



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL CASE NO. 93 OF 2008

1. STELA NDUKU MULINGE

2. FAITH KATIWA KILUVA.....PLAINTIFF

VERSUS

1. KYALO NZOMO

2. MASAI NZOMO

3. JOSHUA NZOMO.....DEFENDANTS

J U D G M E N T

1. By a plaint dated 27/6/2008, the Plaintiffs, **Stella Nduku Mulinge** (1st Plaintiff) and **Faith Katiwa Kiluva** (2nd Plaintiff) sued the Defendants, **Kyalo Nzomo** (1st Defendant); **Masai Nzomo** (2nd Defendant) and **Joshua Nzomo** (3rd Defendant). The Plaintiffs' claim to be the owners of Land Registration Number 337/2361 situate in **Mavoko Municipality** in **Machakos District** (herein after suit land).

2. The Plaintiffs accused the Defendants of trespassing into the aforesaid suit property and seek the following orders:-

a. "An order for declaration that the Plaintiffs are the lawful and rightful owners of all that property known as Land Reference Number 337/2361 situate in Mavoko Municipality in Machakos District.

b. An order for declaration that the Defendants' acts of interference with all that property known as Land Reference Number 337/2361 are otherwise illegal and void.

c. A permanent injunction restraining the Defendants by themselves, servants, agents or otherwise howsoever from obstructing and/or interfering with the Plaintiffs' possession, enjoyment and peaceable use of all that property known as Land Reference Number 337/2361.

d. Damages for trespass.

e. Costs of this suit.

f. Interest on (d) and (e) above.

g. Any other or further relief that this Honourable Court may deem fit to grant.”

3. The Defendants denied the Plaintiffs’ claim as per the statement of defence dated 1/8/2008. The Defendants denied any knowledge of the existence of **L.R. No. 337/2361** (suit land) and further denied having trespassed into the said land. The Defendants denied any service by the Plaintiffs of notice of intention to sue.

4. During the hearing of the case, the Plaintiffs called two witnesses; PW1 **Stella Nduku Mulinge** and PW2 **Sebastian Munengi Mulandi**. It emerges from the evidence of PW1 that the two Plaintiffs who are sisters purchased the land in question from their brother, **Sebastian Munengi Mulandi (PW2)** on 7/3/2006. That they met all the conditions for the completion of the sale transaction including payment of stamp duty, clearance of rates, consent to transfer, valuation of the property and the transfer of the property and registration of the same in the Plaintiffs’ names. That the Plaintiffs were not able to take possession of the property as the surveyor who they sent to the ground to identify the beacons was chased away by some people who had occupied the land and constructed some iron sheet structures therein.

5. PW2 **Sebastian Munengi Mulandi** a brother to the Plaintiffs confirmed having sold the suit land to the Plaintiffs. Indeed the copy of the grant (Exh. No. 8) **Number IR 69585** reflects that the **LR No. 337/2361** (suit land) reflects that the same was transferred from PW2 to the Plaintiffs on 21/6/96. It is PW2’s evidence that he fenced the suit land but carried no other developments therein. PW2’s evidence is that he did not know the Defendants and that the suit land was not occupied by anybody at the time he sold the same.

6. On the other hand, DW1 **Robert Musya Nzomo** testified on behalf of the Defendants. DW1 described himself as a brother to the 1st Defendant and a son to the 3rd Defendant and stated that he did not know the 2nd Defendant. DW1 stated that he was not aware of the suit land and denied any trespass, stating that they only occupy land owned by their father the 3rd Defendant. DW1 however admitted having put up the structures and the fence complained of by the Plaintiffs and stated that they have occupied the ten acres of land since 1941 and that the land has been sub-divided into 159 plots. DW1 however had nothing to show to confirm that the land belonged to his family.

7. It is clear from the copy of the grant produced (exh.8) that the Plaintiffs are the registered owners of the suit property having purchased the same from their brother (PW2). The Defendants have not exhibited any documents in respect of the suit property. Indeed the evidence of DW1 is that he had nothing to show to confirm that the suit land belonged to his family. However, the Defendants’ witness admitted that the structures on the suit land were put up by his family. It is clear from the evidence of DW1 that 1st Defendant is his brother and the 3rd Defendant their father.

8. I find on a balance of probability that the Plaintiffs’ case has been proved. Although the Defendants’ evidence is that their family has occupied the land since the year 1941, this is not a case of adverse possession. On the other hand, the Plaintiffs have not given any evidence upon which this court can assess damages claimed for trespass. Consequently, I enter judgment for the Plaintiffs against the Defendants as prayed in the plaint in prayer No. (a) (b) (c) and (e).

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 22nd day of **May** 2014.

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B. THURANIRA JADEN

JUDGE