



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 608 OF 2007

GLADWELL MUTHONI NJOROGE.....PLAINTIFF

VERSUS

WANGARURO MBUGUA

WABGAYA KUNGU

GACHAMBI w/o GICHUI

KAMAU NDERU

WILLIAM WANGARURO MBUA

MWAURA KUNGU, NJERI w/o WANGARURO

RURIE w/o KIARIE

WANGARURO KUNGU

CHEGE KUNGU

SAMUEL MWICHARO

NJERI w/o NGANGA

MUMBI w/o GATHORI

WANGECHI w/o MBUA

GACHEHII w/o MAKENA

PAUL KUNG WANYOIKE

NJERI d/o KARIUKI

MBUGUA MBUA.....DEFENDANTS

(ALL TRADING UNDER THE FIRM NAME AND STYLE OF

WANGARURO'S FAMILY TRADING AND FARMING)

JUDGMENT

This suit was commenced by way of an Originating Summons dated 10th July 2002 and filed on 12th July 2002 which was subsequently amended on 1st October 2004, 29th January 2007 and on 11th February 2011 in which the Plaintiff sought for the following orders:

- a) A declaration that the Plaintiff is entitled by adverse possession to the parcel of land known as Land Reference Number 1036, Section III Eastleigh, Nairobi (hereinafter referred to as the "suit property").
- b) An order that the Plaintiff be registered as the proprietor of the suit property.
- c) The Plaintiff be granted the costs of this suit.

The Further Amended Originating Summons is premised on the grounds set out on its face together with two affidavits. The first one is the Supporting Affidavit sworn by Gladwell Muthoni (now deceased and hereinafter referred to as the "Deceased") sworn on 29th January 2007 and filed together with the Further Amended Originating Summons dated 29th January 2007. The second affidavit is the Supplementary Affidavit sworn by Stella Wambui Muthoni on 11th March 2011. In the Supporting Affidavit, the Deceased averred that she moved into the suit property on 9th July 1960 after purchasing it from one Gurdas Singh. As evidence of that she annexed a copy of the Sale Agreement between them. She further averred that the said Gurdas Singh instructed his advocates M/s G.S. Sandhu & Co. to transfer the suit property to her when she completes making the payments of the purchase price. It was her averment that she completed the payments but the said advocates failed to effect the transfer as instructed. It was her further averment that after her entry into the suit property, she developed it and lived there. She further averred that without her knowledge and in unexplainable circumstances, the suit property was transferred by the said Gurdas Singh to one Rasiklal Rachnhodji Patel and 5 Others after which the suit property was further transferred to the Defendants on the same day. It was her averment that the suit property is currently registered in the names of the Defendants. She further averred that being aggrieved with that action she filed HCCC No. 456 of 1984 Gladwell Muthoni versus Wangaruro Mbugua & Others and on 5th October 1988, the court ruled against her and found that the Defendants were entitled to the suit property. She further averred that since that Judgment was delivered on 5th October 1988, the Defendants have not taken any steps to recover the suit property from her and as such she has continued in quiet uninterrupted possession of the suit property since. She further averred that in the year 1991, the Defendants filed a suit against her in the Rent Restriction Tribunal being Case No. 112 of 1991 where they obtained orders of vacant possession against her on 15th March 1993. She however averred that those orders and proceedings were invalid as she was not a tenant of the Defendants hence the Rent Restriction Tribunal had no jurisdiction to try the matter. She further averred that her continued possession of the suit property is adverse to the Defendants' title and she had extinguished that title as a consequence of which she claims the same as hers under the doctrine of adverse possession.

In the Supplementary Affidavit sworn by Stella Wambui Muthoni on 11th March 2011, she averred that she became a party to this suit on 4th February 2011 in place of her deceased mother, the late Gladwell Muthoni Njoroge. It was her averment that she was born and raised on the suit property together with her other siblings. It was her further averment that when the Deceased moved into the suit property, it had a small 3-roomed house but with time she developed and built 11 rental houses from which she collected rent. She confirmed being aware of the suit filed by the Deceased against the Defendants which was HCCC No. 456 of 1984, stating that since the Judgment was delivered on 5th October 1988, the Defendants have never taken any steps to have them evicted from the suit property. She averred that according to the Court of Appeal decision in **M'Ikiara M'Rinkanya & Another versus Gilbert Kabeere M'Mjibiwe Civil Appeal No. 124 of 2003**, it is settled law that a judgment for possession of land should be enforced before expiry of the 12 years limitation period. She averred that the rights of the Defendants under that Judgment were extinguished upon expiry of 12 years from 5th October 1988 when the Judgment was delivered. She pointed out that the Defendants cannot rely

on that Judgment to allege that the issue of proprietorship of the suit property was determined. She further averred that the Deceased subsequently acquired possessory title to the suit property by adverse possession and she had rightfully brought the present proceedings to enforce her rights. She further averred that the Deceased never paid any rent to the Defendants as a tenant or otherwise and that the case in the Rent Restriction Tribunal No. 112 of 1991 did not seek to evict the Deceased but was a claim for rent arrears. She further noted that the Defendants had at that time being 1991 not sought to evict the Deceased if at all she was a tenant who had defaulted in paying rent for about 15 years. She averred further that under section 8 of the Limitation of Actions Act, no claim for rent arrears can be made after expiry of 6 years and as such the said RTCC No. 112 of 1991 was for all purposes null and void. She further indicated that the said RTCC No. 112 of 1991 was heard and determined on 15th March 1993 but the same was stayed pending determination on the issue of proprietorship of the suit property. She added that the order of stay of execution in the said case has never been set aside or appealed against. She further stated that since then, the Defendants have never taken any steps to move the court to have the issue of proprietorship determined by the court. She further averred that the Defendants filed an application dated 5th July 2007 seeking to strike out the suit herein on the ground that it is *res judicata* but that the same was dismissed both for want of prosecution and lack of merit.

In response the Defendants filed the Replying Affidavit of Wangaruro Mbugua, the 1st Defendant, sworn and filed on 9th July 2010, in which he averred that they purchased the suit property on 27th August 1974 from Rasikal Ranchhodhji Patel, Gordharias Narandas Shah, Guaracharan Singh Sandhi and Kartar Kaur for Kshs. 30,000/- and the same was transferred and registered under their names on 6th May 1976. He further averred that upon acquiring the suit property, they inherited the Plaintiff as a tenant. It was his averment that the Plaintiff continued paying rent to them through their lawyers. He added that it is true that the Plaintiff then filed HCCC No. 456 of 1984 Gladwell Muthoni versus Wangaruro Mbugua & Others and on 5th October 1988, the court ruled against her and found that the Defendants were entitled to the suit property. He further averred that arising from that Judgment, the Plaintiff reverted to her earlier status of a mere tenant. He differed with the Plaintiff stating that they have always taken valid steps to evict the Plaintiff out of the suit property. He further added that being a protected tenant, he was advised by his advocates that the rent having been assessed at Kshs. 1,000/- per month, they had no option but to fall back on the provisions of the Rent Restriction Act. He stated that they continued taking steps to recover the suit property including giving the Plaintiff notice dated 29th November 1990 terminating her tenancy by 31st December 1990 under the provisions of the Rent Restriction Act for non-payment of rent. He further averred that upon the Plaintiff's refusal to vacate the suit property, they filed Rent Restriction Tribunal Case No. 112 of 1991 seeking vacant possession relating to the aforesaid notice and Kshs. 172,000/- being rent arrears. He added that the matter proceeded and orders were granted against the Plaintiff to give vacant possession and payment of rent. He then stated that the Plaintiff has subsequently always filed applications that have no merit to avoid final eviction from the suit property. He further stated that this present suit has also been instituted to frustrate them so that they do not evict the Plaintiff. It was his further averment that they have always used the legal and judicial way to gain access to the suit property but the Plaintiff has all along abused the court process and used extra-judicial ways to remain on the suit property.

The 1st Defendant, Wanguroro Mbugua, filed his Further Affidavit sworn on 6th May 2011 and filed on 9th May 2011 in further response to the Plaintiff in which he denied that the suit property had a 3-roomed house stating that it has had 11 rental houses which the Deceased grabbed from them and through powerful people and abusing the court process has been in forceful occupation since they bought it. He further averred that the Deceased never paid the rates for the suit property if at all she believed herself to be the owner thereof. He further averred that the Judgment delivered in HCCC No. 456 of 1984 was never relied upon to them to evict the Deceased out of the suit property because it was a dismissal of the Plaintiff's Originating Summons seeking for adverse possession of the suit property. He further pointed out that in that Judgment, the court determined that the Deceased was paying rent to them as a tenant. He further pointed out that they treated the Plaintiff as a tenant and indeed proceeded to file Rent Restriction Tribunal Case No. 112 of 1991 seeking inter alia vacant possession of the suit property. He pointed out that this was less than 6 years since the delivery of the Judgment in HCCC No. 456 of 1984. He further asserted that they have made several execution processes but the same have been frustrated by the Deceased through powerful people. He further added that even if there was adverse possession by the Deceased, the same was extinguished at death as the said right is a *right in personam* and cannot accrue to the daughter of the Deceased or her siblings. On those grounds, he sought for the dismissal of this suit with costs.

Analysis and Determination

The main issue for determination in this suit is whether the Deceased and by extension the beneficiaries of her estate have acquired the suit property by way of adverse possession by virtue of having occupied it for more than 12 years since 5th October 1988 when the Judgment in HCCC No. 456 of 1984 was delivered.

Under **Section 38(1)** of the **Limitation of Actions Act**, where a person claims to have become entitled by adverse possession to

land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land. For one to sustain a claim for adverse possession, he must demonstrate possession that is *nec vi, nec clam* and *nec precario*; that is, possession which is without force, without secrecy, and without permission. Such possession must also be accompanied by the necessary *animus possidendi*, which is an intention to acquire the land as one's own. Such possession must have been continuous and uninterrupted for duration of at least 12 years.

In this particular case, the claim by the Deceased that she acquired the suit property by way of adverse possession has been challenged by the Defendants on two grounds: that she was a mere tenant on the suit property therefore her occupation was permissive and that her occupation of the suit property was interrupted as the Defendants filed a court case against her seeking vacant possession.

The Plaintiff as well as the Defendants are in agreement that the Defendants purchased the suit property while the Plaintiff was in occupation. It is common ground that the Plaintiff then proceeded to file suit against the Defendants as the new title holders of the suit property in HCCC No. 456 of 1984 Gladwell Muthoni versus Wangaruru Mbugua & Others and on 5th October 1988, the court ruled against her and found that the Defendants were entitled to the suit property. Subsequently, the Defendants proceeded to the Rent Restriction Tribunal for an assessment of the rent payable by the Plaintiff and indeed this rent was assessed at Kshs. 1,000/- per month. Arising from this, it is clear that the Rent Restriction Tribunal found that the Plaintiff is a protected tenant and proceeded to assess her rent. This issue was addressed in the case of **Wanje versus Saikwa (No. 2) Civil Appeal No. 72 of 1982** where the Court of Appeal held as follows:

“A person who occupies another person’s land with that person’s 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.”

Arising from this, it is clear to me that the Plaintiff was a tenant of the Defendants and continued in occupation of the suit property with permission from the Defendants. Arising from this, my finding is that the occupation by the Deceased of the suit property was not adverse to the Defendants’ title but was rather permissive.

Further to this is the question of the running of time in favour of the Deceased considering the filing of a court case by the Defendants seeking vacant possession of the suit property. It is common ground that the Defendants filed Rent Restriction Tribunal Case No. 112 of 1991 against the Deceased seeking *inter alia* vacant possession of the suit property. As was held in the case of **Githu vs Ndeete (1984) KLR**, time stops running when the registered owner asserts his right through legal proceedings or makes an effective entry onto the suit property. Arising from this is my finding that time started to run in favour of the Deceased on 5th October 1988 but was interrupted in 1991, a mere 3 years later when the Defendants filed that case. The Deceased had not accumulated sufficient time to warrant a claim of adverse possession against the Defendants.

The upshot of the foregoing is that the Plaintiff has failed to satisfy all the requirements of a claim for adverse possession over the suit property and this suit is accordingly dismissed with costs to the Defendants.

SIGNED AND DATED BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 17TH DAY OF OCTOBER 2018.

MARY GITUMBI

JUDGE

DELIVERED BY JUSTICE BERNARD EBOSO AT NAIROBI

THIS 22ND DAY OF OCTOBER 2018.

B. M. EBOSO

JUDGE



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