



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 3881 OF 1986

FRANCIS MUNGAI KIMANI PLAINTIFF

VERSUS

NGENDO KIBOGORO DEFENDANT

JUDGMENT

The plaintiff, Francis Mungai Kimani, has brought this suit against the defendant Ngendo Kibogoro for an order that he is entitled to be registered as the proprietor of half portion of Land Reference Number Kiambaa/ Waguthi/T83 on the ground that since 24th February, 1964 he has openly, peacefully and as of right, been in possession and occupation of the said piece of land for a period of over 12 years immediately preceding the filing of this suit and for another order directing that he be registered as the proprietor of the portion of land. The application is supported by an affidavit sworn by the plaintiff on 17th October, 1986.

There is no dispute as to the facts of this case. The parties, through their counsel have agreed that the plaintiff has been in occupation of half portion of the land in dispute namely Kiambaa Waguthu / T83 since 1964. They have further agreed that, the dispute between them over the land was also the subject of Kiambu Magistrate's Court Land Succession Case Number 2 of 1975 and that the parties have also appeared before the Assistant Chief of Waguthu Sub-Location in connection with the dispute. The appearances before the Assistant Chief were before and after the date of filing this suit. Notwithstanding these disputes, the parties agree that the plaintiff has never been evicted from the suit land by the defendant and has remained on the land since 1964.

Learned counsel for the parties filed written submissions in which the following arguments were advanced on behalf of the parties. For the plaintiff Mr Kamonde submitted that the plaintiff having enjoyed an uninterrupted possession of the suit land from 19th April, 1964 till 17th October, 1986 ie over 12 years, he had acquired rights over the suit land under the Limitation of Actions Act and the defendants title thereto had been extinguished. Mr Kamonde further submitted that the discussions held at the Assistant Chief's office did not interrupt the plaintiff's possession of the land; neither for that matter, did the succession case, as the effect of registration of the defendant as the proprietor of the land was that she took and held the land subject to any liabilities or interest which were unregistered but nevertheless enforceable and subject to which the deceased held the land. Counsel for the plaintiff argued that when the defendant's husband died, the plaintiff was in the process of acquiring overriding interests within the meaning of section 30(1) of the Registered Land Act. These interests could not and were not affected by the succession case or the registration of the defendant as the proprietor of the land, but continued to subsist up to the time the defendant's interest thereon became completely extinguished after 12 years continuous adverse possession of the land by the plaintiff.

The basic argument by Mr Thuo, for the defendant, was that though it is admitted that the plaintiff has been in occupation of land since 1964 his occupation has not been continuous but was interrupted by the various disputes between the parties which have been referred to the Assistant Chief and the Succession Case No 2 of 1975 at Kiambu in which the plaintiff's claim to the land was allegedly rejected. Mr Thuo relied on the authority of *Hosea v Njiru & Others* [1974] EA 526 and *Peter Wanyoike Gathure vs A Beverly* [1965] EA 514 for his contentions. He further relied on the case of *Sospeter Wanyoike vs Waithaka Kahiri* [1979] KLR 236 for his argument that the filing of a suit interrupts adverse possession. As can be seen from the two respective arguments by both counsel, the real issue in this suit is whether the plaintiff's occupation of the suit land has been interrupted by the reference of the dispute to the Assistant Chief or by Kiambu Succession Case No 2 of 1975.

While I agree with Mr Thuo's statement of the general principle of the law on the subject of adverse possession, ie that the person claiming to have acquired title by adverse possession must prove that he has been in exclusive possession of the land for a continuous period of 12 years without any interruption, there is no authority for his further contention that the filing of a suit in 1975 interrupted the period of adverse possession; in fact the position is clearly the opposite. The filing of a suit does not interrupt adverse possession; in certain cases it may even amount to a re-affirmation of adverse possession (see the case of *Gatimu Kinguru vs Muya Gachangi* [1976] KLR 253 cited by counsel for the plaintiff). Neither has the reference of the dispute to the Assistant Chief of the local area affected the adverse possession. The defendant has admitted that since 1964 the plaintiff has been in possession of the suit land. This possession has not been interfered with. The plaintiff has never been evicted. In those circumstances, how could it be argued that his possession has been interrupted. In my view the correct position is that the plaintiff possession having begun in 1964, the plaintiff was in the process of acquiring what section 30(1) of the Registered Land Act recognises as overriding interests when the succession case was filed in Kiambu after the death of the defendant's husband. The outcome of the case did not affect the plaintiff's rights in the land for the defendant held it subject to such overriding interests as were in the process of being acquired by the plaintiff. The defendant on being registered as the proprietor of the land as successor in title to her husband acquired exactly the same rights and liabilities as her husband had held. She could not have acquired rights which were superior to her deceased husband. In this respect the decision in the case of *Sospeter Wanyoike vs Waithaka Kahiri* (cited above) is no authority for the general proposition made by Mr Thuo that the filing of a suit interrupts the period of adverse possession. That case was decided on its very peculiar facts and circumstances, the plaintiff therein having filed a suit in the Resident Magistrate's Court at Kiambu claiming to have the land in question transferred to him from the defendant and upon the dismissal of the case by the Resident Magistrate for want of Land Control Board consent, the plaintiff then having brought a fresh suit in the High Court for a declaration that he had become entitled to the land by adverse possession of over 12 years. The learned judge found, on the facts of that case, that the filing of the suit in the Magistrate's Court in 1974 was an acknowledgement of the defendant's title to the land and therefore interrupted the period of adverse possession. I do not understand the case to have laid down a general principle to the effect that every filing of a suit interrupts adverse possession for, obviously, that would be wrong.

As was held in the earlier case of *Gatimu Kinguru vs Muya Gachangi* [1976] KLR 256 (a decision to which the learned judge in the *Kahiri* case does not appear to have been referred) the filing of a suit may amount to an assertion of a hostile title by the plaintiff which necessarily meant a denial of the defendant's title. I think the position in law is that stated by the Court of Appeal in the case of *The Public Trustee and Beatrice Muthoni vs Kamau Wanduru* (Court of Appeal Civil Appeal No 73 of 1982) in which it was held that even a decree establishing the proprietor right to the suit land, will not, without successful execution, interrupt adverse possession.

For the above reasons I find that the plaintiff's possession of the suit property has not been interrupted by the succession case or by the disputes referred to the local Assistant Chief. The plaintiff was in a continuous uninterrupted adverse possession of the suit land from 1964 upto the time of filing the suit in 1986, ie a period of over 24 years. Within that time he acquired the right to be registered as the proprietor of the suit premises under the Limitation of Actions Act and the rights of the defendant became extinguished. He is therefore entitled to the orders he seeks in the suit.

Accordingly there will be judgment from the plaintiff against the defendant as follows:-

(a) A declaration that the plaintiff is entitled to an order under section 38 of the Limitation of Actions Act to be registered as the proprietor of half portion of Land Reference Number Kiambaa / Waguthu / T 83 in place of the defendant who shall execute a valid transfer in favour of the plaintiff free from all encubrance.

(b) The defendant will pay the plaintiff's costs of this suit plus interest thereon at the court rate.

Orders accordingly.

Dated and Delivered at Nairobi this 12th Day of May, 1988

T. MBALUTO

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JUDGE