



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1279 OF 2002 (O.S.)

STEPHEN KAMAUPLAINTIFF

VERSUS

CHARLES GATHOGO KAMAU.....DEFENDANT

JUDGMENT

On February 3, 1983, Mr. Justice E. O’Kubasu (as he then was) read the Ruling in HCCC No. 482/81 between the parties presently before this Court in this suit, in which he dismissed Titus Maina Kamau’s application to set aside the Arbitrators’ Award, and proceeded to enter Judgment in terms of the Award in favour of Charles Gathogo Kamau.

In accordance with that Judgment, the defendant was awarded three acres of land in land parcel Loc 15/Kigongo/46 while the Plaintiff was awarded 5 ½ acres. The Defendant carried out the sub division of the land in 1984, excising his three acres, and eventually (in 2002) obtaining title to the same, under a new number namely Loc 15/Kigongo/1312.

On July 29, 2002 the Plaintiff, Stephen Kamau, a son of Titus Maina Kamau filed an Originating Summons in this court, seeking the following orders:

- 1. For a declaration that the title to and the claim of the defendant to land parcel/Loc 15/Kigongo/1312 is extinguished by the operation of Limitations of Actions Acts Cap 22 Laws of Kenya***
- 2. For a further declaration that the Plaintiff’s occupation of land parcel Loc. 5/Kigongo/1312 or the original parcel Loc 15/Kigongo/46 (from which 1312 arose after subdivisions) has extinguished the defendants title to the said land.***
- 3. For an order for the deletion of the defendants name on the register of land parcel Loc 15/Kigongo/1312 and the insertion of the Plaintiff’s name.***
- 4. For an order for costs to the Plaintiff***

The Plaintiff argued that the Defendant failed to execute his judgment for over 12 years, from 1983 to 2002, when he obtained title. In accordance with section 4(4) of the Limitations of Actions Act, Cap 22, the Judgment had lapsed, and could not be enforced.

Section 4(4) aforesaid states as follows:

“An action may not be brought upon a judgment after the end of

twelve years from the date on which the judgment was delivered or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due”

As the Judgment here required the delivery of the suit property, it ought to have been done within the required 12 years, and the Defendant having failed to do so, the Judgment had lapsed, so argued the Plaintiff.

The Opening line of section 4(4) stipulates that ***“an action may not be brought upon a judgment after the end of 12 years ...”*** However, it is not the decree holder here who has brought this action. The section does not say that after 12 years the judgment shall lapse. What the Respondent has done here is to simply execute his judgment over a period of time. He now has the title to the suit property, and it is too late in the day to argue that the judgment was not capable of being enforced through effluxion of time. The Judgment having been executed, without any opposition from the Plaintiff, it has now been overtaken by events.

In any event, the Plaintiff has not established his right to the suit land. According to his own testimony, the suit land belonged to his father; that he was given the land by his father who showed him where to build a homestead. He obviously had no independent claim to the suit land; indeed, he was only 17 at the time he built his homestead on that land. By then, the Defendant had been awarded a three acre portion of that land. Since then the Defendant asserted his right to occupation by having his mother look after the same and cultivate the land, while he lived in Nairobi. According to his evidence, corroborated by his brother (DW2) the Defendant was in continuous control over the land, in which he grew coffee bushes and macadamia trees. He regularly visited the land. On the other hand, the Plaintiff’s evidence about his claim to the suit land is weak. He has not provided unequivocal testimony about his occupation of the land. His own witness PW2 (Humphrey Kangaru) was unreliable as he was not sure whether the suit land belonged to the Plaintiff or to his father, Titus. Equally, PW3 (Benson Karuge) testified that the Plaintiff lived on his father’s land.

Having heard all the witnesses, I much prefer the evidence of the Defendant and his witness. They were credible, reliable, and consistent with what the elders – the Arbitrators had found, and what Hon. O’Kubasu, J. confirmed. On a balance of probability, I am satisfied that the Plaintiff has not established a case for adverse possession, and I find that the Defendant is the lawful owner of the suit land.

Accordingly, I dismiss the Plaintiff’s claim with costs to the Defendant.

Dated and Delivered at Nairobi this 28th Day of April, 2004

ALNASHIR VISRAM

JUDGE