



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 243 OF 2015 (O.S)

SIMON KILINGE KINGOO.....1ST PLAINTIFF
ROBERT KYALO MUEMA.....2ND PLAINTIFF
BENSON MAKAU MWANGANGI.....3RD PLAINTIFF
PETER MBINDYO MUTINDA.....4TH PLAINTIFF
JOSEPH KIVULA WAMBUA.....5TH PLAINTIFF
JULIUS MUTUKU KYENGO.....6TH PLAINTIFF
DORCAS HEDRICK KIOKO.....7TH PLAINTIFF
PATRICK MAINGI MUTIE.....8TH PLAINTIFF
TITUS MAKAU KING'OLA.....9TH PLAINTIFF
MUTHEU MASUNI.....10TH PLAINTIFF
PATRICK WAMBUA.....11TH PLAINTIFF
MUTISYA KAMIA.....12TH PLAINTIFF

VERSUS

AMOS KAMIA NGUKU.....1ST DEFENDANT
MUENI KAMIA.....2ND DEFENDANT
MUTIO KAMIA.....3RD DEFENDANT
MUNYAKA KAMIA.....4TH DEFENDANT
ROBERT KAMIA.....5TH DEFENDANT

JUDGMENT

1. In the Originating Summons dated 11th December, 2015, the Plaintiffs are seeking for the determination of the following questions:

a. Whether the Plaintiffs are entitled by virtue of adverse possession to all that parcels of land known as L.R. No. Mavoko Town/Block 3/2668 which are registered in the names of the 1st Defendant.

b. Whether the Plaintiffs should be registered as proprietors of all that parcel of land situate in Machakos County and known as L.R. No. Mavoko Town/Block 3/2668 which is registered in the names of the 1st Defendant.

c. If answers to (a) and (b) above are in the affirmative, whether the court should make declarations and orders directed to the Lands Registrar Machakos to give effect to the said findings.

d. Whether the Plaintiffs should be paid costs of this suit.

2. The Originating Summons is premised on the grounds that the 1st Defendant is registered as the owner of parcel number Mavoko Town/Block 3/2668; that the Plaintiffs have been in continuous and uninterrupted use of the suit land for more than twenty three (23) years and that the Defendants knew of the Plaintiffs' adverse possession of the suit land for the said period.

3. In the Affidavit in support of the Originating Summons, the 6th Plaintiff deponed that the 1st Defendant's wife and the 4th Defendant allowed the Plaintiffs to enter into the suit property between the year 1993 and 2004; that the Plaintiffs have worked and settled on the suit land in exchange of some money which was indicated as the purchase price and that the Plaintiffs later on realised that the 4th Defendant and the other sellers were not the registered owners of the suit land.

4. The 6th Plaintiff who swore an Affidavit on behalf of the other Plaintiffs, deponed that for more than twelve (12) years, they have been residing on and using the suit land to the exclusion of the Defendants without any interruptions; that the 1st Defendant's title has now been extinguished by operation of the law and that they should be declared to have acquired the suit land from the 1st Defendant by way of adverse possession.

5. None of the Defendants filed an Affidavit in response to the Originating Summons. The 1st Interested Party deponed that the Interested Parties are the legal representatives of Amos Kamia Nguku (*the deceased*) who died on 30th June, 1979; that the suit land was registered in the name of the deceased; that the persons who purportedly sold and allowed the Plaintiffs on the suit land had no legal capacity to do so and that if the Plaintiffs have in any way occupied the deceased's land, then they are intermeddling with the deceased's Estate.

6. The 1st Interested Party finally deponed that the Plaintiffs do not have a valid claim against the deceased's Estate and that the inclusion of the deceased's name as a Defendant is an act of dishonesty on the part of the Plaintiffs because the deceased never sold any land to them.

7. This matter proceeded by way of *viva voce* evidence. The 6th Plaintiff, PW1, informed the court that all the Plaintiffs purchased the suit land from the Defendants; that each of the Plaintiff has developed his portion of land and that they only realised that the 1st Defendant was dead after purchasing the suit land.

8. According to PW1, the Plaintiffs were informed that the land belonged to Rebecca, who is the wife of the 1st Defendant (also deceased) and that the Plaintiffs have been in occupation of the suit land for more than twelve (12) years.

9. In cross-examination, PW1 stated that they never bought the land from the 1st Defendant; that they bought the land from Rebecca Kamia (*the 1st Defendant's wife*) and the 3rd Defendant (*who is Rebecca's son*); that the rest of the Defendants are the sons of Rebecca and that they were not aware that the 1st Defendant died in 1979.

10. PW1 stated that they never bought the suit land from the Interested Parties and that they do not know them. It was the evidence of PW1 that they have not breached any law and that they are entitled to the suit land by way of adverse possession.

11. DW1 informed the court that he is one of the administrator of the Estate of the Late David Nzomo; that they were issued with the Letters of Administration on 5th July, 2012 and that the suit land is still registered in favour of the 1st Defendant.

12. It was the evidence of DW1 that Rebecca was the 4th wife of the 1st Defendant and is now deceased; that the 2nd Defendant is also deceased and that all the children of the 1st Defendant were 32. DW1 informed the court that they have never sold the suit land to the Plaintiffs.

13. In cross-examination, DW1 stated that the Defendants have been occupying the suit land and that they received a report that Munyaka sold a portion of the land in the year 2001; that the said Munyaka had been allocated where his mother had settled and that they demolished the house he had put up on a portion of the suit land. It was the evidence of DW1 that when they demolished the 4th Defendant's house on the suit land in the year 2003/2004, there was no one living on the land. However, it was the evidence of DW1 that people got on the land in the year 2001 and that when he went to the land in the year 2004 he was chased away by the people who were occupying the land.

14. DW1 informed the court in cross-examination that the last time he went to the land was in the year 2004; that he found people living on the suit land and that the said people got on the land illegally. In re-examination, DW1 stated that he was not sure when the Plaintiffs entered the suit land.

15. The Plaintiffs' advocate submitted that the occupation by the Plaintiffs was adverse to the interest of the registered owner; that the Interested Parties admitted that the Plaintiffs entered the suit land without the permission of the registered owner and that the Interested Parties did not take any steps to evict the Plaintiffs from the suit land.

16. The Plaintiffs' counsel submitted that the occupation of the suit land by the Plaintiffs was many years before the Succession Cause was filed; that the Plaintiffs can claim adverse possession against the Estate of the deceased and that illegal occupation is a component of adverse possession. Counsel relied on numerous authorities which I have considered.

17. The Defendants' counsel submitted that the 1st Defendant was sued posthumously and that both the Plaintiffs and the purported sellers have been intermeddling with the deceased's Estate thus committing an offence under Section 45(2) of the Laws of Succession Act. Counsel submitted that for a claim based on adverse possession of land to succeed, the Plaintiff must demonstrate that his entry on the land was lawful, and was with the consent of the registered owner; and that the occupation was adverse to the title holder's title, which is not the case here.

18. The evidence placed before me shows that the 1st Plaintiff purchased five (5) acres of the suit land, then known as plot number 33 within Lukenya Ranch from Rebecca Mbeneka on 23rd January, 1993. The 2nd Plaintiff purchased another five (5) acres of the suit land from a Mrs. Annah Matheka on 21st November, 2004 while the 3rd Plaintiff made some payment for a portion of the suit land to the 3rd Defendant on 5th August, 2000.

19. The 3rd Plaintiff made further payments of the land to the 4th Defendant on 21st August, 2001, 1st July, 2000, 7th September, 2000 and 25th January, 2001.

20. The evidence exhibited by the 5th Plaintiff shows that he purchased a portion of the suit land (1 acre) from the 1st Defendant's (deceased) wife, Rebecca Kamia on 10th August, 2001 while the 6th Plaintiff purchased a portion of the suit land measuring 1 acre from the 3rd Defendant. The 7th Plaintiff purchased 1.5 acres of the suit land from the 4th Defendant on 16th February, 2000 while the 8th Plaintiff purchased 1 acre from the same Defendant on 11th June, 2002.

21. The 9th Plaintiff on the other hand purchased a portion of the suit land from the 4th Defendant vide an Agreement of 27th June, 2004. The 9th Plaintiff made payments for the land he bought in several instalments. The 10th Plaintiff purchased 1 acre of the suit land from the 4th Defendant vide an Agreement of 31st May, 2004.

22. The evidence produced by the Plaintiffs shows that they purchased portions of the suit land from Rebecca, who was one of the wives of the registered proprietor of the suit land and from the 4th Defendant who is the son of the registered proprietor. The said purchases were between the years 1993-2004. It is the registered proprietor's wife and the 4th Defendant who allowed the Plaintiffs on the land.

23. The Interested Parties are the administrators of the Estate of Amos Kamia, the proprietor of the suit land, who died in 1979. DW1 admitted in evidence that the suit land has been occupied by people whom calls trespassers since the year 2001. It is the Interested Parties' case that the occupation of the suit land by the Plaintiffs amounts to intermeddling with the Estate of the deceased.

24. That may be so. However, where a party enters the land by way of purchase, even where the said purchase is null and void, time will start running in respect of a claim for adverse possession if the occupation is adverse to the use of the land and the interests of the registered owner, or his predecessor in title. It does not matter that the said occupation is illegal in the first place.

25. Indeed, DW1 admitted that the Plaintiffs entered the land without the permission of the administrators of the Estate of the deceased. The said administrators knew since the year 2001, or even earlier, that the suit land was occupied by people who even chased them away in the year 2004. However, they never took any legal steps to have the said people, including the Plaintiffs, evicted from the suit land.

26. The Interested Parties having denied that the Plaintiffs are not entitled to the Estate of the deceased as beneficial owners, the Plaintiffs' interest in the suit land became adverse to the interests of the beneficial owners.

27. In the case of *Baber Alibhai Mawji vs. Sultan Hasham Lalji & another (2010) eKLR*, the Court of Appeal held as follows:

“It is also important that the registered owner in this case had persistently denied that the Respondent had beneficial ownership but at the same time, over a long period of time, failed to eject him yet the Appellant fought many battles that the Respondent was not a beneficiary of a trust, beneficial owner or tenant. In a situation such as this one before us where the registered owner is not sure of the status of the person in occupation of the land, there is a strong inference that the possession is adverse to tith interest.”

28. The Plaintiffs having settled on the suit land as early as 1993, and without the permission of the Administrators of the Estate of the registered proprietor of the suit land, an inference that the occupation was adverse to the interest of the Estate and its beneficiaries is drawn.

29. Indeed, notwithstanding the fact that the Interested Parties applied and were granted the Letters of Administration in the year 2012, the time for purpose of adverse possession started running as against the registered proprietor immediately the Plaintiffs occupied the suit land. This is so because the squatters' interest in the land is the holding of and dominion over the suit land, and not when the administrators obtained the Letters of Administration. Justice J.B. Ojwang (*as he was then*) stated as follows on that issue:

“The only business of the squatter is to squat, possess, enjoy and retain; and once the minimum duration is completed, he can seek the formal indicia of ownership of the land which he has possessed for long.”

30. The fact that the Plaintiffs occupied the suit land way before the Estate of the registered could be administered is neither here nor there in a claim of adverse possession.

31. In the case of *Aggrey J.B. Luvutse vs. Alexander Musa Limisi (2009) eKLR*, Chitembwe held as follows:

“By the time the Defendant filed Succession Cause Number 1436 of 1995 in Nairobi, the Plaintiff had occupied the whole land for sixteen (16) years from 1979... The transfer of the property to the Defendant does not affect the Plaintiff’s contention that he had occupied the property for over twelve (12) years before the transfer was effected. The Defendant was aware of the Plaintiff’s occupation.”

32. The entry of an adverse possessor on land need not be legal, but must be under some right. Although the occupation of the suit land by the Plaintiffs amounts to intermeddling with the Estate of the deceased, they entered the land as purchasers. In fact, the law on adverse possession provides that the entry of the adverse possessor should not be by the permission or consent of the owner. In *Ndiema Samburi Soti vs. Elvis Kintai Chepkeses (2010) eKLR*, the Court of Appeal held as follows:

“A person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not dispossessed the owner and the possession is not illegal (Wanje vs. Saikwa (No.2) (1984) KLR 284).”

33. Therefore, the mere fact that the occupation of the suit land by the Plaintiffs is contrary to the provisions of the Law of Succession Act cannot in itself defeat a claim for adverse possession. The Plaintiffs having occupied the suit land for twelve (12) years uninterrupted and without the permission of the registered owner or the administrators of the Estate of the registered owner, I find that they are entitled to the suit land by way of adverse possession.

34. For those reasons, I allow the Originating Summons dated 11th December, 2015 as follows:

a. The Plaintiffs are entitled by virtue of adverse possession in their respective shares of parcel of land known as Mavoko Town/Block 3/2668.

b. Machakos Land Registrar to register the Plaintiffs as proprietors of the parcel of land known as Mavoko Town/Block 3/2668.

c. Each party to bear his/her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF JANUARY, 2019.

O.A. ANGOTE

JUDGE