



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

CIVIL CASE NO. 2405 OF 1994

ANSEL MWANGANGI KIOKO.....PLAINTIFF

VERSUS

1 DAVID MWAWEU KALUTE

2 ALICE NDINDA KALUTE

3 MUTHUE NGANGA.....DEFENDANTS

J U D G M E N T

The plaintiff moved the court by way of originating summons to determine whether or not he is entitled to be registered as the proprietor of land parcel Number Mbiuni/Kambaa/51 in place of the first and second defendants by virtue of the provisions of section 38 of the limitation of actions Act Cap 22 laws of Kenya. The basic ground as pleaded is that the plaintiff has openly, peacefully and as of right been in adverse occupation of the said land since 1973 to the time of institution of the suit, that is, July, 1994.

The Originating Summons is supported by an affidavit sworn by the plaintiff together with several documents annexed thereto. The plaintiffs claim was resisted by the defendants who filed two affidavits and third defendant (now deceased) respectively.

Upon directions by the court the affidavits on record constituted the pleadings and the parties adduced oral evidence.

Both the plaintiff on one hand and the first and second defendants on the other claim ownership of the land based on purchase from the third defendant . The dimension advanced by the plaintiff however is that his claim is not based on the contract of sale but that of adverse possession which however is grounded on the agreement of sale produced in evidence.

It is true that the subject matter is agricultural land, a transaction of which must be approved by the Land Control Board which issues consent as to deal. The plaintiff did not obtain a consent. The first and second defendants did. The plaintiff says, the consent was not necessary as his claim is on adverse possession and, as at the item the first and second defendants came onto the scene and purported to purchase the land form the 3rd defendant, the 3rd defendant's right to the said parcel of land had been extinguished and so no title could pass from the third defendant to the first and second defendants.

There has been some contention that the plaintiff did not buy L.R 51 but 317 from the third defendant. In his evidence however he has explained to the satisfaction of the court that the right L.R. No is 51 not 317. In any case the evidence as to physical possession relates to L.R. 51 and not 317. I am fortified in so holding by the evidence of pw2 Nguluku Mutiso who witnessed the agreement between the plaintiff and the third defendant and that of Pw3 Terezia Nzake Mwanza a neighbour of the plaintiff and the registered proprietor of L.R. Mbiuni/Kambaa 52.

The third defendant is now deceased and as the dead tell no tales, the only pointer we have is her affidavit sworn on 16th August, 1994 and filed on 8th September, 1994. She repeatedly mentioned the discrepancy in the title numbers in this suit which as I have stated has been explained satisfactorily by the plaintiff. Further the third defendant admitted in paragraph 17 of the said affidavit that the plaintiff paid her a total of kshs. 3,877/75. The allegation of a trick by the plaintiff and one Nzili Ngomi is left hanging because of the unequivocal admission by her of the receipt of the money. After the sale of the land the 3rd defendant, according to the plaintiff, moved elsewhere. She seemed to confirm this in paragraph 18 of her affidavit.

The plaintiff admitted that he did not pay the full price for the land as this was conditional on registration and issuance of the title deed.

It is significant that from 1973 to 1994 when the third defendant purported to sell the subject matter to the first defendant and second defendant, there was no approach onto the said parcel of land to challenge the plaintiffs occupation and/or possession.

I watched the parties give evidence before me. I was impressed by the honesty with which he (plaintiff) presented his case and the demeanour he displayed confirmed this. He knew that the 3rd defendant was deceased but he was frank to say that he did not complete the payment of the purchase price. This added to his credibility and I believe his assertion that he has been in possession of the suit property from 1973 uninterrupted and is therefore entitled to the prayers sought.

As for the first and second defendants, by the time they purportedly purchased the land, the 3rd defendant had no title to pass. It had been extinguished by the adverse possession of the plaintiff.

Accordingly, the plaintiffs suit hereby succeeds. He is entitled to be registered as the proprietor of land parcel No. Mbiuni/Kambaa/51 in place of the first and second defendants whose title must now be cancelled. The plaintiff shall also have the costs of this suit.

Orders accordingly.

Dated at Nairobi this 26th day of November, 1998.

A. MBOGHOLI MSAGHA

JUDGE