



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 601 OF 2013

GREEN VALLEY ENTERPRISES LIMITED..... PLAINTIFF

=VERSUS=

NAISIANOI MPESHE.....1ST DEFENDANT

LAKATIA MPESHE.....2ND DEFENDANT

AMOS NKONYONYO MPESHE.....3RD DEFENDANT

NICHOLAS KUPERE MPESHE.....4TH DEFENDANT

TUMPEINE MPESHE.....5TH DEFENDANT

JUDGMENT

This suit was filed in the High Court at Machakos on 8th May, 2012. The same was transferred to this court in 2013 and given its current case number. The original plaint was dated 7th May, 2012. The plaintiff amended its plaint on 23rd November, 2016. In its amended plaint dated 22nd November, 2016, the plaintiff averred that it purchased all that parcel of land known as Kajiado/Kitengela/2020 (hereinafter referred to as “the suit property”) in October, 2005 at Kshs. 1,500,000/= in a public auction that was organized by Kenya Commercial Bank Limited. The plaintiff averred that the suit property was registered in its name on 5th October, 2005 on which date it was also issued with a title deed in respect thereof. The plaintiff averred that prior to purchasing the suit property, the plaintiff’s directors viewed the suit property and confirmed that the same was vacant and free from any encumbrances. The plaintiff averred that the suit property remained vacant until sometimes in 2008 when the defendants and their families encroached on the same, constructed houses and started residing thereon.

The plaintiff averred that it learnt after filing this suit that the defendants had buried their relatives Mpeshe Moyae Modo and Mary Mpeshe on the suit property with full knowledge that the ownership of the property was in dispute. The plaintiff averred that despite demand made upon the defendants to vacate the suit property they had refused to do so. The plaintiff sought judgment against the defendants jointly and severally for;

1. A declaration that the plaintiff is the legal owner of the suit property.
2. An order directed at the defendants, their families, agents, assigns and/or employees to vacate the suit property forthwith.
3. An order for the exhumation of the remains of Mary Mpeshe and Mpeshe Moyae Modo and all other persons who have been buried on the suit property.
4. Costs of the suit

The defendants filed a joint statement of defence and counter-claim on 5th July, 2012. The defendants averred that they had no knowledge of how the plaintiff acquired the suit property. The defendants denied that the suit property was vacant when the plaintiff acquired the same. The defendants averred that the 1st and 2nd defendants were the widows while the 3rd, 4th and 5th defendants were the sons of the late Mpeshe Moyae Modo who died on 28th April, 1997 (hereinafter referred to only as “the deceased”). The defendants averred that before his death, the deceased was the registered owner of all that parcel of land known Kajiado/Ololoitokoshi/Kitengela/1862 (hereinafter referred to as “Plot No. 1862”). The defendants averred that the deceased acquired Plot No. 1862 from Ololoitokoshi Kitengela Group Ranch (hereinafter referred to as “the Group Ranch”) in which he was a member. The defendants averred that the deceased and his family comprising of the defendants entered and occupied Plot No. 1862 in June, 1989. The defendants averred that the deceased and the defendants constructed homesteads and houses on a portion of Plot No. 1862 and used the remaining portion for agricultural and livestock farming. The defendants averred that they occupied the entire parcel of land.

The defendants averred that in or about 1990, the deceased subdivided plot No. 1862 into three (3) portions namely, Kajiado/Ololoitikoshi/Kitengela/

3204, 3205 and 3206 (hereinafter referred to as "Plot No. 3204, Plot No. 3205 and Plot No. 3206"). The defendants averred that the deceased sold Plot No. 3206 and remained with Plot No. 3204 and Plot No. 3205 in his name which he continued to occupy. The defendants averred that when the deceased died in 1997, he was buried on Plot No. 1862. The defendants averred that they had occupied Plot No. 1862 from 1989 without any interruption and that no attempt had been made to evict them from the property. The defendants averred that the suit property was not situated in the neighbourhood of Plot No. 1862. The defendants averred that if the suit property was situated in the location where the defendants were residing then the same was carved out or hived off from Plot No. 1862 in which case the creation of the property and the registration of the same was irregular, unlawful and fraudulent.

The defendants denied that they entered and constructed houses on the suit property in 2008. The defendants reiterated that they had occupied the suit property for over 23 years. The defendants averred that the plaintiff's rights in the suit property were extinguished under the Limitation of Actions Act, Chapter 22 Laws of Kenya.

Without prejudice to the foregoing, the defendants admitted that the plaintiff was the registered owner of the suit property. The defendants averred that the defendants and the deceased had been in adverse possession of the suit property from the year 1989. The defendants averred that together with the deceased their occupation of the suit property was actual, open, notorious and exclusive. The defendants averred that the suit property could only be accessed by them or on their permission. The defendants averred that the suit property was part of Plot No. 1862 owned by the deceased. The defendants averred that they all along occupied the suit property on the reasonable belief that the same formed part of Plot No. 1862. The defendants averred that pursuant to Sections 37 and 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, the plaintiff and its predecessor in title held the suit property in trust for the defendants who had acquired the property by adverse possession.

The defendants' counter-claim was brought by way of Originating Summons which was pleaded as an extension of the defence. I found this procedure of pleading strange. The defendants should have simply brought their counter-claim together with their defence or in the alternative, they should have filed a separate suit by way of Originating Summons and had the same consolidated with the plaintiff's suit instead of coming up with a procedure which is unknown in law. In the counter-claim, the defendants added the deceased through his legal representatives as an applicant in addition to the five (5) initial defendants. The plaintiff was the sole respondent. The defendants sought the following reliefs against the plaintiff in the Originating Summons;

1. A declaration that the plaintiff's right to recover the suit property was barred under Section 7 of the Limitation of Actions Act in that the defendants had openly and peacefully as of right occupied the suit property from June, 1989 for a period of over 12 years preceding the presentation of the Originating Summons in court.
2. An order that the defendants be registered as proprietors of the suit property in place of the plaintiff under section 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.
3. Costs.

The Originating Summons was supported by the affidavit of the 5th defendant, David Tumpeine Mpeshe sworn on 4th July, 2012 in which he reiterated the contents of the defendants' statement of defence that I have highlighted above at length. The plaintiffs filed a reply to defence and defence to counter-claim on 13th February, 2017. The plaintiff denied the allegations of fraud, irregularity, illegality and misrepresentation alleged against it in the defence. The plaintiff denied the defendants' counter-claim in its entirety. The plaintiff urged the court to dismiss the defendants' counter-claim with costs and to enter judgment for the plaintiff as prayed in the amended plaint.

At the trial, the plaintiff's director, Richard Kiplagat (PW1) adopted his witness statement filed in court on 10th February, 2017 as his evidence in chief and produced the documents attached to the plaintiff's list of documents dated 9th February, 2017 as PExh. 1. PW1 urged the court to grant the reliefs sought by the plaintiff in the plaint. The plaintiff's second witness was Wycliffe Maengwe Kebaso (PW2). PW2 told the court that he was a surveyor working with the Government of Kenya and that he was in charge of Kajiado County. PW2 adopted his witness statement filed in court on 20th April, 2017 as his evidence in chief and produced Registry Index Map for Kitengela Registration Section as PExh. 2 and the sub-division scheme for Kitengela Group Ranch Parcel 50 as PExh. 3. PW2 told the court that the maps that he produced in evidence reflected a true record held at their office. The plaintiff's last witness was David Nyambaso Nyandoro (PW3). PW3 was the Land Registrar for Kajiado County. He adopted his witness statement dated 20th April, 2017 together with the documents attached thereto as his evidence in chief.

For the defendants, Paul Sane Nanapu (DW1) was the first to give evidence. He adopted his witness statement filed in court on 8th November, 2018 as his evidence in chief. The defendant's second witness was the 5th defendant, David Tumpeine Mpeshe (DW2). DW2 adopted his witness statement dated 23rd September, 2013 as his evidence in chief and produced the documents attached to the defendants' list of documents dated 23rd September, 2013 as DExh. 1.

After the close of evidence, the court directed the parties to make closing submissions in writing. The plaintiff filed its submissions and further submissions on 25th June, 2019 and 25th October, 2019 respectively while the defendants filed their submissions on 24th September, 2018.

From the pleadings and the submissions by the advocates for the parties, the following are the issues arising for determination in this suit;

1. Whether the suit property exists and whether it has been demarcated.

2. Whether the plaintiff is the lawful owner of the suit property.
3. Whether the defendants have acquired the suit property by adverse possession.
4. Whether the plaintiff is entitled to the reliefs sought in the amended plaint.
5. Who is liable for the costs of the suit?

Whether the suit property exists and whether it has been demarcated.

I am satisfied from the evidence before me that the suit property is in existence and that it has been demarcated. PW2 who was a surveyor in charge of Kajiado County told the court that the suit property existed on the survey map for Kajiado District/Ololoitikoshi/Kitengela and that it bordered Kajiado/Kitengela/3204, Kajiado/Kitengela/3205 and Kajiado/Kitengela /1863. PW2 produced as exhibit a copy of the Registry Index Map for Kajiado District/Ololoitikoshi/Kitengela. That survey map shows the existence of the suit property and its location. PW2 told the court that the suit property and Plot No. 1862 that was owned by the deceased were resultant parcels following the subdivision of a former group ranch known as Ololoitikoshi/Kitengela Group Ranch/50 (hereinafter referred to as "Plot No. 50"). PW2 produced in evidence a subdivision scheme for Plot No. 50 as an exhibit. The said subdivision scheme also shows the existence of the suit property next to the deceased's Plot No. 1862, and Plot No. 1863.

PW3 who was the Land Registrar for Kajiado County corroborated the evidence of PW2 on the existence of the suit property as a separate and distinct parcel of land from the deceased's Plot No. 1862. PW3 produced in evidence as exhibits, a copy of the register for Plot No. 50 showing that the same was subdivided and title closed on 22nd February, 1989. The said register shows that the subdivision of Plot No. 50 gave rise to new parcels, Kajiado/Ololoitikoshi/Kitengela/1802 to 2032. PW3 also produced a copy of the register for the suit property which shows that the same was opened on 22nd February, 1989 in the name of Ololoitikoshi Kitengela Group Ranch who transferred the same to one, Christopher Suyianka Pakine on 23rd March, 1989. The said Christopher Suyianka Pakine charged the property to Kenya Commercial Bank on 2nd January, 1990 to secure a loan of Kshs.100,000/=. He created a further charge in favour of the same bank on 7th April, 1993 to secure a loan of Kshs. 300,000/=.

PW3 also produced a copy of the register for Plot No. 1862 that was owned by the deceased. The said register shows that Plot No. 1862 also came into existence on 22nd February, 1989 when its register was opened with Ololoitikoshi Kitengela Group Ranch as the first registered owner of the property. The said register also shows that Plot No. 1862 was transferred to the deceased, Mpeshe Moyae Modo on 4th May, 1989 and that on 25th June, 1991 the title was closed upon subdivision that gave rise to titles, Kajiado/Ololoitikoshi/Kitengela 3204 to 3206.

The said copies of the registers for the suit property and Plot No. 1862 show that the same were subdivisions of Plot No. 50. I find the evidence before the court on the existence of the suit property overwhelming. The defendants did not place before the court any credible evidence to rebut the evidence by the plaintiff's witnesses. The defendants produced some sketch drawings showing the location of various parcels of land. The drawings were intended to show that the suit property does not exist on survey maps and on the ground. The said sketch drawings do not show who drew them and the basis thereof. The same have no evidential value in my view.

It is therefore my finding that the suit property exists and that the same has been demarcated.

Whether the plaintiff is the lawful owner of the suit property.

The plaintiff placed evidence before the court showing that it purchased the suit property at a public auction on 12th July, 2005. The auction was conducted by Garam Investments Auctioneers on behalf of Kenya Commercial Bank Ltd. which sold the property in exercise of its statutory power of sale under the charge and further charge that had been executed in its favour by Christopher Suyianka Pakine. The plaintiff produced in evidence the advertisements of the property for sale on 12th July, 2005, the certificate of sale showing that it was the highest bidder for the property at the auction, letter of consent of the Land Control Board dated 15th October, 2005 approving the transfer of the property to the plaintiff, instrument of transfer dated 5th October, 2005 through which the suit property was transferred to it, a copy of a title deed for the suit property in its name and a certificate of official search dated 29th November, 2011 showing that the property was registered in its name. The defendants did not place any evidence before the court showing that the suit property was owned by the deceased. It is my finding therefore that the plaintiff is the lawful owner of the suit property.

Whether the defendants have acquired the suit property by adverse possession.

In Gabriel Mbui v Mukindia Maranya[1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probability the following elements;

- 1. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.**
- 2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.**
- 3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.**

4. **The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable *animus possidendi*, that is to say occupation with clear intention of excluding the owner as well as other people.**
5. **Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.**
6. **The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.**
7. **The possession must be continuous uninterrupted, unbroken for the necessary statutory period.**
8. **The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.**
9. **The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.**
10. **The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.**

In Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necplocario (no force, no secrecy, no evasion)The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

In Wambugu v Njuguna [1983] KLR 172 the court stated as follows:

“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

The burden was upon the defendants to prove that they had acquired the suit property by adverse possession. I am not satisfied that the defendants discharged this burden of proof. To start with, the defendants' contention that the suit property did not exist was inconsistent with their adverse possession claim because the defendants could not claim to have occupied adversely land which according to them did not exist. In their Originating Summons, the defendants claimed that they entered the suit property in 1989. The plaintiff had on its part contended that the suit property was vacant until 2008 when the same was encroached on by the defendants. The burden was on the defendants to establish that they entered the suit property in 1989 and not in 2008 as claimed by the plaintiff. Apart from the allegations in the Originating Summons and witness statements that were adopted as evidence, the defendants placed no evidence of their alleged entry into the suit property in 1989.

Even if it is assumed for argument sake that the defendants and the deceased entered the suit property in 1989, I would still not find that they have acquired the suit property by adverse possession and as such are entitled to be registered as the owner thereof. If the defendants entered the suit property in 1989, their right to acquire the suit property by adverse possession would have crystallized in 2001 after continuous occupation for 12 years. The deceased died on 28th April, 1997 meaning that if he was in occupation of the suit property, he had occupied the same for only 8 years as at the time of his death. His occupation did not therefore meet the threshold for adverse possession. For the remaining defendants, even if it is assumed that they had occupied the suit property for more than 12 years as at the time they brought the Originating Summons on 5th July, 2012 and as such had acquired a right to claim the suit property by adverse possession, such right was subject to the rights of Kenya Commercial Bank as chargee. As I mentioned earlier in the judgment, Christopher Pakine who owned the suit property before the same was sold to the plaintiff created a charge and further charge over the property in favour of Kenya Commercial Bank Ltd. (“KCB”) on 2nd January, 1990 and 7th April, 1993 respectively. By the time these charges were created the defendants' right to acquire the suit property by adverse possession had not accrued. The defendants' rights to claim the suit property by adverse possession if any accrued in 2001 after the charge and further charge had been created. The defendants said right was therefore subject to the valid charges that had been created by the registered owner of the suit property in favour of KCB. The registered owner of the suit property defaulted in his loan repayment to KCB. KCB thereafter invoked its statutory power of sale under the said charge and further charge and sold the suit property to the plaintiff. Since KCB's charges were not subject to the defendants' right of adverse possession, KCB passed a valid title to the plaintiff free from any encumbrance. The plaintiff was registered as the owner of the suit property on 5th October, 2005. For the purposes of Limitation of Actions, time would have started running as against the plaintiff as from 5th October, 2005 when it acquired the property. As at 2012 when the defendants brought their claim for adverse possession, 12 years had not lapsed from the time the plaintiff acquired the suit property. No adverse possession claim could therefore arise as against the plaintiff.

Due to the foregoing, it is my finding that the defendants' adverse possession claim has not been proved and as such the defendants are not entitled to the reliefs sought in the Originating Summons.

Whether the plaintiff is entitled to the reliefs sought in the amended plaint.

From the above findings, I am satisfied that the plaintiff has proved its case against the defendants. The plaintiff is entitled to a declaration that it is the lawful owner of the suit property and an order for possession. I am however unable to grant prayers for the exhumation of the bodies of deceased persons who were buried on the suit property due to time lapse. Mary Mbeshe and Mpeshe Moyae Modo whose bodies are sought to be exhumed were buried 5 years and 24 years ago respectively. In my view, there is no body to exhume. I am of the view that an exhumation order would serve no practical purpose in the circumstances.

Who is liable for the costs of the suit?

Costs of and incidental to a suit is at the discretion of the court. As a general rule, costs follow the event. In this suit, the plaintiff has succeeded in its claim against the defendants. No reason has been put forward that would warrant denying the plaintiff the costs of the suit. The plaintiff shall have the costs of the suit.

Conclusion:

In conclusion, I enter judgment for the plaintiff against the defendants jointly and severally as follows;

1. I declare that the plaintiff is the lawful owner of all that parcel of land known as Kajiado/Ololoitikoshi/Kitengela/2020 (“the suit property”).
2. The defendants, their agents, servants and/or anyone claiming under them shall vacate and handover possession of the suit property to the plaintiff within ninety (90) days from the date hereof.
3. In the event that the defendants or any of them fail to vacate the suit property within the prescribed period, the plaintiff shall be at liberty to apply for warrants for their forceful eviction from the property.
4. The plaintiff shall have the costs of the suit.

DELIVERED AND DATED AT NAIROBI THIS 24TH DAY OF JUNE, 2021.

S. OKONG’O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

N/A for the Defendants

Ms. C.Nyokabi-Court Assistant