



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

HCC(OS) 89 OF 2005

DANIEL MBATHA MWANIKA APPLICANT/ PLAINTIFF

VERSUS

WAMUINI FARMERS CO. LTD.....1ST RESPONDENT/DEFENDANT

WAMUINI FARM SURVEY COMM. COMPRISES OF:

JOSEPH WAINAINA NDUNGU 2ND RESPONDENT/DEFENDANT

JAMES MUTONGA NJOROGE 3RDRESPONDENT/DEFENDANT

NJOROGE KAHIGA 4TH RESPONDENT/DEFENDANT

PAUL KINYANJUI MWANGI5THRESPONDENT/DEFENDANT

WAMUEL NJENGA MUGO 6TH RESPONDENT/DEFENDANT

AMOS MUIRIGI 7TH RESPONDENT/DEFENDANT

DAVID NDISHU GITAU..... 8TH RESPONDENT/DEFENDANT

J U D G M E N T

1. This suit was commenced by Originating Summons dated **26th July 2005**, supported by an affidavit deponed on the same date by the applicant/Plaintiff **Daniel Mbatha Mwanika** , seeking declaratory orders to the effect that land parcel **No.KIMININI/KAPKOI SISAL BLOCK 2/WAMUINI "B"/645**, has been in peaceful occupation of the plt for more than twelve (12) years prior to the issuance of the title deed thereof hence acquiring title by adverse possession.

2. The suit also seeks orders directing the Land Registrar Trans-Nzoia District , to cancel the title deed No. **KIMININI/KAPKOI SISAL BLOCK 2/WAMUINI "B"/646**, as the portion thereof measuring 0.41 hectares has already been included in the said title deed **No.KIMININI/KAPKOI SISAL BLOCK 2/WAMUINI 'B' /645** and that the eighth (8th) respondent herein , **David Ndichu Gitau** , be ordered to give vacant possession of the said 0.41 hectares currently under the occupation of the applicant.

3. It is averred in the supporting affidavit that the applicant is the registered proprietor of the parcel of land known as **Kiminini/Kapkoï Sisal Block 2/Wamuini 'B'/645** measuring approximately 2.6 hectares or 6.4 acres (herein, the suit land or plot No.645) while the eighth respondent is the registered proprietor

of the parcel known as **Kiminini/Kapkoi Sisal Block 2/Wamuini "B'/646** (herein, plot No.646) measuring 0.41 hectares. These portions are part of the larger portion known as **Wamuini Farm** which was sub-divided and allocated to its members by its survey committee which was comprised of the second (2nd) to the seventh (7th) respondent .

4. The applicant averred that he was a member of the Wamuini Farm and that he contributed towards his membership in 1974 and was issued with a share certificate in 1978 (ie annexure "DMM3") whereas the seventh respondent was not a member. The suit land was previously known as plot No. 29. It measured approximately 6.4 acres as per the acre map (Annexure "DMM4") and in the year 1980, the applicant took possession thereof. However, in 1997, without the knowledge of the applicant, the second to seventh respondents secretly sold to the eighth respondent a portion of the land measuring 0.41 hectares notwithstanding that the applicant had been in peaceful and uninterrupted occupation and use of the land for a period of twelve (12) years prior to the sale.

5. The applicant averred that by the time the land was sold to the eighth respondent, it had extensively been developed by himself. He created drainage trenches and planted trees. The eighth respondent's agent made an attempt to enter Plot No.646 in 1999 and this resulted in a Criminal charge against him vide SPM. Criminal Case No.2183 of 1999. The agent was convicted as per the judgment of the court (Annexure "DMM5").

6. The applicant further averred that in a decree issued by the court vide SPM.CC. Land case NO.60 of 1999 (Annexure "DMM6") the 6.4 acres of the suit land were given to him and as per the letter of the District Surveyor dated 20th March 2000(Annexure "DMM 7") which confirmed that the total acreage of the suit land was 6.4 acres and not as indicated in the title deed thereof. It was thus confirmed that the acreage of the suit land was reduced to 5.5 acres after 0.41 acres were carved out by the second to seventh respondents and then sold to the eighth respondent .

7. The applicant contended that the second to seventh respondents had no better title to pass to the eighth respondent the same having been obtained by himself after the expiry of the twelve (12) years from the time he took quiet and peaceful possession of the suit land in 1980.Hence this suit and the orders sought herein.

8. In the replying affidavit dated **7th September 2005**, deposed by the third respondent, **JAMES MUTONGA NJOROGE** on behalf of all the respondents and in his capacity as the secretary of Wamuini "B" Farm Survey Committee, it averred that the applicant held three (3) shares in Wamuini "B" Farm and these were equivalent to 4 ½ acres of the land which he was allotted but he caused the issuance of a title deed respecting plot No.645 indicating that it measured 6/4 acres which was not the actual position on the ground.

9. The respondent averred further that the eighth (8th) respondent was a member of the farm and the lawful owner of plot No.646 measuring 0.41 hectares whose title deed he received in 1997, long before the applicant received his title deed for plot No.645 in the year 2000. Plot No.646 was always occupied by the eighth respondent whose agent was acquitted of the charge of trespass in Criminal Case No.2183 of 1999. The respondent contended that this suit is incompetent and bad in law as the applicant cannot claim adverse possession over land which he already has title to.

10. In the amended originating summons dated 30th March 2006, **Wamuini Farmers Co. Ltd**, was added as the first respondent while the former seventh respondent became the eighth (8th) respondent. At the hearing of the suit, the plaintiff, **Daniel Mbatha Mwanika (PW1)**, more or less reiterated the contents of his supporting affidavit but added that the first respondent was incorporated in 1974 for purpose of purchasing land on behalf of its members. He was among the founding members of the company and held about 200 shares. He produced a search certificate respecting the company (P.Ex.1) and share purchase receipts (P.Ex.2 a – d). He also produced the share certificate (P.Ex.3) which he received in 1978.

11. He (plaintiff) indicated that he was allocated 6.4 acres of the material Wamuini Farm and from

1980, he tilled the land and planted assorted crops. But in 1999, his portion of the land was sub-divided and when he obtained the title deed for the land he found that he was entitled to only 4.5 acres instead of 6.4 acres. He therefore filed a complaint with a land tribunal and obtained a decree (P.Ex.4) showing that he was entitled to 6.4 acres of the land and ordering that the land register be rectified accordingly. Rectification was effected as per the green card (P.Ex.5) and a title deed (P.Ex.6) was issued.

12. The plaintiff further indicated that in 1999, his land was interfered with by an agent and / or employee of Pastor Ndichu (the eighth (8) respondent) after the pastor obtained a title deed respecting part of his (plaintiff's) land. The relevant green card (P.Ex.8) indicated that more than an acre of his land had been taken away. He caused the eighth respondent's agent to be charged in court resulting in a conviction as per the court proceedings (P.Ex.7).

13. The plaintiff ended by urging this court to declare that the portion of land allegedly belonging to the eighth respondent belongs to him by way of adverse possession having occupied the same for a period of twelve (12) years without any interruption. He also urges this court to order the cancellation of the title deed issued to the eighth respondent and for his eviction from the land which he continues to occupy.

14. Julius Njuguna Wanganga (PW2), confirmed that the plaintiff was a founder member of the first respondent and that he was allocated 6.4 acres of the company's land and although the survey committee of the farm allocated part of the land to the eighth respondent, he was not a member of the company.

Mary Wairimu Kinyanjui (PW3), confirmed that the plaintiff occupied a portion of the land which was allocated to him in the year 1980 and that he did so uninterrupted until part of the land was allocated to another person whom she did not know.

15. The defendant survey committee testified through the second defendant/respondent, **Joseph Wainaina Ndungu (DW1)**, to the effect that the committee members were elected in 1994 for purposes of surveying and distributing land to the members of the first respondent who included the plaintiff. In the process, it was found that some of the members were occupying larger portions of land than their respective shares. The plaintiff was one such member and therefore his portion was sub-divided to be commensurate with his shares. The extra portion was thus allocated to the eighth respondent /defendant without any complaints being received from anybody upto the time of completion of the survey in June 1997. In December 1997, clearance certificates were issued to members thereby paving way for them to process individual title deed. The plaintiff therefore obtained his individual title deed and so did the eighth defendant /respondent. A register of the farm members (PW1) was produced.

16. . The second respondent further testified that it was after the eighth respondent went overseas for further studies that the plaintiff/applicant filed a complaint in the land tribunal alleging that his land had been given to somebody else. He never informed the survey committee about the complaint in the tribunal which decided in his favour. Thereafter, he obtained a new title deed without cancellation of the title deed issued to the eighth respondent. It was the respondents contention that the plaintiff did not speak the truth before this court.

17. The fourth (4th) and sixth (6) respondents/defendants i.e. **Njoroge Kahinga (DW2)** and **Samuel Njenga Mugo (DW3)**, fully agreed with what was herein stated by the second respondent on behalf of the survey committee. They (4th & 6th respondents) were also members of the committee. The eighth (8th) respondent, **David Ndichu Gitau (DW4)**, also agreed fully with the testimony of the second respondent. He produced a title deed and green card (D.Ex.2 A-b) respecting his portion of land which he said was hived off the portion which was irregularly occupied by the plaintiff and which he now occupies.

18. It is apparent from all the foregoing evidence, that the plaintiff and the second to the eighth defendant were all members of the first defendant company which was the lawful owner of all the portion of land known as Wamuini B Farm which was essentially purchased for purposes of sub-dividing and distributing

it among its members on the basis of the number of shares held in the company by each individual member.

The eighth defendant's membership was disputed by the plaintiff but the register (D.Ex.1) which was not materially discredited and / or invalidated by any other documentary evidence confirmed that he was indeed a member of the company and therefore the farm it owned. The area-map exhibited by the plaintiff (Annexure "DMM 4") was not established in terms of origin and authenticity.

19 The members of the farm as may be seen from the evidence held or occupied their individual portions of the farm with the consent of the first defendant pending issuance of respective title deeds. As indicated by the defendants through **Wainaina Ndungu (DW1)** and **Njoroge Kahinga (DW2)**, the role of the survey committee were to issue clearance certificate to enable members to obtain their individual title deed.

The registration of individual portions and the subsequent issuance of title deeds to individual members meant that the ownerships of such individual portions shifted from the first defendant to the individual owners.

20. Accordingly, the plaintiff registered his individual portion (i.e plot No.645(suit land)) and obtained a title deed dated **24th march 2000** (P.Ex.6) giving the approximate area of the land as 2.6 hectares.

The eighth defendant, also registered his individual portion (i.e. plot No.646) and obtained a title deed dated **24th December 1997** (D.Ex.2) giving the approximate area of the land as 0.41 hectares.

It is notable that the eighth defendant's title deed came before that of the plaintiff . He is therefore the actual registered proprietor of plot No.646, which the plaintiff alleges that it is part of his plot No.645.

21. The plaintiff's basic complaint is that the survey committee reduced his entitlement of 6.4 acres or 2.6 hectares by 0.41 hectares which it allocated to the eighth defendant. However, the defendants indicated that the 0.41 hectares were the extra portion occupied by the plaintiff.

In his evidence, the Plt indicated that when he noted that he was given an entitlement of 4.5 acres, he filed a complaint at the Land Tribunal which found that he was entitled to 6.4 acres. A decree to that effect was issued by the court and the register was rectified to show his actual entitlement of 6.4 acres or 2/6 hectares.

22. The relevant green card (P.Ex.5) indicates that the plaintiff was initially registered as the proprietor of the suit land on **22nd June 1999** and a title deed was issued to that effect. The latter title deed (Pex.6) issued on **24th March 2000**, was the result of the rectification of the register in terms of the court's decree. It is this latter title deed that forms the basis of the present claim against the defendants. The plaintiff thus claims ownership of the eighth defendant's plot No.646 measuring 0.41 hectares by adverse possession if not the entire suit land (plot No.645) measuring 2.6 hectares.

23. It is on the basis of the doctrine of adverse possession that the plaintiff herein seeks declaratory orders and cancellation of the title deed issue to the eighth defendant for plot No.646 and vacant possession of the plot.

The record from the registrar (PE.1) shows that both plots No.645 and 646 and indeed the entire parcel of land comprising those plots and others belonged to the first defendant before being surrendered to the **Government of Kenya in August 1997** to effect a sub-division and transfer scheme. This explains why the portion allocated to the plaintiff was initially transferred and a title deed issued to him on **22nd June 1999** while the portion allocated to the eighth defendant was transferred and title deed issued to him on **24th December 1997**.

24. The eighth defendant thus became the registered proprietor of his plot No. 646 before the plaintiff became the registered proprietor of his plot No.645.

The principles that govern the grant of declaratory orders are to the effect that the question before the court must be real and justiciable rather than a theoretical question and that the person raising it, must have a real interest to raise it (*see Matalinga & Others Vs Attorney General (192) E.A.518*.)

25. It is on the basis of the aforementioned principles that the court exercises its jurisdiction to make a declaration of rights since a declaratory judgment is not meant to confer a right where none exists.

The question herein is whether the plaintiff has established a right over plot No.646 by adverse possession when it is quite apparent that the process of conferring legal and equitable rights over land under the Kenyan Law is settled. This is most dependent on formal processes of allocation or transfer and consequent registration of title (*see, Joseph Letuya & Others Vs Attorney General & Others (2014) e KLR.*)

26. Such was the process undertaken herein in conferring legal ownership of plot No.645 to the plaintiff firstly in 1999 and secondly in 2000 and to the eighth defendant for plot No. 646 in 1997.

Interestingly, the plots had already been transferred through surrender to the government of Kenya by the first defendant as shown in the documents produced by the plaintiff (i.e P.Exh.1, 5 and 8). It may therefore be said that prior to the transfer and registration of the two plots to the plaintiff and the eighth defendant respectively, they belonged to the Government of Kenya rather than the first defendant and as such were classified as Government land which by dint of S.41 of the *Limitation of Actions Act*, cannot be claimed by way of adverse possession. Perhaps, this explains why the plaintiff did not deem it fit to join the Attorney General on behalf of the Government of Kenya in this suit.

27. This also explains why the present claim against the defendants cannot in the circumstances be tenable for grant of the orders sought herein as the plaintiff has not established a real interest or right over plot No.646 in contrast to the eighth defendant's title thereto.

Be that as it may, adverse possession could also not be claimed against the first defendant company because the plaintiff took possession of the suit land when it was under the ownership of the first defendant. He remained in occupation of the land with the consent of the first defendant upto the time he acquired registration thereof in his name. His membership in the company remained intact upto the time of registration. It guaranteed him peaceful occupation of the land.

28. The guarantee was dependent on his membership in the first defendant company and was never at any one point interrupted by cancellation of the membership which would have rendered the plaintiff's possession of the land illegal and adverse in relation to the first defendant whose land would have been dispossessed from itself by the plaintiff who would have been in occupation without the permission and consent of the first defendant, its actual owner at the time.

In Wanje Vs Sakwa (NO. 2) (1984) KLR 284, the Court of Appeal held that in order to acquire by the statute of limitation a 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 having discontinued his possession of it. Further, 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.

29. Apparently, the plaintiff was not in actual open, hostile and continuous possession of the suit land to the exclusion of the first defendant who was the true owner at the material time. He was in occupation courtesy of his membership with the first defendant which granted him necessary consent for the portion he was truly entitled to and which did not include the portion allocated to the eighth defendant. In any event, the period prescribed by the limitation of Action Act (Cap 22) for one to acquire legal title over land by way of adverse possession is twelve (12) years.

The eighth defendant became the registered proprietor of plot No.646 in 1997 yet this suit was filed in 2005 prior to the expiry of the prescribed twelve (12) year period.

30. It is clear from all the foregoing factors based on facts and law, that the plaintiff has failed to establish a right over plot No.646 by adverse possession for the issuance of the orders sought in the Originating Summons. His claim against all the defendants is unsuccessful and is hereby dismissed with costs to the defendants.

J. R. KARANJA

JUDGE

[Delivered and signed this 22nd day of July 2015.]