



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 89 OF 2001**

**MARION THIRIMU GITAGIA AND 2 OTHERS .....APPELLANTS**

**VERSUS**

**MOSES KARUMBO NJENGA .....RESPONDENT**

**J U D G M E N T**

On 20th July 1994 the respondent in this appeal filed a suit in the court of the Chief Magistrate at Kiambu to seek an eviction order against the appellants from his piece of land known as Kiambaa/Kihara/T.515.

He said in the plaint that he had been allocated the land by Kiambu County Council and was the registered proprietor thereof; but that the appellants had constructed a structure thereon without his consent, hence the suit subject to this appeal.

In an amended defence filed by the appellants, they countered that they were the ones allocated the plot as a women group known as Rumwe, in 1980, that they had since been in occupation thereof, had fenced off the plot and put up building structures thereon.

The defence also alleged that the respondent had been irregularly allocated the suit plot or that he obtained it through fraud and gross misrepresentation.

Particulars of the alleged fraud were specified in paragraph 4A of the amended defence.

The appellants also averred that the plaint was bad in law as it did not disclose a cause of action against them and prayed for the dismissal of the suit with costs.

The case was heard by Mrs. Karanja, Senior Principal Magistrate on 11th July 2000 when both parties appeared and testified.

The respondent said he was the registered proprietor of the suit property and produced the relevant documents which he considered entitled him to the proprietorship of suit land, namely Kiambaa/Kihara/T. 515.

The documents ranged from the extract of the minute of the District Allocation Committee approving his application, letter from the District Allocation Committee to the District Lands Office requesting that he be issued with title deed to the suit plot; another letter to the Permanent Secretary Local Government requesting for approval for the plaintiff to be issued with title deed; official search to show the respondent was at the time the registered owner of the suit land, the title deed itself and the green card to show the history of the plot.

On the other hand the appellants testified through one of them Marion Thirimu who said her group was allocated the plot in 1980 in order to use it for carrying on the activities of Rumwe Women Group; like keeping pigs, planting Napier grass and putting up structures thereon for rental purposes.

That they never went for a title deed for it but later they learned that the respondent had been issued with a title to it.

That when they reported the matter to the District Commissioner at Kiambu they were told to wait for the conclusion of this case.

The learned magistrate wrote and delivered judgment on the dispute on the 25th July 2002 granting the order sought by the respondent and this is what prompted this appeal being filed herein, I cannot tell when because while copy of the appeal in the record is dated 27th February 2000 (it must have been 2001), the receipt issued on filing of the memo of appeal is dated 16th March 2001.

Unfortunately I cannot find the original memorandum of appeal and there is no court stamp on the copy in the record of appeal to indicate the date this appeal was filed in court. However no issue was taken over this and the appeal was argued as if all was okay.

The memorandum of appeal had 6 grounds of appeal; namely that the magistrate erred in not giving due regard to the defendant's/appellant's evidence; that she erred in failing to find that the disputed land parcel number Kiamba/Kihara/T.515 was fully developed by the defendants to the tune of Kshs.1,000,000/=; that she erred in failing to consider that the appellants have been in peaceful and quiet possession of the suit property for 12 years prior to the allocation to the plaintiff-respondent; that she erred in law and fact in finding that there was no fraud without calling evidence from Kiambu County Council and further without considering the evidence of one of the defendants, that she erred in failing to find that there was a stay of registration of the suit property and that she erred in entering judgment against the third party without its evidence yet that evidence was crucial to the suit.

The appeal was fixed for hearing before this court on 25th June 2002 when only the appellant and counsel appeared but not the respondent and/or counsel. The court allowed the appellant to proceed as it had adjourned the appeal for a similar reason on 13th May 2002.

Counsel for the appellant literally repeated what was contained in the grounds of appeal adding that there was evidence of adverse possession in favour of the appellants which the learned magistrate did not consider and that even the evidence of fraud alleged against the respondent was not considered either.

That the lower court only considered fraudulent title and documents produced by the respondent.

That it was wrong for the court to order eviction of the appellants from the suit plot.

Counsel referred to correspondence from the office of the President and the Provincial Administration to show that the plot belonged to Rumwe Women Group from 1980.

That the judgment of the magistrate had serious discrepancies as it failed to address crucial issues like adverse possession and that the lower court had no jurisdiction to make an eviction order.

He prayed that the case be sent back to the lower court for a retrial.

When the learned magistrate wrote her judgment, she remarked that the case was very straight forward indeed and I agree with that remark.

Counsel's first complaint is that though there was evidence of adverse possession raised by the appellant's the magistrate did not consider it.

She was not supposed to consider this evidence because, in my view, if title to land is being sought by a

litigant on the basis of adverse possession, then the provisions of order VI of the Civil Procedure Rules must be complied with and the application made in that regard by way of Originating Summons.

The appellants made no such claim, even if it would have been by way of counter claim; if at all.

The defence witness evidence that:

“We were given the plot in 1980

or that

“we built the structure in 1980”

does not satisfy the condition for claiming land by way of adverse possession.

A litigant has to establish a free continuous and uninterrupted occupation of the disputed land for a period of 12 years or more to satisfy the ingredients of adverse possession.

This is not what the appellants did in the case subject to this appeal.

As regards the allegation of fraud made in paragraph 4 of the amended defence no evidence was adduced to describe or specify them.

What was stated in the paragraph quoted above remained allegations and without evidence to confirm them the learned magistrate cannot be blamed for not considering the evidence which never was.

In any case since it was the defence side which made the allegations, it was upon it to prove them and not the respondent.

Section 27(a) of the Registered Land Act describes interest conferred by registration thus:-

*“The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

As regards L.R. No. Kiambaa/Kihara/T. 515, the respondent was such proprietor and his ownership cannot be ousted by mere communication from the Office of the President or Provincial Administration purporting to allocate the suit plot to the appellants or because such title has been cautioned.

In my view the appellants had no defence or a reasonable one to the respondent’s claim and the order made by the learned Senior Principal Magistrate was the correct one in the circumstances.

There is no authority saying that the Senior Principal Magistrate had no jurisdiction to issue the eviction order.

I dismiss this appeal with costs.

Delivered and dated this 29th day of July, 2002.

**D.K.S. AGANYANYA**

**JUDGE**