

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 1202 OF 2007(O.S)

COSMAS MULWA MALOMBE.....PLAINTIFF

VERSUS

WANGO MUNYALO.....DEFENDANT

JUDGMENT

The defendant is the widow and administrator of the estate of one, Samuel Munyalo Mulandi, deceased (hereinafter referred to as “the deceased”). The deceased and his two brothers Mukunga Mulandi and Kavulu Mulandi were at all material times registered as proprietors in equal shares of all that parcel of land known as Matinyani/Kisaini/533. On 21st October, 1977 the plaintiff and the deceased entered into an agreement for sale pursuant to which the deceased sold to the plaintiff his 1/3 share in Matinyani/Kisaini/533 (hereinafter referred to as “Plot No. 533”) at a consideration of Kshs.95,000/-. The plaintiff paid to the deceased the purchase price in full between 21st October, 1977 and 21st October, 1978 for the said portion of Plot No. 533. Plot No. 533 was an agricultural land. No consent was obtained from the Land Control Board for the transaction between the plaintiff and the deceased and the said portion of Plot No. 533 was never transferred to the plaintiff by the deceased. The plaintiff however took possession of the said property and used the same for grazing cattle until 1992 when he was prevented from accessing the same by the deceased who purported to repudiate the agreement for sale between them on the ground that his sons had raised objection to the same. The plaintiff later learnt that the deceased had purported to sell the same parcel of land to a third party who had entered the same and commenced construction and other activities thereon.

Following the invasion of the property by the said third party, the plaintiff filed a suit at the Senior Resident Magistrate’s Court at Kitui, namely Kitui SRMCC No. 115 of 1992 against the deceased and one, Mukai Musyoka (hereinafter referred to as “the Kitui case”). In the Kitui case, the plaintiff sought a declaration that he was the legal and equitable owner of the portion of Plot No. 533 that he had purchased from the deceased and general damages. In the alternative, the plaintiff sought a sum of Kshs.120,000/- being a refund of the purchase price he had paid to the deceased inclusive of interest and damages he was likely to incur as a result of losing the property. The Kitui case was defended by the deceased and the said Mukai Musyoka to whom the deceased was said to have resold the property. The case was heard and a judgment delivered on 24th February, 1998. The Kitui court made a finding that the plaintiff had purchased a portion of Plot No. 533 from the deceased and had occupied the same from 1997. The court made a declaration that the plaintiff had acquired equitable title under the Limitation of Actions Act, Chapter 22 Laws of Kenya over the portion of Plot No. 533 which he purchased from the deceased. The court however declined to make an order for the transfer of the said property to the plaintiff on the ground that the order could only be made by the High court under Section 38(1) of the Limitation of Actions Act and Order XXXVI rule 3D of the old Civil Procedure Rules. The court directed the plaintiff to make appropriate application to the High Court for that purpose. The claim as against the deceased’s co-defendant Mukai Musyoka was dismissed with costs. The plaintiff was awarded the costs of that suit as against the deceased.

The plaintiff brought the present suit against the deceased and his two brothers who were co-proprietors of Matinyani/Kisaini/533 (“Plot No. 533”) on 24th October, 2003 seeking a declaration that the title that was held by the deceased in respect of 1/3 portion of Plot No. 533 was extinguished by the plaintiff’s adverse possession of the said parcel of land for more than 12 years and that the deceased’s claim in respect thereof was statute barred under Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya. The plaintiff sought a further order that he be registered as the proprietor of 1/3 portion of Plot No. 533 (hereinafter referred to as “the suit property”) in place of the deceased and that the deceased and his co-proprietors be ordered to cause the sub-division of Plot No. 533 into three portions so that the deceased’s 1/3 portion thereof (“the suit property”) could be transferred to the plaintiff. The plaintiff’s suit before the court which was brought by way of Originating Summons was supported by the plaintiff’s affidavit sworn on 21st October, 2003 in which the plaintiff stated how he acquired the suit property from the deceased and occupied the same from 1977 to 1991 continuously and peacefully. The deceased and his co-proprietors of Plot No. 533 entered appearance and filed separate replying affidavits to the Originating Summons. In his replying affidavit sworn on 18th March, 2004, the deceased admitted that he sold the suit property to the plaintiff in 1977. He contended however that the plaintiff delayed in the payment of the purchase price as a result of which he was forced by the circumstances to resell the same property to a third party, one Mukai Musyoka who had already taken possession and settled on the land. The deceased denied that the plaintiff had taken possession of the suit property and had occupied the same continuously between 1977 and 1991. The deceased denied that the plaintiff had acquired the suit property by adverse possession. The deceased contended that his co-proprietors of Plot No. 533 had supported the plaintiff’s claim because of the differences he had with them concerning Plot No. 533.

The deceased brothers, Mukunga Mulandi and Kavulu Mulandi who were also co-proprietors of Plot No. 533 filed a replying affidavit on 11th December, 2003 sworn by Mukunga Mulandi on 6th December, 2003 in which they fully supported the plaintiff’s claim against the deceased.

While this suit was pending hearing, Plot No. 533 was sub-divided and the portion thereof that was sold by the deceased to the Plaintiff was given land reference number Matinyani/Kasaini/1305 (“the suit property”) and registered in the name of the deceased on 5th October, 2011. The sub-division was carried out after the death of the deceased on 9th April, 2006. The Grant of Letters of Administration in respect of the estate of the deceased was issued to his wife, Wango Munyalo on 8th November, 2011. On 14th October, 2015, the plaintiff amended the Originating Summons and substituted the deceased’s wife, Wango Manyalo as plaintiff in place of her deceased husband, Samuel Munyalo Mulandi. The plaintiff also discontinued his claim against the hitherto co-proprietors Plot No. 533, Mukunga Mulandi and Kavulu Mulandi.

In the amended Originating Summons, the plaintiff's adverse possession claim was directed at the new parcel of land, Matinyani/Kasaini/1305 ("the suit property"). The amended Originating Summons was served upon the deceased's wife, Wango Munyalo who was now the sole defendant but she did not respond to the same. When the suit came up for hearing on 22nd February, 2018, the deceased wife, Wango Munyalo (hereinafter referred to only as "the defendant") did not appear in court despite service having been effected upon her. The plaintiff gave evidence and called one witness, Charles Musya Kikungu (PW 2). After the close of the plaintiff's case, the plaintiff's advocates filed written submissions on 12th June, 2018.

I have considered the plaintiff's case as pleaded in the Originating Summons and the affidavit that was filed in response thereto by the deceased. I have also considered the evidence that was adduced by the plaintiff in support of his case and the submissions by the plaintiff's advocates. On the evidence before me, I am satisfied that the plaintiff has proved his claim against the defendant. The plaintiff led evidence that he bought the suit property from the deceased in 1977. He paid the purchase price in full. The deceased gave him vacant possession of the property. He took possession and remained in occupation until 1991 when the deceased purported to rescind the agreement for sale and to resell the suit property to a third party who moved to the property and dispossessed the plaintiff of the same. This development led to the filing of the Kitui Case by the plaintiff against the deceased and one, Mukai Musyoka to whom the deceased was said to have resold the suit property. In the judgment that was delivered on 24th February, 1998, the Kitui Court made a finding of fact that the plaintiff had purchased the suit property from the deceased in 1977 and that the plaintiff had been in occupation of the property from 1977 up to the time the suit was filed. The Kitui court also made a finding that the plaintiff had established that he was the equitable owner of the suit property having occupied the same since 1977 and made a declaration to that effect. These findings by the Kitui court have neither been varied nor set aside. Upon assessment of the evidence before me, I have reached the same conclusion. The plaintiff has established that he entered the suit property in 1977 after purchasing the same from the deceased, he fenced the same, put up a temporary structure thereon for his herdsman and used the property for grazing his cattle until 1991 when he was dispossessed of the property by a third party to whom the deceased is said to have resold the suit property. I am satisfied that the plaintiff has established the ingredients of adverse possession claim that were set out in the cases of Ann Iumbi Kiseli v James Muriuki Muriithi (2013) eKLR, Wambugu v Njuguna (1983) KLR 173 and Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR which were cited by the plaintiff in his submissions.

In conclusion, it is my finding that the plaintiff has proved his claim against the defendant on a balance of probabilities. I therefore enter judgment for the plaintiff against the defendant in terms of prayers 1 and 2 of the amended Originating Summons dated 13th October, 2015. The defendant did not appear in court to defend the suit. I will not condemn her to pay the costs of the suit. Let each party bear its own costs of the suit. It is so ordered.

Delivered and Dated at Nairobi this 31st day of January 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Nyabuto h/b for Mr. Mutua for the Plaintiff

N/A for the Defendant

Mr. Okumu-Court Assistant