



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CIVIL CASE NO 1882 OF 1982

SARAH NYAMBURA KUNGUPLAINTIFF

VERSUS

DAVID JOHN NJOROGE THIGEDEFENDANT

JUDGMENT

This suit was filed by way of any originating summons supported an affidavit sworn by the plaintiff Sarah Nyambura Kungu against the defendant David John Njoroge Thige on the 2nd day of June 1982. Orders being sought for by the plaintiff being:

- (1) A declaration that the plaintiff has acquired or become entitled by adverse possession of over 12 years to all that piece of land registered under the Registered Land Act Cap300 of the Laws of Kenya and comprised in the title Number Limuru/Ngecha/377 situated in Ngecha, Limuru, Kiambu District;
- (2) An order that the plaintiff herein be registered as the sole proprietor of the said land parcel No Limuru/Ngecha/377 instead of the above named defendant David John Njoroge Thige who is at present registered as the owner of the said land parcel No Limuru/Ngecha/377.

The contents of the supporting affidavit in brief terms are to the effect that the plaintiff is the wife of the previous registered owner of the suit premises Zacharia Kungu Gitenguri. They said Kungu gave her this piece of land as a gift in 1963. She took possession of the land and has since resided on it uninterrupted and exclusively. She has during this time built a house on the suit premises and developed the land extensively. At the end of 1963, consent of the Land Board had not been obtained. Therefore no transfer and registration was possible. At the end of that year the gift to her became null and void for lack of registration. She then went in adverse possession of the land from then till 1975 when her husband's title was extinguished and she became entitled to the suit premises by virtue of section 38(1) of the Limitation of Actions (cap 22). It is under the provision of this section that she wishes the court to order that she instead be registered the owner of the suit premises. By the time the defendant became registered as the owner of the suit premises in April, 1982, she had already acquired overriding interest in the suit premises.

The defendant filed a replying affidavit and denied the fact that the plaintiff was entitled to any of the reliefs she was seeking for in this originating summons. Defendant contended that he was properly registered as the owner of the suit premises, having purchased the suit premises in an Auction for the sum of 140,000. The previous owner being the husband of the plaintiff failed to pay for a loan to Kenya

Commercial Bank secured with the suit premises.

Although he had bought the land in an auction on 25th February, 1982, he was not so registered as the owner till May 1982. As far as he knew, the plaintiff was the wife of the previous owner of the land. She did not begin living on the land till early 70s. Prior to the sale of the land, the auction had been advertised. The plaintiff did not do anything about it till he had bought the land. Sale was completed and it was when she was served with Notice to vacate the land that she quickly commenced these proceedings.

As far as he knew, the plaintiff was properly married to Kungu who owned another piece of land in Nyahururu where he lived with some of his family. On the above fact the court should not grant the orders prayed for.

To consider the evidence adduced by the plaintiff in more details, she told the court that she got married to Zacharia Kungu in 1961. Soon after marriage she lived with Kungu wherever he was working. The suit premises originally belonged to her husband. The land had been given to him by his grandfather. They have lived on this land since they got married. In 1965 her husband left her and went to live in Rift valley where he had bought another piece of land. Before he left he gave her the land as a gift but never actually transferred it. From the time she was given the land, she stayed on it with her six children developed it extensively. Her husband does not support her but occasionally leaves money with the children when he passes by. She has been able to look after her children because she is a teacher and does farming on the suit premises. She has done very extensive improvement on the land, fenced it and extended the house.

In 1973 she asked her husband in front of the elders to transfer the land to her and he said he would transfer but never did. Since 1965 up to date she has been in exclusive uninterrupted occupation of this piece of land. She knew about the loan he took but had nothing to do with him since he left for Rift Valley. They are married not divorced and they have six children. She had no idea about her land being sold till the day of the auction. By the time she got to the Auction to stop the sale, the defendant who comes from their area had bought it. It is from there that she filed this suit to claim her right on the ground that she had acquired an interest in the land by way of adverse possession having lived on the land for 17 years from 1965 to 1982, to the exclusion of anybody else.

Edward Kimani Mangele gave evidence for the plaintiff. He has known the plaintiff since 1964. Her husband being his age-group. He knows the plaintiff and her land in Ngecha location. He himself lives in Muguga sub-location about 8 to 10 miles away. Next to the plaintiff he has another property which he checks on very often. He knew that the plaintiff's husband went to Rift Valley but does not know the exact year. He knew the land belonged to Sarah because she is the only person that he sees on the land and the children. According to Kikuyu Customary Law, the land belongs to Sarah because she has got children. Although he was never been inside the land, he knows it very well and from the time Kungu went to Rift Valley has never seen him on the land.

Rachel Nyambura also a friend of the plaintiff gave evidence in her support. She has known the plaintiff since 1962 and even knows where she lives at Ngecha. She knew Sarah had been living on this land without her husband since about 1965. She knew that the suit premises was Kungu's family land and before he went to Rift Valley, Sarah told her that Kungu had given her the land as a gift and he would transfer the land to her. She tried on several occasions to ask Sarah whether Kungu had transferred the land but Sarah told her that her husband was sick most of the time and she was afraid to ask him. She knew it as a fact that Sarah had extensively developed the land. She was a frequent visitor to the land but had never seen Kungu there since he went to Rift Valley.

That is the evidence upon which the plaintiff is seeking for a declaration that she had already acquired an interest in the suit premises by way of adverse possession. The defendant's story is that he saw an auction advertised. He knew the suit premises because it is only a few kilometers from his house. He went to attend the auction. He bought the property, paid 35,000 on the same day the 25th February, 1982. After twelve days he paid the rest of the money 105,000. Thereafter the Kenya Commercial Bank transferred the suit premises to his name and he obtained the title as the registered owner.

On the 4th June, 1982 he wrote a letter to the plaintiff and her husband giving them Notice to vacate the suit premises. They did not do so. A few days after this when these proceedings were started. It is the defendant's evidence that he was known to the plaintiff's family for a long time having been a friend of one of the Kungu's sons before the family went out to the Rift Valley. He only came to know the plaintiff when she moved onto the land in the early seventies and not 1961. It was when she was teaching at St Paul's that she moved onto the land. He produced a letter Exh 2 from the past Headmaster of St Paul's School. The letter stated that the plaintiff had been posted to St Paul's Primary School when he was the Headmaster in 1973. In addition, the defendant produced his certificate of Primary Education for St Paul's Primary School. It shows that he finished at the school in 1967 having gone there in 1959.

Before he bought the land he knew it belonged to Kungu his home being only one kilometer away. He also knew that the suit premises was left with the plaintiff as the 2nd wife of Kungu while the 1st wife moved to the Rift Valley. Kungu has two wives so he comes and goes as he likes. As far as he knew, Sarah the plaintiff moved onto the land in 1974 when Kungu sister to her husband moved out.

The evidence was supported by an elderly man. Assistant Chief Gerald Maungu Ndeti. He is the Assistant Chief of Ngecha sub-location the area in which the suit premises is situated. He had been previously the subchief of the same area from way back in 1954. He was known to both the parties in the dispute. He was also known to Zacharia Kungu the plaintiff's husband. While he did not know when the plaintiff and Kungu got married he nevertheless knew that the plaintiff moved to the suit premises in 1974. Before she moved on, Kungu's sister and her husband had been living on the land. Before moving onto the land, the plaintiff was staying at St Paul Primary School. Since 1974 the plaintiff has been staying on the suit premises while her husband Kungu comes to the land as his home.

He remembered that sometime in 1982 there was a dispute between Kungu and his brother over the land. He presided over the hearing of the dispute and it was decided that the land belonged to Kungu. The plaintiff did not make any claim to the land nor did Kungu ever inform him that he had given the land to Sarah his wife as a gift. He knew Mangele PW2 who comes from Muguga. He had no plot adjacent to the suit premises. As the sub-chief of the area, he had never heard of a quarrel between Sarah and her husband. They were husband and wife.

Mr Kariuki who appeared for the plaintiff's contention is that the suit premises was given to the plaintiff by Kungu as a gift in 1963. At the expiry of one year, the gift became void for want of consent of the Land Board and Registration of the title into the plaintiff's name. From about 1964 the plaintiff went into adverse possession of the land. Her acquisition of the land by way of adverse possession crystallized in 1975 or thereabout after a period of 12 years. During this occupation the plaintiff was not occupying the land as Kungu's wife because he had deserted her with her children and gone to set up a home in the Rift Valley. Although the plaintiff did not apply to the court for a declaration that she had now become the owner of the suit premises, she did so in 1982. Therefore even at the time when the defendant was purchasing the suit premises the plaintiff's claim on the land had already matured. The defendant's purchase of the land does not affect the overriding interest that she had acquired. It is not in dispute that if the plaintiff was a wife to Kungu and living on the suit premises as Kungu's wife the question of her acquiring an interest in the land by way of adverse possession would not have arisen. Mr Kariuki has conceded to this in his written submission par (p).

“The plaintiff whose husband left her years ago has resided on the suit premises with the children not as the wife of the former owner, Zacharai Kungu Gitenguri but as an occupier in adverse possession.”

It therefore follows that the plaintiff has established her case on two main issues:

- (a) Was she a deserted wife?
- (b) Did she enter the suit premise on or about 1964?
- (c) Was this suit premises ever given to her as a gift?

As to Mr Kariuki's contention that the suit premises was given to the plaintiff as a gift which became void and that she the plaintiff was a deserted wife I can find no evidence upon which that contention is based. I have considered the evidence both of the plaintiff and that of the defendant and came to above finding.

1st to consider the plaintiff's own evidence in that she married Kungu she then moved onto the suit premises in 1963 and the land was given to her as a gift. The only evidence that the plaintiff adduced in support of her allegation was that of Rachel a woman friend of hers who had never heard Kungu give away the land to Sarah as gift. All she knew was what Sarah had told her. Then there was the evidence of a man not even a neighbor but somebody from another location altogether who tell the court that he had never seen Sarah's husband on the suit premises since he went to Rift Valley. A man who even conceded in cross-examination that he has never been on the land but sees it from his own plot. A plot which according to the chief who knew the area does not exist. I didn't think for a minute that the plaintiff was serious in her evidence nor was she interested in telling the truth. The only aspect of her testimony that I believed was that she had extensively developed the land. When it was revealed in evidence that she was not teaching at St Paul in the sixties but seventies, she became tongue-tied. The Headmaster's letter supports the defendant's story that if she moved to the land when she went to teach at St Paul then it was in 1973 or 1974.

Then there is the evidence of the Assistant Chief which I believed that Sarah did not move onto the land till 1974. Who else other than this old man would know better as to who owns what in his sub-location? After considering the evidence in its totality I was left in no doubt that (1) Kungu never gave Sarah his piece of land as a gift. Otherwise he would have come to say so or Sarah would have called the elders whom she said she had asked Kungu about the transfer of the land in their presence.

Secondly Kungu was the owner of the suit premises and he conducted himself as the owner to the extent of mortgaging the property to get money. Thirdly that infact Sarah did not move to the suit premises in 1963 or 1964 as she claimed. It is obvious that at the time of the sale Sarah had only occupied the suit premises for about 8 years. Lastly that at no time was Sarah separated or deserted from her husband. She herself conceded that Kungu was her husband and that he came and gave to their six children money every now and then. I reached the conclusion that Kungu and the plaintiff were indeed and infact husband and wife.

I am therefore satisfied that the plaintiff has not established her case to warrant this court granting her the reliefs she sought in this Originating Summons. I hereby therefore dismiss her suit with costs. Order accordingly.

Dated and Delivered at Nairobi this 20th day of May, 1987

E. OWUOR

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JUDGE