



REPUBLIC OF KENYA

HIGH COURT OF KENYA

AT EMBU

HC MISC. 17 OF 2006

NGORU MWARIRIE.....PLAINTIFF

VERSUS

SOSPETER NYAGA REBETA.....RESPONDENT

JUDGMENT

The Plaintiff herein namely Ngoru Mwaririe filed this Originating Summons on 28th February 2006. He has sued one Sospeter Nyaga Rebeta claiming Title of land parcel No.LR/EVURORE/NGUTHI/1943 measuring 1.5 H. by way of adverse possession. He wants this court to declare him the owner of the said parcel in place of the defendant herein under section 38 of the Limitation of Actions Act Cap.22 of the Laws of Kenya.

In his Affidavit in support of the Originating Summons, he has deponed that he has lived on that parcel of land since 1940 peacefully and without interruption. He says that he is therefore entitled to be registered as the proprietor of the same. I need to point out at this early stage that the originating summons is not accompanied by a certified extract of the Title as commanded under Rule 3D (2) of Order XXXVI of the Civil Procedure Rules.

As aptly stated by the court of Appeal in the case of KASUVE –V- MWAANI INVESTMENTS LIMITED & 4 OTHERS (2004) KLR 184,

***“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. Indeed Rule 3 D(2) of Order XXXVI Civil Procedure Rules requires that a certified extract of the title to the land in question should be annexed to the Affidavit Supporting the Originating Summons*”**

This Rule is couched in mandatory terms. This requirement would only be dispensed with if the Applicant came to court and explained his inability to procure the certified copy of the register. This was not done. Had I been moved to strike out this Originating Summons at the initial stages, I would not have

hesitated to do so. I will nonetheless proceed to determine the matter on its own merits.

In his testimony, the plaintiff stated that he was born on the land in question but that the person who was allocating the land gave it to the defendant herein. He did not say the circumstances under which the land was allocated to the defendant. From the evidence adduced by the defendant, the land in question was wrongly registered in the names of the plaintiff's son one Njiru Ngoru in 1979 following the adjudication process. An appeal was lodged against that decision with the Minister as required under the Adjudication Act. The Chief Land Registrar lodged a restriction on the Title on 17/5/1980 pending the outcome of the Appeal. The Appeal was heard and determined in favour of the defendant herein. He was therefore registered as the owner of the said parcel on 21/5/1988. He told the court that he sold it later to one Lincoln Mbaka Mbungu who testified as DW 2.

According to the defendant, the land in question was given to him by his clan in 1988 and he has been cultivating it since that time. He sold it to DW 2 when it was totally free from all encumbrances. He told the court that he actually cultivated the said plot for the 18 years after the same was registered in his name until he sold it to DW2. DW 2 also confirmed that he is the one in occupation now and that the plaintiff has never lived there or cultivated the same since 1988. The defendant produced a certified copy of the extract of Title for plot No.EVURORE/NGUTHI/1228 showing that the Plaintiff was registered as the owner of that plot on 3/8/1979. The said plot is still in his name. That is where according to the defendant and DW 2 the plaintiff lives and cultivates.

I have considered this evidence carefully along with the relevant law on the subject. In a case of adverse possession, the basic yet most important ingredient is "possession". The plaintiff or claimant must first and foremost establish and prove that he/she has been in possession of the land in question. This is a point of fact which must be proved before the court can even venture into the legal aspect of whether the said possession was adverse to the registered owner's Title or not.

The plaintiff just said that he has been living on the land. The defendant and the current owner rebutted that claim. In my considered view if indeed the plaintiff was living on the said land, DW 2 would have been the first one to admit that fact so that he can counterclaim for eviction. He is happy with the situation. He said he was working on the land with no interference from anybody whatsoever. Further to this, why would the plaintiff "squat" on another person's land while he has his own only 1km away? It does not make sense. I do not believe that the Plaintiff has been living on the said land as he claims. He has failed to prove continuous and uninterrupted possession of the said plot. The issue of adverse possession does not even arise.

In sum therefore, I find and hold that the plaintiff has dismally failed to prove his claim against the defendant on a balance of probabilities. His case has no merit whatsoever and the same is hereby dismissed with costs to the defendant.

W. KARANJA

JUDGE

Signed by the above but delivered and dated at Embu this 17th day of March, 2011 by the undersigned.

M. WARSAME

JUDGE