



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 358 OF 2012

KENYA AFRICAN NATIONAL TRADERS &

FARMERS UNION (*Suing thro' its officials*)

KIMANI WANYOIKE (*Chairman*)

PETER MUGEKA MAINA (*Secretary General*)

AND

IBRAHIM WANENE (Treasurer).....**PLAINTIFF**

VERSUS

KIMUNDU NDUNDA NTHEI 43 OTHERS.....**DEFENDANTS**

JUDGMENT

1. In the Originating Summons dated 25th September, 2012, the Plaintiff is seeking for the following orders:

a. The Kenya African National Traders & Farmers Union be declared to have acquired title by adverse possession to the suit premises previously known as Plot No. 406 at Lukenya Ranching and Farming Co-operative Society Limited and now known as Mavoko Town Block 3/2174 (and upon sub-division into Mavoko Town Block 3/5686 -5717 (inclusive)).

b. That the registration of Rose Muthoni John as proprietor of L.R. No. Mavoko Town Block 3/2174 (and upon sub-division into Mavoko Town Block 3/5682-5717) and the persons deriving title from Rose Muthoki John being Paddy Kamau Nganga, George Ngaari Nganga, George Kariuki, John Githirwa Maina and all other Defendants named herein or Lukenya Ranching & Farming Co-operative Society Limited based on the land previously known as Plot No. 406 and now known as Mavoko Town Block 3/2174 (and upon sub-division into Mavoko Town Block 3/5682-5717) inclusive be cancelled and the Land Registrar Machakos do rectify the register to enter the name of the Plaintiff as registered proprietor.

2. The Originating Summons is supported by the Affidavit of the Plaintiff's Chairman who has deponed that the Plaintiff is a land buying company; that the Plaintiff entered into a Sale Agreement with the 43rd Defendant in respect of Plot No. 406 and that the 43rd Defendant agreed to sell to the Plaintiff the suit land for Kshs. 800,000.

3. It was the deposition of the Plaintiff's Chairman that after paying the entire purchase price, the Plaintiff took possession of the land with the knowledge of the Defendants; that its members have been in exclusive possession of the said land and that it was only in October, 2011 when the Plaintiff was pursuing the title documents that they learnt that the title had been issued to the 2nd Defendant who then transferred the suit land to the 3rd -6th Defendants.

4. After the transfer of the land to the 3rd -6th Defendants which was renamed as Mavoko Town Block 3/2174, the Plaintiff's Chairman deponed that the said land was sub-divided and transferred to the 7th to 42nd Defendants; that it is the Plaintiff's members who have been in possession of the land and the Plaintiff's members have developed the land. It is the Plaintiff's case that a period of twelve (12) years has expired since the Plaintiff's members took possession of the suit land.

5. Although the Defendants were served with the Summons to Enter Appearance by way of advertisement in the Daily Nation Newspaper, they neither entered appearance nor filed a reply to the Originating Summons. The matter proceeded for hearing in their absence. When PW1 appeared in court on 17th October, 2018, he adopted his Affidavit, the contents of which I have summarized above.

6. The Plaintiff's advocate submitted that by building structures on the suit premises without obtaining permission from the 1st Defendant who was the registered owner of the suit property, the Plaintiff manifested *animus possidendi*, a clear mind and intention of dealing with the suit premises; that the 1st Defendant was, as such, dispossessed of the suit premises and that the Plaintiff's acts were *nec vic, nec clam, nec precario*.
7. The Plaintiff's advocate finally submitted that the 1st Defendant could not pass a good title to the Defendants because the said title had been extinguished by adverse possession of the suit land and that any dealings over the same was fraudulent.
8. The Plaintiff's advocate finally submitted that the computation of time for adverse possession began to run on 3rd August, 1995 when the last payment of the purchase price was made and that the Plaintiff's members have been in occupation of the land since then. The Plaintiff's Counsel relied on several authorities which I have considered.
9. The uncontroverted facts in this matter is that the Plaintiff, which is a land buying company, was incorporated on 14th October, 1960. On 21st October, 1993, the Plaintiff entered into a Sale Agreement with Kimundu Ndunda Nthei, who owned Plot No. 406 at Lukenya Ranching and Farming Co-operative Society. The said land measured approximately 40 acres.
10. The Agreement between the Plaintiff and the said Kimundu Ndunda Nthei provided that the purchase price was Kshs. 800,000 which was to be paid by 3rd August, 1995 after which the seller was to inform Lukenya Ranching and Farming Co-operative Society that he has surrendered his interest in the land.
11. The Plaintiff's Chairman produced in evidence a statement showing that the last installment towards the purchase price was paid on 3rd August, 1995. It was the evidence of PW1 that its members took possession of Plot No. 406 in the same year that they made the last payment.
12. The evidence produced in court shows that upon survey, Plot No. 406 became to be known as Mavoko Block 3/2174 measuring 18.36 Ha (*approximately 45.9 acres*). Indeed, no evidence was tendered by the Defendants to show that parcel number Mavoko Town Block 3/2174 is different in any respect, except the number, with Plot No. 406.
13. The Plaintiff produced in evidence the copy of the green card showing that the suit land was registered in the name of 1st Defendant on 12th June, 2008. Initially the suit had been registered in favour of the government on 26th August, 2004.
14. The green card shows that the 1st Defendant transferred the suit land to the 2nd - 6th Defendants on 15th July, 2008, who then sub-divided the land into several parcels being Mavoko Block 3/5682-5717. The said sub-divisions were then transferred to the 7th-42nd Defendants.
15. The Defendants did not controvert the Plaintiff's claim that it is the Plaintiff's members who have been in possession of the entire land since 1995. It is therefore not in dispute that the Plaintiff's members have been in continuous, open and uninterrupted possession of the suit land they paid for.
16. As was held in the case of **Public Trustee vs. Wanduru Ndegwa, Civil Appeal No. 73 of 1982 (1984) eKLR**, adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve (12) years if the purchaser takes possession of the property. This is so because it is on such a date that the true owner is dispossessed off possession, and therefore the period of limitation starts to run.
17. Having not disrupted the Plaintiff's occupation of the suit land since 1995, the title of Lukenya Ranching and Farming Co-operative Society Limited was extinguished around the year 2007. The Society could not have therefore passed a valid title either to the government or the 1st Defendant in the year 2008. The transfer of the suit land to the 1st-42nd Defendants was therefore an exercise in futility, the title to the land having been extinguished by effluxion of time.
18. For those reasons, I find that the Plaintiff's members have established on a balance of probabilities that they are entitled to the suit land having been on the land *nec vic, nec clam, nec precario* for twelve (12) years. Consequently, I allow the Originating Summons dated 25th September, 2012 as follows:

a. The Kenya African National Traders & Farmers Union be and are hereby declared to have acquired title by adverse possession to the suit premises previously known as Plot No. 406 at Lukenya Ranching and Farming Co-operative Society Limited and now known as Mavoko Town Block 3/2174 (and upon sub-division into Mavoko Town Block 3/5686 -5717 (inclusive).

b. That the registration of Rose Muthoni John as proprietor of parcel of land known as Mavoko Town Block 3/2174 (and upon sub-division into Mavoko Town Block 3/5682-5717) and the persons deriving title from Rose Muthoki John being Paddy Kamau Nganga, George Ngaari Nganga, George Kariuki, John Githirwa Maina and all other Defendants named herein or Lukenya Ranching & Farming Co-operative Society Limited based on the land previously known as Plot No. 406 and now known as Mavoko Town Block 3/2174 (and upon sub-division into Mavoko Town Block 3/5682-5717) inclusive be cancelled and the Land Registrar Machakos do rectify the register to enter the name of the Plaintiff as the registered proprietor.

c. The costs of this suit to be borne by the Defendants.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE