



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC MISCELLANEOUS CIVIL SUIT NO. 10 OF 2010(O.S)

MBARI KIONI.....PLAINTIFF

VERSUS

SALOME WANJIRU MWAURA1ST DEFENDANT

GITHUNGURI CONSTITUENCY RANCHING CO. LTD2ND DEFENDANT

JUDGMENT OF THE COURT

The Applicant filed an originating summons on 29th November, 2010 seeking the following orders:

1. That the 1st Respondent's title to the parcel of land comprised in Title Number Ruiru/Ruiru East Block 1/155 in Ruiru, Thika comprising by measurement Naught Decimal Five Naught (0.50) hectares (hereinafter referred to as the suit property) has been extinguished by virtue of Section 17 of the Limitation of Actions Act (Cap 22), consequent to the Applicant's adverse possession for a period in excess of twelve years.
2. That the Applicant be registered as the proprietor of the suit property in place of the 1st Respondent in whose favour the land is currently registered.
3. That the 1st Respondent do transfer at her own costs and expense the suit property to the Applicant forthwith and in default of the 1st Respondent signing, executing or endorsing the necessary documents or the transfer, the Deputy Registrar of this Court to sign, execute and or endorse such papers/documents to effect the transfer.
4. That an inhibition order to issue against the Respondent prohibiting any transfer, transmissions, alienations or any disposition of any interest or dealing in any other manner in the land comprised in the suit property.

The Originating Summons was duly served on the 2nd Respondent on 25th January 2011 as attested to by the Affidavit of service sworn by Bernard Kinyanjui Ng'ethe on 14th February 2011 and filed in court on the same date. After failing to establish the whereabouts of the 1st Respondent, the Applicants Advocates filed an application dated 14th February 2011 under Order 5 Rule 17 of the Civil Procedure Rules, seeking orders that service of the Originating Summons and the supporting affidavit dated 29th November 2010 be served by way of advertisement upon the 1st Respondent in one of the local newspapers.

The application dated 14th February 2011 was heard and allowed by this Court (Muchelule J) on 4th March 2011, and the court ordered that the 1st Respondent be served by way of advertisement in the Daily Nation within 30 days, and to enter appearance within 15 days of service. Advertisement was effected on 17th March 2011 as attested by the Affidavit of Service sworn by Stephen Mwanza Gachie sworn on 4th April 2011, and the subsequent letter by the Applicant's Advocate to the Deputy Registrar of this Court dated 1st April 2011, attaching an original copy of the said advertisement.

The Respondents failed to enter appearance or file any defence, and interlocutory judgment was entered against them on 18th July 2011 by the Deputy Registrar of this Court. This Court gave directions on 19th October 2011 that the hearing of the Originating Summons would proceed by way of affidavit evidence. The Applicant's Advocate at the said hearing held on 6th December 2011 made oral submissions relying on the supporting affidavit sworn by the Applicant on 29th November 2010.

The Applicant in his supporting affidavit has given evidence that he is the lawful owner in possession and occupation of the suit property, and that he acquired the said parcel of land for valuable consideration in 1988 from the 2nd Respondent, and was thereupon issued with a Certificate of Ownership. The Applicant states that at the time he was acquiring the suit property, he also bought an adjacent parcel of land being RUIRU/RUIRU EAST BLOCK 1/154 from another allottee of the 2nd Respondent, and for which parcel of land he has since obtained registration thereto. The Applicant further states that he immediately thereafter commenced development on the two parcels of land and has constructed his residence thereon as well as made other substantial developments on the same.

The Applicant states that he has since then resided on the said parcels of land peacefully and quietly, until the commencement of the construction of "Ruiru Bypass" road. The Applicant further states that following the said construction there was heightened interests in the land neighboring the suit property in anticipation of the expected growth of the area, and a rise of prices of property in the area by unexpected margins. The Applicant's averment is that land owners and residents in the area started losing their property to "brokers" who were keen on capitalizing on the road constructions, and this phenomenon led him to pursue the issuance of a title deed to the suit property, which for a long time he had tried in vain to obtain from the 2nd Respondent.

Further, that when the Applicant sought to be given the clearance certificate for the issuance of the title deed from the 2nd Respondent, he learnt that the 1st Defendant was already registered as owner of the same, and had been issued with a title deed sometimes in the year 1998 or thereabouts. The Applicant thereafter tried to register a Caution over the property but the same was rejected by the Lands Registrar. The Applicant denies knowing the 1st Respondent as she had not at anytime appeared to on the suit property to claim the same.

A copy of Certificate of Ownership issued to the Applicant by Githunguri Constituency Ranching Company Ltd dated 7th July 1988 was produced as evidence. Upon perusal of the same there is no indication on the said certificate as to which land it is issued in respect of, if any. Also produced as evidence are photographs of the suit premises showing a residential property and some trees planted thereon, and a copy of certificate of official search on the suit premises dated 28th October 2010. The certificate of official search indicates that the 1st Respondent is the registered proprietor of the suit property and that a title deed was issued to her. There is no indication of when the said registration took place, or of when the said title deed was issued. No evidence of title was produced by the Applicant with respect to the adjacent parcel of land no. RUIRU/RUIRU EAST BLOCK 1/154 which he claims to be registered in his name.

I have carefully read and considered the Applicant's pleadings and evidence. The Applicant has filed these origination summons under Order XXXVI Rule 3D of the revoked Civil Procedure Rules (Cap 21) (now Order 37 Rule 7 of the 2010 Civil Procedure Rules) and sections 37 and 38 of the Limitation of Actions Act (Cap 22). The law on adverse possession is settled. Where a person has been in continuous, uninterrupted occupation or possession of land for a period of 12 years or more he may apply to the High

Court to be registered as the proprietor thereof in place of the owner of the suit premises under section 38(1) of the Limitation of Actions Act. The Court of Appeal in **Wambugu v Njuguna (1983) KLR 172** held that adverse possession contemplates two concepts: dispossession and discontinuance of possession. The Court of Appeal further held that the proper way of assessing proof of adverse possession is 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 that he or she has been in possession for the requisite number of years.

The issue before this court therefore is whether the Applicant has been able to prove on a balance of probabilities that he has dispossessed the 1st Respondent for 12 years to be entitled to adverse possession. The Applicant has given evidence that he has been in continued and uninterrupted possession of the suit premises from the year 1988, and that the 1st Respondents has never come to the suit premises to assert her rights to the property. The Applicant is also required to bring evidence of the date of the 1st Respondent's dispossession or discontinuance, which is the date when the statutory period of 12 years starts running. The provisions of section 9(1) of the Limitation of Action Act state as follows as to the accrual of the right of action in the case of a present interest in land:

“Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance...”

Since the Applicant claims that the 1st Respondent has never been in occupation of the suit property, the date of dispossession in this suit can only be the date the 1st Respondent became registered owner of the suit property, which is the date when time began to run for purposes of adverse possession.

Order XXXVI Rule 3D of the revoked Civil Procedure Rules and Order 37 Rule 7 of the 2010 Civil Procedure Rules require that an application by originating summons under section 38 of the Limitation of Actions Act be supported by an affidavit to which a certified extract of the title to the land in question has been annexed, so as to ascertain who the title holder is, and when the title holder acquired rights over the said land. The Court of Appeal in **Johnson Kinyua v Simon Gitura Rumuri** Civil Appeal 265 Of 2005 (Nyeri) [2011] KLR has held that a search certificate duly signed by the Registrar can be produced as evidence in place of the extract of title. The Court of Appeal stated as follows:

“Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act, and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate. Thus section 36(2) of the Registered Land Act provides:-

“Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto and certified copies of any documents or of the registry map or of any plan filed in the registry.”

Concerning the same point section 37(2) of the Registered Land Act states:-

“Every document purporting to be signed by a Registrar shall, in all proceedings be presumed to have been so signed until the contrary is proved.”

In our view reference to certified extracts in Order 37 refers to titles under the other systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration we think a search certificate meets the requirements of the relevant law.”

The certificate of search produced in evidence by the Applicant does not give particulars as to the date of registration of the 1st Respondent, or of the date of issue of a title deed to the 1st Respondent. In the absence of these particulars and of any evidence as to the date of registration of the 1st Respondent as owner of the suit property, this Court is not able to make a determination as to whether the threshold of 12 years has been met for adverse possession to attach.

The Applicant has therefore not discharged his burden of proof and the originating summons dated 29th November, 2010 must fail. The interlocutory judgment entered on 18th July 2011 is hereby also set aside. There will be no order as to costs.

Dated, signed and delivered in open court at Nairobi this ____23rd ____ day of
____February____, 2012.

P. NYAMWEYA
JUDGE