



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 50 OF 2004 (O.S)

BONIFACE NZOMO KALANI.....1ST PLAINTIFF

MWENDO NDISYA ALIAS MALE NDISYA2ND PLAINTIFF

PETER KOMU KIMULI3RD PLAINTIFF

VERSUS

MUNYWOKI MUSUVA NGAO.....DEFENDANT

JUDGMENT

1. In the Originating Summons dated 22nd April, 2004, the Plaintiffs are claiming to be the purchasers and occupiers of land comprised in title number Muthetheni/Kalamba/586 (*the suit land*) and or have become entitled to it by adverse possession. They are therefore seeking for the following orders:

a. That the Applicants were and are the purchasers for value of various parts comprising the entirety of the above set out parcel of land for value who have long since completed their parts of the bargain and should thus be, either jointly or severally, registered as the proprietors thereof pursuant to the provisions of the Registered Land Act and/or;

That in addition and in the alternative and without prejudice, there be a declaration that the Applicants have by their own physical and otherwise effective occupation of the land comprised in the title aforesated for more than twelve (12) years and, in particular, for at least fourteen (14) years, openly, without prayer, without interruption and peacefully become entitled to be registered, either jointly and/or severally, as the owners thereof by adverse possession.

b. That an order do issue advising and/or directing the Land Registrar, Machakos District to register the above-named title in the names of the Applicants.

c. That the costs of this Summons and consequential costs be borne by the Defendant.

2. The Originating Summons is based on the grounds which have been particularized in the Affidavit and Further Affidavit of the 3rd Applicant. I shall refer to the contents of the said Affidavits and the annexures shortly.

3. The Originating Summons was opposed. The Defendant filed a detailed Replying Affidavit which I will also refer to in this Judgment. The Defendant's brother also filed a Further Affidavit opposing the Plaintiff's claim.

The Plaintiffs' case:

4. The 3rd Plaintiff, PW1, relied on the Affidavits sworn on 22nd April, 2004 and 21st December, 2004. PW1 informed the court that during the adjudication process, the Plaintiffs purchased land known as Muthetheni/Kalamba/586; that the 1st Plaintiff purchased his portion of the suit land from the Defendant vide an Agreement dated 6th October, 1981 for Kshs. 14,475; that the 2nd Plaintiff purchased his portion vide an Agreement of 18th February, 1990 for Kshs. 37,000 and that he (*the 3rd Plaintiff*) purchased his portion of the suit land on 10th April, 1990 for Kshs. 45,000.

5. It was the evidence of PW1 that the three (3) portions of land that they purchased were physically marked off and that they took possession of the same; that the 1st and 2nd Plaintiffs put up permanent homes on their respective portions of land and that owing to the disputes that arose during the adjudication process, they were unable to process the titles. It was the evidence of PW1 that it was not until the year 2001 that the court made a Ruling in favour of the Defendant. PW1 deponed that the Defendant has declined to transfer the land in their favour and that in any event, they have been on the land for more than fourteen (14) years.

6. It was the evidence of PW1 that the Defendant freely and in acknowledgement appended his signature on all the Sale Agreements and that those signatures are apparently and precisely of the same hand with the one appended on his Repeating Affidavit.

7. According to the 3rd Plaintiff, the Defendant moved out of the suit land in the year 1967 and not 1978. According to PW1, it was not until the year 2004 that he heard rumours that the Defendant intended to sell the suit land to a third party.

8. In cross-examination, PW1 denied that it is the Defendant's brother, Mr. Kyengo, who sold the suit land to them and that he started farming the land immediately he purchased it. It was the evidence of PW1 that Mr. Kyengo only signed the Agreement as a witness and not as the Vendor.

9. PW2 stated that he purchased a portion of the suit land vide an Agreement dated 18th February, 1990; that he put up a house on the suit land and that he also uses the land for grazing purpose. PW2 denied that it is Mr. Kyengo who sold the land to him and stated that he has been on the land for twelve (12) years.

10. It was the evidence of PW1 that he paid the purchase price to the Defendant and that it is not true that Mr. Kyengo refunded him the purchase price.

11. On his part, the 1st Plaintiff, PW3, stated that he bought a portion of the suit land from the Defendant on 6th October, 1981; that the Defendant signed an Agreement of the same date and that his brother, Mr. Kyengo, witnessed the said signing. It was the evidence of PW3 that he has put up a permanent building on the said land.

The Defence case:

12. In his evidence, the Defendant, DW1, informed the court that he is the registered proprietor of the suit land; that he has never sold the suit land to the Plaintiffs and that it is his younger brother, Mr. Kyengo, who purported to sell the land to the Plaintiffs. PW1 stated that although he had told his younger brother to watch over the suit land, he never authorized him to sell it and that there was a day his brother gave him money which he refused to take.

13. It was the evidence of DW1 that the Plaintiffs registered a caution on the land when he told them to vacate the land. It was the evidence of DW1 that none of the Plaintiffs have built houses on the suit land. DW1 stated that even after finding out that Mr. Kyengo (*deceased*) had sold the suit land, he did not report the issue to the police.

Submissions:

14. The Plaintiffs' advocate submitted that the Applicants have been peacefully using the suit land for agricultural purposes; that the Plaintiffs made their last installment on 22nd December, 1990 and that by the time the suit was filed in the year 2004, fourteen (14) years had lapsed. Counsel relied on several authorities which I have considered.

15. On his part, the Defendant's counsel deponed that during the objection proceedings, PW1 admitted having bought the land from Mr. Kyengo Masuva (*deceased*); that Mr. Kyengo acknowledged having sold the land to the Plaintiffs and that the Plaintiffs declined to receive the purchase price. Counsel submitted that none of the basic conditions to justify a claim for adverse possession were brought out by the Plaintiffs and that the suit should be dismissed.

Analysis and findings:

16. The Plaintiffs produced in evidence three (3) Sale Agreements to prove that they purchased the suit property. The 1st Plaintiff produced the Agreement of 1st November, 1981 which shows that he had purchased a piece of land at Mumbuni from the Defendant at a price of KShs. 14,000. The said Agreement shows that he initially paid KShs. 1,585 leaving a balance of KShs. 12,415. The Agreement shows that it was signed by the Defendant and witnessed by Kyengo Musuva (*deceased*).

17. The second Agreement dated 1st November, 1981 shows that the 1st Plaintiff paid to the Defendant KShs. 4,000 leaving a balance of KShs. 8,415. This particular Agreement was signed by the Defendant and was witnessed by Bernard Kiweze, Kyengo Musuva and Musyoka Kalani. The other Agreements showing how the 1st Plaintiff paid the balance of the purchase price are dated 28th February, 1982 (*where KShs. 4,100 was paid*); 2nd May 1982 (*where KShs. 215 was paid*); 4th July, 1982 (*where KShs. 1,100 was paid*); 1st August, 1982 (*where the balance of the purchase price was paid*) and the Agreement of 27th May, 1985 where the Defendant purportedly stated that he has "*done transfer to Boniface Kalani for the piece of land which is at Mumbuni.*"

18. All the Agreements between the 1st Plaintiff and the Defendant were witnessed by Kyengo Musuva and other witnesses. Indeed, in the last Agreement of 27th May, 1985, it is shown that the Assistant Chief of Kalama sub-location witnessed the signing of the Agreement.

19. The 2nd Plaintiff also produced the Agreements that he purportedly entered into with the Defendant. In the Agreement of 18th February, 1990, the 2nd Plaintiff purportedly paid to the Defendant the entire purchase price of KShs. 37,000 for the portion that he bought. The 2nd Plaintiff also produced the Agreement of 3rd May, 1990 showing that the Defendant had acceded to the placing of boundaries on the portion of land purchased by the 2nd Plaintiff. The two (2) Agreements were duly witnessed.

20. The third set of Agreements that the 3rd Plaintiff produced is dated 10th April, 1990. The Agreement shows that the 3rd Plaintiff paid to

the Defendant the purchase price of Kshs. 45,000 with the first installment being paid on the date of signing the Agreement. The Agreement was purportedly signed by the Defendant and whose signature was witnessed by the late Kyengo and one Domitila Komu.

21. The Agreement of 6th May, 1990 shows that the 3rd Plaintiff paid to the Defendant a sum of Kshs. 25,000 in the presence of Kyengo and Domitila. The last two (2) installments were paid vide the Agreements dated 17th August, 1990 and 22nd December, 1990.

22. The Defendant has denied ever signing all the above Agreements. According to the Defendant, it is his younger brother, Kyengo, who sold the suit property to the Plaintiffs without his authority.

23. DW1 informed the court that on one occasion, his younger brother, the late Kyengo, gave him the proceeds of the said sale which he rejected. When asked if he ever reported the issue of the sale to the police, DW1 stated that he did not.

24. The Agreements which the Defendant is said to have signed are eleven (11) in total. They were signed between 6th October, 1981 and 3rd December, 1990. That is a span of ten (10) years. All signatures of the Defendant were witnessed by his brother Kyengo and other witnesses.

25. It is inconceivable that the Defendant's younger brother could have sold the Defendant's land for more than ten (10) years without him realizing that his land is being sold without his knowledge. Indeed, it is unbelievable that the Plaintiffs could have entered into all those Agreements of Sale with the Defendant's younger brother without ascertaining that he was selling the suit land on behalf of his elder brother. In one of the Agreements, the Assistant Chief of the area witnessed the Defendant signing it.

26. Although the Defendant was directed to present his known and specimen signatures to a handwriting expert by the court, he never did so. The failure by the Defendant to comply with the Ruling of the court of 19th May, 2005 shows that he indeed signed the Agreements in respect to the sale of the suit land. The said Agreements were not only signed by the Defendant, but they were also witnessed by his brother Kyengo and other witnesses. In any event, having denied that he never signed the impugned Agreement, the burden of proving that lay on him (*the Defendant*).

27. Even if it is true that the Defendant did not sell the suit properties to the Plaintiffs, the evidence before me shows that the Plaintiffs took possession of their respective portions immediately after entering into the Agreements. The 3rd Plaintiff was the last one to enter into the Agreement of 22nd December, 1990. It would appear that all along, the Defendant did not have a Title Deed for the suit.

28. According to the Title Deed produced by the Defendant, the Defendant was issued with the Title Deed for the suit land on 28th March, 1990. Indeed, the proceedings that were taken before the Land Registrar on 25th March, 2004 shows that the Plaintiffs had been on the land since the year 1990. The Defendant acknowledged that he found the Plaintiffs cultivating the suit land.

29. The totality of the evidence before me shows that by the time the Defendant acquired the Title Deed of the suit land in 1990, all the three (3) Plaintiffs were already utilizing the suit land. The Defendant only changed his mind in transferring the suit land to the Plaintiffs when the Title Deed came out in his name.

30. In the case of *Wambugu vs. Njuguna, Civil Appeal No. 10 of 1982*, the Court of Appeal held that where a claimant pleads the right to land under an Agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is that the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve (12) years after such payment. The last installment/payment by the three (3) Plaintiffs in this matter was on 22nd December, 1990. The Defendant was registered as the proprietor of the suit land on 28th March, 1990, on which day time started to running.

31. By the time this suit was filed in the year 2004, a period of twelve (12) years had lapsed from the time that the Plaintiffs made the last payment of the purchase price. Indeed, the Defendant never took back possession of the suit land from the date of issuance of the Title Deed. Consequently, he cannot recover the suit land because he is time barred.

32. For those reasons, I find and hold that the Plaintiffs are entitled to the entire land known as Muthetheni/Kalamba/586 by way of adverse possession. The Originating Summons dated 22nd April, 2004 is therefore allowed as follows:

a. The Land Registrar, Machakos, be and is hereby directed to register the title in respect of parcel of land known as Muthetheni/Kalamba/586 in the names of the three (3) Plaintiffs, that is Boniface Nzomo Kalani, Mwendo Ndisia and Peter Komu Kimuli as tenants in common.

b. The Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE