



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI

CIVIL SUIT No. 993 of 2003

**KENYA COMMERCIAL BANK LTD (Suing as the Administrator of the Estate of
PAUL NJOROGE MUCHENE (Deceased)**

..... **PLAINTIFF**

VERSUS

**SERAH NJERI MUCHENE (Sued on her own behalf and as the Administrator of the Estate of
PERMINUS MUCHENE MWANGI (Deceased)).....**

DEFENDANT

JUDGMENT

This suit was filed on 26th September 2003 by way of an Originating Summons dated 25th September 2003 brought under Order XXXVI Rules 3D and 3F of the Civil Procedure Rules, Section 38 of the Limitation of Actions Act and Section 143 of the Registered Land Act. The Kenya Commercial Bank appears as Plaintiff, suing as the Administrator of the Estate of Paul Njoroge Muchene (hereinafter referred to as “the deceased Plaintiff”). The Defendant Sarah Njeri Muchene is sued on her own behalf and as the Administratrix of the Estate of Perminus Muchene Mwangi (hereinafter referred to as “the deceased Defendant”). The Plaintiff seeks a determination of the questions whether or not

- 1. The land in dispute L.R. No. KABETE/LOWER KABETE/566 was bought in or around 1962 jointly by the two deceased persons (Paul Njoroge Muchene and Perminus Muchene Mwangi) from one Stephen Ngige in the ratio of 2.62 acres to 4 acres**
- 2. the deceased Defendant had the whole land registered in his name on 22nd June 1962 at the expense of the deceased Plaintiff’s rights over 2.62 acres**
- 3. the deceased Plaintiff and his family have been in uninterrupted possession and occupation of the portion of 2.62 acres of land in dispute to date**
- 4. the said occupancy by the deceased Plaintiff and his family is adverse within the meaning of Section 38 of the Limitation of Actions Act**
- 5. the register pertaining to L.R. No. KABETE/LOWER KABETE/566 should be rectified in view of the foregoing**
- 6. the Defendant should pay the costs of these proceedings.**

For avoidance of doubt as to the effect of the various provisions of the law relied on herein I have considered it appropriate to cite the same as hereinunder:

1. (a) Rule 3D of Order XXXVI provides that:

“(1) An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

(2) The Summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed

(3) The Court shall direct on whom and in what manner the summons shall be served.

(b) Rule 3F of Order XXXVI provides that:

“An application under the registered Act other than under Sections 120, 128, 133 143 and 150 thereof shall be made by Originating Summons unless there is pending a suit involving the same lands when the application may be made by summons in that suit.

2. The relevant parts of Section 38 of the Limitation of Actions Act reads as follows:

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person registered as the proprietor of the land.

(2) An order made under sub Section (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

3)

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this Section.

3. Section 143 of the Registered Act reads as follows:

“(1) Subject to subsection (2), the Court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that only registration, (other than a first registration) has been obtained, made or omitted by fraud or mistake”

(2) The register shall not be rectified as to affect the title of a proprietor who is in possession and has acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

There is no dispute as to the claimant’s possession and use of the suit premises since the 60’s. Indeed such possession and use is admitted by the Defendant who however says that the same was by way of a license given by the “deceased Defendant” on condition that no construction should be undertaken thereon. The same is supported by other witnesses who however admit not to have witnessed the grant of license as to confirm the terms thereof.

Also not in dispute that the Deceased Defendant was previously registered as the sole owner of the suit land in 1962 and that his widow, the Defendant was subsequently registered on 24th March 2003 as owner, being the administratrix of his estate. Apparently, the issue of whether an Originating Summons is the proper procedure for lodging a claim of this nature was dealt with by the Hon. Justice Hancox in his Ruling delivered on 8th December 1976 in H.C.C.C. No.1422 of 1976 brought by deceased Plaintiff against the Deceased Defendant over the same suit land. I have no doubt that the parties hereto are aware of that Ruling which appears not to have been appealed against. The outcome of that suit was also not

disclosed to this Court. It would seem that Section 143 of the Registered Land Act is wrongly cited being a provision expressly excluded under Rule 3F of Order XXXVI. It is clear from the reading thereof that when one is claiming under Section 143, the suit ought not to be brought by way of an Originating Summons.

Although claiming occupation, the Plaintiff's 1st witness (PW.1) Lawrence Njoroge Muchene in his oral testimony admitted that the Plaintiffs have never been in occupation but have cultivated the land. He claims his father bought the land without disclosing the source of his knowledge. He says only that he was aware of goings on because he was then 22 years old. PW2 a neighbour also confirms the cultivation but knows nothing of the sale save that he introduced the seller of the land, Stephen Ngige Wainaina to Perminus (deceased Defendant). He believes that the Deceased Plaintiff financed the sale without giving evidence as to the source of his knowledge. He was not a party to the negotiations. PW3 claims being present when the Deceased Plaintiff, prior to his death, asked the Deceased Defendant to cause a certificate to issue in his name in regard to 2.62 acres. She claims that there were 9 other persons present but those persons were neither named nor called to testify in support of that claim.

Curiously DW1 the registered proprietor Sarah Njeri Muchene contradicts herself on the issue of the Plaintiffs' possession. She said in her oral testimony that her Deceased husband never allowed the deceased Plaintiff to cultivate on the land and that her having said he had done so in her Replying affidavit of 28th November 2003 was not true. She later under re-examination said that indeed her husband did allow the Deceased Plaintiff to graze on the land. She told the Court that the financing of the purchase was by husband who produced Kshs.3,500 and her father who advanced them Kshs.9000/=. She said further that the money was given to the vendor by one Maruri whose evidence has not been availed to the Court for undisclosed reasons. That the said Maruri featured somewhere in the transactions is supported by the vendor's testimony that he is indeed the one who paid the moneys to him. The vendor however denied any knowledge as to the source of the funds.

The Defendant solicited the vendor's testimony to support her claim that her husband bought the land directly and solely from the vendor but the vendor denies having dealt with him at all. She says that her deceased husband knew of the property and that it was up for sale and introduced her to vendor. The vendor's testimony does not support this at all since he says that it was Maruri who persuaded him to sell the land and that the Deceased Defendant was not introduced to the vendor until much later. He says in paragraph 14 of his affidavit that:

“when Maruri started making instalments he was accompanied by a young man whom I came to know later as Perminus Muchene Mwangi.”

He contradicted himself in cross examination when he said that he came to know Perminus after the 1st and 2nd installments had been paid. Nowhere does he state having met the Defendant at the time of the sale as claimed by her. One witness whose evidence is not supported by any other is PW.2 who claims to have been the one who introduced the deceased Defendant to the deceased Plaintiff in regard to the sale of the suit property in 1962. I find his testimony, together with that of PW3 and PW4 and PW5 to be of no evidential value.

Parties herein invited the Court to visit the suit premises which the Court ruled would be decided upon at the close of oral submissions. After considering the facts and reviewing the evidence I formed the view that the visit would not be necessary since the possession and use of the suit premises by the deceased Plaintiff's estate is not disputed. Neither is the acreage said to be in their possession and use. Counsel for the Defendant also sought directions as to whether to make submissions on the law in the course of the proceedings which the Court directed should be reserved until the end of Counsel's submissions and examination of witnesses. Despite being invited to file written submissions on or before the 24th February 2006, none of the parties appears to have done so.

I find that the evidence adduced herein by the Plaintiff is insufficient to support their claim of adverse possession in that the exact date of taking possession has not been established. The purchase of the

property by the Deceased Plaintiff has also not been proven on a balance of probabilities and all evidence adduced to that effect is mere hearsay. No agreement has been adduced and no witness account has been given in relation thereto. In any event, prove of sale would only be useful if the claimants were seeking a declaration of a trust or presumed trust which is not the case here. Possession of over a long time is not disputed but there is strong doubt if such possession has been adverse at all.

Adverse possession, legally defined, is

“An occupation inconsistent with the right of the owner: the possession of those against whom a right of action has accrued to the true owner and without lawful title.” [see P.G. Osborn’s Law Dictionary 5th Edition.]

Adverse possession could be presumed from the suit filed in 1976 by the deceased Plaintiff whose outcome, as previously noted has not been made known to this Court. It is not clear to me how such adverse possession can be presumed against the Defendant who became registered as proprietor to the suit premises on 24th March 2003, when no trust is presumed as against her deceased husband. The present claim for adverse possession is directed at the Defendant as the registered owner. The law as restated in the leading cases of GATHURE –vs- BEVERLY [1965] EA 514, and KAMAU –vs- KAMAU [1984] KLR 539 is that a period of prescription cannot begin to run against a title shown in a certificate of title prior to the date of the grant of the certificate and such period begins to run from the date of registration of each and every transfer effected upon the land. It is possible to have a claim in adverse possession even where the initial entry into the land is engineered by an agreement for sale as is clear from the case of SOSPETER WANYOIKE –vs- WAITHAKA KAHIRI [1979] K.L.R. 236. However, no claim in adverse possession can exist against the Defendant herein prior to the lapse of 12 years from the 24th March 2003. This suit having been filed six months after her assuming ownership of the suit premises is grossly premature. Coupled with my other findings on the facts as presented by the various testimonies recorded herein, I am of the considered view that the Plaintiff has not proved its case against the Defendant on the balance of probabilities, and that none of the questions sought to be determined herein can be determined in favour of the Plaintiff. In particular, I find that the evidence adduced herein is insufficient to satisfy this Court that the requirements of Section 143 of the Registered Land Act have been fulfilled to warrant the cancellation of the Defendant’s title and the rectification of the register. In my final conclusion, I find that this suit fails. I have no option but to dismiss the same, which I hereby do, with costs to the Defendant.

Dated and delivered at Nairobi this 22nd day of March 2006.

M.G. Mugo

Judge

In the presence of:

Mr. Thiga for the Applicant/Plaintiff

Mr Githinji for the Respondent/Defendant