

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL SUIT 67 OF 2005 (OS)

PHLISILA WANJA KAMAU.....PLAINTIFF

VERSUS

MARGARET KARUGI KAARA.....1ST DEFENDANT

CHARLES WAWERU GATONYE.....2ND DEFENDANT

JUDGMENT

The Originating Summons was filed by the plaintiff Philisila Wanja Kamau against Margaret Karugi Kaara and Charles Waweru Gatonye seeking orders of declarations in respect of a portion of land out of plot No. 1150. The Originating Summons is supported by affidavit of plaintiff and is based on grounds set out on the application. The plaintiff swears that she has resided on the said plot since 1968 to date. The first defendant was registered as owner of the plot under orders issued in Succession No.145/1992 and that in that Succession case the first Defendant was holding land in trust for other beneficiaries including the husband of the plaintiff (who died in 1994). The plaintiff swears that the first Defendant subsequently sold the said piece of land to 2nd Defendant fraudulently and in collusion with others. The second defendant obtained title on 7/7/1997. There was a tribunal case where the plaintiff was awarded 1 ½ acres. The award was entered as decree of court in Senior Resident Magistrate Kerugoya No. 49 of 1997 and upheld by Provincial Land Disputes Appeal Tribunal on 15/9/1999. However there is evidence that the award and proceedings in this matter was quashed by the High Court at Nairobi on 4th day of July 2000. Therefore the proceedings instituted by the plaintiff in the Tribunal are not of any effect.

However, the issue of adverse possession as between the plaintiff and the Defendants remains unresolved. In his replying affidavit the 2nd Defendant swears that he took possession of the land in 1997 and has fenced and is exercising rights of ownership. The first Defendant also swears that he sold the land to 2nd defendant in 1997 after the confirmation of grant in the estate of her husband. And that her son Moses Kamau Kaara the husband of plaintiff was given 4 acres of land at Mwea where he settled with his family. Also that the land allocated to plaintiff's husband had belonged to the first Defendant and she had agreed to get it registered in deceased name and that when the grant was confirmed and she was given 5.55 acres namely plot No. **Ngariama/Thirikwa/1550** and that she gave the proceeds of sale to her two surviving sons. It is to be noted that no money was given to plaintiff on behalf of her husband. The first Defendants explains that she never gave plaintiff anything because her husband and his brothers had already got 4 acres each in Mwea from their father in his life time. It is also denied that plaintiff had ever been in possession since she has always resided on Mwea Land. The issue of possession is settled. The plaintiff in her cross examination said she does not reside on the land in dispute but she resides in Mwea, see PW2 evidence. After considering all the evidence on both on both sides. It appears to be true and find so that the plaintiff has not proved her possession of the disputed piece of land at any time. The second defendant swears that he fenced his land when he purchased it and took possession 1997. The other issue to be noted is that the succession of the father –in-law estate was undertaken when the plaintiff's husband was still alive. He is said to have died in 1994. The succession case was No. 145 of 1992 at Kirinyaga and he never denied the land. The Plaintiff's claim that she was awarded a piece of land by the Tribunal cannot be maintained as the award was set aside by the High Court.

It is my finding therefore that declaration sought on the ground of adverse possession has not been proved on the prayer numbered two. I have not found any evidence of fraud or collusion against the defendants. The first defendant sold thee land in dispute after grant was confirmed. The upshot is therefore that the plaintiff has not proved her case and this suit is hereby dismissed.

No order is made as to costs.

Dated this 7th December, 2007.

J. N. KHAMINWA

JUDGE

7/12/2007

Khaminwa- Judge

Njue -clerk

Plaintiff present in person.

Read in open court.

J. N. KHAMINWA

JUDGE