REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 811 OF 1975

AMOS WAINAINA ……………………………..……. PLAINTIFF

VERSUS

BELINDA MURAI

CLAUDIUS MURAI

FREDRICK KAIRU

THERESIUS MUCHERU

THOMAS KIMANGU

THOMAS GAKIRIO

RICHARD ROITA

JAMES MWANGI

PATRICK MUCHERU

STEPHEN KIENJERU……….........…………….. DEFENDANTS

JUDGMENT

In this originating summons the plaintiff, Amos Wainaina, seeks a declaration of entitlement by adverse possession to a piece of land occupied by him in the Ngerere/Thombotho area of Kahuro sub-location in Muranga'a district. The land is registered under the Registered Land Act, title number Loc 8/Ngerere/Thombotho/172. He also seeks an order that he be registered as the sole proprietor of that land in place of Ignatius Murai (deceased), the registered proprietor.

Ignatius Murai died on 16th May 1974 and the defendants are the legal representatives of the deceased. It is not disputed that the plaintiff was permitted by the deceased to occupy the land in 1961 when the deceased was chief of Mugoiri location and the plaintiff a sub-chief. The plaintiff has been in occupation rent-free ever since, despite a notice to quit given by the defendants' advocates dated 26th July 1974 in which reference is made to "the verbal licence granted to you by the late Mr Murai to occupy the above piece of land".

The plaintiff built a house on the land on going into occupation. It is made of mud and the original thatched roof was later replaced by one of corrugated iron sheets. He has been cultivating grass, napier grass, fruit, maize and coffee in the land which extends to 3.33 hectares. The coffee was planted in 1965.

In 1969 the deceased enabled the plaintiff to borrow on the security of the land by signing a charge in favour of Barclays Bank. The amount was indefinite and the plaintiff borrowed Shs 3000, followed in 1979 by a further Shs 3000. The full amount has been repaid by the plaintiff with the exception of the final payment of Shs 440.85 which was made by James Mwangi Murai, one of the defendants. The pay-in slip is headed "Amos Wainaina Loan A/c".

It appears from a letter from the bank of James Mwangi Murai dated 1st September 1975 that he had approached the bank with a view to having the title deed discharged. On 12th January 1976, the bank wrote again threatening to sell the property unless the loan was cleared. A copy of this letter was addressed to the plaintiff but the final payment was made without reference to him. By that time the present summons had been served on the defendants. It is not clear why the plaintiff failed to pay the outstanding balance, but I attach no significance to the fact of payment by one of the defendants.

The plaintiff said that he used the loans to develop the land and made the repayments from his salary.

The plaintiff's mother died in 1967 and is buried on the land.

The boundaries are marked by cedar posts erected by the plaintiff on a date he cannot remember. The boundary is not wired. The plaintiff said that he put up the posts before the death of Ignatius Murai. His witness, Evans Maina, said (not without some hesitation) that he had seen the posts from 1969 onwards. No witness could say precisely when the posts were erected. James Murai said it must have been recent, after the death of his father, and I am inclined to think this is probably so. Had the posts been erected during the lifetime of Ignatius Murai the plaintiff would have remembered the year and would be now have completed the fencing. The plaintiff claimed to have been adopted by the late Ignatius Murai. I was not impressed by his evidence which was given with noticeable embarrassment before a crowded Court. His witness, Evans Maina, gave conflicting evidence regarding the ceremony and defence witnesses whom I considered to be reliable and who would have been present at or at least known of such adoption denied any knowledge of it. The ceremony described did not accord with Kikuyu custom as described by a former president of an African Court, Thomas Ndindirukia. I am not satisfied that the plaintiff was adopted as he claimed.

There was some evidence that the late Ignatius Murai instructed wattle trees on the land to be cut down between 1961 and 1963 and that at a later date he prevented the plaintiff from building a stone house. The plaintiff was not cross-examined and denied any wish to put up a stone building. This evidence was vague and largely hearsay. Against this, both James Murai and Irungu, who claimed to have supervised the cutting down of the trees, admitted that they were cut down in 1961 before the plaintiff entered the land, the object being to clear the land for him and at the same time to enable the deceased [Ignatius Murai] to benefit from the sale of the wattle bark.

I do not accept that any trees were cut down by or on the instructions of Ignatius Murai after the plaintiff went into occupation of the land nor that he was refused permission to build a stone house.

In an affidavit the first defendant said that the plaintiff told her he had bought the land for Shs 8,000, of which he had paid Shs 7200; but in evidence she denied this. It was apparent that she knew little about the contents of her affidavit. The plaintiff in cross-examination said he had given Ignatius Murai Shs 7200 as a reward, but not for buying the land. He said that that was in 1962, that he had no witnesses and that no record was made of the payment. I am not satisfied that he made any such payment.

James Murai said that he was aged fifteen in 1961 and that his father always made it clear to him that he would inherit the land and, on several occasions during his school holidays, they went together to see the land. The plaintiff was not cross-examined with respect to these visits and Ignatius Murai left no written will, nor is there any acceptable evidence of any oral will. In succession proceedings in the District

Magistrate’s Court at Kiharu the magistrate ordered that James Murai should inherit the land in dispute by consent of the other members of the family. There was no reference to the wishes of the deceased.

Also relevant is the fact admitted by the plaintiff in cross-examination that he inherited six acres of land about 70 miles distant from the land in dispute and sold it in 1967 for Shs 4400 in order to develop the land in dispute.

I find on the foregoing evidence that the plaintiff has been in continuous and exclusive possession of the land since 1961. Was he a donee, a licensee or a tenant at will?

The plaintiff claimed to be a donee. Following his adoption he said he was given the land as a prospective share of is inheritance. I have already said I am unable to believe that any adoption took place. Similarly, I am not satisfied that the plaintiff was given the land as a gift whether as a prospective share of his inheritance or otherwise.

The defendants said that the plaintiff was a *Muhoi* (a person, usually a poor person, with no land of his own who under Kikuyu customs is permitted to occupy and cultivate land temporarily and who could never acquire ownership). This claim was not made in the affidavit filed on their behalf where the plaintiff was said to be a licensee. Counsel for the defendants attempted to equate licensee with *muhoi*, but in *Kimani v Gikanga* [1965] EA 735 Duffus J A equated *Muhoi* with tenant at will. Even if the plaintiff was a *muhoi* this does not prevent him from acquiring registered land by adverse possession under the Limitation Act. In distinguishing between a licensee and a tenant at will, exclusive possession was formerly conclusive. In *Lynes v Snaith* [1899] 1 QB 486, 488 Lawrance J said:

As to the first question, I think it is clear that she was a tenant at will and not a licensee; for the admissions state that she was in exclusive possession – a fact which is wholly inconsistent with her having been a mere licensee.

The Court of Appeal in England in *Cobb v Lane* [1952] 1 ALL ER 1199 modified this statement of the common law. The conclusion of the court is stated in the headnote as follows:

The fact of the exclusive occupation of property for an indefinite period is no longer inconsistent with the occupier being a licensee and not a tenant at will. Whether or not a relationship of landlord and tenant has been crated depends on the intention of the parties, and in ascertaining that intention the Court must consider the circumstances in which the person claiming to be a tenant at will went into occupation and whether the conduct of the parties shows that the occupier was intended to have an interest in the land or merely a personal privilege without any such interest.

In *Heslop v Burns* [1974] 3 All ER 406 the latest of a line of cases in which the distinction between a licensee and a tenant at will was considered, Scarman LJ had this to say (at page 415): What on earth has happened between 1899 and 1952? Are we witnessing judicial legislation without the assistance of Parliament? The answer is ‘No’. The law as I understand it is precisely the same today as it was then. The legal question is a question as to the intention of the parties. The legal balance still shows a tilt in favour of a tenancy at will; for, once an exclusive occupation has been established, a tenancy at will is presumed unless there are circumstances which negative it. What has happened, of course, is not that the law has changed but that society has.

Mr Mitra, for the plaintiff, referring to section 3 of the Judicature Act submitted that in Kenya we should follow the common law as it existed in 1897 that is that the only test should be exclusive possession. Subsequent decisions he said were due to circumstances peculiar to conditions in England and were not applicable to the circumstances of Kenya and its inhabitants. Scarman L J, following the passage from his judgment which I have quoted, went on to mention the Rent Restriction Acts and the emergence of a licence to occupy as a possible mode of land-holding. We have rent control and licences to occupy here; and I see no reason to hold that the common law as it has developed in England should not be applicable here in Kenya.

The plaintiff has established exclusive occupation. A tenancy at will is accordingly presumed. Are there any circumstances which negative it? Ignatius Murai is unfortunately not available to explain his intention. The plaintiff's evidence cannot be relied upon. Thomas Ndindirukia, an independent witness, said that Ignatius Murai told him that because the plaintiff had come from another area he helped him by giving him land to cultivate so that he could help his children. One can, I think, assume that Ignatius Murai was interested in retaining the plaintiff as one of his subchiefs and providing him with land to cultivate would enable him to settle in the area and ensure his loyalty.

The plaintiff was allowed to build a house on the land, to improve it, to cultivate permanent crops and to bury his mother on the land. Ignatius Murai assisted him to borrow money on the land without restriction as to the amount. Failure to repay the money would have resulted in the sale of the land by the bank.

Doe d Groves v Groves (1848) 10 Q B 486 bears some similarity to the present case. The owner of a house and land died intestate leaving his wife and minor son in occupation. The wife remarried and seven years later the son left. He returned occasionally to spend two or three weeks at a time with his mother and step-father. The defendant (the step-father) sought to mortgage the premises and the solicitor pointed out that the heir-at-law was his step-son. The step-son then came to the solicitor's office with the defendant, executed a mortgage and handed the money obtained thereby to the defendant. It was held that there was ample evidence to admit the presumption that the defendant occupied the premises as a tenant at will.

The evidence adduced in the present case I think tends to strengthen rather than negative the presumption of a tenancy at will. I find that the plaintiff was a tenant at will.

The plaintiff's claim is based on adverse possession of the land for more than twelve years. Under section 12(1) of the Limitation of Actions Act, a tenancy at will is taken to be determined at the end of one year from its commencement unless it has previously been determined, and accordingly the right of action of Ignatius Murai accrued and the plaintiff's adverse possession commenced sometime in 1962. Section 7 provides:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person. Thus the right of the defendants as legal representatives of Ignatius Murai, the deceased, came to an end sometime in 1974; let us say, the end of 1974.

On 26th July 1974, the defendant's advocates wrote to the plaintiff threatening action unless he gave vacant possession within thirty days. They took no further action, however, and the plaintiff remained in possession and filed the present originating summons on 28th April 1975. For the defendants it was submitted that the plaintiff acknowledged the title of Ignatius Murai when the charge was executed; and the right of action accrued from the date of such acknowledgment, and not before.

Section 24, however, provides that every acknowledgment of title must be in writing and signed by the person making it. There is no evidence of any such acknowledgement by the plaintiff. Section 38(1) of the Limitation of Actions Act provides:

Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act … he may apply to the High Court for an order that he be registered as the proprietor of the land … in place of the person then registered as proprietor of the land.

The land in question is registered under the Registered Land Act, an Act cited in section 37. The plaintiff has been in adverse possession for more than twelve years and is therefore entitled to the land. I accordingly order that the plaintiff be registered as the sole proprietor of the piece or parcel of Land Loc8/Ngerere/Thombotho/72 in place of Ignatius Murai (deceased), the registered proprietor of the land. The defendants will pay the plaintiff's costs.

Declaration accordingly.

Costs to plaintiff.

Dated at Nairobi this 25th Day of October 1976

A.H. SIMPSON

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JUDGE