REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC CIVIL SUIT NO. 133 OF 2011 (O.S)

IN THE MATTER OF THE LIMITATION OF ACTIONS AT

AND

IN THE MATTER OF LAND PARCEL REFERENCE NO.214/181

NYAMBURA GITHAGUI.....APPLICANT

VERSUS

DOUGLAS LACKEY.....1ST RESPONDENT
BRITT INGER LACKEY.....2ND RESPONDENT

RULING

The applicant brought this suit by way of Originating Summons under Sections 17, 18, 37 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya and Order 37 Rule 7 (1) and (2) of the Civil Procedure Rules, 2010 in respect of a parcel of land known as LR No. 214/181 Muthaiga, for the following orders,

1. This Honourable Court be pleased to grant a permanent injunction restraining the respondents by themselves, their servants and/or agents from parting, disposing, partitioning, subdividing or in any way dealing with the land.

2. The applicant be declared to have become the legal owner entitled by adverse possession of over 12 years since 16th July, 1996 to all that parcel of land known LR 214/181 Muthaiga, Nairobi.

3. The said applicant be registered as the sole proprietor of the said parcel of land namely LR. No. 214/181 in place of the above named respondents in whose favour the land is currently registered.

4. The last original indentures in respect of LR. NO. 214/181 which are with the respondents be dispensed with.

5. In the alternative to prayers 2,3 and 4, the court make a determination as to whether the applicant is entitled to be paid by the respondents all costs of improvement and maintainance of LR. No. 214/181 the structures and grounds thereon since 1996 until the determination of this suit, and value thereof.

6. Costs of this application be provided for.

The application is supported by an affidavit sworn by the applicant Nyambura Githagui. Alongside the Originating Summons the applicant filed an application by way of Notice of Motion for injunction orders. On the same day, Muchelule J. issued interim restraining orders in favour of the applicant pending the hearing of the application inter partes. That is the basis of this ruling.

The 1st respondent Douglas Lackey filed a replying affidavit in answer to the Notice of Motion where he contested the applicant's application. Both learned counsel have filed written submissions on behalf of their respective clients and cited some authorities. These I have read.

The applicant and the 1st respondent were married but their marriage was dissolved by the court through a compromise reached in 1996. The couple had a daughter who was then a minor. The suit property was registered in the name of the two respondents and for purposes of record the 2nd respondent was the 1st wife of the 1st respondent. It is the 1st respondent's case that he allowed the applicant to remain in the suit premises because their daughter was then a minor but her stay therein was not exclusive. The 1st respondent kept on visiting the premises to see his daughter and therefore the applicant cannot claim that her stay in the house has been to the exclusion of the 1st respondent. The 1st respondent states that the applicants retained possession with his permission, and therefore that does not affect his title to the property and the occupation has not been hostile to the title.

It is his case, that the applicant cannot make a claim for adverse possession for those reasons. On the other hand the applicant says that her occupation of the suit premises for over 12 years has not been disputed and the issue is whether such occupation was adverse. She relies on a consent order recorded in divorce case No. 93 of 1993 between her and the 1st respondent. It is her case that she was not a licencee and if that were the case, that would have been recorded in the said consent as well as other key issues in the divorce including custody and child support. There is evidence that the applicant filed a suit for division of matrimonial property. That notwithstanding, the 1st respondent did not remove the applicant from the suit property. Those facts lead to only one conclusion that the applicant was not a licencee but a trespasser.

The applicant also does not claim to be a tenant or the licencee; she claims to be in adverse possession of the suit property from the time the decree absolute was made in July, 1996. The real issues at this point in my view are whether or not the applicant is entitled to retain a matrimonial home on the basis of adverse possession and what rights the divorced wife is entitled to in such circumstances. In the case of **Waweru versus Richu (2001) LLR 4559 (CAK)** the Court of Appeal held that a claim for adverse possession cannot succeed if the person ascerting the claim is in possession of the property with permission of the owner. There is ample authority also that, a person cannot be in adverse possession against his or her spouse even where there has been desertion- See **Keelan Versus Garvey (1925) 1 IR 1**. In the English case of **Vaughan Versus Vaughan (1953) 1 QB 762** Lord Denning had this to say,

"Upon issuance of a decree absolute the wife became a licencee with a revocable licence to stay in the house. She could not be turned out at once. She was entitled to have reasonable time in which to make arrangement and what is a reasonable time depends on all the circumstances of the case".

The applicant has a duty to establish a prima facie case with a probability of success and also show that if the order is not granted she is likely to suffer irreparable damage that may not be compensated by an award of damages. Where the court is in doubt it shall decide the matter on a balance of convenience.

After the divorce proceedings, the applicant continued to stay in the suit premises with the permission of the 1st respondent. There is no evidence that at any one time the 1st respondent terminated that arrangement. The 1st respondent has explained satisfactorily why he allowed the applicant to continue to reside in those premises. The applicant cannot claim to be a trespasser in view of the said circumstances. The circumstances under which the applicant continues to reside in the suit premises cannot be said to amount to adverse possession by any stretch of imagination. I find that the applicant has not established any prima facie case with the probability of success. Even if I were to find that she had such a case I would still not grant the injunction orders because in prayer No. 5 of her Originating Summons, she has alluded to damages as being adequate compensation if the suit were to be determined in her favour. In effect she has pleaded herself out of the principles provided in the case of Giella vs Cassman Brown & Company Limited (1973) E.A 358.

Accordingly the applicant's application is hereby dismissed and it follows that the interim orders are hereby vacated. The respondents shall have the costs of this application.

Orders accordingly.

Dated, signed and delivered at Nairobi this 12th Day of July, 2011

A. MBOGHOLI MSAGHA

JUDGE