



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA**

Civil Case 109 of 2001

SOLOMON MUATHE MITAU & 787 OTHERS..... PLAINTIFFS

VERSUS

NGUNI GROUP RANCHDEFENDANTS

JUDGMENT

Introduction

1. On 25.7.2001, Solomon Muathe Mitau and 787 other persons filed an Originating Summons pursuant to section 38 of the Limitation of Action, Cap 22 Laws of Kenya. They claimed that they had acquired ***“prescriptive rights of the whole of land parcel number Ikutha/Nguni/1 measuring approximately 9379.0 hectares [and] for the determination of the following questions;***

i. The Plaintiffs having been in continuous quiet and/or uninterrupted actual occupation and possession of the whole of the land parcel Number Ikutha/Nguni/1 for a period of over 12 years, the Plaintiffs be declared [to have acquired] proprietary interest in the said parcel of land.

ii. The registration of the defendant as proprietor of the land parcel Number Ikutha/Ngun/1 being a first registration which is subject to prescriptive rights which were in the process of being acquired by the plaintiffs and the prescription period having expired, then the defendants be declared to hold the title to the land the subject matter of this suit in trust to the Plaintiffs

iii. The registration of the defendant as the proprietor of land parcel Number Ikutha/Nguni/1 be cancelled.

iv. Such other orders be made as may be meet effect title to the suit land to the plaintiffs (sic).

v. Costs of this application be awarded to the Plaintiffs.”

2. The grounds in support are that:

“(a) The Plaintiffs have always lived in their

respective portions of the land comprised in land title number Ikutha/Nguni/1.

(b) The area covered by the title comprises large

chunks of Maluma location and Kalivu location.

(c) The registered proprietor of suit land Nguni Group

Ranch exists only in name and has never occupied and/or worked on the suit land.

(d) The Plaintiffs have nowhere else to go and have always used their respective portions of the suit land which is the only home they know.

(e) The area where the land is situated has never been properly declared an adjudication area and the registration of the suit land is a nullity in law.

(f) The Defendant is in law not the owner of the suit land.

(g) By prescription, the title to the subject land has reverted to the plaintiffs.

(h) The honourable court has jurisdiction to make orders sought.”

3. Solomon Muathe Mitau, the first Plaintiff on his own behalf and on behalf of the other Plaintiffs swore a Supporting Affidavit on 20.7.2001 and in it he deponed that all the Plaintiffs were residents of land parcel number Ikutha/Nguni/1 prior to its registration and they were unaware that the Defendant had been incorporated as a group ranch until 19.5.2001 when the Chief, Kilivu Location informed them that they were living on land belonging to the Group Ranch aforesaid. They were then asked to pay Kshs. 20,000/= in order to become members of the Group but they declined to do so because the land did not belong to the Group Ranch but to themselves.

4. On 6.9.2001, Samuel Kasimbu Ndumbali filed a Replying Affidavit to the summons and in it he deponed that he was the Chairman of the Defendant Group Ranch and he was its member No. 167. That the Group Ranch was registered on 25.9.1975 and he was well versed with his history from then on. He went to depone to the following issues;

- i. that upon registration of the Group Ranch under the Group Representative Act, Cap. 287 Law of Kenya, a register of members was opened and 452 members were reregistered.
- ii. that members continued using the ranch for grazing purposes and sometimes in 1995 they resolved to sub-divide it.
- iii. in 1996, consent to subdivide was granted by the Kitui Central Land Control Board and;
- iv. on 11.12.1999, the firm of M/S Gatome & Associates, licensed surveyors were appointed to undertake the sub-division.
- v. Sub-division commenced in November 2000 which process has not been completed.

5. The deponent in response to the issues raised by the Plaintiffs stated further that non-members would occasionally trespass into the ranch while searching for pasture and this practise increased in 1995 when the decision to sub-divide it was taken.

6. On the contention that the Plaintiffs that they were unaware of the creation of the Defendant, he deponed that some of the Plaintiffs were in fact members of the Group Ranch and those persons were:

“PLAINTIFF	MEMBER
184	253
212	139

251	18
261	4
278	134
285	248
292	1
471	3
600	424
693	222”

7. That the above Plaintiffs subsequently denied knowledge of this suit at a meeting convened by the Chairman aforesaid. He added that investigations also confirmed that the following Plaintiffs were minors who had no capacity to sue and he deponed that;

“Plaintiffs Numbers- 356, 357,358 and 359 at Mambui School,

381, 383, 393, 395, 396, 397, 401, 404, 406,410,413, 414,415, 416,417,418,426,436, 437, 438, 439,440, 459, 556, 557, 558, 564, 565, 566, 586,652,653,654 and 665 at Kalivu Primary School.

That I also know the following Plaintiffs to be infants who are attending nursery school, nos. 398, 460, 559, 666.

That I also know the following Plaintiffs to be infants who are not attending school; 128, 129, 132,, 141, 366, 367, 385, 394, 417, 418, 424, 425, 427, 442, 447, 448, 449, 461, 462, 476, 477, 480, 483, 488, 489, 492, 493, 494, 500, 501, 502, 503, 504, 505, 506, 507, 510, 516, 517, 520, 521,526, 529, 530, 531, 546, 547, 548, 555, 567, 575, 576, 577, 578, 591, 592, 593, 594,595 596, 599, 610, 623, 624, 625, 626, 629, 630, 631, 632, 633, 634, 637, 638, 639, 640, 641, 642, 643, 646, 647, 648, 649, 650,661, 662, 671,673, 674, 675, 759.

8. Further that in the list of Plaintiffs some of them repeated their names as follows:-

§ ***“Number 4 is the same person as number 237***

§ ***Number 89 is the same person as number 90***

§ ***Number 124 is the same person as Solomon Muathe Mitau***

§ ***Number 138 is the same person as number 144***

§ ***Number 177 is the same person as number 179”***

9. He then depones as follows in paragraphs 24 - 28 of his Affidavit aforesaid:

§ ***“That I know plaintiff number 73; he is an Assistant Chief of Kyusyani sub-location, and not a resident on the suit land***

§ ***That I know plaintiff number 148, he resides at Kabati in Kauwi Location and not on the suit land.***

§ ***That I know plaintiff number 154, he resides at Katangi in Machakos District and not on the suit land***

§ ***That I know plaintiffs numbers 91, 92, 93, 94, 95, and 97, they reside in an area known as Kitui County Council Holding Ground which is way outside the suit land.***

§ ***That I know plaintiff number 120. She lives in Mutha Location and not in the suit land.***”

10. He concluded by stating that the suit as filed should be dismissed with costs.

11. I should pause here and note that on 12.6.2002, parties appeared before Nambuye, J. and recorded a consent order in the following terms;

“That the names of the applicants named as plaintiffs number 153, 161, 162, 164, 176, 184, 220, 261, 267, 269, 285,286, 292, 293, 294, 295, 378, 379, 400, 471, 472, 474, 617, 618, 693, 695, 724, and 787 improperly joined as plaintiffs in the main suit be ordered struck out.”

12. When the trial commenced before Wendoh, J. and later before Sitati, J. the Plaintiffs called 7 witnesses namely PW1, Solomon Muathe Mitau, PW2, Muendo Mbaluka, PW3, Juma Mulelu, PW4, Sammy Mutuku Katemi. PW5, Muli Mutungi, PW6, Musango Mutie Mutuku and PW7, Musyoki Mutua and the exhibit produced was P. Exhibit 1- extract of title for the disputed land. Their case can be summarized as follows:-

13. That they all lived peacefully on the suit land and accessed all the social amenities on it communally until 1995 when Samuel Ndumbali demanded Kshs. 20,000/= for survey of the land and when they refused to pay it, they were threatened with eviction. They denied knowledge of any adjudication of land in the area and that they were opposed to a private surveyor entering the land and they instead want a government surveyor to demarcate their land and the title held by the Defendant should be cancelled. They admitted that prior to their entry to the land the same was used for grazing purposes and that they came from different parts of the larger Ukambani and settled on it.

14. Of interest is that when some of them entered the land (like PW1 and PW2), they paid Kshs. 1,200/= to a village elder who then showed them where to settle.

15. They denied knowledge of the officials of the Defendant ranch or how the title was acquired, and yet PW1 and PW2 said that they settled on the land in 1965. PW4 however said that he settled on the land in 1989 having purchased his portion from one Ben Kitukui. PW5 said that he was born on the suit land in 1973 and he lives on his father’s portion of it and PW6 paid Kshs. 5,500/= in 1988 to be shown his land in the ranch but he confirmed that his home is in Makueni. PW7 also paid Kshs. 5,500/= to be shown a portion of land in the group ranch and to him the same constituted a purchase price for 20 acres of land. His home was in Wote, Makueni and he came to know of the suit land in 1991. He later purchased another portion of it in 1992.

16. The evidence for the Defendant was tendered by Samuel Kasimbu Ndumbali and it is the same as that contained in his Replying Affidavit and I see no need to repeat it. The only addition was that PW1 – PW7 have temporary structures on the land having forcefully maintained possession and 1/3 of the Plaintiffs have remained on the land while others have all voluntarily moved out.

17. I have read the submissions filed by the Advocates for the parties and my findings are as follows:-

18. Firstly, from P.Exhibit 1 the suit land, viz L.R. Ikutha/Nguni/1 was registered on 20.5.1975 and the registered proprietor thereof was said to be “***Nguni Group Ranch.***” The Certificate of Title was issued on 26.8.1980 but the Group Ranch was incorporated on 17.2.1976 under section 7 of the Group Representatives Act, Cap. 287.

19. The Plaintiffs have asked this Court to determine whether they have acquired proprietary interests since they have occupied the land for a period exceeding 12 years. They number 788 and along the way some of them were struck off and out of the remaining Plaintiffs, only 7 were able to give evidence for themselves and purportedly for others. The situation is novel in many respects because;

i. without evidence as to how long each of the Plaintiffs has been in occupation of the land, it would be difficult for this court to determine whether in fact each of them, has been in possession for a period exceeding 12 years. As Madan, J. stated in Parklands Properties Ltd vs Patel [1981] KLR 52:

“The issue whether a party’s possession of a piece of land is adverse is a matter for evidence, and a decision thereon depends upon whether the part alleging adverse possession successfully established the particulars of adverse possession pleaded.”

20. In the present case, the Originating Summons was filed on 25.7.2001 and all that Solomon Muathe Mitau states in the Supporting Affidavit is that;

“all the Plaintiffs are residents of and have always lived in the land comprised in land parcel title number Ikutha/ Nguni/1”

21. The period of entry into the land by each of the Plaintiffs is not given and in evidence, PW1 & PW2 said that he entered in 1965; PW2 in 1965; PW3 said that he was born on the land in 1973 and that he was a son of one Mulelu Muia, a co-Plaintiff; PW4 said that he brought a portion of the land in 1989 and then he took possession on an unclear date; PW5 said that he was born in 1973 on the suit land and he knew no other home; PW6 said that he was shown the portion of land to occupy in 1988 but it is unclear when he took possession; PW7 said that he occupied the land in 1991.

22. I am being asked to make a blanket declaration in respect of adverse possession by all the Plaintiffs and yet the evidence in support of the claim cannot certainly support that common claim.

(ii) as a corollary to the above, the Defendant

insisted that some of the Plaintiffs were minors and had no capacity to sue in their names. On 18.2.2004, the advocate for the Plaintiffs stated as follows;

“I have a list of minors listed as Plaintiffs whom I will not call to court”

23. If indeed there are minors amongst the list of Plaintiffs who are they and what period of possession adverse to the title can be attributed to them? Without that evidence, no claim of adverse possession can be sustained.

24. Secondly, the whole essence of the law relating to adverse possession is possession itself. I have elsewhere above said that the period of possession by individual Plaintiffs is unclear. However, where is the evidence that Nguni Group Ranch was itself disposed of the land? In Wanje vs Saikwa (No.2] 1984 KLR 284 it was held that;

i. ***“In order to acquire by the statute of limitations 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.***

ii. ***What constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.***

iii. ***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.”***

25. In this case there is no evidence whatsoever that registered members of Nguni Group Ranch ever lost possession of or discontinued possession of the entire parcel of land and the Plaintiffs took it over. In fact although the Plaintiffs collectively claim the 9379 hectares comprised in the title there is no evidence that they have been in possession of that acreage to the exclusion of registered members-

Granted, as was held in Muthuita vs Wandie [1982] KLR 166 a party need not claim definable portions of land but in this case the land has been defined but there is no evidence that any portion if it was no longer in the possession of the registered proprietor and what portion of it if at all each or all of the Plaintiffs is entitled to.

26. Thirdly, assuming for a minute that the Plaintiffs are entitled to the suitland, there are mechanisms to enforce their claims within the Group Representatives Act other than by the approach they have taken. In fact from the evidence tendered, they may have disagreed with the registered representatives and they refused to pay the survey fee. It is telling that some of the named Plaintiffs were later struck off the suit by their own application because they were not consulted when the suit was filed.

27. On the whole therefore I see no evidence before me to declare the Plaintiffs as having acquired the land by adverse possession. On the other hand, I agree with the Defendant that the summons as framed is incompetent; the names of the Plaintiffs are repeated; minors have sued without capacity and there is no doubt that possession as claimed is suspect.

28. In any event, the suit cannot meet the expectations for the orders that the Plaintiffs seek and the same is dismissed with costs to the Defendant.

29. Orders accordingly.

Dated and delivered at **Machakos** this **27th** day of **May 2009**.

Isaac Lenaola

Judge

In the presence of: Mr. Gachuhi h/b for Mr. Musyoka for Plaintiffs

No Appearance for Defendants

Isaac Lenaola

Judge