



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 122 OF 2000

ELIZABETH WAIRIMU WAIYAKIPLAINTIFF

VERSUS

EUNICE WAMAITHA WAIYAKIDEFENDANT

J U D G M E N T

The land known as Dagoretti/Kinoo/375 belonged to Tiras Waiyaki Munyua who died on 22nd March 1990. He left behind his wife, the plaintiff herein and several children including Dr. Munyua Waiyaki (PW2).

The defendant was the deceased daughter in-law. She having married his son Benjamin Githieya also deceased. He died in 1997.

It appears after Tiras Waiyaki and Githieya's death the land was subdivided into various parcels in 1999 including Dagoretti/Kinoo/2482 (marked A on exhibit 2), Dagoretti/Kinoo/2483 (marked B) and Dagoretti/Kinoo/2484 (marked as C). There is also Dagoretti/Kinoo/2503 (marked as X in exhibit 2).

The defendant was allocated Dagoretti/Kinoo/2483 but since she was also laying a claim to 2482, 2484 and 2503, over which she had also placed cautions, the plaintiff filed a suit in this court on 25th January 2000 to claim vacant possession thereof and also for the removal of cautions therefrom.

In the meantime, the defendant had also filed pleadings in this same court by way of an originating summons on 17th March 2000 for the determination of whether she had become entitled to disputed parcels of land by virtue of adverse possession on ground that she had occupied them uninterrupted for a period of 12 years and more and why whether by virtue of this she could not be registered as proprietor thereof.

These two cases were consolidated by an order of this court dated 31st July 2000.

The plaintiff's evidence was that her husband bequeathed to her his estate during his lifetime in a will dated 5th October 1988 (see exhibit 3(b)) and that apart from parcel number Dagoretti/Kinoo/2483 given to the defendant – in the name of her minor son, the suit plots are hers and not those of the defendant.

According to her parcels known as Dagoretti/Kinoo/2482 and 2503 are hers while Dagoretti/kinoo/2484 was meant for the family grave yard.

When the plaintiff testified in the case she expressed that she actually had no quarrel with the defendant

on any other plot except plot number Dagoretti/Kinoo/2484 which was meant for a grave yard and where the latter had put up a pig and poultry houses. It was agreed that the defendant's husband was buried on this plot, though he had his own house and compound on plot number Dagoretti/Kinoo/2483.

The defendant's brother-in-law, one Edwin Muiro was also buried here, and so was another brother-in-law, Mwathi Waiyaki who had his own home elsewhere on this land namely Dagoretti/Kinoo/2489.

During cross-examination the defendant was asked if she knew three (3) other family members had been buried at this plot but she said she did not know.

And during the survey and sub-division the plot Dagoretti/Kinoo/2484 was clearly marked as a cemetery. Another plot in dispute was one plot Dagoretti/Kinoo/2503 over which the two parties disputed.

This plot as well as that marked as a cemetery and Dagoretti/Kinoo/2482 are registered in the name of the plaintiff. The evidence adduced about this latter plot showed it was not used either by the plaintiff or the defendant but the defendant only alleged her father-in-law showed it to her and her husband as theirs.

She also alleged she was similarly shown plot number Dagoretti/Kinoo/2482, 2483 and 2484 by her said father-in-law in 1985.

That by that time these plots were one since the land had not been demarcated.

However, in spite of this, the said father-in-law made a will in 1988, not disputed during the hearing of the case, and revoked all former wills and testamentary dispositions made by him and by that will dated 5th October 1988 he devised and bequeathed all his immovable and movable properties wheresoever, to his said wife, the plaintiff.

Thus, even if the deceased had intended to give the defendant and her husband Githieya part of his land this intention was revoked by the will dated 5th October 1988 which bequeathed all his property to the plaintiff who subdivided it in 1999 and gave the defendant plot number 2483 in the name of her minor son.

The defendant's evidence to show that she had acquired the suit plot by way of adverse possession did not conform to the requisite conditions for the reliefs sought in the originating summons to be granted.

In particular the defendant did not show or prove that she had entered into possession of plot numbers Dagoretti/Kinoo/2482, 2484 and 2503 and or that she had remained in such adverse possession to the exclusion of the registered proprietor for at least 12 years or more.

The only evidence she gave was in respect to plot number Dagoretti/Kinoo/2484 which was meant for a cemetery where she said she had built a pig and poultry houses without saying when she did so.

The defendant was required to give evidence to show exclusive uninterrupted possession of these plots without the permission of the owner or fraud for twelve years or more before the date of filing the originating summons on 17th March 2000 (see Section 7 of the Limitation of Actions Act – Cap 22 Laws of Kenya). This possession could have taken the form of fencing or cultivation.

And where cultivation of the land is the evidence put forward to support the claim by adverse possession, then it should be definite as to area and time – see **Kimani Ruchine and Another v Swift Rutherford Co. Ltd and Another [1980]K L R 10**. This was not done by the defendant herein.

On the other hand the plaintiff proved she is the first Registered proprietor of the suit plots. The land, then whole in 1988 was bequeathed to her by her deceased husband through a will dated 5th October 1988. This will has never been challenged.

No evidence was adduced to prove that she held any of the suit parcels of land in trust for the

defendant.

She sub-divided the land into small portions and gave a portion thereof, plot number Dagoretti/Kinoo/2483 to the defendant's family. The latter should have been grateful to the former for this good gesture rather than engage in this, otherwise, unproductive litigation.

That the deceased father in-law showed her and her husband the suit parcels of land, without more, was not sufficient to give the defendant a legal right to them.

I allow the plaintiff's suit and dismiss the defendant's originating summons but as parties are very close relatives, I order each of them to bear her own costs hereof.

Delivered this 27th day of February, 2003.

D.K.S. AGANYANYA

JUDGE