



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO. 110 OF 2009

SHIPHIRA WAMBUI WACHIRA & 6 OTHERS.....PLAINTIFFS

VERSUS

KARIUKI S/O MURAGA.....DEFENDANT

JUDGMENT

Shiphirah Wambui Wachira, Rose Nyaguthii Kiiru, Mary Muthoni Wachira, Jane Wairimu Wachira, Charles Mureithi Wachira, Joseph Maina Wachira and David Maina Wachira being the Plaintiffs herein, took out Originating Summons dated 6th July, 2009 in which they sought for an order to declare them as having acquired **L.R.No.Thegenge/Ihithe/434** by adverse possession. In the Originating Summons the Plaintiffs asked this court to determine the following questions:

1. **Whether the Plaintiffs have become entitled to the said land parcel number Thegenge/Ihithe/434 having been in continuous and uninterrupted possession of the said land.**
2. **Whether the defendant's title to land parcel number Thegenge/Ihithe/434 has been extinguished by Plaintiffs' adverse possession thereof for a period of over 40 years.**
3. **Whether an order should be issued to the effect that the District Land Registrar Nyeri do cancel the name of the defendant in the land register for land parcel no.Thegenge/Ihithe 434 and in substitution thereof register the plaintiffs as the registered proprietors of the said land.**
4. **Whether the Plaintiff should be granted the costs of this summons.**

The summons is supported by the affidavit of Shiphirah Wambui Wachira sworn on 6th July 2009. On 16th November 2009, the Plaintiffs successfully obtained the order of leave to serve the Notice of Institution of this suit plus the summons by the substituted service. Pursuant to the aforesaid order, the firm of Muchiri Wa Gathoni & Co. Advocates on behalf of the Plaintiffs advertised the Notice of Institution of this suit in which **Kariuki s/o Muraga**, the Defendant was invited to enter appearance within 20 days. The Defendant did not enter appearance nor file a defence. This court allowed the plaintiffs to prosecute the case ex-parte when it became clear that the defendant did not file a defence nor attend the hearing.

The Plaintiffs' case was supported by the evidence of Shiphirah Wambui Wachira (P.W.1) who told this court that their late father, Wachira Mathenge purchased L.R.no.Thegenge/Ihithe/454 from Kariuki s/o Muraga. She produced as exhibits in evidence the sale agreement written in Kikuyu language and the

English translation which was executed on 20th August 1969. It is further the evidence of P.W.1 that upon executing the agreement the defendant handed over the original title deed to the purchaser and also gave him vacant possession. A certified copy of the title was produced as an exhibit in evidence. She also produced an official search which indicates that as of 14th July 2009 the land in question was still registered in the name of Kariuki s/o Muraga. The Plaintiffs' father died and was buried on the suit land. The Plaintiffs aver that they have been in occupation of the land for over twelve years. During this period, P.W.1 stated that they cultivated tea. The Plaintiffs urged this court to enter judgment as prayed in the Originating Summons and to direct that the land be registered in the name of David Mathenge Wachira and Shiphirah Wambui Wachira to hold in trust for themselves and the other Plaintiffs. At the close of evidence, Mr. Muchiri, learned advocate for the Plaintiffs made no submissions but instead urged this court to take into account the pleadings and the evidence and make its decision.

I have considered the pleadings and the evidence tendered. I think this suit can be determined by answering each of the questions posed to this court to answer. The first issue is whether the Plaintiffs have become entitled to acquire L.R.no.Thegenge/Ihithe/434 by adverse possession having been in continuous and uninterrupted possession of the said land for over 12 years? The evidence of P.W.1 indicates that the Plaintiffs came into occupation of the suit land by virtue of the sale agreement between the Defendant and the Plaintiffs' father, Wachira Mathenge on 20th August 1969. It is alleged that the late Wachira Mathenge paid the consideration of Kshs.700/= in full to the Defendant. I am convinced the Plaintiffs' deceased father paid the consideration in full. The Plaintiffs', however, are not filing this suit on behalf of the estate of Wachira Mathenge, deceased, but they have brought it on their personal capacities. If the Plaintiffs had purported to have filed the action on behalf of the estate of the deceased father, they would have been required to take up letters of administration to enable them competently file the action. In **Wambugu =vs=Njuguna (1983) K.L.R at page 173**, the Court of Appeal held inter alia:

“That where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is, the claimant's possession is deemed to have become adverse to that of the owner after payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.”

It is clear that the above requirement is only applicable if the Plaintiffs were claiming on behalf of the estate of Wachira Mathenge, deceased. However, the case of the Plaintiffs is that they are individually and severally claiming to have been in occupation of the suit land for over 40 years hence they should be declared to have acquired prescriptive rights over L.R.No.Thegenge/Ihithe/434. There is no evidence to controvert what the Plaintiffs have stated. I do not also have any reason to doubt the veracity of their evidence. The proper test to be applied in the case of the Plaintiffs' is that stated in holding no.3 by the Court of Appeal in **Wambugu =Vs=Njuguna (supra)** which is to the effect that:

“The Limitation of Actions Act, on adverse possession, contemplates two concepts:dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

It is obvious that the evidence tendered by the Plaintiffs establishes both the concepts of dispossession and discontinuance of possession. The Plaintiffs were able to show that the defendant was dispossessed and his occupation discontinued over the land in question for over twelve (12) years. I am convinced that the answer in the first question is in favour of the Plaintiffs.

The second question which was left to this court to grapple with, is whether the defendant's title has been extinguished. The answer is in the affirmative. The Plaintiffs have satisfied this court that they have been in continuous and uninterrupted occupation of L.R.No.Thegenge/Ihithe/434 since 1969.

The third question is whether the District Land Registrar, Nyeri, should be directed to cancel the name of

the defendant and substitute it with those of the Plaintiffs in the register in respect of L.R.Thegenge/Ihithi/434. The answer to this question is yes, because the defendant's title remain extinguished by effluxion of time. The last question is whether the plaintiffs are entitled to costs. It is trite law that costs follows the event, but in this case I do not see the need to burden the defendant with costs. I will make no order as to costs.

In the end, I grant judgment as prayed in the Originating Summons dated 6th July, 2009 with no order as to costs.

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

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J.K.SERGON

JUDGE

In the presence of

Mrs. Kalinya h/b for Mr. Muchiri for Plaintiffs

N/A for Defendant but with Notice