



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 1710 of 2002

1. Land and Environmental Law Division

2. Subject of main suit:-

Land – Adverse Possession

a) LR Githunguri/Nyaga/T183

b) Defendant and plaintiff step brother

c) Father had two wives

d) Property owned by father – one parcel of land (divided equally between the two houses).

Two plots in town given each to each house.

3. In 1985 defendant/respondent –

i) Transfers LR Githunguri/Nyaga/T183 to himself as 1st

born son of the 2nd house

ii) Originating Summons filed and issued orders to be prayed for orders that

he be registered owner of the said land.

4. Held – Application for adverse possession rejected

Suit dismissed – plaintiff to be evicted from suit premises – defendant in possession of title.

j) Case law – Nil

k) Advocate

C. Goi of Gichuki King'ara & Co. Advocates for the plaintiff-present

Simon Ngugi Gichu the defendant in person – present

JAMES NGUGI GICHU APPLICANT

VERSUS

SIMON NGUGI GICHU RESPONDENTS

JUDGMENT

1: Background of suit

1. James Ngugi Gichu, the plaintiff/applicant herein is related to Siemon Ngugi Gichu, the defendant/respondent herein as step brothers. Their father had married the plaintiff/applicants mother who unfortunately passed away in 1948. He had a second wife who is mother to the defendant/respondent herein.

2. According to the plaintiff/applicant, the father had allocated him the suit land after he paid traditional the goat and a pot of beer. He told him he could construct on the said plot. He had been on the said land for 60 years. It seems the defendant came and claimed the land was his. The plaintiff had by now planted maize, bananas vegetables and different types of vegetables. He had lived on the land over 60 years and thus the 12 years had in effect expired.

3. On being cross examined by the court he stated that his father had a total of 7 ½ acres out of the two houses his mother was from the first house. She bore 3 sons and 3 daughters. The second house– which belongs to Siemon Ngugi – the defendant/respondent herein has 4 daughters and 3 sons. Out of the 7 ½ acres he was given 2 ½ acres. 4 ½ acres went to the 2nd house. That second house sold 2 acres. The two acres were originally bought. The second house sold the land.

4. A dispute arose before the District Officer and found to be not heard as his younger uncle passed away.

5. Out of the 3 sons only two of them are left. One of the sons died.

6. The plot they have he occupiers. The whole family is in a total of 5 acres land. 2 acres was sold. Out of this 5 acres land

2 ½ acres is occupied by his brother and 1st house 2 ½ acres is occupied by the 2nd house.

7. That they now want his land/plot.

II: Defence

8. The defendant/respondent did not attend court. He was served on 10 September 2007 but is said to decline to receive the summons notice for hearing.

9. He had in effect filed a replying affidavit that is on the record and to which the plaintiff did not file a further replying affidavit.

10. He depon that the said price of land was given to him as a gift on 10 April 1985. At no time was the plaintiff applicant being on the land for over 50 years but that their father acquired the first registration on 26 June 1957. The gift given by their father was during his life time. There was no secret about the land being given to him as a gift. Nine days later after the land was transferred to him both the plaintiff and the brother filed a cautions as licensee. This caution was accordingly removed on 24 August 1990.

11. The defendant/respondent was able to produce a ruling by the District Land Registrar Kiambu one Kago Gachiri who had the opportunity to hear the parties including their late father on whether the

caution should be removed or not. The said District Land Registrar stated that though the plaintiff/applicant (cautioner) had been given the land 20 years previously by his father and whereby he constructed a semi-permanent house, he further decided to transfer the same plot to his first born son of the 2nd house, namely the defendant respondent.

12. The father to the two sons told him he had a farm and two town plots "In his capacity" as the head of the family, he had sub-divided the farm into two equal portion and given the same to both his wives. He [had] also "decided" to share his town plots between the two houses by giving each plot to the eldest sons of each family. The father had never authorized the plaintiff/applicant to construct any building nor was it his wish to give both plots to the same house. The matters was referred to the elders who ruled that the title be cancelled and transferred back to the father and be distributed at his death. The Land Registrar rejected this proportion. The suit land was transferred by the father to his respective families during his life time and in keeping with the Kikuyu customary law. That the father decision was therefore correct to apportion the property be held as he wished.

13. The plaintiff/applicant was given 30 days to appeal to the Chief Land Registrar when the caution was removed on 8 July 1985 and registered on 24 August 1990. No appeal appears to have been field.

14. An attempt to file suit was made to the district officers sometime in July 1987 known as case Nyaga/T183 and T182. I believe it was not completed for hearing on grounds that an uncle passed away.

15. Should adverse possession be granted to the plaintiff's applicant?

II: Finding

16. The plaintiff/applicant wishes that the title Githunguri/Nyaga T 183 be extinguished on the grounds that he had lived on the land since 6 January 1948. These respondents stated that the father was registered as absolute proprietor on

26 June 1957 and it could not be correct that the plaintiff had been on the land since 1948. That at no time was the land bequeathed to the plaintiff applicant but in effect it was bequeathed to the family of the 2nd house. The intention of their father that each house gets one town plot (of which one plot is the dispute property in question) and the other be divided equally between the two houses. This being the farm.

17. The plaintiff/applicant was aware when their father registered the respondent as owner of the land. There was no secret when in 1985 this occurred. It was given to him as a gift.

18. I find that the plaintiff/applicant has not established adverse possession. The land was never intended to be his and or nor did his father bequeath it to him but transferred it as a gift to the respondent , the 1st son of the second house.

19. The intention of their late father which was duly expressed by him during his life time is that he intended the properties to be shared equally between the two houses. Namely, 50% of the farm land and each to have the land plot in town with T183 specifically giving to the 2nd house to be held by the defendant/respondent.

20. I reject this suit for adverse possession and do hereby dismiss this suit with no orders as to costs to the defendant on grounds that the defendant failed to attend the court hearing.

21. For ease of clarification the plaintiff/applicant be evicted from the suit premises. The defendant holds title and is accordingly in control of the same.

Dated this 3rd day of October 2007 at Nairobi.

M.A. Ang'awa

JUDGE

C. Goi of Gichuki King'ara & Co. Advocates for the plaintiff-present

Simon Ngugi Gichu the defendant in person – present