



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MACHAKOS

ELC. CASE NO. 60 OF 2017

SAMMY MUTUKU MBUSYA..... PLAINTIFF

VERSUS

PATRICK KIPARTY WAKIMWA.....1st DEFENDANT

PHILIP NDAMBUKI MUINDE.....2nd DEFENDANT

JUDGMENT

1. In the Amended Complaint dated 3rd May, 2018, the Plaintiff averred that he entered into an Agreement with the 1st Defendant on 7th July, 2002 for the purchase of land known as Machakos/Matuu/4154, formerly known as Plot No. 4154 Matuu, at the price of Kshs 100,000 and that at the time of the said purchase, he believed that the 1st Defendant did not have a Title Deed.

2. The Plaintiff averred that after paying for the land, he put up a building comprising of shops and residential rooms; that the 1st Defendant made him believe that plot number 4154 measuring 0.03 Ha was not registered, which was not true, and that the 1st Defendant subsequently purported to sell the suit property to the 2nd Defendant while knowing that he had sold the same land to the Plaintiff.

3. The Plaintiff is seeking for the following prayers against the Defendants:

a) An order of permanent injunction restraining the Defendants whether by themselves, their servants and/ or agents or others whomsoever from trespassing or in any other manner howsoever from interfering with the Plaintiff's peaceful occupation and use of his land parcel number Machakos/Matuu/4154.

b) A declaration that Sammy Mutuku Mbusya (the Plaintiff) is the rightful owner of land parcel number Machakos/Matuu/4154 having purchased the same from the 1st Defendant on 7th July, 2002

bb) In the alternative and without prejudice to prayer (b) Sammy Mutuku Mbusya (the Plaintiff) be declared to have a beneficial interest and/ or to have acquired land parcel number Machakos/Matuu/4154 measuring 0.03 Ha or thereabouts by way of adverse possession.

c) An order compelling the Defendants to sign and execute the necessary papers to cause the transfer of land parcel number Machakos/Matuu/4154 and forthwith cause the same to be registered in the name of the Plaintiff and in the default the said documents be executed by the Deputy Registrar of this Honorable court.

d) The Land register relating to land parcel number Machakos/Matuu/4154 be rectified in such a manner as to reflect the Plaintiff as the registered owner of land parcel number Machakos/Matuu/4154.

e) In the alternative to prayers above, the Defendants be compelled to compensate the Plaintiff a sum equivalent to the market value of land parcel number Machakos/Matuu/4154.

f) General damages for breach of contract as against the 1st Defendant.

g) Costs of the suit and interest on (e) and (f).

4. The Defendants filed an amended joint Defence on 30th May, 2018 where they denied each and every allegation of law and fact raised in the Plaintiff and further averred that the 1st Defendant did not appoint Patrick Musyoki Kioko as his agent, neither did he give him the Power of Attorney dated 16th June, 2002.

5. The Defendants denied the allegations of fraud and fraudulent misrepresentation on their part and averred that the 2nd Defendant was a *bona fide* and lawful proprietor of the parcel of land parcel number Machakos/Matuu/4154. The Defendants averred that if the Plaintiff was duped by Patrick Musyoki Kioko, then his claim lies against him and not against the Defendants.

6. The Defendants denied the jurisdiction of this court and averred that the matter was within the jurisdiction of the Principal Magistrate's Court at Kithimani; that the suit was bad in law and that the same should be struck out. In the Defence (*there is no Counter-claim*), the Defendants prayed for the following orders:

a) A declaration that the 2nd Defendant is the lawful owner of the suit property known as LR Machakos/Matuu/4154.

b) An order of permanent injunction restraining the Plaintiff by himself, his servants, agents or any other person claiming interest through him or otherwise from entering, remaining on, trespassing, constructing, erecting any structures, alienating, dealing or otherwise howsoever from interfering with the 2nd Defendants property known as land reference number Machakos/Matuu/4154

c) An order of vacant possession and/ or eviction of the Plaintiff from the suit property.

Evidence of the Plaintiffs

7. The Plaintiff testified as PW1 and adopted his witness statement. PW1 testified that he was also known as Bernard Mutuku and that he used the names Bernard and Sammy indiscriminately. It was his testimony that in June, 2002, he learnt that the 1st Defendant had donated a Power of Attorney to Patrick Musyoki Kioko to sell the suit property to any willing purchaser.

8. PW1 testified that on the strength of the authority dated 16th June, 2002 donated to the said Patrick Musyoki Kioko, he agreed to purchase the suit land and entered into an Agreement on 7th July, 2002 with Patrick Musyoki Kioko who was the agent of the 1st Defendant and that he paid the purchase price of Kshs 100,000.

9. It was the evidence of PW1 that it was not disclosed to him that the plot he was buying was registered as Machakos/Matuu/4154 and that he came to find out about this information after he conducted a search on 27th October, 2016.

10. It was his testimony that pursuant to the agreement of sale, he took possession of the suit land and fully developed it; that he came to learn that the original owner of the suit land later on sold the same land to the 2nd

Defendant and that he had been in possession of the land for more than 14 years.

11. PW2 was Patrick Musyoki Kioko who adopted his witness statement. PW1 testified that he was given a Power of Attorney by the 1st Defendant to sell the suit land to Sammy Mutuku Mbusya; that the agreed purchase price was paid and that the Plaintiff was given possession of the suit property where he built commercial houses that are fully occupied by tenants.

12. On cross examination, PW2 stated that the Power of Attorney did not specify the land being sold neither did it indicate the acreage; that the Power of Attorney did not also indicate the location of the land and that the acreage of the land in the agreement was 20 x 100 feet whereas the Title Deed indicated the acreage as 0.03 ha.

13. PW2 informed the court that he received Kshs 100,000 from the Plaintiff, which he gave to the 1st Defendant; that he did not know that the Power of Attorney was to be registered and that when he went to obtain the consent of the Land Control Board, he found the land had been sold.

14. PW3 was Stanley Muli Nzioki who adopted his witness statement. PW3 testified that his neighbour, PW2, introduced him to the Plaintiff who sought for his services to undertake developments on parcel number Machakos/Matuu/4154 and that he undertook the developments on the suit property for two weeks after which he was stopped by the Defunct County Council of Matuu for lack of an approved plan for development of the land.

15. PW3 testified that after obtaining the requisite documentations, the developments continued and that while undertaking the construction, nobody came to claim ownership of the plot.

Evidence of the Defendants

16. DW1 adopted his witness statement and testified that in 1993, he acquired land reference Machakos/Matuu/4154 from a colleague, Dr Suva and that he was issued with a Title Deed for the land.

17. It was the evidence of DW1 that in the year 2007 he started building structures on the suit property and that in February, 2016 he approached the 2nd Defendant with a view of selling him the land. It was the evidence of DW1 that he entered into a Sale Agreement with the 2nd Defendant for the sale of land parcel number Machakos/Matuu/4154 and was paid Kshs 4.7 million for the same; that he obtained consent from the Land Control Board for the transfer of the land on 26th April, 2016 and that he executed the transfer documents for the suit property in favour of the 2nd Defendant.

18. DW1 informed the court that he was not aware of a Power of Attorney dated 16th June, 2002; that the same was a forgery; that he did not prepare the said Power of Attorney, neither did he authorize anybody to transact in the suit land on his behalf and that he did not enter into the agreement for sale of land dated 7th July, 2002. DW1 stated that the Plaintiff could have been duped by Patrick Musyoki Kioko.

19. DW2 testified that the 1st Defendant approached him with the intention of selling to him the suit property. According to DW2, he conducted a search and confirmed that the suit land was registered in the name of the 1st Defendant. It was his evidence that after establishing that the suit property was registered in favour of the 1st Defendant, he entered into a sale agreement dated 27th April, 2016 with the 1st Defendant.

20. DW2 told the court that he paid Kshs 4.7 million to the 1st Defendant and that prior to the payment of the purchase price, the consent of the Land Control Board to transfer the suit land was obtained by the 1st Defendant and that a transfer was executed in respect of land parcel number Machakos/Matuu/4154. It was his testimony that the land was not sold to him fraudulently but that he was a *bona fide* purchaser for value of the suit land.

Submissions:

21. The Plaintiff's advocate submitted that the Plaintiff has been in possession of the suit land since the year 2002 and that PW2 was authorized by the 1st Defendant to sell the suit land. According to counsel, while placing reliance on the case of *Peter Mbiri Michuki vs. Samuel Mugo Michuki (2014) eKLR*, the Plaintiff has acquired the title to the suit property by way of adverse possession. It was submitted that the 1st Defendant sold the suit land to the 2nd Defendant, while knowing that the Plaintiff had taken possession of the land and carried out developments. It was submitted that there was no proper counterclaim on record hence the orders sought by the Defendants could not issue.

22. Learned counsel for the Defendants, vide submissions dated 10th February, 2020, framed four issues for determination: firstly, whether or not there was a valid agreement for sale between the Plaintiff and the 1st Defendant dated 7th July, 2002; secondly, whether or not the 2nd Defendant's title was obtained by fraud; thirdly, whether the 2nd Defendant's title to the suit property had been extinguished by the Plaintiff's adverse possession and fourthly, who should bear the costs of the suit.

23. On the first issue, counsel challenged the Power of Attorney for not being registered. Reliance was placed on the case of *Francis Mwangi Mugo vs. David Kamau Gathogo (2017) eKLR*. It was submitted that a Power of Attorney ought to be specific or general; that the Power of Attorney ought to deal with a particular piece of land and that it ought to be attested and registered. Reliance was placed on the case of *Stephen Njihia Mbugua Stephen Kihara Muchui & 2 Others (2015) eKLR*. The Defendants' counsel urged the court to find that there was no valid Power of Attorney or Sale Agreement in respect of the suit property between the Plaintiff and the 1st Defendant.

24. The learned counsel for the Defendants cited the provisions of Sections 26(1) and 80 of the Land Registration Act and submitted that the onus was on the Plaintiff to prove fraud. While placing reliance on the case of *Alice Chemutai Too vs. Nickson Kipkimu Korir & 2 Others (2015) eKLR*, learned counsel submitted that the Plaintiff failed to prove fraud as against the Defendants or at all.

25. On the issue of whether the Plaintiff was entitled to the suit property by virtue of the doctrine of adverse possession, learned counsel for the Defendants invited the court to consider the case of *Nahashon Muriithi Jeremiah vs. Nelson Mwangi Kinguru (2015) eKLR*. Counsel submitted that the Plaintiff had not demonstrated that he had been in adverse possession of the suit land and hence his claim for adverse possession was unsustainable.

Analysis and Determination:

26. The Plaintiff's claim is that he purchased parcel of land known as Machakos/Matuu 4154 from the 1st Defendant at a price of Kshs. 100,000. To prove this assertion, the Plaintiff produced in evidence Agreements of Sale dated 17th July, 2002 and 9th September, 2002.

27. In the Agreement of 7th July, 2002, Patrick Kioko acknowledged having received a sum of Kshs 45,000 from the Plaintiff, while in the Agreement of 9th September, 2002, the said Patrick Kioko admitted having received Kshs. 20,000. In both Agreements, the said Patrick Kioko is said to have received the payments on behalf of the 1st Defendant.

28. The Plaintiff also produced in evidence a handwritten document dated 16th June, 2002 purportedly by the 1st Defendant. The document states that the 1st Defendant has given Patrick Musyoki the Power of Attorney to sell his plot for Kshs. 100,000. The Plaintiff denied having signed the said Power of Attorney.

29. The evidence that was produced in this court shows that the Title Deed to parcel of land known as Machakos/Matuu/4154 (*the suit property*) was registered in favour of the 1st Plaintiff on 4th March, 1993. The said

land was transferred to the 2nd Defendant on 27th May, 2016.

30. Although the Plaintiff has produced in evidence two handwritten agreements showing that he paid one Patrick Kioko a sum of Kshs. 100,000, the said agreements do make any reference to parcel number Machakos/Matuu/4154. Indeed, considering that the 1st Defendant was already registered as the proprietor of parcel number Machakos/Matuu/4154 in the year 2002, it is inconceivable that he would have authorized the sale of the said land without providing the specific parcel number of the land that he was selling.

31. The 1st Defendant has denied that he donated to the said Patrick Musyoki Mbusya a Power of Attorney. I have perused the said Power of Attorney. The said document has not made any reference to the suit property, neither was it registered, contrary to the provisions of the law and case law.

32. In the case of *Francis Mwangi Mugo vs. David Kamau Gathongo (2007) eKLR*, it was held that a Power of Attorney is an instrument that seeks to declare certain rights over immovable property and must be registered. This is the same position that the court took in the case of *Stephen Njihia Mbugua vs. Stephen Kihara Muchai & 2 Others (2015) eKLR*. Considering that the said Power of Attorney did not specify the land that the Plaintiff and Patrick Kioko were transacting in, and the said Power of Attorney having not been registered, the same is ineffectual, null and void.

33. Having found that the purported Power of Attorney was null and void, and the suit property having been registered in the name of the 1st Defendant as at the time Patrick Kioko purported to sale it to the Plaintiff, it is my finding that the said sale was a nullity. I say so because Patrick Kioko did not have any proprietary interest in the suit property and could not therefore pass a good title to the Plaintiff or at all.

34. Section 26 (1) of the Land Registration Act provides as follows:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

35. The Plaintiff has not proved that the sale of the suit property to the 2nd Defendant by the 1st Defendant was done fraudulently, or by mistake or through a corrupt scheme. The Plaintiff's claim that he is a purchaser of the suit property therefore fails.

36. The Plaintiff informed the court that he has been in possession of the suit property, and that he has been collecting rent from tenants since the year 2002; that he has been in a continuous, uninterrupted possession of the suit property for more than 12 years and that he should be declared to have obtained beneficial interest in the suit property by way of adverse possession.

37. Indeed, the law pertaining to adverse possession is now settled. Section 7 and 38(1) of the Limitation of Actions Act states as follows:

“7. 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.

38(1) 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.”

38. The courts have put the above provisions of the law and the doctrine of adverse possession into context. In the case of *Kimani Ruchine vs. Swift Rutherford & Co. Ltd [1980] KLR*, the court held as follows:

“The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario...The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by any recurrent consideration”.

39. In *Teresa Wachuka Gachira vs. Joseph Mwangi Gachira (2009) eKLR*, the Court of Appeal held as follows:

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivation depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor.”

40. In *Benjamin Kamau Murima & Others vs. Gladys Njeri, Civil Appeal No. 213 of 1996*, the Court of Appeal held as follows:

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possession of that land”

41. The Supreme Court of India, in *Karnataka Board of Wakf vs. Government of India & Others (2004) 10 SCC 779*, stated as follows:

“In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

42. The issue for determination in this matter is whether the Plaintiff has been in continuous occupation of the suit land for twelve (12) years, and whether the said occupation has been adequate in continuity and in extent to show that his possession is adverse to that of the Defendant.

43. The Plaintiff informed the court that after purchasing the suit property in the year 2002, he put up shops and commercial buildings on the land. According to the Plaintiff, he has rented out the shops and the commercial buildings. On his part, PW3 stated that he was contracted by the Plaintiff to build the shops and commercial buildings for residential purposes. It was the evidence of PW3 that at some point, he was stopped from constructing the said buildings by the local authority for want of documentation.

44. Although PW3 stated that the Plaintiff did obtain the approvals for the construction of the commercial buildings on the suit property, the said approvals were never produced in evidence. Indeed, one would have expected the Plaintiff to produce the approved development plans to prove the assertion that indeed the suit property has permanent developments, and to show that the said developments have been on the suit land for 12 years.

45. Having not produced in evidence the approved development plans and photographs to show the existence of the structures on the suit property, I find that the Plaintiff has not proved that he has been on the suit property peacefully, openly and continuously for 12 years. There is no evidence before me to show that the Plaintiff's possession of the suit property was adequate in continuity, in publicity and in extent to show that his possession was adverse to the true owner.

46. For the reasons I have given above, I dismiss the Plaintiff's Amended Plaint dated 3rd May, 2018 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE



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