



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 1103 Of 1999

LUCY WAHU GICHAGAPLAINTIFF

VERSUS

MWIHAKI MUTURI DEFENDANT

J U D G M E N T

On 02.06.99, the plaintiff filed the present proceedings by originating summons under sections 37 and 38(1) of the Limitation of Actions Act (Cap.22) and Order XXXVI rules 3D and 12 of the Civil Procedure Rules praying for the following orders:-

1. That the applicant has become entitled by adverse possession to all that parcel of land comprised in title number KIAMBAA/WAGUTHU/T805 in Kiambu District and registered under the Registered Land Act in the name of the defendant.
2. That the applicant be registered as the proprietor of the said land parcel number KIAMBAA/WAGUTHU/T805 in substitution of the defendant.
3. That the Chief Land Registrar do enter in his register the said substitution under section 125 of the Registered Land Act (Cap.300).
4. That the costs of this suit be provided for.

The originating summons is supported by the plaintiff's affidavit sworn on 02.06.99.

On 07.05.01 the defendant filed a replying affidavit in opposition to the plaintiff's claim.

Eventually the suit came up for hearing before me on 18.10.05 whereat the plaintiff was represented by learned counsel, Mr. K.K. Macharia while the defendant was represented by learned counsel, Mr. G.K. Gatere.

The plaintiff testified on her own behalf. Her case may be summarized as under. She entered into an agreement with the defendant in 1983 for the defendant to sell her the suit land, title No. KIAMBAA/WAGUTHU/T805 for Kshs.80,500/=.

Plaintiff told this court that she raised various amounts totaling Kshs.37,000/= towards the agreed price. She said she made the various payments on 14.10.83, 20.06.90 and 22.01.84. It was plaintiff's evidence that she entered the land in 1983 before making the payments and that she has planted crops on the land. Plaintiff added that the defendant subsequently refused to pay the balance of the purchase price and sued her in the lower court to get her to vacate the land vide Kiambu Senior Principal Magistrate's Court Civil Case No.774 of 1993, Mwiwaki Muturi vs Lucy Wahu. The parties in the 1993 Kiambu case are the defendant and plaintiff, respectively, in the present case. The plaintiff herein told this court that the above Kiambu case for her vacation of this suit land was dismissed. I pause here to note that the proceedings in Kiambu SPM's CCC No.774 of 1993 were produced by the defendant herein as Exhibit 'C' and they show that the case was dismissed 'for non-attendance and prosecution', with costs. Plaintiff herein further told this court that the defendant sued her again regarding the same land and for similar orders Vide Kiambu Senior Principal Magistrate's Court Civil Case No.415 of 1996, Mwiwaki Muturi vs Lucy Wahu. I pause once again to note that the proceedings in the second Kiambu case were produced before this court by the defendant herein and they show that the second case was also dismissed for non-attendance of the "plaintiff" therein.

The plaintiff herein told this court that no appeals were filed against dismissal of the Kiambu cases. Plaintiff, however, told this court that the defendant herein took the issue of the suit land to the D.O. Kiambaa but she (plaintiff) was not aware if the matter is pending before the D.O. Kiambaa.

Plaintiff maintained that she has been in occupation of the land since 1983, i.e over 20 years; that she has not been evicted; and that her occupation has been peaceful. Plaintiff urged this court to order that she be given title to the land, on account of adverse possession for over 12 years.

During cross-examination, plaintiff said the balance of purchase price not paid is Kshs.43,500/=. Plaintiff also said that after defendant herein refused to take the balance of the purchase price, she (plaintiff) took the money to her then advocate who was still representing her in the present case and that the advocate gave her a receipt. The said receipt was not produced before this court. Plaintiff also told this court that he never went to the Land Control Board to ask for transfer of the land to her.

Plaintiff reiterated the prayers in her originating summons.

On the other hand, the defendant herein, an elderly lady, gave evidence on her own behalf. She too never called any other witness. The defendant's evidence may be summarized as under. She produced as Exhibit 1 a Certificate of Official Search dated 14.01.02 showing that she is the registered proprietor of land Title No. KIAMBAA/WAGUTHU/805 (suit land) since 01.03.83. Defendant confirmed she entered into an agreement to sell the land to the plaintiff for Kshs.80,500/= but the plaintiff paid her various sums totaling to only Kshs.36,700/= and refused to pay the balance. According to defendant, payment was supposed to be completed between 1983 and 1985 but the plaintiff never completed making payments. Defendant denied that there was agreement for plaintiff to settle on the land before completing payments. Defendant conceded that the plaintiff constructed a wooden house on the suit land in 1985.

Defendant confirmed suing the plaintiff herein vide Kiambu Case No.774 of 1993 claiming the balance of the purchase price, failing which she would refund to the plaintiff what she had received from her. Defendant herein said her Kiambu case was dismissed for non-attendance by her advocate. It was the further evidence of the defendant herein that after Kiambu Civil Case No.774 of 1993, she filed a similar case against the plaintiff herein for eviction of plaintiff from the suit land, but that case too was dismissed for non-attendance of advocate for the defendant herein who was plaintiff in the Kiambu case. Defendant

added that after dismissal of the second Kiambu case, she referred the matter to Kiambaa Land Disputes Tribunal. The defendant herein pointed out that the complaint she lodged with the Land Disputes Tribunal has not been decided.

Defendant maintained that the plaintiff should not be registered as proprietor of the suit land in her place as she has not purchased it. It was the defendant's case that she did not refund the money received from the plaintiff because the plaintiff refused to accept refund of her money. Defendant denied receiving a letter from plaintiff signifying her willingness to pay defendant the balance. It was defendant's case that after plaintiff put up the wooden house on the suit land, the defendant sued but unfortunately her effort to get redress from the lower court floundered on account of her advocate's non-attendance before court. Defendant acknowledged that the plaintiff put up a timber house on the suit land and still lives there. Defendant added that after dismissal of her two suits before the Kiambu Court, she resorted to the Tribunal. Defendant acknowledged that since 1983 she has not entered the land or cultivated on it.

Defendant urged this court to order eviction of the plaintiff from the suit land, notwithstanding absence of a prayer to that effect in her pleadings. She expressed willingness to refund the plaintiff what she paid to her and clarified that the money to be refunded is Kshs.36,700/=.

I have duly considered the rival arguments of the parties.

The claim of the plaintiff herein over the suit land is based on adverse possession of the said land. Plaintiff told this court that she has been in uninterrupted possession of the land since 1983. Defendant denied that plaintiff took possession in 1983. She (defendant) testified that plaintiff took possession in 1985 and that upon the plaintiff's failure to complete paying the balance of the purchase price, she (defendant) took the plaintiff to court at Kiambu seeking plaintiff's eviction but the two cases were dismissed on account of the failure of her counsel to attend court.

As I understand it, adverse possession in this context relates to a situation where the occupier of someone else's land takes and remains in possession of the land in question with the knowledge of the registered proprietor for 12 years or over without protestation or interruption by the registered proprietor. The present suit was filed on 02.06.99. If we accept the plaintiff's evidence that she took possession in 1983, her occupation or possession would be about 16 years. Pausing here for the moment, the issue of interruption of the possession begs to be addressed. I note that the defendant sued for eviction of the plaintiff herein from the suit land vide Kiambu SPM'sC CC No.774 of 1993. By then the plaintiff herein, even if we assume she had been there from 1983, would have been in possession or occupation for only 10 years. Such possession, being for less than 12 years, would not entitle the plaintiff to a claim over the land by adverse possession.

I hold that the institution of the 1993 Kiambu case constituted an interruption of the possession relied on by the plaintiff herein to claim to be entitled to the land. I further hold that even on this score alone, the plaintiff's claim must fail. Additionally, I accept the evidence of the defendant herein that the plaintiff herein took physical possession of the suit land in 1985, which reduces the period of plaintiff's possession to a period of only 8 years as at the time the present suit was filed. Once again, the issue of adverse possession for 12 years or over does not arise. I hold that on this score also the plaintiff's claim must fail.

It is not without significance that after Kiambu SPM's CCC No.774 of 1993 was dismissed for technical reasons, the defendant herein filed Kiambu SPM's CCC No.415 of 1996. When this latter case was again dismissed for similar reasons, the defendant herein did not relent but went to the Land Disputes Tribunal with the similar aim of seeking eviction of the plaintiff herein from the suit land. The defendant herein has projected herself as someone determined to assert her claim over the suit land and she took gallant steps to assert such claim. Her misfortune seems to be that she was let down by the lawyer who acted for her. I would not lay the lawyer's failure at the doorstep of the defendant herein in those circumstances.

I hold that the plaintiff has not proved her case to the standard required by law, i.e. on a balance of probability, and that the plaintiff's suit must fail. It is hereby dismissed with costs.

Orders accordingly.

Delivered at Nairobi this 5th day of April, 2006.

B.P. KUBO

JUDGE