



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

**Civil Suit 579 of 2003**

**ANGELA WAIRIMU GETHI .....PLAINTIFF**

**VERSUS**

**CHARLES WAHOME GETHI .....DEFENDANT**

**J U D G M E N T**

The Plaintiff herein is the widow of the brother of the Defendant.

It is not disputed that the suit land i.e. L.R. No.7381 was registered in the name of the deceased husband of the Plaintiff. (*Hereinafter referred to as the deceased*).

It is the Plaintiff's case that the Defendant occupied a small portion of the suit land as a caretaker and agent of the deceased husband. After his death his licence to occupy the said portion came to an end and thus she seeks the vacant possession of the portion occupied by him.

The Defendant denies that he was a caretaker and agent and thus a licensee for the portion of 6 acres. He claims that he was put in possession of the 6 acres plot by the deceased in 1970 as a tenant at will and has been in continuous and uninterrupted possession of the said portion for 33 years. He claims that he developed the land by fencing the same, digging terraces thereon, supplying the same with piped water, planting trees thereon, erecting dwelling houses thereon as well as conducting farming activities thereon without any interruption.

The Plaintiff, in her evidence, testified that her husband passed away in the year 1994 and by a grant of probate of written will she became the registered owner of the suit land by succession transmission. Going back to the history, she stated that herself and the deceased were in active public service and needed a caretaker for the suit land. The deceased thereupon asked the Defendant who was jobless to act as a caretaker of the suit land in Nyandarua which and measures over 300 acres. The Defendant has his homestead in Nyeri District.

They bought cattle and the suit land was mainly used for cattle. Though they also grew some vegetables.

In 1989 the deceased gathered his family as he was ailing and handed over the management of the farm to her in place of the Defendant. She was not sure whether the deceased conveyed this message to the Defendant who also denied having received the same. But she showed the letter to the Defendant soon after 1994. According to her the Defendant was living in the Farm House till then and he moved out

from there and put a structure of granary in another portion of the land around 1999.

According to her the Defendant was allowed to farm for subsistence but after his removal from the main house, he had started farming on the other side. No claim in the estate of the deceased was made by the Defendant.

In Cross-examination, she reiterated that the structures were put up by the Defendant after he moved out from the farm house. The portion is on the side of the land called Pesi and the farm house is on the other side called Matara.

The cultivation of the land is done through Irrigation Community Project and the Farm House side also gets water from the pipes laid by that project. She denied he had done any terracing as the land already has a gentle slope.

The Land Rent receipts shown to her and produced by the Defendant show that it was issued in the name of the Deceased. According to her the money paid by the Defendant was the proceeds of income from Dairy Products of the farm.

In cross-examination, the Defendant also agreed that one of the receipts dated 30<sup>th</sup> August, 1992 was by a cheque and he did not have any Bank Account. He also agreed that as the cheque was given by his deceased brother, the cash money were also given to him by his brother.

She however agreed that the Defendant brought his family either in late 70s or early 80s which was admitted to be around 1990 by the Defendant.

In his evidence, Defendant stated that he was requested by the deceased to come to the land and stay there as a caretaker since 25<sup>th</sup> March, 1971. He denied he was an employee and stated no wages were paid to him by his late brother. Although he stated that he was living in the main House since 1971, he also stated that he as well occupied the 6 acres portion of land since 1971 and developed by erecting four houses, sheds for animals, planted fruit trees and also cultivated maize and French beans. He had fenced the area. He also evicted squatters with the help of police and Administrative officers.

He denied, he was given any notice to quit or shown the letter (P Ex 4) written the deceased. Even the Plaintiff had not given any notice in writing but she has taken him before the District Officer and filed a complaint in a Criminal Case. He was acquitted of the criminal charge, (Criminal Case No. 2435/02, Nyahururu Court).

I may state here that in the Ruling delivered under section 210 of Civil Procedure Code, the learned Magistrate had observed, after stating that the Defendant was requested to settle on the land by his brother in 1971 and I quote:

***“Apparently, he was hired on the land since then to-date”.***

The date of the Ruling was 16<sup>th</sup> April, 2003. The proceedings and Ruling were produced by the Defence as DEx 1.

The Magistrate and Arbitration case before District Officer stressed that the case was a family issue.

The Defendant agreed in cross examination that he was looking after animals of the deceased and was allowed to keep his own, as well as he cultivated subsistence crops while taking care of the land.

As regards the will of the deceased, he stated that the deceased did not tell him about the will and that he objected in the succession proceedings before the High Court but did not succeed.

In re-examination however he said he left Matara to go to Peri in 1990. This is an important piece of evidence. As per his own version, the Plaintiff started asking him to vacate the land after she obtained

the grant of probate which evidently was on 17<sup>th</sup> August, 1999.

In re-examination he also contradicted himself by saying that he was not given any money by the deceased to pay the land rates and that he did not file any objection proceedings in the High Court.

He also contradicted when in examination in-chief he said he did not have any other land while in cross-examination it transpired that he had an ancestral land being Kanyu/Ichiega/399 of about 3.1 Hectares. But he testified that he had given it to his eldest son.

The Defendant called a witness one Isaiah Joseph Kuria Muniu who knows the family and has his piece of land in the same area. He used to be a chief in the years 1965 to 1986 and according to him the Defendant came on the land since 1971 when the deceased called him and an Inspector of Police to assist the Defendant as regards the issue of the squatters on his land. Apart from stating that he lives on the 5 to 6 acres of piece of land and cultivates vegetable and food crops, he did not know what else the Defendant did or does on the land. He could not say when the house was erected by the Defendant except to say that Defendant lives at Pesi side with one of his two wives and not with both wives as was stated by the Defendant.

This is the evidence before me.

Thereafter oral submissions were made elaborating the written arguments filed.

The Agreed issues were filed on 8<sup>th</sup> April, 2004.

I do not think it is in dispute that the suit land is registered in the name of the Plaintiff and the Defendant was asked to move on the land at the request of the deceased husband of the Plaintiff and brother to the Defendant.

The main issues to be determined by me are, in my opinion, as follows.

- (1) was the Defendant put into possession of the property as a licensee or as a tenant at will.**
- (2) Is the Defendant entitled to any portion of the suit land and if so what is the area.**
- (3) Whether the Defendant has acquired title to the portion of land in question admeasuring 6 acres by way of adverse possession by virtue of section 12 of the Limitation of Actions Act, (Cap 22).**
- (4) Is the claim of the Plaintiff for vacant possession of the portion of the suit land occupied by the Defendant is time barred by virtue of section 7 of the Limitation of Actions Act.**

From the evidence it is clear that the Defendant initially moved into the suit land with the consent of the deceased registered owner as a caretaker. He also lived in the Farm House. Even as per the Defendant it is not clear when he moved out from the farm land and occupied the Pesi side portion of the land which he claims to be in exclusive and uninterrupted possession of. According to him it was in 1971, 1990 and also in 1999.

As per submissions made by Mr. Kitheka the learned counsel for the Plaintiff, looking at whatever dates, the occupation by the Defendant of the Pesi side portion was with consent of the deceased registered owner and it became adverse only when the Plaintiff claimed the same in 1999 and thus the possession became adverse to the right and interest of a registered owner from that date. Moreover, the Defendant has not been able to prove or identify the portion of the suit land over which he was occupying exclusively and continuously as he was grazing his cattle along with those of the deceased all over the suit land. The Defendant has also agreed that he was allowed to cultivate the subsistence crop by the owner and that he was taking care of his land while doing so.

Reliance was placed on the case of **Ndatho v Itumo & 2 Others (2002)2 KLR, 637** wherein the Court of

Appeal held:-

***“(1) To defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.***

***(2) The filing of a suit for recovery of land stops time from running for purposes of section 38 of the Limitation of Actions Act under which a person may claim to have become entitled to by adverse possession.”***

Similar views were echoed in the case of **Kasuve v Mwaani Investments Limited & 4 Others (2004) 184** wherein the Court of Appeal held:

***“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuance of possession by the owner of his own volition.”***

According to Mr. Kitheka further submitted that even if it is accepted that the Defendant was Tenant at will, the same was terminated in 1994 on the death of the Plaintiff's husband.

As per the trite expressions from the law, the tenancy at will is created by express agreement or by implication. By nature it is a tenancy where the lessee has no certain or sure estate, for the lessor may put him out at any time he pleases.

In **Cheshire and Burn's Modern Law of Real Property** (1988 Edition) on page 366 a portion of words of Lord Simonds are quoted:-

***“It has been properly described as a personal relation between the landlord and his tenant: it is determined by the death of either of them or by one of variety of acts .....***

It is not in doubt that the Defendant came on to the suit land by consent of the deceased. They had their personal agreement as brothers, details thereof are not properly revealed even by the Defendant. But he agreed that he was to take care of the land and along with his brothers animals, he was allowed to keep his animals and to cultivate the subsistence crops. It is not stated by the Defendant that he was allowed by the deceased to occupy the six acres which he claimed to be in exclusive possession, since 1971. It is not proved by him that he took up the occupation of this six acres exclusively by 1971, because it is also agreed by him that his family (only one wife) moved in 1990 and he moved only in 1999 because he was living in the main house till then. Thus his exclusive possession or occupation if at all, was shown in respect of the main house since 1971 to 1999 which in any event he has not claimed. Even if he can be assumed to be in possession of the six acres portion through his family since 1990 as a tenant at Will, it is in any event came to closure at the death of the late brother and in any event in the year 2000 when the Plaintiff had claimed the right thereof within the period of 12 years.

The Defendant's evidence with contradictions on the relevant issues has not been strengthened by the evidence of his witness who agreed that it was the deceased who introduced the Defendant as the one who would be taking care of the land. Apart from a structure and cultivating vegetable and food he did not state which other actions the Defendant had done over the portion of land which according to him was 5 to 6 acres.

Thus, in my humble opinion, the Defendant has not proved to the standard required the exclusive and open possession of the portion of land he is claiming. His own evidence (Ruling of the Magistrate) shows that he was hired by the deceased and was allowed to be on the land and continues to do so till the date of ruling which was in April 2003.

Considering all the circumstances of the case, I am not satisfied that the Defendant was in occupation as a tenant at will. The authorities cited by Mr. Njogu to show that tenancy at will shall be presumed by

exclusive possession and time can run in favour of the tenant at will of the expiry of first year under section 12(1) of the Limitation of Actions Act (Cap 22) cannot be of avail to the Defendant, as it is not proved by the Defendant. That he was in exclusive possession for 12 years.

Even if I am wrong in holding as aforesaid, the tenancy at will may have been established from 1971 as regards the main farm house which is not claimed by the Defendant. Moreover, the possession through the family of the portion was agreed to be in 1990 and by him from 1999. The death of the deceased husband had, in my view, terminated the tenancy which was in 1994. The contention of Mr. Njogu that it was terminated in 1989 when the letter (P Ex4) was written by the deceased is of no avail as the Defendant had not been intimated by the deceased of such termination (P. Ex9).

Considering all the evidence before me, I am of the view, though with lot of sympathy for the Defendant, that he has not proved that he has been in exclusive and continuous possession of the portion of 6 acres at Pesi side of the suit property so as to claim the right of adverse possession. Thus I also reject that the suit is time barred under section 7 of the Limitation of Action Act.

I may also ponder here, whether the Defendant can ask for such declaration of acquisition of the right under adverse possession, by way of the Defence, specially looking at section 38 of the Limitation of Acts Act and Order XXXVI of Civil Procedure Rule.

Lastly I shall deal with the issue raised during submissions as regards the validity of the verifying affidavit of the Plaintiff. It is not amongst the Agreed Issue. It is contended that the verifying affidavit does not disclose the person who has drawn the same. Thus under section 35 of the Advocates Act (Cap 16), the same is fatally defective. Reliance was placed on several authorities that the omission to comply with the said provision is fatal. (see **Apindi v Shabir & Another (2003) KLR 588 and Johann Distelberger v Joshua Kivinda Muindi & Another (Nairobi HC, Misc. App. No.1587 of 2003).**)

He submitted that the plaintiff with annexed fatally defective affidavit is also fatally defective and thus be struck out.

He further submitted that as the above is an issue of Law, it can be raised at any time even during appeal.

Mr. Kitheka was caught unaware but did show the court a separate page which avers attached to the verifying affidavit in his file. It is however also true that the court file did not have that separate page disclosing the person who drew and filed the same.

In the authorities, the said issue of defect was raised on time and the court dealt with it. In this case the said issue is raised during submissions where the Plaintiff has been debarred from putting her case as to the real status on the matter. In our adversarial system of law, the parties must be given appropriate notice of any issue taken, except that of the issue of jurisdiction which in any event renders the matter a nullity on which nothing can stand. This is not the case here.

Order VI Rule 7 of Civil Procedure Rules also states that the parties may by his pleading raise any point of law. The purpose of this rule is to give due notice to the other side. The Defendant in this case has not done so and has tried to take a direction which can be termed as unjust.

Looking to the peculiar circumstances of the case, I shall refuse to be a party of an unjust action and shall refuse to uphold the objection. I am satisfied that the omission to put the second page in the court file and in the Defendant's file was by an oversight and thus it was not fatal.

The upshot of all the aforesaid is that I allow the plaintiff in terms of prayer numbers (a) and (b) thereof.

As I have indicated that I have full sympathy with the Defendant who came on the land at the request of the deceased brother and thought that he would stay there for his life. Thus shall not grant the order of

costs to the Plaintiff.

**Dated, Delivered and Signed at Nairobi this 12<sup>th</sup> October, 2007.**

**K.H. RAWAL**

**JUDGE**