



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 488 of 2001

MARGARET WANJIKU MUHIA PLAINTIFF

VERSUS

NGANGA MUTURA 1ST DEFENDANT

STEPHEN NYUMU NJOROGE 2ND DEFENDANT

JUDGMENT

I: Procedure

1. Two cases have been consolidated herein. Hccc488/01 Originating Summons filed by Wanjiku Muhia herein referred to as the plaintiff and Nganga Mutua herein referred to as the defendant for adverse possession.

2. The other suit is Hccc570/01 in which the said defendant sued the plaintiff for eviction.

3. For ease of reference the parties in this case are referred to as follows:-

Margaret Wanjiku Mutua Plaintiff

Represented by

Kinyua Murithi & Co. Advocates

Nganga Mutura Defendant No.1

Stephen Nyumu Njoroge Defendant No.2

Represented by

Mwicigi Kinuthia & Co. Advocates.

II: Background

4. The facts before this court to my understanding is that the defendant No.1 Nganga Mutua and his late brother Muhia Mutura had a long standing dispute over land parcel LR Githunguri/Kanjai/846. The two seem to have gone to the magistrates court where two orders by the courts were issued for the eviction of Muhia Nganga S. Wamwai (Magistrate and R. Kuloba (magistrate).

5. The late Muhia Nganga left the land and went to live elsewhere. According to his brother, the defendant, he quarrelled with his wife and returned home. The defendant permitted him to be on the land. The said Muhia Nganga committed suicide. At his funeral the widow his wife returned home. After the burial she refused to leave.

6. The defendant No.1 filed suit in the magistrates court being RMCC91/95 seeking orders to evict her from the said land. (Defendant No.1 had another parcel of land that was his). The magistrate gave orders for eviction. These orders were supported on appeal in the superior court CA 284/96 (Waweru J) but was set aside by the Court of Appeal CA 142/00 Gicheru, Shah & Owuor JJA who held that the issue was one of trespass and neither courts had jurisdiction to hear the said case. That the case ought to be remitted to the Lands Disputes tribunal.

7. The plaintiff took action by filing this present suit Hccc488/01 for adverse possession that she had been on the land since 1971. The defendant counter-acted this by filing Hccc570/01 seeking eviction of the defendant from the suit land. The 2nd defendant is the new registered owner of the land whom the 1st defendant sold the land to. He has since passed away and was represented by his son.

8. The parties admitted the following facts by consent:-

i) That on 19 December 1978 the 1st defendant was registered as the owner of Land parcel Githunguri/Kanjai/846.

ii) That on 12 July 1999 the 1st defendant sold to the 2nd defendant land parcel No. Githunguri/Kanjai/846.

iii) That prior to the sale of the land by the 1st defendant to the 2nd defendant there were court proceeding in:-

Githunguri Residence Magistrates court being Hccc 91/95 between the plaintiff and the 1st defendant.

Hccc No.284/96 arising from judgment of the Resident Magistrates Court.

CA 142/00 in the Court of Appeal between the plaintiff and the 1st defendant.

Civil Case 2/1983 Resident Magistrate court at Sheria between 1st defendant and [Muhia] Nganga Mutua (The husband of the plaintiff).

9. The plaintiff wishes to have portion of the land the defendant 1 and 2 wish the plaintiff to be evicted from the land.

III: Finding

10. The question is whether the plaintiff acquired the suit property by way of adverse possession and whether she is entitled to the suit property?

11. On the other hand whether the defendants are entitled to evict the said plaintiff in the prayers of

the suit they filed thereafter?

12. The Court of Appeal ruled that the courts had no jurisdiction to determine the issue of eviction of the plaintiffs as the defendant claimed she was a trespasser. Such jurisdiction laid with the Land Disputes Tribunal. This Court of Appeal decision was decided on 16 March 2001. The defendant 1 and 2 did not proceed to the Lands Disputes tribunal. They instead sold the land by Defendant No.1 to Defendant No.2. I must state here that whilst a suit is pending the doctrine of Les Pendes apply. That the land should not be sold. It is a situation that does not arise for the land registered under the Registration of Lands Act Cap.300

Ishmael Kagunyi Thande

V

Housing Finance Co. of Kenya Ltd.

2006 e KLR.

Where the prayer pleading his pendes was set aside by the applicants advocate while seeking a temporary injunction. The reason of setting aside the prayer being that the court had no jurisdiction to hear and or apply the doctrine under the Registered Lands Act.

13. The issue of eviction as far as the Court of Appeal decision is concerned is now decided being that this court has no jurisdiction to determine the same^[1]. I am accordingly bound by the said decision and as such the court hereby dismisses the suit Hccc570/01 filed by defendant 1 and 2 against the plaintiff.

14. As to the doctrine of adverse possession, the rules are clear that a person has to have been on the land for 12 years uninterrupted. In this case the plaintiff claims she had been on the land for 30 years. The defendant states that this is not true but did permit her husband to occupy the land. He claims eviction. He infact permitted the plaintiff to be on the land. This is seen when he permitted the plaintiff's daughter to be buried on the land. The said defendant No.1 stated the District Officer asked that he allows the burial there. Thus the plaintiff husband was buried on the land in 1991 and the daughter in 1998.

15. To my mind burial on the land has no significant as opposed to title. It is though important to note that the main issue herein is whether the plaintiff has been in quite occupation of the land.?

16. The issue of the plaintiff's presence on the land lies with the tribunal Lands Disputes Tribunal. I would withhold making any decision on the issue of Adverse Possession on grounds that the Court of Appeal has made a counter decision that this matter be heard with the Lands Disputes Tribunal on the issue of Trespass of land.

17. I accordingly would further find that this suit be stayed on Hccc488/01 pending the issue to be determined by the Lands Disputes Tribunal as directed by the Court of Appeal.

18. It is important to note that that plaintiff's is before court on her own rights and not that of her late husband.

19. I hereby order accordingly. The suit and costs to await the tribunals finding.

20. This matter will be mentioned within 90 days.

DATED THIS 18TH DAY OF JUNE 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

Z.K. Muriithi of Kinyua Muriithi & Co. Advocates for the plaintiff

S.M.W. Kinuthia of Mwicigi Kinuthai & Co. Advocates for the defendant

[1] Esther Kavaya v Nelson Musungu 2006 e KLR

b) Victoria Khakhubi & 3 Others v Joseph Maloba Odhiambo 2000 e KLR