



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

CIVIL CASE 93 OF 2007

SOPHIA THIMU WAMUICI 1ST APPLICANT

JOSEPH MWANGI KAMAU 2ND APPLICANT

CHARAGU KAMAU 3RD APPLICANT

KARIUKI KAMAU 4TH APPLICANT

JOHN NJOKA KAMAU 5TH APPLICANT

KARIITHI KAMAU 6TH APPLICANT

KARIMI MWAI 7TH APPLICANT

VERSUS

JOSEPHINE KERU GICHANGI RESPONDENT

J U D G M E N T

Sophia Thimu Wamwici, Joseph Mwangi Kamau, Charagu Kamau, Kariuki Kamau, John Njoka Kamau and Karimi Mwai hereinafter referred to as the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th applicants respectively took out an originating summons dated November 2007 through **Messrs S.K. Njuguna & Co. Advocates** against **Josephine Keru Gichangi** hereinafter referred to as “*the respondent*” for orders that:-

“1. THAT the Plaintiffs by adverse possession have

acquired land parcel number Mutira/Kaguyu/ 819 under section 37 and 38 of the Limitation of Actions Act.

2. THAT the Defendant be ordered to execute all the documents required to effect the transfer of the said whole piece of land to the Plaintiffs and in default the Executive Officer of this Honourable Court be authorised to sign the same on behalf of the Defendant.

3. THAT the costs of this suit be awarded to the Plaintiffs.”

The application was expressed to be brought pursuant to the provisions of Section 37 and 38 of the Limitation of Actions Act.

In support of the application all the applicants swore respective supporting affidavits. They all deponed to more or less the same facts save for slight variations here and there. Indeed the 1st applicant is the mother and grandmother of the remaining applicants respectively. The affidavits of the 2nd to 7th applicants are similar in content. However for purposes of appreciating this dispute properly, I think the 1st applicant's supporting affidavit gives a clear background of the dispute. She depones thus:-

"1.

2. That the subject matter in this case relates to Land Parcel Number Mutira/Kaguyu/819 which is currently registered in the name of the Defendant named in this case.

3. That sometimes during the year 1963 my late husband Kamau Kimunya bought the said whole piece of land parcel number Mutira/ Kaguyu/819 from one Gichangi Githimu the deceased husband of the defendant herein.

4. That upon the sale of the said piece of land we settled with our family in the said piece of land where we are and having been in full occupation from 1963 and up to and including to date.

5. That from 1963 up to and including to date we have been in continuous peaceful and uninterrupted occupation of the said whole piece of land with my families (sic).

6. That the deceased husband of the Defendant herein and his family have never occupied or utilized any part of the suit land.

7. That my husband passed away during the year 1973 and we have buried his remains in the said piece of land.

8. That we have also buried the remains of the 1st wife of my late husband in the said piece of land.

9. That we have also buried my two sons my grandson, and my granddaughter in the said piece of land.

10. That on the said piece of land we have 3 semi-permanent houses and 22 other houses of my sons and grandchildren.

11. That we have planted over 600 coffee plants and over 12000 plants in the said piece of land and the Defendant is aware of the (sic) all the developments we have caused on the said piece of land.

12. That besides the coffee and tea plants we have planted bananas among other crops and the estimated value of the developments we have on the said piece of land would amount to over Kshs.4.5 million or thereabouts.

13. That I have been in adverse occupation of the suit land together with my families from 1963 to date which is a period over 44 years.

14. That the above piece of land was transferred to the Defendant in 1989 and since then I have been in adverse, continuous and uninterrupted occupation of the whole of the said piece of land with the other plaintiffs for the last 18 years.

15. That I verily believe that by virtue of Section 37 and 38 of Limitation of Actions Act myself together with my co-plaintiffs who are my sons and grandson have acquired good title to the whole of the suit land by way of adverse possession and that the Defendant should transfer the said whole

piece of land to me and my co-plaintiffs.”

On being served with the application, the respondent filed a replying affidavit. In pertinent paragraphs she deponed:-

“1.

2. That I am the registered owner of land parcel No. Mutira/Kaguyu/819.

3. That I swear as hereunder in opposing the originating summons dated 23/11/2007.

4. That on 24/10/2007 I filed a plaint demanding that the defendant do vacate my land or be evicted forcefully and for removal of cautions registered by one Joseph Mwangi the 2nd Plaintiff herein.

5. That the plaint and summons in Kerugoya case No. 425 of 2002 were served upon the plaintiff herein on 30/10/2007 and I annex hereto the plaint and summons and affidavit of service.

6. That the plaintiffs filed defence on 2/11/2007 and served it on my advocate.

7. That the present suit is an after thought and was filed on 23/11/2007 after the plaintiffs received pleadings in the Kerugoya Case No. 425/2007 for eviction.

8. That the claim of adverse possession is misplaced as their occupation is now challenged in the Kerugoya Court.

9. That it is untrue that my deceased husband sold the suit property to one Kamau Kimunya.

10. That the plaintiffs' occupation of the land is (sic) been against my will and I have demanded orally or (sic) several occasions that they do vacate but they have refused.

11. That there was a previous suit by one James Kariuki for adverse possession which was dismissed by the court.

12. That any developments the plaintiffs have made on the land have been done with full knowledge that the land belongs to me.

13. That I am advised by my advocate on record that there is no property in a dead body and whether people are buried on the land is irrelevant and does not give them a claim over my land.”

Stung by what was deponed to in paragraphs 4, 5, 6 and 7 of the aforesaid affidavit, the applicants moved very quickly to try and remove the rag under the feet of the respondent by filing an application dated 13th December 2007 seeking to withdraw and transfer to this court for hearing and final determination of the Kerugoya SRMCCC No. 425 of 2007 aforesaid. As expected the application was opposed. However when the application came up for interpartes hearing before me on 29th January 2008 a consent order was recorded allowing the application. Consequently the Kerugoya court file was transferred to this court for hearing alongside this suit. Consequent upon the two suits were consolidated for hearing.

On 14th November 2008 parties took directions as to the manner of disposal of the originating summons. Directions were given that the originating summons be heard by way of viva voce evidence and that the originating summons be converted into a plaint whereas the replying affidavit be deemed to be a defence. Subsequent thereto, the directions aforesaid were on 26th March 2009 further varied by consent. Parties now agreed that the originating summons as consolidated with Kerugoya SRMCCC No. 425 of 2007 be disposed off by way of the affidavits on record and written submissions as there was general consensus that the applicants entered the suit premises on or before 1973. Respective written submissions were duly filed which I have carefully read and considered together with cited authorities.

As I see it the issue for determination by this court is fairly simple and straight forward and is whether the applicants have proved their claim to the suit premises on the basis of adverse possession. If not then they are entitled to be evicted from the suit premise as sought by the respondent in Kerugoya SRMCCC No. 425 of 2007.

What is the law on adverse possession? It is by and large settled. It was succinctly stated by my brother **Kariuki J.** in the case of **Omukaisi Abulitsa v/s Albert Abulitsa Shitseswa, Kakamega HCCC No. 86 of 2005 (UR)** thus:-

*“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).”***

I need not add anything as far as this elucidation of the law is concerned. It is common ground that the applicants have been on the suit premises since 1973 or much earlier. The extract of title to the suit premises attached to the originating summons however indicates that the suit premises comprise about 4.7 acres. It was first registered in the names of **Gichangi Githiru** on 21st November 1959. Apparently this **Gichangi Githiru** was the husband of the respondent. The 2nd entry was on 15th January 1974 which is a caution registered by one **Joseph Mwangi** claiming purchaser’s interest. The third entry is on 29th August 1989 where the suit premises were transferred and registered in the name of the respondent. This registration would appear to have been as a result of the process of transmission following the death of her husband in 1979 and her successful petition for the grant of letters of administration. The effects of this transaction will become clearer later in this judgment.

Granted that the applicants entered the suit premises on or before 1973, was that entry adverse to the respondent’s claim to the land? The applicants maintain that their entry to the suit premises was pursuant to a sale agreement between the late **Kamau Kimunya**, the husband to the 1st applicant and father and grandfather to the other applicants and the late **Gichangi Githiru**, the husband of the respondent. Apart from this bare statement there is no credible evidence tendered that would lead this court to confirm that assertion. For instance there is no sale agreement or even indication of the purchase price and if the same was paid the mode of such payment. However assuming for once that indeed that was the case, then their entry to the suit premises was with the permission of the owner and not adverse. Possession can only be adverse if it is inconsistent with and in denial of the title of the owner in form of want of

permission. By claiming therefore that their husband, father and or grandfather had bought the suit premises, the applicants have failed to prove that they had no colour of right to be on the suit premises other than their occupation and possession by permission of the vendor. In the case of **Waweru v/s Richu (2007) EALR 403**, it was held that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. The court went on to hold that for controlled transactions pending completion one cannot lay a claim of adverse possession of such land during validity of the contract until contract of sale has been repudiated or rescinded by the parties in which case adverse possession starts upon termination of the contract. However for controlled transactions such as the case herein possession becomes adverse when the contract becomes void by operation of law under section 6(1) of the land control Act that deals with consent to the transaction by the relevant land control boards.

It is the case of the applicants that they entered the suit premises in 1963 pursuant to a purchase agreement which as I have indicated elsewhere in this judgment is doubtful. Be that as it may, their occupation would have become adverse after 3 months when the purported sale agreement became void because in 1963 there were in force the Land Control Regulations 1961. See the case of **James Wachira Waiganjo v/s Kamau Wanjohi, C.A. Civil appeal No. 123 of 1955 (UR)**. In the same year the constitution came into force and by Section 218(2) thereof, an agreement for the sale of Agricultural land “..... shall be absolutely void for all purposes at the expiry of 3 months after the making of the agreement if application for consent has not been made within that time to the appropriate Divisional Board.....” See **Public Trustee v/s Wandaru (1984) KLR 314**. That section later became Section 6(1) of the Land Control Act, 1967 and the period was extended to 6 months. The argument of the applicants then is that their occupation of the suit premises became adverse to the original owner’s interest, 3 months thereafter following failure to obtain the necessary land control board’s consent. The same argument may be advanced assuming even that the applicants entered the suit premises in 1973. There is no evidence that on both occasions the consent of the relevant land control board was ever obtained. Accordingly time started running in favour of the applicant the moment the agreement became void for want of consent of the land control board, 3 months if the entry was in 1963 and 6 months if the entry was in 1973. That being the case then the applicants would have been in continuous and uninterrupted occupation of the suit premises for a total of 44 years if the entry was in 1963 and 34 if they entered in 1973 by the time they lodged the instant originating summons. That is way above the threshold of 12 years. In law therefore they are entitled to an order of adverse possession.

However has their occupation been continuous and uninterrupted? I do not think so. It would appear that the respondents through whose consent the applicant’s entered the suit premises later passed on sometimes in 1979. Following his demise the respondent as a widow petitioned for a grant of letters of administration intestate in Nyeri High Court succession cause number 340 of 1984. She was issued with the grant that was later confirmed. The succession cause was not contested by the applicants or any one of them. Pursuant to the confirmed grant, the respondent caused the suit premises to be transferred into her name by way of transmission. Thereafter the respondent initiated Keruogya SRMCCC No. 425 of 2007 seeking “... **forceful eviction of the defendants from land parcel No. Mutira/ Kaguyu/819 and removal of the caution registered over the land by the 1st defendant and loss of mesne profits....**” By this very action, the respondent asserted her claim to the suit premises thereby curtailing and bringing to an end the applicants’ claim to the same by way of adverse possession. In other words time stopped running in favour of the applicants in terms of adverse possession the moment the applicant took the aforesaid steps to assert her title to the suit premises by filing the above suit. The facts in this case are strikingly similar to the case of **Githu v/s Ndete (1984) KLR 776**. It was held therein that:-

“1. The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons adverse possession.

2. Where the person in possession has already began and is in the course of acquiring rights under section 7 of the Limitation of Actions Act (Cap 22) and by virtue of Section 30(F) of the Registered Land Act (Cap 300) those rights are overriding interest to which the new registered purchaser’s title will be subject.

3. Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of the right for the purpose of stopping the running of time under the limitation of Actions Act..”

If I got the applicant’s argument right, they are saying that they and been in adverse possession of the suit premises in excess of 12 years as stipulated by law and the filing of the Kerugoya suit by the respondent did not affect the rights accrued to the applicants as aforesaid. That argument may have held them in good stead had they taken steps in terms of holding number 2 in the Githu decision (supra) by filing suit for adverse possession ahead of the respondent’s suit for their eviction. As it is the applicant’s had not taken steps under the limitation of Actions Act to assert their claim to the suit premises by way of adverse possession. Instead they only rose to the occasion when the respondent beat them to game. The story would perhaps had been different had the applicants filed this originating summons ahead of the respondent’s suit in Kerugoya court. That would have shown that as persons in possession had taken steps under the Limitation of Actions to assert their claim. They did not do so. Indeed even earlier on they had an opportunity to assert their claim in the succession proceedings relating to the estate of the respondent’s deceased husband through whom they had gained entry into the suit premises but they did not.

The respondent asserted her claim to the suit premises by having the same transferred and registered in her name and initiating a legal process to have the applicants evicted from the suit premises. Accordingly time ceased to run under the Limitation of Actions Act in favour of the applicants. The period of adverse possession having been broken by the respondent’s action aforesaid it had to start all over again. So that by the time the applicants initiated this suit on 23rd November 2007, their adverse possession had already come to an end when the respondent commenced her action on 24th October 2007. Indeed time could only have started to run in their favour after 24th October 2007. So that by the time they filed this originating summons, they had not attained the threshold of 12 years.

Accordingly the applicants’ claim must fail. I have no doubt that this decision shall pain the applicants who have been in occupation of the suit premises for well over 40 years. They have interred their loved ones thereon. They have made substantive investments and developments. Perhaps they have known no other home. However the law is no respecter of emotions and sentimental feelings. Harsh as it may appear to be, the law has to be applied and obeyed.

The applicants having failed to prove their claim of adverse possession the same is dismissed with costs to the respondent. As for Kerugoya SRMCCC No. 425 of 2007 I grant prayer 1 & 2 sought therein. The applicants’ have 60 days from today to voluntarily vacate the suit premises failing which they shall be forcefully be evicted. The caution registered on the suit premises by the 2nd applicant shall however forthwith be removed. The respondent too shall have the costs of that suit. As there was insufficient material laid before me on the question of mesne profits, I decline to make such an award.

Dated and delivered at Nyeri this 18th day of June 2009

M. S. A. MAKHANDIA

JUDGE