



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 2534 of 1994 (O.S.)

BERNARD WAMENJU KABUGAPLAINTIFF

VERSUS

JOHN KIHENJO KANG'ETHE1ST DEFENDANT

JAMES MAMBO KANG'ETHE2ND DEFENDANT

AND

JONATHAN MBUGUA MWIRUTI.....INTENDED 2ND PLAINTIFF/APPLICANT

J U D G M E N T

(1) This is a typical case of litigation by proxy or remote control. Simon Mwiruti J. Mbugua (“Simon”), the original Plaintiff, filed this suit by way of Originating Summons on the 15th July 1994. He sued the two Defendants John Kiheny Kang’ethe (“**John**”) and James Mambo Kang’ethe (“**James**”), the registered proprietors of the piece or parcel of land known as Title No. Limuru/Ngecha/T.38 (“**the suit land**”) claiming title thereto by adverse possession. The Defendants filed a joint Defence on the 12th August 1994 denying the Plaintiff’s claim.

(2) Simon died in June 2002 before this case was heard. He was survived by a son Jonathan Mbugua Mwiruti (“**Jonathan**”). Jonathan is an adult and married with three children. After the death of Simon, a man named Bernard Wamenju Kabuga (“**Bernard**”) obtained a Grant of Letters of Administration Intestate of Simon’s estate and then applied to be substituted as the Plaintiff in place of Simon. Bernard made the application for a Grant jointly with his wife on the 16th January 2003. Bernard was Simon’s son-in-law and Jonathan is Bernard’s brother-in-law.

(3) On the 1st April 2005 when the hearing of the suit was in progress and both the Plaintiff (Bernard) and Jonathan had finished giving evidence, Jonathan applied to the court for leave to be joined as a Plaintiff in the suit on the ground that he too had lived on the suit land continuously for over twelve years and had acquired title thereto by adverse possession. I heard the application and dismissed it on the 31st March 2006, for the reasons stated in my ruling.

(4) Before lodging his application to be joined as Plaintiff, Jonathan had appeared in this case on the 28th February 2005 and gave evidence for the Plaintiff. Part of his evidence in chief was as follows:-

“I live on Plot 38 Ngecha also known as Limuru/Ngecha/T.38, and I am in court in connection therewith. I have lived on that plot since 1973. On the plot is my house and a small portion is reserved for subsistence farming. There is a residential house and outbuildings where I keep chicken and cows. The residential house was built by my father. I have a wife whom I married in 1980. I have three children. I was not aware that my late father had filed this suit.”

(5) Under cross-examination by learned counsel for the Defendants, Jonathan said ?

“From 1978, I have had exclusive user of the plot – not even my father cultivated it after 1978. I have never filed any suit against the Defendants claiming the land. I do not know when they became registered as proprietors.”

(6) The Plaintiff (Bernard) also gave evidence (P.W.1) and said, *inter alia* ?

“I know the Plaintiff who is my father-in-law. He is now deceased. I am the legal administrator of his estate together with my wife ... My brother-in-law, Jonathan and his family are currently in possession of the suit property. He and my late father-in-law have cultivated this land since 1973 and my brother-in-law built a house there in 1978 and started living there. The house was actually built by the deceased father-in-law for his son ... I pray the property be registered in our names as the Administrators of the deceased’s estate for transmission to my brother-in-law who has resided there since 1978.” [Emphasis added]

(7) A number of interested things arise from the testimony of these two witnesses. If Jonathan has been in occupation of the suit land since 1973 as both he and Bernard claim, why did Jonathan not join Simon as Plaintiff in 1994 to file the suit? As of that year, he was an adult having got married in 1980. By 1994, he was a mature adult with the requisite legal capacity to file a suit. He claims to have been in exclusive occupation since 1978. When Jonathan sought to be joined in the suit as plaintiff, it was far too late in the day and his application was rejected. It is clear to me, on the evidence, that having failed in his attempt to be joined as plaintiff, Jonathan is now relying on his brother-in-law Bernard to obtain the title for his (Jonathan’s) ultimate benefit. That much has been confirmed by Bernard in his evidence.

(8) John Kihenyoo Kang’ethe (“**John**”), the First Defendant, gave evidence. He lives at Naishi in Njoro, Nakuru District. James Mambo Kang’ethe, the Second Defendant, is his younger brother. When their father, Harun Kang’ethe, died at Nakuru in January 1978, they brought his remains back to Ngecha and buried him on the suit land. Their father had lived in Sabatia in Baringo District until his death. He had two parcels of land at Ngecha which he asked his younger brother, Simon Ngugi, to look after on his behalf. After the death of their father, the suit land was registered in their joint names. They asked their elder brother, Moses Gachuho, who lived close by to keep an eye on it.

(9) Sometime in 1994, Moses Gachuho reported to John that someone was erecting a house on the suit land and he also made a report to the local Chief. There was nothing the Chief could do because Simon had apparently placed a caution on the title way back in 1990, and followed it with a suit in 1994. John confirmed that Jonathan (P.W.2) indeed occupies part of the suit land albeit without his consent and against his will.

(10) Moses Gachuho (“**Moses**”), the Defendants’ elder brother, gave evidence on their behalf. He explained how after the death of their father Harun he applied for a Grant of Letters of Administration and then had the suit land registered in the joint names of his two brothers in accordance with the wishes of their late father. He confirmed that he looked after the property on behalf of his brothers and reported to them and the Chief when he saw Simon constructing a house on it in 1994. The Chief told him that since the matter was already in court, there was nothing he could do. Moses had lived in Ngecha since 1975. He also said that his younger brother, James, lives on the suit land. He categorically denied the claim by Simon in his Complaint that he had occupied the suit land since 1973.

(11) John and his brother Moses struck me as witnesses of truth. They answered questions put to them by learned counsel and the court without hesitation. I accept their evidence. However, I did not get the

same impression when I observed and listened to the Plaintiff (Bernard) and Jonathan giving evidence. Both of them appeared somewhat evasive and gave a clear impression that their evidence was fabricated and concocted for a particular purpose.

(12) Learned counsel for the Plaintiff submitted that he had proved that Simon, the original Plaintiff, and his son, Jonathan, were in occupation of the suit property for over twelve years between them and are consequently entitled to be registered as proprietors in place of the Defendants. Simon, in his Originating Summons and supporting affidavit claimed to have been in possession of the suit land since 1973. But according to Moses (D.W.2), the Defendants' elder brother, the first time he saw Simon building a house on the property was in 1994 and he promptly made a report to the Chief and also alerted his brother John, the First Defendant. On this point and in view of what I have said about the credibility of Bernard and Jonathan, I am persuaded by the evidence of Moses. I find as a fact and hold that Simon entered the suit land in 1994 and not in 1973 as he claimed.

(13) Jonathan in his evidence also said that he did not know until after the death of his father (Simon) that his father had filed a suit against the Defendants. This cannot be true since both of them are alleged to have been living on the suit land since 1973. It is also curious that even after the death of his father on the 3rd June 2002, Jonathan did not seek to be joined as a Plaintiff until after the hearing had started and he had already given evidence on behalf of Bernard, his brother-in-law.

(14) On the evidence, I find as a fact that the Plaintiff has not proved on a balance of probabilities that as at 1994 when he instituted this suit, Simon had been in occupation of the suit land for more than twelve years. It is true that Jonathan lives on the suit land and Bernard had suggested in evidence that I should grant him the title so that he, in turn, can transmit it to Jonathan. Even if he had succeeded, it would not have been proper to make an order in those terms because there is no such prayer in the Plaintiff. In any case, since he is in possession he did not have to ride on the back of his father or Bernard to claim title by adverse possession.

(15) For the reasons I have given, the Plaintiff's claim fails and I order that it be and is hereby dismissed with costs to the Defendants, such costs to be paid out of the estate of Simon.

(16) Finally, and with regard to the Counterclaim, I note that although the Defendants were granted leave of the court to amend their Joint Defence and Counterclaim on the 5th December 1997 by Githinji, J (as His Lordship then was), no amended joint defence and counterclaim would appear to have been filed. Consequently, the orders sought by the Defendants remain those set out in their Joint Defence and Counterclaim dated and filed on the 12th August 1994.

(17) The orders for injunction, vacant possession and eviction cannot issue against Simon as he is now long deceased; and the Defendants having failed to enjoin Jonathan in these proceedings notwithstanding his being in occupation of the suit land without their consent and against their will, such orders cannot also issue against him as he is not a party to this suit. In the result, the Counterclaim, on which no evidence was led at the trial, fails and I order that it be and is hereby dismissed with no orders as to costs.

Dated and delivered at Nairobi this Twenty-third day of May 2007.

P. Kihara Kariuki

Judge