



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 74 of 1995

M'IMPWI M'ARIMI 1st PLAINTIFF

M'ARIMI M'TUERANDU.....2nd PLAINTIFF

V E R S U S

DORCAS KARINTHONI.....3rd DEFENDANT

JUDGEMENT

1. The Originating Summons dated 29.3.1995 is expressed to be premised on Order XXVI Rule 3D of the Civil Procedure Rules as read together with s.38 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The Application if that is the law applicable ought to be one in which the Applicant seeks orders of adverse possession.
2. During the hearing of the Application, Mr. Nyaboga abandoned prayers 1 and 3 which were the prayers for orders of adverse possession and the one for an order directing the Land Registrar Meru to rectify the register and to transfer land parcel number Nyaki/Giaki/669 to the Plaintiffs in place of the Respondent. The remaining prayer which is supposed to be the basis for this Judgment is prayer 2 which is a prayer for “a declaration that the respondent holds the title to the said land parcel No. Nyaki/Giaki/669 in trust for the plaintiff”
3. The other prayer (No.4) is for an order that costs be provided for.
4. I note that Lady Justice Sitati in a Ruling dated 6.12.2005 found that the Respondent was properly served and that the hearing of the Originating Summons should proceed by way of Affidavit evidence. The only Affidavit on record which is relevant to the substantive dispute is the one sworn by the Applicant on 28.3.1995. The Respondent has never filed any response to the Summons and there is therefore no other Affidavit to look at.
5. The Affidavit of the Applicant aforesaid has 18 paragraphs and all but one make out a case for the abandoned prayer for orders of adverse possession to issue. The only paragraph that is of relevance to the prayer now left for determination i.e. the question of trust is paragraph 17 which reads as follows: -

“That I am also advised by my lawyers and I verily believe the advice is sound that all persons, including the said DORCAS KARINTHONI M'ANAMPIU, who were registered as proprietors of the said land parcel subsequent to the 26.7.1979 held the said land in trust for me.”

The evidence leading to this averment is this;

6. That he was allocated land parcel number Giaki/669 measuring 12.40 acres in 1965. No evidence whatsoever of this allocation is given. In any event, he states further that he took possession of that land and built a homestead there and he has been living there ever since. That on an undisclosed date he found that the land was registered in the name of one Mugambi Maina. He adds that when at an undisclosed date he searched the register he found that since 27.2.1989, the land is actually registered in the names of Dorcas Karinthoni M'Anampiu who he says has never taken possession of the land. With this background, he expects this court to declare that the said persons have been holding the land in trust for him.

7. I am at a loss to understand the basis for the alleged trust. Counsel said nothing of it and the Affidavit in support of the Summons has nothing save the background to the declaration.

8. The evidence as presented is hollow, and cannot be the basis for a declaration of trust. In fact once the claim for adverse possession was abandoned, then all evidence in the supporting Affidavit went away with it. The prayer for a declaration of trust was left without hinges or legs to prop itself on and sadly it cannot be granted in the state it was left in. The plaintiffs ought to have considered the matter a little further.

9. As it is, there is little to prod this court to grant the orders sought. Prayers 1 and 3 of the Summons dated 29.3.1995 are declared as abandoned and dismissed while prayer 2 is found to be without merit and is also dismissed. I shall make no order as to costs since the Respondent did not enter appearance or participate in the proceedings.

10. Orders accordingly.

Dated, signed and delivered at Meru 11th Day of July 2006.

ISAAC LENAOLA

JUDGE

In the Presence of:

Mr. Ogoti holding brief for Mr. Nyaboga Advocate for the plaintiffs

N/A Advocate for the defendants

ISAAC LENAOLA

JUDGE