



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 229 of 1992

WANJIRA WAWERU PLAINTIFF

VERSUS

PETER KABUGA DEFENDANT

JUDGMENT

The plaintiff's claim against the defendant is that she is entitled by adverse possession to 1.8 acres of Ruguru/Kiamariga/278 (hereinafter called the suit property) registered in the defendant's name. The plaintiff in evidence stated that she was the wife of Waweru Munyu deceased. She got married to him in 1956. That originally the suit property was registered in the name of the father of her deceased husband. Her father in law was called Munyu. Her husband had no other brothers but only one sister. That sister died without leaving any children. Her husband, she said got mentally ill in 1958. During the life time of her father in law she and her husband were residing at a property at Gikonyu. On that property they built a house.

However her husband because of his mental illness was in and out of hospital. He also used to assault her and even at one time threw one of the children into the toilet. The plaintiff in 1965 deserted her home because of the behaviour of her husband. She got employment in Thika where she retired in 1991. However she stated that even before her retirement she used to visit the suit land and she also left Kibuthu and Macharia her relatives in charge of that property. In 1992 after her retirement and when she sought to obtain grant of her deceased husband she discovered that the defendant jointly owned the suit property with her late husband. The defendant owned 1.8 acres and her deceased husband the same acreage of that property. She produced the Green Card as evidence of that ownership. In respect of the defendant she said that she did not know him and he was not from their area. She said that the defendant was a school teacher and that he met her late husband when he had been mentally sick for a long period. To support this, the plaintiff exhibited two letters one dated 2nd July 1974 and the other one dated 28th August 1992. In respect of the letter dated 2nd July 1974 which was written by Dr. W.J. Muya he stated as follows:-

“Thank you for the above mentioned letter. This letter follows out meeting – Mrs. Mwangi/Dr. Muya at Mathari Hospital on 25th June 1974. Waweru was admitted in this hospital on 20th May, 1974 and is currently receiving treatment here for a psychiatric illness. His illness is of a recurrent nature having been admitted in this hospital previously in 1958 and 1966; he was also admitted in Nyeri Psychiatric Unit two times, 1958 and 1966 as well. I have examined this man, and in my opinion, he does not appear to appreciate the whole implication involved in land transaction. He is unlikely to do

so even at a future date especially because;-

- (a) His illness does recur.*
- (b) Each attack causes progressive deterioration in personality.*
- (c) Illness affects his power of judgement.*

His condition has shown an improvement, but it is difficult for the time being to predict when he will be discharged.

In respect of the letter 28th August 1992 it was written by Dr. C.K. Munene. He stated as follows;-

“TO WHOM IT MAY CONCERN

RE: WAWERU MUNYU, IP NO. 553/74.

This is to certify that the above named was under treatment here between 21.5.74 and 27.9.74. He was treated for a psychiatric condition called chronic schizophrenia which is recurrent in nature and causes progressive personality deterioration and impairment of judgement. In my view he would not have been capable of managing his property as a result of this illness. He was last seen here on 27.9.1974 and was referred to Provincial General Hospital, Nyeri, Psychiatric Unit for follow up. In Nyeri he was admitted on a number of occasions.

The plaintiff concluded by asking the court to give her the 1.8 acres registered in the defendant's name. On being cross examined by the defendant she denied that the defendant assisted her late husband or that he purchased for him a sewing machine.

PW 2 said that he knew the plaintiff's late husband. He confirmed that her late husband was the only son of Munyu Kabia. He said that he is a clan member of her late husband. That her late husband was mentally sick from 1958. He had in his life time being hospitalized at Nyeri and Mathare Hospital. That he was always on medication for that condition. He confirmed that he did assault the plaintiff from time to time and that at one time threw their child in the toilet. That behaviour caused the plaintiff to desert her matrimonial home. In respect of the registration of the defendant as co-owner with the deceased of the suit property he said that some corruption must have been used to get that registration independent's name. He said that the original title was in the name of Munyu Kabia the father of the deceased. He therefore said that the land rightly belongs to the plaintiff. He said that in all 34 years since the death of the plaintiff's husband the defendant has never occupied the suit property. On being cross examined by the defendant this witness said that as a clan member he was never informed of the transfer of the property into the defendant's name. PW 3 stated that the plaintiff's husband was like a brother to him because their fathers were brothers. He said that the deceased became mentally ill in 1956. He said that he did not know how the defendant got registered as the owner of the suit property. He confirmed that the deceased was unwell until his death. The defendant he said is not of their clan and does not come from their area. That throughout this land had been cultivated by the plaintiff. In his defence the defendant he stated that he got to know the deceased in 1969. It was from that date that the deceased began to visit him at the school where he taught. That it was the deceased who told him that he had a property. That since the wife of the deceased the plaintiff was not there he used to help the deceased. At one time the deceased told him that he desired to sell a piece of land. As consideration for the 1.8 acres of the suit property the defendant bought for the deceased a sewing machine and paid him Kshs.4000/-. On making that payment he and the deceased obtained the Death Certificate of Munyu Kabia. After that they filed a succession and divided the land in both their names equally. After that a member of the deceased's clan called Kibuthu sued him in respect of the suit property. That case was dismissed in September 1979. He produced a copy of the certified proceedings of 6th September 1979 showing that the suit was dismissed for want of prosecution. The defendant additionally said that they lived with the deceased together in the school compound. That the deceased even after his transfer from that school used to visit him and he used to give him potatoes. On being cross examined he responded that the deceased had never been

mentally sick particularly that he was not sick when he sold him land. In respect of that transaction he said that all his witnesses are now dead. That after the death of the deceased he used to go to the land to plant crops but the plaintiff would uproot them.

The issues that the court needs to consider in this matter is whether the plaintiff is entitled to the suit property by adverse possession and whether the deceased was mentally sick when he sold his land to the defendant and whether the defendant had knowledge of his illness. In respect of the first issue the plaintiff stated that she was in possession of the suit property all along and used to cultivate the same even before the death of the deceased in April 1982. The defendant did not contradict that evidence. The defendant stated that at one time he planted crops which were uprooted by the plaintiff. The plaintiff deserted her matrimonial home in 1965. The defendant was registered as an owner of 1.8 acres of the suit property on 6th July 1973. Time for purposes of the adverse possession would begin to run from that time. The plaintiff, it would seem was in possession of the suit property for a period of almost twenty years. In response to this issue therefore I do find that the defendant's entitlement to suit property was extinguished and the plaintiff's right under adverse possession has been established. The court notes that the defendant in his statement of defence filed in this matter did not deny the plaintiff's claim to adverse possession. In making that decision in the case of *C.A. NO. 213 OF 1996 BENJAMIN KAMAU MURIMA & 3 OTHERS V GLADYS NJERI* where the Court of Appeal stated,

“The combined effect to the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of a proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

In respect of the second issue as can be seen from the letters exhibited by the plaintiff the defendant was mentally sick even at the time when the transaction with the defendant was undertaken. In view of that the burden was upon the defendant to prove that the deceased was of good health when the transaction was undertaken. It should be noted that the defendant did not state when he purchased the property from the deceased. There were no documents to support his claim for purchase. A person suffering from mental illness is incapable of giving an intelligent consent in a sale agreement. If the defendant had knowledge of the deceased's mental illness the contract they entered into is voidable at the instance of the deceased. The plaintiff has obtained Letters of Administration for the estate of the deceased. She seeks to avoid the contract on behalf of the estate with the defendant if any. In the defence filed by the defendant the defendant does not plead that he purchased the property from the deceased. He is bound therefore by his pleadings and cannot seek to amend his pleadings orally. The judgment of this court is;-

- 1. That the title of Peter Kabuga to the 1.8 acres in land LR NO. Ruguru/Kiamariga/278 is extinguished.**
- 2. That the plaintiff has become entitled by adverse possession to the title of Peter Kabuga of 1.8 acres in land LR NO. Ruguru/Kiamariga/278.**
- 3. The plaintiff is awarded costs of this suit.**

Dated and delivered at Nyeri this 11th day of April 2008.

MARY KASANGO

JUDGE