

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1267 OF 1997

NGUMI MACHARIAPLAINTIFF

VERSUS

HONTENSIAH WAMAITHA NJOGU.....1ST DEFENDANT

NGUMI NJOGU2ND DEFENDANT

MUGUKU NJOGU 3RD DEFENDANT

NDUNGU NJOGU 4TH DEFENDANT

JUDGMENT

The Plaintiff has sued the Defendants herein for an order for eviction on the grounds that they are trespassers in the suit premises. The Defence is that the suit is time barred, as the suit is not brought within 12 years of the commencement of the cause of action. Secondly the Defence does not comply with the provision of O.VI rule 4. However no point was taken on this by the Plaintiff. There is a counterclaim to the Defence, which seeks a declaration that the Defendants be registered as the owner of the suit premises on the ground that they have a title to the land by way of adverse possession. The Plaintiff submits that this order cannot be granted as adverse possession can only be claimed in an originating summons. This is the procedure for making a claim to adverse possession under O.36 rule 3D (1). I am of the view that a Defendant can seek this relief in a counterclaim and need not file a separate Originating Summons. The Plaintiff is the owner of the suit premises and produced evidence of the title. It is his evidence that the 1st Defendant was married to his son and that he died in 1985. The other Defendants are the Defendant's children. He alleges his son and the 1st Defendant who were living on the suit premises were chased away by him from the suit premises after a quarrel. He states that they came back in 1996 and the Defendants now live on the suit premises. He is not in agreement with the Defendants living on his land and wants them evicted from it. The Plaintiff is an elderly man of a peppery disposition and made clear his dislike for the 1st Defendant. It seems he was opposed to the marriage between the 1st Defendant and his son.

In support of her father's story his daughter Jacinta gave evidence to the effect that the 1st Defendant and her brother were living in the suit premises but they were chased away by her father as they were abusing her mother. When her brother died in 1985 the 1st Defendant and her brother were living in another place.

Her brother was buried in a plot adjacent to the suit premises and the 1st Defendant who was there at the time of the burial collected money with her father and took their goods away in January 1986. The 1st Defendant returned in 1992 and sought to come back but the Plaintiff refused and she left. She returned again in 1993 with her sons and stayed in a small house built by her deceased husband. She is still there. Her father had gone to the police and elders to get rid of her.

The 1st Defendant gave evidence that she married in 1969 and stayed with her husband on the suit premises and the Plaintiff was away in Loitokitok. She continued in there until 1985 when she went near to her father's land and leased a piece of land and on which she carried out cultivation. She was returning to the suit premises every three or four months. She had lodged a caution against the suit premises because she discovered that the Plaintiff had made a will leaving his property to his daughter P.W.2.

The Plaintiff was filed in May, 1997. In order to succeed in her counterclaim the Defendants had to show that they had been in continuous adverse occupation of the suit premises. This would have been

since 1985. I accept that the 1st Defendant stayed in the suit premises until 1985 but she then left to cultivate near her father's land. There was therefore no continuous occupation from that time on.

The suit is not time barred as the Defendants did not return until 1992 and did not reside on the suit premises against until 1993. Thereafter the Plaintiff tried to get rid of the Defendants' by going to the Chief. I accept the evidence of P.W.2 as truthful as she appeared to be an honest and straightforward person.

The Defendants have no right in law to remain in the suit premises and however hard it may be the Plaintiff is entitled to require them to go as they are not there with his consent.

In the circumstances I make the order of eviction sought for in the Plaint in prayer (a). I will not order mesne profits nor costs, which are to be borne by both parties equally. The caution lodged by the 1st Defendant is to be removed. I dismiss the counterclaim for the reason given herein.

Dated and delivered at Nairobi this 14th day of October 2004

P.J. RANSLEY

JUDGE