



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU

Civil Suit 59 of 2006 (OS)

TRUPHOSA GICHUKU NYAGA.....PLAINTIFF

VERSUS

MICHAEL NJAGI NJERU.....DEFENDANT

JUDGMENT

The plaintiff filed an Originating Summons on 4/7/2006 seeking orders:-

(a) a declaration that Kagaari/Kanja/T135 has been acquired under adverse possession and should be registered in her name. The Originating Summons is supported by affidavit of applicant and in addition oral evidence was given. The plaintiff exhibited TGN1 dated 21/9/1970. The evidence is that the plaintiff entered the plot in dispute under a sale agreement. The Land Control Board Consent was not obtained and the transaction became null and void under section 6 of Land Control Act Cap.302. The plaintiff's submits that this was about May 1971. The land was registered in 1980 and time began to run for a period of 12 years which expired in 1992. The defendant submits that for adverse possession the plaintiff should have enforced her claims against the administrator of the estate. It is also the defence case that plaintiff entered the land by consent of his father and therefore the adverse possession doctrine does not apply. In support of his case the defendant cited the authority of **Civil Appeal No.35 of 2002 Titus Mutuku Karue vs Mwaani Investments Ltd and others**. In which he says it was held that the correct person to sue is the administrator. The plaintiff suggested issues for determination.

1. Has the plaintiff been in continuous open and un interrupted possession of the suit land?
2. Has the occupation been adverse?
3. Did the change of ownership from deceased to the Defendant interrupt the prescriptive rights of the plaintiff?
4. Is the plaintiff entitled to the declaration she seeks?
5. Who should pay costs of this suit?

In answer to these issues it is not disputed that the plaintiff entered into possession under a sale agreement in 1970. The sale agreement became null and void for failure to comply with provisions of Land Control Act Cap.302. There is no dispute that after the expiration of time which is prescribed under Land Control Act (3 months), the plaintiff continued in occupation of the land and the seller (registered

owner) took no action to evict the plaintiff from the land. The plaintiff continued in possession which became unlawful and adverse to the interests of Defendant and the plaintiff is still in occupation uninterrupted. No one has taken action to evict her from such possession. The possession was not adverse until the transaction became void for non compliance with Land Control Act.

It is therefore my finding that the possession was adverse and that a period of 12 years has elapsed. The title of the registered owner had become extinguished and he was only holding as trustee for the plaintiff. The defendant obtained transfer for purpose of Section 28 and 30 Registered Land Act Cap.300 which protects the unregistered rights (overriding interests) Section 30 (c) protects rights being acquired relating to the Limitation of Actions Act or by prescriptions. When the period of prescription terminated after 12 years as stated above the registered owner could not recover the land by virtue of Section 7 Limitations of Actions Act. Therefore he continued holding the land in trust for plaintiff. His title was extinguished. The plaintiff counsel refers to the case of *Githu Vs Ndeete KLR [1984] 776* in support of this proposition where the court said “The change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons adverse possession”. Where a transaction is entered into by a person who dies before the same is completed the said transaction can only be concluded by the administrator of the estate under the ordinary provisions of civil procedure. The surviving party does not become a beneficiary of the estate. He has to enforce his claims against the estate. The case of *Ngunyai Vs Ngumanyu [1985] KLR 606* is relied upon to support the preposition that this suit is not resjudicata just because the plaintiff withdraw her claims in the succession case. It is clear that the issues arising were not considered or adjudicated upon.

I have considered the defendants evidence and submissions. It is my finding that the plaintiff has proved her case on a balance of probability and I enter judgment in her favour as prayed in the Originating Summons with costs of this suit.

Dated this 7th April, 2008.

J. N. KHAMINWA

JUDGE

7/4/2008

Khaminwa- Judge

Njue – Clerk

Mr. Kathungu for Defendant

Kiama HB for Gichugi for Plaintiff

Read in open court.

J. N. KHAMINWA

JUDGE