



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C. 49 OF 2014
FORMERLY KERUGOYA E.L.C 482 OF 2013

SARAFINA WANJUKI
NJIRU.....PLAINTIFF

VERSUS

DAVID NJERU NTHIGA.....DEFENDANT

JUDGEMENT

Introduction

Mrs Sarafina Wanjuki Njiru, the claimant took out the originating summons which was filed under Order 37 Rule 71 of the 2010 Civil Procedure Rules as read with Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya. The originating summons is supported by her affidavit dated 13th April, 2011. According to her originating summons, she seeks the following orders from this court:

1. That this Honourable Court be pleased to make a declaration that the applicant SARAFINA WANJUKI NJIRU has obtained an adverse TITLE to parcel of land KAGAARI/WERU/580.
2. THAT this Honourable Court be pleased to make an order that the defendant's title to the said land has been extinguished.
3. THAT this Honourable Court be pleased to cancel the registration of the defendant DAVID NJERU NTHIGA as the proprietor of Parcel of land KAGAARI/WERU/580 in the names of SARAFINA WANJUKI NJIRU.

The defendant/respondent has opposed the claim of the plaintiff. According to him, he had bought the suit land from the husband of the plaintiff in 1978. He has therefore urged the court to dismiss the claim.

The Case for the Plaintiff:

The plaintiff is the only witness who testified in support of her claim. The defendant stated that she is a farmer who grows cereal crops and miraa. According to her, the defendant is not her relation and is not her neighbour. She has stated that the suit land parcel number Kagari/Weru/580 measuring four acres is registered in the name of the defendant. She produced the green card as P. Ex 1, which shows that the suit land is now registered in the name of the defendant.

It is also her evidence that Francis Njiru Karugano also known as Mwaniki Karugano is her husband

with whom she has been living in the suit land since 1966, being the year of their marriage . According to her, the husband suffers from some mental infirmity which started in 1978. It is also during that year that the husband fell down and fractured his legs forcing him to use a walking stick. As a result, she is the one who now looks after her husband and their six children. Her further evidence is that they have been living in the suit land since 1966.

The defendant's evidence shows that they have done development on the suit land. Those developments include houses and food crops in respect of which she produced photographs as P. Ex (2a) – (2g) showing the houses and the food crops on the suit land.

It is also her evidence that no one has ever told her to quit the suit land and that this suit land has never been sold to any person. In addition to planting bananas and miraa, some of her children are buried on the suit land. Finally, the defendant says that she does not know how the defendant came to be registered as the owner of the suit land. She states that the suit land belongs to her and has prayed to the court to transfer the ownership of the suit land to her together with the costs of the suit.

The Case for the Defendant:

The defendant is the only witness who testified in his own behalf. He has stated that he is a peasant farmer growing coffee, bananas and sugar cane. He states that the suit land belongs to him. Furthermore, he has stated that the plaintiff has refused to leave the suit land. According to him, the suit land was sold to him by the husband of the plaintiff in 1978. He further says that the agreement for sale of the suit land was prepared by an advocate called Patrick Njiru. Additionally, it is this Patrick Njiru who prepared the transfer of ownership forms.

Furthermore, he has stated that he is leaving all other matters to God to assist him in relation to this suit land. According to him, God knows the truth. He also says that the plaintiff has lied to the court by stating that she has never seen him in her home. He says that the plaintiff went to his home and requested for money to buy kerosene.

In cross-examination, the defendant admitted that he has never lived on the suit land and has never planted any crops there. It is also his evidence that the plaintiff did not witness the sale agreement in respect of the suit land. He also testified that he tried to evict the plaintiff four times without success. This he says was to enable him work on the suit land. He further testified that he has on a number of occasions told the plaintiff to vacate the suit land.

In response, the plaintiff refused to vacate the suit land. As a result, he filed a case against the plaintiff at the D.C's office. This case was referred to the High Court at Embu from the office of the D.C. And thereafter, it was referred to Kerugoya and from Kerugoya it was referred back to Embu.

Furthermore, he stated that it is the plaintiff who filed a case at the tribunal in the D.C's office. He went further to state that he also filed a case in that tribunal. According to him, the plaintiff's case against him was dismissed. He says he cannot recall when he filed the case in the tribunal unless he referred to his records. The defendant was emphatic that the case which he filed against the plaintiff was transferred to Kerugoya being High Court case number 45 of 2011.

When he was shown a court document titled ***“issues for determination in the High Court at Embu case number 45 of 2011 (O.S),”*** he stated that he is the one who prepared this document which is dated 27th November, 2013 which he filed in the High Court registry at Kerugoya. He insisted that he is the one who filed the case number 45 of 2011. The document titled ***“issues for determination”*** was produced as exhibit P. Ex 3. He stated emphatically that he was the plaintiff in case number 45 of 2011.

When he was shown the tribunal proceedings which were put in evidence as exhibit P. Ex 4, he admitted that it is the plaintiff who first filed a case in the tribunal and that he was the defendant in the tribunal proceedings. He insisted that it was his case which was transferred from the D.C's office to the High Court and not that of the plaintiff. The tribunal proceedings which were transferred to the court of

the Chief Magistrate Embu were produced as exhibit P. Ex 5. According to those proceedings, the plaintiff was Sarafina Wanjiki Njiru and the defendant was David Njiru Nthiga.

When he was pressed further to explain the contents of exhibit P. Ex 5, he answered that he thought that P. Ex 5 relates to his similar case. He also stated that he was in possession of similar documents to exhibit P. Ex 5. He concluded his evidence that he had filed a case at the tribunal which was progressing alongside that of the plaintiff. In that case, he sought the eviction of the plaintiff. He then closed his case and had no witness to call.

The Applicable Law:

This is a claim for adverse possession. For an applicant to succeed in a claim for adverse possession, it must be shown that the claimant was in occupation of the suit land for twelve or more years. It must also be shown that the claimant has been using the suit land as of right, meaning openly and that the defendant was fully aware of this occupation and usage. Additionally, the occupation of the suit land must be continuous meaning it should not be broken or interrupted. These principles were approved by the High Court of Kenya in the case of *Kimani Ruchire v. Swift Rutherfords & Co Ltd (1980) KLR 10 at page 16 letter B*.

Furthermore, according to the Court of Appeal in *Oketch Okale v R, (1965)EA 555* this court is required to consider the whole evidence that is tendered by both parties and then make findings of fact based on the that evidence.

Issues for Determination

In the light of the oral evidence adduced in court, and the submissions of counsel for the plaintiff, the following are the issues for determination:

1. Whether or not the plaintiff was in occupation of the suit land for a continuous, uninterrupted and open manner for twelve or more years.
2. Whether or not she is entitled to the declarations sought
3. Who should pay for the costs of this suit.

Evaluation of the Evidence, Findings and the Law:

I have considered the evidence of the plaintiff and that of the defendant. I believe the evidence of the plaintiff that she has been in continuous occupation of the suit land since 5th February, 1981. I also believe her evidence that she planted cereal crops, bananas and other plants on the suit land. She produced photographs which clearly indicate the type of developments she has done on the suit land. Her children who died are buried on the suit land. I also believe her evidence that the defendant has never lived on the suit land and has not planted any crops in that land.

I also believe the evidence of the plaintiff that she filed a case in the tribunal at the D.C's office which was referred to the High Court, because the tribunal took the view that this was a matter for the High Court to decide, because they lacked jurisdiction.

I do not believe the evidence of the defendant. He impressed me as a witness who was not telling the truth. He admitted in court that he has never stepped on the suit land. He has also admitted that he has never planted any crops on the suit land. His assertion that he filed a case against the plaintiff at the tribunal is not true. He failed to produce any document to support his claim. It is for this reason that I reject the evidence of the defendant, which I find to be incredible.

According to the case of *Kimani Ruchire v. Swift Rutherfords and Co. Ltd, supra*, a plaintiff who claims ownership by adverse possession is to prove that he has been in continuous occupation of the suit land for an uninterrupted period of twelve or more years. I find that the plaintiff has met the threshold for the grant of the declarations that she is entitled to be declared the owner of the suit land and to be

registered as the owner of the suit land. The defendant's title to the suit land has been extinguished.

In light of the whole evidence produced in court and the law, I find that that plaintiff has proved her case on a balance of probabilities and I therefore enter judgement in her favour.

Verdict and Disposal Order:

In the light of the foregoing matters, I hereby make the following orders:

1. The plaintiff is hereby declared as the owner of the suit land number KAGAARI/WERU/580.
2. The plaintiff is entitled to be registered as the owner of the suit land.
3. The certificate of title in the defendant's name is declared null and void and it is hereby canceled.
4. The plaintiff is awarded the costs of this suit with interest at court rates.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 25th day of FEBRUARY, 2015

In the presence of Mrs Sarafina Wanjuki Njiru and in the absence of the defendant and counsel for the plaintiff.

Court clerk Mr. Muriithi.

Right of appeal under Section 66 Civil Procedure Act explained to the parties.

J.M. BWONWONGA

JUDGE