



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO. 1971 OF 1999**

**MARIO MAJANE KIMANI & 12 OTHERS.....PLAINTIFFS**

**=VERSUS=**

**NAIROBI CITY COUNCIL & 2 OTHERS.....DEFENDANTS**

**JUDGEMENT**

**Introduction**

1. This Originating Summons was filed by thirteen (13) Plaintiffs on behalf of members of Baba Dogo Welfare Society which was said to comprise of 800 members. The Plaintiffs sought to be registered as owners of LR Nos.336/64 and 336/65 (suit properties) by way of adverse possession. Prior to filing of this suit, the Plaintiffs had sought leave of Court to file this suit as a representative suit. The leave was granted on 6<sup>th</sup> October 1999.

2. Though the Plaintiffs were claiming the suit properties, during the hearing, the witnesses for Plaintiffs indicated that they no longer had interest in LR No336/65. They stated that they were only interested in LR No. 336/64 (suit property). The suit property was originally owned by Jose Antonio Remedio D'Silva and Francis Soares. The latter was locally known as Baba Dogo after which Baba Dogo Estate in Ruaraka area as well as other institutions were named. Baba Dogo seems to have had huge parcels of land within the area and wherever he donated any land for public purposes, he insisted that the recipient had to incorporate the name Baba Dogo, hence the names such as Baba Dogo Primary School, Baba Dogo Secondary School, Baba Dogo Catholic Church and Baba Dogo Sports grounds etc.

3. By an indenture dated 16<sup>th</sup> March 1973, Baba Dogo and his co-owner conveyed the suit property to Unicom Investments Limited (2<sup>nd</sup> Defendant). By an agreement dated 6<sup>th</sup> May 1999, the 2<sup>nd</sup> Defendant sold the suit property to Avi Marketing and Investments Limited (3<sup>rd</sup> Defendant). After purchase of the suit property by the 3<sup>rd</sup> Defendant, the 3<sup>rd</sup> Defendant took possession and evicted persons who had encroached on to parts of the suit property particularly the parts which touched on the roads within the area.

4. The 3<sup>rd</sup> Defendant then embarked on construction of a perimeter fence round the suit property and proceeded to level the ground by removing tons of soil which it sold to a third party. This is what prompted the plaintiffs to file Nairobi HCCC No.1648 of 1999 (OS) which was later terminated and the current suit filed.

**Plaintiffs Case**

5. The Plaintiffs presented evidence of three witnesses. It is the Plaintiff's case that they have been staying in the suit property since 1983 until 1999 when the 3<sup>rd</sup> Defendant evicted them from the suit property on allegations that it had purchased the suit property. It is their evidence that all along, they have known that the suit property had been donated by Baba Dogo for construction of a market in the area. To the Plaintiffs, the 3<sup>rd</sup> Defendant's action amounted to grabbing of a public utility plot.

6. One of the witnesses PW1 John Thuo stated that he is a member of Baba Dogo Welfare Society. His father used to stay on the suit property with the permission of Baba Dogo. While he was a young man in the 1970's he used to visit his father. He himself entered the suit property in 1994. His father died in 1998. He testified that he had come to Court on his behalf and on behalf of his deceased father and mother as well as the 800 members of Baba Dogo Welfare Society.

7. On her part, PW2 Joyce Wairimu testified that she was born in the suit property in 1966. She testified that she was raised by her grandmother who was working for Baba Dogo. When her grandmother grew old and unable to work, Baba Dogo gave her a portion of the suit property where she stayed until her demise at the age of 129 years in the year 2012. She testified that she started working independently of her grandmother in 1993. She kept goats, had a food kiosk, sold charcoal and groceries. She testified that in 1999, a lady called Jane Wangui who was in company of a man of Asian descent went to the suit property and declared that the third Defendant was the owner of the

suit property. She testified that her structures were demolished and she was evicted. They came to court where they obtained injunctive orders after which she went back and reconstructed her structures. Since re-construction, she has not been removed from the suit property. The witness further testified that she inherited the portion which her grandmother had been allocated by Baba Dogo.

8. PW3 George Odanga testified that he was a footballer in his younger days. Baba Dogo used to sponsor the footballers. In 1976, Baba Dogo gave him a space of 5ft by 7 ft where he built a kiosk. He used to sell sodas and oranges. He testified that all along, he knew that the suit property belonged to Baba Dogo. Baba Dogo died in 1980. He still continued to stay on the suit property until 1999 when he together with others were arrested and taken to court but since the complainant did not attend court, they were released. While he was in custody, his kiosk was demolished in preparation for construction of a wall round the suit property. He stated that the plaintiffs have no problem with LR NO.336/65 but had issues with the suit property. The witness conceded that there was no search conducted to ascertain ownership of the suit property before they filed this suit.

#### **First Defendant's Case.**

9. The first Defendant did not call any evidence. However the 1<sup>st</sup> Defendant's position is that the Plaintiffs have no cause of action against it. The 1<sup>st</sup> Defendant contends that as far as it is concerned, the suit property as well as LR 336/65 which were originally LR 336/12/2 belonged to Baba Dogo and his co-owner Francis Soares. The two donated LR 336/65 for development of public utilities and that the suit property was reserved for a public market. The 1<sup>st</sup> Defendant states that whoever claims ownership of the suit property has to provide proof of the same.

#### **The Second Defendant's Case**

10. The second Defendant did not call any evidence but it adopted the witness statements of the 3<sup>rd</sup> Defendant's witness as well as the documents relied upon by the 3<sup>rd</sup> Defendant.

#### **The Third Defendant's Case**

11. The 3<sup>rd</sup> Defendant presented two witnesses. The witnesses testified that the 3<sup>rd</sup> Defendant purchased the suit property from the 2<sup>nd</sup> Defendant on 6<sup>th</sup> May 1999 at Kshs.39,000,000/=. When the suit property was purchased, the same was vacant save for some temporary structures which were at the periphery of the suit property. The 3<sup>rd</sup> Defendant applied to the 1<sup>st</sup> Defendant seeking permission to put up a fish factory. Approvals were given but were later cancelled. There was an application to construct go downs. The application for construction of go downs was granted. There was also approval from National Environmental Management Authority. These approvals were later cancelled on allegations that the suit property was a public plot. When the 3<sup>rd</sup> Defendant started putting up a perimeter wall, there was a lot of resistance from some people who had encroached on to the suit property. The 3<sup>rd</sup> Defendant put up a wall which was pulled down by the 1<sup>st</sup> defendant.

12. The 3<sup>rd</sup> Defendant denied that the Plaintiffs' claim that they were on the suit property arguing that there were only a few temporary structures which were on the road reserve but had partly encroached on to the suit property. The encroaching structures were the ones which were removed during the construction of the wall. The 3<sup>rd</sup> Defendant explained that initially the 3<sup>rd</sup> defendant was called Kutchi Constructions Limited. On 9<sup>th</sup> January 1999, the Company made a special resolution where the name of the Company changed to Avi Marketing and Investments Limited before the Company purchased the suit property. On the delay to have the certificate of change of name which came out in 2007, the 3<sup>rd</sup> Defendant explained that the delay was on the part of the companies registry.

13. The 3<sup>rd</sup> Defendant further testified that its offices wrote letters to the relevant authorities seeking confirmation on ownership of the suit property. It was finally confirmed that the 3<sup>rd</sup> Defendant is the owner of the suit property. When the lease expired, the 3<sup>rd</sup> Defendant applied for its renewal which was allowed and the lease was renewed for 50 years with effect from 2010.

#### **Analysis of evidence and issues for determination.**

14. I have carefully gone through the evidence adduced by the Plaintiffs as well as the evidence adduced by the 3<sup>rd</sup> Defendant's witnesses. I have also considered the submissions filed by the Plaintiffs as well as those filed by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. This case was filed in 1999. It is being decided after two decades. The same has gone through the hands of at least nine (9) judges four of whom have been elevated to the Court of Appeal out of whom one has retired. I only had the opportunity of taking the evidence of the last defence witness but the demeanor and credibility of the witnesses who testified before is well captured in the record.

15. The issues which emerge for determination are as follows:-

*i. Was this suit filed in accordance with the law or in other words is this suit competent?.*

*ii. Who is the registered owner of the suit property?*

*iii. Have the plaintiffs proved that they have been in possession of the suit property as to call for a declaration that the interest of the registered owner has been extinguished?.*

*iv. Which order should be made on costs?*

Whether this suit was filed in accordance with the requirements of the law or in other words is the suit competent

16. This suit was brought as a representative suit under the provisions of Order 1 Rule 8 of the Civil Procedure Rules. The Plaintiffs came to Court under the umbrella of Baba Dogo Welfare Society. The Plaintiffs while seeking leave informed the Court that they were members of Baba Dogo Welfare Society. As at the time of grant of leave, there was no entity called Baba Dogo Welfare Society. This Society was registered in 2000 under the Societies Act. This notwithstanding, the Plaintiff's did not comply with the provisions of Order 1 Rule 8. The Plaintiffs were expected to serve the 800 members they alleged were staying on the suit land through personal service or by advertisements and any such person who may have been served was expected to apply to the court to be made a party. This did not occur. As at the time of hearing, the witnesses who testified claimed that the number had come down to 400.

17. This suit is a claim for adverse possession based on Section 38 of the Limitation of Actions Act. Under Order 37 Rule 7 (2), the Originating Summons must be supported by an affidavit to which a certified extract of the title to the land in question has to be annexed. In the instant case the Plaintiffs neither annexed any extract of title for LR 336/64 nor LR 336 /65. The Plaintiffs only pointed to a copy title in the 3<sup>rd</sup> Defendant's bundle of documents. This is not what the law states. The need for an extract of title is to ensure that the Plaintiff's claim is directed at the registered owner of the property being claimed.

18. Though the Plaintiffs in their evidence stated that they were no longer interested in LR 336/65, there was no extract of titled annexed to the Originating Summons. As I am writing this judgement, the proprietor of LR 336/65 is not known because there is no extract of title or even a search from the lands office. The only documents which allude to the ownership is contained in letters and memos from the ministry of lands and the 1<sup>st</sup> Defendant's office. These documents attribute ownership of that particular parcel to Baba Dogo and his co-owner Francis Soares. This is not what the law required.

19. The Plaintiffs tried to argue that failure to annex an extract of title to the originating summons is not fatal. They cited the decision of Justice Angote in the case of Anne Itumbi Kiseli Vs James Muriuki (2013) Eklr where the judge held as follows:-

***“ ...The production of the title or a certified extract of the title , in my view , can either be by way of an affidavit or during the hearing of the viva voce evidence. What is critical is that at the end of the trial, the plaintiff must place before the court a title document or a certified copy of the extract of the title to prove that the person he has sued is the registered owner. The plaintiff produced in evidence the official search in respect to the suit property which shows that it is registered in the name of the defendant. This fact has not been denied by the defendant. Consequently, the failure to annex a certified extract of the defendant's title on the supporting affidavit is not fatal to the plaintiff's originating summons”.***

20. In the instant case, the Plaintiffs did not annex extracts of titles to the Originating Summons. They did not even produce or annex any certificates of searches in respect of the two properties they claim. They did not even produce any extract of titles in respect of the two properties during the hearing. What the Plaintiffs did was to point out to the indenture between Baba Dogo and his co-owner Francis Soares and the 2<sup>nd</sup> Defendant and also pointed out to the evidence of the 3<sup>rd</sup> Defendant which stated that a search had been conducted which showed that the suit property had been transferred to the 2<sup>nd</sup> Defendant on 16<sup>th</sup> March 1973.

21. What is more interesting is that the Plaintiffs are challenging the authenticity of the title held by the 3<sup>rd</sup> Defendant. They argue that the title held by the 3<sup>rd</sup> Defendant was issued on 4<sup>th</sup> November 2010 whereas the suit property is said to have been purchased vide agreement dated 6<sup>th</sup> May 1999 and was transferred by indenture dated 28<sup>th</sup> May 1999. The Plaintiffs argue that a certificate of change of name from Kutchi Constructions Limited to the 3<sup>rd</sup> defendant was issued on 19<sup>th</sup> January 2007 and that therefore the same was fraudulent. If this be the argument of the Plaintiffs, then their claim against the 3<sup>rd</sup> Defendant is misconceived. I will however come back to this issue later in this judgement.

22. In Mtana Lewa Vs Kahindi Ngala Mwagandi, Ouko JA had this to say on the importance of annexing an extract of title or certificate of official search to an originating summons :-

***“ In Teresa Wachuka Gachira Vs Joseph Mwangi Gachira Civil Appeal No.325 of 2003, the court emphasised the importance of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence in form of a copy of document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See Kyeyu Vs Omuto, Civil appeal No.8 of 1990. See also the present position in Johnson Kinyua VS Simon Gitura Civil Appeal No.285 of 2005, where this court found that existence and proprietorship of land can be proved by either an extract copy of title or certificate of official search”.***

23. The Plaintiffs in this case neither produced an extract of title for either LR 336/64 or LR 336/65 nor a copy of an official search. They are still challenging the evidence of ownership produced by the 3<sup>rd</sup> Defendant in respect of LR 336/64. This being the case and given that Order 1 Rule 8 of the Civil Procedure Rules was not followed coupled with the fact that Baba Dogo Welfare Society was not in existence when leave to bring a representative suit was granted, I find that the Plaintiffs' suit is incompetent and is for striking out. However in case I may be wrong given the fact that the court ought to do substantive as opposed to technical justice , I will proceed to address the merits of this case.

Who is the registered owner of the suit property?

24. I have stated hereinabove that the Plaintiffs have not been of any help as far as the ownership of the suit property is concerned. This is because they failed to attach a copy of an official search or a certified extract of title of either LR 336/64 or LR 336/65. However this notwithstanding, the 3<sup>rd</sup> Defendant has shown that it is the registered owner of LR 336/64 (suit property). The 3<sup>rd</sup> Defendant has shown how the suit property was transferred from Baba Dogo and his co-owner Francis Soares to the 2<sup>nd</sup> Defendant which in turn sold it to the 3<sup>rd</sup> Defendant. An issue has been raised on how a company which was not in existence in 1999 was able to have the suit property registered in its name. Of course the documents produced by the 3<sup>rd</sup> Defendant show that the 3<sup>rd</sup> Defendant was issued with a certificate of change of

name in 2007. The fact however remains that there was a special resolution which was passed by Kutchi constructions Limited on 19<sup>th</sup> January 1999 changing the name to Avi Marketing and Investments Limited. When this resolution was passed, the 3<sup>rd</sup> Defendant had not purchased the suit property. It is therefore my view that even though the certificate of change of name was issued in 2007, the resolution to change the name was made in January 1999 long before the 3<sup>rd</sup> Defendant purchased the suit property. DW1 explained that it is the companies registry which delayed in processing certificate of change of name. The Plaintiffs advocate called for a resolution filed by Kutchi Constructions Limited for change of name but a copy of resolution was not filed among the documents given from the company registry. If the companies registry had not received any resolution, they would have said so. Otherwise there is no way a change of name would be effected without a resolution of the company to be affected by the change. The suit property was registered in the 3<sup>rd</sup> Defendant's name and when the lease expired, a renewal was applied for and was granted. A new certificate of title was issued in 2010 which shows that the 3<sup>rd</sup> Defendant is the registered owner of the suit property. I therefore find that the 3<sup>rd</sup> Defendant is the registered owner of the suit property.

**Have the plaintiffs proved that they have been in possession of the suit property as to call for a declaration that the interest of the registered owner has been extinguished ?.**

25. For one to acquire interest in land of a known owner, that person has to be in continuous occupation of the land without interruption for a period at least 12 years. My understanding of the law regarding adverse possession is that if one feels that he has met all the conditions to have him/her declared as having acquired land through adverse possession, he/she has to file a claim in court for declaration of those rights before any interruption occurs. One should not sleep on his rights for say 15 years after which he/she is evicted before moving to court to file a claim for adverse possession. It is my view that if one was evicted from a property before asserting his rights through a case, that case cannot have any basis unless after going back and staying for another 12 years he brings a suit for adverse possession.

26. In the instant case, the 3<sup>rd</sup> Defendant who purchased the suit property from the 2<sup>nd</sup> Defendant removed those who had encroached on to the suit property. This suit was filed after the ejection of the Plaintiffs. In the case of **Wines & Spirits Kenya Limited & another Vs George Mwachiru Mwangi (2018) eKLR** the Court of Appeal stated as follows:-

***“ The law is clear on when time starts running for purposes of adverse possession. The possession or occupation must be with the knowledge of the registered owner (see Kimani Ruchine & another Vs Swift Rutherford & Co. Ltd (1980) Supra. Time cannot therefore start running until the registered owner becomes aware that there is a trespasser occupying his/her property and does nothing to assert his rights on the property for at least 12 years . That being so, time in this case only started running in 2012. Immediately thereafter, the appellants had the respondent evicted from the suit premises. Even as at the time they filed their claim before the High Court, they had already been evicted. It was evident therefore that the respondent was not in actual possession for over 12 years as alleged (20). In addition, no evidence was ever preferred to show that the appellant had been aware of the trespassers during the last 12 years”.***

27. There is no evidence to show that the 2<sup>nd</sup> Defendant which was the immediate owner of the suit property prior to the 3<sup>rd</sup> Defendant purchasing it knew that there were trespassers on the suit property. Evidence on record shows that the plaintiffs always thought that the suit property belonged to Baba Dogo and that Baba Dogo had surrendered it to the 1<sup>st</sup> Defendant for purposes of constructing a market place. A look at the documents herein show that the suit property was not occupied even prior to the purchase by the 3<sup>rd</sup> Defendant. When the 3<sup>rd</sup> Defendant purchased the suit property, it allowed its sister Company to start parking its lorries on it. The problem only arose when the 3<sup>rd</sup> Defendant started constructing a perimeter wall round the suit property. It is even clear from Nairobi HCCC No.1648 of 1999 (OS) that the Plaintiffs who are the ones who later filed this suit were complaining about the wall obstructing them from accessing their houses. The issue was not on whether they were being removed from the suit property. The evidence of PW3 also confirms that indeed the Plaintiffs were not in occupation of the suit property. He testified that when the wall by the 3<sup>rd</sup> Defendant was being constructed, part of his building (kiosk) was demolished and the other part was left intact. This confirms the 3<sup>rd</sup> defendant's evidence that those who were removed were on road reserves but had encroached on to the suit property.

28. The photographs which were filed in court soon after this case was filed show that there were no persons in occupation of the suit property. The Plaintiffs at first obtained ex-parte injunctive orders which were later vacated after the true picture emerged. The plaintiffs never went back to build as the witnesses for the plaintiff claimed. There are pictures attached to an application by the 3<sup>rd</sup> Defendant which sought permission to construct a wall round the suit property to protect the same. This application was unfortunately not heard. The request for a site visit was also not met though there was a promise that a visit was going to be considered. From the photographs, the suit property is clearly vacant. Garbage collectors are using it to sort out garbage and mechanics are using the vacant land as a garage

29. Some of the Plaintiffs' witnesses were found to be not truthful. Some pretended not to know how to read or even write while being cross-examined but during examination in chief, they were able to read documents. The court made this observation and one of the witnesses was stopped from further testimony. This shows that the witnesses were not credible. After the plaintiffs were evicted, they embarked on pressurising their leaders to press for allocation of the suit property to them for purposes of putting up a public market. At some stage, the 1<sup>st</sup> Defendant proposed to relocate the 3<sup>rd</sup> Defendant to an alternative plot so that the suit property could be converted to a public market. However this did not happen as there was no relocation effected. The 1<sup>st</sup> Defendant resorted to intimidating the 3<sup>rd</sup> Defendant by approving its building plans and thereafter cancelling the same on the pretext that the suit property had been surrendered for purposes of constructing a public market. There was no evidence of surrender adduced and in any case the same 1<sup>st</sup> defendant approved extension of lease of the 3<sup>rd</sup> Defendant.

30. PW3 claimed that Baba Dogo gave him a 5ft by 7ft space in 1976 where he put up a kiosk. This evidence is not credible. Baba Dogo would not have given him a portion on the suit property which he had already sold in 1973. PW2 testified that she was under care of her grandfather until 1993 when she took charge of the portion which had allegedly been given to her grandmother. Her grandmother died in 2012. If her evidence is true, then she cannot claim to have been in continuous possession for the requisite 12 years. She was in possession on her own right for only six years. She is not bringing this suit on behalf of the estate of her late grandmother. If she was doing this on behalf of her grandmother, then she should have taken out grant of letters of administration in respect of her estate. PW1 testified that he

entered the suit property in his own right in 1994. He did not bring this suit on behalf of the estate of his late parents. If it were true that he was in occupation, he would have been in occupation for only five years which is short of the statutory 12 years period required. The other witnesses who had recorded statements abandoned them. Their statements were expunged from the record at the request of their advocate who had abandoned them.

**Conclusion.**

31. It is clear from the above analysis that the Plaintiffs claim is not only incompetent but the Plaintiffs have failed to establish the ingredients of adverse possession. The Plaintiff's suit is hereby dismissed with costs to the Defendants.

**Dated, Signed and Delivered at Nairobi this 7th day of November 2019.**

**E.O.OBAGA**

**JUDGE**

In the presence of :-

M/s Sebastian for Mr Sarvia for 3<sup>rd</sup> Defendant,

Mr Wafula for Plaintiffs,

Mr Mokuu for 1<sup>st</sup> Defendant,

Mr Mulandi for Mr Samnakay for 2<sup>nd</sup> Defendant

Court Clerk : Hilda

**E.O.OBAGA**

**JUDGE**