



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 2 OF 2013

ESTHER GATHONI MWAURA.....PLAINTIFF

VERSUS

PAUL MUTUA NDATU..... DEFENDANT

JUDGMENT

This suit was commenced by way of Plaint dated and filed on 19th January 2006 wherein the Plaintiff sought for an order of eviction of the Defendant and all those associated with him from parcel of land known as Machakos/Nzukini Phase IV/279 (hereinafter referred to as the “suit land”) in respect of which she claimed proprietorship. The Plaintiff also requested the court to award her the costs of this suit.

The Plaintiff’s case is that the suit land belonged to her late husband one James Henry Mwaura Mwenja. She further claimed that during her husband’s life time, he had employed the Defendant to take care of the suit land as well as herd the cattle and goats kept therein. She however stated that the Defendant was fired from this job by her late husband in the year 1994 and was ordered to vacate the suit land. She further claimed that the Defendant did not heed the order to vacate the suit land but continued to stay thereon without her knowledge until June 2005 when she came to learn of the Defendant’s continued stay on the suit land together with his family. She further stated that the Defendant had even gone ahead to lease out parts of the suit land to third parties. She stated further that she gave the Defendant notice to vacate the suit land which notice was not heeded by the Defendant thereby necessitating the filing of this suit. In her Plaint, the Plaintiff stated that the continued stay of the Defendant in the suit land denies her the exclusive right to enjoy and do what she wants to do with the suit land and she prayed for the court to order the Defendant together with anybody else associated with him to vacate the suit land.

In his Defence, filed on 9th February 2006, the Defendant denied that the Plaintiff is the registered proprietor of the suit land and claimed that he had been in continuous and uninterrupted use and occupation of the suit land for well over 30 years and has therefore acquired prescriptive rights over it. He admitted that he lives on the suit land with his family and had developed the same. He claimed to have been in occupation thereof since 1978 with the Plaintiff’s full knowledge until the year 2005. He contended that the Plaintiff had relinquished her rights over the suit land and has no claim against him.

This suit proceeded for full hearing on 19th November 2013 when the Plaintiff and a second witness gave

their evidence to support the Plaintiff's claim over the suit land. The Defendant was absent from court despite being duly served with a hearing notice. At the hearing, the Plaintiff confirmed the facts set out above contained in her Plaintiff and produced her documents which included her title deed to the suit land, Letters of Administration of the estate of her late husband and confirmation of grant, among others. She further disclosed to the court that the Defendant was hired in 1980 and was fired in 1994. She produced to the court a payroll in a book in respect of the Defendant which her late husband used to keep records concerning the Defendant's employment. She further stated that upon learning of the continued stay of the Defendant on the suit land after he had been fired, she, accompanied by her brother in law Samuel Nganga Mwenja and PW2 known as Samuel Mbinda proceeded to the farm and indeed did find the Defendant living on the suit land. She further confirmed that upon arrival, they called 3 elders who were neighbours to their meeting with the Defendant. She produced the signed minutes of the meeting wherein it was resolved that the Defendant do vacate the suit land as he had admitted that the suit land belongs to the Plaintiff. She further intimated that upon their return to the suit land in September of the same year, the Defendant had not vacated, prompting her to file this suit.

PW2 named Samuel Mbinda confirmed that he accompanied the Plaintiff to the suit land on 1st June 2005. He corroborated the Plaintiff's evidence and confirmed that the Defendant did not claim any ownership rights over the suit property. He confirmed the position that the Defendant claimed to be living on the suit land with permission of the Plaintiff's late husband. He also confirmed that the Defendant agreed to vacate the suit land. He confirmed that he was the one who kept the minutes of this meeting and proceeded to produce the same.

The issues for determination were filed by the Plaintiff's advocates as follows:

1. Whether the Plaintiff is the lawful proprietor of the suit land.
2. Whether the Defendant was an employee of the Plaintiff's husband at the suit land upto March 1994 when the employment was terminated and the Defendant ordered to vacate the suit land.
3. Whether the Defendant had acquired the suit land by way of prescriptive rights.

On the first issue for determination, it is clear that the Plaintiff produced her title deed in respect of the suit land. In her testimony and the testimony of PW2, it emerged that the Defendant did not claim any ownership rights over the suit land as evidenced by the minutes of the meeting held in June 2005 with the Defendant which the Defendant signed. However, the Defendant did register his claim over the suit land in his Defence wherein he claimed to have been in open and uninterrupted and continuous occupation of the suit land for over 30 years.

On the second issue, it emerged quite clearly that the Defendant was indeed an employee of the Plaintiff's late husband as stated by the Plaintiff in her testimony and supported by the payroll book produced by her. The Defendant did not deny this fact and in fact admitted to the same in his Defence. The payroll book shows that the Defendant's employment was terminated in March 1994.

The final and most important issue to address is whether the Defendant acquired any prescriptive rights over the suit land as he claimed in his Defence. It goes without saying that during the time the Defendant was employed by the Plaintiff's late husband, he was living on the suit land with the permission of the Plaintiff's late husband. In the minutes produced by PW2 signed by the Defendant, among others, it was stated that the Defendant believed that he continued to stay on the suit land with the permission of his late employer. This being the case, the Defendant could not have acquired any ownership rights over the suit land as stipulated in the case of **Wanje versus Saikwa (No. 2) Civil Appeal No. 12 of 1982** where the Court of Appeal held as follows:

“A person who occupies another person's land with that person's consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.”

Further, even if the Defendant continued to stay on the suit land without the Plaintiff's late husband's permission, the total period of time between that time and the time the Plaintiff served him notice to

vacate does not amount to the 12 years prescribed in the Limitation of Actions Act. Accordingly, I make the finding that the Defendant did not acquire any prescriptive rights over the suit land. The title deed in the name of the Plaintiff therefore remains valid and enforceable by this court.

Arising from the foregoing, I hereby enter judgment in favour of the Plaintiff as prayed in the Plaint and award costs to the Plaintiff.

SIGNED AND DELIVERED IN NAIROBI THE 26TH

DAY OF SEPTEMBER 2014.

MARY M. GITUMBI

JUDGE