



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 130 of 2007

MUREITHI MUNYU.....APPELLANT

VERSUS

ESTHER WANGECHI.....RESPONDENT

*(Appeal from the Judgment of B. M. Kimemia, Resident Magistrate Karatina,
in the Senior Resident Magistrate's Civil Case No. 137 of 2005
delivered on 23rd November, 2007 at Karatina)*
JUDGMENT

This judgment is the result of the appeal against the judgment of B. M. Kimemia, learned Resident Magistrate vide Karatina S.R.M.C.C. No. 137 of 2005, delivered on 23rd November 2007. MURIITHI MUNYU, the Appellant herein, had filed an action against ESTHER WANGECHI, the Respondent herein, by way of the plaint dated 7th July 2005 in which he asked for judgment in the following terms:

1. *A declaration that the Defendant is registered as proprietor of Plot No. 1/09 Karatina Town on her own behalf and on behalf of the plaintiff in the ratio of 2:3 respectively.*
2. *Transfer of 2/5 of Plot No. 1/09 Karatina Town to the Plaintiff.*
3. *Costs of the suit and interest.*

The Respondent filed a defence to deny the Plaintiff's claim. The learned trial Resident Magistrate heard the dispute and dismissed the suit. Being aggrieved by the aforesaid decision, the Appellant preferred this appeal.

On appeal, the Appellant put forward the following grounds in his Memorandum of Appeal:

1. *"THE Trial Magistrate erred in law in holding that the Respondent's Title to the suit land was not extinguished under the doctrine of adverse possession in favour of the Appellant.*

2. *THE Trial Magistrate misdirected herself in law in holding that the Appellant could have pursued his claim on the suit land by way of filing a Protest to the Confirmation of Grant yet the Appellant was not a heir and or dependant of the deceased former owner.*
3. *THE Trial Magistrate misdirected herself in law in holding that the Respondent's Title to the suit land was absolute contrary to the evidence adduced that it was a Leasehold Interest.*
4. *THE Trial Magistrate erred in law and fact in failing to appreciate that the Respondent had done several overt acts confirming/acknowledgment that she held two fifth of the Plot in favour of the Appellant.*
5. *THE Trial Magistrate erred in law and fact in ignoring the role played by the relevant Local Authority in the allocation, development and use of Leaseholds with its jurisdiction.*
6. *THE Trial Magistrate erred in failing to appreciate that the Respondent Counter Claim for eviction was statue barred.*
7. *THE Trial Magistrate erred in law and fact in failing to appreciate that the several quasi decisions made by the Municipal Council of Karatina confirming the appellant as Legal owner of two fifth of the suit Plot could only be reversed by way of Prerogative Orders in Judicial Review Proceedings and could not just be wished away.*
8. *THE Trial Magistrate erred in law and fact in failing to analyse and evaluate the evidence adduced and hence came to a wrong finding.*

When the appeal came up for hearing, this court directed the parties to file written submissions which they did. This being the first appellate court, I am enjoined by law to re-evaluate the case that was before the trial court but bearing in mind that I had no advantage to observe the demeanor of the witnesses as they testified. The record shows that the Appellant had tendered the evidence of three witnesses in support of his case before the trial court. The Respondent testified alone without calling for the evidence of independent witnesses. The Appellant told the trial court that his brother, Munyu Ngunyi had invited him and his other brother Munyiri Munyi to each put up a shop on the parcel of land known as KARATINA BLOCK 1/109. He claimed that Munyu Ngunyi now deceased, built three shops and upon his demise, he enjoyed possession of two of the deceased's shops. The Plaintiff further alleged that the Municipal Council of Karatina sub-divided the Plot into two portions in the ratio of 2:3. He claimed he applied for the transfer of 2/5 to himself which application was approved. In the year 2005, the premises standing on the Plot were razed down by fire. The

Plaintiff (appellant) has accused the Defendant (respondent) of preventing him from connecting electricity from her portion.

In her defence, the Respondent averred that her deceased husband, Munyu Ngunyi had only given two shops erected on the plot to the Appellant and his other brother but the deceased did not express any intention to part with a portion of his Plot. The Respondent further alleged that that is the reason why the Appellant did not seek to succeed the deceased in her husband's succession proceedings vide Nairobi H.C.SUCC.NO. 233 OF 1981. According to the Respondent, there was no trust which was created in favour of the Appellant. From the evidence on record, it is apparent that the Municipal council approved for Plot No. KARATINA BLOCK 1/109 to be partitioned into two portions in the ratio of 2:3. It is also not in dispute that the aforesaid parcel of land was transmitted to the Respondent to hold it in trust for herself and her children on 16th October 1984. The transmission was done vide NAIROBI H.C.SUCC.CAUSE NO. 2 OF 1981.

Having set out in brief the case that was before the trial court, let me now turn back to the arguments made on appeal. In the first ground of appeal it is the submission of the Appellant that the trial Magistrate erred when she ruled that the Respondent's title had not been extinguished by adverse possession in favour of the Appellant. It is also averred by the Appellant that he has utilized the portion (2/5) he was given for over 38 years while the Respondent has been utilizing the deceased's portion (3/5). According to the Appellant, a trust in favour of the Appellant was created. That trust was not extinguished upon the death of the deceased. The Respondent is of the view that the doctrine of adverse possession did not take effect because the Appellant had merely been in occupation for only 4 years, i.e. from 1986 to 1990. I have carefully looked at the evidence tendered. It is clear that the Respondent became the registered proprietor of the Plot in question on 18th April 1985. The Appellant filed the suit before the trial court in the year 2005. I have looked at the minutes of the Municipal Council of Karatina, Planning, Works and Housing Committee of 14th and 28th October 1992 and it is clear that the Council approved the transfer of the Plot from the Respondent and 8 others to Muriithi Munyu, the Respondent and others. In 1993, the Lands Office approved the sub-division of the Plot, giving the Appellant 2/5 of the Plot and the remaining portion i.e. 3/5 to the Respondent. It is not denied that as of now the parties are in occupation in terms of those proposals. At the time of transfer, the Respondent knew that the Appellant was in occupation of 2/5 of the Plot. She did not seek and has not sought to evict the Appellant from his portion. In fact the problem started when the Appellant's premises were gutted down by fire in 2005. It should be noted that by the time of seeking for the approval for the sub-division of the aforesaid Plot, the Respondent had already obtained title. If indeed she had not recognized the fact that she was holding 2/5 of Plot NO. KARATINA BLOCK 1/109 in trust for the Appellant, then why did she bother herself visiting the council offices. I am convinced that there was a trust created in favour of the Appellant. The Respondent's conduct manifests the facts that she recognized the existence of that trust. Her registration as the proprietor of the aforesaid title did not oust the Appellant's rights of trust despite the fact that those

rights were not noted in the register. The Appellant's rights are recognized under *Section 30* of the Registered Land Act. In the case of KANYI =VS= MUTHIORA [1984] K.L.R. 712, the Court of Appeal in dealing with a case of near similar facts, rendered itself *inter alia* as follows:

“1. A proprietor by first registration or any subsequent registration is not relieved by anything in *Section 28* from any duty or obligation to which he is subject as a trustee.

2. The Respondent had rights against the Appellant stemming from possession and occupation of part of the land, which amounted to overriding interest not required to be noted on the register and the appellant's proprietorship was subject to it, *Section 30 (g)* of the Registered Land Act.”

With respect, I think the learned trial Magistrate erred when she dismissed the Appellant yet there was overwhelming evidence which was available to establish the claim. There was ample evidence to show that the Respondent participated in seeking for the approval of the sub-division of the Plot. She even allowed the Appellant to put up a new structure on the portion he was in occupation after the previous premises were gutted down.

It is argued that the learned Resident Magistrate erred when she failed to appreciate that the Respondent's counter claim for eviction was time barred. In the counter claim, the Respondent had claimed that the Appellant should be evicted from the suit Plot because he was in occupation without any colour of right. The counter-claim was introduced into the Respondent's defence on 20th March 2006. There is no dispute that the Appellant was in occupation of the aforesaid Plot long before the Respondent's husband passed on in 1976. The Respondent became registered as the proprietor of the suit Plot in 1985. The Appellant has continued with his occupation upto date. From the date of obtaining title upto the date she applied to have the Appellant to be evicted from the suit land, i.e. from 1985 to 2006, about 21 years had lapsed. There is no evidence that the Respondent had initiated any steps to have the Appellant evicted prior to the year 2006. By virtue of *Section 7* of the Limitation of Actions Act, the Respondent's counter-claim was time-barred hence untenable in law.

In the end, I am satisfied the appeal must succeed. Consequently, the appeal is allowed. The order of the learned Resident Magistrate dismissing the suit is set aside and is substituted with an order entering judgment in favour of the Appellant as prayed in the Plaint. The order allowing the Respondent's counter-claim is set aside and is substituted with an order dismissing the counter-claim.

Costs of the appeal, the suit and the counter-claim is given to the Appellant.

Dated and delivered at Nyeri this 11th day of June 2010.

J. K. SERGON
JUDGE

In open court in the presence of Mr. Wachira holding brief Maina Karingithi for the Respondent and Wachira holding brief Kiama for Appellant.