchased L.R.NO.76/364 in Thindigua Kiambu measuring $\frac{3}{4}$ acre from Thindigua as per annexure marked "WNG1".

The plaintiff avers that in 1986 the late **Onesmus Mwenje** sold to him his undivided portion of $\frac{1}{4}$ acre for Kshs.1,900/- whereupon the plaintiff built a semi permanent residential house and settled with his family.

The plaintiff states that in 1987 the said **Onesmus Mwenje** requested that he relocates from the $\frac{1}{4}$ acre plot in Thindigua in exchange with a plot in Mathare a move that the plaintiff resisted but following deliberations with the local elders in August 1987 it was resolved that the plaintiff relocates to the Mathare plot on the condition that the late **Mwenje** builds for the plaintiff a house on the Mathare plot similar to the one the plaintiff had built on the Thindigua plot. The late **Mwenje** did not build the house for the plaintiff and the plaintiff continued residing in the Thindugua plot until **Mwenje** died.

The plaintiff avers that by the year 2011 when he filed the instant suit he had been in adverse possession of the $\frac{1}{4}$ plot of the suit property for a period in excess of 12 years which entitled him to be registered as the owner thereof. The plaintiff avers that in August 2014 a stranger came to his house on the suit property and demanded that he vacates the land since the same had been sold to the 2nd defendant. A search on the property carried out on 29th August 2014 indeed confirmed the property had been transferred to the 2nd defendant. Copy of the search is annexed and marked as "WNG4".

The Defendants through **Lucy Wamaitha Kiarie** filed a replying affidavit in opposition to the plaintiff's application sworn on 28th October 2014. The deponent states that land parcel **L.R.NO.76/364 Thindigua Kiambu** was originally owned by her late mother **Esther Nduta Kiarie** who willed the same to **Samuel Kiarie**, **Phyllis Nyambura Kinyanjui** and **Onesmus Mwenje**. The deponent in the replying affidavit deposes that the plaintiff and the late **Mwenje** were workmates at the Kenya Railways corporation and that when the plaintiff was laid off in 1985, he did not have a place to stay and **Onesmus Mwenje** allowed him to store his goods temporarily in a charcoal shed on the suit/premises for a while but the plaintiff subsequently refused to vacate the premises when asked to do so.

The defendants deny that the late **Mwenje** sold any land to the plaintiff and/or that the plaintiff built any semi permanent residential house on the suit premises and maintain that the plaintiff merely refurbished the charcoal shed that the late **Mwenje** had allowed him to store his goods in. The Defendant further deny there was even an agreement to sell the land to the plaintiff or any agreement that **Mwenje** would relocate the plaintiff from the suit premises to his plot (**Mwenje's**) in Mathare where he was to build a house for the plaintiff. The defendants further deny there was ever a meeting of elders conveyed by the plaintiff at which the issue of the relocation of the plaintiff to Mathare was discussed and state the alleged meeting referred to by the plaintiff at paragraph 7 of his supporting affidavit is a fabrication and that annexure "WNG2" the alleged verdict by the elders does not show that **Mwenje** was infact a participant in any such deliberations.

The defendants further state the plaintiff has not been in continuous uninterrupted possession of the suit property for a period of over 12 years as alleged by the plaintiff and point to two previous cases being Nairobi Resident Magistrate's Court Civil case NO. 824 of 1988 brought by **Onesmus Mwenje** against the plaintiff seeking his eviction from the suit premises and further Kiambu Chief Magistrate's Civil case NO. 67 of 2002 by the plaintiff against **Philis Nyambura Kinyanjui** and **Lucy Wamaitha Kiarie** where the plaintiff sought an order of injunction against the defendants and an order for specific performance of an agreement of sale allegedly entered into in November 1985 or thereabout whereby the Defendants were to sell to the plaintiff one quarter of an acre out of L.R. NO. 76/364 **Thindigua/Kiambu** Municipality for a consideration of Kshs.40,000/-. The plaintiff in the suit (**CMCC NO.67 of 2002**) claimed that he paid Kshs.1,900/- towards the purchase price and the defendants on mutual understanding allowed him to take possession of the suit premises in 1986 whereupon he constructed his residential houses.

Paragraphs 7 and 8 of the plaintiff's plaint in **CMCC NO. 67 of 2002** point to the relationship not being as cordial as the plaintiff would like the court to believe in the instant suit.

The two paragraphs are reproduced hereunder for ease in reference:-

7. On or about 1986 the Defendants without any justification whatsoever refused and or declined to accept further payment towards consideration and instead reported the matter to the area Chief for arbitration and thereafter filed a suit for vacant possession being Nairobi RMCC NO. 824 of 1988. The plaintiff seeks leave of the court to refer to the proceedings before the area chief at the hearing hereof.

8. On or about 1st day of February 2002 and in fragrant breach of the agreement the Defendants has served the plaintiff with verbal one month quit notice and now intend to transfer the said property to a 3rd party thereby depriving the plaintiff of his interest in the suit premises.

The pleadings in regard to Nairobi **RMCC NO. 824 of 1988** have not been furnished by the parties but it is evident that the occupation of the suit premises by the plaintiff was definitely under challenge which even drove the plaintiff to institute a suit in Kiambu vide Kiambu **CMCC NO. 67 of 2002** the determination of which the parties have not disclosed.

Following the replying affidavit filed by the Defendants the plaintiff filed a further affidavit sworn on 20th November 2014 filed in court on 28th November 2014 responding to the replying affidavit by **Lucy Wamaitha Kiarie**. The plaintiff reiterated that he had purchased ¼ acre portion from **Onesmus Mwenje** though no written agreement was prepared and that he had occupied and possessed the portion for uninterrupted period of more than 12 years. Referring to the case instituted by **Onesmus Mwenje in 1988** seeking for his eviction, the plaintiff states the case was dismissed though the annexure "WNG4" which he furnishes as proof of the dismissal of the case are letters exchanged between the parties lawyers and do not disclose how the suit was finalized, if at all it was finalized.

The parties filed written submissions as directed by the court. The plaintiff/Applicant's submissions dated 17th December 2014 were filed in court on 14th January 2015 while the Respondents submissions dated 18th February 2015 were filed on the same date.

The plaintiff reiterates the facts of the case in his filed submissions. It is his submission that his possession has been adverse and avers that the suit by **Onesmus Mwenje RMCC NO. 824 of 1988** where he sought vacant possession of the suit premises was dismissed for want of prosecution and further avers that the suit **Kiambu RMCC 67 of 2002** which he (the plaintiff) filed has no bearing to the instant suit since it involved different defendants. The position of the plaintiff is that since **Onesmus Mwenje** did not build for him an alternative house in Mathare as the local elders had directed to enable the plaintiff to relocate the plaintiff continued in adverse possession and is therefore entitled to be declared as owner of the ¼ acre portion.

The Defendant/Respondent in their submissions submitted that the plaintiff is not entitled to the orders of injunction he seeks as he has not satisfied the conditions upon which a temporary injunction may be granted. The conditions for grant of injunction are fairly well settled within our jurisdiction as the principles established in the case of **Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358** have withstood the test of time. These principles are:-

1. An applicant must show a prima facie case with a probability of success,
2. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
3. When the court is in doubt, it will decide the application on the balance of convenience.

In order to determine whether a prima facie case with a probability of success has been disclosed the court of necessity has to consider the pleadings filed by the parties and the material placed before the court in support of and in opposition to the application. The plaintiff's suit is founded on what is stated to have been an agreement to purchase a portion of ¼ acre out of L.R.NO. 76/364 from **Onesmus Mwenje** though the property was jointly owned by **Onesmus Mwenje, Phyllis Nyambura Kinyanjui** and **Lucy Wamaitha Kiarie** as joint tenants. The plaintiff further claims to have become entitled to be registered as owner of the ¼ acre portion by reason of prescription by virtue of having been in adverse possession for a period in excess of 12 years preceding the filing of the suit.

The plaintiff admits the alleged agreement of sale was not written and consequently in terms of Section 3 (3) of the Law of Contract Act Cap 23 Laws of Kenya the plaintiff cannot found a cause of action on a contract for a disposition of an interest in land unless the contract is in writing and the same has been signed by the parties. The court would have no jurisdiction to sustain such a suit. If the plaintiff was merely relying on the alleged contract entered into in 1986 I would have had no difficulty in finding the suit to be incompetent and hence to strike the same out as I would have been entitled to do by virtue of section 3 (3) of the Law of Contract Act.

However the plaintiff also basis his suit on adverse possession and whether or not a party has been in adverse possession is a matter of evidence which usually is only available during the trial. In the present case the issue indeed arises whether the occupation of the suit premises by the plaintiff was adverse and whether the suit property (head title) having been jointly held by the then registered owners, the interest of the late **Onesmus Mwenje** had been defined so that he could dispose it as he is alleged to have done.

I have perused the indenture dated 13th august 1983 which conveyed the property **LR.NO.76/364** to **Samuel Kiarie, Philis Nyambura Kinyanjui** and **Onesmus Mwenje** and its clear the conveyance was made to them jointly and not in any defined shares such that none of the joint owners owned any specific and/or defined portion of the land.

The Respondents referred the court to the case of **Isabel Chelangat –vs- Samuel Tiro Rotich & 5 others (2012) e KLR where Munyao J** considered what constitutes joint ownership and how jointly held land may be dealt with. The learned Judge in the case quoting from **Cheshire & Burn's Modern Law of Real Property** stated:-

“-----According to Burn, -----a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares---”. Further regarding possession the authors stated:-

“on unity of possession each co-owner is entitled to possession of any part of the land as the others. One co-owner cannot point to any part of the land as his own to the exclusion of the other(s) if he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other(s), so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature and duration, for in theory of law, they hold just one

estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants acquiring their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time”.

The position as expressed by the authors, **Chesire & Burn’s** as above is codified in our law under section 91 of the Land Registration Act, 2012 Section 91 (4) provides:-

“if land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently-

a. Dispositions may be made only by all the joint tenants,

b. On death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly, or

c. Each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void”.

In the present case the plaintiff claims to have entered into an agreement to purchase ¼ acre portion from the late **Onesmus Mwenje** who was a joint owner of the Land with two other persons. Under the law the said **Mwenje** could not enter into such an agreement without the involvement of the other joint owners. He simply had no land that he could singularly deal with. Under section 91(4) of the Land Registration Act, 2012 such an agreement would be void and incapable of being effectuated. It follows therefore even if there was an agreement between the plaintiff and the late **Onesmus Mwenje** for the purchase by the plaintiff of a portion of ¼ acre out of **L.R. NO. 76/364**, which however the defendants deny, that agreement would have been void and unenforceable.

On the issue whether the plaintiff then was in adverse possession of the portion of the suit premises, the Defendants submit that the plaintiff’s possession of the parcel of land was not adverse as he came onto the property with the knowledge and approval of one of the co-owners, **Onesmus Mwenje**. There is further evidence that there have been efforts and attempts to evict the plaintiff and thus the possession cannot be described as being peaceful, continuous and uninterrupted for over a period of 12 years.

The legal position is that where a person enters the land with the permission of the owner such a person cannot adversely possess the land. There is ample judicial authority for this proposition and the defendants have referred the court to the case of **Muraguri Githitho –vs- Mathenge Thiongo (2009) eKLR** where **Justice Makhandia** (as he then was) while considering the instances where adverse possession arises stated as follows:-

“The applicant according to his evidence entered the suit premises in or about 22nd January 1968. However his entry would appear was not hostile or adverse to the owner’s title. Rather he entered the same as a purchaser from Gakuu Ngatia. That being the case, then his entry to the suit premises was with the permission of the owner and was thus not adverse to the Respondent’s title to the suit premises. Possession can only be adverse if it is inconsistent with and in denial of the title of the owner inform of want of permission. By claiming therefore that he bought the suit premises, the applicant has failed to prove that he had no colour of right to be on the suit premises other than his occupation and possession by permission of the vendor who in this case was Gakuu Ngatia. In the case of Waweru –vs- Richu (2007) EALR 403 and Wanje –vs- Saikwa (NO.2) KLR 284 it was held that a claim for adverse possession cannot succeed if the person asserting it is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. This is the situation obtaining herein”.

The above holding by **Makhadia J**, mirrors the situation we have in the present suit. The plaintiff herein

states he entered possession of the suit land pursuant to a sale agreement and hence with the permission and/or consent of the owner. The plaintiff had the option to seek to enforce the agreement of sale, if there was such an agreement and evidently the plaintiff in 2002 brought an action in **Kiambu RMCC NO. 67 of 2002** seeking enforcement of the said agreement. In my view this was an acknowledgement on the part of the plaintiff of the ownership by the Respondents of the suit land. The plaintiff does not disclose what became of the case he filed at Kiambu. Was it ever finalized or it is still pending? The court has no information and will leave it at that lest it makes any finding that could be prejudicial in case the suit is still pending.

All in all, having regard to the evidence and material that has been placed before the court, I am not satisfied the plaintiff has demonstrated a prima facie case with any probability of success and/or that damages would not be an adequate remedy in case the plaintiff is successful at the trial. There is evidence that at some stage the plaintiff and the defendants were discussing the value of the plaintiff's developments with a view of compensation suggesting that damages would be adequate compensation. Indeed under prayer (c) of the plaint in **Kiambu RMCC NO.67 of 2002** the plaintiff prayed for an order for **“specific performance of the said agreement or alternatively a refund of the purchase price and compensation for the development on the suit premises”**. In the suit the plaintiff also prayed for general damages for breach of contract and this fortifies my view that compensation would be an adequate remedy were the plaintiff to succeed in the suit.

In the premises, I hold that the plaintiff's Notice of Motion application dated 1st September 2014 lacks any merit and the same is hereby dismissed with costs to the Defendants.

Ruling dated, signed and delivered this...**19th**.....day of...**June**.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

Mrs Ndetho..... for the Plaintiffs

Mr. Njenga..... for the Defendants