



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
CIVIL CASE NO.86 OF 2011

VIRGINIA WANJIKU MWANGI.....PLAINTIFF

VERSUS

DAVID MWANGI JOTHAM KAMAU.....DEFENDANT

J U D G M E N T

Virginia Wanjiku Mwangi hereinafter referred to as the plaintiff took out an Originating Summons against David Mwangi Jotham hereinafter referred to as the defendant. The plaintiff sought for orders that it be declared and decreed that all that property described as GITHI/IGANA/1218 situated in Mukurwe-ini within Nyeri County registered in the name of the Defendant is held for the benefit of the Plaintiff **and** that it be declared and decreed that all that property described as PLOT NO.4C THAARA TRADING CENTRE situated in Mukurwe-ini within Nyeri County registered in the name of the Defendant is held for the benefit of the Plaintiff/Applicant **Moreover** that in the alternative this Honourable Court be pleased to declare the Plaintiff to be the owner of both those properties known as L.R.GITHI/IGANA/1218 and PLOT NO.4C THAARA TRADING CENTRE both situated in Mukurwe-ini within Nyeri County by adverse possession. **Furthermore** that this Honourable Court be pleased to restrain the Defendant/Respondent by an order of permanent injunction from entering, alienating, disposing or in any other manner interfering with the Plaintiff's exclusive possession, use and occupation of the two properties namely L.R.GITHI/IGANA/1218 and PLOT NO.4C THAARA TRADING CENTRE both situated in Mukurwe-ini within Nyeri County and that the Defendant be ordered to bear the costs of this Originating Summons.

The Originating Summons was based on the grounds that the Defendant is the registered owner of the two suit properties as trustee for the plaintiff's benefit and that the plaintiff is one of the wives of the Defendant and she has had continuous, exclusive and uninterrupted possession, occupation and use of the two properties since their marriage in the year 1957 whereon she has carried out substantial investments and developments at her own cost and that the Defendant has expressed an intention to unilaterally dispose of the suit properties and has already successfully applied for removal of the cautions lodged by the plaintiff over the properties hence the Plaintiff stands to suffer irreparable loss and will be rendered a destitute if her matrimonial home is sold to a third party.

The plaintiff swore a supporting affidavit where she states that she got married to the respondent in the year 1957 under the Kikuyu Customary Law and out of the said union they were blessed with seven (7) children between 1958 and 1969, 4 boys and 3 girls. She claims which claim is not controverted that the defendant also has another wife named Marion Wairimu with whom he also has seven children and that since her marriage to the defendant, she has always lived on Land Parcel No.Githi/Igana/1218 and carried on business on the premises erected on Plot No.4C Thaara Market both of which belonged to the

defendant's father, one Jotham Kamau (now deceased) which he bequeathed to both the plaintiff and the defendant with the defendant being registered as owner as trustee. The defendant is in occupation of a separate parcel of land of similar acreage also inherited from his father which he occupies with his other wife.

The plaintiff claims to have been in continuous occupation of the two parcels enjoying quiet possession with her children with the blessings of her father-in-law and has put in considerable investment on both properties at her expense including the home where she now lives. When she got information that the defendant was attempting to sell the suit properties behind her back despite having his other property that he occupies, the plaintiff applied to have cautions registered over the two properties. However, the defendant successfully applied to the Resident Magistrate's Court Mukurwe-ini to have the caution lifted and is now intent on disposing of the properties to third parties which will effectively render her destitute. She urged this Honourable Court to direct that the suit properties are held by the defendant as trustee for her benefit, or in the alternative that she has become entitled to be registered as owner of the properties by adverse possession having occupied the same continuously, peacefully and without interruption for over five(5) decades.

The defendant filed a Memorandum of Appearance and a replying affidavit whose import is that the defendant denied all allegation by the plaintiff and stated that the plaintiff is not running any business on plot number 4C Thaara Market and put the plaintiff to strict proof thereof. He further depones that it is not true that the suit land herein were bequeathed to the plaintiff herein by his late father and put the plaintiff to strict proof thereof. He said that indeed land parcel number GITHI/IGANA/1218 is a resultant subdivision of land parcel number GITHI/IGANA/1 which at all material times belonged to him and not to his father. That his father transferred plot 4C Thaara Market to him in his life time and at no time did he indicate that he was to hold the same on behalf of any one else. He also said his father's land at material times was GITHI/IGANA/31 which upon and agreement with his father and his sons was subdivided and the resultant subdivisions were transferred to his sons save for land parcel number GITHI/IGANA/1220. That the plaintiff has at all material times occupied land parcel number GITHI/IGANA/1218 with his consent as his wife and she has no basis of claiming ownership by way of adverse possession.

He states that the plaintiff has deliberately neglected him as his husband in that she has in fact refused to stay with him on land parcel number GITHI/IGANA/1220. That as the registered proprietor of the suit land he should not be unnecessarily be barred from utilizing the same and that the plaintiff is out to harass him at his old age after he has distributed his property to his children and concludes that the plaintiff's application is scandalous, misconceived, has no merit and has no basis in law hence the same should be dismissed with costs.

When the matter came up for hearing on the 5/2/2013 J.W. Wachira for plaintiff was ready to proceed however Mr. Muchiri wa Gathoni for defendants was not ready to proceed as the defendant wanted to engage another lawyer. The matter was adjourned to 11/3/2013 to allow the defendant engage a lawyer. The defendant was present when Mr. Muchiri informed the court of those developments.

On the 11/3/2013 the plaintiff was present with his lawyer. The defendant was seen in court but disappeared. I saw him seated in the witness gallery but left before the matter was called.

The plaintiff proceeded in her testimony and stated that she is the second wife of the defendant having married him in 1959 and residing on the parcel of land No.Githi/Igana/1218 registered in the defendant's name with her seven children that their marriage has been blessed with. The couple have another parcel of land being plot No.4C Thaara. Also registered in the defendants name.

In her evidence in chief the plaintiff adopted the affidavit in support of the Originating Summons and produced the title to the parcel of land No.Githi/Igana/1218 and the allotment letter for plot No.4C Thaara.On cross-examination by the court, the plaintiff stated that there is a shop on the plot at Thaara market which is rented to a lady called Warakira. There are five rental houses on the plot which have been in existence since the defendant's father died. The defendant takes rent from the shop but does not

support the plaintiff. He resides on another parcel of land which is about 2.4 acres with his first wife and seven children whilst the parcel of land the plaintiff occupies is about 1.2 acres.

The defendant did not testify as he was absent at the time of hearing though he had been in court in the morning of the hearing date. However his affidavit is on record in which the defendant states that he has shared a larger part of his property to her children and therefore the the Originating Summons is to curtail his freedom to deal with his property as a registered proprietor. He states that the plaintiff does not run any business on plot No.4C Thaara Market and has never been in occupation of the same. He denied that the plot was bequeathed to the plaintiff by his late father. On the other hand parcel of land No.Githi/Igana/1218 has been occupied by the plaintiff with the defendant consent as his wife and therefore she has no basis of claiming adverse possession. The plaintiff has neglected him as her husband and has refused to stay with him on land parcel Githi/Igana/1220. The plaintiff intends to harass him in old age after distributing his property to his children. The defendant was not available for cross-examination to establish the veracity of the replying affidavit.

Both parties filed submissions on the Originating Summons. The *gravamen* of the plaintiff's filed on 17/4/2013 is based on Section 28(a) and 93(1), (2), (3) and (4) of the Land Registration Act. **Section 28 (a)** provides that all registered land shall be subject to the overriding interest of spousal rights over matrimonial property as may for the time being subsist and affect their interest without being noted in the register.

Section 93 (1) provides that subject to the law on matrimonial property if a spouse obtains land for the co-ownership and the use of both spouses there shall be a presumption that the spouses shall hold the land as joint tenants.

Section 93(2) on the other hand recognizes acquisition of interest in land by a spouse though not registered as an owner has contributed to the same through labor or other means to the productivity, upkeep and improvement of the land. The said spouse is deemed to have acquired interest in the land by virtue of ownership in common of the said land with the spouse in whose name the certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized.

The plaintiff further submitted that the defendant has no authority to dispose off the suit properties without the consent of the plaintiff as the said properties are matrimonial property.

She further submitted that the law on adverse possession stipulate that for one to claim to have become entitled to land by adverse possession, then that person must have occupied the land continuously, peacefully and without interruption for over 12 years. The plaintiffs in this case has been in continuous, peaceful and uninterrupted occupation of the suit land for over five decades, to be precise 53 years.

In conclusion, the plaintiff submits that section **38 of the Limitation Actions Act Cap 22 laws of Kenya** gives a person in adverse possession the right to move to the High Court for an order that he be registered as a proprietor of that land. The plaintiff therefore seeks an order that he be declared the proprietor of both suit properties by adverse possession.

The defendant his brief submissions states that the plaintiff is his real second wife. The two suit properties were transferred to him by his late father and there is no joint ownership. The parcel of land No.Githi/Muthandu/1218 is registered in the defendant's name. The defendant transferred land No.Githi/Muthambi/1217 to the plaintiff's son. He collects rent from plot No.4C THAARA. He has no intention whatsoever of selling his properties. Lastly he states that the plaintiff has no right to be registered as an owner of the properties even under Kikuyu Customary Law.

This court has weighed the evidence on record on both sides and finds that the plaintiff and defendant are husband and wife who got married in 1957 under Kikuyu Customary Law and they have had 7 children within the marriage. The plaintiff has lived on the land parcel no GITHI/GANA/1218 and

carried on business on PLOT NO 4C THARA TRADING CENTER. Both parcels belonged to the father of the defendant one Jotham Kamau. There is no evidence that the two properties were bequeathed to the plaintiff and defendant jointly but there is evidence that PLOT NO 4C THARA TRADING CENTER was acquired by the defendant when the marriage was subsisting whilst land parcel no GITHI/GANA/1218 was registered in the defendant's name in 1997 approximately 40 years after marriage. The marriage between the two has not been dissolved as the two are still husband and wife.

The **first issue** to be determined is whether the plaintiff has established a claim under adverse possession. The plaintiff's claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession has the right to apply to the High Court for an order that he be registered as the proprietor of the land. The person must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years. The adverse party is the one who dispossesses the true owner of the property. The former must openly occupy the property exclusively, keeping out others, and use it as if it were his own. Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continual (although not necessarily continuous or constant) without challenge or permission from the lawful owner, for a fixed statutory period to acquire title. Where the property is of a type ordinarily occupied only during certain times, the adverse party may need to have only exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely **(a) open and notorious use of the property**. For this condition to be met the adverse party's use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.

The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If the legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about. **(b) Continuous use of the property** – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fail to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party's return. He cannot count the time between his ejection by the true property owner and the date on which he returned. **(c) Exclusive use of the property** – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met. **(d) Actual possession of the property** – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

The actions of the adverse party must change the state of the land, as by **clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock** and **constructing buildings** or other improvements. If the property is residential, such actions may include **mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures** (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner. **(e) Non-permissive, hostile or adverse use of the property** – The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party's motivations may be viewed by the court in several ways: **Objective view**—used without true owner's permission and inconsistent with true owner's rights. **Bad faith** or intentional trespass view—used with the adverse

possessor's subjective intent and state of mind . **Good faith** view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.

The Specific requirements for adverse possession by the court is a Claim of title or claim of right. The mere intent to take the land as one's own constitutes "claim of right. A claim of right exists if the person believes he has rightful claim to the property, even if that belief is mistaken. A negative example would be a timber thief who sneaks onto a property, cuts timber not visible from the road, and hauls the logs away at night. His actions, though they demonstrate actual possession, also demonstrate knowledge of guilt, as opposed to claim of right, Good faith or bad faith, improvement, cultivation, or enclosure, Payment of property taxes, color of title: A legal document that appears (incorrectly) to give the claimant title, dispossession not under force of arms is a specific requirement for the principle of adverse possession to apply . In such cases dispossessing the owner or after discontinuation of possession by the owner of his own volition the person in adverse possession has a right to acquire title.

The court finds that the plaintiff has not satisfied the claim on adverse possession as the plaintiff's occupation of the suit premises is not adverse as she was given permission to be in possession by the defendant as a wife of the defendant hence there is no element of **non-permissive, hostile or adverse use of the property**.

The **second issue** for determination is whether the defendant is holding the land in trust for the plaintiff. **Section 126 (1) of the Registered Land Act cap 300 Laws of Kenya (repealed) provided that a person acquiring land, a lease or a charge in a fiduciary capacity could be described by that capacity in the instrument of acquisition and, if so described, could be registered with the addition of the words “as trustee”, but the Registrar would not enter particulars of any trust in the register.**

There is no evidence that the defendant was registered in the instrument of acquisition as a trustee and therefore the court finds that there is no trust envisaged under the said section. Conversely the plaintiff has not established that there existed a trust under the Kikuyu Customary Law as no evidence was adduced to prove that a father could bequeath land to his son to hold it in trust for the latter's wife. However the court finds that the parcels of land were bequeathed to the defendant by his father for his lineage and therefore he is holding the said property for the said lineage hence requires the consent of the plaintiff before alienating or disposing the same.

The court finds that the plaintiff has not demonstrated that she is entitled to the orders sought that she be declared to be in adverse possession save that she has beneficial interest in the suit properties which is now recognized under the provision of **section 28(b) of the Land Registration Act no 3 of 2012** and this court declares that the plaintiff has a beneficial interest though not noted in the Register. She has spousal rights over the matrimonial property.

Section 93 of the Land Registration Act provides for co-ownership and other relationships between spouses, where the spouse obtains land for co-ownership and use of both spouses or all the spouses there shall be a presumption that the spouses shall hold the land as joint tenants unless a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in his or her own name only or the spouses are taking the land as joint tenants.

Section 93 provides that if land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labor to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered.

This court finds that the Land Registration Act is not applicable in this matter as section **105(1) (a) (I)** deems the defendants certificate of title as having been issued under the Land Registration Act and therefore **section 106 (1)** is applicable to the parcels of land in issue. However, section 106 (3) **(a) provides that any rights, liabilities and remedies shall be exercisable and enforceable in accordance**

with the law that was applicable to the parcel of land immediately before the registration of the land under this Act.

The court finds that the plaintiff has proved that she has beneficial interest in the suit properties and issues an order in terms of ***prayer 2*** of the originating summons and declares that all that property described as PLOT NO 4C THAARA TRADING CENTER situated in Mukurwe-ini within Nyeri County registered in the name of the defendant is held for the benefit of the defendants family including the plaintiff and ***therefor*** issues an order of permanent injunction restraining the defendant from alienating or disposing off the suit properties. For avoidance of doubt since the the defendant and plaintiff have interest in the registered and beneficial interest respectively, no order of injunction can be issued restraining the defendant from enjoying his rights as a registered owner save disposing and alienating. Since this is a family dispute, this court makes no orders as to costs. Orders accordingly.

Dated and Delivered at Nyeri this 11th day of October 2013

A. OMBWAYO

JUDGE