



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 08 OF 2019

SIMON MUTHUKA KAMU.....PLAINTIFF

-VERSUS-

HARRISON MUSYIMI KAKUNDI.....1ST DEFENDANT

JEREMIAH NZOMO MASAI.....2ND DEFENDANT

JUDGEMENT

1. Through a plaint dated 25th February, 2019, the Plaintiff prays for orders against the defendants for;

- a) **An eviction order against the 1st and 2nd defendants from land parcel Nzai/Nziu/393 to be supervised by the OCS Makueni police station.**
- b) **A declaration that land parcel Nzai/Nziu/393 is the property of the estate of Martha Mbane (deceased).**
- c) **Costs of the suit and interest.**
- d) **Any other relief that this honorable Court deems fit to grant.**

2. The Plaintiff's case is that land parcel Nzai/Nziu/393 (suit land) belongs to the estate of Martha Mbane (deceased) but the Defendants have been trespassing since the year 2016. He avers that the trespass has even been confirmed by the District Surveyor but the Defendants have ignored his demands to vacate the suit land.

3. The Defendants filed a joint statement of defence and denied the claim. They aver that the suit land was secretly and illegally excised from land parcel Nzai/Nziu/477. Further, they aver that the 2nd Defendant is not in occupation of the suit land and has been wrongly enjoined in the suit. They also filed a counter claim in which they seek the following orders;

- a) **A declaration that the Plaintiff's suit is time barred under the provisions of the law of Limitation of Actions Act, Cap 22, Laws of Kenya.**
- b) **The Plaintiff's suit be dismissed with costs.**
- c) **A declaration that the 1st defendant has acquired ownership rights of all that parcel of land known as Nzai/Nziu/393 by way of prescription/adverse possession.**
- d) **An order directing that the plaintiff do sign all the documents to effect transfer of land number Nzai/Nziu/393 to the name of the 1st Defendant and in default, the deputy registrar to execute them.**
- e) **Costs of the suit and the counter claim.**

4. The Defendants aver that the 1st Defendant's parents started utilizing the suit land in 1996 and that the 1st defendant officially moved thereon in 1998 whereupon he constructed a permanent house, planted trees and cultivated extensively. They aver that the suit land has never been utilized by the Plaintiff or his family. They also aver that the 1st Defendant has acquired the suit land through adverse possession and that the plaintiff's claim is time barred.

5. The Plaintiff filed a reply to defence and defence to counterclaim in which he denied all the allegations of fact contained therein. He avers

that the 2nd Defendant is properly enjoined in the suit as he has trespassed by cultivating. He also avers that the 1st defendant and his ancestry have never had any peaceful enjoyment of the suit land in light of the numerous Court orders and judgments ordering them to vacate since 1974.

6. The Plaintiff in his evidence adopted his statement filed on 3rd April, 2019 in which he stated that the suit land is registered in his late mother's name, Martha Mbane Kamu, and that she inherited it from her husband, Kamu Muange, who died in 1976.

7. That in 1974, his father sued Kimeu Mathuku, Masai Mitambo (2nd Defendant's father) and Kakundi Mathuku (1st Defendant's father) *vide* Machakos District Magistrate's Criminal Case No. 1008 of 1974. The Court judgment ordered the Defendants to vacate his father's land which they did.

8. That in 1997, the children of Kamu Muange sued Kamutu Masai, Micah Sila Masai and Jeremiah Masai *vide* Makueni SRM's Court Criminal Case No 470/1997. The three accused persons were convicted and fined Kshs 500/= each or 2 months imprisonment.

9. That in the year 2000, they sued Micah Masai, Jeremiah Nzomo Masai and Kamutu Masai *vide* Makueni SRM's Court Criminal Case No. 6 of 2000. The accused persons were convicted and fined Kshs 1,000/= each or 2 months imprisonment.

10. Further, he stated that the accused in Makueni SRM's Court Criminal Case No 470/1997 appealed to the High Court at Machakos, *vide* Appeal No. 69 of 1997, but the appeal was dismissed.

11. He also stated that there were several Court orders ordering the District Commissioner/Officer-Matiliku to remove the defendants from the suit land.

12. Further, he stated that on 22nd March, 2018, they engaged a surveyor who found out that the Defendants had encroached and/or trespassed on the suit land. He produced the following documents;

a) Copy of green card of land parcel Nzai/Nziu/393- **P. Ex 1**

b) Grant of letters of administration intestate - **P. Ex 2**

c) Surveyor's report dated 13/05/2018 - **P. Ex 3**

d) Copy of demand letter dated 14/01/2019 - **P. Ex 4**

e) Order issued on 30/03/1997 in case No. 470/96 - **P. Ex 5**

f) Order issued on 03/12/1997 in case No. 470/96 - **P. Ex 6**

g) Judgment in Criminal Case No. 06/2000 - **P. Ex 7**

h) Judgment in Criminal Case No. 470/1997 - **P. Ex 8**

i) Judgment in Criminal Case No. 1008/1974 - **P. Ex 9**

j) Judgment in Criminal Appeal No. 69/1997 - **P. Ex 10**

13. On cross examination, he said that he started preaching in 1969 and was aware that it is wrong to lie. He agreed that apart from the current case, he has never sued the 1st Defendant. He agreed that the two Defendants are currently using the land and that they trespassed in the year 1995. He said that he did not see the need to sue the 1st Defendant even though he trespassed in 1995. He agreed that the trespass by the 1st Defendant did not happen in 2018. He agreed that the 1st Defendant has planted orange trees and is the one who harvests them.

14. Further, the Plaintiff said that he does not know how long it takes for an orange tree to mature. He agreed that the last time he cultivated the suit land was in 1995 and that the 1st Defendant has been in occupation of the land since 1995. He agreed that he has read the surveyors report which shows that the 1st Defendant trespassed in 1998.

15. He said that he could not identify the trees on photo No. 2 and did not know the banana plants in photo No. 3 but agreed that he could see a house. He said that there were other houses in photo No. 6 and mango trees in photo No. 6. He agreed that all that property belongs to the 1st Defendant. He agreed that the 1st Defendant has been using the land since 1995. In re-examination, he said that the 1st Defendant is using the land by force.

16. Aaron Kyengo Kamu (PW1) adopted his stated dated 3rd April, 2019 which is a replica of the Plaintiff's statement.

17. On cross examination, he said that he was born in 1960 and the Plaintiff is his elder brother. He was aware that Harrison trespassed into the land in 1995. He agreed that the current suit was the first that had been filed against Harrison. He agreed that he sees Harrison cultivating and grazing on the land. He agreed that Harrison has built on the land. He also agreed that Harrison has planted mango and orange trees

which he has been harvesting since 1995. He agreed that Jeremiah Nzomo uses the suit land as well.

18. PW1 agreed that the last time he used the land was in 1995 and that Simon has been on the land since 1995. In re-examination, he said that the trees he mentioned were planted by Harrison but he (PW1) had also planted some before Harrison chased him away.

19. The 1st Defendant in his defence adopted his undated statement filed on 12th March, 2019 in which he stated that; he was born in 1980 and found his parents and grandparents using the entire parcel 477 which includes the portion claimed by the Plaintiff. Parcel 393 had been left uncultivated and was being utilized for grazing. In 1996, his parents cleared portion 393 and planted orange and mango trees. He (1st Defendant) moved into parcel 393 in 1998 and has been in occupation since then. He stated that his occupation has been open, peaceful, without secrecy and with full knowledge of the Plaintiff.

20. In 2018, the Plaintiff claimed the parcel and after checking from the lands office, the 1st Defendant was shocked to find that parcel 477 had been secretly surveyed in 1974 and a new number issued to Kamu Muange. The parcel was later transferred to Martha Mbane through succession. The two are the parents of the Plaintiff. Further, he stated that no one raised the issue of ownership since 1974 and the silence was because they were aware that what they did was wrong. It was also his statement that the Plaintiff and his family have never used the land.

21. Further, he stated that in 2018, the OCS visited the land and asked where the Plaintiff had been when the Defendant was carrying out all those developments. The Plaintiff remained quiet and the OCS advised them to file a suit in court.

22. On cross examination, he agreed that the suit land is registered in the name of Martha Mbane but could not remember when she was issued with title to the property. He agreed that according to the green card, Martha was registered as the proprietor in 1979 and that the initial owner was Kamu Muange. Parcel 477 is registered in his grandfather's name, Mathuku Masai Mitambo.

23. He had nothing to show that parcels 477 and 393 were initially one. His father's name is Kakundi Mathuku. He said that his Advocate did not call his attention to case No. 1008 of 1974. He refused to comment about the assertion by the Plaintiff's Counsel to the effect that P. Ex 9 resolved that the suit land belongs to the Plaintiff.

24. Further, he stated that his father died in 2005 but utilized the land in his lifetime. His father's house is in parcel 477 and that is where he was buried. There is a path between parcels 477 and 393 but he could not tell whether it was created by the Government. He said that Muika Masai is a neighbour but they are not related. He denied ever seeing the surveyors report and denied that his entry into the land was by force. He denied seeing the land registrar in 1998. He denied being summoned by the D.O-Wote over the suit land. He denied that PW1 planted trees on the land.

25. He said that he was born in 1980 and moved into the land in 1998 when he was 18 years. He got married in 2003. He agreed that his mother filed a succession cause in Makueni but could not remember the cause number. He denied that his mother abandoned the succession cause. He was not aware of the outcome of the cause or any other succession cause over the suit land.

26. He acknowledged receipt of the demand letter but denied seeing the surveyors on the suit land in 2018. He could not remember being asked by several authorities to give vacant possession of the land. He was not aware of a case filed in Court in the year 2000 and never heard of a case filed in 1996. He denied that they vacated the suit land and then re-entered. He was not aware that the current registered owner of parcel 393 is deceased.

27. Regina Mutindi Kakundi (DW1) is the 1st Defendant's mother. She adopted her undated statement filed on 12th March, 2019 in which she stated that the Plaintiff is known to her as they are from the same area but the Plaintiff's land is several kilometers away. Their land and that of the Plaintiff is divided by a river which acts as a boundary. Her husband, Kakundi Mathuku, utilized the entire parcel 477 for many decades and the portion claimed by the Plaintiff had been left uncultivated until 1996.

28. The 1st Defendant got the claimed portion from his father and he occupied it during his father's lifetime in 1998. His occupation since then has been open, peaceful, without secrecy and with the Plaintiff's knowledge. In 2018, the Plaintiff claimed the portion and after following up, DW1 learnt that the Plaintiff's father caused parcel 393 to be fraudulently excised from parcel 477. Further, she stated that the plaintiff, his parents and grandparents have never utilized parcel 393.

29. On cross-examination, she said Simon Muthuka Kamu is just a neighbour. That parcel 477 is registered in the name of her father in law, Mathuku Mitambo. She agreed that she had no evidence to show that parcels 477 and 393 were initially one. She denied being aware that parcel 393 was registered in the name of Kamu Mwange in 1974. Her husband did not tell her that he had a case with Kamu at Machakos District Magistrate Court in 1974. She agreed that they filed a case after realizing that the suit land was registered in the name of Martha Mbane but could not tell the case number. She remembered Succession Cause No. 73 of 2018 and stated that apart from that one, she did not file any other case. She entered the land with her husband in 1996 and no surveyor ordered them to vacate the land in 1998.

30. She agreed that they were summoned by the OCS in 2018 and she invited him to the ground. She planted the trees on the suit land with her husband and the 1st Defendant also planted. The family of Kamu has never planted trees on the suit land. She denied seeing any letter from an Advocate. She denied that the Defendants' entry into the suit land was forceful. She denied being related to Jeremiah Nzomo Masai.

31. John Nzyoka Masika (DW2), adopted his undated statement filed on 12th March, 2019 in which he stated that; he is the Divisional Chairman of the Aanzu Clan from Makueni County and the parties herein are known to him. The Defendants are his neighbors. Parcel 392 belonged to Muithi Ndoli but succession was done and it currently belongs to Richard Muuo Kitung'a and Muthuka Mukula.

32. That in 2018 when the dispute arose, he learnt that the suit land had been excised secretly from parcel 477 and registration done in the

name of Kamu Muange and later transferred to Martha Mbane. He also stated that the 2nd defendant is not in occupation and has been wrongly sued.

33. Further, he stated that the 1st Defendant, his parents and grandparents have used the suit land for many decades whereas the Plaintiff, his parents and grandparents have never used it. That the suit land had been left uncultivated until 1996 when the 1st Defendant's parents cleared, planted trees and continued grazing.

34. He stated that in 1974, Syu Kivulu gave Martha Mbane a small portion of parcel 392 to cultivate and relinquish later. The Plaintiff and his parents have always lived on their land which has a different number. The 1st Defendant has used the suit land openly, uninterrupted and with Plaintiff's knowledge since 1998 and has therefore acquired it by way of adverse possession.

35. On cross examination, he said that the 1st Defendant belongs to the Aanzio clan and the Plaintiff belongs to the Akitulu clan. That after succession, parcel 392 was sub-divided between Mukula's and Kilunga's family. Parcel 477 is owned by Kakundi who is now deceased. When he became the clan chairman in 2004, he never heard anyone complaining that parcel 393 had been grabbed. Kakundi never mentioned the Court cases to him. He became aware of the cases when the Defendant was sued in this case.

36. He agreed that he was aware of the supreme Constitution for the Kamba. He said that an elder of one clan cannot arbitrate over a dispute involving another clan. He agreed that he usually visits the home of the 1st Defendant who has built a permanent house on the land. He could not remember the number of houses on the land. Harrison never informed him that the suit land is registered in the name of Martha Kamu. He learnt about the registration in Court on the day he testified. He could not remember when the illegal survey of the suit land was carried out. He could not tell how Kamu was registered in 1974.

37. Samuel Muthuka Mukula (DW3), adopted his undated statement filed on 12th March, 2019 in which he reiterated the Defendants' case about the fraudulent excision of the suit land from parcel 477, occupation by the Defendants and non occupation by the Plaintiff.

38. Additionally, he stated that Syu Kivulu was his grandmother and was the one who gave Martha Mbane a portion from parcel 392 for cultivation. Martha was later kicked out after some differences.

39. On cross examination, he said that he was aware of a land dispute between Simon Muthuka and Musyimi Kakundi. He was not aware of the owner of parcel 477 but parcel 393 is owned by Musyimi. Kakundi Mathuku is known to him and is the father of Musyimi. He never heard of any Court case between Kakundi and Kamu in 1974. The land is being used by the 1st Defendant. Harrison is his neighbour and the family of Kamu lives far from them. Parcels 393 and 477 are adjacent to each other and there is no path between them.

40. In his submissions, the Plaintiff identified the following as the issues for determination;

- a) **Whether the 1st and 2nd Defendants have proprietary interests over land parcel Nzai/Nziu/393.**
- b) **Whether the 1st and 2nd Defendants have adverse claims over land parcel Nzai/Nziu/393.**
- c) **Whether the 1st and 2nd Defendants have trespassed on land parcel Nzai/Nziu/393.**
- d) **Whether an eviction order ought to issue against the 1st and 2nd Defendants from land parcel Nzai/Nziu/393.**

41. On the first issue, he relied on section 26(1) of the Land Registration Act to submit that he is in possession of a green card showing that the Estate of Martha Mbane is the absolute owner of the suit land. He submitted that the Defendants have not proved that the title was obtained fraudulently, through misrepresentation, illegally, unprocedurally or through a corrupt scheme. He relied on the case of **Esther Ndegi Njiru & Anor –Vs- Leonard Gatel (2014) eKLR** where the Court held that;

“The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

42. On the second issue, he submitted that the Defendants have to prove that they have been in actual, open, exclusive and hostile possession of the suit land. He cited the case of **Gabriel Mbui –Vs- Mukindia Maranya (1993) eKLR** where Kuloba J stated that;

“...the plea of adverse possession is always based on facts and the facts must be asserted, pleaded and proved. The factual proof requires the person who claims adverse possession to show on what date he took occupation of the premises, the nature of his possession or the possessory acts, whether the factum of his possession was known to the owner of the land, how long the possession went on, whether his possession was open and undisturbed. All these are questions of fact and unless they are asserted and proved, a plea of adverse possession must fail.”

43. He submitted that the Defendants have not been living peacefully on the suit land because there have been numerous Court orders and judgments requiring the Defendants to vacate.

44. It is also his submission that the 1st Defendant cannot claim the suit land by adverse possession yet he does not recognize the estate of Martha Mbane as the true owner of that land. He cited the case of **Haro Yonda Juaje –Vs- Sadaka Dzenge Mbauro & Kenya**

Commercial Bank (2014) eKLR where the court stated that;

“One cannot claim to have acquired land by adverse possession if he claims that the land he is occupying is his ancestral land having been born and brought up on the land and the registered owner has never been in possession of that land....one cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession.”

45. He submitted that the 1st Defendant committed a wrongful act knowingly since he admitted having checked the ownership of the suit land at the lands registry. He cited the case of **Gabriel Mbui (supra)** where the learned Judge stated as follows;

“And in Equity, a person cannot get title by doing wrong. Even if he has been in possession for twelve or more years, a Court of Equity would not allow him to enforce his strict rights under the Limitation of Actions Act. There is a broad principle of Equity dating back for more than one hundred years, that where a person has gained advantage by violation of the law, he will not be allowed to enforce rights accruing to him by virtue of his defiance of the law.....Thus a squatter cannot, by deliberately trespassing on the others land or by remaining there and lying low and saying nothing, acquire a title to himself....this is contrary to equity and natural justice.”

46. Relying on section 3 (1) of the Trespass Act, Cap 294, he submitted that the surveyor’s report is evidence that the Defendants have trespassed on the suit land and continue to do so to date.

47. The Defendants in their submissions identified the following as the issues for determination;

a) Whether the Plaintiff’s suit is time barred?

b) Whether there is any succession filed by the 1st defendant’s mother over the suit land.

c) Whether the 1st Defendant is entitled to land number Nzai/Nziu/393 by way of adverse possession.

48. On the first issue, the Defendants submitted that time to recover the suit land started to run in 1998 when the Plaintiff discovered that the 1st Defendant was in occupation. They submitted that there is an admission on record that the Plaintiff did not do anything to remove the 1st Defendant since 1998. They cited, *inter alia*, the case of **Edward Moonge Lengusuranga –Vs- James Lanaiyara & Anor (2019) eKLR** where the court held that;

“Section 7 of the Limitations of Actions Act provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the 1st defendant having bought the suit land in the year 1999 (as per paragraph 6 of the plaint) and taken possession of the same, the plaintiff herein could only seek to recover it from the 1st defendant, but only if he did so within 12 years after the sale agreement.”

49. They also submitted that the law of Limitation of Actions is intended to protect Defendants against unreasonable delay in bringing suits against them.

50. On the second issue, they submitted that the 1st Defendant filed a citation for the estate of the Plaintiff’s mother in Makueni PMC Cause No. 73 of 2018, after the Plaintiff started claiming the suit land. They submitted that the citation was closed when the Plaintiff agreed to take up letters of administration and contends that no substantive orders can be granted through a citation. They submitted that the succession cause alluded to by the Plaintiff was never filed.

51. On the third issue, they submitted that there is ample evidence showing that the 1st Defendant entered into the suit land in 1998 and has been using it peacefully, openly, without secrecy, without permission and with the full knowledge of the Plaintiff. They submitted that the Plaintiff did not produce an OB report showing that the 1st Defendant entered the suit land by force.

52. They submitted that it is possible to raise a defence of adverse possession by way of counter claim and relied on the Court of Appeal decision in **Chevron (K) Ltd –Vs- Harrison Charo wa Shutu (2016) eKLR (Makhandia, Ouko & M’Inoti JJA)**. The court held as follows;

“The courts, have since this decision, held that a claim by adverse possession can be brought by a plaint. See Mariba v Mariba Civil Appeal No. 188 of 2002, counter-claim or defence as was the case here. See Wabala v Okumu (1997) LLR 609 (CAK). In Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala v Okumu [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the

procedure. Similarly, in Bayete Co. Ltd v Kosgey [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

53. Further, they submitted that the claim of adverse possession is properly directed to the Plaintiff as the legal representative of the registered owner. They relied on the case of Phyllis Wanjiru Kamau –Vs- Wilson Gichuhi Gachangwe & 2 Others (2019) eKLR where the court stated that;

“30. Having established that this court has jurisdiction to deal with the dispute, I will now turn to the question; whether the claim for adverse possession can be made against the estate of a deceased person and whether defendants have been properly sued.

31. Section 16 of the Limitation of Actions act provides that;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration”.

32. In the case of Peter Mbiri Michuki vs. Samuel Mugo Michuki Court Of Appeal at Nyeri Civil Appeal No. 22 of 2013, the court had this to say in respect of section 16 of the aforementioned Act;

“The effect of this provision is that when the letters of administration was granted for the estate of the plaintiff in this case, the administration of the estate dates back to the date of death”

33. In the case of Mate Gitabi vs. Jane Kaburu Muga and 3 Others Nyeri Court of Appeal Civil Case No. 43 of 2015, the court was dealing with a situation where an adverse possessor claimant was in occupation of the land of a deceased person. The court stated thus;

“He continued to occupy the land openly, without secrecy, without violence and without permission. He did so in a manner inconsistent with and wholly adverse to the right of the estate of the deceased, his heirs and all those claiming under him. In this regard, it little matters that the 1st Respondent did not take out letters of administration until 2003, or that she did not get to be the registered owner until 2004, both events being more than thirty years since the appellant took adverse possession of the land or dispossessed the 1st Respondent...”

54. Having looked at the pleadings, evidence and rival submissions, it is my considered view that the following issues arise for determination;

a) Whether the plaintiff’s suit is time barred?

b) Whether the 1st defendant has acquired land parcel No. Nzai/Nziu/393 by way of adverse possession.

55. On whether the Plaintiff’s suit is time barred, according to Section 7 of the Limitation of Actions Act, an action to recover land may not be brought after expiry of 12 years from the date on which the right accrued.

56. The 1st Defendant testified that his parents moved into the suit land in 1996 and he personally entered in 1998. The Plaintiff and his brother (PW1) testified that the 1st Defendant entered the suit land in 1995. According to the surveyor’s report (P. Ex3), the Defendants encroached into the suit land in 1998.

57. In order to resolve this issue, it is important to highlight the litigation history concerning the suit land as per the various Court decisions produced by the Plaintiff.

58. In Machakos DM’s Court Criminal case No. 1008 of 1974 (P.Ex9) the complainant was Kamu Muange and the accused persons were Kimeu Mathuku, Masai Mitambo and Kakundi Mathuku. They were charged with trespassing on land parcel No.393. In the judgment, the Magistrate expressed himself as follows;

“The accused persons are members of the same family.....They admit that the complainant’s land in the area is registered in the land registry No. 393 while theirs which is adjacent to that of the complainant is registered No. 477.....We visited the disputed land and indeed we were shown portion of the land the claimant claimed his, under cultivation by Masai Mitambo 2nd accused and Kakundi Mathuku 3rd accused....We then directed personnel of the survey department to go and clearly show the parties their respective boundaries of their land there. This has been done and the parties are satisfied with the boundaries they were shown and the dispute is over. The question is however, had the accused persons actually trespassed into the complainant’s land by entering and working therein? In the evidence available, I am convinced that they did. I therefore find them guilty of the offence charged and convict them.”

59. In Makueni RM’s Court Criminal Case No. 470 of 1996 (P.Ex8), the complainant was Peter Mwaka Kamu and the accused persons were Kamutu Masai, Micha Sila Masai and Jeremiah Nzomo Masai. They were charged with trespassing on land parcel No.393. The three prosecution witnesses (Peter Mwaka Muange Kamu, Simon Muthuka Muange Kamu & Aron Kyengo) were the sons of Kamu Muange and

Martha Mbane Kamu. Their parents were deceased and they testified on how the accused persons entered their fathers' land and started to plough. In the judgment, the Court expressed itself as follows;

“From the evidence adduced by the witnesses on both sides, it has been proved to this Court that land plot No. Nzaiu 393 was litigated by Kamu and Masai before it was registered for Kamu and his wife Martha Mbane Kamu through the process of adjudication. The same plot has been inherited by PW2 Simon Muange Kamu and his brother after their parents have died. Then Kamu and his brothers have the right to protect the same land plot....the excuse given by the accused persons and their witnesses that they have paid money for the survey officer to visit the land is not reasonable excuse to trespass upon the plot of the complainant. And therefore, all the three accused persons are found guilty and are convicted as charged.”

60. The accused persons were also ordered to vacate and remove all their crops from plot No Nzaiu/Nziu/393 by 15th March,1997.

61. In Machakos High Court Criminal Appeal No 69 of 1997 (P.Ex10), the Appellants (Kamutu Masai, Jeremiah Nzomo Masai & Micha Sila Masai) appealed against the conviction and sentence in Criminal case No. 470 of 1996. An issue was raised as to whether a son of a deceased registered owner was a proper complainant and the court expressed itself as follows;

“So, who was to be the proper complainant in this case? the appellants say that it was not Peter Kamu (PW1) because he was not the registered owner. This Court does not think so. The law does not speak of the registered owner of some private land. An occupier could be a tenant or heir. But the complainant should be in occupation and this is not to be strictly defined only as physical and present occupation. When Peter Kamu (PW1) and Simon Kamu (PW2) referred to the appellants entering and ploughing their plots No. 393, they were saying that they have a right over that land which initially was registered in their late father's name and after his demise, in the name of Simon's mother. According to Peter Kamu (PW1), he received report of the trespass when he was “at home”. It is quite probable that the Kamus do not live on plot No. 393 but that does not diminish their right to be complainants when trespass is committed against it. Thus, PW1 was properly put forth as a complainant.”

62. In a judgment delivered on 15th July, 1997, the High Court found that the Appellants were properly convicted and properly ordered to vacate the land together with their crops.

63. In Makueni RM's Court Criminal Case No. 6 of 2000 (P.Ex7), the accused persons were Micah Ndisya Masai, Jeremiah Nzomo Masai and Kamutu Masai. They were charged with two counts to wit; Forcible detainer and disobeying court orders. In the judgment delivered on 5th August, 2003, the court expressed itself as follows;

“From the evidence adduced by the prosecution witnesses, it has been proved beyond any doubt that, land plot No. Nzaiu/Nziu/393 belongs to the complainant PW1-Simon Muthuka Muange who cares the land in trust for his younger brothers after their mother, Martha Mbane Kamu-who is the registered owner of the land died....from the evidence of the five prosecution witnesses....all who visited the land....and some witnesses; Land Registrar....Land Surveyor and CID Police Sergeant...and they saw the three accused persons trespassing, cultivating and erecting structures on the land plot No. Nzaiu/Nziu/393 of the complainant....therefore, each accused...on each count...is found guilty and is convicted as charged.”

64. From the foregoing, it is evident that the families of the Plaintiff and Defendants have litigated over the suit land since the 70's. The history paints a picture of a defiant family that has consistently refused to obey Court orders. It is interesting to note that in all those litigations, the Defendants' families never raised the issue of plots 393 and 477 being one initially. In any case, the evidence does not support their assertion and the Defendants testified that they had no evidence to show that the two parcels were initially one.

65. It appears that there was no court action between 2003 and 2019 when the current case was filed. That is a period of approximately 16 years and if the law is applied strictly, then the Plaintiff's suit is time barred and the period within which a decree can be enforced has also expired. However, the question in my mind is whether the court should allow the Defendants to benefit from an illegality which they have been aware of all along. It is my considered view that doing so will not advance the interests of justice and will create a bad precedent where litigants can disregard court orders with impunity and without consequences.

66. Further, the conduct by the Defendants is an affront to the principles of equity and rules of natural justice. Indeed, I totally agree with the findings of Kuloba J. in the case of **Gabriel Mbui (Supra)** to the effect that it is not equitable for a person to get title by doing wrong.

67. From the circumstances of this case, it cannot be concluded that the Plaintiff has been indolent in the enforcement of his rights and as such, I decline to find that the Plaintiff's suit is time barred.

68. On whether the Defendants have acquired land parcel No. Nzaiu/Nziu/393 by way of adverse possession, based on the reasoning above, the Defendants' claim of having acquired title by adverse possession cannot stand. These are people who have clearly gained advantage by violation of the law and it does not matter that they have been in possession for 12 years or more. Further, I am convinced that their occupation has been forceful and therefore fails to meet the threshold of an adverse possessor.

69. Flowing from the above, I am satisfied that the Plaintiff has satisfied this court that on a balance of probabilities that he has a cause of action against the Defendants. The Defendants counterclaim must therefore fail. Same is dismissed with costs to the Plaintiff.

70. The upshot is that the Plaintiff's suit succeeds as prayed. In the circumstances, I hereby proceed to enter judgement for the Plaintiff and against the Defendants as hereunder;

a) An eviction order against the 1st and 2nd defendants from land parcel Nzaiu/Nziu/393 to be supervised by the OCS

Makueni police station.

b) A declaration that land parcel Nzau/Nziu/393 is the property of the estate of Martha Mbane (deceased).

c) Costs of the suit and interest.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 29TH DAY OF JUNE, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi