



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 217 OF 2014 (O.S)

BETH KAMENE MUTUNE.....APPLICANT

VERSUS

COSMAS MUEMA MUALUKO.....1ST RESPONDENT

THERESIA NDUKU MUALUKO.....2ND RESPONDENT

JUDGMENT

1. In the Originating Summons dated 15th December, 2014, the Applicant has prayed for the following orders:

a. That Beth Kamene Mutune be declared to have acquired title No. Mavoko Town Block 3/4629 previously known as Plot No. 584 Lukenya by way of a purchase and consequently be registered as the proprietor thereof.

b. That in the alternative and without prejudice to (1) above the Plaintiff, Beth Kamene Mutune herein be declared to have a beneficial interest and/or acquired by adverse possession title No. Mavoko Town Block 3/4629 previously known as Plot No. 584-Lukenya, after the Defendants failed to effect transfer after the Plaintiff purchased the land in the year 1996, from the Defendants herein jointly and severally.

c. That this Honourable Court be pleased to restrain the Defendants, by an order of permanent injunction from entering, alienating, disposing or in any other manner interfering with Plaintiff's exclusive possession, use and occupation of Title No. Mavoko Town Block 3/4629, containing ten (10) acres.

d. That the land register relating to Title No. Mavoko Town Block 3/4629 be rectified in such a manner as will reflect the Plaintiff herein as the registered owner of Title No. Mavoko Town Block 3/4629.

e. That an order that the Defendants do forthwith effect transfer of the property known as Mavoko Town Block 3/4629 and in the alternative of non-compliance of this order, the Deputy Registrar do sign the relevant documents required to be signed by the Defendants to effect the changes and/or transfer at the Land's offices-Machakos.

2. The Originating Summons is supported by the Affidavit of the Applicant who has deponed that in 1996, he bought ten (10) acres of land from the 2nd Respondent; that he has been in possession of the land with his family since then and that on 9th October, 2013, he realised that the 1st Respondent, who is the

biological son of the 2nd Respondent, had fraudulently caused the suit to be registered in his name.

3. Although the Respondents were served with the Originating Summons, they never filed responses. The matter proceeded for hearing on 1st November, 2017.

4. The Applicant, PW1, informed the court that he relies on the filed Affidavit; that he bought a portion of the suit land from the 2nd Respondent who did not transfer it to him and that he has since learnt that the said land has been transferred to the 1st Respondent, who is the 2nd Respondent's son.

5. The Applicant produced in evidence the agreement that he entered into with the 2nd Respondent dated 12th October, 1996 to support his case. The Applicant also produced in evidence a certificate of official search showing that the suit land was registered in favour of the 1st Respondent on 12th September, 2012.

6. The Applicant's advocate submitted that Article 40 of the Constitution protects the right to acquire and own property; that Section 38 (1) of the Limitation of Actions Act states that where a person claims to have become entitled by adverse possession to the land registered under any Act, he may apply to the High Court for an order that he may be registered as the proprietor of the land and that the Applicant has been on the land since 1996.

7. The Respondents in this matter have not denied that the Applicant bought the suit land from the 2nd Respondent in 1996.

8. Indeed, the Applicant produced the Agreement of Sale showing that he purchased land measuring five (5) acres (*approximately 2Ha*) from the 2nd Respondent.

9. Although the initial land was known as Plot No. 584, Lukenya Farming and Ranching Co-operative Society, it has since mutated to Mavoko Town Block 3/4629.

10. Having purchased the land in 1996 and taken possession, the Applicant has lived on the said land as of right for more than twelve (12) years.

11. I am satisfied that the Applicant has proved non-permissive, actual, open, notorious, exclusive and adverse use of the suit land for the statutory period and should be registered as the owner of the land measuring 5 acres.

12. For those reasons, I allow the Applicant's Originating Summons in the following terms:

a. The Applicant be and is hereby declared to have acquired by adverse possession a portion of a parcel of land known as Mavoko Town Block 3/4629 measuring 5 acres (approximately 2 Ha).

b. Parcel of land known as Mavoko Town Block 3/4629 to be sub-divided by curving out 5 acres (approximately 2 Ha) which the Applicant bought and the Applicant to be registered as the proprietor of the said 5 acres.

c. The land register relating to the suit land to be rectified in the manner specified in (b) above by the Machakos County Land Registrar.

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

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF JANUARY, 2018.

O.A. ANGOTE

JUDGE