



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 252 OF 2014**

**JULIETA MARIGU NJAGI.....PLAINTIFF**

**VERSUS**

**VIRGINIA NJOKI MWANGI.....1<sup>ST</sup> DEFENDANT**

**JOHN NGARI NGUNGI.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. By a plaint dated and filed on 13<sup>th</sup> February 2003, the Plaintiff sued the original Defendants Luka Mwangi Hosea and Ngungi Borana seeking their eviction from *Title No. Nthawa/Riandu/450* (hereinafter the suit property). The Plaintiff also sought *mesne* profits, costs of the suit and any other relief the court may deem fit to grant.

2. The Plaintiff pleaded that she was the registered proprietor of the suit property having purchased it from one Livan Ndwiga Ngungi, for valuable consideration. It was further pleaded that the Defendants had trespassed onto the suit property and refused to vacate it despite demand.

3. The Defendants in their original defence dated 15<sup>th</sup> March 2003 denied the Plaintiff's claim in its entirety. They instead pleaded that they had bought the suit property from one Norman Ndwiga Ngungi and had been in possession thereof for more than 20 years.

4. It would appear that during the pendency of the suit, both the original Defendants passed on and were substituted by their personal representatives who are the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively.

5. The current defendants amended their statement of defence on 19<sup>th</sup> July 2017 and included a counterclaim. They pleaded in the counterclaim that they had acquired the suit property through adverse possession as they had occupied the suit property since 1960. It was also pleaded that the Plaintiff was holding the suit property in trust for the Defendants. However, no particulars of trust were pleaded.

6. The Defendants, therefore, prayed for dismissal of the Plaintiff's suit and for entry of judgement in their favour on account of the counterclaim in the following terms;

*a. Nthawa/Riandu/450 be registered in the names of the Defendants.*

*b. The Defendants have obtained adverse possession of parcel No. Nthawa/Riandu/450 having resided there since 1960s.*

*c. The Plaintiffs hold title of Nthawa/Riandu/450 in trust for the Defendants.*

*d. Title No. Nthawa/Riandu/450 in the names of the plaintiffs be cancelled and instead the same to be registered in the names of the Defendants.*

*e. The costs be in the cause.*

7. The Plaintiff filed a reply to the amended defence and answer to counterclaim dated 17<sup>th</sup> October 2017 in which the Defendants' counterclaim was denied in its entirety. The Plaintiff contended that the counterclaim was bad in law and ought to be struck out for non-compliance with the **Civil Procedure Rules** and "other related laws". The Plaintiff further pleaded that the counterclaim was vexatious and frivolous for having been brought forward 15 years after the institution of the suit.

8. It is evident from the court file that there has been considerable delay in the hearing and conclusion of the suit. The record shows that this

suit was partly heard before the late Hon Justice Joyce Khaminwa in 2006 when the Plaintiff called two witnesses and closed her case. The parties do not appear to have taken steps to have the hearing concluded for another 12 years.

9. There is no indication on record if directions were given on how the part-heard suit shall be concluded. However, it would appear that the parties were content to proceed with the hearing *de-novo*. The Plaintiff called two witnesses on 14<sup>th</sup> December 2017 whereas the Defendants called 3 witnesses and closed their case on 13<sup>th</sup> February 2018.

10. The gist of the Plaintiff's case was that she lawfully bought the suit property from the then registered owner, Livan Ndwiga Ngungi, for valuable consideration in consequence of which a title deed was processed and issued in her name. It was her case that when she bought the suit property in 2002, the Defendants were not residing thereon.

11. The 1<sup>st</sup> Defendant's evidence was that the suit property was bought by her late husband from one Norman Ndwiga. She could not remember when it was bought. She stated that she had been residing there for 40 years even though no title deed was ever issued to her late husband.

12. The 2<sup>nd</sup> Defendant stated that he was the son of the original 2<sup>nd</sup> Defendant (now deceased). He stated that he was about 27 years of age and that the suit property was bought by his late father from Norman but a transfer was never done. He, therefore, wanted a share of his late father's land. It was his case that he and his family members resided on the suit property.

13. Upon conclusion of the hearing, the Plaintiff's advocate was given 45 days to file and serve written submissions whereas the Defendants' advocate was given 45 days after service to do likewise. By the time of preparation of this judgement, however, none of the parties had filed any submissions.

14. The court has noted from the court file that the parties herein had framed and signed a statement of eleven (11) issues for determination in the suit dated 13<sup>th</sup> May 2003. The statement was filed on 13<sup>th</sup> March 2003. However, those issues do not incorporate the issues raised in the amended defence and counterclaim dated and filed on 19<sup>th</sup> July 2017. The court shall, therefore, revise and adjust the issues accordingly.

15. The court is of the view that the main issues for determination in this suit are the following:

- a. Whether the Plaintiff is the registered proprietor of Title No. Nthawa/Riandu/450 (the suit property).
- b. Whether the Plaintiff purchased the suit property from Livan Ndwiga Ngungi as *bonafide* purchaser for valuable consideration.
- c. Whether the Defendants were in actual occupation of the suit property at the time the Plaintiff purchased it.
- d. Whether the Defendants have established the claim for adverse possession.
- e. Whether the Plaintiff holds the title to the suit property in trust for the Defendants.
- f. Whether the Defendants' counterclaim is bad in law.
- g. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
- h. Whether the Defendants are entitled to the reliefs sought in the counterclaim.
- i. Who shall bear costs of the suit and the counterclaim.

16. The court has considered the evidence on record on the 1<sup>st</sup> issue. There is adequate oral and documentary evidence to demonstrate that the Plaintiff is the registered proprietor of the suit property. The Plaintiff produced copies of the land register, certificate of official search and copy of the title deed for the suit property.

17. The 2<sup>nd</sup> issue is whether the Plaintiff purchased the suit property from Livan Ndwiga Ngungi as *bonafide* purchaser for valuable consideration. The court has examined the evidence on record on this issue. The copy of the green card on record shows that the register was opened on 11<sup>th</sup> January 1978 when Livan Ndwiga Ngungi was registered as proprietor. A restriction was simultaneously entered in the register to prevent further dealings pending the conclusion of an appeal before the minister. The said restriction was removed on 6<sup>th</sup> April 1987 and the suit property was transferred to the Plaintiff on 15<sup>th</sup> January 2002.

18. Although it was contended by the current Defendants that the original Defendants purchased the suit property or portions thereof from Norman Ndwiga Ngungi, there is no evidence on record that the said Norman ever owned the suit property. The evidence on record only reveals that he was a clan elder and the father of Livan Ndwiga Ngungi who was the first registered proprietor of the suit property.

19. The court, therefore, finds and holds that the Plaintiff was a *bonafide* purchaser of the suit property. There is evidence on record that the plaintiff paid some consideration. The vendor, Livan Ndwiga Ngungi also testified during his lifetime before the late Hon. Justice Khaminwa and confirmed having sold the suit property to the Plaintiff and not the original Defendants. He conceded having been paid the purchase price. The court finds no evidence of foul play in the sale transaction.

20. The 3<sup>rd</sup> issue is whether the Defendants were in actual occupation of the suit property at the time it was sold to the Plaintiff. The Plaintiff's evidence was that the original Defendants were not residing on the suit property at the time of sale. She, however, conceded that one of them, Ngungi, was cultivating a portion thereof. The Defendants, on the other hand, insisted that they were in occupation at the material time.

21. The evidence of occupation from the Defendants and their witness was not very clear. When the Defendants filed their original defence, they claimed to have been in occupation for over 20 years. However, in her evidence, the 1<sup>st</sup> Defendant claimed to have been in possession for over 40 years. To complicate the issue further is the Defendants' amended defence and counterclaim which pleaded that they had been in occupation since 1960 (ie a period of 57 years).

22. The court is of the view that at least one of the original Defendants may have been cultivating the land but was not residing thereon. There was no evidence that any of the Defendants had built any houses on the suit property. The evidence of Livan Ndwiga Ngungi was that by the time he sold the suit property to the Plaintiff, the Defendants had not built any sheds on the suit property. The court, therefore, finds no evidence that the Defendants were in actual occupation of the suit property at the time of its sale to the Plaintiff.

23. The 4<sup>th</sup> issue is whether the Plaintiffs have established their counterclaim for adverse possession. The law on adverse possession in Kenya is founded on the provisions of the **Limitation of Actions Act (Cap 22)** and the **common law of England**. The law relating to adverse possession was restated in the following decided cases; **Wambugu Vs Njuguna [1983] KLR 171; Githu Ndeete [1984] KLR 776; Kimani Ruchire Vs Swift Rutherfords & Co Ltd [1980] KLR 10** and **Kasuve Vs Mwaani Investments Ltd & 4 Others [2004] 1KLR 184**.

24. The legal requirements were summarized in the case of **Kasuve Vs Mwaani Investments Ltd and 4 Others [2004] 1KLR 184** 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 dispossessing the owner or by the discontinuation of possession by the owner on his own volition, Wanje Vs Saikwa (No. 2) [1984] KLR 284”**

25. As indicated in paragraph 21 hereof, there were serious inconsistencies and contradictions on the Defendants' pleadings and evidence on the time when their occupation commenced. Neither the 1<sup>st</sup> nor the 2<sup>nd</sup> Defendant could remember when they took occupation after they allegedly purchased portions of the suit property from Norman Ndwiga. In her witness statement dated 31<sup>st</sup> June 2016 the 1<sup>st</sup> Defendant stated that she had been in occupation of 2 acres of the suit property for “more than 20 years.” In her further statement dated 24<sup>th</sup> November 2017, the 1<sup>st</sup> Defendant claimed that Norman Ndwiga Ngungi and Livan Ndwiga Ngungi referred to one and the same person and that her late husband had purchased part of the suit property from him in 1973.

26. It was further stated by the 1<sup>st</sup> Defendant that the late Norman did not show them the property they had actually bought but a separate one owned by his son, Ileri Ndwiga. The said Ileri later on asked them to move to the suit property which Norman had sold to the Defendants. The date of the said movement was not disclosed either in her oral evidence or witness statements.

27. The bottom line is it is hardly possible to establish the year in which the Defendants or the original Defendants took possession of the suit property. It is also not possible to establish if the Defendants had exclusive possession of the suit property or identifiable portions thereof for a period of more than 12 years. There is some evidence on record that Livan was at some point cultivating part of the suit property before he sold it to the Plaintiff. However, cultivation by itself does not constitute adverse possession.

28. The court is also not satisfied that the Defendants have demonstrated that their occupation, for whatever period, was adverse to the true owner of the land. There is some evidence by Livan Ndwiga that he had allowed the original Defendants to cultivate or occupy part of the suit property and that when the former decided to sell it to the Plaintiff, he notified the original Defendants of the sale. There was also no evidence to demonstrate the kind of developments undertaken on the suit property or whether they were inconsistent with the rights of the registered owner. The 4<sup>th</sup> issue is, therefore, answered in the negative.

29. The 5<sup>th</sup> issue is whether the Plaintiff holds the title to the suit property in trust for the Defendants. Apart from the failure by the Defendants to plead the particulars of trust, there was no evidence adduced which could demonstrate the existence of any trust with respect to the suit property. There is also no material on record from which a trust, whether express, resulting or constructive could be deduced. This issue is, therefore, answered in the negative.

30. The 6<sup>th</sup> issue is whether the Defendants' counterclaim is bad in law. It was pleaded by the Plaintiff that it was bad in law for failing to comply with the provisions of the Civil Procedure Rules and other related laws. No particulars of those provisions of the Rules or other related laws were given. No submissions were made to elaborate on this issue either. The court is of the view that any violation of procedural requirements cannot invalidate the resultant proceedings. This court is obliged to dispense substantive justice under **Article 159 1 (d) of the Constitution of Kenya** without undue regard to procedural technicalities.

31. The 7<sup>th</sup> and 8<sup>th</sup> issues are on whether the Plaintiff and the Defendants are entitled to the reliefs sought in the plaint and counterclaim respectively. In view of the court's findings on the preceding issues, it would follow that the Plaintiff is entitled to the reliefs sought in the plaint save the claim for *mesne* profits which was not established. The Defendants are not entitled to the reliefs sought in the counterclaim since they failed to prove their counterclaim.

32. The 9<sup>th</sup> issue relates to costs of the suit and the counterclaim. 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 and of the counterclaim.

33. The upshot of the foregoing is that the court finds merit in the Plaintiff's suit which shall be allowed with costs whereas the Defendants' counterclaim shall be dismissed with costs. Consequently, the court makes the following orders.

a. Judgement is hereby entered for the Plaintiff against the Defendants as prayed for in the plaint save for the claim for *mesne* profits which is hereby disallowed.

b. The Defendants' counterclaim is hereby dismissed.

c. The Plaintiff is hereby awarded costs of the suit and the counterclaim.

d. The Defendants shall have a grace period of 60 days within which to voluntarily vacate the suit property. In the event of their failure to vacate within that period, any process of eviction shall be conducted strictly in accordance with the applicable laws including the Land Laws (Amendment) Act 2016.

34. 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 the Plaintiff in person and Ms Ngige holding brief for Mr Kahuthu for the Defendant.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**20.09.18**