



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCC. NO. 1306 OF 2003

NJIRI

KARANJA.....PLAINTIFF

VERSUS

GICHUHI WA

WAMBUI.....DEFENDANT

JUDGMENT

The plaintiff sued the defendant in respect of a parcel of land title No. Gilgil/Karunga/Block 6/79 which he pleaded was his land and which the defendant is said to have trespassed onto and occupied illegally. He also pleaded that as a result of the defendant's illegal occupation of his land he had been losing Kshs. 10,000/= per year since 1995 which he would have received had he rented the land to tenants and therefore claimed mesne profits from the defendant.

The substantive order claimed by the plaintiff against the defendant or his agents and employees is eviction from the said parcel of land.

The defendant filed a defence in which he denied all the averments of the plaint and states that the case was *res judicata*. The defendant also claimed right of ownership of the said parcel of land on the ground of adverse possession having lived on the said parcel of land ever since the year 1969 continuously and uninterrupted. He also pleaded in the defence that the plaintiff lacked any *locus standi* to bring about this suit and the same should be struck out with costs.

The plaintiff testified in support of his pleadings and the defendant also did the same and called one witness. I have looked at the evidence adduced by the parties. The land in question was originally owned by Naivasha Kikuyu Farmers Co- operative Society limited. The land was subsequently subdivided and the share holders who were members of the said society issued with ballot cards. The plaintiff was issued with ballot card No. 079. It is that card which he used to obtain the title deed which he produced in these proceedings. Indeed his, title deed reads Gilgil/Karunga/Block 6/79. On the other

hand the defendant did not produce any title to the property or any ballot card which would have facilitated the issuance of a title in his name.

From the evidence of the defendant and his witness it would appear that they concede that the defendant occupies the said parcel of land. A claim of adverse possession is not available to the defendant by way of a statement of defence. He should have filed an Originating Summons under Order XXXVI supported by an affidavit under the old rules of civil procedure. This he did not do. In any case, it is the plaintiffs' case he forcefully entered that land and in fact some proceedings against the defendant's relatives were instituted by the plaintiff, evidence of which has been produced, these being the proceedings before the Senior Resident Magistrate at Naivasha in Civil Suit No. 128 of 2001. That matter did not address the issue of title but that of jurisdiction and the court agreed with the advocate for the defendant that only the Co-Operatives Society Act dealt with such matters. The suit was therefore struck out with costs to the defendant. That ruling cannot be said to have determined the issues raised in the present case, and therefore the case before me is not *res judicata*.

Section 27 of the Registered Land Act vests in the registered proprietor absolute ownership of the land, and therefore the defendant has no right whatsoever in respect of that land against the plaintiff. I am persuaded that the plaintiff has proved on a balance of probability that the land belongs to him, that the defendant entered it without his permission and that he should be evicted.

In respect of the claim for mesne profits pleaded, the evidence adduced falls below the required standards. The claim was specific and therefore falls under special damages which must not only be pleaded but strictly proved. That limb of the plaintiff's case is dismissed. Accordingly I enter judgment in favour of the plaintiff against the defendant in terms of prayer (a) of the plaint with costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 4th day of March, 2011.

A. MBOGHOLI MSAGHA

JUDGE