



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

MISC. 1 OF 2004

CHARLES MATHEKA.....PLAINTIFF

VERSUS

HACO INDUSTRIES LTDDEFENDANT

JUDGMENT

1. This case is premised on a claim of adverse possession and in his Originating Summons dated 6.1.2004, the Plaintiff herein, Charles Matheka, seeks orders that this court should declare that he has become entitled to that parcel of land known as L.R. 337/833 situated at Athi River Township within Machakos District by fact of adverse possession. Further, that an order should be issued, directed at the Registrar of Titles, to transfer the said parcel of land to the Plaintiff absolutely and a permanent injunction issued, against the Defendant, restraining it from interfering with the Plaintiff's alleged possession aforesaid and to restrain any attempts at disposing, alienating, charging or interfering in any manner with the Plaintiff's use and enjoyment of that land.

2. In an Affidavit sworn on 8.1.2004, the Plaintiff deponed that he entered upon the suit land on or about 30.5.1972 when he was granted a permit to keep poultry and that he also started irrigation farming on the land measuring 3.5 hectares. He applied for a water pump permit on 10/10/1973 and the Water Apportionment Board for the area granted him that permission. That he thereafter occupied and used the land without interruption and developed it uninhibited. He deponed at paragraph 5 of the said Affidavit that he did the following things during that period that he;

i. *Constructed] a system of piping for irrigation worth a lot of money together with a water pump.*

ii. *[Constructed] servant quarters, my own house and goats and cattle sheds.*

iii. *Planted vegetables for export and beans, crops, oranges, avocados, sugar canes, manured the land."*

3. The Plaintiff added that on 26.8.2003 he was surprised when the Defendant gave him notice to vacate the land and yet the Defendant was apparently aware that he was the one in total occupation of the land and had crops and livestock on it. When he conducted a search, he realized that title had been issued on 1.1.1983 and he had no prior knowledge of such title.

4. His claim is therefore that he had been in occupation and possession of the land for over 12 years and he was entitled to orders under section 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya. That the Defendant who obtained title on 22.12.2000 had nothing transferred to it on that day as title thereto had been extinguished on 1.1.1995 by operation of the law aforesaid.

5. In a Replying Affidavit sworn on 18.2.2004 by Ms Brenda Waka, Company Secretary of the Defendant Company, it is the Defendant's case that it acquired the suit property upon paying Kshs.4 million to the prior registered proprietor, M/S King International Limited. Title was thereafter issued to it on 22.12.2000 and in the year 2003, its agents went to the land with intent to fence it off and found the Plaintiff who agreed to vacate the land but sought time to harvest his crops and relocate his livestock. He also sought magnanimity and pleaded for ¼ acre to occupy. The former request was granted by letter dated 26.8.2003 but the plea for ¼ acre of the land was rejected. Instead of leaving the land as he had promised, the Defendant's case is that the Plaintiff then instituted the present proceedings. At paragraph 12 of Ms Waka's Affidavit, the Defendant categorically denies that the Plaintiff is entitled to the land by fact of adverse possession and the reasons are therein set out as being that;

“a) The Plaintiff admits in his pleadings that he came into the suit premises pursuant to a temporary occupation license granted to him by Athi River Urban Council.

b) In the year 1983 the suit premises was granted to M/S D.K. Paints International Limited. It was a clear term of the grant that the user of the Land was for development of Inoffensive Industrial purposes with ancillary offices and stores and not for agricultural proposes.

c) That though M/S D.K. Paints International Limited did not develop the Land for industrial purposes the said Company exercised other rights of ownership by charging the property to obtain credit and later on sold its leasehold interest to the Defendant.

d) That the Plaintiff used the property for agricultural purposes only and erected structures of a temporary nature.

e) That the Defendant acquired the suit property for valuable consideration and was registered as owner of the suit premises in the year 2000. The Defendant's right of action against the Plaintiff arose from the date of registration as owner of the suit premises in the 2000 and twelve years have not lapsed since the date.

f) The Defendant is by dint of section 23(1) of the Registration of Titles Act (Cap 281) of the Laws of Kenya the absolute and indefeasible owner of the suit premises and his title thereto is not open to challenge on the grounds set out in the Plaintiffs Originating Summons and Supporting Affidavit. True copies of the Transfer and the Certificate of Title/Grant is annexed hereto and marked “BW2a and b”.

g) That the purposes for which the Defendant acquired the suit property was for industrial use and not agricultural use. The Plaintiffs user of the land was not adverse to the Defendant's intended user of the land.

h) That the Defendant has consistently for the last three years been paying rates and other charges to Mavoko Municipal Council under whose jurisdiction the suit property is situated. We have also been paying Land rents to the Central Government. Copies of some of the payment receipts are annexed hereto and marked “BW3”

6. The Defendant in any event prays that the case against it be dismissed with costs.

7. In evidence before me, the Plaintiff stated that he was a farmer and occupant of L.R. No. 337/833 Athi River which he entered in 1972. He was allowed to conduct poultry farming thereon and on 5.6.1972 he was shown the acreage he would occupy. Later, he connected water to it. He continued developing it by planting French beans, bananas and oranges and also reared livestock.

8. He added that when title was obtained on 1.1.1983, he had long taken possession which has remained uninterrupted to-date and he wanted orders as per the prayers in his Plaint.

9. When he was cross-examined, the Plaintiff stated in part that he was formerly employed by the Metrological Department as a technician and lived in Embakasi area and Dagoretti in Nairobi between

1964 and 1997. He had his family with him but that he visited Athi River during the weekends. As to how he entered the suit land, he stated that the same was pointed out to him by unnamed officials of the Athi River Council but that he never paid any rent for it. He also had no evidence that in fact the suit land was used for purposes for which permission had been given by the said Council.

10. The Defendant's witnesses were DW1, Brenda Waka, Company Secretary, DW2 Fredrick Njuguna Gichuhi, Security Officer, International Life House Limited, DW3 Silas Irungu Karori, Dispatch Manager with the Defendant and DW4, David Kingori Gakambi, Commission Agent and Private Investigator. I will summarize their evidence as follows:-

11. Ms Waka stated that the Defendant acquired the suit land from M/S King International Ltd so that it could develop it for manufacturing purposes but was unable to do so because an injunction was issued against it in this suit. That the Plaintiff's occupation of the land is suspect because although he said that he entered it in 1972, there is no clear evidence to that effect. Further, that from the pictures annexed to an Affidavit sworn on 8.1.2004, there was no water pump on the land neither was there evidence of poultry farming contrary to the Plaintiff's assertions on oath. Worse of all, she said, the alleged residence constructed on the land was a windowless "mabati" structure and in fact it showed no evidence of being occupied by anyone. That there is also no evidence of any irrigation on the land contrary to the evidence of the Plaintiff.

12. Ms Waka's further evidence was that the Defendant was unaware of the Plaintiff's alleged occupation and possession of the land prior to title being issued to it and that it has been paying rates and land rent for it since the year 2000.

13. Fredrick Njuguna Gichuhi said that he visited the land in dispute 1987 or 1998 on behalf of the Defendant and that one Mr. Drum, Managing Director of King International Limited pointed the same to him. At that time no one was occupying it but in 1997, he returned to the land with one Silas Irungu and that is when he found the Plaintiff who had started cultivating it. That the Plaintiff did not assert any right to the land and readily agreed to vacate it.

14. When the witness was cross-examined, he admitted that the Plaintiff had made extensive developments and had planted cabbages, bananas and assorted vegetables and had cars and tractors on the land as well as many workers. He also saw cattle pens and goat sheds but denied that the Plaintiff could have been there for more than 20 or even 12 years as claimed.

15. Silas Irungu Karori said that he visited the land in 1997 or 1998 and he was with DW2. They found the Plaintiff on the land and when he was asked to vacate it, he readily agreed to do so and even offered to occupy the next empty plot but failed to do so until 2002 when he sought ¼ acre for cultivation since he had allegedly taken care of the land and secured it from squatters. The plea was rejected and he filed the present case.

16. David Kingori Gakambi produced a report relating to the suit property on instructions of the Defendant and I will revert to it later in this judgment.

17. I have perused the written submissions by both Mr. Masika and Mr. Nguru Advocates for the parties and I have taken into note the useful authorities cited. I should begin by setting out section 38 of the Law Reform Act which provides as follows:-

"(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

18. Further, in Peter Njau Kairu vs Stephen Ndung'u Njenga & Another C.A. 57/1997 the Court of Appeal held as follows:-

“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 straightforward proof of possession is necessary. This of course does not mean that the trespasser must be all the time in possession. He may for instance be in possession through his wife or an off-spring as those are members of his immediate family or a person appointed by him in that respect. Such title can only be deprived in the clearest of cases and it is for this reason that summary procedure in O.36 rule 3(D) is provided by the rule-makers in their wisdom, for summary adjudication thereof.

19. That being the law, before me are two conflicting pieces of evidence;

- i. the Plaintiff’s assertion that he entered the suit land in 1972 and;
- ii. the Defendant’s assertion that as of the year 1997, the Plaintiff was not on the land and therefore section 38 cannot be invoked.

20. I have carefully read the evidence in the matter and I am convinced that the Plaintiff’s assertion cannot be sustained. It is he who must strictly prove that he is entitled to the land and he has not. Firstly, he was the only witness in the case and was unconvincing. I say so, with respect, because he produced P. exhibit 2 a letter dated 5.6.1972 issued by Athi River Urban Council and the document relates to a poultry keeping plot within the Urban Council and of note is a condition that:-

“ the land shall not be used in any manner...dangerous or offensive to the public or neighborhood i.e any kind of birds or animals .”

21. Assuming for a minute that the plot was indeed for purposes of “poultry keeping,” (a notation added to the printed letter by pen) obviously there was a problem with it ab initio. Further, there was no evidential connection laid before me to show that in fact “the poultry keeping plot” was the same as the suit land and to that extent that evidence is both worthless and ineffective.

22. Secondly, P. Exhibit 3 and P. exhibit 4 are an Application for and a water permit and it relates to water piping within Athi River in 1973 and 1980 respectively. Again, there must be strict proof that those permits relate to the suit land and not any other plot within Athi River. The evidence tendered with regard to the alleged entry in 1972 or thereabouts is therefore hollow and cannot be the basis for this court to hold, fairly, that the Plaintiff entered the land in 1972.

23. Thirdly, in his evidence and in submissions by his advocate, the Plaintiff seemed to suddenly shift gears and peg his claim to 1.1.1983 when the title to the suit land was obtained by the first lessee, M/S D.K. Paints (International Limited). I have seen a copy of the Grant and it shows that the suit land is situated on land measuring 3.500 of a hectare or thereabouts. The leasehold interest was for a term of 99 years from 1.1.1983 and one of the conditions of the grant was that any transaction involving the suit land would have to be with the consent of the Commissioner of Lands in writing. The transfer to the second leasehold holder, King International Limited on 18.8.1989 and to the Defendant on 22.12.2000 has not been challenged and in any event, it is irrelevant in as far as the Plaintiff’s claim is concerned. The issue I intend to address is whether in fact, even if 1.1.1983 was to be the relevant date, the Plaintiff has properly proved that the title was extinguished on 1.1.1995, when 12 years expired. Kneller J. in Kimani Ruchine & Another vs Swift, Rutherford Co. Ltd and Another [1977]KLR 10 at 16 stated as follows:-

“The Plaintiff’s have to prove that they have used this land which they claim as of right; Nec vi, nec clam, nec plecario (no force, no secrecy, no evasion). So the Plaintiff must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession of occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavors to interrupt it or by any recurrent consideration; see Wanyoike Gathure v Beverly [1965] E.A. 514, 518, 519, per Miles J. “

24. In all his evidence, the Plaintiff said nothing about the title held by M/S D.K. Paints International Ltd or M/S King International Ltd and whether those two companies were ever aware of his possession, if at

all, during the period when their interests were current. I note however that in evidence before me, the Plaintiff stated that he only came to know that title for the land had long been issued when notice was issued on 31.12.2003 and when he conducted a search against the title. If that be so, then the claim must fail because one of the hallmarks of any claim for adverse possession is that the registered owner was aware of the trespassers possession but did not interrupt it for a period exceeding twelve years. If the possession was stealthy, secret and evasive, then no adverse possession can attach. The point here is that if indeed the Plaintiff only brought his possession into the notice of the registered owner in the year 2003 then twelve years could not have lapsed prior to the year 2004 when the claim was lodged.

25. I should now turn to the second scenario which has been projected by the Defendant. I will quickly dispose of the argument that the Plaintiff needed to prove personal occupation. Whether or not he had a “mabati” structure that was windowless or which had no clothes lines was a rather pedestrian argument. *Kneller, J.* in Kimani Ruchine (supra) said this on the issue of proof of possession;

“Possession can take different forms such as fencing or cultivation; It depends on the physical characteristics of the land. Cutting timber and grass from time to time is not sufficient to prove sole possession of the land, because there are acts which are not inconsistent with the enjoyment of the land by the person seemingly entitled to it. The resources or status of the claimants is not a factor in the correct approach to deciding what constitutes a sufficient degree of sole possession and user. The standard is an objective one and related to the nature and situation of the land. Certainly, where the cultivation of the land is the evidence put forward to support the claim by adverse possession then it should be definite as to area and to time, to time, see, generally, West Bank Estates Ltd v Arthur [1966] 3 WLR 750.”

26. I agree because it matters not whether the claimant is in occupation through his relatives or workers or otherwise.

27. Having so said however, the Defendant’s case was more credible than that put forth by the Plaintiff, in my view; I say this because I believe the evidence of Fredrick Njuguna aforesaid that the Plaintiff was not on the land in 1998 or thereabouts and that it was only in 1997 that the witness found him on the land. If that be the case then the report by Survival Investments dated 6.5.2008 is clear that in fact the Plaintiff was in possession of and occupying his plots nos. 18 and 44 within Athi River and not the suit land in the period prior to 1977. His entry to the suit land was therefore not for a period exceeding twelve years and I have already stated why I think so. The Defendant has forcefully shown that the Plaintiff is a trespasser without any colour of right that can properly be accepted under section 38 of the Limitation of Actions Act.

28. I accept that argument and will return to the case by the Plaintiff and state firmly that it was he who had the onus of proof and he has failed to meet test set out by the law as to his claim. In any event, on a balance of probabilities, his case is weak and cannot be sustained as opposed to that put forth by the Defendant.

29. In the event and without further ado, and since none of the prayers in the Originating Summons can be granted, the Plaintiff’s claim is dismissed with costs to the defendant.

30. Orders accordingly.

Dated and delivered at Machakos this 17th day of November 2008.

Isaac Lenaola

Judge

In the presence of: Mr. Masika for Applicant

Mr. Nguru for Respondent

Isaac Lenaola

Judge