



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 120 OF 1997 (O.S.)

CHARITY NYAGUTHII TIRIA.....PLAINTIFF/RESPONDENT

VERSUS

JAMES MACHARIA THIONGO.....DEFENDANT/APPLICANT

RULING

The case was initiated by Originating summons dated 21st January, 1997, brought under Order XXXVI Rule 3F of the Civil Procedure Rules, and filed on 22nd January, 1997. The gravamen was that the Plaintiff claimed to have acquired prescriptive title over land parcel No. 140/Nyandarua/Kanyagia, and the Defendant should be restrained by injunction from evicting, harassing or otherwise interfering with her possession of the suit land. She sought a transfer by the Defendant to her of the suit land, failing which the Registrar of the Court should execute the transfer documents.

In his grounds of opposition, dated 5th February, 1997, brought under Order L Rule 16 and filed on the same date, the Defendant stated that he was the absolute registered proprietor of the suit land and that there was no trust registered against his title. The Defendant stated that the Plaintiff had not been in occupation of the suit land and had no registrable interest over the same. The Defendant asserted that he had acquired title from the previous owner as a bona fide purchaser for value, without notice of any other interests.

At the time of filing the Originating Summons the Plaintiff had also filed an application by Chamber Summons (dated 21st January 1997) which was heard by the Honourable Mr. Justice Githinji (as he then was), who gave his ruling on 29th July, 1997. The learned Judge noted certain matters which may be set out here:

(i) Although the Defendant denied that the Plaintiff had been in occupation of the suit land for at least 12 continuous years, he the Defendant failed to state that he had been given vacant possession when he purchased the land in 1995. The Defendant had not explained why he had not then taken possession of the land.

(ii) It was established that the Plaintiff with others had, in 1995, filed a suit, HCCC No. 265/95 against the person who had sold the suit land to the present Defendant; and an Order of injunction had been given on 13th September, 1995 restraining the seller from sub-dividing and alienating L.R. Nos. Nyandarua/Kanyagia/140 and Nyandarua/Kanyagia/144. The suit land in the present case was one of the three pieces of land in dispute in HCCC No. 265/95. The Defendant did not make it possible for the Court in the present case to ascertain when he had been registered as proprietor if at all. Since an injunction had been issued against the seller on 13th September, 1995 the Defendant should have shown when he would have acquired title to the suit land. Thus the Defendant had not shown a prima facie basis that he was a bona fide purchaser for value without notice.

(iii) The Plaintiff had deponed that her children were born and brought up on the suit land, and she had no place to go if she had been evicted; and, in the circumstances, she would suffer more harm than the Defendant if she had been evicted before the determination of the suit.

The Defendant, by Chamber summons application dated 15th April, 1998 and filed on 16th April, 1998 moved the Court to discharge, vary or set aside the Order of injunction of 29th July, 1997. In the Defendant's Supporting Affidavit he stated as follows:

- (a) Before he bought the suit land in 1995, he inspected it and ascertained that it was not occupied by anybody.
- (b) The Defendant resided in Nairobi and thus was not able to physically occupy the suit land.
- (c) The suit land was duly registered in the Defendant's name on 6th September, 1995 and the title deed was issued to him. (i.e., before the Order of 13th September, 1995 in HCCC No. 265/95).
- (d) After the registration the vendor took him, the Defendant, to the suit land and formally gave him possession.
- (e) During the time of purchase the Plaintiff was residing on an adjacent parcel of land, L.R. No. Nyandarua/Kanyagia/139 comprising 15 acres registered in the name of Raymond Ruo Danson Muturi (deceased), the very same person who sold the suit land to the Defendant.
- (f) The Plaintiff encroached upon the suit land only after hearing that the Defendant had bought it.
- (g) The Defendant discovered the encroachment on 10th January, 1997, and warned her to stop doing so.
- (h) The Defendant and the Plaintiff then appeared before the Chief, and there the Plaintiff produced the Order of injunction dated 13th September, 1995 which had been issued in HCCC No. 2651 of 1995, against the deceased.
- (i) The Plaintiff has sufficient land in L.R. No. Nyandarua/Kanyagia/139, where she has built a house, and where she grows crops.

The Plaintiff's response was to file grounds of objection, on 10th June 1998. To this was attached an opposing affidavit. She asserted that there was nothing new to warrant the variation or discharge of the injunction given in HCCC 2651 of 1995. She stated that the entire land (supposedly referring to both L.R. No. Nyandarua/Kanyagia/139 and 140) had been registered in the name of Raymond Ruo Muturi Danson (deceased) on his own behalf and on behalf of the entire Muturi family. She said she had always been in possession of the suit lands. She prayed that the suit be expeditiously heard on the merits.

In the course of the slow progress of this cause, the Defendant, on 2nd August, 2002 withdrew his instruction to M/s. Gatheru & Co Advocates and took over the conduct of his case personally. It should be noted that the responsibility to prosecute the suit rested squarely on the Plaintiff. The Defendant's Notice, however, was not filed until 24th January, 2003. On 2nd August, 2002 the Defendant filed an application by Notice of Motion, praying that the case be transferred from the High Court at Nairobi to the High Court at Nyeri. This application was only filed on 24th January, 2003. To this application the Plaintiff filed grounds of objection on 19th March, 2003.

This is the background to the Chamber Summons application dated 13th October, 2003 and filed on 22nd October, 2003 which is the subject of this Ruling. This was the Defendant's application, brought under Order VI Rule 13(1) (a), (b) and (c), and praying:

- (a) That the suit be struck out;

(b) That the Plaintiff be condemned in costs. The grounds to support the application are:

(i) that the Plaintiff has shown no cause of action;

(ii) that the Defendant is the rightful owner of L.R. No. Nyandarua/Kanyagia/140.

In the Supporting Affidavit the Defendant states:

(a) that in 1990, L.R. Nyandarua/Kanyagia/102 was registered in the name of the Settlement Fund Trustees, but on 6th December, 1991 it was transferred to the name of the deceased, Raymond Ruo Danson Muturi (copy of Green Card attached);

(b) that Raymond Ruo Danson Muturi sub-divided L.R. Nyandarua/Kanyagia/102 into several portions, one of these being L.R. Nyandarua/Kanyagia/140;

(c) that a sale agreement was made on 13th January 1995 under which L.R. Nyandarua/Kanyagia/140 was sold to the Defendant by the late Raymond Ruo Danson Muturi (Copy of the agreement attached);

(d) that Raymond Ruo Danson Muturi thereafter applied to Ndaragwa Land Control Board to have L.R. Nyandarua/Kanyagia/140 transferred to the Defendant (Copy of the application attached);

(e) that the parties attended the Ndaragwa Land Control Board and obtained consent to transfer (copy of Board's confirmation attached);

(f) that the suit land was thereafter transferred to the name of the Defendant (copy of Green Card attached);

(g) that it was only six years between the date of transfer of the land from the Settlement Fund Trustees to the deceased, (1991) and 1997 when the Plaintiff filed suit, and thus she could not claim a sufficient longevity of occupancy to give adverse possession as a basis for title claims;

(h) that the suit land was transferred to the Defendant in 1995, and the Plaintiff filed suit only two years later, and this could not give prescriptive rights;

(i) that the Defendant is a bona fide purchaser for value;

(j) that if the Plaintiff had any valid claim she would have settled it against Raymond Ruo Danson Muturi before he died;

(k) That the suit land could not correctly be regarded as family land, because it had been the property of the Settlement Fund Trustees right up to 1990.

The Plaintiff, on 7th November, 2003 filed grounds of objection to the Defendant's application. The grounds given are:

(i) That the Plaintiff/Respondent has been in the suit lands for more than 12 years. (This is quite contrary to the account in the Defendant's affidavit; and the truth seems to weigh more heavily on the side of the Defendant);

(ii) That the Defendant/Applicant acquired his rights with full knowledge of the Plaintiff/Respondent's overriding interests. (The nature of these overriding interests is not disclosed).

On the foundations of these pleadings, counsel then made their verbal submissions, and a consideration of these will lead to the decision of the Court.

The Defendant/Applicant stated that he had bought the suit land, complying with all the prescribed procedures, and the Plaintiff had stated no cogent case to challenge his lawful title to the land. He introduced the relevant approval documents – the sale agreement, the Land Control Board approval, the Green Card, and stated that he bought the land on a willing-buyer-willing-seller basis. In the premises he prayed that the suit be struck out as it showed no reasonable cause of action.

Counsel for the Plaintiff/Respondent submitted, on the basis of the Plaintiff's affidavit, that the deceased, Raymond Ruo Danson Muturi had been registered as owner of the suit land in the capacity of a trustee for the whole family. She laid much store on assertions that the Plaintiff had lived at the suit plot from the early 1980s, that she had lived there since marriage, that her deceased husband had been buried at the suit land, though it was not made clear whether the reference here was specifically to parcel No. Nyandarua/Kanyagia/140. She recalled that when Raymond Ruo Danson Muturi sub-divided the original land parcel into separate plots, the Plaintiff and other relatives had filed suit, HCCC No. 2651 of 1995 (FREDRICK RUO MUTURI & OTHERS v. RAYMOND RUO DANSON MUTURI) which led to an Order by the Honourable Mr. Justice Mwera, on 14th September, 1995, in these terms:

“THAT the Defendant/Respondent, his servants and/or agents be and [are] hereby restrained by a temporary injunction from entering, cultivating, sub-dividing, alienating and/or transferring title Nos. Nyandarua/Kanyagia/139, Nyandarua/Kanyagia/140, Nyandarua/Kanyagia/144 and Nyandarua/Kanyagia/145 until final determination of this Honourable Court.”

It should however be noted that in the next Order the learned Judge provided:

“THAT if the parties discuss and agree they will withdraw this suit, and if not the hearing will take normal course.”

This further Order, which has not been referred to by the Plaintiff/Respondent, is important as it shows that the learned Judge did not consider the prosecution of the suit compelling. It is noteworthy also that the Plaintiff has made no statement on the current ownership of Plots No. Nyandarua/Kanyagia 139, 144 or 145.

The association of the suit lands with family or ancestral land held in trust has not been the subject of focussed submission by counsel for the Plaintiff/Respondent. This is unfortunate, given the significance of the willing-buyer-willing-seller concept, and the status of the Settlement Fund Trustees, to the case of the Defendant/Applicant. It has to be remarked that these elements of significance to the Defendant's case have been quite well articulated in the Defendant's pleadings.

Considering that the Land Control Board is in the position of an oversight body in relation to disposals of agricultural land, I would have expected this Board to take a critical position in the protection of any family land such as may have been; but the evidence on file is that this Board did indeed approve the disposal by sale of L.R. No. Nyandarua/Kanyagia/140 to the Defendant/Applicant.

In his Notice of Motion application of 2nd August, 2002 (filed on 24th January, 2003) the Defendant/Applicant had urged that this case be transferred to the Nyeri High Court, and in his Supporting Affidavit he had stated: “...since the filing of this suit in 1997 by the Plaintiff it has not at any time proceeded to hearing.”

It is more than seven years since this case was filed by the Plaintiff. While now and again the Plaintiff has given impressions of being alive to the importance of a full hearing as the avenue of justice, with regard to the claims, there is no concrete indication that there has been a keenness to prosecute to completion. During the hearing of this application, on 21st January, 2004 the following words came from Mrs. Ndegwa for the Plaintiff/Respondent: “This matter should proceed to full hearing, so that the Applicants can produce full evidence as to how Raymond Ruo came by the title [to the suit land]. It is not a suitable matter for striking out at this stage.” This plea does not address very fundamental points of legal relevance which, at the moment, rest squarely in favour of the Defendant/Applicant: the status of the Settlement Fund Trustees; the decisions of the Land Control Board; the issuance of critical documents of

entitlement, which are generally, regarded as the indicia of ownership; the particulars of the claim of prescriptive rights in favour of the Plaintiff/Respondent.

From my own reading of the pleadings and correspondence on file, and my own hearing of the Plaintiff/Respondent, I was unable to get any impression of urgency towards the prosecution to conclusion of the case. Such a state of affairs is, in my judgement, oppressive to the Defendant/Applicant even though it does not lie in his power to rectify it save through an application such as the present one.

In my assessment, the Plaintiff/Respondent has shown no reasonable cause of action whether in her Originating summons of 21st January, 1997 or in her subsequent applications or objections to motions brought by the Defendant/Applicant. The continued pendency of the suit amounts to a pre-emption of judicial time and resources for a vain purpose, and to the clear detriment of the Defendant/Applicant. Such a state of affairs is an abuse of the process of the Court.

I therefore strike out the Plaintiff's suit brought by Originating Summons, dated 21st January, 1997. The parties shall each bear their own costs.

DATED and DELIVERED at Nairobi this 13th day of February, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the Plaintiff/Respondent: Mrs. Ndegwa, instructed by M/s. Maira & Ndegwa Advocates

Defendant/Applicant: In person