REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2850 of 1990

GEORGE MBURU KOIGI ………………...……..………….. PLAINTIFF

VERSUS

FRANCIS KIENJEKU KOIGI ……...…………..……. DEFENDANT

JUDGMENT

This old 1990 case arises out of a claim based on the tort of trespass. In his Plaint, filed on 12th June, 1990, the Plaintiff claims that he is the absolute owner of all that parcel of land known as LARI/KIRENGA/472 (hereinafter "the suit property"). He avers that the defendant in 1960 unlawfully entered into the suit property, and despite several demands that he vacates, the defendant has failed to do so. He wants the Defendant to vacate the suit property, and seeks a permanent injunction to restrain him from interfering with the suit property. The defendant in his Defence and Counter-Claim states that the Plaintiff holds title to the suit property in trust for himself and the defendant, as well as the entire beneficiaries of their late father. The Defendant denies trespassing upon the suit property and raises a preliminary objection that the suit is statute barred. The Defendant also claims that he has acquired prescriptive rights over the suit property by way of adverse possession due to open and uninterrupted possession for over 12 years.

The undisputed background facts of this case are that the Plaintiff and the Defendant are half-brothers, with a common father, the late Koigi Githu, and different mothers, who were both wives of their deceased father. The deceased had two parcels of land being Lari/Kirenga/389 (hereinafter "389") about 19 acres and Lari/Kirenga/472 (the suit property or "472") about 25 acres. Both lands were owned by the deceased who was at the material time (in 1958) in detention. The deceased was released from detention in 1959. Both families lived in 472 until 1965, when the Defendant's mother was moved to Kirenga 389. The Defendant refused to move and continued staying on the suit property. At this point, the Plaintiff and the Defendant have a different story to tell.

The Plaintiff in his testimony stated that the deceased upon his release from detention divided 389 into portions, allocating one portion to the defendant. Notwithstanding this, the defendant still refused to move from the suit property. The deceased planted branches in 472 i.e. the suit property as a sign that the Defendant should move, but the Defendant uprooted the twigs as a sign of refusal or defiance. This culminated in the Chief ordering the Defendant to pay his father by way of compensation a ram, a he-goat and some money. The Plaintiff claims that the suit property was given to him absolutely by his father in a written will, which he did not produce before this court. He said that he was given the suit property as he had 13 children. He admitted that the Defendant moved into the suit property in 1960 when the act of trespass began.

The Defendant, on the other hand, in his testimony stated that the Plaintiff was registered as the owner of the suit property because he was the eldest son, and only because at that time it was not possible to register two pieces of land in the name of one person. The Plaintiff being the eldest son was chosen to hold the same in trust for others. Upon his return from detention, the deceased indeed claimed that the land was his. The Defendant further testified that the other brothers also continue cultivating the suit property but do not live there. The Defendant continues to occupy about four acres of the suit property.

The clan told him that the Plaintiff was registered as the trustee of the suit property, which belonged to all the deceased's children. The father died in 1989, and was buried in the suit property.

In his submissions before this Court, Counsel for the Plaintiff argued that the Plaintiff was the absolute owner of the suit property under the Registration of Lands Act (Cap 300 of The Laws of Kenya). Further, that the deceased had approximately 30 years before his death to allocate portions of the suit property to the other brothers, and he neither did this, nor rescinded the registration. Relying on the ***Six Carpenters' case*** (1610) 8 Co. rep. 146a, Counsel submitted that the Defendant's act amounted to trespass ***ab initio*** even though the initial entry may have been allowed. He relied on the case of ***M'Mukanya vs M'Mbijiwe (1984) K L R 761***, which sets out the ingredients of the tort of trespass, and on ***Mbira vs Gachuhi (2002) E A 37***, stating that the Defendant's occupation was not adverse to the Plaintiff's title. Counsel further submitted that "trust" was a question of fact to be proved by evidence; that there was no evidence of trust; and lastly that the testimony of DW 2 was hearsay as he was in detention at the material time.

Counsel for the Defendant submitted that the written will relied upon by the Plaintiff that allegedly bequeathed the suit property to him had not been produced in Court nor did the Plaintiff explain why the deceased gave him 25 acres which is substantially more that he gave others. Counsel relied on the case of ***Muthuita vs Muthuita (1986) KLR 328*** arguing that the Defendant having occupied four acres of the suit property for 30 years peacefully, he was entitled to the same, by way of adverse possession. Counsel finally submitted that the suit was statute barred under the Limitations for Action Act for having been filed more than three years after the cause of action began.

Before I look into the substance of the suit, let me deal with the preliminary objection, which if it satisfies the requirements in ***Mukhisa Biscuits vs West End Distributors (1969) E A 696*** will dispose this suit. A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued by way of preliminary objection, may dispose the suit.

In this case, the act of trespass began in 1960. The suit was filed 30 years later. The Plaintiff is not only guilty of laches, but the suit is barred under the aforesaid statute of limitations. **On that ground alone, this suit is dismissed with costs to the defendant**.

This leaves the Court to consider the Defendant's Counter-Claim which is based (1) on trust and (2) on adverse possession.

With regard to the Defendant's claim that the suit property is held by the Plaintiff in trust for himself and the other nine brothers and sisters of the Plaintiff, I find that there is no such evidence on a balance of probability. The Plaintiff has produced a Certificate of title of ownership. That is prima facie proof of his absolutely ownership, and the onus is on the Defendant to demonstrate that that ownership was subject to a trust. There is no such evidence. The deceased common father to both the Plaintiff and Defendant had a good 30 years, after his release from detention, and before his death, to arrange or alter the situation giving rise to the Plaintiff's ownership. He did no such thing. On the contrary, he sub-divided 389 and settled the other children, leaving the suit property in ownership of the Plaintiff. The Defendant's claim that the clan elders pronounced the suit land to be held in trust for **all** the children at various clan meetings was not corroborated. No clan elder was called. The only other witness (DW 2) was also in detention at the time, and his testimony was not particularly helpful. It is also instructive to note that none of the other siblings (brothers and sisters of the Defendant) either laid a claim for the suit property based on trust, or at the very least came forward to give evidence of the same in this Court. The Defendant simply has not discharged the onus of establishing "trust".

Accordingly, I reject the first ground of the Defendant's counter-claim, and hold that there is no evidence of "trust" before this Court, and that the Plaintiff is the absolute owner of the suit property, except for the four acres occupied by the Defendant to which I now turn to in the final part of this Judgment.

With regard to the issue of adverse possession, there is no dispute that the Defendant has been in uninterrupted possession for 30 years. The issue is whether his possession was "**adverse"** to the rights of

the Plaintiff? Was his occupation inconsistent with and in denial of the title of the true owner of the suit property? Or, as Justice Hancox, Ag J. A. said in ***Francis Muthuita vs Milka Muthuita*** ***(1982 – 88) 1 KAR 42*** was it "**hostile"**, because as he said:

"***possession can only be adverse if it is held against another party, in the sense of being hostile."***

There is sufficient evidence to indicate that it was indeed "hostile". The Plaintiff himself gave evidence that he attempted, on many occasions, to ask the Defendant to vacate the suit property without success, and that is indeed why he filed this suit. He testified that his late father planted branches on the suit property to indicate that the Defendant should vacate, but the Defendant uprooted the same as an act of refusal or defiance. The Defendant was even condemned to pay compensation for his defiance. All this indicates that his occupation was "**adverse"** to that of the Plaintiff, and having been in such uninterrupted possession of the suit property for a period exceeding 12 years, the Defendant has acquired title to the same.

I, therefore, allow the Defendant's Counter-Claim based on adverse possession and declare that he is entitled to the four acres of the suit property occupied by him. I award him costs of this suit.

Dated and delivered at Nairobi this 19th day of September, 2006.

ALNASHIR VISRAM

JUDGE