



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CIVIL CASE NO. 50 OF 2001

RAMADHAN SIMIYU MAKOKHA.....PLAINTIFF

VERSUS

RUTH NASIEBANDA MATARA.....DEFENDANT

JUDGMENT

1. The Plaintiff by an originating summons filed in court on 29th March 2001 sued the Defendant asking the court to determine;

(a). Whether the Plaintiff has acquired the title to land parcel no. Ndivisi/Muchi/816 measuring approximately 1.4 ha for having been in possession of the said parcel for a period exceeding 12 years thereby acquiring proprietary interest in the said parcel and whether he should be registered as the legal proprietor thereof.

(b). Whether the Defendant had a lawful right to bury her late son Allan Simiyu Wekesa on L.R. No. Ndivisi/Muchi/816 and whether the Defendant should be ordered to exhume the body for burial elsewhere.

(c). who should pay the costs of this application.

2. The summons is supported by the grounds listed on the face of it and facts deposed to in the affidavit sworn by the applicant and filed alongside the originating summons. The Defendant opposed the suit and filed a replying affidavit on 22nd May 2001. Directions were taken and the suit proceeded to hearing by way of adducing oral evidence. The Plaintiff's evidence and that of his witness was taken by my learned brother Sergon J. in March and July of 2005. Subsequently the matter was fixed for mention and hearings which did not take off. The matter again proceeded before me on 9th May 2013 when the Plaintiff closed his case and on 24th September 2013 when the Defendant and her witness adduced evidence.

3. The Plaintiff in his testimony told court that his original land was acquired by Pan Paper Mills Ltd. He therefore purchased the land parcel no. Ndivisi/Muchi/816 (hereinafter referred to as the "*suitland*") from Jonathan Masika Sichangi and Patrick Lusweti Sichangi in 1971. He paid Kshs. 1,700 for the land that measured 4 acres. He did a search and physically visited the land and found it vacant. They had an agreement drawn by J.M. Wafula advocate but which agreement he lost as his house got burnt.

4. He occupied the land with his family in 1971 and still resides on the land to date. He continued that

Jonathan Sichangi is dead while Patrick Sichangi lives in Webuye at a place called Dina. On 23rd February 2001, he was attacked by hooligans hired by the Defendant and therefore he moved out of the land temporarily. The Defendant also brought a corpse and buried it on the suitland. That the Respondent never constructed a house on this land while he was in occupation. He asked the court to declare that he had acquired the suitland by adverse possession. In cross examination, he said he saw the title documents before he bought the suit land. The sellers told him they were the beneficiaries of the land although they had not taken letters of administration. He never visited the land board for consent. That all the houses standing on the land were built by him and there was no problem until 23rd February 2000 when he was ejected for 4 months.

5. Shaban Wamalwa Kakai testified as PW2. He told court the Plaintiff is his brother-in law. He is aware the Plaintiff lives on the suitland. He was present when the sale was negotiated and money paid. The land was vacant. He constructed a house for the Plaintiff on the suitland. In cross-examination, he said he stayed with PW1 during the transaction. He knew Matara Sichangi - deceased and his two brothers who sold PW1 land. The suitland has fixed boundaries. He concluded his evidence by stating that PW1's on the land stay was peaceful between 1971 – 2000.

6. PW3 was Saidi Asman a neighbour to PW1. Their parcels of land share the same boundary. On 23rd February 2001, he had screams from PW1's land telling him to move. PW1 moved out but later came back. During cross -examination by Mr. Areba advocate, the witness said his land is Ndivisi/Muchi/1223. When the Plaintiff occupied the suit land, there was no house on it. He settled in the area before the Plaintiff but he also did not know Matara Sichangi – deceased. He continued in his evidence that the Plaintiff lived on the land peacefully from 1971 – 2001. He has never seen the Defendant cultivating maize crop on the land. The Plaintiff then closed his case.

7. The Defendant opened her case on 24th September 2013. She gave evidence that she lives in a rental house in Chwele. She is the widow of Jackson Matara Sichangi-deceased and therefore sister in-law to Jonathan and Patrick Sichangi. She produced the death certificate of her deceased husband as Dex. 1. She married him in 1964 and he died in 1970. They lived on the suitland. She also produced copy of the title deed as Dex. 2. She took out letters of administration of the estate of her deceased husband in Webuye PMC Suc Cause no. 46 of 1994 and produced the proceedings as Dex. 3. She used the certificate of grant she obtained to secure registration of the suit land into her names and produced transfer documents as Dex. 4. It is her evidence that they had a home on this land and it is where her husband was buried. She denied the Plaintiff has been living on this land peacefully from 1971. That the Plaintiff came to the land in 1973 but she presented a complaint to the local administration that stopped him.

11. The Defendant states that they used the suit land jointly with her mother in-law. She used the land till the year 2000 when her son died and the Plaintiff attempted to block his burial through court. It is her further evidence that the Plaintiff built on the land in the year 2000. The Plaintiff burnt her house in 1973 but she continued living on the land in her mother in-law's house. Her mother in-law was not buried on this land but was buried in the home of Jonathan Sichangi-deceased. She was not aware of the sale of land by her brothers' in-law to the Plaintiff. She asked the court to order the Plaintiff to leave her land. During cross-examination by Mr. Omukunda, she denied being married in Chwele. She said she went to Chwele in 1980 where she has lived on a plot to date. It is her evidence that her house was burnt by the Plaintiff not demolished as she had said in her replying affidavit. She used the suit land lastly in 2000 when she planted maize and beans. It is her evidence that Patrick and Jonathan sold their parcels to the Plaintiff then they moved away.

12. Patrick Lusweti Sichangi was the Defendant's witness and testified as DW2. He identified the Defendant as his sister in-law. His brother (husband to the Defendant) died in 1970 and was buried on the suit land. He denied selling this land to the Plaintiff. He heard that the Plaintiff burnt the Defendant's house. He also heard that the Plaintiff tried to settle on this land in 1973 but was stopped. He said they have buried two people on the suitland i.e. his brother Matara Sichangi and his nephew. In cross examination, he said he sold his land in 1969 and relocated. Jonathan Sichangi-deceased also later sold his land and bought land elsewhere. His mother was buried in Jonathan's land and the Defendant did not

build another house after her first house burnt in 1973. He did not know the Defendant's other children. He is not aware she re-married. He knows the Defendant lives in Chwele but he has never gone there. The defence then closed their case.

13. The questions this court finds arising for determination are;

- (i). Is the Plaintiff in occupation of the suit land and if yes, from what date.
- (ii). Was the Defendant in occupation of the land upto the year 2000?
- (iii). Has the Plaintiff proved that his interest over the suitland is adverse to that of the Defendant?

14. The Plaintiff's Counsel filed submissions which basically summarized the evidence adduced by the Plaintiff. The Defendant did not file any submissions. From the Defendant's evidence, the Plaintiff first went to the suit land in 1973 when he was chased away by the local administration. It is the same year he allegedly burnt down the Defendant's house. The Defendant avers further that the Plaintiff came back to the land in 2000 when he settled on it. The suitland Ndivisi/Muchi/816 was registered in the name of Matara Sichangi in 1970 and remained so until 2001 when the Defendant became the registered owner by way of transmission.

15. The Plaintiff on his part states that he bought this land from Jonathan and Patrick Sichangi in 1971 and took possession immediately. He admits that at the same time of sale the land was registered in the name of Matara Sichangi who was already deceased. Patrick (DW2) has since denied selling the land to him. What puzzles this court if no sale ever took place as put by DW2, then on what basis did the Plaintiff demolish the Defendant's house (as alleged) in 1973 or why the Defendant allowed him to settle on the land in the year 2000 without any action taken against him? Neither the Defendant nor her witness adduced evidence to enable this court reach an alternative conclusion other than that there must have been sale of the suitland which DW2 denied. This is because both the Defendant and her witness did not give any evidence of any existing relationship between them and the Plaintiff or if they knew him before 1973. Can a complete stranger come out of the woods and choose the defendant's land parcel?

16. The Defendant stated further that although her house was demolished in 1973, she continued to live on the suitland in her mother-in-law's house. She used the land until the year 2000 when her son died and while burying him, the Plaintiff attempted to stop burial using a court order. From the evidence on record, two things happened in the year 2000. First, the Defendant buried her son on the suitland and secondly, the Plaintiff was temporarily evicted from the suitland. I say temporarily because apparently he returned as it is not disputed he is currently in occupation of the suitland. The Defendant lives in a rental house in Chwele. She did not say exactly why and when she moved out of the suitland in her evidence in chief. But under cross-examination, she answered that she went to Chwele in 1980 where she lives todate (underline for emphasis).

17. DW2 made a very elusive statement in his evidence; ***“I heard the Plaintiff burnt the house as I was not present. I also heard the Plaintiff tried to settle on this land in 1973 but he was stopped.”*** He did not say he heard from who and what steps he took. He said the Defendant had one child with Matara Sichangi – deceased but does not know her other children. He knows the Defendant lives in Chwele but does not know where as he has never visited her. DW2 did not say how the Defendant used the land other than that they had buried two people on it. His evidence is more of hearsay which then does not add value to the defendant's case. The first burial of Matara Sichangi- deceased took place before the Plaintiff took possession of the suit land. The second burial of his nephew (Matara's son) was in 2000 under a lot of tension as it seemed the Plaintiff was resisting.

18. In contrasting the evidence of the Plaintiff with that of the Defendant, both PW2 and PW3 confirmed the Plaintiff's possession and use of the suitland. PW2 said he built the first house for the Plaintiff in 1971 and even stayed with him on the suitland. PW3 said he knew the Plaintiff from 1971 as his neighbour and in possession of the suitland. He said the land was vacant and the Defendant has never

lived on it or used it. PW3 admitted the tension in the year 2000 between the Defendant and the Plaintiff. I find the evidence adduced by the Plaintiff and his witnesses as more truthful and coordinated. Therefore the answer to my first and 2nd question is in the positive that the Plaintiff took possession of the land in 1971 having purchased it from Jonathan and DW2. Although the sale may not have been valid as the sellers had no capacity to pass title of the suitland, the transaction put the Plaintiff into possession thereby giving a basis for time to run in a claim for adverse possession.

19. In determining whether the Plaintiff's user of the land has been adverse to the rights of the Defendant, I will consider case law and statute law relating to the claim for adverse possession. Under Section 38 (1) of the Limitations of Actions Act, it authorizes a person claiming to be entitled by adverse possession to apply to the high court that he be registered as proprietor in place of the registered proprietor. Such a claimant must prove that;

- i). He has been in exclusive possession of the land openly as of right and
- ii). without interruption for a period of 12 years after dispossessing the owner *see also Wambugu vs. Njuguna Civ. Appeal no. 10 of 1982 (1983) KLR 172.*
- iii). the person in possession must be in whose favour time can run.

20. The Defendant averred that he is the widow of Matara Sichangi- deceased. She claims this land as a beneficiary. She did bury her son on the suitland in the year 2000. No one else except her has made claim to evict the Defendant from the suitland. In my opinion, the Plaintiff's user and occupation of the land therefore dispossessed her of that right although the land was registered in the name of the deceased person. When the Plaintiff took possession thereof, a claim for adverse possession became valid as the Plaintiff's interest in the land was adverse to the beneficiaries of the estate of the deceased.

21. The evidence clearly shows the Plaintiff's occupation was open, peaceful and interrupted for a period more than 12 years up to the time when this suit was filed. It is proved that he took possession in the year 1971 and lived peacefully until the year 2000. In that year, the Defendants came with hired goons to evict the Plaintiff which eviction was short-lived. Although the Defendant alleges it is the Plaintiff who wanted to stop her from burying her son on the suit land. PW3 corroborated PW1's evidence that it is the reverse of what the Defendant said which took place. The Defendant did not produce any document showing she had sued the Plaintiff that would then interrupt time from running between the years 1971 to 2000. The Plaintiff remains in possession todate.

22. In conclusion, I find the Plaintiff has proved his case against the Defendant as regards to prayer (a) of the originating summons within the required standard of the law. The Defendant shall execute the necessary documents to cause the suit land to be registered in the name of the Plaintiff forthwith. Having found for the Plaintiff, the Defendant's claim for eviction made in the counter-claim therefore fails and is hereby dismissed.

23. On the aspect of prayer (b) of the O.S. that asked for an order of exhumation of the body of the Defendant's son, I find the Plaintiff has not adduced satisfactory evidence why that order should be made. Although the Defendant had no right to bury that body there, the burial already took place. This burial was done 14 years ago and it would be unfair to the dead to disturb that body after the several years that has since lapsed. The Plaintiff did not prove any damage suffered as a result of that body lying on the suit land. This prayer is declined by this court.

24. Costs is a discretion of the court. The Plaintiff has already been awarded the suit land Ndivisi/Muchi/816 as an adverse possessor. I find it unjust to condemn the Defendant to pay him costs since she has lost her land. I therefore make an order that each party to bear their own costs of the suits.

DATED, SIGNED and DELIVERED this 22nd day of May, 2014

A. OMOLLO

JUDGE.