



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 49 OF 2015

MUPA MWAUCHI

CHICHWA (WIDOW) & HER FAMILY.....PLAINTIFF

VERSUS

MARY OTIENO.....DEFENDANT

JUDGEMENT

1. The plaintiff herein identifying herself as Mrs Mupa Mwauchi Chichwa brought this suit vide her originating summons dated 11th March 2015 against Mrs Mary Atieno seeking to be granted the following relief:

(a) Declaration, that I the plaintiff not and have never been thwarts of the defendant and that unless lawfully proven otherwise, the defendant has no good title of the land known as Mrima Bwiti and further that the Court to order that the defendant's alleged ownership of the land is revoked and title thereto be cancelled and the same be issued to the plaintiff.

(b) I the plaintiff having been on the land from to date with the full knowledge of the proper owner. I have lawfully attained rights over the same by way of adverse possession as per stipulation of the limitation of Action Acts Cap 22 Laws of Kenya Section 38. (1) that says – provides that, where a person claims to have become entitled by adverse possession to had registered under any of the Acts cited in section 37 of this Act (which are Government Land Act, the registration of titles Act on the registered Land Act, or land comprised in lease registered under any of those Acts; he/she may apply to the High Court for an Order that he/she be registered as proprietor of the land or lease in place of the person then registered as proprietor of the land.

(c) Costs of this Originating Summons be provided for.

2. The suit is opposed by the defendant vide her 67 paragraph affidavit. The defendant pleaded that the suit is defective for failure to identify the suit land or annex a certified copy of the records of title. The defendant also deposed that she was allocated the plot No Kwale/Mrima Bwiti SS/651 by the government through the Settlement Fund Trustees in 2007 as compensation for her plot which fell within the Titanium Mining Project area at Nguluku area. She narrated how her plot was acquired.

3. The defendant deposed that the plot given to her was from the government land LR 9864 in Mrima Bwiti and it had been leased to Associated Sugar Company. That after the collapse of Ramisi Sugar Factory, some squatters moved into part of this land. That she was shown her plot by the government surveyors who had taken farmers from Nguluku for that purpose. That Tsuma Mwauchi son to the plaintiff has been seeking compensation from the defendant. The defendant states that when she was shown her plot, it was vacant with no structures or houses except some crops which were claimed by

1. The plaintiff
2. Fatuma Muthami
3. Mwangolo

Fatuma & Mwangolo accepted compensation of Kshs 38,000 each but the plaintiff refused to take. The defendant narrated how she acquired her title and that it is in 2014 when the plaintiff's son constructed a house on the land claiming it is her mother's. The defendant has annexed a letter of allotment together with her title bearing her names and other documents marked (a) to (e). She urged the Court in paragraph 80 of her replying affidavit to strike out the suit with costs.

4. After the pleadings closed, parties presented their oral evidence. The plaintiff testified on 7th December 2016. She said that she lives with her daughter Zena in Nguzo 1 Ramisi. She brought the case because she has nowhere to live and farm. She adopted her statement filed in Court and asked the Court to give her permission to return to the suit land.

5. In her statement filed on 23rd September 2016, the plaintiff said she went to this land in 1984 and settled on it with her family. That all this time, no one stopped her. That it is her source of livelihood. That is only until 2015 when the defendant came laying claim to the land. The plaintiff avers that they have built semi-permanent structures on the land and a school. She also stated that the defendant's title is a forgery and asked the Court to scrutinise it. It is the plaintiff's evidence that she told the defendant that she would vacate the suit land only if she gave them an alternative land to go to. Lastly the plaintiff stated that she is entitled to the suit land by virtue of adverse possession. She urged the Court to allow her claim. In support of her case, she produced 3 photographs as exhibits.

6. In cross-examination, the plaintiff said she does not know where her husband was born but all she knows they lived together on the disputed land where and gave birth to all her children. The plaintiff said she got on to the land after Ramisi Sugar Factory collapsed. That when the surveyor visited the land in 2015, it was only her house & the defendant's house that were on the land. That the school is not built on her land. She knew her neighbours called Mary Ansansi, Abdalla Ambwana, Ngoro, Salim Omar & Amina Abdalla. The plaintiff said that she knew the land belonged to Ramisi Sugar & the government when she got on the land. She also knew the defendant was given the land by the government. The witness admitted that their area Chief had told them the government would give people that land. She lodged a complaint that during survey she was left out. That the person currently farming the land is his son. Lastly that the defendant wants to evict her and she has nowhere to go.

7. PW 2 is SWALEH ABDALLA SALIM. He adopted his statement filed in Court as his evidence. In summary, he said the defendant was not to blame as the mistake was created by the surveyor and the District Resettlement and Compensation Committee (DRCC) who were discriminatory. PW 2 said he went to the area in 1996 while the plaintiff had got on to the land earlier. In cross-examination, PW 2 said they were represented in the District Resettlement Compensation Committee by the former sub-chief who is now deceased.

8. KAHINDI KENGA testified as PW 3. He said the suit land belongs to the plaintiff who has used it since 1984. That when the surveyors came, they changed everything. In cross-examination, PW 3 said he had a title deed for his plot. That there are 3 plots between his plot and the plaintiff's plot. That he was given an offer by the Settlement Fund Trustees and paid the requisite charges. All the documents were issued by the government. That the plaintiff was not given land. This marked the close of the plaintiff's case.

9. The defendant called 2 witnesses. The defendant testified as DW1. She said she was adopting the contents of her replying affidavit as part of her evidence. She said she was born in Mivobuni location Nguluku Center. That she bought a plot No 61 in Nguluku center in 1990. Then they were moved by the Government Titanium mining project and in return she was given plot no 651 in Bwiti Settlement Scheme. That she was shown the land by the Committee of both Nguluku & Bwiti in 2007. DW1 said it is the surveyors from Kwale who showed her the boundary beacons. That no one was living on the land at the time except there was a tree nursery. The only neighbour she met who was living there is called Ngoro and he is still her neighbour to date.

10. DW1 continued in her evidence that they appeared before the Chief with the plaintiff and she was advised to pay the plaintiff for her tree seedlings the sum of Kshs 27,000= . However the plaintiff refused to take the money. That the county government officers also told the plaintiff to leave the suit land. DW1 continued that the plaintiff's son agreed to move out and was to be paid Kshs 10,000 for his structure. The witness produced this agreement as Dex 2, transfer form as Dex 3, Discharge of charge as Dex 4 and letter of offer as Dex 5.

11. That to date the plaintiff's son has not moved out. She urged the Court to dismiss the plaintiff's case with costs to her. In cross-examination by the plaintiff, DW 1 denied the plaintiff was living on the suit land. She also denied cutting down the plaintiff's trees.

12. NICHOLAS SANYA testified as DW2. He works with Lands & Adjudication Settlement as a surveyor. He produced the report prepared by the Director of Lands & Adjudication Settlement Mr Kennedy Njenga dated 7.3.2018 as Dex7. DW2 said that the people who were moved from Nguluku were settled by the government at Mrima Bwiti Settlement Scheme. That the genuine squatters living on the scheme land were also settled. That it was the role of the District Resettlement Compensation Committee (DRCC) to identify and register the squatters on the portions they were found to be occupying. That the defendant was given plot 651 while the plaintiff was not given any land.

13. That the plaintiff can write a letter asking to be given a plot then she can be considered for future resettlement programmes. DW2 also produced the letter authorising him to give evidence as DW 6. In cross-examination, the witness said those who came to cultivate and leave were not considered that the verification exercise was done in 2004. The land was being allocated per household. This also marked the close of the defence case.

14. Both parties have filed written submissions. The plaintiff has put reliance on the provisions of section 7 & 38 of the Limitation of Actions Act Cap 22. Section 38 of the Act provides thus "*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, 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. The simple question for this Court to determine is whether time was running in favour of the plaintiff to enable her acquire any adverse rights over the suit land as envisaged under section 38 quoted above. The plaintiff in her evidence states that the defendant showed up to claim the land in 2015 yet she had been using the land from 1984 uninterrupted. Further from the evidence of the defendant, she was allotted this land in 2007 and only got a title in 2009 from the Settlement Fund Trustees. This evidence is corroborated by the plaintiff's answer during cross-examination when she said that they got on to the land after the collapse of Ramisi Sugar Factory. She also stated that she knew at the time she was getting onto the land that it belonged to the government.

16. Unfortunately the plaintiff did not join the government in these proceedings. The question then would be even if they were joined whether a claim for adverse possession can be brought against the government. The defendant in her submissions has referred this Court to

the provisions of section 41 of the Limitation of Actions Act. The section states thus;

“This Act does not –

(a) enable a person to acquire any title to, or any easement over –

(i) Government land or land otherwise enjoyed by the Government;

(ii) mines or minerals as defined in the Mining Act (Cap. 306);

(iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);

(iv) water vested in the Government by the Water Act (Cap. 372);

*(v) land vested in the county council (other than land vested in it by section 120 (8) of The Registered Land Act (Cap. 300);
or*

(vi) land vested in the trustees of the National Parks of Kenya; or

(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.

17. Further under the provisions of section 13(1) of CAP 22, a right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run. Section 41 above states clearly that this Act cannot enable a person from acquiring any title to government land. Is the STF a government body? In the case of **Anne Itumbi Kiseli vs James M. Muriithi (2013) eKLR**, Judge Angote found that land held by Settlement Fund Trustees is government/Public body by virtue of the provisions of section 167 of the Agriculture Act cap 318 thus its land is not included by the provisions of section 38 of Cap 22.

18. The plaintiff herein did not bring evidence to show that the land she is claiming was previously registered under private ownership. The plaintiff is unhappy that despite her being on this plot, somebody else was allocated. She may be right in feeling aggrieved by the government’s decision to exclude her but the defendant did not allocate herself this particular land. The plaintiff ought to have commenced a civil suit against the government agencies for not being included among those allocated plots in their possession within the scheme. Such claim cannot in my view be brought by way of adverse possession. The Court of Appeal in the case of **Faray Maharus vs J. B Martins Caley Industries & 3 others MSA Civil Appeal No130 of 2003** held that;

“There can be no adverse possession on public or government land however long one may have been squatting thereon without let or hindrance from the government. Therefore the appellant cannot benefit from the long period of his occupation of the disputed property.”

19. In the instant suit, the plaintiff’s claim for adverse possession against the defendant’s right has not matured as the defendant only acquired title to the suit property in 2009. This suit was filed in 2015 which is only six years after the title was issued to the defendant. Since the defendant acquired time from the government against whom time could not run, the claim for adverse possession does not lie. Consequently this suit fails on account of the provisions of sections 13(1) & 41 of Cap 22 and by virtue of the fact that the twelve years is yet to lapse as against the defendant who from the evidence adduced already took possession of the land.

20. Accordingly this suit is dismissed. The plaintiff should channel her claim to the relevant government agencies. Given the observation I made on the financial means of the litigants that were involved in this suit, I order each of them to bear their respective costs of the suit.

Dated, signed & delivered at Mombasa this 5th day of July 2018

A. OMOLLO

JUDGE