



CIVIL

Adverse possession claim:-

- What should the plaintiff prove in her claim.
- Does change of ownership of the land the subject of adverse possession affect the plaintiff claim.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CASE NO. 80 OF 2002

MALIAMU NCURUBI M'IBIRIPLAINTIFF

VERSUS

FRANCIS M'IMANYARA M'RINGERA ALIAS IMANYARA RINGERADEFENDANT

JUDGMENT

Maliyam Ncurubi M'Ibiri filed this case seeking the order of the court that she had acquired title over parcel number *Nyaki/Kithoka/715* which was later sub divided into five portions by adverse possession. The claim was defended by the defendant who also filed a counter claim. The defendant by the counterclaim sought the eviction of the plaintiff and her family members. Maliyam Ncurubi M'Ibiri the original plaintiff died during the subsistence of this cause and by an order dated 20th February 2009 this court gave Mary Ntimba leave to substitute the deceased plaintiff. A limited grant had been issued to Mary to file the application to substitute the plaintiff. Mary gave evidence as PW1 and stated that parcel number 715 was purchased by her late brother James Mworira. James Mworira purchased the land through an auction held on behalf of Kenya Commercial Bank (K.C.B). That parcel of land was registered in the name of the defendant. She exhibited a green card to show that ownership. It is four acres. In the year 2002 the defendant subdivided that land into five portions being, *Nyaki/Kithoka/2455 to 2459*. Those parcels are in the name of the defendant. Mary stated that the original plaintiff was her mother. When the late James Mworira her brother purchased that land in 1976 her mother moved on the land. Her mother died in the year 2004 and was buried on that land. James Mworira and her late father had died before the plaintiff and they were both buried on that land. All this while the defendant who lived in the opposite land (shamba) to the suit property did not object to those burials. From 1976 when the plaintiff lived on that land, she built houses, planted coffee, macadamia trees and gravellier trees. After the death of the plaintiff, her son and Mary's brother, John Gituma continued to occupy the land. The defendant did not raise any objection to the continued occupation by the plaintiff and by Gituma. It should be noted that the period of occupation by the plaintiff of the suit property from 1976 to 2004 is 28 years. However the relevant period to be considered for the purpose of this action is from 1976 to the year this case was filed, the year 2002. That is a period of 26 years. PW1 Mary stated that in all that time, the plaintiff did not vacate the land. To prove that the suit property was purchased by James Mworira from K.C.B Mary referred to a letter written by K.C.B acknowledging that sale. That letter which was exhibited in the originating summons is in the following terms:-

“Kenya commercial Bank Limited

3rd September 1976.

This is to certify that I, J.O. Kolula on behalf of M/S Thika Auctioneers & General Merchants have received Kshs. 11,500/= being sum paid in respect on title deed Nyaki/Kithoka/715 from Mr. James Mworira Kumbu of P.O. Box 635, Meru.”

PW1 said that the defendant whilst her family occupied the suit property went to the lands office and subdivided it into five portions. She denied that the defendant had developed the suit property. She confirmed that the K.C.B did not give Mworira a title after he purchased the land. She was aware that the defendant after obtaining gazettelement that the original title was lost was issued with another title of the suit property in the year 2002. PW1 said that Gituma who occupies the land cultivates two acres and the rest he leases out. She however confirmed that Gituma resides on the land. On being cross examined,

PW1 was unaware that the original plaintiff had been summoned by the chief to explain her right of occupation of the suit property. PW2 Albert Tharimba is a retired teacher. He was related to the original plaintiff whom he called aunt. He confirmed that the plaintiff moved on the suit property in 1976 built houses and settled there. He used to visit her on the land. On her death, the plaintiff was buried there. It was in the year 2002 that he got to know the defendant who lived near the suit property. Sammy M'Buuri Mugambi was PW3. He said that land neighbours the suit property. He too confirmed that the plaintiff lived on the suit property from 1976 up to her death in 2004. When she moved on the suit property, the plaintiff requested him to build her a house. His profession is masonry and carpentry. He built two houses. This witness was aware that on the death of the plaintiff she was buried on that land. He stated that the defendant who is also in the neighbourhood had never lived on the suit property. The witness said that the suit property previously belonged to the defendant's brother who later died. Before 1976 when the plaintiff's family moved on the land, he saw no one living on that land. There were houses on that land which the plaintiff found there but the plaintiff demolished them. He now sees Gituma cultivating the land whereby he plants beans, maize and French beans. He was aware that Gituma was the son of the plaintiff. Gituma also gave evidence as PW4. He confirmed that his mother moved in the suit property in 1976 and lived there until her death. That land had been purchased by his late brother, James Mworira. After the death of the plaintiff, he continued to occupy the land. All the witnesses for the plaintiff were emphatic that if the court was to visit the land it would find that the land was only occupied by Gituma. The defendant Francis M'Imanyara M'Ringera said that he used the suit property in 1976 as security for a loan he obtained from K.C.B. He delayed in the repayment of his loan and as a result the property was due to be sold on 6th July 1976. On realizing that the sale was to take place, he went to K.C.B at Othaya to repay the loan. At the bank he was instructed to pay the loan at the offices of Hamilton Harrison & Mathews Advocate. They were the advocates for K.C.B. On 20th June, 1976 he paid the outstanding loan of Kshs. 13,863.30/=. It should however be noted that the defendant did not prove by documentary evidence this payment. He further stated that on making payment he demanded the release of title to him. K.C.B advised him to collect the title from Hamilton Harrison & Mathews Advocates. When he approached that firm of advocates, he was requested to wait for them to look for the title. It was then that his then advocate Ms A. Mbaya & Co. Advocate begun to correspond with Hamilton Harrison & Mathews advocates requesting for the release of title. He exhibited letters as defence exhibit 2(a) to 2(f). Those letters refer to a High Court Civil Case No. 2907 of 1976 **Kenya Commercial Bank Limited Vs. Imanyara Ringera**. It is not clear what the relationship of that case is to the suit property. It should also be noted that those letters are of dates between 1998 and the year 2000. Apart from the letter of the defendant's advocate, defence exhibit 2(b) the other correspondence do not refer to the suit property. The defendant stated that the bank's lawyers were unable to trace the title documents which led to the partner of that firm preparing an affidavit acknowledging the misplacement of that title which affidavit the defendant used to get another title to be issued by the lands office. The defendant did however confirm that he saw the plaintiff enter the suit property in 1976. He was aware that the plaintiff entered the land on the basis that the land was purchased from K.C.B. The defendant stated that he complained to the local chief about the plaintiff's occupation of that land and in this regard referred to the defence exhibit number 4 which is a letter written by the chief summoning the plaintiff and the defendant to his office. What however is material is that the letter is dated 7th May 2002. This case was filed on 15th May 2002. The summoning by the chief was within the same month that this suit was filed. The defendant attributed his failure to get the plaintiff out of the land to the fact that he did not have a title deed of the land. It is on the basis of that evidence that he sought that the plaintiff's family would be evicted from the suit land. He however stated that Gituma only occupies parcel number *Nyaki/Kithoka/2455* measuring 0.36 Ha. It is clear from the evidence before court that the plaintiff had openly occupied the suit property and her occupation was uninterrupted for a period of 28 years. This case for declaration that she holds the title to the land in adverse possession was filed by her and not Gituma. It is therefore immaterial what portion of land Gituma occupies. It is however to be noted that the whole parcel of land comprising of parcel number

715 before subdivision is under the control of Gituma since the death of the plaintiff. It is also important to note that the defendant confirmed the plaintiff's evidence that the plaintiff entered parcel number 715 in 1976. The defendant did not contradict the evidence of the plaintiff that the plaintiff occupied that land until the date of her death in the year 2004. In order to prove that the plaintiff had acquired title to land by adverse possession, it is material to consider what was held in the case **Mbira Vs. Gachuhi** [2002] 1 EA. The court in its ruling set out what the plaintiff ought to prove as follows:-

- a) ***That there had been absence of possession by the true owner through abandonment.***

- b) ***That the adverse possessor had been in actual possession of the piece of land;***

- c) ***That the adverse possessor had no colour of right to be there other than his entry and occupation;***

- d) ***That the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;***

- e) ***That there was a sufficient animus to dispossess and an animus possidendi;***

- f) ***That the statutory period, in this case twelve years, had elapsed.***

- g) ***That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and***

- h) ***That the nature of the property was such that, in the light of the foregoing, adverse possession would result.***

The plaintiff was on the land some 26 years. She had dispossessed the defendant of that land. In all those 26 years there was no interruption of her occupation. The fact that the defendant subdivided the suit property into 5 parcels of land did not defeat the plaintiff's claim in adverse possession. This was well set out in the case **Githu Vs. Ndeete [1984] KLR**. In that case, it was found that the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such a person's adverse possession. In my view, the plaintiff well met the conditions set above in the case **Mbiira vs. Gichuki** (supra). The defendant from 1976 lost his right over the suit property. The defendant did nothing to assert his right over that land. By that means the plaintiff's right to acquire title under adverse possession began to run. A case in point is **Samwel Nyakenogo vs. Samwel Orucho Onyaru** Civil Appeal No. 24 of 2004 where the Court of Appeal had this to say:-

“In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by his having discontinued his possession of it. The Limitation of Actions Act on adverse possession contemplates two concepts; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession will then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for that requisite period. See Wambugu Vs. Njuguna Civil Appeal No. 10 of 1982. Adverse possession means that a person is in possession in whose favour time can run.”

The defendant alleged in his evidence which was uncorroborated that Gituma was only in occupation of a portion of land and that is the only land which is the subject of this case. He relied on the case **Wilfrida Achola Orido vs. Ignatius Omondi Likor** Civil Appeal Case No. 253 of 2001 where the Court of appeal stated thus:-

“The respondent is only entitled to the portion of the suit land that he proved to have occupied by adverse possession.”

That submission by the defendant was rejected earlier in this judgment on two basis. Firstly, this claim relies on the occupation by the plaintiff from 1976 to 2002. Secondly, on the basis that Gituma, although he admitted having leased some of the land he however confirmed to have the whole portion of the suit property under his control. Having considered the evidence before me, I find that the plaintiff has proved her claim to title over the suit property in adverse possession on a balance of probability. I cannot end this judgment without recognizing the effort put in by the counsels for the parties by supplying to the court the authorities in support of their client's case. The judgment of this court is as follows:-

1. The court hereby declares that the plaintiff acquired title over parcel number Nyaki/Kithoka/715 which was subdivided into parcels number Nyaki/Kithoka/2455, 2456, 2457, 2458 and 2459 by adverse possession.

2. The defendant's counterclaim is hereby dismissed with costs to the plaintiff.

3. The plaintiff is awarded costs of this suit.

Dated, signed and delivered at Meru this 17th day of February 2011.

MARY KASANGO

JUDGE



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