



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Suit 54 of 2010

ARNOLD MUATHA MAINGI.....PLAINTIFF

V E R S U S

1. KATELEMBO MUVUTI ATHIANI CO-OPERATIVE RANCHING SOCIETY LIMITED

2. COLLINS KITAKA KALOKI.....DEFENDANTS

R U L I N G

1. The Plaintiff's suit herein by **originating summons filed on 12th March 2010** is in adverse possession. The Plaintiff's case is that he acquired title to **land parcel L.R. MACHAKOS TOWN BLOCK 3/1155** by adverse possession under the **Limitation of Actions Act, Cap 22**. He seeks a declaration to that effect. He also seeks an appropriate order of permanent injunction.
2. In his affidavit sworn in support of the originating summons the Plaintiff has deponed as follows at paragraphs 19 and 20-
"19. That an official search conducted at the Machakos District Lands Registry shows that no one has so far been allocated parcel number MACHAKOS TOWN BLOCK 3/1155 (annexed hereto and marked AMM 2 is a copy of the said official search certificate).
20. That also annexed hereto and marked AMM 3 is a copy of the certified abstract of records from the Machakos District Lands Registry showing that land parcel number MACHAKOS TOWN BLOCK 3/1155 has not been registered under any person's name..."
3. The certificate of official search annexed is not signed by the Land Registrar. The certified copy of the register, also annexed, shows that as at 11th March 2010 the registered proprietor of the land was the Government of Kenya at P.O. Box 30089, Nairobi.
4. It is therefore difficult to see why the Plaintiff has sued the Defendants in adverse possession. Adverse possession is a claim against the title of a registered proprietor of land.
5. The Defendants entered a joint appearance through counsel on 16th March 2010. But on 18th March 2010 the 2nd Defendant entered another separate appearance, through a different counsel.
6. On 19th April 2010 the Defendants filed a joint notice of preliminary objection to the suit through counsel. The points taken are
 - (i) That the pleadings as drawn "are a non-starter and an abuse of the court process and do not state

under what law they have been brought.

(ii) That the pleadings as drawn “do not by themselves establish any known cause of action.”

(iii) That the land known as MACHAKOS TOWN BLOCK 3/1155 is duly registered in the name of the 2nd Defendant and “the purported pleadings herein are in contravention of the Constitution”.

7. On 13th May 2010 the 2nd Defendant filed a replying affidavit (sworn by him) in response to the originating summons. In it he disputes the Plaintiff’s adverse possession. He also depones that he is the registered proprietor of the suit land and has annexed to the affidavit a copy of the title deed which shows that on 11th March 2010 the 2nd Defendant was registered as proprietor of the suit land and a title deed issued to him on 15th March 2010.

8. On 19th May 2010 the 1st Defendant filed a notice of preliminary objection to the suit dated 17th May 2010. The points taken are-

(i) That the 1st Defendant is not the registered owner of the suit land, and no case has been made against it.

(ii) That no claim in adverse possession can be made against anybody who is not registered proprietor of the land.

9. The two notices of preliminary objection are the subject of this ruling. I have considered the submissions of the learned counsels appearing, including the cases cited.

10. It appears from the material placed before the court by the Plaintiff himself that before the 2nd Defendant was registered proprietor of the suit land on 11th March 2010 the land was registered in the name of the Government of Kenya. The 1st Defendant does not appear in any document of title exhibited before court. It does not appear to have been the registered proprietor of the land before the 2nd Defendant was registered proprietor, whatever interest it might have had in the land. So, the 1st Defendant cannot properly be sued by the Plaintiff in adverse possession. As already noted, adverse possession is a claim that runs against the title of the registered proprietor of the land, and the 1st Defendant was not such registered proprietor. No cause of action in adverse possession is thus disclosed against the 1st Defendant, and the claim in adverse possession against it is hereby struck out with half of the costs of the suit.

11. The other claim is for an order of permanent injunction to restrain the 1st Defendant (as well as the 2nd Defendant) from “trespassing, entering, encroaching or by any other means interfering with the (Plaintiff’s) quiet possession and enjoyment of (the suit land)...”. That is a claim that the Plaintiffs can pursue against the 1st Defendant independently of the claim in adverse possession.

12. As regards the 2nd Defendant, the Court of Appeal has held that “mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession. See **Githu – vs- Ndeete [1984] KLR 776**. See also **Kasuve – vs- Mwaani Investments Limited & 4 others [2004] I KLR 184**.

13. The 2nd Defendant’s registration as registered proprietor of the suit land on 11th March 2010 could not interrupt the Plaintiff’s adverse possession, if otherwise established by evidence. But the claim as against the 2nd Defendant could be sustained only if the registered proprietor prior to the 2nd Defendant (the Government of Kenya) is sued. The Limitation of Actions Act applies to the Government subject to certain exceptions. See **section 43** of the Act. The Plaintiff can seek to bring in the Government of Kenya into the suit by an appropriate application.

14. So, as things stand now, there is a cause of action against the 2nd Defendant in adverse possession. Whatever defects there may be in the suit for failure to sue the registered proprietor prior to the 2nd Defendant can be rectified by joinder and amendment.

15. In summary, the preliminary objection of the 1st Defendant succeeds only to the extent of the claim in adverse possession which is hereby struck out with costs. The 2nd Defendant's preliminary objection is overruled with costs to the Plaintiff. Those will be the orders of the court.

DATED AT NAIROBI THIS 6TH DAY OF AUGUST 2012

H.P.G. WAWERU

JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER 2012

**ASIKE-MAKHANDIA
JUDGE**