



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 184 of 2003

DELAMERE ESTATES LIMITED.....PLAINTIFF

VERSUS

NDUNG’U NJAI & 42 OTHERS.....DEFENDANTS

JUDGMENT

The plaintiff is the registered owner of a parcel of land known as **L.R. No. 429** which contains by measurement 640 acres or thereabout and is situated in Naivasha area and is popularly known as **Manera Farm**. By a plaint filed on 18/11/2003, the plaintiff stated that the defendants were or are employees of the plaintiff. Prior to 1999, they were all housed on a 2 acre portion of the said land in what was known as a “**labour camp**” and in or around 1999 the labour camp residents requested the plaintiff to allocate a portion of its land to them as retirees and/or as long serving employees and/or dependants of deceased employees of the plaintiff. The plaintiff obliged by purchasing alternative parcels of land for the people who were staying in the labour camp and the purchased parcels of land were known as **NAIVASHA/MWICHIRINGIRI BLOCK 4/662 & 671**. The plaintiff purchased the said parcels of land on condition that the defendants would be moved there so that they vacate the plaintiff’s property. At the time of purchase of the said parcels of land, the people who were in occupation of the plaintiff’s land numbered 25 as per a list which was produced as Plaintiff Exhibit 7.

It is the defendants and/or their representatives who identified the aforesaid parcels of land which measured seven (7) acres or thereabout before the plaintiff purchased the same and thereafter the defendants subdivided parcels of land amongst the 25 people and titles were issued to them.

The plaintiff provided at its cost piped water to the said two plots and further provided transport to move the defendants. Nineteen (19) of them moved out and resettled on the aforesaid purchased properties but six (6) of them refused to move and started putting up semi permanent houses on the plaintiff’s land. The plaintiff raised the matter with the area District Officer who had been involved in all the aforesaid negotiations and transactions between the plaintiff and the defendants and the District Officer Naivasha wrote a letter dated 8/8/2000 addressed to the people who had refused to move out. The said letter was as follows:-

“District Officer’s Office

Naivasha Sub District,

P.O. Box 11

NAIVASHA

8th August 2000.

All Squatters,

Gichagi Wendani Group

Delamere Estate

NAIVASHA

RE: NOTICE TO VACATE

It has been observed that you have continued to reside illegally in a private property you lay no legal claim (sic). The rest of you have left for a new settlement facilitated by Delamere Estates as a token of appreciation to those who one time were the farm's employees. You are hereby given 21 (Twenty One) days from the date of this letter to voluntarily vacate the area. Note that if at the elapse of the period given, you have not moved out, you will forcibly be evicted and possibly prefer legal charges against you.

(Signed)

DISTRICT OFFICER (1)

NAIVASHA SUB DISTRICT

The squatters refused to move out and on 28th October, 2000 the Government decided to evict them but they resulted to violence and went on rampage, beat up the plaintiff's staff and burned one house and destroyed a bridge. The plaintiff stated that the defendants are now illegally occupying about 50 to 60 acres of its land and have purportedly sub-divided the land amongst themselves and constructed semi permanent structures thereon.

By reason of the defendants' illegal occupation of the said land, the plaintiff has been deprived of use and enjoyment of the same, the plaintiff averred.

The plaintiff therefore urged the court to make a declaration that the defendants were trespassers upon the plaintiff's 50 to 60 acres portion of **L.R. No.429** and order their eviction and further issue a **quia timet** injunction to restrain them by themselves, their agents and/or servants from further encroachment on the plaintiff's land. The plaintiff further prayed for general damages for trespass and costs of the suit.

The defendant s filed a joint statement of defence through Wachira Mburu, Mwangi & company Advocates. They denied the plaintiff's claim and in particular denied that the plaintiff was the registered owner of the suit land, **L.R. No. 429**. They stated that on diverse dates between the years 1943 and 1978 they moved in and settled on the suit land and since the said time to date they were in actual possession of the land. They alleged that they had dispossessed the plaintiff of the said land having been in continuous and exclusive possession of the suit land and were exercising all the rights of an owner of the land. They further claimed that they were in adverse possession of the suit land for a period in excess of 26 years prior to the commencement of this suit. They therefore stated that the plaintiff's suit was time barred and the plaintiff's title to the land had been extinguished by reason of the provisions of **Limitation of Actions Act Cap 22 Laws of Kenya**. They urged the court to dismiss the plaintiff's suit.

The plaintiff filed a reply to the said defence and joined issues with the defendant in so far as the defence

consisted of denials to the plaintiff's claim. The plaintiff denied that the plaintiff settled on the suit land between 1943 and 1978 or that they had acquired any rights over the suit land. The plaintiff further denied that the defendants had been in adverse possession of the plaintiff's land for over 26 years prior to the commencement of the suit. The plaintiff also denied that the suit was statute barred as alleged by the defendant.

When this matter first came up for hearing on 14th March, 2005, an application for adjournment was made on behalf of the defendant's advocate, Mr. Kariuki. The court was informed that the defendant's advocate had lost his brother and was therefore engaged in burial arrangements. None of the defendants were in court but the application for adjournment was granted and the defendants were ordered to pay court adjournment fees before the next hearing date.

On 11th April, 2005 the plaintiff's advocates set down the matter for hearing on 2nd November, 2005. A hearing notice was served upon the defendants' advocates on 23rd May 2005. Come the said date, the defendants had not paid court adjournment fees as earlier ordered and neither themselves nor their advocate attended court. The defendants' advocate had sent his court clerk to court to instruct any advocate to seek an adjournment on his behalf for the reason that counsel was unwell. One Miss Manyoni Advocate made the said application on behalf of Mr. Kariuki for the defendants. The nature of Mr. Kariuki's ailment, if any, was not disclosed and no medical evidence of his illness was tendered to the court. The defendants were also absent and no explanation was given for that. The plaintiff's counsel strenuously objected to the said application for adjournment.

The court considered the application and declined to exercise its discretion in favour of the defendants and proceeded to hear the plaintiff's case. The plaintiff adduced its evidence through its Managing Director, Mr. Christopher Yebei Chirchir.

It is not in dispute that the plaintiff is the registered owner of the parcel of land known as **L.R. No. 429** (suit land) as per a Deed of Conveyance and Assignment that was produced as Plaintiff Exhibit 1. It is also not in dispute that the defendants are either employees or were employees of the plaintiff. Some of the defendants may also be dependants of present or former employees of the plaintiff. They had been authorised by the plaintiff to enter and occupy a portion of the suit land when they were working for the plaintiff and remained in occupation of the suit land after their employment by the plaintiff came to an end. Others remained on the suit land as dependants of their retired spouses or parents. The reason why the plaintiff purchased the two properties known as **NAIVASHA/MWICHIRINGIRI BLOCK 4/662** and **NAIVASHA/MWICHIRINGIRI BLOCK 4/671** was for purpose of settling the defendants. It was unfortunate that they turned down the plaintiff's kind gesture even after the two parcels of land had been sub-divided for them and piped water connected thereto and instead chose to remain in unlawful occupation of the suit land. When the plaintiff and/or the Government of the Republic of Kenya tried to remove them from the plaintiff's property they resorted to violence and destroyed some properties belonging to the plaintiff. It was also said that they were engaging in wanton destruction of forest and were encroaching on water catchment areas as well as engaging in illegal game hunting.

Their only defence is that they have been in adverse possession of the suit premises for over 26 years and therefore the plaintiff's claim is time barred. Whereas the defendants and their advocate failed to attend court for the hearing of the matter and advance their line of defence, I do not think that they have any right of occupation of the suit premises under the doctrine of adverse possession. If a person is an employee of another and by virtue of his employment he is allowed to reside on his employer's property, his entry and occupation thereon is not adverse to his employer's rights because he entered therein with permission of his employer.

The person is actually a licensee and time does not run in favour of a licensee as was held in **HUGHES VS GRIFFIN [1969] 1 WLR 23**. In that case it was also held that a licensee has no adverse possession.

In **WAMBUGU VS NJUGUNA [1983] KLR 172** the Court of Appeal considered the issue of adverse possession and held that in order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having

discontinued his possession of it. Since the defendants originally occupied the suit land with permission of the plaintiff, their occupation was not adverse. In the above cited case, the court held that occupation can only be either with possession or adverse; the two concepts could not co-exist. But once permission to occupy has been determined, the occupation now becomes adverse. It would appear that sometimes in the year 2000 the defendants and other people who were in occupation of the suit land were given notice to vacate the same failing which they were to be evicted forcefully and that was after they had refused to relocate to the alternative lands which the plaintiff had purchased for them. That is when their adverse possession and occupation of the plaintiff's land began but not earlier.

The plaintiff's Managing Director also told the court that between 1965 and 1978 the plaintiff offered its employees who had retired or were about to retire facilities to purchase a parcel of its land measuring about 5000 acres and the said settlement is currently known as **Kasambara Farm**.

In my view, the defendants' occupation of the suit land is without any colour of right and they must respect the plaintiff's proprietary rights over the suit land as by law enshrined.

On a balance of probabilities, I hold that the plaintiff has proved its case and I declare that the defendants are trespassers upon the plaintiff's portion of land which they have unlawfully occupied and hereby order them to vacate therefrom within the next ten (10) days from the date hereof failing which the plaintiff shall be at liberty to evict them by use of appropriate legal means. I also issue a perpetual injunction to restrain the defendants, their agents and/or servants from engaging in any further acts of trespass upon the suit land.

Each party shall bear its own costs of the suit.

DATED, SIGNED AND DELIVERED on this 14th day of February, 2006.

D. MUSINGA

JUDGE

14/2/2006

Judgment delivered in open court in the presence of Mr. Karanja holding brief for Mr. Kiburi for the plaintiff and N/A for the defendant.

D. MUSINGA

JUDGE

14/2/2006