



REPUBLIC OF KENYA

HIGH COURT AT MERU

CIVIL CASE 251 OF 1994

M'MAKINYA M'ITUNGA PLAINTIFF

VERSUS

KARUNTIMI RAIJI DEFENDANT

JUDGMENT

This case was fully heard by the Hon. Mr. Justice Ouko. Before he could write the judgment, he was transferred from this station of High Court at Meru. The responsibility of writing the judgment then fell on me.

The plaintiff M'Makinya M'Itunga filed this action by way of originating summons seeking for a declaration that he owns 9 acres out of parcel No. NYAKI/THUURA/131. By the time when this came up for hearing, the plaintiff was deceased but an order was made by this court on 13th March 1997 that he be substituted by Mwongera M'Makinya. The action was defended by the defendant. The evidence adduced before court on behalf of the plaintiff by Mwongera was that the plaintiff was his father. He confirmed that he had been appointed as a legal representative of his father after his death. Before death, his father was living on the suit property with his two wives and a grandchild. He entered that land in 1954. By the time of his death, he had planted miraa trees, bananas and other subsistence crops. He had also built a house for each of his wives and one for his grandchild. He said that the suit property was divided by an access road. His deceased father was occupying the lower side of that property. After the death of his father, the defendant destroyed the houses on that parcel of land. That matter was reported to the police and the defendant with his sons were charged and convicted of that offence. In their appeal before the High Court, the same was unsuccessful and they served the term of sentence given by the lower court. The wives of the deceased father had died prior to his father and were buried there and so was his deceased father. The defendant obtained registration of the suit property and in so doing included the portion belonging to his deceased father. That was in March 1973. He said that the defendant when he moved to the upper side of the suit property he found his deceased already on the portion which is now the subject of this suit. During the lifetime of his father, the defendant never used the portion which is now the subject of this suit. This witness was unable to indicate the size of his father's portion of land. PWII was a cousin to the defendant. He said that in his childhood in 1954 he saw the deceased plaintiff enter into the suit property. He confirmed that the deceased had houses for both of his wives and a store. He too confirmed that the suit property is divided by a road and that the deceased land was bigger than the defendant land. He stated that in 1954 he was 3 years old but as he grew he saw the deceased plaintiff and his family on that land. He also confirmed that the defendant when they came on the upper side of the suit property, he found the deceased already in occupation of this land. PWIII was a neighbour of the deceased plaintiff. He too confirmed that the deceased occupied his portion of land even before the declaration of emergency in this country. He had 5 houses in this land and had built for both of his wives houses. Both of his wives and the deceased are buried on that land. The defendant in evidence talked about previous cases that existed between him and the deceased. In one case, the DO had made an award

which was later set aside. He however did confirm under cross examination that the deceased occupied that portion of land together with his family and his wife. He also confirmed that there were houses built by the deceased. He stated that the deceased being in occupation of that land for about 21 years. DWII also confirmed that the deceased occupied what he called one corner of the suit property. He kept animals on that land and had houses together with his wives. He also confirmed that the deceased was already on the land when the defendant began to occupy the upper part. DWIII also confirmed that the suit property is divided by a road and that the deceased occupied the lower part whilst the defendant occupies the upper part. There are two issues raised by the defendant which I believe need to get my response at this stage. Firstly, the defendant submitted that the plaintiff's suit must fail because it offends the rule of *res judicata*. The defendant referred to Meru CMCC No. 241 of 1985 which was referred to arbitration before elders. According to the evidence of the defendant, the award of the elders was set aside. Indeed I have perused the file which is attached to the present case file and I find that on 22nd July 1990 the elder's award was set aside by the court. The other case that the defendant referred to was Meru HCC No. 257 of 1990. That file is also before me. I note that on 9th March 1994 the court dismissed the plaintiff's suit for having been filed out of the limitation period without leave of the court. In the defendant's submissions, those two suits make this present suit to be *res judicata*. The defendant relied on the case of **Kibogy V. Chemweno HCCA No. 41 of 1980**

“Where a matter is directly and substantially in issue between the same parties, it is a condition precedent to the application of the doctrine of res judicata that the issue has been finally decided by the court.”

The correct definition of *res judicata* is found in section 7 of the Civil Procedure Act. That section provides:-

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

It is obvious to me that the two previous suits filed by the plaintiff had not been heard and finally decided on merit. I am of the view that the doctrine of *res judicata* cannot be successfully raised against the suit in those circumstances. The other issue that I need to deal with was raised by the defendant to the effect that Mwongera M'Mukinya was not substituted within one year of the death of the original plaintiff as required by order XXIII of the Civil Procedure rules. I have two responses to make in respect of that submission. Firstly, there is an order that was made in this file by this court on 13th March 1997 which order allowed Mwongera M'Mukinya to substitute the deceased plaintiff. It is worthy to note that when the application for substitution came before court on 13th March 1997 the defendant's counsel did not oppose the same. Such an order having been made and not appealed against the defendant's submission must fail. Secondly, it is noted that the deceased plaintiff died in January 1996. The application for substitution was filed on 20th June 1996. That was well within the one year required by Order XXIII. The date of filing the application is the applicable date to guide the court whether substitution was made within the time provided under the Rules. That submission therefore that Mwongera was not properly substituted is rejected. Having dealt with those two matters, the only issue that I believe is at hand is whether the plaintiff has proved his case for adverse possession. I wish at this point to acknowledge the effort put in by both counsels to provide case law in support of their submissions. I am indebted to them. In the case of **Kimeu V. Syina** Civil Suit No. 1402 of 1986 the court held as follows:-

“As for the claim based on adverse possession, the plaintiff was duty bound to adduce inter alia that he had been in possession of the suit land, that his occupation was exclusive, was adverse to the defendant's rights as owner and that his occupation had been continuous and uninterrupted or unchallenged for a period in excess of twelve years since the possession commenced.”

In the case of **Githu V. Ndeete Civil Appeal No. 24 of 1979** the court held

“A title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land which the owner holds title”.

There is one case that its facts match the facts of this case almost entirely and that is the case of **Gatimu Kinguru V. Muya Gathangi** Kenya Law Reports. It will be recalled that the deceased plaintiff was said by both Mwongera and the defendant together with their witnesses to have been in occupation of the lower part of the suit property from 1954. The deceased plaintiff in his affidavit in support of the originating summons said that he did not know how the defendant obtained registration of his portion of land. It is also clear from the evidence that the area the deceased plaintiff occupied is clearly discernable. He occupied the lower part of the suit property which is divided by the road. Most witnesses could not however tell the acreage of that portion. In the case of **Gatimu** (supra) the land similarly had not been separately surveyed between the plaintiff and the defendant but the Hon. Mr. Justice Madan (*as he then was*) stated in that case:-

“It is however definitely identified and identifiable portion with a clear boundary. That which can be ascertained is certain; that which is definite is positive..... I think the absence of a plot and title number should present no difficulty or be a bar to the defendant establishing his claim on the ground of adverse possession.”

I make a finding that the plaintiff's continuous occupation of the suit property adversely to the defendant's title for more than 12 years was not interrupted by the previous suit filed by him. What the plaintiff was seeking in those suits was a confirmation of his rights of ownership in the court of law. His occupation of the suit property was open and notorious. It was to the exclusion of the defendant as far as the lower part of the suit property is concerned. More than that I do find that the defendant also held the suit property title in trust in as far as the lower part is concerned for the deceased plaintiff. I also find that bearing in mind section 28 of the Registered Land Act that such a trust existed and is recognized by law. It is clear that the defendant who came on the suit land after the deceased plaintiff wrongfully combined the deceased plaintiff's land when registering the suit property. I therefore hereby in this judgment hold that the defendant was a trustee for the deceased plaintiff for the portion of land the plaintiff occupied. In the end I find that the plaintiff's claim is proved. The judgment of this court is as follows:-

- 1. I hereby declare that the plaintiff acquired by adverse possession an absolute title to the lower side of the suit property parcel No. NYAKI/THURA/131.***
- 2. I order that the estate of M'Makinya M'Itunga deceased be registered as the owner of the lower part of the suit property in place of the defendant. To that end, I order that title to parcel No. NYAKI/THUURA/131 be cancelled by the land Registrar and in so doing the need of having original title document is dispensed with. Thereafter I order that that parcel of land be subdivided into two portions one portion being on the upper side of the access road dividing the parcel of land and the other portion being on the lower side from the access road dividing that parcel of land. The upper side of that parcel shall be registered in the name of the defendant and the lower part shall be registered in the favour of the estate of M'Makinya M'Itunga deceased. Thereafter, those interested in that estate of M'Makinya M'Itunga deceased can proceed under the Succession Law to make their claim.***
- 3. The costs of the suit are awarded to the plaintiff.***

Dated and delivered at Meru this 25th day of September 2009.

MARY KASANGO

JUDGE