



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 375 of 2008 (O/S)

ALICE WAMBUI KAHIGU.....PLAINTIFF

VERSUS

PHILIP KAMUNYE GATHERU.....DEFENDANT

JUDGEMENT

The plaintiff **Alice Wambui Kahigu** filed an originating summons against the defendant **Phillip Kamonye Gatheru**, seeking a determination on the following:-

- 1. Whether the plaintiff is entitled under section 38 of the limitation of Actions Act Cap 22 of the Laws of Kenya to be registered as the proprietor of the entire portion of land LR No. Nyandarua/Silanga/198 measuring approximately 3 acres.**
- 2. Whether the Defendant is registered as the proprietor of LR No. Nyandarua approximately three (3) acres in trust for the plaintiff.**
- 3. Whether the Defendant should transfer LR No. Nyandarua/Silanga/198 and measuring approximately three (3) acres to the plaintiff failing which the Deputy Registrar of the High Court of Kenya at Nakuru be authorized to execute the transfer documents in favour of the plaintiff.**
- 4. Who pays the costs of this suit.**

The originating summons is supported by the affidavit of Alice Wambui Kahigu, the plaintiff herein. After filing the originating summons, the plaintiff was granted leave by this Court to serve the defendant by substituted service in a National newspaper. The plaintiff complied with the order of this Court and on 17th of June 2011 published a notice in the Daily Nation Newspaper. This Court was satisfied that the defendant was properly served and issued directions for the plaintiff to proceed with her suit against the defendant, his absence notwithstanding.

During the hearing of the case, the plaintiff testified and called two (2) witnesses. The plaintiff testified that in 1994, Francis Warui Kinyanjui agreed to transfer his share of three (3) acres from title **No. Nyandarua/Silanga/198** also known as **Gitaka farm**: That she entered into an agreement with his appointed agents Gladsam & Company and duly paid the entire consideration for the three acre survey fees registration fee and files for the acquisition of a community dam on the farm which resulted in her a farm being registered as Nyandarua/Silanga/198 and was given a mutation form to that effect: That she started living on the suit land in 1994 with her nephew PW3 until 1996 when she moved on to settle in Nyahururu town due to ill health: that she has made a lot of developments since 1994 and her stay and control has been continuous, she has been in possession and in occupation: That the owner of the land and his agent passed on before transfer and registration of the suit land was

done and despite frantic efforts by her no details were available to the plaintiff even at the Land Registrar's office: that although the plaintiff had legally purchased the land, she has also acquired the land through adverse possession having had continuous and uninterrupted occupation for a total of 19 years.

PW2 Alphonse Kamau testified that he was a brother to Githika Kimani(now deceased) who had been the owner of Nyandarua/Silanga/198 also known as Gitaka farm: That he was involved in the sale of the suit property alongside the agents Mayfied Gladsam & Co and that the plaintiff is among purchasers who had purchased and paid full consideration for her portion: That he personally wrote to the land registrar on 11th July 2003 when he realized that the suit land had been transferred to a 3rd party stating that the plaintiff was the bonafide owner and that the Defendant was not one of the purchasers of Gitaka farm.

PW3 James Nyumu testified that he was a nephew of the plaintiff and had lived on the suit land with his family since 1996 and that the plaintiff had caused massive developments on the suit land: That at no time since he occupied the suit land had he seen anyone laying claim on the land.

I have read the originating motion filed by the plaintiff in this case. I have also carefully considered the evidence that was adduced by the plaintiff in support of her case and the authorities cited by counsel in his submissions.

The plaintiff claims that she is a bonafide purchaser of the suit property but was unfortunate not to have had the land transferred to her by the vendor before his death. She claims she should be declared to have acquired the title in respect of the suit land by adverse possession.

The law to be considered by this court in determining whether or not the plaintiff had acquired title to the suit land by adverse possession is settled. In *Wambugu Vs Njuguna (1983) KLR 172* the Court of Appeal held that in order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land by either being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor defeats his title and acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The plaintiff is required to prove that the owner of the land had discontinued possession of the suit land for a continuous period of twelve years so as to entitle the plaintiff to the title of the suit land by adverse possession.

The Court of Appeal in *Francis Gicharu Kariri Vs Peter Njoroge Mairu CA No293 of 2002 (Nairobi)* (unreported) approved the decision of the High Court in the case of *Kimani Ruchire Vs Swift Rutherford & Co Ltd (1980) KLR 10 at page 16 letter B, where knetter J. held* that:

“ The plaintiffs have to prove that they have used this land which they claim as of right Nec vi, Nec clam, Nec precario (no force, no secrecy, no persuasion). So, the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any end endeavours to interrupt it or by way of recurrent consideration”.

In this case the plaintiff has established that she took possession of the suit land in 1994 after she had paid consideration and all other dues to the vendor. This has been corroborated by PW1 the brother to the owner of the land. She had further established that she had been in continuous occupation of the suit land from 1994 without let or hindrance from anybody. She had further established that this action of taking possession of the suit land, dispossessed the owner of the same, having occupied the said parcel for a period of over twelve years, she had acquired the title of the said parcel of land by adverse possession.

The plaintiff's occupation and possession of the said parcel of the land has been exclusive, open, quiet continuous, peaceful and uninterrupted since 1994. There is no evidence adduced that the Defendant, registered as the owner of the suit property has made any effort to assert his proprietary rights over the

said parcel of land.

Having carefully evaluated the evidence adduced in this case, I do hold that the plaintiff has established that she had acquired her title in respect of the suit land by adverse possession. I will therefore, enter judgment for the plaintiff against the Defendant as prayed in her originating motion. I therefore make the following orders.

- (1) The plaintiff is declared to be entitled to all that parcel of land known as LR No. Nyandarua/Silanga/198 measuring approximately three (3) acres by virtue of having acquired the same by adverse possession.
- (2) The Deputy Registrar is authorized to execute all the necessary instruments to vest title No. Nyandarua/Silanga/198 to the plaintiff.
- (3) Since the Defendant did not enter appearance in this matter and since the plaintiff's case was heard in the absence of the defendants, I will make no orders as to costs.

Dated, signed and delivered this 3rd day of May, 2013.

**L N WAITHAKA
JUDGE**

PRESENT:

Ms Mureithi for Plaintiff
No appearance for Defendant
Mwangi – Court Clerk