



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 58 OF 2014**

**DIONISIA IGANDU NDWIGA.....PLAINTIFF**

**VERSUS**

**JULIET NJERI NYAGA.....DEFENDANT**

**JUDGEMENT**

1. By an originating summons dated 25<sup>th</sup> June 2008 brought under **Order OXXXVI Rule 3D of the Civil Procedure Rules**, the Plaintiff sought the following orders against Juliet Njeri Nyaga who was the sole Defendant at the material time;

- a. That this honourable court be pleased to make a declaration that the applicant Dionisia Igandu Ndwiga has obtained and adverse title to Title No. Kagaari/Kigaa/2195.*
- b. That this honourable court be pleased to make an order that the Defendant's title to the said land be extinguished.*
- c. That this honourable court be pleased to cancel the registration of the Defendant Juliet Njeri Nyaga as the proprietor of piece of land Kagaari/Kigaa/2195 and in place thereof, order the registration of the Plaintiff Dionisio Igandu Ndwiga.*
- d. That the costs of this application be awarded to the Applicant.*

2. The said originating summons was based upon the grounds contained in the supporting affidavit sworn by the Plaintiff on 7<sup>th</sup> June 2008. It was stated that sometime in 1977 or thereabouts the then registered owner of *Title No. Kagaari/Kigaa/2195* (hereinafter known as the suit property) Mbogo Mbothenja sold it to the Plaintiff's late husband Stephen Ndwiga Njamumo (hereinafter called Stephen).

3. The said Mbogo thereupon handed over the original title deed for the suit property to Stephen and also handed over vacant possession of the property. It was further stated that even though Mbogo Mbothenja (hereinafter known as Mbogo) did not transfer ownership of the suit property, the Plaintiff and his family continued to enjoy quiet possession without interruption. They developed the suit property by building 5 houses and a water tank and by planting cash crops and various trees.

4. The said originating summons was subsequently amended on 4<sup>th</sup> October 2009 to include Mbogo as the 2<sup>nd</sup> Defendant in the proceedings. All the other particulars and supporting documents remained the same.

5. In her replying affidavit sworn on 17<sup>th</sup> March 2009, the 1<sup>st</sup> Defendant stated that she bought the suit property from the 2<sup>nd</sup> Defendant in 1994 and the transaction was processed in the normal manner culminating in the issuance of a title deed to her. She also disclosed the existence of previous legal proceedings amongst the parties herein or those under whom they claimed. One such suit was Embu *PMCC No. 478 of 1994* by Stephen against Mbogo for specific performance regarding the sale of the suit property.

6. The 2<sup>nd</sup> Defendant filed a replying affidavit sworn on 4<sup>th</sup> March 2015 in which he denied having sold the suit property to Stephen as alleged by the Plaintiff. He stated that he had only allowed Stephen to reside on the suit property to enable him work on the adjacent parcel of land which he (Mbogo) had sold to him. He also claimed that the original title deed was stolen by Stephen since he did not give him the original title.

7. The court has considered the pleadings in this matter, the replying affidavits, the respective witness statements of the parties as well as the documentary evidence on record. The main question for determination in this suit is whether or not the Plaintiff has satisfied the requirements for an order of adverse possession as required by law. The legal requirements for proving adverse possession are fairly well settled in Kenya. They were restated in the cases of **Wambugu Vs Njuguna [1983] KLR 172; Githu Vs Ndeete [1984] KLR 776; Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184 and Kimani Ruchine Vs Swift Rutherfords & Co Ltd [1980] KLR 10.**

8. In the case of **Kasuve Vs Mwaani Investments Ltd** (supra), the requirements of adverse possession were summarized as follows;

**“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, Wanja Vs Sakwa No. 2 [1984] KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”**

Such possession must, of course, be without force, without secrecy and without evasion as expressed in the *Latin* rendition *nec vi, nec clam, nec precario*.

9. The first element relates to the Plaintiff's possession of the suit property. The court is satisfied on the evidence on record that the Plaintiff has demonstrated exclusive possession of the suit property for more than the statutory period of 12 years. The 1<sup>st</sup> Defendant confirmed during cross-examination by the Plaintiff's counsel that he had never returned to the suit property since 1977. He did not even know if the Plaintiff or Stephen had developed the suit property over the years. Prior to the filing of the instant suit, Plaintiff's possession had not been interrupted in any manner.

10. The next aspect for consideration is whether such possession was hostile and adverse to the interests of the title holder. It was claimed by the 2<sup>nd</sup> Defendant that the Plaintiff and her husband entered the suit property with his permission. The court accepts that the initial entry was indeed with permission but that is not the end of the matter. If, as contended by the Plaintiff, the 2<sup>nd</sup> Defendant sold the suit property to Stephen in 1977, then the necessity of such consent ceased upon sale. I shall say more on this aspect of sale bearing in mind that the issue before court is adverse possession and not specific performance.

11. The first reason why the court does not believe that the Plaintiff's possession all along was with the permission of the 2<sup>nd</sup> Defendant is that the Plaintiff's use of the suit property was totally inconsistent with the 2<sup>nd</sup> Defendant's title to the property. The Plaintiff stated in her supporting affidavit that they had erected 5 semi-permanent houses, a permanent water tank, cultivated cash crops such as miraa, coffee, mangoes and bananas. Those are long-term investments and developments. Moreover, the 2<sup>nd</sup> Defendant testified that he never went back to the suit property between 1977 and the time of sale to the 1<sup>st</sup> Defendant. That is not consistent with normal human behavior. It is simply incredible that the 2<sup>nd</sup> Defendant could license a stranger to occupy his land and house on a temporary basis and then disappear for decades without checking on how the licensee was utilizing the property.

12. The second reason why the court does not believe that the Plaintiff was merely a licensee of the 2<sup>nd</sup> Defendant is that he informed the 1<sup>st</sup> Defendant that the person who was residing on the suit property was his nephew. That was the evidence of the 2<sup>nd</sup> Defendant during cross-examination by the Plaintiff's advocate. The court believes the evidence of the 1<sup>st</sup> Plaintiff on that aspect. The 2<sup>nd</sup> Defendant must have lied to her so as not to raise any eyebrows on why a total stranger could be in occupation of the suit property. In my opinion, it was a lie designed to induce the 1<sup>st</sup> Defendant to enter into the sale transaction without hesitation or suspicion.

13. The court's consideration of the totality of the evidence on record is that the Plaintiff's occupation of the property was without force, without secrecy and without evasion. It was adverse to the interests of both Defendants and exclusive in nature. It was not interrupted at any time before expiry of the statutory period of 12 years stipulated under the **Limitation of Actions Act (Cap 22)**. As was held in the case of **Githu v. Ndeete** (supra) a mere change of ownership of property the subject of adverse possession does not interrupt possession.

14. Although the following remarks are not necessary for the determination of this suit, I think it is necessary to make them here. The court agrees with the submissions by the Defendant's counsel that the three (3) letters dated 25<sup>th</sup> July 1977, 9<sup>th</sup> November 1977 and 7<sup>th</sup> April 1979 do not specifically mention the suit property as the subject of a sale transaction. However, the letter of 7<sup>th</sup> April 1979 from Mbogo informs Stephen that “*I do not have many things except you have prevented many things to and...even Title Deed you have (sic). Greet your people.*”

15. One may wonder which **title deed** was being referred to in the said letter. In my opinion, it could not be the title deed for the transaction on parcel No. 2194 which was finalized without dispute many years before. It could only refer to the title deed for the suit property whose transfer had not been finalized by 7<sup>th</sup> April 1979.

16. The other question which arises is this. If the 2<sup>nd</sup> Defendant knew as far back as 1979 that Stephen had the title deed for the suit property, why did he report its alleged loss in 1994? Why did he cause gazettment of its loss and issuance of another title deed? The only logical explanation points to some mischief and fraud on the part of the 2<sup>nd</sup> Defendant. He simply wanted to obtain another title deed so that he may sell the suit property to an unsuspecting buyer. That explains why he lied to the 1<sup>st</sup> Defendant that it was his nephew who was residing on the suit property.

17. The final issue for determination is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. In the premises, the Plaintiff shall be awarded costs of the suit.

18. The upshot of the foregoing is that the court finds merit in the Plaintiff's originating summons dated 25<sup>th</sup> June 2008 and amended on 4<sup>th</sup> November 2009. The same is consequently allowed as prayed. The 2<sup>nd</sup> Defendant shall bear the Plaintiff's costs as well as the 1<sup>st</sup> Defendant's costs.

19. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 20<sup>TH</sup> day of SEPTEMBER, 2018.**

In the presence of Ms Ngigi holding brief for Mr Mugambi for the Plaintiff and Ms Kiai holding brief for Mr Kathungu for the Defendant.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**20.09.18**