



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 464 OF 1985 (OS)

PAULINE WAMBUI NGARI PLAINTIFF

VERSUS

JOHN KAIRU

JAMES CHEGE DEFENDANTS

JUDGMENT

By an Originating Summons dated 18th February 1985 and filed in this Court on the same date, the Plaintiff Pauline Wambui Ngari brought this suit against John Kairu the first Defendant, and James Chege the second Defendant claiming to be entitled to be registered as proprietor of one moiety of land parcel No. Dagoretti/Kinoo/309 on the ground that the Plaintiff has been in adverse possession of the moiety for more than twelve years from 1959.

She claims in her affidavit that the portion of land she wants registered in her name is demarcated on the ground with a fence and that she had planted trees, fruit trees and other permanent improvements and planted various food crops; all those activities being done openly. She claims that a permanent house constructed by her late husband and herself stands on the disputed portion of land.

She goes on to say that in or about 1980 the first Defendant secretly and fraudulently transferred title No. Dagoretti/Kinoo/309 to his name from the name of Titus Nyaga who had held the land on trust for the Plaintiff's husband, a brother of Titus Nyaga; and that thereafter the first defendant transferred the piece of land to his brother in law the second Defendant who knew at the time of the transfer that the Plaintiff was in actual possession of the land and that the Plaintiff had acquired or was in the process of acquiring adverse possession and/or had overriding interests within section 30 of the Registered Land Act.

The Plaintiff alleged that in or about 1980 the second Defendant maliciously demolished her house, uprooted the fence, trees including fruit trees and flowers and physically threw the Plaintiff out from the piece of land.

The first Defendant filed a replying affidavit in which he denied all that the Plaintiff had alleged regarding title to the land.

Although learned counsels handling this suit for the parties, Dr. Kamau Kuria for the Plaintiff and Mr. Mwicigi Kinuthia for the Defendants, went into much details during the hearing of this suit, I do not think I need to do the same in this judgment.

I will only state that from the evidence, Titus Ng'ang'a, Lewis Ngari was the Plaintiff's husband Parcel of land No. Dagoretti/Kinoo/309 was first registered under the Registered Land Act, Chapter 300 Laws of Kenya, in the name of Titus Ng'ang'a Kairu; mentioned earlier as Titus Nganga, on 17th November 1958.

After his death the first Defendant was registered as Successor on 13th March 1963. The second Defendant bought the land from the first Defendant and the transfer was effected on 30th April 1981.

On 22nd January 1985 the Plaintiff registered a caution to prevent dealings with this piece of land. On 19th June 1985 that caution was removed apparently on the ground that the Plaintiff had failed to prove her interest as owner. On 18th February 1985 the Plaintiff filed this suit in this court.

Among the three brothers, Titus Nganga Kairu was the eldest while the first Defendant was the youngest. The two worked in Tanzania jointly doing business. The Plaintiff's husband remained in Kenya and evidence shows that the Plaintiff was not steadily living with her husband. She used to desert him for long periods. Of course the Plaintiff disputes that but on the balance of probabilities I should come to the conclusion that the Plaintiff was sometimes deserting her husband. Her husband did not have land on his own and he died and was buried on parcel of land Dagoretti/Kinoo/309, courtesy of the first Defendant, but giving rise to subsequent claim by the Plaintiff in this suit.

From the evidence as a whole, it is difficult to see a continuous adverse possession of the suit portion of land by the Plaintiff.'

The three brothers did not inherit their father's piece of land in Muranga and it appears the Plaintiff's husband who was in Kenya was the most careless person among his brothers as the other two were away in Tanzania and may not have been properly informed about that land. May be all the three for some reason did not want that piece of land.

Parcel of land Dagoretti/Kinoo/309 was bought. It was not therefore ancestral land. According to the Plaintiff, that piece of land was bought by all the three brothers together. According to the first Defendant, he bought it together with Titus Nganga Kairu without the involvement of Lewis Ngari. After buying the land, the two agreed that the land be registered in the name of Titus Nganga Kairu who was the eldest brother and the most active partner in the acquisition of that piece of land. The two also acquired another piece of land and this was at Kinyariri.

On the balance of probabilities, the evidence in support of the Defendant's case on this issue is more persuasive than the evidence in support of the Plaintiff's case:

Further it be noted that after the Plaintiff had said that the land was bought by the three brothers jointly, she came to say later that that land was subsequently sub-divided between Titus Nganga Kairu and her husband only. She did not give the reason why the first Defendant was excluded

. Evidence on that sub-division is not convincing. It is denied by both Defendants and there is no evidence of it on the relevant land register as should have been the case.

Titus Nganga Kairu died before the Plaintiff's husband died. The second Defendant and the widow of Titus Nganga Kairu went to Kikuyu District Magistrate's court to determine the Successor to parcel No. Dagoretti/Kinoo/309 among other property left by Titus Nganga Kairu. The first Defendant has stated how the property was shared between him and the widow of Titus Nganga Kairu. The Plaintiff's husband was alive. He knew about the case. He raised no claim. There is no evidence of such a claim. Apparently the Plaintiff was nowhere near. That was in 1963. The first Defendant was declared by the court to be the Successor to Dagoretti/Kinoo/309.

The Plaintiff's husband did not complain until he died. No complainant from the Plaintiff until sometime in 1984 when she took the matter to elders and Administrative Officers who all rejected her claim – before she came to this court.

The above is the position and as I see it the Plaintiff's case is based on three grounds:

First is that the registration, under the Registered Land Act, of Titus Nganga Kairu as proprietor of Dagoretti/Kinoo/309 made him a trustee of the Plaintiff in respect of the portion of Dagoretti/Kinoo/309

she is claiming. This if proved would be sufficient to give her title in respect of that portion unless there are other reasons preventing it.

In my opinion, the Plaintiff has not succeeded in proving the truth she claims. Apart from the evidence, see also the requirements in section 28, the proviso, as read with Section 126 (1) of the Registered Land Act. The two sections must be read together. The words "as trustee" must be entered in the land register although particulars of that trust should not be entered in the register. Of course such particulars would be kept safely in the relevant parcel box as evidence of the basis of the entry made in the land register.

Nothing like that has been proved in this suit.

The second round on which the Plaintiff's case is based is adverse possession by the Plaintiff. If proved the plaintiff would be entitled to the portion of land she is claiming because that adverse possession would have created a trust. But that would be only if there are no other grounds defeating the effect of that trust after the trust has been proved.

I said above that on the balance of probabilities I am not satisfied that the Plaintiff has proved this ground. There is evidence of her occasional desertion of her husband making it difficult to find a continuous period of more than 12 years. There is no evidence of adverse entry. The evidence I have is that the Plaintiff's husband was living on the portion of land the Plaintiff is claiming as a brother of the first Defendant and Titus Nganga Kairu. He was living there with their consent and he lived there until he died and they buried him. There is no evidence he had claimed ownership of the portion of land the Plaintiff is claiming in his suit. There is no evidence he did anything adverse to the title of Titus Nganga Kairu or the interest of the first Defendant. Titus Nganga Kairu died before the Plaintiff's husband died. If the Plaintiff's husband had been in adverse possession, which has not been proved, the Plaintiff would not at the same time have been in adverse possession as she was merely living on that land because she was the wife of Lewis Ngari, defendant on him and each one of the two could not separately be in adverse possession. I have been given no authority to the effect that in Kenya when a husband is in adverse possession, his wife is also in adverse possession of the same piece of land.

In any case, supposing both of them were in adverse possession or anyone of them was, then from 1959 to 1963, that adverse possession would have been against Titus Nganga Kairu the then registered proprietor of Dagoretti/Kinoo/309. That was a period of four years only. Titus Nganga Kairu died. The first Defendant became the Successor in 1963. That is the time the Plaintiff would have correctly claimed that her adverse possession against the first Defendant began to run. It was not correct to mention 1959.

The first Defendant retained that piece of land until 30th April 1981 when he transferred it to the second defendant. That from 1963 is a period of 18 years and had the Plaintiff taken up the matter in a court of law and proved her case to the satisfaction of the court, the period was over 12 years and acceptable.

The Plaintiff filed no suit against the first Defendant. It is the court which has to find that a party is in adverse possession. A party can only claim it as the Plaintiff is claiming in this suit. But such a claim in itself is no proof that the party claiming is actually in adverse possession. It is the court to declare it after hearing evidence.

By the time the first Defendant sold that piece of land to the Second Defendant, the Plaintiff had not been declared by a court of law to be in adverse possession against the first Defendant. If she had qualified to be so declared, she had slept on her rights and allowed the first Defendant to sell the land. Adverse possession, if any, thereby ceased to run against him.

It was the second Defendant on the spot. Adverse possession against him, if any, began to run from 30th April 1981. It comes from the mouth of the Plaintiff herself that the second Defendant did not take more than five years to kick her out. Otherwise evidence is that she was not there and only came later to claim the land. I just cannot see how the Plaintiff can succeed against the second Defendant on the ground of adverse possession based on a period of less than five years. The first Defendant having transferred the land to the second Defendant, the first Defendant is not capable of transferring the same land to the

Plaintiff and her claim against the first Defendant is absurd;

The third ground on which the Plaintiff's case is based is in section 30 of the Registered Land Act. It was not specified which paragraph of section 30 is applicable. Since section 30 covers various aspects each different from the other, I do not see how the whole section could apply. On that basis alone, I would dismiss this ground – as bad in law since – it is not specific.

But perhaps let me go a little bit further. In my opinion the only part of section 20 upon which the Plaintiff could properly rely is paragraph (g). I did not think paragraph (f) is available to her.

I do not see how the rights of a person under section 30 (g), or indeed under any paragraph of section 30 can give rise to a proprietary interest capable of defeating the absolute ownership of a registered proprietor.

I am aware of a Court of Appeal, Civil Appeal No. 42 of 1978 reported in the Nairobi Law Monthly magazine of November 1989 where names of the parties were not given and where the court of Appeal was saying in effect that overriding interests under section 30 (g) could defeat absolute proprietorship. It went on to order rectification of the Register under section 143 of the Registered Land Act.

With all due respect, I do not agree with that decision. In my opinion, section 30 of the Registered Land Act is talking about interests or rights which are inferior to the rights and interests of a registered proprietor of land, the latter rights and interests being “absolute ownership” and “not liable to be defeated, except as provided in this Act” as they are safeguarded by section 27 (a) and the opening paragraph of section 28. The rights and interests under section 30 are even inferior to the rights and interests of a proprietor who is registered as a trustee under the proviso to section 28 as read with section 126 (1). They appear also to be inferior to the rights and interests under section 28 (a). I think that is the reason why the rights and interests of a registered proprietor of land, as well as those under section 28 (a) and under the proviso to section 28 are registrable under the Act while the overriding rights and interests under section 28 (b) as read with section 30 are not registrable unless and until the Registrar directs that they be registered in accordance with the proviso to section 30. Even when they are so registered, the absolute ownership of the registered proprietor of land, which absolute ownership is “not liable to be defeated except as provided in” the Registered Land Act, still remains only subject to those registered overriding interests. In other words, registration of an overriding interest does not change or enhance its quality. It becomes an entry on the relevant land register just as an encumbrance on the absolute ownership of the registered proprietor of land and no more. An encumbrance like a lease or a caution or a prohibitory order does not give the person who has registered the encumbrance or a proprietary ownership of the piece of land affected. In fact the encumbrances I have mentioned are much superior than overriding interests under section 30 which exist only at the pleasure of the registered owner of the piece of land affected.

In the circumstances, therefore, I do not see how a person claiming overriding interests, inferior interests, under section 30 (g) can be elevated to be given an absolute ownership of the registered proprietor of that land. I would have thought the rights envisaged under section 30 (g), and indeed all overriding interests under section 30, are no better interests than those of licencees. The words of the section to be noted are:

“ the rights of a person ... to which he is entitled in right only of such possession or occupation ...”

Nothing more than that. In my opinion, anything more than that amounts to defeating the rights and interests of the affected absolute owner or registered proprietor of land by a process which is not provided for in the Registered Land Act. That is contrary to section 27 (a) as read with the opening paragraph of section 28 of the Act.

It means therefore that even if the Plaintiff succeeded in proving her overriding interests, that alone would not be sufficient to give her title

. I have indicated that the person enjoying possession and occupation under section 30 (g) does so only at

the pleasure of the registered proprietor of the affected piece of land. If the second Defendant found the Plaintiff in possession or occupation of a portion of parcel of land Dagoretti/Kinoo/309, he did not like her there and according to her evidence, the second Defendant kicked her out. He was entitled to do so as the absolute owner who had not invited the Plaintiff to be on that part of the land. The first Defendant who may have given the Plaintiff's husband permission to live on the piece of land had already sold it and could do nothing about it, and as I said, he no longer had the capacity to transfer to the Plaintiff the portion of land she is claiming.

From what I have been saying above therefore, even if the Plaintiff would have succeeded in proving all or any of the three grounds she is basing her case on (which she has not done) then she would have been caught by the fact of the existence of the Succession Cause in which the first Defendant was awarded parcel of land Dagoretti/Kinoo/309 as heir. The decision in that Succession Cause, in my view obliterates the Plaintiff's claim. I said the Succession Cause proceeded when the Plaintiff's husband was a live and he was aware. The Plaintiff must be, at least, deemed to have been aware. If it is true the Plaintiff and her husband had any interest in that piece of land, they or one of them could have sought to be made a party I the Succession Cause or should have raised objection to the proceedings. They both did nothing. The case was decided. The first Defendant was given the piece of land. There followed no objection in a court of law from the Plaintiff or her husband with regard to the Succession Cause. To date no such objection. It is 34 years since 1963. Some 22 years after the Succession Cause was decided, the Plaintiff comes to this court to file a case which has nothing to do with the Succession Cause and is clever not to mention that Succession Cause so that I am not informed.

In my view the Plaintiff is trying to avoid the effect of the doctrine of Res Judicata. I would not allow her escape that effect even if she has come before me basing her case on a trust, section 30 of the Registered land Act and adverse possession.

Accordingly I rule that not only has the Plaintiff failed to prove her case to my satisfaction on the grounds on which she relied but also she brought this case when the matter was res judicata. She ought to have raised the issue of a trust, the issue of overriding interests, and the issue of adverse possession in the Succession Cause. In the final analysis therefore, the Plaintiff's suit is hereby dismissed in its entirety. She will pay costs of this suit.

Delivered and dated this 17th day of September 1997.

J.M. KHAMONI

JUDGE

Present:

Mr. Mugambi for Mr. K. Kuria for Plaintiff.

Mr. M. Kinuthia for the Defendant.

Further Order:

Parties may obtain copies of the proceedings and of the Judgment from the Registry on payment.

J.M. KHAMONI

JUDGE