



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.42 OF 2007

HAZEL WANJIKU WAMUTITU.....1ST PLAINTIFF
T.M. KIMATHI.....2ND PLAINTIFF

VERSUS

JORETH LIMITED.....DEFENDANT

J U D G M E N T

1. This suit was commenced by way of an originating summons filed on 18th April, 2007. The Plaintiffs were Hazel Wanjiku Wamutitu and T.M. Kimathi (hereinafter referred to as the 1st and 2nd plaintiffs respectively). The defendant is Joreth Limited. The plaintiff claim to be entitled to be registered as proprietors of the suit property known as Plot No.154, Thome Farmers No.5 Limited and now known as L.R. No.13330/572, and sought determination of the following questions:

(i) That Hazel Wanjiku Wamutitu and T.M. Kimathi be declared to have acquired title by adverse possession to the suit premises previously known as Plot No.154 Thome Farmers No.5 Limited and now known as L.R. No.13330/572.

(ii) That the registration of Joreth Limited as proprietor of L.R. No.13330/572 and or any other persons deriving title from Joreth Limited based on the land previously known as Plot No.154 and now known as L.R. No.13330/572 be cancelled forthwith and the Land Registrar do rectify the register to enter the name of the plaintiffs as registered proprietors of the said property and a permanent injunction do issue against the defendant, its agents, servants or any other persons claiming title through the defendant from transferring, assigning, building, entering, charging or in any other way interfering with the plaintiffs occupation use of the suit premises.

(iii) The costs of these proceedings be borne by the defendant.

2. The application was supported by an affidavit sworn by Hazel Wanjiku Wamutitu who swears that she acquired the suit property by virtue of acquisition of one share in Thome Farmers No.5 Limited. And that she took possession of the plot in 1979 and has been in uninterrupted occupation since then. Her suit was precipitated by information that the defendant had sold her plot to someone else. Upon making enquiries, she learnt that the plot had been surveyed and allocated a new number i.e. LR No.13330/572 and that the

defendant was in the process of transferring the plot to someone else. The plaintiff maintained that the defendant has no genuine claim to the suit property, and that the defendant has acquired the property by virtue of adverse possession.

3. In response to the originating summons the defendant filed four affidavits. Three of the affidavits were sworn by the defendant's director Harun Muturi. The 4th affidavit was sworn by one Francis Kariuki Nganga a licensed auctioneer and private investigator. In the affidavits the defendant's director swears *inter alia*: that the defendant is the lawful owner of the suit property, and has been exercising exclusive and unhindered proprietary rights. The defendant maintains that the plaintiffs have never been in the suit property nor did the defendant ever sell to the plaintiffs the suit property. It is observed that the plaintiffs' claim is anchored over ownership of a share in a company known as Thome Farmers No.5 Limited. The defendant denied having any connection with that company or that the company had any legal or equitable rights over the suit property. The defendant has in the past placed various notices in the Daily Nation asserting its proprietary rights over the suit property. The defendant also by an advertisement placed in the Daily Nation on 7th April, 2006, advertised various parcels of land for sale including the suit property. The plaintiffs did not however comply with any requirements of the notice.

4. Francis Kariuki Nganga swore that on the instructions of the defendant he carried out investigations and established that a total of 23 individuals and organizations had trespassed into the suit property. He swore that the plaintiffs were not in physical possession of the suit property at the time he carried out his investigations in 1991 and submitted his report.

5. Following directions given for the hearing of the originating summons to proceed by way of oral evidence, the hearing of the originating summons proceeded on 7th December, 2010. The 1st plaintiff testified in support of the plaintiffs' case. There was however no evidence offered in support of the defence. The 1st plaintiff explained that she bought the plot No.154/Thome through buying shares in the company Thome Farmers No.5 Limited. She produced a receipt for Kshs.6,200/= and the share certificate for 1 share representing ½ an acre. She also produced survey receipts given to her in 1979 when she was shown the plot.

6. Upon taking possession of the plot she fenced the plot and started cultivating it. She planted bananas, napier grass and sweet potatoes. She continued cultivating the property until the year 2007 when she learnt from other neighbours that some strangers and a surveyor had been to her plot. She followed up the matter with the defendant's advocate. It was then that she was told that she was supposed to have paid a sum of Kshs.200,000/=. The witness explained that despite promises she was never given a title to the suits property. She denied having been served with any notice to vacate the land. She maintained that the defendant was not a stranger to her claim because the defendant is the one who had sold the land to Thome Farmers No.5 Limited. She produced photographs of the plot showing the cultivation that she had done.

7. Written submissions were duly exchanged and filed by the party's counsel in which each urged the court to find in favour of his client.

8. I have carefully considered the pleadings herein, the evidence and the submissions filed by both parties. It is evident to me that the dispute herein involves the same property i.e. Plot No.154/Thome registered as L.R. NO.13330/572. Bearing in mind the questions posed in the originating summons for determination, the main issue is whether the plaintiffs have been in possession of the suit property, and whether they have been exercising open, exclusive and uninterrupted possession for a period of over 12 years.

9. The plaintiff has explained that she got possession of the suit property upon acquiring 1 share in Thome Farmers No.5 Limited. She has produced share certificates and receipts for purchase of the share. In addition, She has produced a receipt of for Kshs.1,150/= for survey fees in respect of plot No.154/Thome No.5. The plaintiff has explained that she got possession of Plot No.154 in 1979. The plaintiff has essentially substantiated her allegation that she obtained possession of the suit property through acquisition of the one share in Thome Farmers No.5 Limited.

10. Although the defendant's director Harun Muturi initially denied any knowledge of Thome Farmers No. 5 Limited, it is evident from the affidavit sworn by Francis Kariuki Nganga that the defendant did instruct him to carry out investigations involving that company. From the report of investigations which is annexed to Nganga's affidavit, it is evident that the defendant was attempting to identify shareholders of Thome No.5 Limited who were in occupation of plots allegedly owned by the defendant. Several people and organizations were identified. The report was however not conclusive as the investigators had difficulties getting the relevant documents. It cannot therefore be conclusively stated that the investigation established that the plaintiffs were not among the persons who took occupation of the plot under authority from Thome Farmers No.5 Limited.

11. Thus, the defendant has not counteracted the plaintiffs' allegation that they have been in occupation of the suit property since 1979. It matters not that the plaintiffs may have obtained possession from someone who had no equitable or beneficial rights. The fact is that the plaintiffs have exercised open, exclusive and uninterrupted rights of occupation of Plot No.154 from 1979 to the time of filing plaintiff's suit which is for a period of over 12 years. The plaintiffs' occupation of the suit property was not with the consent or authority of the defendant. The plaintiff occupied the plot asserting proprietary rights as a purchaser. Although the plaintiffs appear not to have carried out any permanent developments on the property, the plaintiffs exercised exclusive rights over the suit property which were inconsistent with the defendant's proprietary rights. It matters not that the plaintiffs may not have been physically residing on the suit property. They were in control and exclusive occupation of the suit property and this was adverse to the defendant's interest. Thus I am satisfied that plaintiff have established their claim. I declare that the plaintiffs have acquired title to Plot No.154/Thome Farmers No.5 Limited also known as LR No.13330/572 by adverse possession. The Land Registrar shall be directed to register the plaintiffs as proprietors of the suit property.

Dated and delivered this 30th day of May, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Kingara for the plaintiffs
Kimathi H/B for the defendant
B. Kosgei - Court clerk