REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI
Civil Case 19 of 2007

SUSAN MUMBI WAITITU }

FRANCIS MBATO NDATA}……..……...……...…...PLAINTIFFS

JOSEPH GITAHI NDATA }

VERSUS

MUKURU NDATA }

THERESIA WAMUYU }

JENELLICA WAIRIMU}…..…….……...……DEFENDANTS

JOSEPH MWANGI }

LUCY WANJIKU }

J U D G M E N T

By an originating summons dated 20th March, 2007 and filed in this court the following day, **Susan Mumbi Waititu, Francis Mbato Ndata** and **Joseph Gitahi Ndata,** hereinafter referred to as "*the plaintiffs"* sought from **Mukuru Ndata, Theresa Wamuyu, Jenetica Wairimu, Joseph Mwangi** and **Lucy Wanjiku,** hereinafter referred to as "*the defendants"* the following orders:-

"**1. THAT under** *section 38* **Limitations of Action Act, the plaintiffs have acquired title by adverse possession over the original LR. NO.CHINGA/GIKIGIE/67 and as such entitled to be registered as proprietors of the portions thereof under their occupation.**

2. THAT the 1st defendant Mukuru Ndata had created a trust in favour of the plaintiffs original LR. NO.CHINGA/GIKIGIE/67 and as such the subdivision and subsequent alienation of the land as LR. NOS.CHINGA/GIKIGIE/

1640, 1641, 1642 and 1643 to his co-defendants in exclusion of the plaintiffs is against the said trust.

3. THAT the costs of this suit be provided for."

The originating summons was supported by the affidavit of the 1st plaintiff who swore it on behalf of the other plaintiffs. In the main she deponed that she was a daughter in law to the 1st defendant who was also a father to her co-plaintiffs. That the 1st defendant was the registered proprietor of the original **LR. NO.CHINGA/GIKIGIE/67** hereinafter referred to as the "*the suit premises"*. The suit premises had since been subdivided into Nos. 1640, 1641, 1642 and 1643 by the 1st defendant and transferred the same to his co-defendants who are his children excluding the plaintiffs. That they had

been using and occupying the suit premises for over 30 years according to portions given to them by the 1st defendant and have developed the same by planting tea bushes, installing electricity, water and building permanent residents among other valuable developments. That they were effectively being rendered destitute by the 1st defendant's act of alienating the entire land to his co-defendants excluding them.

When the application was served, the defendants reacted by filing a replying affidavit through the 1st defendant. He deponed that the suit premises belonged to him solely, even before he subdivided the same into eight equal portions in the year 2006. That he had purchased the suit premises for value. That his wife is deceased and since he had planted tea bushes in the suit premises, he decided to share out the said land equally among his 8 siblings. That the plaintiffs are only aggrieved because of his decision to give to his daughters part of the suit premises. That from the subdivision aforesaid, the plaintiffs have been given **Chinga/Gikigie/1639, 1644 and 1646** respectively. He denied vehemently having created a trust in favour of the plaintiffs and that the plaintiffs had acquired title to the suit premises by way of adverse possession.

On the eve of the hearing of the application the plaintiffs filed a further affidavit. However since it was filed out of time and without leave of court I will ignore the same and indeed expunge it from the record. On the hearing day, **Mr. Kingori** and **Ms Mwai**, learned counsel for the plaintiffs and defendants respectively agreed to have the suit heard and determined on the basis of the supporting and replying affidavits already on record. In other words they chose to forego oral evidence in support of their respective claims.

I have carefully considered the application, the replying and supporting affidavits, the annextures thereto and the law. To begin with it is a cardinal principle that whoever seeks equity must come to court with clean hands. In their supporting affidavit the plaintiffs have categorically stated the 1st defendant has alienated the entire suit premises to his co-defendants to their exclusion and have thereby been rendered destitute. In my view the plaintiffs are not being candid with the court. In the replying affidavit, the 1st defendant has categorically stated that all the plaintiffs have been given their portions of land following the subdivision of the suit premises. He has supported that averment with documentary evidence for instance consent from Othaya Land Control Board to the subdivision and transfer as well as mutation forms. This averment has not been discounted and or controverted by the plaintiffs. It must therefore be taken to be true contrary to their claim that the 1st defendant had subdivided the suit premises and transferred portions only to the co-defendants and excluded them. Lack of candour on the part of the plaintiffs should alone disentitle them to the remedies sought.

However, I will go further. Part of the plaintiffs' claim is hoisted on the doctrine of adverse possession. *Section 38* of the Limitation of Actions Act allows a party to move the High Court for an order that he be registered as the proprietor of the parcel of land he may have acquired by virtue of adverse possession. However for the doctrine of adverse possession to apply the person invoking it must prove that he has been in continuous and uninterrupted occupation of the suit land. That his occupation as aforesaid was adverse to the owner and or proprietor of the suit land. That his occupation was without the consent of the owner of the suit land. Further even if he had entered the land with consent of the owner, he may also have to prove that the said consent was later withdrawn but he nonetheless continued to occupy the land in excess of 12 years after the withdrawal of the consent. The plaintiffs in this case are children and daughter in law of the 1st defendant. By virtue of that relationship their occupation of the suit premises which they now want to possess by way of adverse possession was with the consent of the 1st defendant. The 1st defendant has not done anything remotely suggesting that he wanted them out of the suit premises. If he had ordered them out of the land and they resisted and continued to stay on the land then and only then will time for adverse possession, begin to run. This is not the case here! The nearest that he has come to do so is perhaps when he started the process of subdivision of the suit premises from 2005 onwards against the wishes of the plaintiffs. That is when in my view the period for adverse possession started to run if at all. It is been only 3 or so years in time. They therefore have long way to go (9 years or so) before they can lay a claim to the suit premises against the 1st defendant on account of adverse possession. All said and done the plaintiffs cannot acquire title to the suit premises by adverse possession as they are family members of the 1st defendant. They occupy the land as family members with the knowledge and consent of the 1st defendant. Their occupation of the same had not at any given time been adverse to the right and interest of the 1st defendant. They cannot therefore invoke the doctrine adverse possession to found their claim.

As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land. In the circumstances of this case, the plaintiffs have miserably failed in this onerous task. The 1st defendant has deponed that he purchased the suit premises for value. Accordingly it is not family land passed over through the ages. I have no reason to cast doubts over this averment. The plaintiffs themselves have not in the supporting affidavit deponed to anything to suggest that the suit premises were actually ancestral land. Trust cannot be imputed. It must be proved. In the absence of such proof, I find and rule that there was no trust envisaged by the 1st defendant in favour of the plaintiffs.

It seems to me that this suit was instituted by the plaintiffs solely to secure their interests at the expense of other siblings. They would wish to continue occupying larger portions of the suit premises in their present occupation and which they will loose in the event that the 1st defendant carries though his scheme to subdivide the suit premises into 8 equal portions and share the same among his 8 siblings. Justice must be done to all. The 1st defendant has deemed it necessary to share the suit premises equally among his children irrespective of whether they are boys or girls. I do not thing that he should be stopped from executing this wise decision and which is in tandem with modern trends in the world with regard to gender equity and equality merely because the plaintiffs will end up losing some portion of the land in their occupation and the developments they have made thereon. I do not think that children should be allowed to compel their parents to share out their property according to their whims and idiosyncrasies. The 1st defendant cannot be forced to give out to the plaintiffs his property in his life time by an order of this court.

In the result I have come to the inevitable conclusion that this originating summons has no merits and is accordingly dismissed with costs to the defendants to be paid jointly and severally by the plaintiffs.

Dated and delivered at Nyeri this 9th day of October, 2008.

M.S.A. MAKHANDIA

JUDGE