



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. MISC. APPLN. NO. 17 OF 2019**

**NDOLO SILA.....1<sup>ST</sup> APPLICANT**

**JUSTUS NGUI.....2<sup>ND</sup> APPLICANT**

**AGNES MUSYOKA.....<sup>RD</sup> APPLICANT**

**PRISCILLA MUTINDI KIIO.....4<sup>TH</sup> APPLICANT**

**JOSEPH MULI MUMO.....5<sup>TH</sup> APPLICANT**

**MWANZIA KYALO.....6<sup>TH</sup> APPLICANT**

**MUIA SAMMY.....7<sup>TH</sup> APPLICANT**

**MARTIN MUTIE NZUKI.....8<sup>TH</sup> APPLICANT**

**VERSUS**

**LUCY NJERI.....1<sup>ST</sup> RESPONDENT**

**WANJIRU NDUTA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. In the Notice of Motion dated 16<sup>th</sup> April, 2019, the Applicants are seeking for the transfer of Kithimani ELC. No. 2 of 2019 to this court.
2. The Application is supported by the Affidavit of the 1<sup>st</sup> Applicant who has deponed that the Respondents filed a case at Kithimani Law Courts for his eviction from land known as Machakos/Ndalani Phase 11/79; that he was allocated the suit property in 1972 by the Land Officers then; that he has lived on the suit property with his family since 1972 and that in his Defence, he has pleaded the Defence of adverse possession, a claim of which the lower court does not have jurisdiction to deal with.
3. In reply, the 1<sup>st</sup> Respondent deponed that the Applicants filed the suit in Kithimani ELC Case No. 2 of 2019 seeking to restrain the Applicants from trespassing on the suit property; that the Applicants proceeded to file a Defence and Counter-claim and that the only evidence that the 1<sup>st</sup> Applicant has relied on in the attempt to prove that he is entitled to the suit land by adverse possession is a letter of the Deputy Commissioner dated 17<sup>th</sup> October, 2018.
4. The 1<sup>st</sup> Respondent finally averred that the claim that the suit property had been allocated to the 1<sup>st</sup> Applicant by the then land officers cannot co-exist with the averment of acquiring the suit property by way of adverse possession and that while this court has jurisdiction to hear a claim on adverse possession, a transfer of the file to this court would only be prudent if the Applicants provide evidence on the face value of the existence of adverse possession.
5. In his submissions, the Applicants' advocate deponed that a party can raise the issue of adverse possession in his Defence or Counter-claim; that under Section 38(1) of the Limitation of Actions Act, it is only the High Court that can determine the issue of acquisition of land by way of the doctrine of adverse possession and that the lower court file in Kithimani ELC. No. 2 of 2019 should be transferred to this court.

6. The Respondents' counsel submitted that before the lower court file is transferred to this court, the Applicants have to prove that they have been on the property for over twelve (12) years and that the Applicants are gambling between a claim that the land was allocated to the 1<sup>st</sup> Applicant and a claim for adverse possession.

7. The copy of the Plaint annexed on the 1<sup>st</sup> Applicant's Affidavit shows that the Respondents herein sued the Applicants in Kithimani SRMCC No. 2 of 2019. In the said Plaint, the Respondents are seeking for a declaration that the late WambuiGitha Jacinta, whose Estate they are representing, is the registered proprietor of land known as Machakos/Ndalani Phase 11/79.

8. The Respondents have further sought for an order of permanent injunction restraining the Defendants from claiming the suitland and damages for trespass.

9. The Applicants filed a Defence and Counter-claim in respect to the Plaint. In their Counter-claim, the Defendants/Applicants averred that the 1<sup>st</sup> Defendant/Applicant settled on the suit property in 1972; that the Plaintiffs/Respondents lost their claim to the suit property by the equitable doctrine of laches and adverse possession and that the title to land known as Machakos/Ndalani Phase 11/79 should be declared to have been lost by the Plaintiffs to the Defendants by way of adverse possession.

10. It is trite that a Defendant can raise a Defence of adverse possession while responding to the Plaintiff's claim. Indeed, in the case of *Chevron (K) Limited vs. Harrison Charo Wa Shutu (2016) eKLR*, the Court of Appeal quoted with approval the case of *Gulam Mariam Noordin vs. Julius Charo Karisa, Civil Appeal No. 26 of 2015*, where the court held as follows:

***“When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant; and that the latter's title was so extinguished.”***

11. Section 38(1) of the Limitation of Actions Act grants this court (*the High Court*) exclusive jurisdiction to handle claims pertaining to adverse possession. The said Section states 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.”***

12. Considering that the 1<sup>st</sup> Applicant has pleaded in the Counter-claim that he settled on the suit property in 1972 and that the court should declare him as the owner of the land under the doctrine of adverse possession, then, it is only this court that can entertain the Counter-claim, and not the lower court.

13. Although the Respondents have invited the court to look at the Applicants' claim to ascertain if indeed their claim meets the threshold for a claim of adverse possession, I decline to accept the invitation. Indeed, any comment by this court on whether the 1<sup>st</sup> Applicant has a good claim or not will amount to the court making a decision before hearing the parties. The issue raised by the Respondents on the merits of the Applicants' claim can only be dealt with by this court at trial, or while dealing with an Application for injunction, and not otherwise.

14. Having pleaded in the Counter-claim that they are entitled to the suit property by way of adverse possession, the Applicants' Application dated 16<sup>th</sup> April, 2019 is meritorious. The Application dated 16<sup>th</sup> April, 2019 is therefore allowed as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**