



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. MISC. APPLN. NO. 53 OF 2017**

**PAUL MULI MUYANGA.....APPLICANT**

**VERSUS**

**KAINDI NGUI MUNUVE.....RESPONDENT**

**JUDGMENT**

1. In the Originating Summons dated 29<sup>th</sup> May, 2017, the Plaintiff has prayed for the following orders:

***a. That the Plaintiff herein be declared to be entitled by adverse possession for over twelve (12) years to all that parcel of land known as Nzambani/Kyanika/43.***

***b. That the Plaintiff be registered as absolute proprietor in respect of title number Nzambani/Kyanika/43.***

***c. That the costs of these summons be awarded to the Plaintiff.***

2. The Originating Summons is supported by the Affidavit of the Plaintiff who has deponed that the Defendant is the registered proprietor of a parcel of land known as Nzambani/Kyanika/43 (*the suit land*); that he was born and brought up on the suit land and that he is 43 years old.

3. According to the Plaintiff, he has lived on the suit land continuously, peacefully and uninterrupted for a period of twelve (12) years; that his parents and brother were buried on the suit land and that he has acquired prescriptive rights over the suit land.

4. In response, the Respondent deponed that her late husband, Simon Ngui Munuve, purchased land parcel number Nzambani/Kyanika/43 from the Plaintiff's father; that her husband then allowed the Plaintiff's family to cultivate the suit land because the Plaintiff's family own the adjacent land which is Nzambani/Kyanika/42 and that upon the demise of her husband and after the distribution of his Estate, he was bequeathed the suit land and issued with a Title Deed on 9<sup>th</sup> April, 1991.

5. The Respondent finally deponed that there is no development or construction on the suit land and that the suit should be dismissed. The Originating Summons proceeded by way of *viva voce* evidence.

6. In his evidence, the Plaintiff, PW1, informed the court that he lives on the suit land; that he was born on the land in 1976 and has been living on the suit land since then and that he has buried his brother and wife on the land.

7. According to the evidence of PW1, the Surveyor visited the suit land and confirmed that he has put up houses on parcel number 43 and that the Defendant has never lived on or cultivated the suit land.

8. In cross-examination, PW1 stated that she was not aware that the suit land had been sold to her father-in-law, Muyanga Muli; that Phillip Muli is her nephew and that she was not aware of the Agreement of 26<sup>th</sup> July, 2016.

9. On his part, the Defendant, DW1, stated that parcel number 43 was bought by her late husband many years ago; that her late husband bought the land from Muyanga Muli vide an Agreement dated 28<sup>th</sup> August, 1973 and that the Plaintiff resides on a neighboring piece of land.

10. According to DW1, it is Mr. Kithome, and not the Plaintiff, who has developed the suit land and that although she wanted to sell the suit land to Lameck (*his sister*), her family declined to approve the sale. According to DW1, the Plaintiff has been cultivating the suit land with her permission; that the suit land has graves and that it is true that the late Kithome was buried on the suit land.

11. In his submissions, the Plaintiff's advocate submitted that the District Surveyor confirmed in his report that the houses, the graves and the cultivation of the land were on parcel of land number Nzambani/Kyanika/43; that the Defendant has never displaced the Plaintiff from the

land and that since 1976, he has been living on the suit property.

12. The Plaintiff's advocate submitted that on the basis of the evidence before the court and the applicable law, the Plaintiff has been in possession of the suit land openly, continuously and uninterrupted for a period of twelve (12) years. Counsel relied on several authorities which I have considered.

13. The Defendant's advocate submitted that on a closer look of the map, the two unidentified graves are at the boundary of the said parcels of land; that this means that the parties were not sure of the boundaries during the burial and that the Defendant allowed the Plaintiff to bury his relatives on the suit land.

14. Counsel submitted that the Plaintiff has been using the suit land periodically with the express permission of the Respondent and that the land belonging to the family of Muli Muyanga is parcel number Nzambani/Kyanika/42 and not the suit land.

15. The evidence before me shows that the Defendant was registered the proprietor of parcel of land known as Nzambani/Kyanika/43 on 9<sup>th</sup> April, 1991. According to the Defendant, the suit land was initially registered in her late husband's name. Upon his death, the said land was transmitted to her.

16. The Plaintiff informed the court that he was born and raised on parcel number 43; that he was born in 1976 and that he has always lived and cultivated the suit land. To prove that he actually resides on the suit land, and that he has buried his relatives on the land, including his late brother Kithome, the Plaintiff produced the Surveyor's report.

17. In his report dated 9<sup>th</sup> October, 2018, the District Surveyor, Kitui, stated that parcels of land known as Nzambani/Kyanika/42 and 43 exist on the ground; that the boundary separating the two parcels of land was non-existent and that a permanent house is built on parcel number 43. The Surveyor further stated in his Report that parcel number 43 has four (4) existing graves.

18. The Defendant stated that the suit land was purchased by her late husband from the Plaintiff's father vide an Agreement dated 28<sup>th</sup> August, 1973 and that her husband allowed the Plaintiff to be cultivating the same. DW1 admitted that the Plaintiff's brother is buried on the suit land.

19. The Plaintiff has shown, by way of the Surveyor's report, that he has a house on the suit land. Indeed, the Defendant has admitted that since her husband purchased the land in 1973, they have never utilized it. The fact that the Defendant has never taken possession of the suit land since 1973 when her husband purchased it goes a long way to confirm the Plaintiff's assertion that he has never vacated the suit land since he was born in 1976.

20. The Defendant never adduced evidence to show that the Plaintiff is occupying parcel number 42 and not parcel number 43. Considering that the Defendant's husband bought the suit land from the Plaintiff's father in 1973 but never took possession of the same, and in view of the evidence produced in court showing that the Plaintiff has been in possession of parcel number 43 since the year 1973, I am convinced that the Plaintiff has been in possession of the land openly, continuously and uninterrupted for at least twelve (12) years.

21. Section 38(1) of the Limitation of Actions Act provides as follows:

***“(1) 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.”***

22. Having shown that his possession of the suit land is adequate, continuous and exclusive, and in the absence of evidence to the contrary, I allow the Plaintiff's Originating Summons dated 29<sup>th</sup> May, 2017 as follows:

***a. That the Plaintiff be and is hereby declared to be entitled by adverse possession to all that parcel of land known as Nzambani/Kyanika/43.***

***b. The Land Registrar, Kitui, do register the Plaintiff as the absolute proprietor of parcel number Nzambani/Kyanika/43.***

***c. Each party to pay for his/her own costs.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**O.A. ANGOTE**

**JUDGE**