



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CIVIL CASE 6 OF 1995

JESSIE KUTHIIPLAINTIFF

VERSUS

ELIAS THAATHI.....1ST DEFENDANT

MURIUKI M'NJUNGE.....2ND DEFENDANT

JOHALNA IRERI SIMON.....3RD DEFENDANT

STEPHEN KIBE.....4TH DEFENDANT

JUDGMENT

The plaintiff filed a plaint in this case on 3.2.1995. The plaint was amended on 5.3.1997. The plaintiff pleads that on 6.12.1961 the deceased M Njunge Wanjiku alias M'Njunge Njoku became registered proprietor of plot **Gaturi/Githimu/1210**. He had borrowed money from AFC secured by charge on the said land. The said M'Njunge Wanjiku died on 10.9.1978. He was the father of first defendant. After his death and on 10.10.1978 first defendant agreed to sell to the plaintiff's husband Mana Njuguna 3 acres of land out of said registered land for the sum of shs.27,000/=. The first defendant was able to redeem the land and it was agreed that he would give a portion of 3 acres to the said Mana Njuguna. The first defendant took out a grant of the estate of his deceased father. He put the purchaser and his family into possession of the land (3 acres). However before the legal transfer could be effected the husband of plaintiff the said Mana Njuguna died.

Subsequently and in furtherance of the agreement to transfer the land to the plaintiff an application for and consent of the Divisional Land Control Board was obtained in favour of plaintiff and her son. The plaintiff and her family are still in occupation of the land registered as **Gaturi/Githimu/3892** and **3893** (Original 1210). The plaintiff exhibited exhibit 8 application of consent of relevant land control board. Consent was given to sub divide and transfer by sale of land sub divisions to Jesse Kuthii her son Leonard Njeru Njagi, part of plot **No.Gaturi/Githimu/1210**. It is therefore clear that the reference to this land as Gaturi/Githimu in exhibit one 1210 was an error in recording number of plot. The first defendant is not in a position to disown it as in reality he was clearly dealing with plot number 1210.

The first defendant did sub divide the parcel **Gaturi/Githimu/1210** into portions which were allocated new numbers **Gaturi/Githimu/7094, 3892, 3893, 3894 and 3895**. Notwithstanding that the first defendant land received purchase price for the land and the plaintiff was in possession, he ,1st defendant refused to transfer the land to the plaintiff who is now claiming parcels Gaturi/Githimu/7094, 3892 and 3093. On 30.6.1995 the parties before the amendment of the plaint and the addition of 3rd and 4th defendants agreed issues were filed. In summary the issues raised as between the parties these are;

- (1) Did the original owner M’Njunge Wanjiku as registered owner of plot No. Gaturi/Githimu/1210 charge the same in favour of AFC and was the loan outstanding by the time of his demise.
- (2) Did the said deceased or his personal representative the first defendant require to redeem the land.
- (3) Was there an agreement to sell some 3 acres out of the said land entered into by original proprietor with plaintiff’s husband and or did the first defendant enter into or continue the same with the plaintiff.
- (4) Were the plaintiff and her family put into possession pursuant to the said agreement or was she a licensee.
- (5) Did first defendant obtain the necessary land board consent to facilitate the transfer of the 3 acres to the plaintiff and did he fail to effect the transfer in breach of agreement.
- (6) Has the plaintiff been in continuous uninterrupted possession of the suit land since 1978 and has she acquired title by adverse possession. To these issue it is to be added No.7 does the plaintiff have any competent cause of action for determination by the court against 3rd and 4th defendants.
- (8) Has the plaintiff established a case for adverse possession against the defendants 3 and 4.
- (9) Has the plaintiff established a case for specific performance against 3 and 4 defendants.

The plaintiff has exhibited the certificate copy of a green card in respect of plot No. **Gaturi/Githimu/3892** which is a subdivision of plot No.1210 now held by Stephen Kibe the 4th defendant. Also plot no.3892 Gaturi/Githimu was a subdivision of plot No.1210 now in name of Mbogo Njue. Further sub division of 1210 is parcel No.3895 which has been sub divided into other plots under title No.4846 and 4847 which were sub divided in several plots and among them plot 7094. On 6.2.1985 all these plots were reregistered firstly in the name of first defendant, Elias Thati M’Njunge and his son Muriuki M’Njunge second defendant for no consideration at all. Regarding the title number Gaturi/Githimu/1210 the land was first registered in the name of original owner [on 6.12.61] and on 11.9.1981 in the name of first defendant and 2nd defendant who was then a minor aged 15 years. Both of them became registered in succession case. The land was subdivided on 6.6.1985.

Its clear then that when the first defendant proceeded to apply for sub division of plot No.1210 he had already obtained a grant of representation in the estate of his deceased father. He was acting as administrator. Agreement exhibited as document No.1 of the plaintiff clearly shows that the first defendant voluntarily admitted that his father died on 10.9.1978 leaving the family land with a loan from AFC and there was demand for the repayment of money secured. It is shown that he entered into the agreement with plaintiff husband for the sale of 3 acres of land and acknowledged receipt of shs.14,000/= leaving shs.13,000/= unpaid. The agreement speaks for itself. It was signed and witnessed. This agreement is clear evidence of the plaintiffs claim. As I have stated there is an obvious error in the numbering the land in the agreement. Evidence shows that the correct number was 1210 not 210. The defendant has not demonstrated that his father had any other plot in which the sale agreement related. The denial of the plot number is a mere defence. The identity of the land is known since the plaintiff and her family entered into the occupation straight away and are still in occupation. There is also supporting evidence that the exhibit no. 1 agreement of purchase was entered into by the first defendant and plaintiff’s husband when the first defendant as stated wanted to pay off the AFC loan secured by title charge registered on 7.10.77 and 14.1.78 respectively. Both charges were discharged on 19.12.78 or soon

thereafter. Furthermore the agreement was witnessed by his brother and there was no objection from the mother – widow. It is my finding that the agreement was genuine and validly entered into by the parties named therein. I believe the evidence of the plaintiff that the agreement entitles her and her family to 3 acres of land which were purchased under the said agreement by her late husband. Since the provisions of Land Control Act were complied with she is entitled to registration as owner. I would therefore answer issues unlured one and two in one affirmative. On issue 3 the agreement was validity entered into by the first defendant and plaintiff's deceased husband. Issue no 4 is in the affirmative the plaintiff was granted possession as a purchaser not a licensee and the land board consent was granted for the transaction and the first defendant failed to honour the agreement of purchase. Issue no.5 is in affirmative land board consent was granted and the plaintiff with her family has been in continuous occupation of the land for a long time. The Limitation of Actions Act cap 22 prohibits one from filing suit to recover possession of land after expectation of 12 years. In this case it is the plaintiff in possession who filed suit. The defendant's title had become extinguished and there was no interest to be transferred to subsequent parties. I declare that the subsequent purchases bought nothing and have no interest in the land in dispute. On lines 7, 8 and 9 I find that the same are to be answered in the affirmative the plaintiff has a case against all the defendants and is entitled the title to her 3 acres of land as agreed. The first plaintiff flagrantly cheated the plaintiff of land and court of equity can not allow him to benefit and enjoy rights he had acquired illegally. Looking at the authority of ***Kaimu versus Shaw (1986 – 1989) E A 221.*** That court held that **“when interpreting a contract the court ought to give effect to the intention of the parties as far as possible and avoid deviating interpretations however early or possible they may appear.”** In this case the contract was commenced by the plaintiff's husband who died before completion and the first defendant upheld the contract and promised to complete the same with the widow (plaintiff). He took positive steps by obtaining consent of land board control board in her favour kept her in possession of the land. He never took action to remove her from the land up to now. By the year 1995 – 19 years. In the said case above quoted it was held **‘At the time the appellant sought to enter the suit land his title as well as part of his predecessor in title had extinguished and- But it is elementary that a grantor of land cannot grant better title than he has.’** Counsel for the plaintiff also submits that where suit for recovery of land becomes prohibited under Limitation of Actions Act that title becomes an over riding interest pending registration under registered land act. This was held in the case ***of Githui versus Ndate (1984) 776 and Kimani Kibogoro (1990) KLR 49*** and that no change of ownerships by registration or succession otherwise can change the position. As is to be seen this case involves the issue of sale of land. There is no provision that prevents claims of adverse possession to the filed by any of plaintiff and in a complex claim it is appropriate to file and to proceed by way of plaintiff. I have perused the submissions of 1st and 2nd defendants they ask the plaintiff's suit be dismissed with costs. They do not mention that they received purchase price for the land. They rely on technicalities. In answer the plaintiff is the one who was taken by the 1st defendant to the land control board for the necessary consent to transfer the land. This confirms that although the transaction was commenced by her deceased husband she continued the sale and she obtained and retained possession of the land sold. She has told us. The issue of proceeding by plaintiff is already discussed above. The 3rd and 4th defendants have had nothing to say except that they purchased the land subsequently but they must have examined what land they were purchasing and must have noticed the land was occupied. The defendants have cited the judgment of court of appeal in ***Civil Appeal No. 65/1990 (1991) KAR. Holding 2*** stated if the appellant had wished to base his claim on adverse possession he should have brought it by way of OS and not by plaintiff. The facts of this case are quite different. The OS is a summary procedure which does not envisage complex issues calling for evidence of witnesses. For the above reasons judgment is entered for plaintiff against all the four defendants for:-

- a) declaration that the plaintiff has acquired title to parcels **Gaturi/Githimu/7094, 3892, 3893** measuring 3 acres in total.
- b) Declaration that the defendant's title to the above plot has become extinguished and therefore the defendants 2nd 3rd and 4th acquired no title from him (first defendant). All titles registered in their names regarding the said plot shall be cancelled and be expunged from the land register in respect of that the titles and original number **Gaturi/Githimu/1210** be restored original number.
- c) That the plaintiff be registered as the proprietor of parcels Gaturi/Githimu/7094, 3892 and 3893

measuring 3 acres in total.

d) The costs of this suit shall be taxed and be paid to the plaintiff by all the defendants jointly.

It is so ordered.

11/12/2007

Khaminwa – Judge

Njue -Clerk

The Judgment is therefore rectified as above.

J. N. KHAMINWA

JUDGE