



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 94 OF 2007 (O.S.)

NYAWIRA NDUNGO.....PLAINTIFF

VERSUS

KUHIA WATHINJI.....DEFENDANT

JUDGMENT

NYAWIRA NDUNGO, the Plaintiff herein, took out the Originating Summons dated 13th August 2007 whereupon she prayed for the following orders:

1. ***That it be declared that the plaintiff Nyawira Ndungo is entitled to be registered as the absolute proprietor of all that parcel of land known as L.R. NO. AGUTHI/GATHAITHI/212 by adverse possession in place of the defendant herein KUHIA WATHINJI or otherwise the defendant holds the land in trust for the benefit of the plaintiff.***
2. ***That costs be provided for.***

The Plaintiff swore an affidavit in support of the Originating Summons. **Kuhia Wathinji**, the defendant herein, filed a replying affidavit to oppose the summons. When the Summons came up for hearing, this Court directed that the Originating Summons be disposed of by oral evidence.

The Plaintiff testified without summoning the evidence of independent witnesses. Nyawira Ndungo told this Court that she resides on the parcel of land known as L.R. AGUTHI/GATHAITHI/212 which land is registered in the name of the Defendant. She claimed the land was registered in his name in trust of her late husband while he was in detention. She claimed she consented for the Defendant to be registered as

such since by then women were not allowed to own land. She stated that she and her mother-in law moved into occupation after land adjudication and consolidation. The Plaintiff said that she has since then been in occupation. She cultivated coffee, tea and bananas. The Plaintiff states that she has put up a permanent building where she lives with her family. The Plaintiff further averred that she uses more than half the land. On cross-examination, the Plaintiff alleged that the Defendant attempted to evict her. She stated that she was involved in a civil suit with the Defendant before the Chief Magistrate's Court in the year 2005. In the aforesaid suit, the Defendant had sought for her eviction.

Kuhia Wathinji, on his part, told this Court that his brother Ephantus Ndungu, disappeared from home in 1952 and has never returned to date. He said his brother did not come back from detention. He claimed he bought many pieces of land in 1956 which were consolidated and registered in his name as **L.R. NO. AGUTHI/GATHAITHI/212**. The Defendant claimed that his late brother was married to two wives who left for their parents when he was taken to detention. The Defendant further claimed that the Plaintiff cohabited with Ephantus Ndungu but deserted him and went to marry one Johana Waruhuu. The Defendant refuted the Plaintiff's claims that he was to share with his late brother **L.R. NO. AGUTHI/GATHAITHI/212**. He claimed that the Plaintiff visited him in 1980 and requested him to give her a portion to occupy after she was chased away by her husband, Jonathan Waruhuu. He said he acceded to her request. In 1985, the Defendant claimed, the Plaintiff sued him claiming the land. The Defendant claimed that he gave the Plaintiff a conditional stay but she has refused to vacate hence he wants her evicted. In cross-examination, the Defendant admitted that the Plaintiff came to occupy his mother's house. His mother is said to have passed away in 1986. He claimed the family had no ancestral land. He conceded that the Plaintiff had a son with his late brother. The Plaintiff further alleged that though he gave her a small portion to occupy on a temporary basis, the Plaintiff and her children put up five houses on the land. **Paul Kiruthu** (D.W.2), a neighbour to the Defendant told this court that he is aware that the Defendant inherited a portion of the land from his father. He said he knows the Defendant bought other pieces which were later consolidated with the land in dispute. D.W. 2 claimed he witnessed the Defendant give a small portion to the Plaintiff to occupy in 1980. D.W.2 confirmed that the Plaintiff and the Defendant have had their disputes taken for arbitration before the Provincial administration. Both the Defendant and D.W.2 have claimed the Plaintiff occupies a quarter of an acre of the land in dispute.

At the close of the evidence, learned counsels from both sides were invited to file written submissions. I have considered those submissions plus the evidence. Basically the Plaintiff is seeking to be declared to have acquired L.R. NO. AGUTHI/GATHAITHI/212 by adverse possession. In WAMBUGU =VS= NJUGUNA [1983] 172, the Court of Appeal held *inter alia*:

“In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose or which he intended to use it.....

The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession.”

Let me inquire whether or not the Plaintiff's case meets the above requirements. The Plaintiff avers that she has been in continuous occupation and use of half the land since 1957. The Defendant has denied the Plaintiff's assertions but he admits that the Plaintiff has been in occupation of his land since 1980 on his permission. The Defendant claimed the land was not ancestral land. His witness i.e. **Paul Kiruthu** (D.W.2) contradicted him. D.W. 2 stated that part of the land in dispute was ancestral land which the Defendant inherited from his father. The truth of the matter is that part of the land is ancestral land and a

portion of it was purchased by the Defendant. The suit before me is not for the declaration of a customary trust but it is a claim based on adverse possession. The Plaintiff has specifically pleaded that she has been in peaceful occupation of part of the land since 1957 until the year 2005, when the Defendant purported to evict her. The Defendant claimed he allowed the Plaintiff to occupy a small portion in 1980. If Defendant's allegation was true, then why did he allow the Plaintiff to embark on massive developments on the land. Those developments included five houses, cultivation of coffee, tea and bananas. The Defendant admitted that the Plaintiff had a son out of her marriage with the Defendant's deceased's brother, Ephantus Ndungo. It is admitted that the Plaintiff lived in the house of her mother-in-law. After a careful consideration of the evidence of both sides, I am convinced that the Plaintiff told the truth. The Defendant's evidence was at times inconsistent and contradictory. Whichever way one looks at it, the Plaintiff has been in occupation of the land in dispute for more than 12 years. She has been in occupation without the permission of the Defendant. It is not true that the Defendant permitted the Plaintiff to occupy the land. The Plaintiff simply moved in and took occupation despite the Defendant's protests. I am convinced the Plaintiff has proved her case to the required standards in civil cases. The Plaintiff has claimed the entire land. The evidence presented before this court shows that she is in occupation of half the land. I hereby declare that the Plaintiff has acquired half of **L.R. NO. AGUTHI/GATHAITHI/212** by adverse possession. The Defendant is hereby ordered to execute the necessary documents to cause half of the aforesaid land transferred to the Plaintiff. In default the Deputy Registrar of this Court is authorized to execute the said documents in place of the Defendant. The Defendant to pay costs of the suit.

Dated and delivered at Nyeri this 18th day of February 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Wachira for Kingori for the Plaintiff.