



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 2826 OF 1997

SERAH WANJIRU MBIRA..... PLAINTIFF

VERSUS

KANYORE GACHUHI.....DEFENDANT

RULING

This is the defendants preliminary objection to the suit and to the application dated 21.5.98. The defendants objection is that the suit is res judicata as there has been three previous suits dealing with the same land dispute. First there is HCCC NO. 2029/79 (O.S) That was a claim filed by Medi Kanyore against the present defendant.

She claimed that the defendant was holding 2 acres in Muguga/Muguga 251 in trust for her. That claim was dismissed by Platt J (as then was) on 14.1.80.

There was also HCCC NO. 1399/91 filed by the plaintiff against the same defendant. In that suit, plaintiff claimed that defendant was holding land in trust for her deceased husband. The suit was dismissed on the ground that she had not taken out a Grant of Letters of Administration in respect of her husbands estate. Plaintiff then filed HCCC NO. 4176/92 against the same defendant. She had the same claim that defendant is registered in trust in respect of 1.5 acres for her late husband. Mbogholi J., upheld a preliminary objection that the suit was res judicata by virtue of HCC NO. 2029/79 and dismissed the suit. Mbogholi J., however, made it clear that it is the claim for land by virtue of trust which was res judicata. Mbogholi J. expressly found that there was no specific prayer in the suit that plaintiff be declared to have an interest in the land by virtue of adverse possession and confined himself to the claim based on trust.

Plaintiffs counsel submits that the present suit is based on adverse possession which is different from a claim of land through trust. He relied on my own decision in Peter Waweru Githua versus Hanna Wamaitha Njehia & Anor - HCCC NO. 3055/96 (O.S).

Plaintiff has stated the genealogy of Kanyore Gachuhi in the supporting affidavit which, is however, not relevant to the claim based on adverse possession. Although HCCC No 2029/97 (O.S) was brought by Medi Kanyore to claim a share on behalf of her house and not by Mumbi Kanyore (co wife) to claim a share of her house Mbogholi J was satisfied that HCCC NO. 4176/92 concerned the same matter as HCCC NO. 2029/79 (O.S). As Platt J had found that Kanyore Gachuhi had nothing to do with the land as he had died before the case, HCCC NO. 4176/92 could have ended in the same way as HCCC No. 2029/79 (O.S) if it was heard on merit.

It is clear from the Ruling of Mbogholi J that the court did not decide on the issue of adverse possession. The claim of land by adverse possession is based on statute - S 38 of the limitation of Actions Act. It is brought to court through a different procedure from other suits (order 36 Rule 3 CP Rules) Plaintiff is required to prove different facts from the facts which constitute a trust. The claim based on adverse possession could not have been combined with the claim based on trust in HCCC No, 4176/92. The claim based on adverse possession was not the subject matter in HCCC no. 2029/79 (O.S). Plaintiff says that she has been in occupation of the land for over 32 years.

She is still in occupation as the defendant has given her a Notice to vacate the land within 6 months. Hers is a serious claim. The court should afford her an opportunity to be heard on the merits.

As plaint is based on statute, I am satisfied that her claim is not res judicata.

I overule the preliminary objection with costs and order that her application and the suit be heard on the merits.

E . M . GITHINJI

JUDGE

23.7.87

Mr. Karanja present

Mr. Odhiambo present