



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Civil Case 6 of 1997

DORCAS WAIRIMU MURIITHI PLAINTIFF

VERSUS

JOHN KABUTHA DEFENDANT

J U D G M E N T

On 14th January 1997, **Dorcias Wairimu Muriithi** hereinafter referred to as “*the plaintiff*” filed the instant suit against **John Kabutha**, hereinafter referred to as “*the Defendant*” seeking that the defendant be evicted from land parcel **Aguthi/Mung’uria/201** hereinafter referred to as “*the suit premises*”. He also sought general damages for trespass, costs of the suit and interest.

This suit was informed by the following facts as deciphered from the plaint; the plaintiff had since 1989 been registered proprietor of the suit premises through transmission following the death of her husband, **Mureithi s/o Kabutha**. In his lifetime, her said husband had granted the defendant a temporary licence to occupy $\frac{1}{8}$ of an acre of the suit premises on which he built a temporary home pending the defendant’s purchase of his own parcel of land elsewhere. The consideration being natural love and affection as the defendant was his nephew. Upon the plaintiff becoming the registered proprietor of the suit premises as aforesaid she gave the Defendant Notice to vacate the suit premises. However the Defendant claimed to have advanced her deceased husband a sum of Kshs.1,500/= and would only be willing to vacate the suit premises if he was refunded the amount. The Plaintiff duly paid the amount to the Defendant but still the defendant failed, refused and or neglected to vacate the suit premises. By a written notice dated 5th October 1996, the Plaintiff terminated the Defendant’s licence to occupy the portion aforesaid and demanded that he vacates the same on or before 15th December 1996. The Defendant refused to comply with the notice, hence the suit.

Through **Messrs Bali-Sharma & Bali-Sharma Advocates**, the defendant filed a defence to the plaintiff’s claim. He denied that he was occupying a portion of the suit premises as a licensee nor trespasser. That he had lived on the suit premises since 1953 and when his mother died he was and is still living on the suit premises and as such the plaintiff cannot claim that he is a trespasser. Finally he contended that having occupied the suit premises for the last 44 years without interruption, he was entitled to claim from the plaintiff a portion of the suit premise by way of adverse possession. By way of counterclaim he prayed that the suit premises be subdivided into 2 equal portions and one portion be registered in his name. Similarly that the plaintiff be declared a trustee of the defendant with regard to the suit premises and a transfer thereof of $\frac{1}{2}$ portion to the defendant be ordered free from encumbrances.

On 20th September 1999 the hearing of the suit commenced before **Juma J** (as he then was). The plaintiff testified that the defendant was a nephew of her husband. He was a son to her husband's sister. She was the registered proprietor of the suit premises. The defendant came to stay with his grandmother when he was very small and his mother had passed on. Her late husband allowed the defendant to put up a 3 bedroomed timber house on the suit premises. The defendant does not cultivate the suit premises. Instead they lease land elsewhere for cultivation. She became the registered proprietor of the suit premises on 6th February 1989 following succession proceedings relating to her late husband's estate. The defendant never objected to her getting the grant. She thereafter issued the defendant with both verbal and written notice to vacate the suit premises but he had refused to comply. The defendant was only allowed to live temporarily on the suit premises. She prayed that the defendant be ordered to vacate the suit premises as he was interfering with her occupation.

Cross-examined by **Mr. Mahan**, learned counsel for the defendant she maintained that the defendant was born elsewhere and came to the suit premises when he was a small boy. That she gave him Notice to quit because he was demanding land from her yet her husband had not given him land before he died. The defendant claimed from her Kshs.1,500/= which he had advanced her deceased husband to save the suit premises from being auctioned. The plaintiff had refunded him the aforesaid amount.

PW2 was **Samuel Murage Kanandi**. He knew both parties to the suit as they were from his clan. He testified that the defendant had come to the suit premise following the death of his mother. In 1995 he had been called by the plaintiff among others to discuss the issue of the defendant vacating the suit premises. The defendant had then said that his intention was not to live on the suit premises permanently. He wanted time to move out as he had no money at the time. He was refunded Kshs.1,500/= and agreed to vacate the suit premises then. He confirmed that the defendant occupies a small portion of the suit premises and that he does not cultivate any portion of it.

Cross-examined, he stated that he first saw the defendant as a small boy. That the deceased's husband of the plaintiff never complained to him about the defendant's presence on the suit premises. He only had daughters. However he could not tell whether the plaintiff's late husband considered the defendant his son.

The 3rd witness called by the plaintiff was **Peter Kihara Kabutha**. He was a step brother of the Plaintiff's late husband as well as the defendant's mother. It was his evidence that the defendant's mother died in 1953 and the defendant was brought up by his maternal grandmother. In 1994 he was sent for by the plaintiff to determine the dispute and to tell the defendant to vacate the suit premises. He was in the company of other elders namely, **Joseph Mwangi Kihara** and **Njage Mwathi**. The defendant then raised the issue of Kshs.1,500/= owed to him by the Plaintiff's late husband. It was agreed that the Plaintiff refunds the same after which the defendant would vacate the suit premises. Later the area Assistant Chief wrote to the defendant asking him to vacate the suit premises as he had been paid Kshs.1,500/= he demanded.

Cross-examined, he stated that when the defendant's mother passed on the grandmother took the defendant to live with her. Demarcation had not taken place. When it was done the grandmother had no land.

Thereafter the hearing of the suit was adjourned generally. When it next came up for further hearing, **Juma J** had ceased to have jurisdiction over the same. Accordingly on 9th May 2005 **Okwengu J** took over the conduct of the suit. Parties agreed to continue with the suit from where **Juma J** had left. Proceedings however were to be typed. It was not until 24th March 2009 that the typed proceedings were availed to the parties. By which time **Okwengu J** too had also ceased to have jurisdiction over the suit by virtue of her transfer to the High Court of Kenya at Nairobi. The matter therefore fell on me to decide the way forward. Parties were still of the opinion that the suit proceeds from where **Juma J** had left.

The 4th and final witness called by the Plaintiff was **Nancy Wanjiku**. She was the daughter of the Plaintiff. She confirmed that the defendant resided on a portion of the suit premises but did not cultivate

it. The portion he occupies as aforesaid was fully taken up by his house. He had been asked to vacate the suit premises immediately the deceased passed on but no avail. This followed the grant of letters of administration intestate to the deceased's estate to her mother, in 1994. The defendant stated that the deceased owed him Kshs.1,500/= and that is why he was staying on the suit premises. In the presence of her uncle, her mother paid the said amount to him. That reimbursement was reduced into writing by the defendant. Later the defendant changed tune and stated that he could not vacate the suit premises since he had sold his land elsewhere in order to assist the deceased. As far as she was concerned, the defendant occupied the suit premises in these circumstances; he first approached his paternal grandfather and asked for land. The grandfather however referred him to her deceased father. Her deceased father in turn gave him a small portion of his land to put up a house. The defendant was a nephew of her deceased father. Her deceased father categorically told the defendant that his occupation of the portion given to him as aforesaid was temporary and that he should never claim the as his same. The defendant has his own land at Kieni and should now vacate and relocate to his aforesaid parcel of land.

Under cross-examination she stated that she had no brothers but 8 sisters. She did not know when the defendant came to the suit premises and what age he was. He gave Kshs.1,500/= to her deceased father to pay off the loan and to avoid the suit premises being auctioned. She denied that he later paid the deceased a further sum of Kshs.1,020/=. During the burial of the deceased, the defendant did not raise the issue of his entitlement to the suit premises. She denied that the deceased took in the defendant as his son or that the defendant's mother was interred in the suit premises.

That marked the close of the Plaintiff's case.

The defendant testified that he had stayed on the suit premises for 53 years and raised his family therein. His mother was a sister to the Plaintiff's deceased husband and when she died she was buried in the suit premises. The deceased had permitted him to occupy the suit premises. Though the suit premises consists of 4 acres, he only occupied ½ acre on which he had put up a house and rears cows and goats. He had also planted trees. He had advanced the deceased Kshs.1,500/= when the suit premises were threatened with auction. That amount had since been repaid. He later advanced him Kshs.1,020/= which had not been repaid. Later the suit premises were again threatened with auction. The deceased again approached him to assist whereupon he sold his land at Naromoru and gave him the money. He therefore stayed on the land because he sold his at Naromoru in order to save the suit premises from being auctioned.

Cross-examined by **Ms Mukuha**, learned counsel for the Plaintiff he stated that he entered the suit premises with the permission of the deceased as he had advanced him some money. That he was not supposed to move out once the loan was cleared. In fact they had agreed that he would get a portion of the suit premises. He had nothing to show though that he had sold his land at Naromoru. He conceded that the issue pertaining to the money he had advanced to the deceased had not been pleaded in his defence.

With that the defendant closed his case.

Parties thereafter agreed to file and exchange written submissions. This was subsequently done. I have carefully read and considered them.

So what are the issues for determination in this suit? To my mind they are essentially 5 to wit;

(i) Whether the Defendant's occupation of the suit premises is on the basis of a licensee

(ii) Whether the defendant has acquired title to the suit

premises by adverse possession.

(iii) Whether a portion of the suit premises was registered in the name of the deceased and subsequently the Plaintiff in trust for the defendant.

(iv) Whether the defendant is a trespasser and liable to Eviction.

(v) Costs

Largely the facts in this suit are not in dispute. It is common ground that the defendant entered the suit premises as a small boy and as nephew of the deceased. It is common ground too that the defendant occupies a small portion of the suit premises but which he does not cultivate. It is also common ground that the defendant has put up in that portion a house in which he resides with his family. It is also common ground that the Plaintiff got registered as the proprietor of the suit premises on 6th February 1989 through the process of transmission. It is also not denied that the deceased was advanced the sum of Kshs.1,500/= to save the suit premises from public auction. That amount has since been repaid by the Plaintiff.

According to the defendant's counsel the only issue which requires this court's determination is the issue of adverse possession for the uninterrupted period of occupation by the defendant. That although there is no originating summons in support of that claim, this court should overlook that requirement and find that the defendant had lived on the suit premises in excess of 44 years and had thereby acquired prescriptive rights. However as I have already pointed, there are essentially 5 (five) issues for determination by this court, one of which is adverse possession.

It is trite law that a party is bound by his pleadings and his evidence should support what he has pleaded. In this case the defendant in his defence claimed that the Plaintiff filed a succession cause secretly without the defendant's knowledge so as to deny him rights to the suit premises. He also pleaded that having stayed on the suit premises for over 44 years without interruption from the plaintiff, he had thereby acquired prescriptive rights. He went to plead that he had also acquired equitable right and interest in the suit premises pursuant to section 30 (g) of the Registered Land Act. Finally he pleaded that the Plaintiff had been registered as the proprietor of the suit in trust for him to extent of the portion he occupies. However he never led any evidence in support of the aforesaid averments. If anything he completely departed from the said pleadings. According to him, he occupied the suit premises on account of having sold his own land at Naromoru and gave the proceeds thereof to the deceased so as to save the suit premises from public auction. The defendant conceded in cross-examination that the issues pertaining to him advancing the deceased the money was not pleaded in his defence. This was therefore a complete departure from his pleadings. In any case there was no tangible evidence that indeed the defendant ever held any land in Naromoru that he sold as aforesaid. When the question was put to him on the issue by **Ms Mukuha** he responded that he had nothing to show that he sold his land at Naromoru to bail out the deceased. Indeed even **Mahan**, in his written submissions gave the issue a wide berth.

All in all, the defendant did not lead any tangible evidence in support of his claim to the suit premises on

the basis of adverse possession, equitable interest and or trust.

From the evidence on record and by defendant's own admission, he entered the suit premises with the permission of the plaintiff's late husband. His entry into the suit premises was therefore by consent and not adverse to the late plaintiff's husband's title to the same. He remained on the suit premises with the permission of the deceased's plaintiff's husband until he passed on. As his entry to the suit premises was with the permission of the plaintiff's deceased husband, time for purposes of adverse possession did not start running. It only started running for purposes of adverse possession when the plaintiff issued him with a Notice to quit sometimes in 1989. She followed up that Notice to quit with the instant suit. By filing this suit, the plaintiff asserted her claim to the suit premises. This suit was filed on 14th January 1997. By that time only 8 years had elapsed after the defendant's occupation of the suit premises had become adverse to the Plaintiff's claim to the same following the issuance of the Notice to quit. That being the case, the threshold of 12 years that would have enabled the defendant to acquire prescriptive rights over the portion of the suit premises he occupies had not been attained. The defendant's claim on this basis must of necessity fail. To the defendant, this was the only issue that this court should have grappled with. Having so found, I would have at this stage determined the case once and for all. However I would wish to deal with the other issues framed.

Was the defendant's occupation of the suit premises on the basis of a Licensee? From the evidence on record, that would appear to be the case. The defendant is not a son of the Plaintiff and or the Plaintiff's deceased husband. Rather he was a nephew to the deceased. He was a son of the Plaintiff's deceased husband's sister. When his mother passed on he came as a small boy and started staying with his grandparents. As he grew up he approached his grandparents and asked for a piece of land to put up a house. The grandparents referred him to the plaintiff's deceased husband who in turn gave him a portion of the suit premises. It is noteworthy that as at this time, the suit premises were registered in the name of the deceased so that the question of family trust does not arise. It is also instructive that he was only given a small portion of the suit premises. He never cultivates the same to date. If the intention of the deceased was to give the defendant a portion of the land nothing would have stopped him from doing so in his lifetime. He would have even given him a larger portion to cultivate as well. It is also instructive that the defendant did not in the lifetime of the deceased demand that the portion he occupies be curved out and registered in his name. The evidence that the defendant was merely given that portion to occupy temporarily as he looked for his own land elsewhere was not at all controverted. The evidence that the defendant too only occupies that small portion and does not cultivate the same is also not challenged. The evidence that the defendant was being temporarily accommodated on the suit premises pending his relocation was even supported by the defendant himself when he claimed that he had advanced the deceased Kshs.1,500/= in a bid to save the suit premises from being auctioned. It would appear that he was determined to remain on the suit premises on the basis of the sum of Kshs.1,500/= aforesaid which he advanced the deceased and later followed it up with Kshs.1,020/=. However that amount has since been repaid to him. The defendant has admitted that much. If indeed his claim to the portion of the suit premises he occupies was on the basis of Kshs.1,500/= he advanced the deceased, why did he then accept the same when repaid by the Plaintiff. His acceptance of the amount in my view brought to an end any reason he may have had in continuing to stay on the suit premises. I have my own doubt as to the alleged subsequent payment of Kshs.1,020/= to the deceased by the defendant. He did not say in his evidence what that amount was for. Further more, the uncontroverted evidence of the fact that the defendant has merely put up a temporary house in the portion he occupies and does not at all cultivate anything thereon points irresistibly to the contention by the Plaintiff and her witnesses that the defendant's occupation was temporary pending his relocation to his own land. There is also unchallenged evidence that the defendant has since acquired his own land at Tetu to which he should relocate. Further there is also evidence of the Plaintiff that the Defendant leases parcels of land elsewhere where he farms. If indeed he was entitled to the suit premises as he claims then surely, he could at least be cultivating the portion of the suit premises that he occupies.

The Defendant was given the portion of the suit premises as a Licensee. That licence expired with the death of the deceased and or with the transfer and subsequent registration of the suit premises in the name of the Plaintiff and or with the Plaintiff's issuance of a Notice to terminate the Licence. Furthermore if the defendant felt genuinely entitled to the portion of the suit premises as of right, why didn't he raise the

issue during the burial of the deceased.

The evidence of PW2 and PW3 is pertinent. They were clan elders and uncle to the defendant as well as brother in law of the Plaintiff. They were at one time involved with the issue as to how the defendant would vacate the suit premises. They confirmed that the defendant had said that he had no intention of living on the suit premises permanently and had agreed to move out on re-payment of Kshs.1,500/=. That amount was paid. The defendant has not disputed that evidence neither has he claimed that these witnesses falsely testified against him. It should also be noted that even the local chief intervened in the dispute and directed the defendant to vacate. On my part I am therefore satisfied that these witnesses were telling the truth. They had nothing to gain from testifying falsely against the defendant. On the whole therefore, I am satisfied that the defendant's occupation of a portion of the suit premises was on a Licence basis.

Was the portion of the suit premises occupied by the defendant registered in the name of the deceased as well as the Plaintiff in trust for the defendant? The answer should be pretty obvious –no. Trust, family or otherwise has to be proved by cogent evidence. No such evidence was indeed led by the defendant. If anything, the defendant completely departed from this claim in his evidence. It was his evidence that he stays on the suit premises because he sold his land at Naromoru to save the same from being auctioned and that he had as well advanced the deceased Kshs.1,500/=. That being the evidence of the defendant, where does the concept of family trust come from? The land was after all already registered in the deceased's name when all this was happening. Had this occurred during land demarcation and consolidation, then, perhaps the defendant would have had a case with the deceased and the Plaintiff.

Is the defendant therefore a trespasser? The defendant's Licensee status having been brought to an end by the death of the deceased and or subsequent transfer and registration of the suit premises in the names of the Plaintiff through transmission and or by the Plaintiff's action of giving him a verbal as well as written notice to vacate the suit premises, the defendant's continued occupation of the suit premise thereafter can only be on the basis of a trespasser. By his own pleadings, the defendant acknowledges that fact by hinging part of his claim on the doctrine of adverse possession. That doctrine applies in a situation where a person enters the suit premises and remains therein as such without as much as the owner of the suit premises taking any steps to eject him therefrom for a period in excess of 12 years. There can be no doubt at all the defendant is a trespasser therefore.

How about Section 30(g) of the Registered Land Act? This section deals with overriding interest. Such overriding interest includes the rights of a person in possession of or actual occupation of land to which he is entitled in right only of such possession or occupation. The record clearly shows that the defendant was not entitled to the suit premises as of right. Yes he is in possession and or actual occupation of a portion of the suit premises. However from the evidence on record his possession or actual occupation aforesaid is not on the basis of any right accrued or accruing to him. Accordingly this section of the law is not available to him.

With regard to costs, I am of the view that the relationship of the parties involved is such that none of them should be condemned in costs.

The Plaintiff had claimed in her plaint general damages for trespass. No evidence was led with regard to this aspect of the claim. Accordingly I have no basis upon which to allow it.

In the result, I am satisfied that the plaintiff has proved her case on a balance of probabilities and she is therefore entitled to prayer (a) in the plaint. I so grant the prayer with a rider that the defendant shall have 45 days from the date of this judgment to voluntarily vacate the suit premises failing which he will be forcefully evicted.

Dated and delivered at Nyeri this 30th day of November 2009

M. S. A. MAKHANDIA

JUDGE