



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 46 of 2012

THOMAS WAMBUGU KARUBU.....PLAINTIFF

VERSUS

STEPHEN NDUNGU KARUKU.....DEFENDANT

RULING

On the 23rd February, 2012, the applicant herein lodged an originating summons dated 22nd February, 2012. The issues for determination are as follows:

- (a) Whether the plaintiff has acquired the title to the whole of the said land by way of adverse possession under section 38 of Limitation of Actions act having lived on this land Tetu/Unjiru/130 for more than twelve years, to be precise 54 years without interruptions, and that the defendant's title to that land has been extinguished by plaintiffs adverse possession.
- (b) Whether the plaintiff ought to be registered as absolute proprietor of the said land parcel No. Tetu/Unjiru/130 in place of the defendant.
- (c) Whether the Land Registrar Nyeri should now be ordered to register the said land in the name of the plaintiff as absolute proprietor.

The grounds on which the application by way of originating summons premised are namely that the defendant has never lived on the land since the applicant's father caused him registered in the said land 54 years ago. Secondly, that the plaintiff has carried out extensive and valuable developments on the suit land and neither the defendant nor his family has ever sought to interfere with the plaintiff's enjoyment of the suit land. Thirdly and lastly that the total period of occupation and utilization of the said parcel of land by the plaintiff is now more than 54 years and the plaintiff has therefore acquired title thereto by way of adverse possession.

The Originating summons is verified and supported by the affidavit of Thomas Wambugu Karuru. In the supporting affidavit, Mr. Thomas Wambugu Karuru states that the defendant is his real brother. He goes further to state that the defendant is his elder brother. The fact of the matter according to Mr. Karuru are that prior to demarcation and consolidation of land, the fragments of land at Unjiru Sub-location, Tetu Location were demarcated and consolidated as Land Parcel No. TETU/UNJIRU/130 and registered in the name of the defendant. The plaintiff/applicant and defendant were brought up on this parcel of land comprising 3.3 acres or thereabouts which is registered in the name of the defendant.

The plaintiff further states that defendant went to live in the Rift Valley from Nyeri when the plaintiff was a very young boy during the state of emergency in 1957. Despite the title being in the name of the defendant, he has been staying in Nakuru and has never been in occupation of the land and has never

claimed occupation for a period of 54 years.

Their mother died on 9th August 2010 leaving them on the land. The plaintiff states that after the death of his mother, the defendant appeared and after burial he secretly sold trees worth of Kshs.48,000 to Kenya Power without their knowledge or consent and yet the trees were not his.

The Originating Summons was accompanied with an application by way of Notice of Motion dated 22nd February 2012 and filed on the 23rd February 2012. The application seeks a temporary injunction restraining and prohibiting the Respondent/Defendant, his agents, families, servants and/or anybody under his authority from entering and interfering with the Land Parcel No. TETU/UNJIRU/130 registered in the name of the Respondent, pending the hearing and final determination of the originating summons.

The Motion is supported by the affidavit of Mr. Thomas Wambugu Karuru sworn on 21st February 2012. In the affidavit, Mr. Karuru states that the defendant has never lived on the parcel of land since he was registered as the owner 54 years ago before the commencement of the suit. The plaintiff has tremendously developed the land where he was brought up by his parents.

On the 2nd day of February, 2012, the Respondent/Defendant came back to Nyeri with the intention of selling the suit land without the plaintiff's knowledge or consent. The land is occupied by about twenty members of the plaintiff's family. The plaintiff states that the defendant had started destroying the trees and has caused the plaintiff to be arrested by the police. The defendant has no house or any development on this land and when he comes to Nyeri he stays in Hotels in Nyeri town. The plaintiff concludes by stating that it would be very unfair and he stands to lose heavily if the defendant sells the suit land.

The defendant on his part stated that he had read and understood the originating summons. He concedes that the applicant is his brother. However, he disagrees with the applicant that the property is family land as he bought the same in 1969 from one Kaniaru Ichamuiru (deceased) who was the first registered owner thereof and which purchase was more than 10 years after land consolidation and demarcation in the area. He was registered absolute owner and took exclusive possession after the purchase and planted trees and Tea Bushes, and has been in possession to date. The defendant further states that contrary to the deposition by the applicant the latter has never occupied the land and has never done any development in the land.

According to the respondent, the applicant has been harassing his workers in the suit land and maliciously damaging the fence. Despite all the above, the defendant has been forgiving the plaintiff being his brother. The defendant further states that all the developments in the suit land were undertaken not by the plaintiff but the former. There is family land L.R NO. TETU/UNJIRU/41 where the defendant has built his residence and where they were all brought up and resided with their parents who are equally buried there. The respondent was chased from their family land by their parents for being disrespectful and troublesome to them and has been living in Nyeri town. His share of family land is still intact as Succession is yet to be undertaken.

In response to the allegations by the defendant, the plaintiff swore a supplementary affidavit on the 21st of March 2012. The affidavit was filed on the same date. The plaintiff denies in toto the contents of the defendant's affidavit in reply sworn on the 19th March, 2012.

The plaintiff states that the defendant was registered to hold Land Parcel Tetu/Unjiru/130 in trust for the whole family and that it is not true that he bought the same. They were born and brought up in the suit land and the defendant went to live in Nakuru and only returned when their mother Susan Nyathuta Karuru died in August 2010. The mother was living on the suit land. The plaintiff further states that the Tea Bushes on the suit land were planted by their mother and went further to annex a K.T.D.A advice slips for January 2012. He states categorically that there is no family land known as Tetu/Unjiru/41 as his mother was barred by the court from burying their father on the said parcel of land.

On the 5th of December 2012 both parties made their submissions. The plaintiff reiterates the contents of

his affidavits while the defendant through his lawyers submit that the claim by the plaintiff is a claim as of right and not adverse possession.

I have considered the documents on record namely the Originating Summons, Supporting Affidavits, Replying Affidavit and Supplementary Affidavit and do warn myself that at this point in I'm not required to make the final decision but to apply the principles set out in *Giella -Vs- Cassman Brown (1973) E.A 358*.

In a nutshell, the plaintiff's case is that the defendant was registered as a trustee of the family land being Tetu/Unjiru/130. He was to hold the land in Trust for the whole family. He did not buy the land as he claims. There is no other family land. The defendant has never lived on the family land. The Defendant has never lived on the family land since being registered as the proprietor 54 years before the filing of the suit. The plaintiff has carried out extensive and valuable developments on the suit land and neither the defendant nor his family has ever sought to interfere with the plaintiffs enjoyment of the land. In the supporting affidavit the plaintiff annexed a copy of the certificate of the official search of Tetu/Unjiru/130 being search No. 420/2/2012 don on the 21st of February 2012.

The entries subsisting on the register at the time of the search reflected the land as freehold comprising of 3.3 acres. The name and address of the proprietor as at 14th February 1969 was Ndungu Karuru. On the 9th of November 2011 a caution was registered in favour of Thomas Wambugu Karuru claiming an interest as a beneficiary. The supplementary affidavit filed on 21st March 2012 has two annexures that can be of help in determining this application. The first annexure in the K.T.D.A advice slip for January 2012 indicating that the name of the grower of the Tea was Susan N. Karuru, the mother to both the plaintiff and the Defendant. This document is annexed and marked TWK 1. The second annexure is a court order barring Susan Nyathuta from barring the remains of one Karuru Ngibu on the piece of land known as L.R. NO. TETU/UNJIRU/141 registered in the name of Kariuki Ngibu until the matter was heard and determined. This temporary order is dated 24th January 2007. The final determination in the matter is not annexed.

The defendant on his part disputes the allegation that the suit land is family land. He bought the same from Mr. Kaniaru Ichamuiru who is deceased and who was the 1st registered owner. No document of purchase or sale is annexed. There is no document annexed in the affidavit to show that Mr. Kaniaru Ichamuiru ever was the proprietor of the land. The Defendant proceeds to assert that he was registered absolute owner of the suit land immediately after the purchase and took exclusive possession of the same where he planted trees and has since been in possession.

Having considered all documents filed by the parties, the issue in consideration is whether the applicant has met all conditions for grant of temporary injunction. The applicant must show that he has a prima facie case with the possibility of success. Secondly that the applicant is likely to suffer irreparable loss and damage not likely to be compensated by monetary terms, thirdly where the court is in doubt it should decide on a balance of convenience.

On whether the plaintiff has established a prima facie case with a probability of success the issue for determination is whether the land in dispute was caused to be registered in the defendants name by his father or whether the defendant purchased it from Mr. Kaniaru Ichamuiru. As stated earlier in this ruling, no evidence of sale and transfer is annexed to the defendants affidavit. On the other hand, the plaintiff has annexed an official search that shows the defendant as the proprietor of the suit property, however the K.T.D.A advice slip for January 2012 to Susan N. Karuru casts doubt as to the allegation that the property was solely the defendant's. The court finds that the dispute between the parties can be dealt with either within the ambit of Adverse possession if it is proved that the defendant purchased the land but did not occupy the same and allowed the plaintiffs to be in continuous and uninterrupted possession of the same for a period of 54 years ,or Customary Trust where it is proved that the defendant was registered to hold the land in Trust for the whole family. These two issues can be adequately adjudicated when full evidence is called.

On the second issue as to whether the plaintiff stand to suffer irreparable loss and damage that cannot be

compensated in monetary terms, I find that the plaintiff has satisfied this condition on the grounds that the allegation that he lives on the land with the other members of the family has not been properly controverted, if the land is sold by the defendant the plaintiff is likely to suffer irreparable loss. The fact that their mother was buried on this parcel of land works to the plaintiff's favor.

Where the court is in doubt it should decide the case on the balance of convenience which also tilts in favor of the plaintiff as he has been residing on the parcel of land with the mother who died on the 9th August 2010. The K.T.D.A advice slips for January 2012 still reads the mother's name as Susan N. Karuru.

With the above background I am of the view that the plaintiff is entitled to the orders sought in the Notice of Motion dated 22nd February 2012 and this court does hereby issue a temporary injunction restraining and prohibiting the respondent/defendant, his agents families, servants and/or anybody under his authority from entering and interfering with with the Land Parcel No. Tetu/Unjiru/130 in the name of the Respondent herein pending the hearing and final determination of this case. Costs of the application shall be in the suit.

Dated and delivered this 29th day of January 2013

**A. OMBWAYO
JUDGE**