



REPUBLIC OF KENYA

IN THE E.L.C. COURT OF KENYA AT EMBU

E.L.C. NO. 138 OF 2014

LIBERATA MUTITU.....PLAINTIFF

VERSUS

GERALD NYAGA KABERE.....1st DEFENDANT

REDEEMED GOSPEL CHURCH INC REGISTERED TRUSTEES.....2nd DEFENDANT

JUDGEMENT

1. The Plaintiff herein, Liberata Mutitu, filed an Originating Summons dated 24th September 1996 seeking a declaration of adverse possession of Title No. KAGAARI/KITHUNGUTHIA/T.32 against the Defendants. The said Originating Summons was, with leave of court, amended on 11th July 2005 in which the Plaintiff framed 8 questions for determination by the court.

2. Although the Plaintiff framed 8 questions for determination in her amended Originating Summons, most of them overlap and in the court's view, there are really 3 main questions for determination namely;

- a. Whether the Plaintiff has acquired ownership of Title No. Kagaari/Kithunguthia/T.32 through adverse possession.
- b. Whether the Defendants should be ordered to execute all necessary documents to effect transfer of the suit property to the Plaintiff.
- c. Whether the Plaintiff is entitled to costs of the suit.

3. The Plaintiff's supporting affidavit which is annexed to the amended Originating Summons states that she entered into a sale agreement with the 1st Defendant for the purchase of the suit property on 15th April 1980. The said affidavit further indicates that she took possession of the suit property in 1980 and continued cultivating it until 1996 when she was forcibly evicted by the 2nd Defendant who had bought the suit property from the 1st Defendant.

4. The 1st Defendant filed an affidavit in opposition to the original Originating Summons on 14th November 1996 in which he stated that the Plaintiff, who is married to his uncle, was occupying and cultivating the suit property with his permission.

5. The 2nd Defendant, on the other hand, filed a replying affidavit to the original Originating Summons on

8th May 1997 in which its pastor then in charge of Kavungua Redeemed Gospel Church stated that the church had bought the property with all developments thereon and that it had taken possession thereof.

6. This suit was handled by 6 different judges and was partly heard by Hon Justice H.I. Ong'udi who heard four witnesses in the matter between 2012 and 2013. The proceedings were thereafter typed after which I heard one defence witness.

7. The Plaintiff testified on 18th July 2012 before Hon Justice H.I. Ong'udi. She stated that she purchased the suit property from the 1st Defendant in 1980 for a sum of Ksh 5000/- out of which she made a down payment of Kshs 3,500/-. The balance was to be paid upon transfer.

8. It was the Plaintiff's testimony that the 1st Defendant failed to transfer the suit property to her over the years and finally sold and transferred it to the 2nd Defendant which forcibly took possession in 1996 and built a church thereon. She further stated that her coffee stems and other crops were destroyed during the takeover. She, therefore, sought to recover the land. She produced a copy of the sale agreement as an exhibit.

9. The Plaintiff also called Sebastian Nyaga Njiru who testified on her behalf as PW 2. PW 2 stated that he witnessed and signed the sale agreement between the Plaintiff and the 1st Defendant. He confirmed the purchase price to be Kshs 5,000/- but he was not involved in the matter thereafter.

10. The Plaintiff's third witness, Mwangi Simon Gathenju, was the Plaintiff's brother in law. He testified that the Plaintiff had cultivated the suit property which is adjacent to his for a long time and had cultivated some potatoes, coffee and other trees.

11. The 1st Defendant testified on his own behalf and stated that sometime in 1980 the Plaintiff approached him and asked to be allowed to cultivate the suit property. He allowed her to cultivate it since she was his aunt. According to his evidence, the Plaintiff asked him sometime in 1981 to sell the suit property to her.

12. The 1st Defendant testified that the purchase price was agreed at Kshs 5,000/- out of which she paid Kshs 2,400/-. The balance was to be paid upon transfer. He stated that after demanding for the balance severally, the Plaintiff told her that she had no money. He finally sold the suit property to the 2nd Defendant which took possession and built a church thereon.

13. During cross-examination by the Plaintiff, the 1st Defendant denied that the sale agreement was typewritten. He insisted that they signed a handwritten agreement and that the typed one was strange to him.

14. The 2nd Defendant called the current church pastor to testify on behalf of the church. He was still new at Kavungua Church and he merely stated the obvious. He testified that the church was a purchaser for value and that they had been issued with a title deed. He produced a copy of the title deed as an exhibit.

15. It is clear from the record that the parties are not agreed on the amount of deposit which was paid and on the outstanding balance. They are also not agreed on whether the sale agreement was handwritten or typed. It is also not clear from the record whether the Plaintiff was to pay the balance of the purchase price before, upon, or after transfer. The last paragraph of the sale agreement produced by the Plaintiff as exhibit P1 provides that:

"It is agreed that after the payment of the balance of Kshs 1500/- the transfer of the said plot No. Kagaari/Kathunguthia/T.32 will be transferred by the seller without any delay whatsoever."

16. In view of the fact that the Plaintiff's claim is based upon adverse possession and not specific

performance of the sale agreement, it shall not be necessary to resolve those issues for purposes of this suit. All that the Plaintiff is required to establish are the elements of adverse possession.

17. The first issue for determination is whether the Plaintiff is entitled to the suit property by virtue of adverse possession as defined in law.

18. It is not certain from the evidence on record exactly when the Plaintiff bought the suit property from the 1st Defendant. In her evidence in chief, the Plaintiff claimed it was in 1981 whereas during her cross-examination she stated it was in 1982. The sale agreement which she produced as an exhibit indicates the date as 15th April 1980.

19. According to PW 2, the year of purchase was 1982 whereas PW 3 did not specify the year but merely stated that the Plaintiff had cultivated the plot for a very long period of time.

20. The 1st Defendant, on the other hand, claimed that sometime in 1980 he was approached by the Plaintiff to be allowed to cultivate the land. The Plaintiff is her aunt and he therefore allowed her to do so. He further stated that sometime in 1981 the Plaintiff sought to buy the plot from him whereupon the purchase price was agreed at Ksh 5,000/-.

21. The 1st Defendant stated that although the Plaintiff paid a deposit of Ksh 2,400/-, she failed to pay the balance of the price despite numerous reminders. The 1st Defendant eventually gave up on her and sold the property to the 2nd Defendant in 1996 which took possession and built a church thereon.

22. The elements of adverse possession were aptly summarized in the case of **Kasuve v. Mwaani Investment Ltd & 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 v. Saikwa (No. 2) [1984] KLR 284.**”*

23. The Court of Appeal in the said case also stated that;

*“A title by adverse possession can be acquired under the Limitation of Actions Act for a part of the land and the mere change of ownership of the land does not interrupt such person’s adverse possession, see **Githu v. Ndeete [1984] KLR 776.**”*

24. The requirements for adverse possession therefore appear to be the following;

- a. The claimant must have exclusive possession of the land.*
- b. The occupation must be open, without force and adverse to the rights of real owner.*
- c. The possession must be without interruption for at least 12 years.*

25. The Plaintiff in this suit appears to have been in possession of the suit property and to have cultivated it from the early 1980s till 1996 when she was evicted upon the property being sold to the 2nd Defendant which took possession and built a church thereon. Even though there is conflicting evidence on record on the year the Plaintiff started cultivating the land, at least the period from 1982 to 1996 constituted a period of more than 12 years.

26. There is also no dispute that the Plaintiff had exclusive possession of the land during the period she was cultivating it. What, however, is not so clear is whether such possession was adverse to the interest of the 1st Defendant or it was with his permission or consent.

27. It is on record that the Plaintiff and the 1st Defendant are close relatives and that the parties had entered into a sale agreement. It is not agreed if the agreement was handwritten or typewritten. The year of the sale is also not agreed because of the conflicting evidence given by the parties. The dates vary between 1980 and 1982. What is apparent, however, is that the Plaintiff took possession with the consent of the owner even though she had not paid the full purchase price and before the transaction could be concluded and the suit property transferred to the Plaintiff.

28. According to the Plaintiff's evidence, she was waiting for the 1st Defendant to transfer the property first while the 1st Defendant testified that he was expecting to be paid the balance before transfer. It was the 1st Defendant's case that after waiting for years and demanding the balance of the purchase price, the Plaintiff failed to pay. The 1st Defendant apparently gave up on her and sold the suit property to the 2nd Defendant. The property was then transferred to the 2nd Defendant who took possession in 1996 or thereabouts.

29. It would appear to me that for all the while the 1st Defendant was waiting for and demanding his balance, the Plaintiff was cultivating the suit property with his permission whether express or tacit. It was only upon the 1st Defendant giving up on the Plaintiff that he sold the suit property and transferred it to the 2nd Defendant. The Plaintiff was thereafter given notice to quit. In those circumstances, I am not satisfied that the Plaintiff's cultivation of the suit property was adverse to that of the owner. The 1st question for determination is, therefore, answered in the negative.

30. The second issue for determination is whether the Defendants should be ordered to execute all the necessary documents to effect a transfer of the suit property to the Plaintiff. In view of my finding and holding on the first question, it follows that this question must be answered in the negative as well. The court not having been satisfied that the Plaintiff has made out a case for adverse possession, it cannot make an order for transfer of the suit property to her.

31. The third question relates to costs of the proceedings. The general rule is that costs shall follow the event so that a party who has succeeded in a suit should generally be awarded costs unless there is a good reason to order otherwise.

32. During the hearing of the defence case, DW 2 stated that he did not wish to insist on costs of the suit and indicated that the church was willing to forgo them. On the other hand, the Plaintiff and the 1st Defendant are close family members and it would not be appropriate to make an order for costs in respect of the land dispute.

33. The upshot of the foregoing is that the Plaintiff's Originating Summons amended on 11th July 2005 fails and the same is hereby dismissed with no order as to costs.

34. It is so adjudged.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **31st** day of **MAY, 2017**

In the presence of the Plaintiff in person and Mr Mogusu for the Defendants.

Court clerk Mr Njue

Y.M. ANGIMA

JUDGE

31.05.17