



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 1024 OF 99

JAMES KAMAU KIMANI..... PLAINTIFF

VERSUS

JAMES GICHURU GATURU..... DEFENDANT

JUDGMENT

By an originating summons dated 1.2.99, plaintiff claims to be the owner by adverse possession of part of L.R. No DAGORETI/KANGEMI T.206 and thus prays for three main orders namely:

1. A declaration that defendant holds plot No. T 206 in trust for plaintiff
2. A declaration that plaintiff is entitled to an order under S. 38 of the limitation of Actions Act, registering him as proprietor of plot no. T. 206 in trust for the defendant.
3. An Order directing defendant to execute a transfer of plot no. T. 206 in favour of the plaintiff.

It is common ground that plot No. T.206 belonged to Charles Gaturu Njagi (father of the defendant) who died in 1985. It is also common ground that plaintiff father died in 1975 and his mother in 1989. It is also common ground that Waithera Njagi - sister of plaintiff is married by Charles Gaturu Njagi. Lastly it is a Common ground that defendant was registered as proprietor of plot in dispute on 20.6.91 and that he has charged the land to the Barclay Bank Kenya ltd to secure a loan.

Plaintiff claims that Charles Gaturu Njagi gave the plot to his parents as dowry for Waithera Njagi and that he has lived on the plot with his parent since 1960 and that the plot belongs to his father. he testified that his parents had a 2 roomed house on the plot while plaintiff had a 4 roomed house on the plot and plaintiff's brother a 2 roomed house. Plaintiff admits that dispute between him and defendant started on 1991 when defendant told him to vacate and that defendant has now demolished the houses and built his own houses for rental.

Defendant testified inter alia that:

- (i) After death of his father who had five wives, HC Probate and Administration Cause No. 439/86 was filed. (ii) Peter Njenga Gaturu (son of Waithera - (plaintiff's sister) and Peter Mukono Gaturu were granted letters of administration.
- (iii) The estate was thereafter distributed and the administrators transferred the plot in dispute to the

defendant.

(iv) Defendant had given three families including family of father of plaintiff the temporary shelter on the plot.

(v) Plaintiffs parents refused to accept the plot ad dowry for Waithera.

Plaintiff testified in his evidence in cross - examination that he is claiming the plot because defendants father had given it to plaintiffs father. He testified in his evidence in chief that the plot belongs to his father and that he told elders that he would not vacate the plot because it was left to him by his parents.

I understand the plaintiffs case a claim of plot No. 206 by adverse possession. The evidence shows that defendant was not owner of the plot until 30.6.91.. When the administrator of the estate of his father transfer the plot to him so it cannot be said that plaintiff was occupying the plot openly are with the knowledge of the defendant. As defendant correctly explains he was not the owner of the plot before 20.6.91. Limitation period would have started to run against the interest of the defendant from 20.6.91 when he was registered the owner of the land. Twelve years has not elapsed since defendant was registered. Indeed evidence shows that soon after defendant was registered in 1991 he disrupted plaintiffs occupation. So there is no valid claim for land by adverse possession against the defendant. A valid claim would only have been made against the administrators of the estate of Charles Gature Njagi

Secondly evidence shows that plaintiff was occupying the plot with permission of his parents. He was living with his parents on the plot. He claims that the plot belongs to his father. In those circumstances he cannot validly make an independent claim for the land by adverse possession. It is his parents who would have make a claim to the land by adverse possession. Plaintiffs parent died without making the claim. Plaintiff does not claim to have a grant of letters of administration in respect of the estate of his deceased father.

So, he has No capacity to represent the estate of his father. He has not in any case claimed that claim for land by adverse possession is on behalf of the estate of his father.

Thirdly, the evidence of the plaintiff does not support claim of land by adverse possession. His evidence is that the plot belongs to his deceased father as it was given to his deceased father by defendants deceased father.

So the claim he is advancing is that the plot belongs to his father by right and not by adverse possession. If that is his claim he should have filed a suit by plaint against the defendants and administrator of the estate. It is for the above reasons that I find plaintiff s claim for land by adverse possession to be frivolous.

Consequently I dismiss the suit with costs to the defendant.

E. M. Githinji

Judge

25.7.2000

Miss Mbuthia holding brief for Mrs Nyaecha present

Mrs Gitonga for Defendant present

