



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 49 OF 2019 (OS)

MARGARET SYOMBUA MUTUKU.....PLAINTIFF

VERSUS

WANZA MUTISO.....1ST DEFENDANT

ROBERT MUTHAMA MUTISO.....2ND DEFENDANT

BERNARD KING'OO MUTISO3RD DEFENDANT

PATRICK KISOI MUTISO.....4TH DEFENDANT

TITUS MUTUKU MUTISO.....5TH DEFENDANT

STEPHEN NZUKI MUTISO.....6TH DEFENDANT

JUDGMENT

1. In the Originating Summons dated 24th April, 2019, the Plaintiff has sought for the determination of the following questions:

a. Whether the Plaintiff is entitled by virtue of adverse possession to one hectare of that parcel of land known as Ndalani/Ndalani Block 1/1419 which is registered in the name of the Mutiso Ndolo.

b. Whether the Plaintiff should be registered as proprietor of one hectare of that parcel of land situate in Machakos County and known as Ndalani/Ndalani Block 1/1419 which is registered in the name of Mutiso Ndolo.

c. If answers to (a) and (b) above are in the affirmative, whether the court should make declarations and orders directed to the County Lands Registrar Machakos to give effect to the said findings.

d. Whether the Plaintiff should be paid costs of this suit.

2. The Originating Summons is supported by the Affidavit of the Plaintiff who deponed that the late Mutiso Ndolo (*deceased*) was the husband of the 1st Defendant and the father to the 2nd to 6th Defendants.

3. According to the Plaintiff, the deceased was and remains the registered owner of all that parcel of land known as Ndalani/Ndalani Block 1/1419 (*the suit property*) and that on 11th October, 2006, the 2nd Defendant allowed him to settle on a portion of the suit property measuring one hectare in exchange of Kshs. 72,000.

4. According to the Plaintiff, the 2nd Defendant misrepresented to him that the land he was selling to him was a portion of parcel number 285; that the Agreement was witnessed by 5th Defendant and that immediately after entering into the said Agreement, he took possession of the land.

5. It is the Plaintiff's case that since the month of October, 2006, he has settled on the one hectare of the suit property which was identified by the 2nd and 5th Defendants and that he has constructed a permanent house on the said land and has been farming on the land since then.

6. The Plaintiff finally deponed that the Defendants have since declined to transfer the one hectare of land that he is occupying to him and that the deceased's and the Defendants' title has since been extinguished by operation of the law.

7. Although the Defendants were served with the Originating Summons, they neither entered appearance nor filed a response. The Originating Summons proceeded by way of *viva voce* evidence as unopposed.

8. In his evidence, the Plaintiff, PW1, reiterated the depositions of his Affidavit which I have summarized above. In addition, the Plaintiff produced in evidence the official search in respect to the suit property; the Sale Agreement she entered into with the 2nd Defendant and the photographs showing the houses that she has developed on the suit property.

9. In his submissions, the Plaintiff's advocate submitted that Section 38(1) of the Limitation of Actions Act entitles a person who is not an owner of land to be registered as an owner where such a person establishes that he/she has become entitled to be registered on account of his/her occupation of the land openly and continuously and with the knowledge of the registered owner for a period of twelve (12) years.

10. Counsel submitted that the Plaintiff has continuously lived on the suit land for many years and should therefore be registered as the proprietor of the land.

11. It is not in dispute that the Plaintiff entered into an Agreement dated 11th October, 2006 with the 2nd Defendant. The said Agreement provides that the 2nd Defendant had sold to the Plaintiff one hectare of land which is "*plot number 285 which belongs to Mr. Mutiso Ndolo.*"

12. After purchasing the said portion of land, the evidence before this court shows that the Plaintiff took possession of the same. The Plaintiff put up permanent houses on the portion of land that she purchased in the same year. The photographs showing the structures that the Plaintiff put up on the suit land were produced in evidence.

13. Section 7 of the Limitation of Actions Act provides 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."

14. Section 38(1) of the same Act compliments the provisions of Section 7 of the Act. Section 38(1) 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 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."

15. As currently submitted by the Plaintiff's advocate, Sections 38(1) of the Limitation of Actions Act entitles a person who is not an owner of land to be registered as an owner of the parcel of land where such a person establishes that he/she has become entitled to be registered on account of his/her occupation of the land openly and continuously and with the knowledge of the registered owner for a period of twelve (12) years or more.

16. The evidence by the Plaintiff that she has lived on the suit property since the year 2006 when she purchased it from the 2nd Defendant continuously and with the knowledge of the registered owner, has not been disputed.

17. Indeed, the Plaintiff produced in evidence the photographs showing the permanent houses that she has constructed on the suit property. In the circumstances, it is my finding that the Plaintiff has proved her claim of adverse possession on a balance of probabilities.

18. For those reasons, I allow the Originating Summons dated 24th April, 2019 as follows:

a. The Plaintiff is entitled by virtue of adverse possession to one (1) hectare of that parcel of land known as Ndalani/Ndalani Block 1/1419 which is registered in the name of Mutiso Ndolo.

b. The Machakos Land Registrar to register the Plaintiff as the proprietor of one (1) hectare of land known as Ndalani/Ndalani Block 1/1419.

c. The Defendants to pay the Plaintiff the costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 16TH DAY OF APRIL, 2021

O. A. ANGOTE

JUDGE