



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
OF KENYA AT KITALE
ELC CASE NO.152 OF 2006

MARY NAMAEMBA MUKOMBIE WASWA.....PLAINTIFF

VERSUS

MARCELLINA NEKESA.....DEFENDANT

J U D G M E N T

1. The plaintiff in this case filed a plaint on **28th August 2006**. She pleaded that she is the registered absolute proprietor of **LR N0 Saboti/Saboti Block 8/Saboti/130** while the defendant is the owner of **LR N0 Saboti/Saboti Block 8/Saboti/131**The two land parcels share a common boundary.
2. In February 2006, the plaintiff states the defendant trespassed onto the plaintiff's land and ploughed $3\frac{1}{2}$ acres and planted maize. The defendant has refused to move out the $3\frac{1}{2}$ acres or have the common boundary aligned despite several demands. The plaintiff's prayer is for a declaration that the defendant is a trespasser and that she should be evicted from the suit land and for costs of the suit.
3. In her defence filed on **4/10/2006**, the defendant denies that she is the registered proprietor of **LR Saboti/Saboti BK8/Saboti/131**. She also denies that the plaintiff is the owner of the suit land. In addition she states that the plaintiff is her co-wife and they do not share a common boundary. The defendant avers that the suit land was bought by the defendant and one Jackson Nyongesa, the parties' common husband, in **1974** after which land was registered in the name of Jackton Nyongesa in trust for the benefit of the defendant and her dependants.
4. The defendant avers that if the suit land exists the same is held in trust by the plaintiff for the defendant and her dependants since it was created out of **LR No.Saboti/Saboti Block 8/Saboti 130**. The defendant avers that she has ploughed and cultivated the said piece of land since **1974**. She also states that no demands have been issued to her.
5. The reply to defence denies that the land was bought jointly by the defendant and Jackson Nyongesa, but says that Jackson Nyongesa solely purchased the plot and thereafter effected a transfer to the plaintiff. The plaintiff maintains in her reply to defence that the plaintiff has been cultivating on **LR NoSaboti/Saboti Block 8/Saboti131** and that the defendant, not being satisfied with their common husband's act of parceling out the land to the two wives, has trespassed onto the plaintiff's parcel. It is also denied that the defendant could have acquired the land by adverse possession.
6. This suit came up for hearing on various dates. Only the plaintiff and the parties' common husband testified in court. The defendant's counsel, Mr. Wafula informed the court on **12/7/17** that he would not

be calling witness and that he was closing the defence case. The court on that day ordered parties to file submissions. As at the **31st July 2017**, only the plaintiff had filed her submissions.

7. The history of this matter shows that there were attempts at an amicable settlement. Despite a consent order recorded on **20/11/2011**, allowing the filing of an amended defence and counterclaim, no action was taken in this regard by the defendant. On the **9/7/17** the court, at the instance of the parties granted them time to negotiate a settlement. No settlement was reached hence this judgment.

8. I find that the issues for determination in this matter are the following:

- 1. Are the parties are married to one common husband?**
- 2. Was the disputed land purchased by their Jackson Nyongesa and the defendant jointly?**
- 3. Was the land subdivided among the two wives by the said Jackson Nyongesa?**
- 4. Is the plaintiff entitled to possess and retain the portion, if any, transferred to her by Jackson Nyongesa or does the defendant have the right to own the land by virtue of the doctrine of adverse possession?**
- 5. Should the defendant be evicted from the plaintiff's portion?**
- 6. Who should pay the costs of the suit?**

1. Are the parties married to one husband?

9. Though the plaint was silent on this issue, the defence brought it out. The plaint only described the parties as neighbours. The Reply to defence confirmed this existence of matrimonial relations between the parties in that they were married to a common husband. Evidence given by PW1 and PW2 (Jackson Nyongesa, who is the parties' husband) confirmed that the plaintiff and the defendants are wives to the Jackson Nyongesa.

2. Was the disputed land purchased by the defendant and Jackson Nyongesa jointly?

10. The defendant never appeared in court to testify in this matter. The assertion was made by the defendant in her defence. It is required evidence to support it. It cannot stand in the absence of such evidence. I therefore find that it has not been established that the land was jointly purchased by the defendant and Jackson Nyongesa.

3. Was the land subdivided among the two wives by their husband?

11. Jackson Nyongesa testified as follows:-

“The plaintiff is my younger wife. The defendant is my elder wife. I own land at Saboti Cooperative Farmers Society. I subdivided my land and gave each of my two wives their own titles. The defendant has title to plot No.131. The plaintiff has title to plot No.130”

12. It is clear that the husband to the parties acknowledges that the land he owned in the Saboti Cooperative Farmers Society Ltd was divided between his two wives who are the parties in this suit.

13. The plaintiff produced a copy of her title **LR No.Saboti/Saboti Block 8/130** which measures **1.480Ha**. It is registered in her name. It was issued on **21/2/2006**.

The plaintiff also produced a certificate of official search dated **9/7/2012**. It shows that **LR No.Saboti/Saboti Block 8/131** is registered in the name of the defendant. It is therefore, true that the husband to the parties separated them by causing them to be issued with separate titles for the land they

owned.

4. Is the plaintiff entitled to retain her portion?

14. The land is registered in the plaintiff's name. There is no cause shown by the defendant as to why the plaintiff should not be allowed to take possession of, retain and develop her portion of the land which is under a different title. There is no claim that the plaintiff can possibly lay claim to this land, especially after failing to attend court to give evidence in support of her defence.

15. The claim for adverse possession is not supported by evidence. In the *Malindi Land case No. 108 of 2011 (O.S) – Kahindi Ngara Mwagandi Versus Mtana Lewa eKLR*, the court stated as follows:-

“Adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner. If the person in adverse possession continuous to occupy land, and the owner does not exercise his right to recover it by the end of the prescribed period of 12 years, the owner's remedy as well as his title to the land are extinguished by virtue of the provisions of sections 7,9,13,37 and 38 of the Limitation of Actions Act. ”

16. However the parties here have familial relations by virtue of marriage to a common husband and this defeats the claim for adverse possession. In the case of *Mbira –Vs- Gachuhi, (2002) Vol I, EA, 137* the court observed as follows:

“To hold that adverse possession can arise between persons living together as hindered, whether by blood or marriage relationship, would open floodgates of litigation. Such a holding would be portentous of calamitous practical consequences on cherished positive cultural practices and usages amongst our people, meant to provide social and economic security in the event of misfortune befalling a number of the community.”

17. For that reason, I find that the plaintiff entitled to take possession of, retain and develop that land comprised in Title No. **Saboti/Saboti Block8/Saboti/130** to the exclusion of the defendant.

5. Should the defendant be evicted from Title No.Saboti/Saboti Block 8/Saboti/130

18. The land comprised in **Plot No.Saboti/Saboti/Block 8/130** is not in the name of the defendant. I have found that she does not have right to it. The land is registered in the name of the plaintiff. It was registered under the Registered Land Act which was repealed, giving ground to the **Land Registration Act, Act No.3 of 2012**.

Section 24 of that Act states as follows:

“Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

Section 25 of that Act states the rights of a proprietor is to be as follows:

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this

Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2)-Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

19. It is therefore clear that where no express interest of another person have been demonstrated to exist in respect of land the registered proprietor holds title to land only subject to the overriding interests in **Section 28** of the Act. In this case no express or implied trust in favour of the defendant has been shown to exist. I find that she has no interest in the land and she should be evicted.

6. Who should pay costs?

20. The defendant, fully knowing that each party had a distinct title to their portions and that the land had been subdivided between the two wives of the Jackson Nyongesa, occasioned this suit by refusing to vacate the disputed land while she had no right to remain thereon and she should pay the costs of the suit.

Determination

21. In the end, I find that the plaintiff has proved her case against the defendant on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendant in this suit and issue the following orders:-

1. An order of declaration declaring that the defendant is a trespasser on the plaintiff's land that is LR No.Saboti/Saboti Block 8/Saboti/130.

The defendant shall be evicted from the said land LR No Saboti/Saboti Block 8/Saboti 130. However the eviction of the defendant shall comply with the statutory requirements of the Land Act with regard to evictions.

2. The defendant shall pay the costs of this suit.

Dated, signed and delivered at Kitale on this 24th day of August, 2017.

MWANGI NJOROGE

JUDGE

24/8/2017

Before - Mwangi Njoroge Judge

Court Assistant – Isabellah/Picoty

Ms. Arunga for Plaintiff

Mr. Wafula for Defendant

Judgment read in open court.

MWANGI NJOROGI

JUDGE

24/8/2017