



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC OS. NO. 306 OF 2017

LEONARD NDAMBUKI MUSYOKA

(Suing as a legal representative of the Estate of

the late Bernard Musyoka Ndambuki) 1ST PLAINTIFF

PETER MUSYOKA MUEMA..... 2ND PLAINTIFF

-VERSUS-

JOHN WAMBUA MUMODEFENDANT

JUDGEMENT

1. Before this Court for determination is the Plaintiffs' Amended Originating Summons dated 17th April, 2018 and filed on 19th April, 2018. It is supported by the affidavits of Leonard Ndambuki Musyoka and Peter Musyoka Muema both sworn on 21st November, 2019. The Plaintiffs pray for the following Orders against the Defendant:

a) THAT this Honourable Court be pleased to declare the Plaintiffs as the legal owner entitled by virtue of adverse possession of over twelve (12) years since 1967 of parcel of land title number Makueni/Kako/332 measuring 23 acres.

b) THAT costs of this application be provided for.

2. The suit is opposed by the Defendant firstly vide the grounds of opposition dated 21st June, 2018 and vide the Replying affidavit sworn by the Defendant on 18th December, 2018.

3. By consent of the parties, this matter proceeded by way of *viva voce* evidence on 23rd November, 2020. The 1st Plaintiff was first in the witness stand. He adopted his sworn affidavit dated 21st November, 2019 and stated as follows in his evidence. That he was born in 1970. That he is the son of the late Bernard Musyoka Ndambuki who purchased the suit property known as Title No. Makueni/Kako/332 from the Defendant's late father, one Wambua Mumo, on or about 27th April, 1967 at a purchase price of Kshs. 5,600. That shortly after execution of the sale agreement and full payment of the purchase price, the 1st Plaintiff's father moved into the suit property together with his uncle, John Muema Ndambuki. That shortly thereafter, his father relocated to Kalawa in Mbooni East, Makueni County where the 1st Plaintiff now resides. That his family moved to Kalawa when he was about 11 years old. That before moving to Kalawa, the 1st Plaintiff's father gifted the suit property to his late brother, John Muema Ndambuki who has lived therein since 1967 to date with his entire family. That the suit property has been fully developed by over 7 people in his uncle's household and these developments comprise fruit trees, domestic animals and houses. That ever since taking possession of the suit property, neither the Defendant nor his late father came forward to lay claim to the suit property. That was not until 2004 when the Defendant came back to Makueni from Shimba Hills that he started to reclaim the suit property as his from the 1st Plaintiff's father.

4. The 1st Plaintiff proceeded further to state that the Defendant filed succession proceedings in Machakos that were later transferred to Makueni vide High Court Succession Cause No. 111 of 2017. That his late father filed a protest against a confirmation of grant in favour of the Defendant. That during the pendency of the succession proceedings, the 1st Plaintiff's mother, Benedetta Mbithe Musyoka, registered a caution against the suit property on 10th June, 2013 claiming purchaser's interest. That a copy of an official search done then revealed that the land was under the proprietorship of one Wambua Mumo, the Defendant's father. That on the second occasion of doing an official search i.e. on 23rd June, 2017, the same revealed that the property had changed ownership and was now under the name of the Defendant. That John Wambua Mumo does not reside in the suit property and it is on account of his impugned registration as owner of the land that this suit was filed to avert feared eviction. The 1st Plaintiff produced five exhibits that were marked P. Exhibits Nos. 1 – 5 in support of his claim.

5. The 2nd Plaintiff, Peter Musyoka Muema, also adopted his sworn affidavit. Like his cousin, the 1st Plaintiff, he was born in 1970 and has resided in the suit property for 50 years. He stated that the suit property was gifted to his late father in or about 1968 by his uncle who had bought it from the Defendant's father. That he has 10 siblings and 20 grandchildren who now live in the suit property in addition to his mother. That the suit property has been fully developed by his siblings and comprises of several houses, mango trees and livestock. That some of the houses as evidenced in the photographs which he produced as P. Exhibit No. 6(a) – 6(d) were built as far back as 1980. That the Defendant does not reside in the suit property. That marked the close of the Plaintiffs' case.

6. In defence to the suit, one witness was called to the stand. John Wambua Mumo, the Respondent herein, adopted his statement filed in court on 13th June, 2019 as his sworn evidence. He stated that he was born in 1952 in Matungulu. That his late father and himself were residents of Matungulu. That he went to Kwale District (now Kwale County) in 1969 when he was about 18 years old together with his parents and after his father had fallen ill. That before moving to Kwale, he was in Makueni. On further cross-examination, he stated that his father had not sold the suit property to Bernard Musyoka before they left for Kwale. That his family had not completely relocated to Kwale. That his father had built 3 houses and planted mango trees in the suit property before relocating to the coast. That his father died in 1975 and that he inherited the suit property from him. That the Plaintiffs are hostile to him every time he has requested them to exit from the suit property and that he has reported them severally to the police. That he now lives alone at Shimo within Wote Town. That he filed for probate and administration of his father's estate in 2004 and that he holds no title deed to the suit property. He produced a copy of a certificate of official search dated 27th October, 2014 marked as D. Exhibit No. 1 which showed his father to be the registered proprietor of the land.

7. None of the parties herein had filed submissions as per the directions issued on 23rd November, 2020 at the time of writing this judgment. Nonetheless, I shall proceed to craft issues for determination on the basis of the pleadings on record and the evidence of the parties. These are the apparent issues in this matter:

i) Whether or not the Plaintiffs have been in actual and exclusive possession of the suit property for a period in excess of 12 years;

ii) Whether or not the Plaintiffs' possession of the suit property is adverse to the Defendant's right of title and interest therein;

iii) Whether or not the Plaintiffs are entitled to the orders sought in the amended originating summons.

8. The Limitation of Actions Act Cap 22 Laws of Kenya provides at Section 7 as follows: -

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

9. Section 38 (1) of the said Act further outlines 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 of this Act, 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.

10. At the outset, evidence was adduced to ascertain that the suit property was at all times registered land under either one of the various Land Acts in force in the year 1967. The Defendant's father was the registered owner back then. The 1st Plaintiff produced Exhibit Nos. 5(a) and 5(b) which are copies of certificates of official search. The former shows that the suit property was registered in the name of Wambua Mumo on 1st September, 1967 while the latter shows that the suit property was registered in the name of the Defendant on 11th April, 2016. The Defendant also produced a copy of a certificate of official search indicating that the suit property was registered in the name of his father in 1967 marked as D. Exhibit No. 1.

11. Of material importance in answering the first question, not only did the Plaintiffs need to factually demonstrate the discontinuation of possession on the part of the registered owner but also that there was actual possession by the Plaintiffs of the suit land. To prove this, the 1st Plaintiff produced P. Exhibit No. 3 which is a copy of the original sale agreement dated 27th April, 1967 between his father and the Defendant's father. Immediately after execution of the agreement, the Plaintiffs' fathers moved into the suit property and began developments such as putting up houses and cultivating. The 2nd Plaintiff produced photographs showing the various developments in the suit property marked as P. Exhibit Nos. 6(a) – 6(d). To date the Plaintiffs have been in continuous possession of the suit property.

12. In turn, the Defendant's father who was a resident of Matungulu in 1967 relocated to Kwale County shortly after signing the sale agreement. Going by the Defendant's evidence, they relocated to Kwale in 1969. In fact, no evidence was adduced by the Defendant to show that he actually interrupted the Plaintiffs' possession of the suit property between 1967 and 2004 when he filed for probate of his late father's estate. No evidence was adduced in respect of the 3 houses claimed to have been built by the Defendant's father or the mango trees that were planted therein. Even after his father died in 1975, nowhere is it stated that he was buried in the suit property. How then can the suit property be his ancestral land?

13. There is no acknowledgement of the fact that the Defendant used to visit the suit property before the year 2004 or evidence that he actually resided in the suit property. In my view, this corroborates the finding which I hereby make that there was a discontinuation of possession of the suit property by the Defendant and his father from the year 1967 for a continuous period of more than 12 years. In addition, I find that the Plaintiffs were in continuous and exclusive possession of the suit property for a period of more than 12 years from the year 1967.

14. Section 13(1) of the Limitation of Actions Act gives a definition of adverse possession, as follows: -

(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

15. Suffice it to say, the Defendant did not present evidence to show that since 1967 when the Plaintiffs took possession, he attempted to resume possession of the suit property or to bring an action against the Plaintiffs. The period of limitation began to run against the Defendant's father in 1967 when the Plaintiffs took possession up to 1975 when the Defendant's father died. And as his father's successor in title, from whom he could lodge a claim to the suit property, the Defendant's right of action continued to run from 1975 and expired in 1979. After that period, the Plaintiff's possession became adverse.

16. The inaction on his part immediately after his father's demise in 1975 and until the requisite 12 consecutive years expired in 1979 can only be construed in favour of the Plaintiffs. Cultivation of the suit property, erection of permanent houses and structures and rearing of livestock, within the limitation period, are activities that clearly demonstrate control and use of the suit property in a manner that is hostile to the rights of the registered owner. The Plaintiffs are therefore entitled to succeed on a claim for adverse possession against the registered owner within the meaning of Section 13(1) of the Limitation of Actions Act.

17. Faced with relatively similar facts as the case herein, the Court of Appeal aptly held as follows in **Public Trustee and another -Vs- Wanduru [1976 - 1985] 1 EA 488 (CAK)**:

18. Kneller JA goes on to state as follows: -

“If the vendor trustee allows the purchaser cestui qui trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession. The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in Bridges v Mees [1957] 2 All ER 577; and Simpson J (as he then was) in Hosea v Njiru [1974] EA 526 (K).”

19. The facts in the present case clearly show an ouster of the registered owner in 1967 from the exclusive possession of the suit property. The facts also corroborate the view that the Defendant at all times had knowledge of the adverse claim of the Plaintiffs in the suit property yet he was indolent to disturb such possession. In that duration of time the Plaintiffs have planted perennial trees such as mango trees which in my view confirms that the intention of the Plaintiffs was to stamp their control over the suit property. In other words, such acts of possession were by all means open and hostile to the title of the registered owner.

20. In **Jandu -Vs- Kirpal and another [1975] 1 EA 225 (HCK)**, Chanan Singh J held as follows: -

“To prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, hostile, open, and notorious (see numerous cases quoted in H. C. Mitra's Indian Limitation Act, 13th Edn., p. 720).”

21. Lastly, a perusal of the copies of certificates of official search presented by both parties herein leads to the conclusion that the nature of the suit property is agricultural land. The property section under Part A of the register confirms that the title is absolute and that the approximate area is 23 acres. No evidence was presented by the Plaintiffs to show that the transaction was completed in accordance with the Land Control Act Cap 302 Laws of Kenya. Therefore, it follows that the views of the Court of Appeal in **Waweru -Vs- Richu [2007] 1 EA 403 (CAK)**, must take precedence wherein it was held as follows: -

“It is not in contention in this case that the Land Control Act applied to the alleged lease or sale of the portion of land claimed by the Defendant or that the consent of the Land Control Board was neither applied for within the stipulated period nor granted. It follows therefore, and Mr Gitonga concedes, that the alleged sale or lease became void for all purposes as provided by section 6(1) of the Land Control Act with the consequences stipulated in section 22 of the Land Control Act. Thus, the agreement of sale in this case was terminated for all purposes by the operation of law and the continuation of possession by the Defendant thereafter could not be referable to the agreement of sale or the permission of the original owner. It was an independent possession adverse to the title of the original owner.

In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under section 6(1) of the Land Control Act for lack of consent of the Land Control Board, such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”

22. While both Plaintiffs may have succeeded in the suit, I am unconvinced that the 2nd Plaintiff has legal title to claim on behalf of his late father's estate. On a balance of probabilities, the amended originating summons partially succeeds in favour of the 1st Plaintiff.

23. Thus, the amended originating summons is allowed in terms of prayer number 1 to the extent that the 1st Plaintiff is declared the legal owner of land parcel Title No. Makueni/Kako/332 measuring 23 acres by virtue of adverse possession. The land register shall accordingly be rectified by the Makueni County Land Registrar to reflect the above. Each party to bear his own costs.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 28TH DAY OF APRIL, 2021.

.....

MBOGO C. G.

JUDGE

Court Assistant: Mr. G. Kwemboi.