



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 17 OF 1999 (O.S)

SCOLA KATITI.....PLAINTIFF

VERSUS

NZAU KYESU.....DEFENDANT

JUDGMENT

1. In the Originating Summons dated 31st December, 1999, the Plaintiff is seeking for the following reliefs from the court:

a. That the Plaintiff herein having been in continuous, quiet and uninterrupted possession of Land Parcel Number Mutonguni/Kauwi/669 for a period of over twelve (12) years, the Plaintiff be declared to have acquired proprietary interest in the suit land.

b. The registration of the Defendant as proprietor of the said land being a first registration which is subject to prescriptive rights which were in the process of being acquired by the Plaintiff, and the prescription period having expired then the Defendant be declared to hold the Land Parcel Title Number Mutonguni/Kauwi/669 in trust of the Plaintiff.

c. The Defendant do effect transfer of title to the suit land to the Plaintiff and the Plaintiff be registered as proprietor of the same.

d. Such other orders be made as may effect the registration of the Plaintiff as the proprietor of the suit land.

2. The Originating Summons is supported by the Affidavit of the Plaintiff who has deponed that land parcel number Mutonguni/Kauwi/669 (*the suit land*) is registered in the name of the Defendant; that the late Elias Katiti Nganda and the Defendant entered into a Sale Agreement in respect of the suit land on 31st December, 1976 before the adjudication process was completed and that the late Elias Katiti entered into possession of the suit land immediately after purchasing the land.

3. According to the Plaintiff, the suit land remains in possession of the late Elias Katiti from 1976 until 1998 when Mr. Nganda passed away and that it was after the death of Mr. Nganda that the Defendant attempted to fence off the land to prevent the family of Elias from utilizing the land. The Plaintiff finally deponed that her use and occupation of the suit land has been uninterrupted since 1976 upto 1998 and that she has acquired prescriptive rights over the land.

4. The Defendant filed Grounds of Opposition in which he averred that the Plaintiff has never been in possession of the suit land for twelve (12) years as alleged; that the deceased's husband had sought to purchase one (1) acre of the suit land but never completed paying the outstanding balance of the purchase price and that the deceased never took possession of the land as evidenced in his Defence in Kitui PMCC No. 300 of 1998.

5. The Defendant finally deponed that in 1976, the Plaintiff had not married Elias Katiti Nganda, the deceased; that Kilonzo Kinyua trespassed on the suit land in November, 1998 and that the Plaintiff has not acquired title over the suit land by adverse possession.

6. The Plaintiff, PW1, informed the court that the late Elias Katiti was her husband; that he purchased the suit land in 1976 from the Defendant and that by 1976, she was married to the late Elias Katiti. It was the evidence of PW1 that she moved on the suit land together with the late Elias in 1976; that her husband died in 1998 and that they were in occupation of the land between 1976 -1998.

7. PW1 informed the court that when the late Elias Katiti died in 1998, the Defendant became violent and evicted her from the suit land. According to PW1, they used the land with Kilonzo Kinyua, who is her late husband's nephew, during the life time of Elias and that the land should be registered in her name. The Plaintiff produced the Agreement of 31st December, 1976 in evidence.

8. In cross-examination, PW1 stated that she was already married to Elias in 1976; that she did terraces on the land and cultivated it after the

purchase of the same in 1976 by her husband and that she used the land for more than twelve (12) years.

9. PW2 informed the court that he witnessed the late Elias Katiti buy the suit land from the Defendant in 1976; that he signed the Agreement that was entered into between the Defendant and the late Elias Katiti in 1976 and that the late Elias Katiti paid the entire purchase price. According to PW2, when Katiti died, the Defendant tried to grab the land from his family members and that the Plaintiff is entitled to the suit land.

10. In cross-examination, PW2 stated that the late Katiti bought one (1) acre of the suit land and that the Plaintiff did terraces on the land and planted sisal on it.

11. The Defendant, DW1 informed the court that the entire land which is registered in his name measures 3.75 acres; that in 1976, he sold a portion of the land measuring one (1) acre to the late Elias Katiti at an agreed price of Kshs. 675 and that he only paid him Kshs. 275 leaving a balance of Kshs. 400.

12. It was the evidence of DW1 that in 1976, the Plaintiff was not married to the late Mr. Katiti; that the Plaintiff was married to the late Katiti in 1978 and that although the late Katiti occupied the one acre that he had bought in 1976, he stopped him from using the land in the same year.

13. It was the evidence of DW1 that when Mr. Kinyua Kilonzo, a relative of Elias Katiti tried to trespass on the land in 1998, he reported the issue to the District Officer who was unable to handle the dispute. That is when he sued him in Kitui PMCC No. 300 of 1998.

14. According to DW1, the Plaintiff has never been in possession of the suit land since 1976 or at all; that he is the one who has been on the land since 1976 and that the Plaintiff has her homestead and farm in Katutu location, which is 30 km away from where the suit land is. It was the evidence of DW1 that he only allowed the late Katiti on the land for six (6) months.

15. DW2 informed the court that the Defendant is his neighbour. It was the evidence of DW2 that although the Defendant sold to the Plaintiff's husband a portion of the suit land measuring one (1) acre, the late Katiti never took possession of the land.

16. The evidence of DW2 was that after the Plaintiff was married to the late Elias Katiti; she was settled 15 km away from the suit land; that it is the Defendant who has been in possession of the suit land all along and that the Defendant has fenced the land with sisal plants and cultivates it.

17. In cross-examination, DW2 stated that the Defendant is his relative; that indeed, the two of them are cousins and that although he knows the Plaintiff's late husband purchased a portion of the suit land from the Defendant, he never witnessed the signing of the Agreement. According to DW2, the Defendant stopped the deceased from using the land when he was unable to pay the balance of the purchase price.

18. The Plaintiff's advocate submitted that the Plaintiff has demonstrated through her testimony that her late husband bought an acre of land from the Defendant; that the Plaintiff's husband took possession of the land and continued being in possession until 1998 when he passed on and that between 1976 and 1998 when he was in possession of the suit land is more than twelve (12) years.

19. Counsel submitted that the Plaintiff's occupation of the suit land with her late husband was open, peaceful and in a manner inconsistent with the rights of the registered owner thereof. Counsel submitted that there is nothing to show that the Defendant interrupted the Plaintiff's continuous occupation of the suit.

20. The Plaintiff's counsel submitted that there is no evidence to show that the Defendant sued for the balance of the unpaid balance of Kshs. 275 or sought to evict the deceased from the land. According to counsel, the Plaintiff's case has met the legal threshold for a claim of adverse possession and is entitled to one (1) acre of land known as Mutonguni/Kauwi/669. Counsel relied on the case of **Peter Mbiru Michuki vs. Samuel Mugo Michuki (2014) eKLR**, which I have considered. The Defendant's counsel did not file submissions.

21. The evidence before this court shows that on 31st December, 1976, the Defendant entered into a written Sale Agreement with the Plaintiff's late husband, Elias Katiti Nganda. According to the Agreement, the Defendant sold to the late Katiti Nganda an unsurveyed parcel of land measuring one (1) acre for Kshs. 675. The Agreement stipulates that the late Katiti Nganda paid Mr. Nzau Kshs. 275 leaving a balance of Kshs. 400. Six (6) elders, including PW2, signed the Agreement of 31st December, 1976.

22. The parties entered into a further Agreement of 13th January, 1977 in which the Defendant acknowledged receipt of a further payment of Kshs. 168, with subsequent acknowledgements of the payments of the balance price having been made on 5th April, 1977 and 1st May, 1977.

23. The evidence of PW2 was that he witnessed the signing of the Agreements that the late Katiti entered into with the Defendant in respect of the one (1) acre of land. The said land, after adjudication, was registered as Mutonguni/Kauwi/669 measuring 1.5 Ha (*approximately 3.75 acres*).

24. The Defendant has not denied that he signed the Agreements that were produced in evidence by the wife of the late Katiti (PW1). The Defendant admitted that indeed he sold to the late Katiti one (1) acre of the suit land.

25. The evidence of the Defendant was that after paying Kshs. 250, the late Katiti did not pay up the balance of the purchase price and that he stopped him from using the land the same year (1976) and that he is the one who has been in occupation of the land since then.

26. The evidence produced by the Plaintiff, and the testimony of PW2, shows that the late Katiti paid up the entire purchase price. Indeed, in

the Agreement of 1st May, 1977 which was witnessed by three (3) elders, it states that Katiti Nganda had given the wife of Nzau Kyesu (*the Defendant*) Kshs. 100.00 to conclude the Sale Agreement of the land he had purchased.

27. Even if it is true that the late Katiti did not pay the balance of the purchase price, the question that arises is this: did the Defendant demand in writing for the said balance of the purchase price? Indeed, the Defendant has not produced any evidence to show that he demanded for the balance of the purchase price. Considering that the Defendant admitted that he was paid a deposit of Kshs. 250 on the date the initial Agreement was signed, and that he allowed the Plaintiff's late husband to take possession of the suit land, it is unlikely that the late Katiti would vacate the land in under six (6) months without asking to be refunded his deposit.

28. The most probable thing that happens when someone is kicked out of the land he has purchased and paid a deposit is to ask for a refund of the purchase price, or sue the seller for either an order of specific performance or for refund of the deposit. In this case, the Defendant wants this court to believe that even after paying almost half of the purchase price, the late Katiti voluntarily stopped using the suit land in less than six (6) months after being given possession without demanding for a refund of his money until 1998 when he died. That cannot be what happened in this matter because of the propensity of what any other human being would do in such circumstances, that is, demand for a refund of the deposit paid.

29. The evidence by PW1 and PW2 that the late Katiti used the suit land by cultivating it from 1976 until 1998 when he died is believable. Indeed, the late Katiti having paid for the land could not just vacate the land without putting up a fight. The Defendant only purported to take back the land in 1998 after the death of Mr. Katiti with the expectation that the old widow, the Plaintiff, will not lay a claim on the land. That was not so, because she filed this suit immediately the Defendant purported to kick out the late Katiti's nephew, Kilonzo Kinyua, from the one (1) acre piece of land.

30. Although the Defendant was registered as the owner of the suit land on 13th November, 1989, it is the Plaintiff and her late husband who were using the one (1) acre portion of the suit land that the Defendant sold to Mr. Katiti since 1976 until 1998 when Mr. Katiti died.

31. Having used the disputed portion of land as the wife of the purchaser openly, peacefully and in a manner that is inconsistent with the rights of the Defendant for twelve (12) years, the Plaintiff is entitled to the said land by way of adverse possession. Indeed, Plaintiff having not taken any practical step to recover the land from the Plaintiff and her late husband from 1976 until 1998, he is time barred from claiming the suit land (*See Section 7 of the Limitation of Actions Act*).

32. Considering that the evidence before me shows that the Plaintiff is entitled to the one (1) acre of parcel of land known as Mutonguni/Kauwi/669 by way of adverse possession, and in view of the provisions of Section 38(1) of the Limitation of Actions Act, I allow the Plaintiff's Originating Summons dated 31st December, 1999 as follows:

a. The Plaintiff herein having been in continuous, quiet and uninterrupted possession of one (1) acre of Land Parcel Number Mutonguni/Kauwi/669 for a period of over twelve (12) years, the Plaintiff be and is hereby declared to have acquired proprietary interest in the suit land.

b. The registration of the Defendant as proprietor of the said land being a first registration which is subject to prescriptive rights which were in the process of being acquired by the Plaintiff, and the prescription period having expired then the Defendant be and is hereby declared to hold one (1) acre of the Land Parcel Title Number Mutonguni/Kauwi/669 in trust of the Plaintiff.

c. The Defendant do effect transfer of title in respect of one (1) acre of parcel title number Mutonguni/Kauwi/669 to the Plaintiff and the Plaintiff be registered as proprietor of the same.

d. The Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE