REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3955 of 1993

WOKI KAMONDE.....PLAINTIFF

VERSUS

LIVINGSTONE MUNYUI KINUTHIA.....DEFENDANT

JUDGEMENT

The facts of this case are largely undisputed.

The Plaintiff is a step-sister to 1st to 3rd Defendants and has been occupying the suit property i.e. Kiambaa/Ruaka/T210 since 1958, with her husband and children.

According to the Plaintiff she was staying at her father's homestead with her husband who died during emergency. At the time of demarcation the suit premises was given to their father and as per the testimony of the Plaintiff, and not denied by the Defendants, that she was given the plot of ¼ acre.

She denied that she was given that plot along with others namely Jackson Ndirangu, Murage Kimani and Wanjiku Mungai. According to her they were in adjacent plot and were asked to leave but she has not been asked to do so.

Their father died in 1977 but as per the evidence before me, the suit premises was transferred in the names of the 1st to 3rd Defendants along with their other deceased brother in 1973. The Plaintiff denies being aware of this fact and stated that it was for the first time in 1991 that she received a letter from 1st to 3rd Defendant asking her to purchase the suit property at a price quoted at KShs.100,000. She denied having received any notice on 5th January, 1978 to vacate the premises. When she came to know that 4th Defendant had purchased the property she placed a caution. According to her, 4th defendant is a wife of her father's step brother. It is on record that 1st and 3rd Defendants have sold the suit property to 4th Defendant.

It is on record from the Plaintiff that all the houses of the father were given their shares from the father's properties. She was not given any. She also stated that neither her father during his lifetime nor the 1st to 3rd Defendant until 1991 asked her to leave the suit property. She and her children have put up structures on the suit property.

She claims the ownership of the suit property and that is why she did not respond to the letter from the 1st to 3rd Defendants demanding Shs.100,000 as sale price (P.Ex.1A and 1B).

Her son Wilson Kairu Kimani (PW.2) reiterated her story and stressed that neither the grandfather (the original proprietor) nor 1st to 3rd Defendants ever indicated that their family was staying as a licencee or that their stay on the suit property was temporary. They were not aware of the transfer of suit property to 4th Defendant by 1st to 3rd Defendants.

Both the Plaintiff and the son (PW.2) denied that the Plaintiff had written a letter dated 28th October, 1991 asking for mercy on an orphan who did not inherit from one Kamonde when he died. I may state here that Kamonde is plaintiff's deceased husband. In that letter she is also averred to have written to be given some time to pay the money demanded. They both denied receiving a letter dated 5th December, 1973 as well as that of 5th January, 1978.

This letter is crucial to this case and is a bone of contention between the parties before me, and rightly so, as in my opinion the fate of the case does rest on the said letter.

Going back to the evidence of the Plaintiff, I shall like to quote a passage from the testimony of PW.2 during examination-in-chief namely:-

"I am aware that my mother was given 1st option to buy the property by a letter dated 28th October, 1991. She did not get Shs.100,000. She communicated that she did not get to buy as she did not work……. But I say that she did not know that the 1st to 3rd Defendant, were the registered owners."

In re-examination he testified;

"If I had, I would have given Shs.100,000 to my uncles. Now I say they were not supposed to ask for money from my mother, I did not mean to say that I would have given money."

I would also observe that the said letter of 28th October, 1991 from the Plaintiff was not signed or thumb printed by her. The plaintiff has averred that she did not know how to write or read. I further note that the letter of demand was from sons of Kinuthia.

It is apparent that the Plaintiff has filed this originating summons dated 12th August, 1993 under Order XXXVI, Rule 3D of Civil Procedure Rules enclosing a certified copy of green card, Part-B which is a proprietorship section of the suit property.

She prays for:

1. A declaration that the defendants' rights and/or interest over plot number KIAMBAA/RUAKA/T.210 have been extinguished under the Limitations of Actions Act Cap.22 Laws of Kenya, on the grounds that the plaintiff herein has been openly peacefully and as of right in occupation of the said plot for a period of over Twelve (12) years preceding presentation of this Originating Summons in court.

2. A declaration that the sale and transfer of plot number KIAMBAA/RUAKA/T.210 by the 1st, 2nd and 3rd defendants to the 4th Defendant was null and void abinitio due to the fact that the plaintiff had at the time of transaction acquired title over the said plot by way of adverse possession.

3. That there be an order for the plaintiff to be registered as the owner/proprietor of the plot number KIAMBAA/RUAKA/T.210 in place of Esther Kanyi Kamonde under Section 38 of the **Limitations of Actions Act Cap.22 of the Laws of Kenya.**

4. Costs of this suite be awarded to the Plaintiff.

In support of her case, the evidence, as briefly stated hereinbefore, was led by the plaintiff. What I have not noted is that the PW.2 did accept that the plaintiff has one land at Thika and her case filed against the Defendant being CMCC No.372/93 before Kiambu Court was dismissed due to technicality. In Re-examination PW.2 also said that it was not fair for my uncles to ask for money from my mother since the Defendants also did not pay anything for their land.

In defence, DW.1 (the first Defendant) agreed that the Plaintiff being their step-sister was allowed to occupy the suit property, after her village was closed during emergency, by their father along with other five people (named by him). The plots were T.210 and T.212 and they all were allowed to construct temporary sheds to live thereon with consent of their father. The Plaintiff was similarly permitted by their father as her husband had died. He added that the permission to occupy the land was given as ***'ahoi'*** as per Kikuiyu custom.

The suit property was registered in their father's name on 3rd June, 1957 and then on 6th October, 1973 the same was gifted inter vivos to the three defendants along with their brother Peter Njoroge Kinuthia who is not alive and thus is not a defendant.

In 1973, according to him, they informed all the occupants including the plaintiff about their ownership. He produced a letter (DEx.3) dated 5th December, 1973 which was addressed to other persons who were also permitted by their father to occupy the plot temporarily. One Dickson Harrison responded by asking for two years' extension by a letter dated 15th January, 1974. It is also alleged that the Plaintiff also asked for some time by letter dated 5th January, 1978 but she never did. Then he referred to her letter dated 28th October, 1991 requesting them to sell the property to her. They agreed to do so at a price of Shs.100,000 which was pleaded to be reduced by her. When they did not concede, she asked for time to pay the purchase price and when she failed to keep up her promise, they sold the suit property to 4th Defendant. That is the background as per his testimony.

In cross-examination he stated that suit property was occupied only partly by the Plaintiff and she still is there without their consent. He responded that the suit property was not an estate property in the succession cause after the death of their father. It is obvious from the record that the suit property was transferred in 1973 to the four sons and thus it cannot be an estate property.

DW.2 in all material aspect reiterated what was stated by DW.1. He produced the letter of 21st October, 1991 written by them asking the Plaintiff to buy the suit property at a price of KShs.100,000 and letter of 28th October, 1991 from her asking for more time as D. Ex. 4A and 4B.

In cross-examination, as regards the questions asked on her letter dated 28th October, 1991, he had this to state:

"I cannot remember who received the letter but I think it was late Peter who was our Secretary……. I cannot tell who brought the same. The letter does not have her thumb print but the name is written. She does not know how to write, but one of her sons has

written. I am sure that it was written by her as she had bargained. I know she did write that letter. As per the wordings also it seems from her. I deny that this one was written by one of us to show that there was sale."

He denied that P. Ex. 1 was the only letter sent by them.

PW.3 is Esther Kanji Muigai who is 4th Defendant and the purchaser of the suit property. It is clear that she is the registered owner as per the abstract and a title deed {EX.DW.4(1)} was produced. I do not think her evidence shall be of use to the claim of the Plaintiff except the fact that she was the registered proprietor before this suit was filed. She had fenced the suit property without any resistance from the Plaintiff. Her denial during cross-examination that she did not know the plaintiff may not be a very relevant factor to the outcome of this case.

These are the facts before the court. Elaborate submissions were made by both the sides.

The issues against the back drop of the facts herein are as under.

1. Whether the Plaintiff has acquired a right to ownership of the suit property under Section 38(1) of the Limitation of Actions Act (Cap 22).

2. Whether the claim of the Plaintiff be entertained in this suit as an overriding interest over the suit property against all the 4 defendants.

3. Whether there is an intercepting acknowledgement by the Applicant of the ownership to suit property by the 1st, 2nd and 3rd Defendants.

Coming back to the facts of this suit it is evident;

1. That the suit property is registered under Registered Land Act (Cap 300).

2. That the Plaintiff has entered the suit property and occupied the same from 1958 with the consent of the then registered owner who was her father and continued to do so when 1st, 2nd and 3rd Defendants became the owners.

3. The 1st , 2nd and 3rd Defendants along with their deceased brother were registered as owners of the suit property on 6th October, 1973.

4. As per the Plaintiff she only received a letter dated 21st October, 1991 from the 1st, 2nd and 3rd Defendants asking her to buy the land at the price of KShs.100,000.

5. The 1st, 2nd and 3rd Defendants thereafter sold the suit property to 4th Defendant at a price of KShs.200,000 and a Title Deed was issued in her name on 125th April, 1993.

6. The present Originating Summons was filed on 12th August 1993 against all the Defendants.

With the background of these facts, the Plaintiff is seeking the prayers as detailed hereinbefore, from this court

It is indisputable that the plaintiff's occupation of the suit property commenced with consent and permission from her father, the original owner of the property. In his life time, he transferred the suit property to his four sons, which included 1st to 3rd Defendants.

According to the sons, on acquiring the ownership of the property on 6th October, 1973, they sent letters to the Plaintiff and other occupants of T.210 and T.212 to vacate. Except for the Plaintiff all others vacated their properties. These letters, although denied by the Plaintiff to have been received by her, would in any event support the Plaintiff claim of adverse possession of the suit property.

I do agree with the submissions made by Mr. Gichachi that for a claim of adverse possession to succeed, it must be shown by the Plaintiff that the possession was adverse to the right of the real owner of the immovable property, in that although the real owner had a chance to take steps to arrest the adverse possession by evicting the occupier or to file a suit of eviction before the lapse of twelve years, he did not do so.

According to the 1st to 3rd Defendants they sent a letter demanding eviction on 5th December, 1973 and thereafter on 5th January, 1978 and 24th June, 1985. But they fell short of evicting her or filing a suit before the period of twelve years lapsed. Thus the period of twelve years was completed on or about October, 1985.

The matter, however, does not rest here.

The plaintiff has conceded receiving a letter dated 21st October, 1991 written by 1st to 3rd Defendants asking her to buy suit property at a price of KShs.100,000. but has denied having written letters of 10th February, 1978 wherein she has asked for more time to vacate the suit land and that of 28th October, 1991 where she has agreed to buy the suit property from her step brothers and has pleaded to lower the price which she could afford.

This is a crucial issue, because if this court agrees with the Defendants that she had written those letters, then those letters would tantamount

to acknowledgement of the ownership of the 1st to 3rd Defendants over the suit property.

It is my view that while the limitation period is running and there is an acknowledgement by the plaintiff as aforesaid then the limitation period starts to run from the date of the acknowledgement. This is the law as per the Limitation of Actions Act (Cap 22) (see sections 23 to 25 of the Act).

I have enumerated in detail the evidence of PW.2, the son of the Plaintiff as regards the demand of purchase from the 1st to 3rd Defendants. It is stressed by the plaintiff's counsel that the letter of 21st October, 1991 was written by the sons of Kinuthia and thus cannot be held to have been definitely sent by the 1st to 3rd Defendants. But as per the evidence PW.1 and PW.2 both have categorically accepted the receipt of that letter and have understood the same to be from the 1st to 3rd Defendants. PW.1 and PW.2 have categorically accepted that the Plaintiff was given first option to purchase the suit property. PW.2 stated interalia that the Plaintiff did not get the money and also that if he had the money, he would have paid the money. Of course thereafter he modified his version by stating that they were not supposed to ask for money from her. It is evident that the Plaintiff was sole beneficiary from her mother's house and the sons from other houses were given their shares. I also observe that specific assertion of her rights under adverse possession was made in their respective evidence.

The submissions were made to the effect that there is no evidence, on how and by whom the letters allegedlywritten by the plaintiff were delivered and who received the same. But while accepting the receipt of the letter of 21st October, 1991, no such comments was made. It is also not stated by either PW.1 or PW.2 that who received the said letter and who delivered the letter. In my view the receipt of one letter was conceded because it is convenient and beneficial to the case of the Plaintiff. On the other hand there is evidence to the effect that the crucial letter of 28th October, 1991 written by the Plaintiff could have been received by their late brother who was their secretary. It is also averred that the language of the letter is that of the Plaintiff and has been written by her son. I may however, hasten to state that no suggestion to that effect was made to either the Plaintiff or PW.2.

In my view, the Plaintiff and PW.2 have all the reasons to deny the crucial letter as their claim depends on that denial. I also note that the 1st to 3rd Defendants openly gave the first option to the Plaintiff and waited upto 1993 to sell the suit property to the 4th Defendants. This suit is filed after transfer of the suit property to the fourth Defendant. I have also seen demeanours of witnesses from both sides and after serious consideration, I find that there were enough reasons for the Plaintiff and her witness to lie than those from the Defendants. I can agree that when she had written the crucial letter, she was not aware of the law, but it is trite law that ignorance of law is not an excuse. On receipt of the letter of offer of sale, which is admitted, I cannot believe that she would have sat over the letter for 2 years.

I thus find that there were acknowledgements from the Plaintiff twice on 5th December, 1973 and on 28th October, 1991 and both these acknowledgements were made during the pendency of the limitation period and thus she has failed to prove her advers possession for continuous twelve years as required under Section 38 of the Limitation of Actions Act (Cap. 22).

As a result of my aforesaid finding, I shall not dwell on the issue of her claim of overriding interest over the suit property under the provisions of Registered Land Act (Cap 300), only because,e for this interest to accrue, she has first to prove her right under adverse possession which she has failed to prove.

I thus dismiss the Originating Summons dated 12th August, 1993 and order accordingly.

Due to peculiar circumstances of the case I order that each party to bear its own costs.

Dated and signed at Nairobi this 8th day of April, 2008.

K.H. RAWAL

JUDGE

8.4.08