

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 238 of 2001

LUKAS MAINA MUGO PLAINTIFF

Versus

TABITHA MUTHONI..DEFENDANT

JUDGMENT

By an originating summons “(O.S)” dated 21st December, 2001, **Lukas Maina Mugo**, hereinafter referred to as “the applicant” sought, as against **Tabitha Muthoni** hereinafter referred to as “the respondent” orders to the effect that having been in continuous, uninterrupted possession and occupation of ½ of the suit premises known as Loc.18/Gachochi/377 hereinafter referred, “the suit premises” for a period in excess of 12 years, he had now become entitled to that portion of the suit premises by and on account of adverse possession. That this court therefore be pleased to order the subdivision of the suit premises and the transfer of ½ share thereof to the applicant absolutely. The applicant too prayed for costs of the application.

In support of the O.S., the applicant swore an affidavit in these terms; that in or about January, 1980, the respondent’s father Githutha Karanja, “deceased” agreed to sell him ½ portion of the suit premises. The deceased however passed on sometimes in October, 1993. Subsequent thereto the respondent petitioned and was granted letters of administration with regard to the estate of the deceased in November, 1998. Prior to that the deceased had given the applicant vacant possession of that portion of the suit premises in or about January 1980 and he had since been in continuous and uninterrupted possession thereof. He had developed the same by planting some 4,500 tea bushes, bananas, yams, arrow roots, wattle trees and other crops. However no consent of the relevant land control board to the transaction was sought nor obtained. The respondent occupies the other ½ of the suit premises and has never utilized the portion currently in possession of the applicant as aforesaid. Finally the applicant deponed that he now verily believed that he had acquired title to the said ½ portion of the suit premises through adverse possession.

From the record, the O.S. was duly served on the respondent. However it would appear that the respondent did not bother to enter appearance and or file a replying affidavit. Accordingly on 26th March, 2009, this court issued directions in terms that the O.S. would be treated as a plaint and the same to proceed to hearing as undefended and by way of formal proof. Lastly it was directed that the suit would be heard by way of viva voce evidence.

It was on the basis of the foregoing directions that the matter came before me for hearing. The applicant testified that he knew the deceased. He was the registered proprietor of the suit premises. He offered to sell 2 acres out of the suit

premises to him. They did not agree on the purchase price though. He was an old man and his wife had passed on whereas his only daughter, the respondent was married somewhere in Rift Valley. In which event they then agreed that he would assist the deceased financially and in terms of food and in return he would surrender the 2 acres of the suit premises to him. On the basis of that understanding he got vacant possession of the portion of the suit premises in 1980 and entered the same. Since then he had planted Bananas, Maize, trees, napier grass, yams arrow roots and tea bushes. The deceased passed on in October, 1993. It was then that his only daughter surfaced and started claiming the entire suit premises. Otherwise he had stayed on the portion of the suit premises for well over 19 years. It was on that basis that he wished the court to declare that he was entitled to 2 acres in his occupation by way of adverse possession. With this evidence, the applicant closed his case.

Mr. Kimani, learned counsel for the applicant then opted to file written submissions. I have carefully read and considered them.

The law on adverse possession is settled. By virtue of section 38(1) of the Limitation of Actions Act, where a person has been in continuous, uninterrupted occupation or possession of land as of right 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. However, whoever seeks to obtain the suit premises on the aforesaid account, he/she must demonstrate by cogent evidence that his entry and continued stay on the suit premises was adverse to the title of the owner of the suit premises. His entry to the suit premises and his remaining thereon must be in the nature of a trespasser. Is that the case here: I do not think so. The applicant in his affidavit in support of the O.S. as well as in his own oral evidence testified that the deceased, who was his step father agreed with him that the applicant would attend to his personal needs for the rest of his lifetime. In consideration for that support and provision the deceased would give to the applicant $\frac{1}{2}$ of the suit premises. The deceased thereafter gave vacant possession of $\frac{1}{2}$ of the suit premises to the applicant who immediately went into possession in 1980 and has remained thereon since.

From the foregoing it is quite apparent that the entry of the applicant on the portion of the suit premises was by consent of the deceased. The entry aforesaid was it not adverse nor did he come in as a trespasser. He actually came in as a Licensee. It is also apparent that contrary to the averments of the applicant the transaction was not strictly speaking a sale transaction. Rather it was in the nature of a gift. The deceased was willing to give a portion of his suit premises to the applicant in appreciation of his efforts to take care and or look after him in his sunset years. Had this been a sale a transaction then the question of the consent of the relevant land control board would have become relevant. This being the scenario, the applicant cannot claim to have entered the portion of the suit premises against the wishes of the owner. If anything he entered the suit with the express permission of the deceased. Time for purposes of adverse possession therefore did not start running then.

The deceased passed on in October, 1993. With that the deceased's consent or permission for the applicant to

occupy the portion of the suit premises came to an end. The respondent thereafter went to court and obtained a grant of letters of administration. The same was duly confirmed in her favour and the suit premises were wholly transferred and registered in the name of the respondent. To my mind it is from this juncture that time for purposes of adverse possession started running against the respondent. However by an application dated 9th January, 2002, the respondent applied to have the applicant evicted from the suit premises in HCCC No. 330 of 1993 (O.S.). It is not clear what became of that application. Suffice to say that with that action the respondent asserted her title to the suit premises and thereby brought to an end if at all the applicant's alleged claim to the suit premises by way of adverse possession. In other words, time for purposes of adverse possession stopped running again. It only again started running after the ruling on the said application if at all. However since the applicant was not candid enough to tell the court the outcome of the said application, I will assume for purposes of this discourse that time started running again on the day that application was filed i.e. 15th January, 2002. That being the case, the 12 years threshold had not been attained by the time the instant O.S. was filed.

Further it is not lost on me that sometimes in 1993, the applicant had filed a suit against the respondent. This was Nyeri HCCC No. 330 of 1993(O.S), **Lukas Maina Mugo v Tabitha Muthoni** from the information I have gathered from the application dated 29th January, 2002 and filed by the applicant, it is apparent that the said suit was based on the very same cause of action as herein. That suit was on 19th December, 2001 dismissed for want of prosecution. It was consequent upon that dismissal that the applicant initiated this suit. In my view, time stopped running for purposes of adverse possession on the day that the aforesaid suit was filed. Time again started running after 19th December, 2001 the day that the suit was dismissed for want of prosecution and the applicant continued with his occupation of the suit premises. If that be the case then, by the time the instant suit was filed on 21st December 2001, the applicant had been adversely in occupation of the suit premises for 3 days only. That cannot be 12 years so as to enable the applicant claim a portion of the suit premises on account of adverse possession.

That being my view of this matter, I am satisfied that the applicant has not proved his case on a balance of probabilities much as it was undefended. Accordingly, the O.S. is dismissed with no order as to costs.

Dated and delivered this 25th day of January 20 10.

M.S.A. MAKHANDIA

JUDGE