



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 200 OF 2018 (O.S)

MWENE MUNDA WELFARE ASSOCIATION

(Suing through its Chairman, Secretary and Organizing Secretary)

DUNCAN KAMBA

KAVILI MBITHI

MUTHUI MUSEMBI.....PLAINTIFF

VERSUS

KITUI COUNTY GOVERNMENT.....1ST DEFENDANT

B2 YATTA RANCHING CO-OP. SOCIETY LTD.....2ND DEFENDANT

KATOTENI NGUAMUKA FARMERS ENVIRONMENTAL CONSERVATION

(Sued through its Patron, Chairman, Secretary and Organizing Secretary)

KYALO NGUTHU

MUTHENGI MULAMBAYA

CEDRIC SAMMY MWANZIA

JOSEPHAT NGUU NDONGA.....3RD DEFENDANT

RULING

1. In the Application dated 17th October, 2018, the Plaintiff is seeking for the following orders:

a. That pending the hearing and determination of this suit and/or further orders, this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants either by themselves, their authorized agents, servants, employees, workers or otherwise whomsoever from harassing, intimidating, threatening the officials and/or the members of the Plaintiff and/or entering, trespassing, evicting, threatening to evict, alienating, selling, advertising for sale, transferring, charging, mortgaging, registering, and/or otherwise interfering with the Plaintiff's, its officials, members, and/or the Plaintiff's its officials and member's possession, use, occupation and/or quiet enjoyment to a portion measuring 3,000 acres or thereabout of all that property situated at the intersection of Katoteni River and Mwita Syano River and being a portion of all that parcel of land known as L.R. No. 12010 at Kitui Yatta B2 (Katoteni), within Kitui County.

b. That costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff's Chairman who has deponed that the Plaintiff is a registered welfare group with a membership of over 3,000 members; that the 1st Defendant is the owner as trustee of land reference number 12010 measuring approximately 30,200 acres situated at Kitui Yatta B2, Katoteni and Land reference number 11802 measuring approximately 23,109 acres situate in Kitui County.

3. According to the Plaintiff's Chairman, the 1st Defendant's predecessor granted to Kitui Yatta Kanyonyoo Co-operative Society L.R. No. 11802 for a term of 99 years with effect from 1st January, 1965; that the 1st Defendant leased L.R. No. 12010 to Katoteni Ranching Society by way of a gazette notice dated 17th January, 1967 for 20 years and that on 12th July, 1974, Kitui Yatta Kanyonyoo Co-operative Society Limited and Katoteni Ranching Society Limited amalgamated into B2 Yatta Ranching Co-operative Society Limited (*the 2nd Defendant*).
4. It is the Plaintiff's case that when the Lease that was issued to Katoteni Ranching Society Limited in respect of L.R. No. 12010 measuring 30,200 acres lapsed, the 2nd Defendant never applied for the renewal of the same; that the members of the 3rd Defendant entered and occupied a portion of L.R. No. 12010 measuring 17,000 acres in July, 2006 and that in the same year, the Plaintiff's members occupied a portion of the same land measuring 3,000 acres (*the suit land*).
5. The Plaintiff's Chairman deponed that since the year 2006, the members of the Plaintiff have been in actual, open, physical and uninterrupted possession of the 3,000 acres of L.R. No. 12010; that the Defendants have always known of the use and occupation of the portion of L.R. No. 12010 measuring approximately 3,000 acres by the Plaintiff's members; that the Plaintiff's members have acquired the said 3,000 acres of land of L.R. No. 12010 by way of adverse possession and that the rights of the 1st Defendant in respect of the 3,000 acres has since become extinguished and the Plaintiff's members have become entitled to be registered as the proprietors of the land.
6. The Plaintiff's Chairman finally deponed that the 3rd Defendant, with the approval of the 1st and 2nd Defendants, and in cahoots with the area police, have been harassing the officials of the Plaintiff with a view of evicting their members from the suit land.
7. In reply, one of the officials of the 3rd Defendant deponed that the Plaintiff's members have never resided on any portion of L.R. No. 12010; that the Plaintiff's members recently attempted to settle on the suit land and caused havoc and that the Plaintiffs filed these proceedings when they were charged with several criminal offences.
8. According to the 3rd Defendant, the 2nd Defendant herein (*B2 Yatta Ranching Co-operative Society*) sued the 1st Defendant in Machakos HCCC No. 9 of 2008 seeking several reliefs in respect to the suit land; that the 3rd Defendant herein was subsequently enjoined in the proceedings and that upon the court hearing the parties in that suit, it issued an order of *status quo*.
9. The 3rd Defendant's official deponed that by the consent of the parties in Machakos HCCC No. 9 of 2008, the portion of land measuring approximately 300 acres was excised from the suit land for surrender to the Government department in charge of the affairs of the Administration Police; that the 3rd Defendant's members have since resided peacefully on the suit land and that some strangers started trespassing on the suit land in September, 2018.
10. It is the 3rd Defendant's case that some of the trespassers on the suit, including one James Ilako Muthangya, were charged in court and that the trespassers have perpetrated acts of arson, assault and that it's the 3rd Defendant who have been in occupation of the suit land.
11. The 1st Defendant filed a Notice of Preliminary Objection in which it averred that the suit is not sustainable by virtue of Section 41 of the Limitation of Actions Act and that the concept of adverse possession does not apply against the Government of Kenya, the County Government, local authority or public land.
12. The Plaintiff's counsel submitted that all that the Plaintiff needs to prove at the hearing hereof is uninterrupted and exclusive possession of the portion of L.R No. 12010 measuring 3,000 acres for over twelve (12) years as against the 1st Defendant.
13. The Plaintiff's counsel submitted that at an interlocutory stage, all the Plaintiff has to show is that on the face of it, it has a right which has been or is threatened with violation and that the Plaintiff has established a prima facie case of possession, occupation and use of the suit land for a period of over twelve (12) years as against the 1st Defendant; that the Plaintiff has proved that its members have been in quiet and uninterrupted possession of the suit land and that their possession has been exclusive, adverse, hostile, open and notorious by residing, cultivating and grazing on the 3,000 acres of the suit land.
14. The Plaintiff's advocate submitted that the 3rd Defendant has confirmed that the Plaintiff's members have been on the land since the year 2018; that whether the said occupation of the suit land is since 2018 as alleged by the Defendants or 2006 as averred by the Plaintiff is a question of fact which can only be determined at the hearing and that an injunction should issue pending the hearing of the suit.
15. The Plaintiff's counsel submitted that if the orders sought are not granted, there is imminent danger of the Plaintiff's members being evicted from the suit land; that in applying the principles for the grant of interlocutory injunction, the exercise of discretion should balance the competing rights of both parties with a resultant effect to do justice and that the balance of convenience should tilt in favour of the Plaintiff.
16. The Plaintiff's advocate submitted that the 1st Defendant, who by law is vested with powers to hold the 3,000 acres of land in trust has not challenged the Plaintiff's claim to the 3,000 acres; that it is the 3rd Defendant who is a trespasser on the 1st Defendant's land, who is now claiming superior rights over the Plaintiff and that a trespasser cannot claim superior rights over the Plaintiff's land.
17. The Plaintiff's counsel submitted that the court should disabuse the 3rd Defendant's notion that the orders of *status quo* issued in Machakos HCCC No. 9 of 2008 gave to it any proprietary rights over L.R. No. 12010; that the orders in that suit were in the interim and that HCCC No. 9 of 2008 has never been heard to date. Counsel did not submit on the question of whether a claim for adverse possession can succeed as against the 1st Defendant.

18. The 3rd Defendant's advocate submitted that the entity that instituted these proceedings was registered on 25th May, 2018; that other than the officials of the group, none of its alleged members are disclosed and that the Plaintiff has not established a prima facie case with chances of success.

19. The 3rd Defendant's counsel submitted that the suit upon which the Motion is founded is primarily a claim for adverse possession which is not available to the Plaintiff; that this being a claim for adverse possession, the Plaintiff must show that they have been in continuous possession of the suit land for twelve (12) years and that such possession must have been open, notorious and with the knowledge of the owner.

20. The 3rd Defendant's counsel submitted that Section 41(a)(1) of the Limitation of Actions Act expressly exclude Government land from being acquired through adverse possession and that the suit land having been registered in favour of the 1st Defendant cannot be acquired by way of adverse possession.

21. This suit was commenced by way of an Originating Summons dated 17th October, 2018. In the Originating Summons, the Plaintiff is seeking to be declared to have acquired Title Deed by adverse possession of a portion of land measuring 3,000 acres of all land known as L.R. No. 12010 at Kitui Yatta B2 (Katoteni), within Kitui County.

22. Contemporaneously with the said Originating Summons, the Plaintiff filed the Notice of Motion in which it is seeking for injunctive orders restraining the Defendants from interfering with their possession of the suit land.

23. The undisputed facts in this matter are that the 1st Defendant, Kitui County Government, which is the Successor in law of the Kitui County Council, is the owner as trustee of Land Parcel L.R. No. 12010 measuring approximately 30,200 acres situated at Kitui Yatta B2 (Katoteni). As admitted by the Plaintiff, on 17th January, 1967, the then Kitui County Council set aside the entire land for ranching purposes and leased it to Katoteni Ranching Society Limited.

24. The Plaintiff's Chairman deponed that on 1st January, 1965, the then Kitui County Council leased another parcel of land known as L.R. No. 11802 measuring 23,109 acres for ranching purposes to an entity known as Kitui Yatta Kanyonyoo Co-operative Society Limited for twenty (20) years with effect from 1st January, 1965,

25. Katoteni Ranching Society Limited having been issued with a Letter of Allotment for L.R. No. 12010 (*the suit land*) in 1967 and Kitui Yatta Kanyonyoo Co-operative Society Limited having been granted a Lease of 99 years for L.R. No. 11802, the Plaintiff has claimed that two Co-operatives Societies were amalgamated on 12th July, 1974 to form B2 Yatta Ranching Co-operative Society Limited. The Plaintiff produced the Certificate of Registration for B2 Yatta Ranching Co-operative Society Limited (*the 2nd Defendant*) dated 12th September, 1974.

26. Whether the 2nd Defendant was formed after the amalgamation of Katoteni Ranching Society Limited and Kanyonyoo Co-operative Society Limited or not, the evidence produced by the Plaintiff shows that by way of gazette notice number 183 of 10th January, 1967, a parcel of land in Kitui Yatta B2 (Katoteni) Kitui District measuring approximately 30,200 acres was set apart for ranching purposes. This is the land that is currently being referred to as L.R. No. 12010.

27. The setting apart of the said land was done pursuant to the provisions of the Trust Land Act (*repealed*). After the said land was set apart by the Kitui County Council, the same was leased to Katoteni Ranching Co-operative Society vide a Letter of Allotment dated 17th August, 1967 for a period of twenty (20) years from 1st September, 1967. The said Lease therefore expired by effluxion of time on or about 30th August, 1987. By this time, the 2nd Defendant had already been incorporated by virtue of the amalgamation of the two Co-operative Societies on 12th September, 1974.

28. There is no evidence before me to show that the Lease that was granted to the 2nd Defendant in 1967 was ever renewed after it lapsed in 1987, meaning that the suit land, being Trust Land, reverted back to the Kitui County Council. Indeed, as at the time the 1st Defendant succeeded the then Kitui County Council, the suit land was Trust Land.

29. Under the Constitution, all land that was "Trust Land" under the repealed Constitution and the Trust Land Act (*repealed*) became Community Land (*See Article 63 (1) (iii)*). According to Article 63 (3) of the Constitution, any unregistered Community Land shall be held in trust by County Governments on behalf of the communities for which it is held.

30. The Plaintiff is seeking to be declared the owner of the suit land by way of adverse possession. Under Section 38(1) of the Limitation of Actions Act, where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, 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.

31. Section 37 of the Limitation of Actions Act provides that the Act applies to land registered under the Government Land Act, the Registration of Titles Act, the Land Titles Act or the Registered Land Act, which have all been repealed and replaced by the Land Act and the Land Registration Act, 2012.

32. The suit land herein is neither registered in the name of the 2nd Defendant nor the 3rd Defendant. The land is being held by the 1st Defendant in trust and on behalf of the Communities residing on the land or the county.

33. That being the position, is the Plaintiff entitled to the suit land by way of adverse possession which as provided for under Sections 37 and

38 of the Limitation of Actions Act? Section 41 of the Limitation of Actions Act provides as follows:

“This Act does not—

(a) enable a person to acquire any title to, or any easement over—

- i. Government land or land otherwise enjoyed by the Government;**
- ii. mines or minerals as defined in the Mining Act (Cap. 306);**
- iii. mineral oil as defined in the Mineral Oil Act (Cap. 307);**
- iv. water vested in the Government by the Water Act (Cap. 372);**
- v. land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300)); or**
- vi. land vested in the trustees of the National Parks of Kenya; or**

(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.”

34. In holding that one cannot succeed in a claim for adverse possession against a County Council, and by extension a County Government, Munyao J. held as follows:

“19. It will be seen from the above, that the Limitation of Actions Act, does not apply inter alia to land vested in the County Council... It follows therefore that one cannot claim the reliefs provided for in the Limitation of Actions Act, including the relief of adverse possession, for land vested in County Councils” (See Francis Kangongo Cheboi vs. Vincent Kiprono Keino & 4 Others (2013) eKLR).”

35. To the extent that the suit land vests in the 1st Defendant, and the same is held by the 1st Defendant on behalf of the communities residing in the County Government of Kitui, and in view of the provisions of Section 41 of the Limitation of Actions Act, it is unlikely that the Plaintiff can acquire the suit land by way of adverse possession.

36. The reading of Section 41 of the Limitation of Actions Act clearly protects the then County Councils from being sued for claims of adverse possession. Even if it is argued that a County Government is a different entity from a County Council, which is not true, the question that would arise is this: Has the County Government of Kitui been in existence for twelve (12) years? The answer is obviously no.

37. Furthermore, the fact that the suit land is not registered under any of the Acts of Parliament mentioned under Section 37 of the Limitation of Actions Act renders the claim for adverse possession a non-starter.

38. In view of the above analysis of the provisions of Sections 41, 37 and 38 of the Limitation of Actions Act viz-a-viz the Plaintiff's suit, I find and hold that the Plaintiff has not established a prima facie case with chances of success. On that ground alone, the Notice of Motion dated 17th October, 2018 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2019.

O.A. ANGOTE

JUDGE