



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

Civil Case 27 of 2003

CHARITY WARUGURU MAINA.....
PLAINTIFF

VERSUS

MAGINDA RANCHOD CHOUHAN.....DEFENDANT

JUDGMENT

The plaintiff brought this suit by way of Originating summons seeking orders that the defendants title, interest or claim over the suit property LR NO. NANYUKI MUNICIPALITY/2787/9/XIV have extinguished and the legal title shall rest in CHARITY WARUGURU MAINA the legal representatives of the estate of Maina Kamurwa who has been in adverse possession of the said parcel of land and that the Commissioner of Lands be ordered to cancel the existing title and to register and issue a new title deed for the said parcel of land in the name of Charity Waruguru Maina on behalf of the beneficiaries of the estate of Maina Kamurwa.

The plaintiff's case is that she is the daughter of Maina Kamurwa now deceased and she is suing as the administrator of his estate after obtaining letters of administration for the benefit of the beneficiaries of the estate.

The family has lived on the suit land since 1971 which is now over 30 years. The family of Maina Kamurwa (deceased) has been in possession of the suit land since 1971 and the defendants have never been in possession. The suit land is about 7.1 acres and they have been utilizing 5.1 acres while the remaining 2 acres is used for residential purposes.

There is a residential house occupied by a tenant. The plaintiff told the court that when her father died in 1996 he was buried on the suit land. Her brother by the name Njoroge Maina died in 1998 and he was also buried on the suit land. At the burial of her late father there were attempts by the defendants to stop the burial but she went to court and an order was issued to allow the burial. But when she buried her late brother in 1998, there was no resistance but she admits that there have been threats to evict the family from the suit land.

On cross examination she admits that the defendants are the registered proprietors but she alleges that the transfer was obtained through fraud. She also admitted that the tenant who lives in the residential house on the suit land pays rent to the defendants and that she has never received rent from that house. But she urged the court to order that she be registered as the proprietor of the suit land in place of the defendants having acquired ownership by adverse possession.

While the defendant's case is that one Hussein Ahment the father of the 2nd and 3rd defendants (now deceased) was the original owner of the suit land LR NO. 2787/9/XIV Nanyuki during the period prior to 1971 when he sold it to Maina Kamurwa (now deceased) who was the father of the plaintiff herein for the agreed purchase price of Shs.55,000/=.

Maina had borrowed the money from HFCK to enable him to purchase the suit land and the charge was registered against the title. He ran into arrears and HFCK threatened to auction the land to recover the amount owed. Maina approached Mr. Naginders Chonnah and Mr. Ahmed Hussein with a request that they do lend him funds to enable him to pay off HFCK. But it was agreed that instead of lending Maina some money, the two would buy ½ share of the property from Maina at the agreed purchase of Shs.40,000/=. And in April 1977 Maina approached the late Ahmed Hussein and the 1st defendant requesting them to purchase his half share of the property so that the two would own the whole land exclusively.

This was agreed and Maina signed transfer forms after receipt of the purchase price of Shs.40,000/=. But despite the fact that Maina had transferred the whole land to the defendants, he continued living on a small portion of land which he had previously occupied on the lower part of the land. It is the defendants case that it was the late Maina who requested the defendants to allow him stay on the land for a short while pending his purchase of some land elsewhere.

This was an oral agreement between parties who had become familiar friends over the years since 1971. It is conceded that the suit land initially belonged to one Mr. Ahmed Hussein (now deceased) who sold it to the plaintiff's father Maina Kamurwa who later resold it to the defendants who are sons of the late Ahmed Hussein. Although the plaintiff claims that the transfer was fraudulent but the defendants have a certificate of registration. A certificate of title is held to be conclusive evidence of proprietorship. Section 23(1) of the Registration of Titles Act (Cap 281) provides:

“23 (1) The certificate of title issued by the registrar to purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as a proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances easement restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation on which he is proved to be a party”.

The alleged fraud must be pleaded and proved. In this suit fraud is not pleaded nor has it been proved. However this is not an issue since the claim in this suit is based on adverse possession. It is not uncommon for claimants of land to put their cases in the alternative, that is to say by pleading the agreement under which he entered the land and then asking for an order based on adverse possession.

The plaintiffs claim is based on adverse possession and therefore as to how the defendants got registered as owners of the land in dispute is not an issue here.

To prove a claim under adverse possession all that the plaintiff has to do is to establish that he came into occupation and took possession exclusively and has lived on the suit land continuously without interruption for a period of over 12 years. The plaintiff concedes that the family of Maina has been utilizing 5.1 acres. The 2 acres where the house stands is being utilized by the tenant who has rented the house and she admitted that she has never received any rent from the said tenant. The present tenant of the house is one GORDON HERBERT. He was called to testify and in his evidence he told the court that the house was rented to him by the defendants and to whom he pays the rent.

The defendants case however is that there has not been any dispossession of the defendants by the acts of the plaintiff; acts of use are not enough to take the soil out of the defendants in title and vest it in the plaintiff. To defeat a title by dispossessing the former owner, acts must be done which are in consistent with his enjoyment of the soil for the purpose for which he intended to use it.

The suit land was transferred by Maina the father of the plaintiff to the defendants in 1977 and the

defendants were registered as proprietors of the suit land. According to the defendants, the said man requested verbally to be allowed to continue occupying the portion he occupied for a short period while he made arrangements to move away to his mother's land. This was in 1977. He stayed on until 1996 when he died. This was about 20 years. And when he died he was buried on the suit land. Three years later his son by the name Njoroge Maina also died and he was buried on the same land.

A person is in adverse possession in whose favour time can run. Nevertheless it does not seem to me that “**adverse possession**” means to some extent at least that which it means. Time cannot run, as I see it, in favour of a licensee and therefore he has no adverse possession.

Possession is a matter of fact depending on all particular circumstances of the case, the character and the value of the property, the suitable and the natural mode of using it, the course of the conduct which the proprietor might reasonably be expected to follow with due regard to his own interest, all these things are to be taken into account in determining the efficiency of a possession.

Trivial acts of trespass do not amount to possession.

In order to acquire by statute of limitation a title to land which has a known owner, that owner must have lost his right to the land by being disposed of it or by having discontinued his possession of it. The courts have always been reluctant to allow an encroacher or a squatter to acquire a good title of land against the true owner.

In order to acquire by statute of Limitation a title to land which has a known owner, that owner must have lost his right to the land by being dispossessed of it or by having discontinued his possession it. And the running of time must be continuous and not suspended against a known owner who has failed to assert his right against the adverse possession. In this case time started running from the time the defendants acquired registration which is well over 27 years now. From the time the suit land was transferred to the defendant to the time Maina died and was buried on the suit land was over 20 years and his son Njoroge Maina died about 2 years later and was also buried on the suit land. I am satisfied that the Maina family has been in occupation and adverse possession for over 30 years and have become entitled to acquire the same by adverse possession. But the next question is whether or not the family of the plaintiff occupied and were in possession of the whole of the suit land.

The plaintiff had conceded that the residential house which was rented out occupied about 2 acres. She also conceded that it was rented out by the defendants who received rent from it. This was confirmed by DW2 GORDON HERBERT who testified that the house was rented to him by the defendants and to whom he paid the rent.

The plaintiff also conceded that she has never received any rent from the said house. This means therefore that the plaintiff's successful claim by adverse possession is limited only to the portion the family is occupying and in exclusion of the area where the residential house stands which is about 2 acres. Section 38 of the Limitation Act provides:

(10) (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act (Government Lands Act, the Registration of Titles Act, the Land Titles Act or the Registered Land Act) or a land comprised of a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as a proprietor of the land or lease in place of the person then registered as the proprietor of the land.”

In my opinion the plaintiff has established her claim by adverse possession. The defendant is not entitled either to possession of or to oust the plaintiff from the portion occupied by the plaintiff. The plaintiff has acquired a transmissible interest in the portion occupied by her against the whole world including the defendants.

The declaration which the court will make is that the plaintiff is owner of the well and clearly demarcated portion which is in her possession and occupation by the Maina family.

The District Lands Surveyor to be contacted to survey and to fix the pickets to enable the process of transfer and registration by the District Land Registrar and the costs of that process to be born by the plaintiff.

Consequently judgment is entered for the plaintiff as above stated.

Each party to bear his own costs.

Those are the orders of this court.

Dated and delivered at Nairobi this 20th day of September 2006.

J.L.A. OSIEMO

JUDGE