



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 1321 OF 2005

PIUS NGUGI PLAINTIFF

VS.

HELLEN FEAR DEFENDANT

JUDGMENT

The plaintiff, Pius Ngugi brought this suit against the defendant Hellen Fear by way of originating summons under **Order XXXVI rule 3(d)** of the **Civil Procedure Rules** for a declaration that he is the proprietor of parcel of land LR. No.1870/240/1 situated in Nairobi and comprised in Grant No.17383. He also asks the court to make a declaration that he is entitled to an order that he be registered as the proprietor for the said piece of land. There is also a prayer for costs.

After instituting this suit, the defendant could not be found and so the plaintiff moved the court by way of chamber summons for an order of substituted service. This application was heard by Osiemo, J and on 8th November 2006, the learned judge gave an order that the defendant could be served by way of substituted service.

This was done but the defendant did not enter any appearance or file any reply to the originating summons. Subsequently, this suit was listed for formal proof. The plaintiff has given evidence in support of his pleadings and in a nutshell he said that in 1974 he entered into an agreement with the defendant to purchase the suit premises. She then left for Europe after she signed all the documents. This transaction was not completed although he paid the agreed purchase price of Kshs.185,000/=. The reason for non-completion of the transaction is that he misplaced all the documents relating thereto.

From the time she left the plaintiff has not heard from her again and his only contact in Europe one Mr. Baker died and so he lost all the contacts. The plaintiff has not heard from any of the defendant's relatives asking for the said property. He is still in possession of the said property although he is not the registered owner because the defendant is still the registered owner. He has been living in the said property all this time and he pays all the rates and bills to the relevant authorities.

During all these years which add upto more than thirty (30), nobody had ever come to claim ownership of the said property, and he adds, it is unlikely because he paid the purchase price and took possession. He therefore claims the property and all rights relating thereto because he is lawfully in possession thereof.

The plaintiff called his wife, Mrs. Josephine Wamboi Ngugi who supported his evidence in its entirety.

After the hearing, the learned counsel or the plaintiff made his submissions which are on record and which I have noted.

The plaintiff's claim is premised on the **Limitation of Actions Act Cap.22 Laws of Kenya. Section 7** thereof provides:

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through him he claims, to that person.

Section 38(1) of the same Act provides:

“Where a person claims to have become entitled by adverse possession to land registered under any of the 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 the land or lease in place of the person then registered as proprietor of the land.”

On payment of the purchase price by a purchaser in occupation, his occupation becomes adverse to the vendor. And if he establishes that his possession is over 12 years, then he is entitled to be registered as owner thereafter, but his occupation must be with the knowledge of the proprietor without any interruption and open in that regard. In the instant case, the plaintiff having completed the transaction of sale, he justified his occupation thereto and since it has been without any interruption all those years, it is my judgment that he is entitled to the prayers sought.

Accordingly on the evidence and the law applicable, I declare that the plaintiff is the proprietor of all that parcel of land known as LR. No.1870/240/1 Nairobi. Having so declared, it is now ordered that he shall be registered as the proprietor of the said piece of land. In the event that any execution of any documents is required, then the Registrar of this court shall do so on behalf of the parties not available.

I have noted that the plaintiff has prayed for costs of the suit herein. I believe, there being evidence that the defendant cannot be traced, this will be an order in futility. The most appropriate order in this regard is that there shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this **16th** day of **July, 2009**.

A. MBOGHOLI MSAGHA

JUDGE