



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 459 OF 1998(O.S)**

**JOSEPH NDUK KIOKO.....1<sup>ST</sup> PLAINTIFF**

**RABECA NTHENYA NDUK.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MUNYAO KIOKO KIKEU.....1<sup>ST</sup> DEFENDANT**

**JUSTINE PENINA MUNYIVA MULINGE....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In the Amended Originating Summons dated 21<sup>st</sup> October, 2011, the Plaintiffs are seeking for the following orders:

*a. A declaration that the Plaintiffs have acquired titles Machakos Town/Block 3/1150 and Machakos Town/Block 3/1151 respectively by adverse possession and for an order directing the Land Registrar Machakos to cause the registration of parcel numbers Machakos Town/Block 3/1150 and Machakos Town/Block 3/1151 into the names of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively.*

*b. An injunction order to permanently restrain the Defendants either by themselves; their servants and/or agents or otherwise however from trespassing on, or in any other manner interfering with the said parcels.*

*c. An order for the payment of the Defendants to the Plaintiffs of the costs of this suit.*

2. The Originating Summons is supported by the Affidavit of the 1<sup>st</sup> Plaintiff who has deponed that as at the time of filing the suit, the Plaintiffs had been in open, continuous and undisturbed occupation of the suit land for more than thirty (30) years; that the said occupation of the suit land by the Plaintiffs has been adverse to that of the Defendants and that the Defendants were registered as the proprietors of the suit land on 13<sup>th</sup> October, 1998 and 27<sup>th</sup> May, 1999 respectively.

3. The 2<sup>nd</sup> Plaintiff finally deponed that the registration of the said titles in the names of the Defendants was futile, null and void as their interest in the title had been extinguished long before they were registered.

4. Although the Respondents were served with the Amended Originating Summons, they entered appearance but never filed Replying Affidavits. The matter proceeded for hearing by way of *viva voce* evidence.

5. The 1<sup>st</sup> Plaintiff informed the court that the 2<sup>nd</sup> Plaintiff is his wife; that they occupy the suit land which measures approximately seven (7) acres; that his parents were living on the suit properties when he was born and that he has been in occupation of the suit land since then.

6. According to the 1<sup>st</sup> Plaintiff, the government recognized them as some of the legal squatters who had lived on the suit land for many years and that the list of squatters shows his father's name. When his father died in 1998, he (*the 1<sup>st</sup> Plaintiff*) continued living on the land to date.

7. The 1<sup>st</sup> Plaintiff finally stated that he did not know the whereabouts of the Defendants; that he has planted a forest on a portion of the land measuring  $\frac{3}{4}$  acre and that he occupies the remaining portions of the land.

8. The 2<sup>nd</sup> Plaintiff stated that she was married to the 1<sup>st</sup> Plaintiff in 1987; that she has always lived on the suit land since she was married and that they are entitled to the suit land by way of adverse possession.

9. The Plaintiffs' advocate submitted that the Plaintiffs' claim meets the threshold for them to be entitled to the suit land by way of adverse possession; that the Defendants have never been in occupation of the suit land and that the Defendants did not defend the Originating Summons.

10. The copy of the extract of title for a parcel of land known as Machakos Town/Block 3/1150 shows that the 1<sup>st</sup> Defendant was registered as the proprietor of the land on 13<sup>th</sup> October, 1998. On the other hand, the 2<sup>nd</sup> Defendant was registered as the proprietor of a parcel of land known as Machakos Town/ Block 3/1151 on 27<sup>th</sup> May, 1999. Before the two parcels of land were registered in favour of the Defendants, the same had been registered in favour of the Government of Kenya on 24<sup>th</sup> February, 1997.

11. The Plaintiffs produced in evidence documents to show that before the suit properties were registered in favour of the Defendants, they were living on the land. Indeed, in the letter dated 25<sup>th</sup> September, 1998, the Farm Manager of Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited stated as follows:

***“The Society Management is aware that you have been living there for many years and even before sub-division of the land i.e. 1983.”***

12. The Plaintiffs also produced several correspondence running back to 1976 which showed that his father, Kioko Kamweli, had settled on the land with his family since 1920, and had even worked for D. Gonslves. The Plaintiffs assertion that he was indeed born on the suit land was not controverted by the Defendants. Indeed, there is no evidence that the Defendants have ever occupied the suit land.

13. However, the law relating to a claim of land by way of adverse possession clearly stipulates that time starts running from the time the land is registered in favour of the Defendants or his predecessor in title. Section 38(1) of the Limitation of Actions Act provides as follows:

***“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”***

14. Under Section 7 as read with Section 13 and 38 (1) of the Limitation of Actions Act, the owner of a property loses the right to claim his property after it is occupied continuously without interruption by an adverse possessor for a period of twelve (12) years. Considering that the Defendants were registered as proprietors of the two properties on 13<sup>th</sup> October, 1998 and 27<sup>th</sup> May, 1999 respectively, and their predecessor in title, the government, was registered as the proprietor of the land on 24<sup>th</sup> February, 1997, a period of twelve (12) years had not lapsed from the period when the suit land was registered in their favour and when the suit was filed. The period that the Plaintiffs lived on the land before the same was registered cannot be computed for the purpose of a claim of adverse possession.

15. In any event, even if it is argued that the land was all along registered in the name of the government before the same was registered in favour of the Defendants, the Plaintiffs' claim would still not succeed. I say so because Section 41 of the Limitation of Actions Act excludes any person from acquiring any title to, or any easement over government land or land otherwise enjoyed by the Government.

16. For the reasons I have given above, I find the Amended Originating Summons dated 21<sup>st</sup> October, 2011 to be unmeritorious. The Originating Summons is therefore dismissed but with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18<sup>TH</sup> DAY OF JANUARY, 2019.**

**O.A. ANGOTE**

**JUDGE**