



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL SUIT 84 OF 2001

AGGREY M. MANG'OLI.....1ST APPLICANT

MAURICE O. MANG'OLI.....2ND APPLICANT

VERSUS

JOHN NDOMBI NATEMBEA.....RESPONDENT

J U D G M E N T

1. The Originating Summons dated 19th July 2001 is premised on the provisions of **Order XXXVI Rule 7** of the **Civil Procedure Rules** and seeks the determination of the following questions;

“1) Whether the Applicants Aggrey M. Mang’oli and Maurice O. Mang’oli have been in adverse possession of Land Parcel Bunyala/Namirama/1048.

2) Whether the Respondent’s title to the said portion of 3½ acres of the suit Land has become extinguished since the Applicants took possession for now over twelve (12) years. (sic)

3) Whether the Applicants herein have acquired title to the said portion of 3½ acres of Land parcel Bunyala/Namirama/1048 and an order that the said portion should be registered in their names.

4) Whether the Respondent should be condemned to pay costs of this Originating Summons.”

2. In the Supporting Affidavit sworn on 19th July 2001, Aggrey Mang’oli deponed that he and the 2nd Applicant were sons of one Daniel Mang’oli (deceased) and that in 1979, the said Daniel Mang’oli purchased 3½ acres to be excised from Land parcel number Bunyala/Namirama/179 from Natembeya Wanankhe (deceased) who was the father of the Respondent, John Ndombi Natembea. That on 25th June 1979, consent to sub-divide the Land was given by the Lurambi Land Control Board and on the same day, consent to transfer the 3½ acres of Land was granted and the parcel of Land was then registered as Land parcel number Bunyala/Namirama/1048.

3. According to the 1st Applicant, their father’s intention was that both Applicants would occupy the Land and so they both took possession upon sub-division and have been living on it since June 1979 or

thereabouts and no one has interfered with that possession including the Respondent and his deceased father.

4. The Applicants' main complaint is that the Respondent's father died before transferring the Land to their father or to them and the Respondent subsequently obtained Letters of Administration to his deceased father's estate and proceeded to distribute the Land to himself and other persons without regard to the Applicants' interest in it.

5. Lastly, that having occupied the suit Land for a period exceeding twelve (12) years, they are entitled to it by adverse possession and the same ought to be registered in their joint names.

6. In his Replying Affidavit sworn on 2nd August 2001, the Respondent deponed that whereas it was true that the Applicants' father bought 3½ acres of Land from Natembeya Nawanikhe and paid for it, he later requested for a refund of the money and he was duly refunded and so he had no claim to the Land at all. Further, that the Applicants' father appeared before Momanyi Birundu, Advocate and signed an Affidavit in which he stated that he had no further claim to the Land he had earlier purchased.

7. The Respondent also added that the Applicants had no lawful claim to the Land and in any event their claim had been heard and determined in Kakamega H.C. Succession Cause No.437/1996 and Kakamega H.C.C.C. No.79/1999 and so all the issues are *res judicata*. That the summons should therefore be dismissed with costs.

8. I have read the evidence of Aggrey Mang'oli, Maurice Mang'oli and Elijah Nyaberi as recorded by G.B.M. Kariuki, J. and their cumulative evidence was that on 25th June 1979, Mohamed Natembeya Nawanikhe sought consent from the Lurambi Land Control Board to sub-divide parcel number Bunyala/Namirama/179 and on the same day consent was given to transfer 16.5 acres to John Ndambi Natembeya and Daniel Mang'oli Kwoba. The minutes of the Board were produced as Exhibit P3.

9. Further, that vide Kakamega H.C. Succession Cause No.437/1996, title number Bunyala/Namirama/1048 which measured 25 acres was transmitted to John Ndambi Natembea, Patrick Natembea Nawanikhe and Huseni Were Mutembete and the former was to inherit 15 acres thereof.

10. Aggrey Mang'olo and Maurice Mang'oli also added that they had occupied the suit Land since 1979 and denied that their father rescinded the contract for purchase of the Land and they were therefore entitled to it.

11. John Ndombi Natembeya and Francis Mang'oli testified for the Respondent and their case was that indeed Daniel Mang'oli purchased the suit Land and begun farming it immediately after purchase. However, on 6th August 1994, he sought and was refunded Kshs.60,000/- and signed an Affidavit stating that he had no further claim to the Land. That the Applicants had never used the land and after their father left it in 1995, he never returned to it. That Daniel Mang'oli said so before the Navakholo Land Disputes Tribunal when the Applicants claimed the Land and their claim was dismissed. The Respondent similarly sought that the present case be dismissed.

12. I have taken into account the Submissions filed by the Advocates for the parties and I have perused the following authorities cited;

i) Murima vs. Njeri C. A. No.213/1996 where the Law applicable to a claim for adverse possession was set out.

ii) Kairu vs. Njenga & Anor C. A. No.57/1997 where it was held that where a father had not acquired title by adverse possession, he had no title to pass to his son.

iii) Nyakenogo vs. Onyaru [2010] eKLR where it was held *inter alia* that mere change of ownership does not invalidate a claim for adverse possession.

iv) *Marisin vs. Kurgat [2005] eKLR* where proof of possession was held to be an essential ingredient of any claim for adverse possession.

v) *Charles Matheka vs. Haco Industries Ltd. [2008] eKLR* where it was held *inter alia* that an adverse possessor must prove that he has used the Land as of right; *Nec vic, red clam, rec plecario (no force, no secrecy, no evasion)*.

13. All the authorities are relevant because in this case, the only issue to address is whether the Applicants have ever occupied the suit Land. I say so because I am satisfied that their father indeed purchased 3½ acres of Land from the Respondent's father but the latter died before he could effect the transfer. I also believe the evidence that the Applicants' father with or without the Applicants used the Land for farming activities between 1979 and on 6th August 1994 when he obtained Kshs.60.000/- as a refund and signed a document (D. Exhibit 1) in which he stated as follows;

“The family of the deceased agreed to refund my dues and I do not therefore intend to lodge any claim in this matter as recorded.”

14. In fact, the Respondent has candidly stated that the Applicants' father stopped using the Land in 1995 and I have no reason to doubt either the validity of the document (D. Exhibit 1) which was signed before Momanyi Birundu, Advocate and I accept the Respondent's case in that regard.

15. More importantly, Daniel Mang'oli testified before the Navakholo Land Disputes Tribunal in a claim filed by the Applicants regarding the suit Land and he stated as follows;

“My name is Daniel Mang'oli ID/NO.1975053/64. I do not know why my children brought Ndombi to court. The reason I say so is that I am the one who bought Land from Natembeya. Since Natembeya died if there was any problem with the shamba I should have been the one to take Natembeya' son to court. This is a shamba which I bought outside. It is not my original shamba. The original shamba at home I have already given to these children. I do not want children to stop me to sell a shamba which I bought outside. I did not sell the shamba to anybody. What happened was that when Natembeya died, I went to his son and asked him to give me a number but he said that he could not do so because the shamba was registered in his father's name. He had to go for succession case first. I found that to be long process requiring money.

So I withdraw from the buying process and told him to return my money. He did agree to return my money equivalent to six head of cattle at present price. He gave me Kshs.60,000/- before an Advocate called Momanyi., Since I have got my money back, I have nothing to do with Natembeya's shamba. I have my part of the shamba to Natembeya's son Ndombi who gave me the money.” (sic)

16. The Applicants are not claiming the Land directly but through their father who as shown above categorically denied having any claim to the Land. He also confirmed that he had given his **“original”** Land to the Applicants who he referred to as **“these children”**. **Where then is the evidence that the Applicants have ever occupied the Land and now deserve it as a matter of right?** I see none.

17. In fact one of the witnesses for the Respondent was one Francis Mang'oli, a brother of the Applicants, who stated that the Applicants have never occupied the suit Land and like his deceased father, was categorical that when the former left the Land, it was exclusively used by the Respondent. I believe that evidence and disbelieve the Applicants.

18. Once I have ruled that on a balance of probability, the evidence of possession is wanting then I can only conclude that the claim for adverse possession cannot stand. As was said in *Kairu vs. Njenga (supra)*, **“in order that a registered owner of Land may be deprived of his title to such Land, in favour of a trespasser (who claims by adverse possession), stringent but straight forward evidence of possession is necessary.”** In this case, no such stringent evidence was tendered.

19. On the whole, I find no merit in the Applicants' claim and I will instead dismiss the Originating

Summons dated 19th July 2001. The Applicants shall pay costs thereof to the Respondent.

20. Orders accordingly.

I. LENAOLA
JUDGE

DELIVERED, DATED AND COUNTER-SIGNED BY B. T. JADEN, JUDGE AT KAKAMEGA
THIS 1st DAY OF FEBRUARY, 2012

B. T. JADEN
JUDGE