



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Miscellaneous 278 of 2008

JOSEPH NGAHU NJIGU & 3 OTHERS.....PLAINTIFFS

Versus

ZAKAYO MACHARU KARIUKI & 8 OTHERS.....RESPONDENT

J U D G M E N T

The plaintiffs filed this suit by way of Originating Summons “(O.S)” dated 2nd December, 2004. It was expressed to be brought under order XXXVI rules 1,2, 3B, 5, 5A, 7, 8A, 8B and sections 3 and 3A of the Civil Procedure Act and Section 143(1) of the Registered Land Act. In the O.S, the plaintiffs sought answers to the following questions;

“(a) Whether the registered owner Mwangi Ngahu (deceased) left any will.

(b) Whether the deceased, the registered owner of L.R.Loc.2/Kangari/603 had the capacity to subdivide his land parcel L.R. Loc.2/Kangari /603 to Loc.2/Kangari/3545 and 35 44.

(c) Whether Mwangi Ngahu (deceased) sold LR.Loc.2/Kangari/3545 to the 5th defendant

(d) Whether Mwangi Ngahu (deceased) transferred or willed Loc.2/Kangari/3544 to the 1st to 4th defendants or whether he transferred it to them at all.

(e) Whether the deceased Mwangi Ngahu who was single held LR Loc.2/Kangari/603 or any subsequent subdivisions thereof in trust of the plaintiffs and the Njigu clan.

(f) Whether the plaintiffs are entitled to Loc.2/Kangari.603 and any other subsequent sub-division thereof being Loc.2/Kangari/3544, 3545, 3645 and 3644 by way of adverse possession.

(g) Whether the 1st to 5th defendants did fraudulently transfer LR. Loc.2/Kangari/603 to themselves by way of subdivisions.

(h) Whether the 1st to 5th defendants had any lawful title to transfer to the 6th, 7th, and 8th defendants respectively and/or to any other person.

(i) Whether the 6th, 7th and 8th defendants have any lawful title.

(j) Whether all subsequent titles from Loc.2/ Kangari/603 should be cancelled for the land to revert back to the plaintiffs and the Njigu clan whose land was held in trust by Mwangi Ngahu (deceased.)

(k) Whether an inhibition should be placed on all the parcels resulting from the subdivision of Loc.2/Kangari/603.

(l) Whether there was fraud in the transfer and subdivision of Loc.2/Kangari/603.

(m) Whether the land should revert back to the estate of Mwangi Ngahu or to the plaintiffs or Njigu clan.”

In support of the O.S, **Joseph Ngahu Njigu** swore the supporting affidavit. In brief, he deponed that LR No.Loc.-2/Kangari/603 hereinafter referred to as “the suit premises” was owned by their uncle, **Mwangi Ngahu** deceased who passed away on 26th October, 2002 at the age of 79 years. The plaintiffs who were all relatives of the deceased have been cultivating and grazing on the suit premises and the deceased held the suit premises in their trust as well as for Njigu clan. However the suit premises were fraudulently sub-divided into Loc.-2/Kangari/3444 and 3545 by the 1st to 6th defendants without the deceased knowledge when he was sick and on his death bed and without their knowledge. Loc.2/Kangari/3544 was subsequently and fraudulently willed to 1st to 4th defendants on 14th May, 2002 and transferred to them on 20th May, 2002. The purported will was a fraud and nullity. Loc.2/Kangari/3545 was allegedly sold to the 5th defendant on 23rd November, 2002 when the deceased was already dead. The said will and subsequent transfers were illegal on the face of it and a forgery as the deceased did not execute them as he even did not know how to write or read English. He further deponed that they had brought the suit in their capacities as nephews and sisters-in law of the deceased having acquired the land by way of adverse possession having lived and tilled the same for over twelve years as the deceased held the land in trust for them and Njigu clan. The deceased died childless and had not been married though a woman he was living with and whom he had married for about four (4) years before his death was chased away by the 1st to 5th defendants, the same year that the deceased passed on. They wanted the transfers cancelled on the basis that they were fraudulently done as the deceased and their grandmother were buried on the land now registered in the name of the 8th defendant. It also amounted to meddling with the estate of the deceased person without letters of administration being secured.

The 4th plaintiff too swore a supporting affidavit. She confirmed the particulars of the O.S and events as stated by the 1st plaintiff in his affidavit aforesaid. She went on to allege that the estate of the deceased was being wasted by the defendants by their subdivision aforesaid. That her brother in law (deceased) and their mother were buried on the land currently registered under the 8th defendant and they had sentimental and customary value to the graves, which are now under threat from their denial of access. That they had been pruning tea and farming on the land with her fellow co-plaintiffs and other members of the Njigu clan since 1940's. The deceased was a bachelor living in Nairobi who only returned home in 1992 during the burial of his mother. The land was therefore held in trust for them by the deceased and in any case they had acquired it by way of adverse possession having lived and worked on it for over 12 years. Finally she deponed that the 1st to 5th defendants used the deceased Thumb Print when he lay comatose at Thika District Hospital using shoe police and other substances while other documents were not executed by him.

The defendants in response to the application swore through **John Kariuki Njigu** a replying affidavit. The replying affidavit was actually in response to the application dated 2nd December, 2004 and amended on 8th December, 2004. That application was for temporary injunction. As it is therefore the defendants did not directly respond to the O.S. Instead through the replying affidavit to the application, one gets round to their defence which essentially is that a similar suit raising similar issues is still pending in Murang'a law courts being PMCC No.498 of 2004. That the application was full of falsehoods as the deceased transferred the suit premises during his lifetime and hence all the transactions were done *intervivos*. The 1st to 5th defendants were relatives of the deceased who transferred the suit premises to them as a gift. They attended with the deceased the land control board at Kigumo and the relevant consent was granted before the subdivision and transfer. Thereafter the 1st – 5th, defendants sold a portion thereof being Loc.2/Kangari/3544 to the 8th defendant, a bonafide purchaser. The applicants at all material times were therefore aware about the *intervivos* transfer as everything was done above board by the deceased. The deceased therefore left no property in his name as the transfers were done during his lifetime. That being the case the deceased left no estate making the suit misconceived. Finally he deponed that the applicants made a complaint at the Maragwa District investigation officer over the matter. Following investigations, the DCIO found no merit in the complaint, closed the file and removed the order of restriction on the suit premises.

The 8th defendant too filed what he called a supplementary affidavit. In pertinent paragraphs, he deponed that he and co-defendants were served with court papers similar in terms as the instant case being Murang'a PMCC NO.498 of 2004. That two suits being similar cannot be instituted in different courts raising the same issues. He was a bonafide purchaser for value of Loc.2/Kangari/3544. However the 6th and 7th defendants had purchased the suit premises from the 5th defendant who had in turn bought Loc.2/Kangari/3545 from the deceased. That before he brought the land he had meticulously did a search and realized that it was in the names of the 1st four defendants. He was in possession of his portion of land where he picks tea and carries out other farming activities and it was not in the possession of the plaintiffs as claimed. Adverse possession does not arise in this case as the deceased himself transferred the suit premises before his demise. The deceased owned the suit premises absolutely and did not hold the same in trust for the Njigu clan as the members of the clan have their own land individually. Since the transfer of the suit premises had been done above board he believed that titles of the 6th, 7th and 8th defendants could not be defeated as they were purchasers for value and third in line of ownership from the deceased.

This suit was initially filed in the High Court of Kenya at Nairobi. However on 27th October, 2008, **Osiemo J** made an order transferring this suit to this court as the suit premises the subject of the suit were situate in Murang'a South District.

On the 14th October, 2009, the hearing commenced before me. The 1st plaintiff testified that the 2nd plaintiff was his step-mother whereas the 3rd plaintiff was his cousin. The 4th plaintiff was however his mother. The suit premises were initially owned by then deceased. He was his paternal uncle. The 1st, 2nd and 5th defendants were his cousins. The 3rd and 4th defendants were however his stepmother and step brother respectively. He came to know the 6th and 8th defendants later after they purchased a portion of the suit premises. The deceased had no family at the time of this death. After his death, 1st to 5th defendants claimed that the deceased had willed the suit premises to them. The deceased could not have done so because when he conducted a search after his death he found that the suit premises were still registered in his name. No letters of administration had been taken out. All the plaintiffs and the 1st to 5th defendants cultivated the suit premises. They had planted Napier grass, maize and tea bushes. After the deceased passed on as aforesaid, the 1st to 5th defendants caused the suit premises to be transferred to them. At this juncture, **Mr. Kahuthu**, learned counsel for the plaintiffs informed the court that he only wished this court to determine the suit on the basis of adverse possession and whether the transfer were fraudulent. **Mr. Kagiri**, learned counsel for the defendants not objecting, an order was made in those terms i.e henceforth the suit would proceed on the basis of adverse possession and whether the transfer were fraudulent. Further, **Mr. Kahuthu** pointed out that since no grant of letters of administration intestate had been obtained in respect of the estate of the deceased, he was withdrawing the suit against the estate of the deceased. Again **Mr. Kagiri**, not objecting, an order in those terms was made.

The 1st plaintiff went on to testify that they no longer cultivate the suit premises since the purchasers have taken over. That they even filed criminal proceedings against them in Kigumo court being criminal case number 282 of 2005 for trespass. His brothers were convicted and sentenced but successfully appealed. He thus prayed that their claim to the suit premises on grounds of adverse possession be allowed.

Cross-examined by **Kagiri**, he responded that they brought the suit as beneficiaries of the estate of the deceased though they had not obtained a grant of letters of administration. The deceased was in occupation of the suit premises between 1992 until he died. The tea was planted with his permission. They entered the suit premises with the permission of the deceased. Thus their entry into the suit premises was not adverse. He was aware that the deceased attended Kigumo land control board meeting on 25th February, 2002. He did not know whether the consent to the transaction was given. However it may have been since the suit premises were subsequently sub-divided. The deceased had no obligation to inform him what he was doing with his land. Though he complained to the DCIO, Maragua with regard to the fraud and the complainant was investigated, the findings were never made known to him. None of the defendants were however charged with fraud in any court. He did not file suit against the deceased based on adverse possession whilst he was alive out of respect.

The 2nd person to testify was the 2nd plaintiff. Her evidence was along the same lines as the 1st plaintiff. Under cross-examination she stated that they had cultivated the land for well over 30 years as a family. That the 4th defendant was her husband and that she had not sued him. She conceded that she did not speak for the clan. She did not sue the deceased whilst alive because she used to assist him. With that the plaintiffs closed their case.

For the defendants, the 3rd defendant testified that the deceased was his paternal uncle. The suit premises belonged to the deceased who did not have a family. The deceased freely willed the suit premises to the 1st to 5th defendants. They later went with the deceased to Kigumo land control board on 14th May, 2002 and the consent to the transaction was given. The deceased then executed a transfer that was subsequently registered. About 5 months after the transfer the deceased passed on. The deceased gave them the suit premises in appreciation of their assistance to him. Later the said defendants decided to sell their respective portions to 8th defendant as it was uneconomical to subdivide the the suit premises into the 5 portions. A consent to the transaction was obtained on 9th November, 2004.

Cross-examined by **Mr. Kahuthu**, he responded thus; that they were given the suit premises by the deceased since they used to take him to hospital. The deceased signed the transfer form before an advocate before his death. The transfer could not be registered immediately however for want of funds. The deceased prepared the will at Thika Hospital. He attended the land control board meeting but died 5 months later.

The 8th defendant testified as follows:- that he was the registered owner of land parcel Loc.2/Kangari/3544 which he bought from 1st to 4th defendants in or about 6th November, 2004. The land was transferred and registered in his name which he had bought for Kshs.1,200,000/=. He was duly issued with the title deed.

Cross-examined, he stated that he bought the land on 6th November, 2004. He was not aware of any dispute over the same. He only came to know the plaintiffs after he was sued. With that the defendants closed their case.

Thereafter respective parties agreed to file written submissions. This was subsequently done. I have carefully read and considered them alongside cited authorities.

As already stated the issues for determination in this suit were narrowed to two; whether the plaintiffs were entitled to the suit premises by way of adverse possession and two, whether the subsequent subdivision and transfer of the suit premises was fraudulent.

It is common ground that the suit premises was owned by the deceased. It is also common ground as well that the deceased passed on as a bachelor. He had no wife or children. Finally, it is also common ground that no grant of letters of

administration had been obtained in respect of the deceased estate by the plaintiffs and or defendants. That being the case on what basis then can the plaintiffs challenge the transfer and subsequent registration of the suit premises in the name of the defendants. To my mind, in the absence of the grant of letters of administration intestate, the plaintiffs have no locus standi to file these proceedings and purport to prove that the transfers of the suit premises were fraudulent. As it is the plaintiffs are purporting to act on behalf of the estate of the deceased in claiming that the suit premises were fraudulently and illegally transferred to the defendants. They are not bringing the suit in their personal capacities. Rather they are bringing the suit as beneficiaries of the estate of the deceased. It is trite law that one can only get locus standi to file a suit on behalf of a deceased person after obtaining a grant of letters of administration intestate.

Assuming however that the plaintiff had the necessary locus standi to mount this suit, I still think that the suit cannot succeed on that ground. There is no cogent evidence adduced. The plaintiffs attribute fraud to the defendant on the basis that some of the transactions were effected after the death of the deceased. That the deceased was not in a position to will to the 1st to 5th defendants the suit premises as he was at the time comatose at the hospital. That the deceased was illiterate and could not read or write. However these were mere allegations. There was no cogent evidence in prove of any of the allegations. Yet there was unconverted evidence that the subdivision of the suit premises into Loc.2/Kangari/3544 and 3545 was done in the lifetime of the deceased. The subdivision and subsequent transfer was intervivos. Indeed the 1st plaintiff conceded under cross-examination that he was aware that the deceased attended the Kigumo land control board, sought and was granted the necessary consent to subdivide the suit premises. If the deceased in his lifetime freely and voluntarily consented to the suit premises being subdivided and transferred to the 1st to 5th defendants on what basis then can the plaintiffs claim that the transaction was fraudulent? I cannot think of any. Yes, the transfers may have been effected after the deceased had passed on. Yes the transfers were also hurriedly done. However that is not evidence of fraud. After all the deceased had voluntarily executed the transfer form. Indeed he did so before an advocate. That fact was not challenged at all. All that was left was for the defendants aforesaid to lodge them with the land registry which they did subsequently. It is also not lost on this court that the plaintiffs lodged a complaint with DCIO Maragwa with regard to the alleged fraudulent transfer of the suit premises. The complaint was duly investigated. Though the 1st plaintiff claims that he was not made aware of the results, it is quite clear to me that the DCIO must have found no merits in the complaint. How else does one explain the fact that upon receiving the complaint, the DCIO had placed a caveat on the suit premises. However the same was subsequently vacated by the same officer. This must have been on the basis that he found that the complaint by the plaintiffs had no basis. Further had their been merit in the complaint, the 1st to 5th defendants or at least some of them would faced criminal changes over the same. My answer then to issue two as framed is that the suit premises were subdivided and transferred but not fraudulently. The deceased voluntarily executed the transfer form and after he had attended the Kigumo land control board, sought and obtained its consent to the transaction.

As regards adverse possession, the law is in my view well settled. It is anchored on sections 7, 13 and 38 of the Law of Limitations Act.

Section 7 provides interlia:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person”.

Whereas section 13 of the same act is in these terms:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession and”

Finally section 38 is as follows:-

“38. (1) where a person claims to have become entitled by adverse possession to land registered under any of he Acts cited in section 37, or land comprised in a lease registered under any of those acts, he may apply to the High Court for an order that he be registered as the proprietor of he land or lease in place of the person then registered as proprietor of the land.”

The onus is on the person claiming adverse possession to prove, in the words of **Kneller J** (as he then was) in **Kimani Ruchine v/s Swift, Rutherford & Co. Ltd (1980) KLR 10** that:-

“The plaintiffs have to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec precario* (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; see *Wanyoike Gathure v/s Berverly* (1965) EA 514, 519, per Miles J.

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; See section 9(1) and 13 of the Limitation of Action Act. So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (See generally paragraphs 481 and 482 on pages 251, 252 of 24 Halbury’s Laws of England (3rd Edition).

More recently, **Kariuki J** restated the law on the subject in the case of **Omukaisi Abulitsa v/s Albert Abulista, Kakamega HCCC No. 86 of 2005** (UR) in these terms:-

*“Section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejection but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38 (supra) to be registered as the proprietor of the land. This is what the doctrine of adverse possession means. Where the period of 12 years is not continuous or is interrupted, the period of adverse possession is broken and must start all over again. But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by adverse possession need not be all the land comprised in the title; it may be a portion of it providing that the portion claimed is demarcated well enough to be identifiable. And as regards assertion of title, it is not enough for a proprietor of the land to merely write to the trespasser. A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time from running. For these propositions of law, see *Gatimu Kinguru v/s Muya Gathangi* (1976) KLR 253, *Hosea v/s Njiru* (1974) E.A. 526, *Sospeter Wanyoike v/s Waithaka Kahiri* (1979) KLR 236, *Wanje v/s Saikwa (No. 2)* (1984) KLR 284, *Githu v/s Ndeete* (1984) KLR 778, *Nguyai v/s Ngunayu* (1984) KLR 606, *Kisee Waweu v/s Kiu Ranching* (1982-88) 1KAR 746, – “see *Amos Weru Murigu v/s Marata Wangari Kambi & District Land Registrar, Nyahururu (NBI HCCC 33 of 2002)*”. On this I would also add *Kasuve v/s Mwaani Investments Ltd & 4 others* (2004) KLR 184, *Samuel Miki Waweru v/s Jane Njeri Richu* (2007) eKLR. I need not add anything as far as this elucidation of the law goes.*

In the circumstances of this case, there is uncontraverted evidence that the plaintiffs entered the suit premises with the permission of the deceased. They continued to till and cultivate the suit premises with his permission and consent. Their entry and use of the suit premises was not adverse to the deceased title. That remained the position until he passed on. As stated in the case of *Wanje V Saikwa* (supra)

“...A person who occupies another person’s land with that person’s consent cannot be said to be in adverse possession as in reality he has not disposed the owner of the land and the possession is not illegal...”

Further the plaintiffs themselves have stated that the deceased held the suit premises on trust for the plaintiffs and the Njigi. Adverse possession and trust are mutually exclusive concepts or doctrines of law. They are not complimentary. The plaintiffs on the basis of foregoing authorities cannot claim the suit premises on the basis of adverse possession. The deceased having subdivided the suit premises and transferred the same to the 1st to 5th defendants in his life time signified that he had brought to an end the occupation of the suit premises by the plaintiffs. Indeed it does appear that the plaintiffs occupation of the suit premises was in the nature of licenses which were brought to an end when the deceased consented to the transfer to the defendants. If thereafter the plaintiffs continued to remain on the suit premises then time for purposes of adverse possession started running afresh. From 2002 upto 2nd December, 2004 when this suit was filed, the threshold of 12 years had not been attained by the plaintiffs as against the defendants. Accordingly they cannot claim the suit premises on the basis of adverse possession as their entry into the suit premises was not in the nature of trespassers. That being my view of the matter, the answer to issue 1 framed is that the plaintiffs cannot claim the suit premises on the basis of adverse possession.

In the end I have come to the inescapable conclusion that the plaintiffs have failed to prove their case on the two grounds advanced on a balance of probabilities. Accordingly it is dismissed with costs to the defendants.

Dated and delivered at Nyeri this 22nd day of March, 2010.

M.S.A. MAKHANDIA

JUDGE

Delivered on 22nd day of March, 2010,

By:

J.K. SERGON

JUDGE