



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 492 OF 2009

ALICE NJAMBI WAITIKI.....1ST PLAINTIFF

LOISE NJERI KINUTHIA.....2ND PLAINTIFF

(Both suing as the Administrators of the
Estate of the Late Robinson Kinuthia Muriakiara)

VERSUS

JOHN KAMAU MUCHAI.....1ST DEFENDANT

PATRICK GITHAE.....2ND DEFENDANT

JACINTA W. NDIRANGU.....3RD DEFENDANT

BENJAMIN WAMAGATA MBUTHIA.....4TH DEFENDANT

(Sued as Trustees of Kinoo Water Trust)

JUDGMENT

The Plaintiffs have sued the Defendants as trustees of the Kinoo Water Trust which was incorporated in January 2008 (hereinafter referred to as the “Trust”) and have been sued as the chairman, vice chairman, treasurer and secretary. The Trust is a successor to Kinoo Self Help Water Project (hereinafter referred to as the “Water Project”) which was registered on or about 1980. The Plaintiffs are the administrators of the estate of the late Robinson Kinuthia Muriakiara (hereinafter referred to as the “Deceased”) who was the registered proprietor of the parcel of land identified as Dagoretti/Kinoo/786 (hereinafter referred to as the “suit property”) prior to his death on 11th October 1992.

PLEADINGS

By a Plaint dated 15th September 2009, the Plaintiffs made a claim against the Defendants jointly and severally for orders that; the caution placed over the suit property be removed; an order that the Defendants and their successors do give vacant possession of the suit property to the Plaintiffs; that the

Defendants do pay the Plaintiffs the sum of Kshs. 8,050/= together with interest from 1981 until payment in full, that the Defendants do pay the Plaintiffs mesne profits in the sum of Kshs. 664,000/= together with interest and costs of this suit.

In the Plaint, the Plaintiffs pleaded that the Water Project/Trust operates and manages a community water project situated in Kinoo location within Kikuyu district. They further pleaded that in 1981, the Deceased agreed to allow the Water Project to enter into, obtain and use the water from the suit property on condition that the Water Project would compensate him with another parcel of land and a sum of Kshs. 10,050/= as compensation for the crops destroyed on the suit property. The Plaintiffs further stated that in breach of the said agreement, the Defendants failed to give the Deceased another parcel of land and only paid him Kshs. 2000/= as compensation for his destroyed crops leaving an outstanding balance of Kshs. 8,050/=. They pleaded further that the Deceased died in 1992 uncompensated by the Water Project/Trust which remains on the suit property to this day. They further stated that on 13th March 2002, the Trust registered a caution against the suit property claiming a licensee's interest. The Plaintiffs therefore aver that there being no consideration given by the Defendants, the caution should be removed, the Defendants should vacate the suit property and pay the outstanding sum of Kshs. 8,050/= together with interest from 1981 and pay mesne profits at the rate of Kshs. 2,000/= per month from January 1981 to August 2009 as Kshs. 2000 x 332 months = Ksh 664,000/=.

The Defendants entered appearance on 6th November 2009 and filed a joint statement of Defence and Counterclaim wherein they averred that the Deceased agreed to donate the suit property to the Water Project/Trust for the development of a community water project and in return was to be compensated by Kiambu County Council by the allocation of the parcel of land known as Dagoretti/Kinoo/T.407 while the Defendants were to pay him compensation only for the crops that were on the suit property whose value was agreed at Kshs. 6,025/-. The Defendants maintained that this sum was fully paid to the Deceased on or about 10th March 1991 and no balance was left outstanding as alleged or at all. The Defendants further averred that they did all they could to secure the transfer of the said parcel of land Dagoretti/Kinoo/T.407 to the Deceased but had been unsuccessful as that parcel of land was neither registered in their name nor in their power to transfer. They further stated that they would demonstrate that the Deceased was in direct engagement with Kiambu County Council and later its successor Kikuyu Town Council concerning the same and added that the proper parties to be sued for the orders sought was Kiambu County Council and its successor Kikuyu Town Council.

The Defendants also made a Counterclaim where they stated that they have been utilizing and have developed the suit property since 1981 by installing pump houses, a water reservoir, boreholes, water pipes and other installations with a value of Kshs. 25,000,000/= and were providing water to over 3,000 families including the Plaintiffs. They contended that they have developed and utilised the suit property openly, as of right, peaceably and without force since 1981 and as such the Plaintiffs' title has been extinguished by adverse possession and they have become entitled to be registered as proprietors of the suit property by virtue of section 38 of the Limitation of Actions Act. In the circumstances, they prayed that judgment be entered in their favour on the Counterclaim for an order directing the Plaintiffs to transfer the suit property to the Defendants and be condemned to pay the costs of the Counterclaim.

There was a Reply to the Defence and Counterclaim filed by the Plaintiffs on 16th November 2009 wherein the Plaintiffs stated that it was the Defendants' responsibility to compensate the Deceased and his estate as the contract was between the Defendants and the Deceased. The Plaintiffs also stated that the Defendants were estopped from shifting their liability under the contract to Kiambu County Council where the Defendants stated that they requested for an alternative land for the Deceased which never materialised. The Plaintiffs further added that the Defendants indicated in the caution that they are licensees on the suit property and are therefore estopped from denying the same. The Plaintiffs also stated that the Defendants entered the suit property with the consent of the Plaintiffs and under a contract whose consideration failed and as such the Defendants are admitted licensees on the suit property.

EVIDENCE

During the hearing of this suit, **PW1**; *Alice Njambi Waitiki* testified that she was the daughter of the

Deceased who died on 11th October 1992. She testified that her late father was the registered proprietor of the suit property. She stated that she applied for Letters of Administration over the estate of the Deceased in Succession Cause No. 21 of 2002 at Kiambu which was granted and confirmed on 6th August 2003. She produced the Confirmation of the Grant and stated that she is the one who had been given the suit property by way of transmission. She further testified that sometime in the year 1981 the Deceased entered into an agreement with the Water Project to use the suit property and compensate the Deceased with an alternative plot as well as pay him the sum of Kshs. 10,050/- being compensation for his destroyed crops on the suit property. She testified that the Deceased was only paid Kshs. 2,000/- for the crops leaving a balance of Kshs. 8,050/- which remains unpaid to date. To support that testimony, she referred to a letter by the Deceased dated 29th August 1987. She also testified that the Deceased was never given an alternative parcel of land to date. She then referred to a Certificate of Official Search which she produced that showed that a caution had been registered against the title of the suit property by the Water Project. She testified that the Land Registrar refused to remove the said caution even after finding that no compensation had been paid to the Deceased or his estate in exchange for the suit property. She further alluded to another parcel of land being Dagoretti/Kinoo/T.407 which was promised to the Deceased in exchange for the suit property which was allocated to one Geoffrey Muiruri Muchai. She further stated that when she requested the Kikuyu Town Council to compensate her with an alternative parcel of land, they directed her to go to the Water Project/Trust who were the ones to compensate her. She stated further that when she went to the Water Project/Trust to compensate her, they sent her back to the Kikuyu Town Council. She stated that in the circumstances, she wanted the Water Project/Trust removed from the suit property to enable her to take possession thereof and enjoy the benefits of the same.

PW2; *Loise Njeri Kinuthia* testified that she was a daughter of the Deceased and one of the administrators of his estate. She confirmed that the suit property belonged to the Deceased and was given to her sister Alice Waitiki as evidenced in the Confirmation of Grant produced by PW1. She added that she had no knowledge of the Water Project/Trust ever paying any compensation to the Deceased or her sister in exchange of the suit property. In cross-examination, she testified that her sister, PW1, was not given any property from the estate of the Deceased other than the suit property.

DW1; *George Muhia Kamau* testified that 10 years previously, he had been a member of the Committee of the Water Project and as such knew the Deceased as well as the Plaintiffs. His testimony was that the Deceased sold the suit property to the City Council of Kiambu in the 1980s for extraction of water therefrom by the Water Project. He stated that the arrangement was between the Deceased and the Kiambu City Council. He further testified that the Deceased was paid a sum of Kshs. 4,025/- for the destruction of his crops at the suit property. He testified that he is the one who was sent to personally hand over Kshs. 4,025/- to the Deceased which he did. He confirmed that the Water Project/Trust has used the suit property now for more than 25 years. He emphasized that the Plaintiffs should have sued the Kiambu City Council and not the Water Project/Trust.

DW2; *Peter Kimani Kiambuthi* stated that he is the current chairman of the Water Project/Trust and knows the Plaintiffs. He testified that some members of the community formed a water project in the 1980s and were given funds by the government to drill a borehole. He further testified that the Water Project was registered as a Trust in the year 2008. He further averred that the borehole that they sank did not have sufficient water but the Deceased and his daughter had a spring at their common boundary. He testified that the committee talked to both of them with a view of acquiring the spring so that it could be developed to become a source for the Water Project. He stated that they agreed to give out the suit property and to be compensated by Kiambu County Council. He referred to one of the minutes [Minute No 216/81 held on 8th December 2012] of the Kiambu County Council which approved that the Deceased be given parcel of land being Dagoretti/Kinoo/T.407 as compensation for the suit property but which parcel was later allocated to somebody else. His testimony was that though he was aware that the Deceased was never compensated for the suit property, the Water Project/Trust was only responsible to compensate the Deceased for the crops destroyed at the suit property and have no other role beyond that. He confirmed that the Water Project paid the Deceased Kshs. 4,025/- for the crops damaged during the development of the spring. He further confirmed that they sent DW1 to hand over this sum to the Deceased. He maintained the position that it was the responsibility of Kikuyu Town Council to

compensate the Deceased on behalf of the public as the Water Project/Trust was a public utility.

DW3; *Jacinta Wairimu Ndirangu* testified that she was a neighbour to the Deceased, a one-time committee member of the Water Project and also a trustee in the Trust. She testified that they have sought to have the suit property transferred to the Trust because the water is used by the community and that the Plaintiffs should seek compensation from Kiambu County Council. On cross examination she stated that the Trust was to pay for the crops only which was done.

THE ISSUES

After evaluating the pleadings, the evidence tendered in court by the witnesses, the written submissions and the authorities each party relied on, this court has found that the issues for determination are as follows:-

1. Who the legal owner of the suit property is.
2. What the legal position of the Water Project/Trust on the suit property is and whether they are entitled to be registered as proprietors of the suit property by adverse possession as claimed in the Defendants' Counterclaim.
3. Whether the Plaintiffs are entitled to be given vacant possession of the suit property.
4. Whether the caution registered against the suit property should be removed.
5. Whether the Defendants should pay to the Plaintiffs Kshs. 8,050/- plus interest thereon from 1981 to date as compensation for the damaged crops on the suit property.
6. Whether the Defendants should pay the Plaintiffs mesne profits amounting to Kshs. 664,000/- claimed by the Plaintiffs for use of the suit property.
7. Who should bear the costs of the suit.

DETERMINATION

Who the legal owner of the suit property is.

It is conceded by both the Plaintiffs and the Defendants that the suit property was legally owned by the Deceased. The 1st Plaintiff and the 2nd Plaintiff were able to demonstrate to this court that they were appointed as the joint legal administrators of the estate of the Deceased. This fact was not disputed by the Defendants. The Plaintiffs were also able to demonstrate to this court vide the Confirmation of Grant which they produced that the suit property was inherited by the 1st Plaintiff. The parties however agree that to this date, the suit property remains in the name of the Deceased owing to the inability of the 1st Plaintiff to have her name inserted as the owner thereof due to the caution registered against the suit property by the Defendants. In light of this, I make the finding that the legal owner of the suit property is the 1st Plaintiff, Alice Waitiki.

What the legal position of the Water Project/Trust on the suit property is and whether they are entitled to be registered as proprietors of the suit property by adverse possession as claimed in the Defendants' Counterclaim.

The Defendants admitted that they were allowed by the Deceased to take over the suit property and use it for the purpose of harvesting water from the springs occurring therein for distribution to residents of the Kinoo area. The Defendants contended that the Deceased entered into a tripartite agreement with the Water Project and the Kiambu County Council (which was later succeeded by the Kikuyu Town Council) whereby it was agreed that the Deceased would give the suit property to the Water Project which would

pay him Kshs. 4,025/- for the damaged crops but that the Kiambu County Council, and now the Kikuyu Town Council would compensate him with an alternative parcel of land. The Defendants admitted that they paid to the Defendant the sum of Kshs. 4,025/- as compensation for the damaged crops and they did not owe the Deceased or his estate anything more though they have continued to use the suit property to this day. The Kiambu County Council or its successor Kikuyu Town Council were never made parties to this suit. It was demonstrated by the Plaintiffs that the Defendants entered a caution against the suit property claiming a licensee's interest but the Defendants now claim to be entitled to be registered as the proprietors of the suit property by adverse possession based on their continued stay on the suit property for a period exceeding 12 years.

During the hearing of this matter, no written agreement was produced to this court which contained the terms of the alleged agreement between the Deceased, the Water Project/Trust and the Kiambu County Council or the Kikuyu Town Council. The Plaintiffs and the Defendants both stated that the arrangement between the Deceased and the Water Project was oral. Where matters of land are concerned, the court requires to see a written agreement as evidence of disposition of an interest in land. This requirement is stipulated in the **Law of Contract Act at section 3(3)** which clearly indicates as follows:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

a. The contract upon which the suit is founded

a. Is in writing

b. Is signed by all the parties thereto: and

b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party...”

As far as I can tell, the suit property, which was registered in the name of the Deceased has never been transferred to the Water Project/Trust. The suit property has been inherited by the 1st Plaintiff who now only needs the caution over the suit property removed for her name to be entered into the register as the registered proprietor of the suit property.

In their Counterclaim, however, the Defendants have laid claim over the suit property claiming that they have been utilizing and have developed the suit property since 1981 by installing pump houses, a water reservoir, boreholes, water pipes and other installations with a value of Kshs. 25,000,000/= and are providing water to over 3,000 families including the Plaintiffs. They contend that they have developed and utilised the suit property openly, as of right, peaceably and without force since 1981 and as such the Plaintiffs' title has been extinguished by adverse possession and they have become entitled to be registered as proprietors of the suit property by virtue of **section 38 of the Limitation of Actions Act**. To that claim, I note that the Defendants did admit that they were allowed by the Deceased to enter into the suit property and to use the same for the harvesting of the water from the spring occurring therein. In **Wambugu v Njuguna (1983) KLR 172**, the Court of Appeal made a finding that,

“Where the claimant is in exclusive possession of the land with leave and licence of the appellant (Owner) in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse, the two concepts cannot co-exist”.

In the case of **Wanje versus Saikwa (No. 2) Civil Appeal No. 72 of 1982**, the Court of Appeal held as follows:

“A person who occupies another person's land with that persons consent cannot be said to be in adverse possession as in reality, he has not dispossessed the owner of the land and the possession is not illegal.”

In the case of **Jandu –vs- Kirpal [1975] EA 225** the court made a finding that:

“The rule of “permissive possession” is that possession does not become adverse before the end of the period which the possessor is permitted to occupy the land”.

In light of the foregoing decisions, the court finds that the Defendants have not satisfied the claim on adverse possession as they were given permission take possession of the suit property by the Deceased.

Where does that leave the Defendants? So far as I can tell, the Defendants fall into the category of licensees. A licence is permission given gratuitously and is not coupled with any grant of interest. It is revocable by the licensor at will (see **Armstrong v. Sheppard & Short Ltd (1952) QB 384**). I am further persuaded by the finding in the case of **Facchini v. Bryson (1952) TLR 1386** where the court stated as follows:

“In all cases where an occupier has been held to be a licensee there has been something in the circumstances such as a family arrangement, an act of friendship or generosity, etc to negative any intention to create a tenancy.”

When I critically consider the circumstances in which the Defendants came to be in possession of the suit property and have remained in possession and use of the suit property since the 1980s to date without paying any consideration for it, it is clear to me that the Defendants were the beneficiaries of an act of generosity on the part of the Deceased. It would appear that the Defendants were also aware of their legal position as licensees on the suit property as they also registered a caution on the suit property claiming a licensee’s interest. The down side of being a licensee as noted above is that it is revocable by the licensor at will.

Whether the Plaintiffs are entitled to be given vacant possession of the suit property.

Having determined that the legal owner of the suit property is the 1st Plaintiff, Alice Waitiki, who now wishes to revoke the license granted by her father to the Defendants, the Defendants have no other wise but to grant the 1st Plaintiff vacant possession over the suit property.

Whether the caution registered against the suit property should be removed.

Section 73(1) of the Land Registration Act No. 3 of 2012 provides that a caution may be removed by order of the court. I consider that the caution has preserved the suit property pending the hearing and determination of this case and has served its purpose. Having determined that the 1st Plaintiff, Alice Waitiki, is entitled to be registered as the owner of the suit property by way of transmission, the caution must be removed for this to be done. Accordingly, I hereby order that the caution registered by the Defendants against the suit property be removed without any further delay and the 1st Plaintiff’s name be entered in the register as the proprietor of the suit property.

Whether the Defendants should pay to the Plaintiffs Kshs. 8,050/- plus interest thereon from 1981 to date as compensation for the damaged crops on the suit property.

All the parties herein are in agreement that the Deceased was supposed to be paid some compensation for the crops on the suit property which were damaged when the Defendants took possession of the suit property. However, the parties herein are not in agreement as to the amount of compensation agreed and whether or not it was paid to the Deceased. The Plaintiffs allege that the Deceased was to be compensated Kshs. 10,050/= for the crops but was only given Kshs. 2000/= leaving a balance of Kshs. 8050/=. The Defendants on their part claim that the amount to be paid to the Deceased was Kshs. 8,050/= but they reduced the amount to Kshs. 4,025/= which reduction was agreed by all the parties. Indeed there is a letter dated 14th February 1991 stating that the compensation for crops had been agreed at

Kshs. 4,025 / = and there is evidence that the Deceased appended his signature to that letter. The Plaintiffs

did not object to these averments by the Defendants. This court finds that the amount claimed by the Deceased for his damaged crops was Kshs. 4,025/=.The Defendants claim that they paid the Deceased this money and that DW1 was sent by the committee members of the Water Project to pay the said monies on 10th March 1991. By this time the Deceased was still alive. I do not see any reason to doubt the testimony of DW1 that he indeed did personally hand the stated amount of Kshs. 4,025/= to the Deceased on behalf of the Water Project. On that count therefore, I find that the Plaintiffs are not entitled to be paid any additional sum of money as compensation for the damage crops on the suit property.

Whether the Defendants should pay the Plaintiffs mesne profits amounting to Kshs. 664,000/- claimed by the Plaintiffs for use of the suit property.

The Plaintiffs have made a claim for mesne profits which they calculated at the rate of Kshs. 2,000/= per month from January 1981 to August 2009 as Kshs. 2000 x 332 months = Ksh 664,000/=. In making my finding on that claim, I wish to rely on the Court of Appeal case of **Rioki Estate Co. (1970) Limited – Vs- Kinuthia Njoroge [1977] KLR 146** which referred to the definition of “mesne profits” in section 2 of the Civil Procedure Act which provided that,

“Mesne profits, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

I would say that the key words in this definition for my purposes is “wrongful possession”. And to lend credence to this, Stroud’s Judicial Dictionary 4th Edition Volume describes mesne profits as:

“Another term for damages for trespass arising from particular relationship of landlord and tenant.”

I think I have by now established and found that the Defendants entered the suit property way back in the 1980s with the permission of the Deceased and have remained in possession thereof to date with the permission of the Plaintiffs who are now the legal administrators of the estate of the Deceased up until they filed this suit requiring the Defendants to vacate the suit property. Clearly, the Defendants cannot be categorized as trespassers on the suit property but are licensees on the suit property. In light of this fact, I find that the Defendants have not been in wrongful possession of the suit property until this suit was filed and are therefore not amenable to pay mesne profits claimed by the Plaintiffs from the period January 1981 to August 2009. However, I will award the Plaintiffs mesne profits for the period commencing when this suit was filed on 15th September 2009 as this signified revocation by the Plaintiffs of the license given to the Defendants to remain in occupation of the suit property up until the Defendants deliver vacant possession of the suit property to the Plaintiffs. I consider the amount claimed of Kshs. 2,000/- per month as reasonable. The total amount of mesne profits payable to the Plaintiffs shall therefore be computed and become payable immediately after the Defendants deliver up possession of the suit property to the Plaintiffs.

Arising from the foregoing, I hereby enter judgment in favour of the Plaintiffs in terms of prayers Nos. a), b) and f) of the Plaint. The other prayers are dismissed.

Owing to the adjustments that the Defendants are required to make in order to grant the Plaintiffs vacant possession of the suit property, I order that execution of this Judgment be stayed for a period of 90 days from the date of delivery of this Judgment.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 19TH DAY OF JUNE 2015.

MARY M. GITUMBI

JUDGE