



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LAND AND ENVIRONMENTAL LAW DIVISION

CIVIL SUIT (ELC) NO.316 OF 2009

FLORENCE NJOKI

KIGO.....PLAINTIFF

VERSUS

KAMAU NDWARU.....DEFENDANT

RULING

1. By a plaint filed on 2nd July, 2009, the plaintiff who claims to be the registered proprietor of LR No. Dagoretti/Ruthimitu/431 (hereinafter referred to as the suit property), seeks an order directing the defendant, Kamau Ndwaru and his family, servants, employees or any person claiming under him to vacate the suit property, failing which, the defendant be forcefully evicted. The plaintiff also seeks an order of permanent injunction prohibiting the defendant and his family members, servants or employees or any other person claiming under him, from occupying, entering, encroaching, cultivating, or in any other way interfering with the suit land.

2. The defendant has filed a defence in which he claims to be a stranger to the claim that the plaintiff is the registered proprietor of the suit property. The defendant maintains that he has lived on the suit property for over 40 years. He denies that he is in illegal occupation of the suit property or that his continued occupation and use of the land is a breach of the plaintiff's constitutional right to personal property. It is also worthy of note that the defendant filed an originating summons on the 15th December, 2009, in which he sought a declaration that the plaintiff's right to claim the suit property has been barred by prescription under the Limitation of Actions Act and that the defendant should be declared the rightful owner of the suit property having been in possession and in occupation for a period of over 30 years. By a consent recorded by parties on 18th May, 2010, the plaintiff's suit and the defendant's originating summons were consolidated. It was agreed that the same be heard together.

3. What is now before me is a notice of motion dated 25th September, 2009, filed on 5th October, 2009. The application has been brought by the plaintiff, Florence Njoki Kigo. She seeks to have the defendant's statement of defence to the plaintiff's claim struck out and summary judgment entered in her favour under Order XXXV Rules 1, 8 and 9 of the Civil Procedure Rules. The application is

supported by grounds which have been stated on the motion, as well as an affidavit sworn by the plaintiff.

4. The plaintiff contends that the defendant has no proper defence to the plaintiff's suit as the plaintiff has a title to the suit property. The plaintiff has exhibited a copy of the title deed and a copy of a letter from the advocates demanding that the defendant vacates the suit property. The plaintiff maintains that the interest of the defendant's father Gabriel Kinyanjui (deceased) in the suit property terminated when the suit property was sold to the plaintiff pursuant to a charge on the property.

5. In the written submissions filed by the plaintiff's counsel, it is contended that the defence filed by the defendant is a mere denial and that the originating summons filed by the defendant 5 months later is a ploy to justify his defence that he has acquired the suit property by virtue of adverse possession. It is submitted that the defendant's claim for adverse possession cannot stand as the suit property was prior to 31st December, 1997 owned by the defendant's father. Time for adverse possession as against the plaintiff could only begin to run from 1st January, 1998 as the plaintiff acquired title to the suit property on 31st December, 1997. It is therefore submitted that the defendant has no valid claim for adverse possession as against the plaintiff, and that the defence filed is a sham merely calculated to delay determination of the plaintiff's suit. It is further submitted that the originating summons and the statement of defence are frivolous as they do not constitute any triable issues. The court is therefore urged to strike out the pleading and enter summary judgment in favour of the plaintiff.

6. It is further submitted that the defendant's possession of the suit property is not adverse to that of the plaintiff as registered owner. This is because the defendant was initially on the suit property by virtue of his kinship to the late Gabriel Kinyanjui. It is pointed out that mere possession and user of land was not sufficient to raise the defence or claim of adverse possession, and that permissive or consequential occupation is not adverse possession. It is submitted that Section 38 of The Limitation of Actions Act, requires that one must have occupied land openly, continuously and without interruption over a period of 12 years adversely to the title of the registered owner.

7. In support of the plaintiff's submissions, the following authorities were relied upon:

- ***Violet Omusula Sikenya vs Vincent Kamali [2006] eKLR***
- ***Mbira vs Gachui EALR 2002 141***
- ***Kimani Ruchine vs Swift Luther Forward Co. Ltd [1980] KLR 10***

8. In their submissions Counsel for the defendant has identified the issue for determination as the ownership of the suit property. It is pointed out that the plaintiff has not exhibited any document to show that he actually acquired the suit property under a sale or Charge. It is also noted that although the plaintiff claimed to have acquired the property on 31st December, 1997 it was not until 12 years later on 30th May, 2009 that she made attempts to move the defendant from the suit property. It is submitted that the plaintiff has not explained whether the defendant is in the suit property as a licensee, tenant, or with the plaintiff's consent. It is further noted that the plaintiff's reply to the originating summons was evasive and silent on the issue of the defendant's father having been buried on the suit land. The court is therefore urged to find that the defence and originating summons raises triable issues which can only be investigated at a full trial.

9. It is pointed out that there were serious issues of facts and law which can only be determined by the court after a full trial. It is submitted that the defendant has shown that he has been in the suit land all his life without any interruption and the fact of ownership of the suit property by the plaintiff could only be cleared at a full trial. ***HCCC No.293 of 2005 Metro Petroleum Ltd vs Wamko Petroleum Ltd [2006]*** was relied upon.

10. I have carefully considered the application and the contending arguments which have been made before me. Order XXXV Rule 1(1), states as follows:

"1. (1) In all suits where a plaintiff seeks judgment for -

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

11. It is evident that the above rule provides for recovery of land by way of summary procedure. In my understanding, the rule is applicable where the ownership of the land is not in dispute and recovery of the land is sought as against either a tenant or a trespasser. In this case, although the plaintiff is the registered proprietor of the suit property the defendant is claiming that the plaintiff's proprietary rights have been extinguished by the Limitations of Actions Act. Therefore, there is a triable issue to be determined as to whether the plaintiff is still the beneficial owner of the suit property or whether the defendant has acquired the ownership of the suit property by way of adverse possession. The defence raises a serious legal issue whose determination is dependent on the establishment of pertinent facts. In my view, this is not an appropriate suit for determination by way of summary procedure.

12. Accordingly, I reject the plaintiff's application dated 5th October, 2009 and order that the suit shall proceed to full hearing.

Dated and delivered this 15th day of November, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Mrs. Ngugi for the plaintiff

Mwangi for the defendant

B. Kosgei - Court clerk