



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 543 of 2000

MAINA GACHERU..... PLAINTIFF

VERSUS

HANNAH WANGUI MWANGI..... DEFENDANT

JUDGEMENT

The Plaintiff Maina Gacheru commenced this suit by way of an Originating Summons dated 5th April 2000 filed on 6th April 2000. He claims from Hannah Wangui Mwangi ownership by adverse possession of a parcel of land known as Land Reference No. LOC 14/KAMUNE/1354. Specifically, the Plaintiff seeks orders in the following words: -

- “1. THAT the Plaintiff be declared the proprietor of Land Reference No. LOC 14/KAMUNE/1354... by virtue of his adverse possession for the period prescribed in the Limitation of Actions Act Cap 22**
- 2. THAT the replacement of the ownership of the Plaintiff instead of HANNAH WANGUI M. by virtue of the right of the Plaintiff of L.R. No. 14/KAMUNE/1354 directed to the Land Registrar Muranga, and transfer of the said land be effected in the name of the Plaintiff**
- 3. THAT the Land Registrar Muranga be directed that the order herein shall be an instrument of transfer of ownership of L.R. Number LOC14/KAMUNE/1354 from the Defendant to the Plaintiff**
- 4. THAT the Defendant be restrained from entering, wasting, damaging or in any way alienating the Land Reference Number LOC14/KAMUNE/1354....(?)...the final decision of the matter**
- 5. THAT the Defendant be directed to pay the costs of this suit.**

The Plaintiff claims to have had exclusive possession of the suit land since 1965. The Plaintiff testified that he came to possess the land following an agreement for sale entered between himself and the Defendants' deceased husband Mwangi Kabaruru which was never completed. Although he says that failure to complete is to be blamed on non-co-operation by the deceased it is clear from the evidence adduced herein that the said sale was declared null and void for lack of land board consent. The said declaration was made in the Ruling in Succession Cause No. 2608 of 1997 out of which the defendant

obtained her right to the land. The same is not disputed. The Plaintiff was an objector to the petition for the Grant of Letters of Administration but admittedly, his objection did not succeed.

The Plaintiff claims to have built a house on the suit premises but that the same was destroyed by ants. He said he lives with his mother on an adjacent plot. He also claims to have been cultivating and grazing on the suit land all along. He did not tell the Court when exactly he had built on the land and did not call any independent witness to support his claim. Conversely, the Defendant herein has testified that she has never seen the Plaintiff on the suit land, cultivating the same or grazing thereon. She testified that although she had not been cultivating the land until recently, when she licensed a certain Mama Wambui to cultivate thereon, she always had possession of the same. She confirmed the Plaintiff's testimony that she does not live on the land and added that there are no structures of any kind on the suit premises. Indeed her evidence stands corroborated by that of her only witness Nguru Kibaru who despite being her brother in law was consistent in his testimony and knows the Plaintiff quite well. He did not appear to have any interest in the suit land or any sign of ill will towards the Plaintiff as to testify against him.

Counsel for both parties herein cited various authorities in support of their clients cases which I have duly considered. I find that, although the Plaintiff's Counsel is correct in his statement on the law, the authorities cited do not support his client's case wherein the same does not meet the test required to prove "adverse possession", which is legally defined in P.G. Osborn's Law Dictionary 1964, 5th Ed, as: -

**“An occupation of land inconsistent with the
right of the true owner: the possession of
those against whom a right of action has
accrued to the true owner. It is actual
possession in the absence of possession
by the rightful owner, and without lawful
title.”**

I do not accept the Defendant's Counsel's submission that the Defendant cannot be sued as owner for reason of not being so registered. As administrator to the estate she is in law the rightful owner for the purposes of this suit notwithstanding that a title in her name has not yet been obtained. Her having entered in the suit and proceeded to defend the suit to the end leads to the presumption that she accepts she is the right defendant despite the fact that she may not have been properly described.

The Plaintiff has not proven the sale and possession of the suit premises or occupation of the same since 1965. He has not demonstrated any dispossession of either the registered owner Mwangi Kabaru or his widow, the Defendant, who has all along had the possible enjoyment of the suit land and who by petitioning for Grant of Letters of Administration Intestate in Succession Cause No. 608 of 1997 clearly asserted her right to the suit land which right the present Plaintiff was unsuccessful in challenging. I accept the submission by the Defence Counsel as supported by the cited authority of MURAGAMI GICHEGE –vs- GUNDA GICHEMBE CIV. APP. NO. 90 OF 2000 that to constitute adverse possession, such possession in denial of the true owner

**“must be peaceful, open and continuous....
open and hostile enough to be capable of
being known by the parties interested in
the property... the onus of establishing these**

**facts being on the person claiming to have
acquired title to land or interest in land by
adverse possession.”**

I do not find it appropriate to consider the evidence adduced before my predecessor in this suit since by ordering a hearing de novo the Court's intention is that the previous record be disregarded and deemed to be no effect in the exercise of my discretion when arriving at a determination of the issues placed before me. I am comfortable, without paying attention to the previous proceedings herein, and considering the pleadings, the facts and evidence adduced before me, to find that on the balance of probabilities, the Plaintiff has not, proven his case against the Defendant as to persuade me to find in his favour and grant him the reliefs sought in his Originating Summons dated 5th April 2000. Accordingly the same is hereby dismissed with costs to the Defendant.

Dated and Delivered at Nairobi this 11th day of November 2005.

M.G. Mugo

Judge

In the presence of:

Mr. Vadgama h/b for Kinuthia for the Plaintiff

Mrs. Kimani for the Defendant