



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 97 of 2004 (OS)

BETWEEN

ERNEST M. MUGAMBI R. IBURI PLAINTIFF

VERSUS

JACOB HENRY KIRIMI 1ST DEFENDANT

JACOB KABUTO KANGANGI MWIRIGI 2ND DEFENDANT

JUDGMENT OF THE COURT

The plaintiff's suit against the defendants was commenced by originating summons dated 25.11.2004. The same was filed under sections 7, 17, 18, 37 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya, order 36 Rules 3D (1), (2) and (3) of the Civil Procedure rules (CPR).

The plaintiff seeks the following reliefs:-

- (a) A declaration that the plaintiff has acquired title to land parcel No. NTIMA/IGOKI/2504 by adverse possession.
- (b) A declaration that the defendant holds the title to land parcel No. NTIMA/IGOKI/2504 in trust for the plaintiff.
- (c) An order that the defendants do execute a valid transfer of LR No. NTIMA/IGOKI/2504 in favour of the plaintiff and in default, the court's executive officer be authorized to execute all necessary documents required to facilitate such transfer. (d) Costs of this suit.
- (e) Such further or better relief the honourable court may deem.

The application was brought for determination of the following ten (10) issues:-

- (i) Whether parcel of land No. NTIMA/IGOKI/2504 measuring 0.88ha was originally owned by the father of the plaintiff one ROBERT M'IBURI M'NJOGU (now deceased).
- (ii) Whether the plaintiff has been in continuous exclusive, open and uninterrupted occupation parcel of parcel of land No. NTIMA/IGOKI/2504 especially since its registration on 12th February 1973.

(iii) Whether the plaintiff has been cultivating and using upon parcel of land No. NTIMA/IGOKI/2504 since its registration.

(iv) Was parcel of land number NTIMA/IGOKI/2504 secretly transferred to the defendants by the late ROBERT M'IBURI M'NJOGU on 5th April 1976?

(v) Has the plaintiff continued to have the possession both in occupation, enjoyment and use of parcel of land no. NTIMA/IGOKI/2504 since 5th April 1976?

(vi) Has such possession, occupation and use of the suit land been interrupted since 5th April 1976?

(vii) Whether such occupation of the suit land has been open and notorious for a period of 28 years?

(viii) Whether the proprietors-in-common (defendants) of parcel No. NTIMA/IGOKI/2504 had the knowledge that the plaintiff has had exclusive use and possession and been in occupation in an open and notorious way since 5th April 1976?

(ix) Have the defendants entered or attempted to enter, use or possess or develop the suit land after the date they were registered as co-proprietors on 5th April 1976?

(x) Has the plaintiff acquired the suit land by adverse possession?

The defendants failed to enter appearance and file defence. In the circumstances and on application by the plaintiff/applicant, interlocutory judgment was entered against them. The suit came up for formal proof before me on 16.6.2005.

The plaintiff's case is that the parcel of land known as NTIMA/IGOKI/2504 is duly registered in the joint names of the two defendants as per the green card P exhibit 1. That the first registration was on 12.2.1973 in the name of Robert M'Iburi M'Njogu, the plaintiff's late father. That ownership of the suit land was transferred to the defendants on 5.4.1976 but that the plaintiff has been in continuous, uninterrupted and exclusive possession of the suit land for upwards of 30 years. That long before the deceased died in 1999, the plaintiff was in occupation of the suit land. That for all this time, neither of the defendants has tried to remove him from the land. The plaintiff also testified that he cultivates the land on which he has put up a farm house and on which he grows crops such as bananas, maize, potatoes and beans and upon which he has also planted trees. That despite the fact that the two defendants are aware that the defendant has been in occupation of the suit land, none of them has tried to remove him therefrom. That none of them has ever been to the suit land since 1976. The plaintiff produced as P exhibit 2 a certificate of search dated 18.11.2004 on land parcel No. NTIMA/IGOKI/2504 which reveals the two defendants as the registered proprietors of the suit land.

In his submissions, Mr. Riungu for the plaintiff urged this court to find that the plaintiff had proved his case against the defendants. He relied on the following authorities:-

1. Githu V. Nteete (1984) KLR 776.

2. Public Trustee V. Wanduru (1984) KLR 314.

3. Mbugua Njuguna V. Elijah Mburu Wanyoike & Another – C.A. No. 27 of 2002 (unreported).

The issue for determination is whether the plaintiff has become entitled to the suit land through adverse possession. After fully considering the evidence that has been laid before me, I am satisfied that the plaintiff is so entitled. It has been held both in the authorities cited to me by learned counsel for the plaintiff and in other cases that for adverse possession to accrue, the plaintiff must have been in continuous, uninterrupted and exclusive possession of the suit property for a period in excess of 12 years.

The evidence before me is that the defendants became joint registered proprietors of the suit property on 5.4.1976. That since then the plaintiff has been in continuous, uninterrupted and exclusive possession of the suit property. There is also evidence before me that the defendants have never ever been to the suit property since. They became the registered proprietors on 5.4.76 and none of them has ever tried to get the plaintiff out of the suit property. The defendants have not controverted that evidence either by filing defence or by giving of oral evidence.

If the defendants had any claim to the suit property, they should have brought a suit to recover the same from the plaintiff by April 1988. They did not do so and have not done so todate. The defendants right to the suit land was thus extinguished by 1988. By the time of filing suit, the plaintiff had been in continuous, uninterrupted and exclusive possession of the suit land for more than 20 years. Having failed to assert their right to the suit land in any manner whatsoever against the plaintiff, the plaintiff has been handed the same on a silver platter.

In the result, I would allow the plaintiff's claim against the defendants. I find that the plaintiff has acquired title to land parcel No. NTIMA/IGOKI/2504 by adverse possession and I enter judgment accordingly for the plaintiff. I also find that the defendants are holding the title to the suit property in trust for the plaintiff. As it is not possible to get the defendants to execute a valid transfer of the suit property in favour of the plaintiff, I order and authorize the Deputy Registrar, High Court of Kenya Meru to execute all necessary documents required to facilitate the transfer to the plaintiff. The plaintiff shall also have the costs of this suit.

It is so ordered.

Dated and delivered at Meru this 28th day of July 2005.

RUTH N. SITATI

JUDGE

28.7.2005