



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE NO. 67 OF 2004(O.S)
CHARLES WANJAU GATIMU.....1ST PLAINTIFF
ESTHER KAGURE MWANGI.....2ND PLAINTIFF
VERSUS
WILLIAM NJUGUNA MURIUKI.....DEFENDANT

JUDGMENT

CHARLES WANJAU GATIMU and **ESTHER KAGURE MWANGI**, being the 1st and 2nd Plaintiffs herein, took out the Originating Summons dated 12th July 2004 and posed the following issues to this court for determination:

- 1. Whether or not the Defendant's right to recover a share of Konyu/Gakuyu/456 is barred under the Limitation of Actions Act (cap 22, of the Laws of Kenya) and title has become extinguished on the ground that since 1959 the Plaintiffs have openly peacefully and as of right been in open and continuous occupation of the Defendant's said share o L.R.Konyu/Gakuyu/456 in trust for the Plaintiffs?**
- 2. Is the Defendant registered proprietor of the said share of Konyu/Gakuyu/456 in trust for the Plaintiffs?**
- 3. That there be an order that the Plaintiffs be registered as proprietors of the Defendant's said share in place of the Defendant under Section 38 of the Limitation of Actions Act (Cap 22, Laws of Kenya).**
- 4. Should the Defendant bear costs of these proceedings?**

In his Supporting Affidavit, Charles Wanjau Gatimu, the 1st Plaintiff, deponed that L.R.no Konyu/Gakuyu/456, hereinafter referred to as the suit land, was a first registration as of 12th May 1959 in the joint names of Mwangi Muriuki and Njuguna Muriuki. He further averred that Mwangi Muriuki was his brother and that he together with his brother settled and occupied the suit land soon after consolidation and demarcation. The 1st Plaintiff further deponed that William Njuguna Muriuki the Defendant herein, has never set foot on the suit land since 1959. The Plaintiffs accused the defendant of stealthy and fraudulently initiating Succession Cause no. 270 of 1999 at the Nyeri High Court.

When served with the Originating Summons, the Defendant resisted the same by filing two Replying Affidavits in which he deponed that both his family and that of Esther Kagure Mwangi, the

2nd Plaintiff herein, utilized the suit land but not settled on it. The Defendant further deponed that he openly filed Succession Cause no. 270 of 1999 after the 2nd Plaintiff failed to co-operate with him in initiating the aforesaid proceedings. It is the Defendant's submission that the Plaintiffs took out the Originating Summons for the sole intention of delaying and frustrating the subdivision and sharing of the suit land.

When this suit came up for hearing two witnesses testified in support of the Plaintiffs' case while the Defendant testified in support of his case without the benefit of independent witnesses. At the close of evidence learned counsels appearing in this case each filed written submissions to bolster their clients case. I have considered the pleadings, the evidence and the rival submissions. The brief facts of the dispute are that L.R.no.Konyu/Gakuyu/456 was registered in the joint names of Mwangi s/o Muriuki and Njuguna s/o Muriuki on 12th May 1959. The 1st Plaintiff is said to be the brother of Mwangi s/o Gatimu while the 2nd Plaintiff is the widow of Mwangi s/o Muriuki. According to the evidence presented, Mwangi s/o Muriuki passed away on 22nd July 1976 prompting the Defendant to file Nyeri H.C.S.C. no.270 of 1999 after taking out citation proceedings against Esther Kagure Mwangi, the 2nd plaintiff. The succession dispute was heard and in the end the grant was confirmed in the name of the Defendant and the 2nd Plaintiff was declared as a beneficiary of her deceased husband's half share of the suit land. It would appear she was subsequently registered as the co-proprietor with William Njuguna Muriuki (Defendant) of L.R.no.Konyu/Gakuyu/456 on 9th May 2003. It was subsequent to the foregoing succession proceedings and the eventual judgment that the Plaintiffs took out the instant Originating Summons. It is the gist of the Plaintiffs' case that the suit land was registered only in the name of Mwangi s/o Muriuki (now deceased) and that it was a mystery as to how the name of William Njuguna Muriuki, the Defendant, was inserted in the register of the suit land as proprietor of half share of the parcel. The Plaintiffs' alleged that it is possible the register was interfered with after the first registration. The Plaintiffs pointed out that the copy of the register shows that the word "**deceased**" was put after the name of Mwangi s/o Muriuki yet he had not passed away as of 12th May 1959. The Plaintiffs' averred that they are the only ones who have all along utilized the land since 1960 and that the Defendant was not utilized any portion. The Plaintiffs claimed they have cultivated the entire land by planting nappier grass, food crops and coffee to the exclusion of the Defendant. On the other hand, the Defendant refuted the Plaintiffs' claim and stated that he has been cultivating coffee on the suit land and that the Plaintiffs' barred him from tending his crops after the commencement of these proceedings and the Succession Cause. It is the submission of Mr. Muthigani, learned advocate for the Plaintiffs' that from the evidence adduced it is clear that the defendant has never occupied nor cultivated half the suit land. The learned advocate urged this court to also find that the Plaintiffs' have been in open, continuous and uninterrupted occupation of the land in question hence the Plaintiffs should be declared to have acquired the same by adverse possession. It is the submission of Miss. Mwai, learned advocate of the Defendant, that the Plaintiffs have failed to tender evidence meeting the threshold to have them declared to have acquired the suit land by adverse possession. She further argued that the suit land is co-owned and the share of the defendant in which the Plaintiffs are claiming to be entitled has not been established yet. The defendant also submitted that there was no credible evidence proving that the Plaintiffs have been in continuous and uninterrupted occupation of the suit land since they have not settled on it hence their occupation has not been adverse to the defendant.

Having given the brief analysis of the pleadings, evidence and the submissions, let me now turn my attention to the questions left to this court to determine.

First: Is whether or not the Defendant's right to recover a share of L.R.no.Konyu.Gakuyu/456 was extinguished by adverse possession?

I have already considered the material placed before me and it is apparent that the late Mwangi Muriuki who was the husband of the 2nd Plaintiff and the Defendant were registered as joint proprietors of the suit land from 1959. The 2nd Plaintiff was later registered as a co-owner in place of her deceased husband by way of transmission pursuant to the Nyeri H.C.Succ.Cause no.270 of 1999. It has also come out clearly that the aforesaid land has not been subdivided though it would appear both parties do subsistence cultivation therein. It is also clear from the evidence that the Plaintiffs only became hostile to the Defendant when the defendant began the process of subdivision. I am convinced the suit land is co-

owned and that the share of the defendant which the Plaintiffs now claims to be entitled has not been ascertained, so that one can say that they have been in continuous and uninterrupted possession and occupation. The Plaintiffs, in my view, have not proved that they have not entered the suit land without the consent of the Defendant, therefore, their own occupation cannot be said to be adverse to that of the Defendant. The East African Court of Appeal in A.Abdulkarim and Another =Vs= Member for Lands & Mines & Another (1958) E.A at pg.436 held inter-alia:

iv) before possession can be adverse, there must be a denial of another's right by an open assertion of a hostile title, with notice thereof to the other, either express or inferred from notorious acts and circumstances, and the burden of proof rests upon the persons claiming title by adverse possession.

The Plaintiffs have averred that they have been cultivating the entire land since 1960 by planting nappier grass food crops and coffee trees to the exclusion of the Defendant. I have already stated that I am convinced by the evidence that the rival parties are co-owners and have both been cultivating the suit land. Consequently, the Plaintiffs' act of cultivation or possession of the suit land would not in the circumstances of this case amount to hostile ouster because they are co-owners of the suit land.

Secondly: Is the Defendant, the registered proprietor of a share of the suit land in trust for the Plaintiffs?

After a critical consideration of the material placed before me, I am not satisfied that there was credible evidence to suggest that the Defendant was registered as a co-owner of the suit land in trust for the Plaintiffs. I doubt whether the Plaintiffs could have used these proceedings to institute a claim based on trust.

Thirdly: Whether an order should be made cancelling the defendant's name from the register of the suit land and in its place that of the Plaintiffs should be put?

I think the answer to the above question is in the negative in view of the Plaintiffs failure to secure favourable answers in the first and second issues herein-above.

Fourthly: Who should bear costs? It is obvious that costs follow the even.

The Defendant, in his Further Affidavit in reply to the Originating Summons he urged the court to issue an order of partition of the suit land. With respect, I do not think I can do that through these proceedings. The procedure used in seeking for an action based on limitation of time is so limited and restrictive. There is no room to accommodate a counter-claim for another remedy other than that specified. In any case, the order the Defendant has sought by way of counter-claim can easily be obtained through the succession proceedings alluded in these proceedings. I decline to grant the order.

In the end, the Originating Summons dated 12th July 2004 is dismissed with costs to the Defendant.

Dated, Signed and delivered in open court this 21st day of February, 2014.

.....

J.K.SERGON

JUDGE

In the presence of:

Miss. Nderitu for Defendant

N/A for Mr. Muthigani for Plaintiff but with Notice-