



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 234 OF 2014

GEDION MUTUA LAVUTA.....APPLICANT

VERSUS

ABEDNEGO MAKAU KOLI.....RESPONDENT

JUDGMENT

1. In the Originating Summons dated 8th May, 2014, the Applicant is seeking for the following reliefs:

a. That a declaration that by virtue of actual possession and use, the Applicant is entitled through the doctrine of adverse possession to ownership of all that land known as Machakos Town-Block 3/1058 measuring 0.8259 Hectares.

b. That an order to issue in the terms that the Applicant be registered as the proprietor and/or owner of all that land known as Machakos Town-Block 3/058 measuring 0.8259 Hectares in place of Abednego Makau Koli.

c. That cost of this Application be borne by the Respondent.

2. The Motion is supported by the Affidavit of the Applicant who has deponed that he was born in Katelembo area, Machakos County, in 1968; that he was born and raised on a piece of land, which after survey, become parcel of land known as Machakos Town-Block 3/1058 (*the suit land*) and that Katelembo Athiani Muvuti Co-operative Society (*the Society*) bought the entire land from a colonial master who had employed their parents.

3. According to the Applicant, he built his house on the suit land in 1987; that when his parents died, they were buried on the suit land and that on 26th December, 2013, he was surprised when the Respondent turned up and told him the land was his. It is the deposition of the Applicant that he had never seen the Respondent before.

4. In reply, the Respondent deponed that he is the registered proprietor of the suit land; that he bought the land from Joseph Ngayai Kiio in March, 2004 and that when he bought the land, the adjacent parcel of land had temporary structures on it.

5. It was the deposition of the Respondent that he hired a Surveyor in the year 2006 to help him identify the beacons of the suit land; that when the Surveyor identified the beacons, he found that there was no single structure on the land and that the Applicant occupies a neighbouring parcel of land.

6. The Respondent finally deponed that in 2011, he discovered that the Applicant had built a house encroaching on his land. It was the deposition of the Respondent that the Applicant has never been in occupation of the suit land for twelve (12) years as alleged.

7. This matter proceeded for hearing by way of oral evidence. PW1 adopted the depositions in his Supporting Affidavit which I have already summarized above.

8. In cross-examination, PW1 stated that his late mother was a member of Katelembo Society; that she was allocated the suit property by the Society by virtue of her membership and that his mother was living on a piece of land neighboring the suit land.

9. It was the evidence of PW1 that his two brothers and his mother had houses on a piece of land that is next to the suit land and that when his mother died, she was buried on the said land. PW1 stated that he did not know the acreage of the land that his mother and brothers were living on.

10. PW1 informed the court that his late mother lived on plot numbers 1059 and 1060; that he does not know in whose name the two parcels of land are registered and that he has put up a house on the suit land. It was the evidence of PW1 that Katelembo Muvuti Co-operative Society beacons the suit land in 1987. The Applicant denied that his houses are built on the land that his mother was living on. However,

he agreed that the suit land is different from the land that his late mother used to live on.

11. The Applicant's daughter, PW2, informed the court that she was born on the suit land in 1991; that she had been living on the suit land with her parents since then and that the suit land has three houses, a cow pen and a toilet. It was the evidence of PW2 that the land also has mature trees.

12. PW2 informed the court that the suit land measures two (2) acres and that other than the three houses on the land, they cultivate the remaining portions of land.

13. PW3 informed the court that he has known the Applicant for more than thirty (30) years; that he has land in Katelembo and that the suit land has all along been occupied by the Applicant and his family. It was the evidence of PW3 that the Applicant and his family have been cultivating the suit land for many years and that he does not know the Respondent or the person who sold to the Respondent the suit land.

14. PW3 stated that the entire land was sub-divided by the Society in 1987 and that it was the Plaintiff's late mother who was a member of the Society. According to PW3, the Applicant's mother's land borders the suit land; that the Applicant's mother was buried on her land when she died and that the Applicant has built his houses on the suit land. When the Applicant's brother died in the year 1980, he was also buried on the Applicant's mother's land.

15. The Surveyor, PW4, stated that he visited the suit land on 11th April, 2017 and that he found that the Applicant and his family were in occupation of the suit land. According to PW4, he found the Applicant has built permanent buildings, planted permanent trees and $\frac{3}{4}$ of the land was under cultivation. It was the evidence of PW4 that the trees on the land were mature.

16. In cross-examination, PW4 stated that the buildings put up by the Applicant occupy $\frac{1}{4}$ of the suit land; that another $\frac{1}{4}$ of the land is for grazing and that the area under cultivation was approximately $\frac{3}{4}$.

17. The evidence of the Defendant, DW1, is captured in his Replying Affidavit which I have summarized in the preceding paragraphs. In cross-examination, DW1 stated that he bought the suit land in the year 2004; that he was on the land in the year 2004 and no one was in occupation of the land in that year; that while checking on the land, the Applicant's mother blew a whistle and a crowd emerged claiming that the land was theirs and that because of hostility, he never fenced the land.

18. The Defendant admitted that the suit land has mature trees and that he is not the one who planted them. According to DW1, he did not have a Sale Agreement in respect of the suit land.

19. The Plaintiff's advocate submitted that PW1 testified that he had been in occupation of the suit land since 1987; that the Applicant's possession has been open, notorious and with the knowledge of the owner and that the Originating Summons should be allowed.

20. The Defendant's counsel submitted that the Applicant has not proved the elements of adverse possession and that the time for an adverse claim should be computed from the time the Respondent knew that the Plaintiff was in possession of the suit land, which, in this case, is the year 2004.

21. The Respondent's counsel submitted that in any event, time cannot start running in a situation where a person was not aware that the subject property had an owner in the first place; that long stay on land in itself alone does not entitle one to acquire title through adverse possession and that the Plaintiff's claims should be dismissed.

22. The evidence before me shows that parcel of land known as Machakos Town-Block 3/1058 (*the suit land*) was registered in favour of the Respondent on 29th April, 2004. According to the Abstract of Title, the land was first registered in the name of the government of Kenya on 24th February, 1997 before the same was transferred to Joseph Kiio by way of "shares" on 29th February, 2000. On 29th April, 2004, the said Mr. Kiio transferred the land to the Respondent.

23. The evidence by the Applicant (PW1), his daughter (PW2) and his neighbour (PW3), is that by the time the Respondent purported to purchase the suit land in the year 2004, the Applicant was already in occupation of the suit land. PW1 and PW3 informed the court that the entire land was acquired by Katelembo Athiani Muputi Farming & Ranching Society from the former owner of the land, who was a white settler. After members of the Society acquired shares, they were given land in the area. This was after the sub-division of the land which was finalized in 1987.

24. The Applicant produced in evidence the membership card of his mother (*deceased*), and her share certificate dated 7th July, 1983. Indeed, the said membership card and the share certificate shows that the Applicant's mother had always been in occupation of a portion of land that was acquired by the Society from the colonial settler. She must have brought up her entire family on the said land.

25. The evidence of the Applicant and his neighbour, PW3, was that the Applicant built his first house on the suit land when he got married in 1987. This was after the Applicant moved out of his mother's compound which neighbours the suit land. This evidence by the Applicant, PW2 and PW3 is believable because there was no evidence to show that the Applicant has ever had a house on a piece of land on which his mother was living on, which abutts the suit land.

26. Indeed, the Surveyor who visited the land informed the court that the suit land has three houses and permanent mature trees which were planted by the Applicant. Those trees are exhibited in the photographs that the Surveyor took. The Respondent admitted in evidence that indeed the suit land has mature permanent trees which were planted by someone else, and not himself.

27. The issue of the Applicant and his family having been in occupation and possession of the suit land was confirmed by the Respondent himself when he stated that he could not fence the land due to hostility from the Applicant, the Applicant's late mother and the neighbours. Although the Respondent was chased away when he visited the suit land in the year 2006, he neither sued the Applicant nor reported the issue to the police. These are acts of someone who knew that the Applicant was claiming the suit land but did nothing to lay his claim on the land.

28. The Respondent's claim that he is the one entitled to the suit land is further compromised by the fact that he did not produce any document to show that the person who sold to him the suit land, Mr. Kiio, ever occupied the land or was a member of Katelembo Athiani Muputi Corporation Society.

29. Indeed, neither the membership card nor the share certificate of the said Mr. Kiio was produced in evidence. It is not therefore clear how the said Mr. Kiio was registered as the owner of the suit land in the year 2000. Furthermore, there was no evidence, by way of a Sale Agreement, to show that indeed Mr. Kiio sold to the Respondent the suit land, and if so, on which terms.

30. As was held by the Court of Appeal in the case of *Nyoro Kimwe vs. John Anderson Githinji (2009) eKLR*, the mere change of ownership of the land which is occupied by another under adverse possessions does not interrupt such a person's adverse possession. Consequently, time started running in the year 2000 when the land was registered in favour of Mr. Kiio and not in the year 2004.

31. The entire land in Katelembo was sub-divided in 1987. The Applicant, having moved from his mother's land to the suit land in 1987, built his houses and settled on the land. He is therefore entitled to the land. Indeed, time started running against the registered proprietors of the land in the year 2000 when the same was registered in favour of Joseph Ngayai Kiio on 29th February, 2000.

32. As was held by the court in *Kinyanjui Chege vs. Mona Gathungu (2005) eKLR*, the right having accrued to the Applicant on the taking of possession, the Respondent and his predecessor in title must be taken to have held the land in trust for the Applicant until and to the time he brought this action for the enforcement of his right of ownership by effluxion of twelve (12) years.

33. The possession of the suit land by the Applicant and his family having been open, notorious and with the knowledge of the registered owner, the Applicant's Originating Summons dated 8th May, 2014 succeeds.

34. For those reasons, I allow the Originating Summons dated 8th May, 2014 as follows:

a. A declaration be and is hereby issued that by virtue of actual possession and use, the Applicant is entitled through the doctrine of adverse possession to ownership of all that land known as Machakos Town- Block 3/1058.

b. An order be and is hereby issued that the Applicant be registered by the Machakos Land Registrar as the proprietor of all that land known as Machakos Town -Block 3/1058 in place of Abednego Makau Koli.

c. The Respondent to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE