



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MAKUENI**

**ELC MISC CASE NO. 43 OF 2017 (O.S)**

**JUSTUS MUNUVE KILONZO.....PLAINTIFF**

**-VERSUS-**

**JOSEPH MUNG'UTU MUNUVI.....DEFENDANT**

**JUDGEMENT**

1. Through an Originating Summons(OS) dated 27<sup>th</sup> January, 2005, the Applicant seeks the following orders;

**a) An order of declaration that the Plaintiff/applicant has acquired by adverse possession a portion measuring approximately 0.75 Hectares comprised in the parcel of land known as Nzau/Kalamba/551 measuring approximately one (1) Hectare situated at Kalamba, Makueni District.**

**b) An order directing the Land Registrar to transfer to the Plaintiff the ownership of the said portion measuring approximately 0.75 Hectares comprised in the parcel of land known as Nzau/Kalamba/551 which the defendant/Respondent has been holding in trust for the Plaintiff.**

**c) An order of permanent injunction be issued to restrain the defendant/Respondent by himself, his agents or servants from entering, working or trespassing into, alienating, changing, selling, subdividing the said parcel of land and/or in any other manner from interfering with the Plaintiff's use and enjoyment of the suit land.**

**d) Spent.**

2. The applicant also seeks a determination of the following questions;

***a) Whether or not the Plaintiff has been in occupation by way of cultivating the said land for a period exceeding 12 years uninterrupted or disturbed by the defendant or any persons/owner of the parcel of land.***

***b) Whether or not the Plaintiff has acquired registrable interest in the said parcel of land by way of adverse possession.***

***c) Whether or not the Plaintiff is entitled to peaceful use and enjoyment of the said portion of the parcel of land known as Nzau/Kalamba/551 which he has been in occupation.***

3. The Originating Summons is supported by the applicant's affidavit sworn on 3<sup>rd</sup> February, 2005. His case is that the defendant sold to him the claimed portion in 1991 and he has been in uninterrupted occupation since then. That the defendant has been aware of his possession and occupation all through and has never given him a notice to vacate. That he has planted orange trees which are mature, dug terraces, planted nappier grass, grown grazing grass and pigeon peas.

4. It is also his deposition that according to his Advocate's advise, he has acquired prescriptive rights and is entitled to be registered as the owner of the parcel of land.

5. The Originating Summons is opposed through an amended reply sworn by the Respondent on 9<sup>th</sup> December, 2014 and filed in court on 21<sup>st</sup> January, 2015. He acknowledged that indeed he sold a portion of land to the applicant but deposed that the sale did not materialize due to objection from his family. Consequently, he entered into a verbal agreement with the applicant whereby he leased the parcel of land to him for 6 years at an annual rent of Kshs 1,000/=. The purchase price of Kshs 6,000/= which had been paid by the applicant was therefore converted to annual rents. Accordingly, he deposed that the applicant was his lessee between July 1991 and July 1997.

6. Further, he deposed that after expiry of the lease, he granted an extension to the applicant to enable him remove his unripe produce. The applicant vacated in July 1998 and he (Respondent) cultivated crops which were uprooted by the applicant in December 1998. He cultivated again in 1999 but the applicant uprooted the crops. He deposed that between January 2000 and April 2003, nobody was in occupation but in April 2003, his son cultivated upto 2005. The applicant re-entered the land in 2005 and damaged the crops. He reported the matter to the OCS- Makueni and the damaged crops were assessed by an agricultural officer. He then filed case No 85/2005 at the Land Disputes Tribunal.

7. It is also his deposition that it was his family which dug the terraces alluded to by the applicant. That the trees referred to as orange trees are actually lemon trees which were planted by his wife.

8. Directions were given that the Originating Summons and Replying Affidavit be treated as plaint and defence respectively and that the suit be canvassed by way of *viva voce* evidence.

9. The Plaintiff testified that on 6<sup>th</sup> July, 1991, he met with the defendant who sold to him 0.75 Ha at a consideration of Kshs 23,000/= and he paid in installments. He produced the agreement in Kamba and its translation as **P. Ex 1** and **2** respectively. He planted sisal plants along the boundary and took possession of the land. He dug terraces, planted food crops and fruit trees. He produced three photos as **P. Ex 3(a), (b) & (c)**. The defendant and his family entered the land in 2005. Between 1991 and 2005, there was no disagreement between him and the defendant over the land. He produced an abstract of title and certificate of official search as **P. Ex 4 & 5** respectively.

10. Further, he testified that the defendant was arrested for contempt of Court and imprisoned for one week. He denied the existence of any agreement to use and vacate the land. He also denied that the purchase price was ever refunded to him.

11. On cross examination, he agreed that neither him nor the seller measured the acreage and the surveyor has never been to the ground.

12. He said that he occupied the land on the strength of the sale agreement and that he was allowed to take possession by the owner. He agreed that the dispute arose in 2004. He denied knowing that the seller's wife and children complained to the chief in 1991 about the land sale. He denied that the seller was ordered to refund Kshs 6,000/= so that he (Plaintiff) could move out of the land. He denied being ordered to cultivate the land for 6 years in order to recover his Kshs 6,000/=.

13. He said that he did not plead for more time in 1997 in order to harvest his crops but agreed that he uprooted crops that had been planted by the seller's wife. He said that the seller's wife did not plant crops in 1997 and that entry was made in 2004. The photos were taken in December 2004. He did not have

photos to show that prior to 2004, he was working on the farm peacefully. He agreed that according to the green card, the Respondent was registered as the owner on 3<sup>rd</sup> December 2004, the same year that he (Plaintiff) was evicted.

14. In re-examination, he said that the title deed was registered on 8<sup>th</sup> July, 1976 but collected on 3<sup>rd</sup> December, 2004.

15. **Kituku Ndemange (PW1)** adopted his statement dated 8<sup>th</sup> October, 2014 as his evidence in chief where he stated that in 1991, the defendant and his brother, James Kithome Munuvi, approached him. They wanted to sell land which they co-owned but was registered in the defendant's name. They needed money to take their mother to the hospital.

16. The Plaintiff agreed to buy the land but requested to talk to the defendant's mother first. They met the mother and she confirmed that she had no objection.

17. They agreed on a purchase price of Kshs 23,000/= for 0.75 Ha and on 6<sup>th</sup> July, 1991, the full purchase price was paid to the defendant and his brother. PW1 signed the agreement together with the others and he could identify his signature in the book. The parties did not go to the land control board but the Plaintiff entered the land in 1991 and stayed there up to 2005.

18. On cross examination, he said that he was present when the purchase price was paid. He was not aware that 5 days after the sale, the Respondent's wife and children objected. He was aware that the parties have been wrangling over cultivation. He was also aware of an incident where they fought. He was not aware that the applicant uprooted crops which had been planted by the Respondent's wife. He said that the applicant purchased half of the Respondent's land but the land was not surveyed. The parties planted trees only.

19. **James Kithome Munuvi (PW2)** adopted his statement dated 8<sup>th</sup> October, 2014 as his evidence in chief. He stated that he sold the land together with his brother, the defendant, in order to raise money for their mother's treatment. He stated that the defendant was corrupt. That they continued receiving the money until his brother changed his mind and decided that he wanted the land back. The sale was on 6<sup>th</sup> July, 1991 and the Plaintiff entered the land in the same year.

20. There was no Land Control Board consent as the defendant refused to attend the board. The portion that was being sold was 0.75 Ha and the same should be awarded to the Plaintiff due to his continued use and possession.

21. On cross examination, he said he was a co-owner of the land and he sold it together with his brother. He agreed that he received half of the purchase price and said that the Respondent's wife has never complained about the sale. He agreed that a dispute arose and was never resolved. He said that the Respondent's wife and children have never evicted the applicant. He agreed that the Respondent's crops were uprooted about one year after the sale. He referred to the Respondent as corrupt because they sold the land and slaughtered a goat. He said that their mother counseled them not to raise any finger over the land. He said that he had no hatred towards his brother but had come to Court to tell the truth.

22. The Applicant closed his case after he and his two witnesses had testified.

23. The Respondent adopted his affidavit in support of the Originating Summons and reiterated its contents in his examination in chief. He then produced, as exhibits, the list of documents dated 24<sup>th</sup> October, 2014. The documents are;

a) Copy of the Title deed **D.Ex 1**

b) Letters from the chief and clan **D.Ex 2**

c) Copy of assessment report **D.Ex 3**

d) Chief's letter and Tribunal papers **D.Ex 4**

24. He testified that the original title deed was issued in his name on 3<sup>rd</sup> December, 2004. Further, he testified that the purchase price of the land was Kshs. 6,000/= which the Plaintiff paid in June 1991 and he was not aware of the other money which the Plaintiff was talking about. He also testified that the Plaintiff did not move into the land.

25. On cross examination, he denied being served with an order of injunction and summons but agreed that he was arrested by the police and taken to prison. The police informed him that the Plaintiff had complained that he (*defendant*) had ejected him from the suit land and damaged his crops. He denied that his mother was sick on 6<sup>th</sup> July, 1991. He agreed that he has a brother by the name James Kithome Munuve and had heard his evidence in Court.

26. He said that only PW2, the Plaintiff and himself were present when the agreement was prepared. He denied receiving Kshs 23,500/= from the Plaintiff and said that no agreement was prepared on 6<sup>th</sup> July, 1991. He agreed that his affidavit omitted the number of people who were present when he received Kshs 6,000/= from the Plaintiff. He agreed that they did not record any documents when he allowed the Plaintiff to cultivate the suit land for 6 years. He does not know what a lease is.

27. He said that the agreement in Kamba language shows the people who were in attendance and the purchase price was Kshs. 23,500/=. He denied knowing Mwenga Kyalo, Muia Mbula, Kyungu Maingi, Kituku Ndemange, Kilonzo Kioko and Kithuka Mutulu. He denied the existence of the assistant chief's name in the agreement. He wasn't aware of the assistant chief's name in the agreement. He said that his children were not in the meeting and denied the signature showed to him. He denied seeing Kilonzo's signature in the agreement but agreed that he saw that of PW2. He said that the title deed belongs to him and not the family. He agreed that the suit land is ancestral. He also agreed that he gave Kshs 500/= to PW2 and remained with Kshs. 5,500/=.

28. Further, he said that his mother was not sick and that the agreement did not show that the reason for selling the land was because of his mother's sickness. He said that PW2 does not own a share in the suit land but agreed that he (Respondent) did not buy the land. He said that his father got him registered in 1969 but the title deed was issued in 2004. He had no document for 1969. He agreed that according to the title, the register was opened on 8<sup>th</sup> July, 1976. He agreed that when they made the agreement in 1991, the title was ready. That he sold 50 feet by 100 feet through an oral agreement. That his wife entered the suit land in 1998 after being allowed by the chief. He denied any relationship with chief Onesmus Kimilu and the assistant chief, He also denied any relationship with the agricultural officer Daniel Ndengele. He said that PW2 was corrupted to testify against him.

29. **Onesmus Kyumwa Kimuli (DW1)** also adopted his statement filed on 27<sup>th</sup> October, 2014 as his evidence in chief. He stated that in 1991, he was the area Chief and Mrs. Rhoda Mung'utu visited his office to complain that her husband, Joseph Mung'utu, had illegally sold the family shamba to Justus Munuve Kilonzo. He immediately wrote a warning letter to Mr. Kilonzo through the area Assistant Chief, Mr. Samuel Mailu. He then summoned the parties to his office and objections were raised by Joseph's wife, mother and children. After listening to the objections, he ruled that Kshs 6,000/= should be refunded to Kilonzo. He then instructed the assistant chief to supervise the refund of the money. He later got a report that parties had agreed to lease the land for a period of 6 years at Kshs 1,000/= per year.

30. In 1998, Joseph's wife reported to him that Kilonzo had destroyed their crops. Mr. Kilonzo denied the allegations and asserted that he had ceased cultivation in July 1998. He did not take any action as he was convinced by Kilonzo's version.

31. In 1999, Joseph's wife reported again that Kilonzo had uprooted the entire crop but Kilonzo denied the allegations. However, the assistant chief confirmed to him that the crops had been uprooted. He

ordered Mr. Kilonzo to refund the 10kg maize, 6kg beans and 10 kg Mbaazi through his office and Mr. Kilonzo obliged.

32. In 2005, Kilonzo uprooted Joseph's crops once again and he (DW1) advised them to report the matter to Matiliku Agricultural officer for damages.

33. He also stated that between July 1991 and July 1997, Kilonzo was a leasee. In 1998 and 1999, the land was occupied by Joseph's family.

34. On cross examination, he said that the people named in the agreement are Mung'utu Munuvi (seller), Mumba Muvui, Kithome Munuvi, Rhoda Mung'utu, Mutio Mung'utu, Kimanthi Kithome, Wambua Mutunge and Maitho Syuomo. Further, he said that the subject was sale of land by Joseph Mung'utu Munuvi from land parcel No. 551. He said that according to the agreement, the balance of Kshs 6,000/= had been received by the seller and the purchase price of Kshs 23,500/= had been fully paid. The purpose of the sale was for medical treatment of Joseph's mother.

35. Further, he said that PW2 was known to him but the defendant had not told him (DW1) that he had given Kshs 500/= to PW2. DW1 later learnt that the purchase price was refunded in a different manner. He agreed that he saw the agreement of Kshs 6,000/= but not the one of Kshs 23,500/=. Further, he said that in 1998, he received a report that Mr. Kilonzo had been given an extension of one year as he had not finished harvesting his crops. He agreed that he was not there when the two parties entered into a sale agreement.

36. **Lonah Mung'utu (DW2)** adopted her statement filed on 27<sup>th</sup> October, 2014 in which she stated that in 1991, she learnt that her husband was secretly selling land and reported to the chief. She attended the chief's meeting with her children and mother in law.

37. Her husband was ordered to refund the money but he had spent everything. It was then agreed that Kilonzo would lease the land for 6 years from July 1991 to July 1997.

38. In 1998 and 1999, she cultivated her shamba but her crops were uprooted by Kilonzo. From November 1999 to March 2003, nobody cultivated the shamba. In April 2003, she started cultivating again until 2005 when her crops were uprooted once again by Kilonzo. They reported the matter to the chief and were referred to Matiliku Agricultural officer. The officer assessed the damage at Kshs. 14,520/=. Further, she stated that Kilonzo never occupied the land for 12 continuous and uninterrupted years.

39. On cross examination, she said that she doesn't know how to read and write and only went to school up to class 3. She agreed being familiar with the chronology of years. She agreed that in 1991, Mung'uti and Munuve entered into a land sale agreement. She agreed that in 2005, her husband was arrested because he had sold the land in question. The arrest came after she cultivated the suitland. She wasn't aware whether her husband's brother, Kithome Munuvi, was present when the sale agreement was made. She agreed that she was not a party to the sale agreement and neither was her son.

40. She agreed that she heard the figure of Kshs. 23,500/= being mentioned in the meeting before the chief. She said that her mother in law was sick in 1991 and was taken to hospital by her husband. She agreed that her husband used the Kshs. 6,000/= to take his mother to the hospital. She did not report the damage of her crops to the police but her husband reported the matter to the police in Wote. She had no document concerning her husband's report. She said that Kilonzo took possession of the entire land but was not aware whether the entire land was sold. She did not know what the purchase price was. In re-examination, she said that she was not aware of the size of land sold.

41. The Respondent closed his case after which the parties filed their submissions as directed.

42. The Plaintiff submitted that he has adduced evidence which shows that he was in continuous and uninterrupted occupation of the suit land from 2<sup>nd</sup> June, 1992 to 2<sup>nd</sup> June, 2004. He submitted that no

eviction suit was ever filed and he was never given a notice to vacate. Further, he submitted that the Defendant's witnesses were unreliable and contends that the retired chief was taking sides because he is a relative of the Defendant.

43. In his submissions, the Defendant identified the following as the issues for determination;

a) *Whether the Originating Summons dated 25<sup>th</sup> January, 2005 was premature in the circumstances.*

b) *Whether the Plaintiff attached an extract of the Title to the land in question as required under Order 37, Rule 7(2) of the Civil Procedure Code. If yes, what is the date and/or when was the Respondent registered as the owner?*

c) *When was the title issued to the Respondent?*

d) *When does adverse possession start to run where the Plaintiff alleges that he acquired adverse possession by an agreement?*

e) *Whether the occupation of the applicant was 12 years or more before action.*

f) *Whether the Applicant had clear possession.*

g) *Whether the Applicant was in possession without the consent of the owner.*

h) *Did the defendant make effective entry into land parcel No Nzau/Kalamba/551 during the purported 12 years between July 1991 to 2004?*

i) *Who pays the cost?*

44. On issues (a), (d) & (e) he submitted that where a party alleges to have acquired adverse possession through an agreement, time starts to run when the final payment of the purchase price is done. He contended that the Plaintiff has not discharged his burden of proving that he paid the full purchase price and relied on the case of **Wanyoike –Vs- Kahiri (1979) KLR** where it was held that;

***“In a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase price.”***

45. He has also cited the case of **Wambugu –Vs- Njuguna (1983) KLR** where the Court stated that;

***“Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchase pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated.”***

46. He submitted that since there is no evidence of payment of the full purchase price of Kshs. 23,500/=, the period of limitation has not started to run hence the suit was premature.

47. On issue (b), he relied on Order 37 Rule 7 of the Civil Procedure Rules to submit that for an application of adverse possession to succeed, the Plaintiff is required to attach a certified title extract of the concerned suit land to the supporting affidavit. He contended that the Plaintiff attached a photocopy instead of a certified extract.

48. On issues (c) & (f) he submitted that the defendant was registered as the absolute proprietor of the suit land on 3<sup>rd</sup> December, 2004 and that between 8<sup>th</sup> July, 1976 and 3<sup>rd</sup> December, 2004, it is common ground that there was a process of land adjudication/registration. He contended that if at all the Plaintiff

was in occupation, he could have recognized the adjudication and registration process. He submitted that failure to recognize the process and assert title is a clear indicator that the Plaintiff had no *animus possidendi*. He relied on the case of **Paul Macharia Wagunya –Vs- Mwangi Macharia Wagunya & Anor (2015)** cited by the Court of Appeal in **Harrison Oyari & 588 Others –Vs- Mareo Oriambu & 22 Others (2016) eKLR**. The Court stated that;

***“Time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In respect of registered land, adverse possession dates from the granting of the Certificate of Title, for that is when the title holder is prima facie entitled to possession and therefore entitled to take action against any intruder to the land.*”**

49. On issue (g), he submitted that between July 1991 and July 1998, the Plaintiff was in possession of the disputed land with his (defendant’s) permission. He contends that he pleaded as much in his amended reply to the Originating Summons and the Plaintiff did not controvert the evidence. Accordingly, he submitted that his evidence remains unchallenged and watertight. He cited *inter alia* the case of **Wambugu –Vs- Njuguna** where the Court stated that;

***“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined.”***

50. On issue (h), he submitted that the evidence on record shows that he made effective entry into the disputed land in July 1998. He relied *inter alia* on the case of **Githu –Vs- Ndeete (1984) KLR 776** where the Court of Appeal held that;

***“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitations of Actions Act.”***

51. Further, he submitted that the Plaintiff’s claim of 0.75 Ha is unsupported and unproved hence the Originating Summons should be dismissed on that particular issue. He relied *inter alia* on the case of **John Imbaiza Vodoye –Vs- Ann Chebet & Anor (2017)** where the Court stated that;

***“.....where a person is claiming only a portion out of a suit land and where he is not claiming all the land comprised in the title, the claimant must show that the portion he is claiming is demarcated well enough to be identifiable.”***

52. Having looked at the pleadings, the evidence and rival submissions, it is my considered view that the only issue for determination is whether the Plaintiff has proved his case on a balance of probabilities.

53. It is not in dispute that in 1991, the Plaintiff and Defendant entered into an agreement for the sale of an unspecified size of land out of land parcel No. Nzau/Kalamba/551 (*suit land*). The Defendant has denied the existence of the agreement in Kikamba (P. Ex 1) and has contested the payment of the full purchase. The denial of the agreement is, in my view, foolhardy because the defendant is using the same agreement to insist that only Kshs 6,000/= was paid out of the indicated purchase price of Kshs 23,500/=. He then goes ahead to explain that the paid amount was converted in annual rent of Kshs. 1,000/= for a 6 year lease.

54. Having looked at the agreement, I am convinced that it was executed by the parties. The sale is, of course, void for want of the Land Control Board consent but for purposes of the claim of adverse possession, the agreement is clear that the amount of Kshs 6,000/= paid on 6<sup>th</sup> July, 1991 was the final balance of the purchase price of Kshs 23,500/=. For emphasis, the agreement states as follows;

***“The balance of Kshs 6,000/= of the purchase price has been paid today to Mungutu Munuvi. I,***

***Mungutu Munuvi sold a piece of land to Justus Munuve Kilonzo at Kshs. 23,500/= and he cleared the final balance of that purchase price on 06/07/1991.”***

55. Having determined that the full purchase price of Kshs. 23,500/= was paid to the Defendant, his claim of a 6-year lease automatically disintegrates. It is true that the defendant pleaded the lease issue in his amended reply and it is also true that the Plaintiff did not file any response, however, the burden remained on the defendant to prove the existence of the lease and it is my considered view that the burden was not discharged. The Defendant agreed that nothing was documented to that effect.

56. As for registration of the defendant as the proprietor of the suit land, the abstract of title and search certificate show that he was registered as such on 8<sup>th</sup> July, 1976. Therefore, it does not matter that he waited until 3<sup>rd</sup> December, 2004 to collect the title deed. The fact is that he was the registered owner all along. The upshot from the foregoing is that the limitation period started to run on 6<sup>th</sup> July, 1991. A continuous period from that time takes us to 6<sup>th</sup> July, 2003. So, was the Plaintiff an adverse possessor between 6<sup>th</sup> July, 1991 and 6<sup>th</sup> July, 2003?

57. The Plaintiff agreed that he was evicted from the suit land in 2004 and the evidence clearly shows that the defendant made a very deliberate intervention which even caused him to be cited for contempt. The same cannot be said about the year 1998 where it is claimed that the defendant's wife planted crops which were uprooted by the Plaintiff. Be that as it may, there is no evidence to support the claim of 0.75 Ha. The agreement is silent on the same and the Plaintiff agreed that the acreage was not measured and the surveyor has never been to the ground. For that reason alone, it is my considered view that the Plaintiff's suit cannot succeed as this Court lacks the luxury of speculation.

58. The upshot of the foregoing is that the Plaintiff has not satisfied this court that on a balance of probabilities, he has a cause of action against the Defendant.

59. In the circumstances, I hereby proceed to dismiss the Plaintiff's suit with costs to the Defendant.

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

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**MBOGO C.G.**

**JUDGE**

**Court Assistant: Mr. Kwemboi**