



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCC. NO. 61 OF 2006

**SUSAN GACHERI RIMBERIA (Suing thro' her Attorney SAMUEL
MWENDA PLAINTIFF**

- VERSUS-

AMINA BASHAN & 2

OTHERSDEFENDANTS

JUDGEMENT

[1] The Plaintiff in this case filed suit against the defendants and prayed for a declaration that the defendants or any other person claiming possession under them are not entitled to enter Plot No. **LR. MOMBASA M.S/ BLOCK 1/237** and their occupation thereof is wrongful and/or unlawful.

She prayed for a mandatory injunction compelling the defendants their servants and/or agents or any other person claiming title or possession under them to forthwith deliver up vacant possession of **LR MOMBASA M.S/ BLOCK 1/237** to the plaintiff. She also prayed for costs of the suit.

[2] The defendant filed their statement of defence on 12th May, 2006. In their defence they deny that the plaintiff herein is a beneficiary

in intestacy of the Estate of David Musonye who died on 13th January 2000 and who was the registered owner of the suit land. They also deny that the plaintiff is the registered proprietor by transmission of the suit property and that the plaintiff is the owner and entitled to possession thereof. They deny that they jointly and severally entered upon the said land illegally and that they have taken possession having trespassed on the same.

They deny the allegation that their occupation is wrongful, they also deny trespass and aver that their occupation is lawful. They claim they are the lawful owners by virtue of adverse possession having been on the land since 1993. They claim the plaintiffs suit is time barred and relied on Section 38 of the Limitations of Actions Act.

[3] This suit came up for hearing on 16th June 2010. The advocate for plaintiff said he was ready to proceed and that he would call one short witness. Mr.Okanga for the defendant applied for adjournment

to another date but the Court ordered the case be heard at 3.30 p.m. on the said day.

At 3.45 p.m. one Samuel Mwenda gave evidence that he had a Power of Attorney from his mother. The same was produced as Exh. 1. The same was registered as P/A 41549/1 and was registered on 11th July 2009. The witness said that the plaintiff was registered as the proprietor of the suit property. The witness produced a Certificate of Lease and a Search Certificate as PExh.2(a) and (b).

He said that his mother acquired title through succession. The previous owner was David Musonye who had died in 2000, the witnesses mother was the beneficiary. A transfer of the property was produced. It was registered on 28th October 2005. It was produced as PExh. No. 3.

The witness said that the defendants came to occupy the suit land in the year 2000 after his father died and that there was no invasion of the land before then. He said the land is 1.49 acres and it is at Shelly Beach, Likoni Mombasa. Further that it was empty before 2000. He said he reported the matter to the police. They went to the site and saw what was on the ground and he was advised to go to Court and get papers so that the defendants could be ejected. He produced a bundle of documents showing he had demanded that the defendants do vacate his land. The notices were dated 8th February 2004 and done by Mbijiwe Mugo & Co. advocates. The bundle was produced as Pexh. 4. The defendants did not move out of the suit land. That necessitated issuing of fresh notices on 2nd February 2006. The bundle was produced in court. The defendants still did not move out and are still on the land. The witness said that defendants have put permanent houses on the land. He then closed his case.

Mr. Okanga for the defendant then applied for the case to be fixed for hearing on priority basis. The Court granted the order. The case came up for fixing of dates on 13/7/2010, 22/7/2010, 31/8/10, 16/5/11, 5/7/11 and 12/9/11 in all these dates the defendants were mostly absent.

[4] On 26th September 2011, the matter came to Court for the application dated 16th July 2010 for the defendants advocate to cease acting for 12 defendants. The application was stood over in respect to the other remaining defendants who were still represented by Mr. Okanga.

On 12th October 2011 the matter was stood over as there was no prove of service. On 9th December 2011 the case was fixed for hearing by the plaintiff. Mr. Okanga though acting for the rest of the defendants refused to accept service of summons for that date. He insisted he wished to cease acting for all the defendants. The Court then adjourned the case and ordered the defendants to pay Court adjournment fees.

[5] On 26th March, 2012, the plaintiff fixed his notice of motion dated 20th February 2012 ex parte to serve the defendants through the newspapers. The application came before the Court on 21st May 2012 and was allowed by the Court. The matter was fixed for hearing on 5th June 2012. There was no attendance for the defendants. It was reschedule for 9th July 2012. On 9th July, 2012, the plaintiff's Counsel came from Nairobi, he had served the hearing notice, there was no appearance by the defendants. The matter was stood over to 17th July 2012. On 17th July, 2012, the plaintiff attended but the defendants did not attend. The Court ordered the process server to be provided security to effect personal service. The case was fixed for hearing on 4th October 2012.

[6] On 4th October 2012 Okanga & Co. again filed a notice of appointment for all the defendants but did not attend the hearing. The Counsel for the plaintiff told the Court that he had called Mr. Okanga who did not respond. He protested that this was a calculated delaying tactic. The Court ruled that the plaintiffs advocate was at liberty to file an application to expurge the new notice of appointment from the record. The Court directed the matter to be heard on priority basis.

This matter came for fixing a hearing date on 16th October 2012. There was no appearance for the defendant. The matter came up again on 13/11/2012, 3/12/2012, 8/2/13 and finally on 25/4/2013.

On 25/4/2013 Mr. Mereka for the plaintiffs said the case was part heard, that the plaintiffs have closed their case and he was prepared to proceed.

Mr. Okanga on the other hand said that he appeared for all the defendants. That he had one defendant in Court and he wanted an adjournment when all the defendants can come to Court. There was protest from Mr. Mereka and the advocates asked for time to discuss the matter. I granted them time. Later at 12 noon the advocates came with a consent in the following terms.

1. For the purposes of hearing of the suit only one witness will adduce evidence on behalf of the defendant.
2. That the witness statement to be filed within the next 14 days and be served on the plaintiffs advocate.
3. Parties to proceed with negotiations with respect to settlement of the whole matter with finality.
4. Matter be fixed for hearing for recording a consent on 20th June 2013.
5. Costs of the day agreed at Ksh. 9000 to be paid within 14 days.
6. Costs in the cause.

The consent was countersigned on the court record by Mr. Mereka for the plaintiff and Mr. Okanga for the defendants.

[7] On 20th June 2013 Mr. Kinyanjui appeared for Mereka & Co. He told the Court that the orders of 25th May 2013 were not complied with in that the witness statements were to be filed within 14 days and Ksh. 9,000 was not paid at all.

The advocate for the defendants and the defendants did not attend the Court. He argued that time for complying with the consent had elapsed and there was no request for extension. Since he had closed his case he asked for a judgment date as it was apparent according to him the defendants were not present and were not offering any defence. He asked the Court to proceed under Order 12 2(a).

[8] After perusing the conduct of the defendant in the the conduct of this case I granted the plaintiff his wish. We proceeded under Order 12 2(a) and there being no defence tendered for the defendant I set the case down for judgment.

[9] I have carefully set out the history of the conduct of this case by the defendants and their advocate Mr. Okanga. It is quite apparent they are a hindrance to the hearing and completion of this case. There is no intention on the part of the defendants to have this suit heard. The plaintiff closed his case on 16th June 2010. This is over three years ago. The reason behind such behaviour by the defendants is not difficult to discern. The defendants have been occupying the plaintiff's land without any colour of right since year 2000. A period they would wish, the Court to declare adverse to the interests of the registered proprietor. The defendant gave his evidence on ownership and subsequent transmission. He produced title documents to prove ownership as earlier stated. He gave the defendants notices to vacate his land. Copies of the notices were produced in court. That evidence has not all been challenged by the defendants. There was no contrary evidence adduced by the defendants. They were given numerous chances to do so. They did not do so. Parties and their advocates are enjoined by Order 1A Rule 3 to assist the Court to further the overriding objective of the Act and that effect, to participate in the process of the Court and to comply with the directions and orders of the Court. The defendants herein have not complied with Court orders, even those they have consented to. The Court is enjoined by Sec. 1B in furthering the overriding objective to handle all matters presented before it for the purposes of attaining

1B (b) the efficient disposal of the business of the Court.

(d) timely disposed of the proceedings . . .

[10] I am afraid the defendants and their advocate have not at all helped this court in achieving these

overriding objectives

The plaintiff on the other hand has been diligent and has done what is required of him by Section 1A rule 3.

He is truly entitled to the orders he seeks in his suit and I do allow the prayers in his amended plaint in the following terms:-

1. That the defendants or any person claiming possession under them is not entitled to enter LR Mombasa M S Block 1/237 and any occupation by them thereof is illegal, wrongful and unlawful.

2. An order is hereby issued compelling the defendants, their servants and/or agents or any other persons claiming title or possession under them to deliver up vacant possession of L.R. Mombasa M S Block 1/237 to the plaintiff.

3. Any defendant that may have erected any structure on land Reference Mombasa M S Block 1/237 shall be accorded ninety (90) days to remove such structure and to move and vacate therefrom. Any defendant not moving within the said 90 days, shall be evicted therefrom at his cost and such defendant shall also be liable to pay the costs of such eviction and costs of this suit. Such eviction being sanctioned by the Court and with the help of the Court Bailiff and/or Police and or/administration on application by the plaintiff/judgment debtor.

4. If all defendants move out within 90 days each party shall bear their own costs.

It is so ordered.

Dated and delivered in open Court at Mombasa this 23rd day of August 2013.

S.N. MUKUNYA

JUDGE

In the presence of:

Mr. Kinyanjui Advocate for the plaintiff'

Mr. Okanga Advocate for the defendants