



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT NAIROBI

ELC SUIT NO. 764 OF 2014

JANNIFER GATHONI NDEGWA

(In her capacity as legal representative of

Bernard Ndegwa Ngoro).....PLAINTIFF

VERSUS

SAMUEL KARIUKI.....1ST DEFENDANT

MONICA KABURA KAMUHINDI.....2ND DEFENDANT

JUDGMENT

The plaintiff brought this suit by way of Originating Summons dated 13th June, 2014 seeking a declaration that she was entitled to the ownership of the whole or a portion of all that parcel of land known as L.R No. Dagoretti/Riruta/2311 (hereinafter referred to as “Plot No. 2311”) by adverse possession and that she be registered as the proprietor of the said parcel of land. The plaintiff’s Originating Summons was brought under Sections 37 and 38(1) of the Limitation of Actions Act, Chapter 22 Laws of Kenya and Order 37 Rule 7 of the Civil Procedure Rules and the same was supported by the affidavit of the plaintiff sworn on 13th June, 2014.

In her affidavit, the plaintiff stated that she was the widow of Bernard Ndegwa Ngoro (hereinafter referred to as “the deceased”). She stated that in the year 1988, the 2nd defendant purchased from the 1st defendant a portion of L.R No. Dagoretti/Riruta/147 measuring approximately 0.162 Ha. She stated that the 1st defendant sub-divided L.R No. Dagoretti/Riruta/147 and excised therefrom the said portion of land that he had sold to the 2nd defendant which was given land reference number Dagoretti/Riruta/2311 (“Plot No. 2311”). She averred that the 1st defendant was supposed to take steps to transfer Plot No. 2311 to the 2nd defendant. The plaintiff averred that before Plot No. 2311 was transferred to the 2nd defendant as aforesaid, the 2nd defendant sold a portion thereof measuring 110 feet by 72 feet (hereinafter referred to “the suit property”) to the deceased on 11th February, 1997 at a consideration of Kshs.250,000/= which the deceased paid to the 2nd defendant in full.

The plaintiff averred that it was agreed between the 1st and 2nd defendants and the deceased that the 1st defendant would transfer the suit property directly to the deceased. She averred that the 1st defendant did not transfer the suit property to the deceased as had been agreed. The deceased however took possession of the property in 1997 after paying the purchase price in full to the 2nd defendant and developed the same by putting up permanent residential houses for his occupation and for leasing. The plaintiff averred that the deceased died on 7th January, 2010 after having been in occupation of the suit property openly and continuously from the year 1997. The plaintiff averred that she continued to occupy the suit property after the death of the deceased. The plaintiff averred that the deceased had acquired the suit property by adverse possession having occupied the same openly and continuously for uninterrupted period of 16 years prior to the filing of this suit.

The defendants were served with the Originating Summons but only the 2nd defendant entered appearance and filed a replying affidavit in response to the same. The 2nd defendant admitted that she sold a portion of Plot No. 2311 to the deceased and that the plaintiff was entitled to a half portion of the said plot.

When the suit came up for hearing on 26th July, 2018, neither the 2nd defendant nor her advocates attended court. The plaintiff gave evidence and closed her case. The plaintiff told the court that she was the administrator of the estate of the deceased. The plaintiff reiterated the contents of her affidavit in support of the Originating Summons. She stated that from the time the deceased entered and took possession of the suit property in 1997 no one had come to lodge a claim over the same. The plaintiff produced as exhibits among others, a copy of Grant of Letters of Administration dated 16th August, 2012 in respect of the estate of the deceased, a copy of a certificate of official search in

respect of Plot No. 2311 and a copy of the agreement for sale of the suit property between the deceased and the 2nd defendant.

I have considered the Originating Summons and the affidavit filed in support thereof. I have also considered the evidence that was tendered by the plaintiff in support of her case and the written submissions on record dated 29th October, 2015. In the case of Salim v Boyd and Another (1971) E.A 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In the case of Kimani Ruchine & Another v Swift Rutherford Co. Ltd. & another (1977) KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, nec plecario (no force, no secrecy, no evasion).....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

I am satisfied that the plaintiff has established her claim over the suit property. As I have stated earlier in this judgment, the 1st defendant did not defend the suit while the 2nd defendant filed an affidavit in which she essentially admitted the plaintiff's claim over the suit property. The evidence that was adduced by the plaintiff to the effect that, the deceased entered the suit property in 1997 developed the same and occupied the same continuously with his family until his death in 2010 was not controverted. It was also not controverted that the plaintiff as the administrator of the estate of the deceased continued to occupy the suit property openly and peacefully after the death of the deceased. The plaintiff has proved that as at the time of his death, the deceased had been in occupation of the suit property for 13 years. In the circumstances, the deceased had acquired the suit property by adverse possession as at the time of his death.

Due to the foregoing, it is my finding that the plaintiff has proved her case on a balance of probabilities. I therefore enter judgment for the plaintiff as follows:

1. I declare that the plaintiff, Jennifer Gathoni Ndegwa in her capacity as the administrator of the estate of Bernard Ndegwa Ngoro has acquired a portion of L.R No. Dagoretti/Riruta/2311 measuring 110 feet by 72 feet by adverse possession.
2. The 1st defendant shall cause to be subdivided at the cost of the plaintiff L.R No. Dagoretti/Riruta/2311 and shall transfer at the cost of the plaintiff a portion thereof which is occupied by the plaintiff measuring 110 feet by 72 feet to the name of Jennifer Gathoni Ndegwa as administrator of the estate of Bernard Ndegwa Ngoro.
3. In the event that the 1st plaintiff is unable or fails to comply with the order given in 2 above, the plaintiff shall undertake the subdivision of L.R No. Dagoretti/Riruta/2311 and the transfer of a portion thereof measuring 110 feet by 72 feet to her name as administrator of Bernard Ndegwa Ngoro. In this regard, the Deputy Registrar of this court shall be authorised to sign all the requisite documents on behalf of the 1st defendant to facilitate the subdivision of L.R No. Dagoretti/Riruta/2311 and transfer of a portion thereof measuring 110 feet by 72 feet to the plaintiff.
4. Each party shall bear its own costs of the suit.

Delivered and Dated at Nairobi this 7th day of February 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Chege h/b for Mr.Kimani for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd Defendant

Roselyne-Court Assistant