



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 46 OF 2011(O.S)

JOHN MAINGI MATILIAPPLICANT

VERSUS

BEATRICE MWOVI MBUSYA.....1ST RESPONDENT

MAINGI MWOVI2ND RESPONDENT

JUDGMENT

1. This suit was commenced by way of an Originating Summons dated 21st February, 2011. In the said Originating Summons, the Applicant is seeking to be registered as the proprietor of a parcel of land known as Machakos/Ulu/31 (*the suit land*) by virtue of adverse possession.
2. The Summons are premised on the grounds that the Applicant has stayed on the suit premises since the year 1974 to date without any interruption; that initially, the land belonged to his late father and that the same was fraudulently registered in favour of the Respondents during the adjudication process.
3. It is the Applicant's case that having settled on the land in 1966, he is entitled to be registered as the proprietor of the same.
4. In the Replying Affidavit, the 2nd Respondent deponed that it is not true that the Applicant has lived on the suit land since the year 1954; that the suit land was initially owned by the Applicant's father who sold and transferred it to his father and that the Applicant has settled on a small portion of the suit land as a licensee of the Respondents.
5. It is the 2nd Respondent's deposition that as a result of the Applicant's acts of wastage of the suit land, various disputes have arisen requiring to vacate the portion of land he occupies and that an order of permanent injunction to restrain the Applicant from wasting the land should issue.
6. The suit proceeded for hearing by way of *viva voce* evidence. The Applicant, PW1, informed the court that he is the son of the late Matili Wangu; that his late father used to work for F.O.B Wilson Limited, a company which had a farm at Ulu Settlement Scheme and that when the owner of the farm re-located, he gave his father the suit land as a gift.
7. According to the Applicant, the government acquired the suit land in 1975 and that at the time of the death of their father, in 1991, they were living on the land.
8. PW1 stated that it was only in the year 1996 that he was notified that Jackson Mwovi had fraudulently obtained documents relating to the suit land and that upon the death of Jackson Mwovi, the Respondents

had the land registered in their favour by way of transmission.

9. It was the evidence of PW1 that his occupation of the suit land was not with the permission of the Respondents or their late father and that he wrote to the Director of Land Adjudication and Settlement in 1996 complaining about the fraudulent transfer of the suit land to the Respondent's father.

10. It was the evidence of PW1 that he has lived on the land since 1955; that he has three houses on the land and that although the Respondents cultivate the land, they do not live on it.

11. PW2 informed the court that he is a retired firm Manager with F.O.B Wilson Plantation having been employed in the year 1962; that the Applicant's father was an employee of F.O.B Limited and that he was amongst the employees who were allocated the land that was owned by the F.O.B limited.

12. It was the evidence of PW1 that after paying the requisite fees, the Applicant's father was allocated the suit land and that his family settled on the land.

13. According to PW2, the Respondents or their late father were not squatters on the land and that the Respondents occupy a neighbouring piece of land.

14. It was the evidence of PW1 that the Applicant's father sold a portion of his land to the Respondents' father.

15. In his evidence, DW1 stated that the suit land was initially owned by the Applicant's father who sold it to their father between 1969-1972; that the Applicant has occupied a small portion of the suit land as a licensee and that the Applicant has contradicted himself as to when he actually entered the suit land.

16. It was the evidence of DW1 that after the death of their father, the suit land was registered in their father's name and that it is their father who allowed the Applicant to live on the land.

17. When the Applicant started selling the suit land, it was the evidence of DW1 that his late father caused him to be charged in court in the year 1996.

Submissions:

18. The Applicant's counsel submitted that in computing dates of adverse possession, the relevant period should be from 1974 when the land was registered in the name of the Respondent's father until when the Applicant was charged in court in November, 1996; that the Applicant continued living on the land even after the criminal case was finalized and that the Respondents or their father have never been in possession of the suit land.

19. The Applicant's counsel relied on the cases of *Mtana Lewa vs. Kahindi Ngala Mwangandi (2015) eKLR* and *Titus Kigoro Munyi vs. Peter Mburu Kimani (2015) eKLR* which I have considered.

20. The Respondents' counsel submitted that from the evidence of PW2, the Applicant does not live on the suit land; that the Applicant's father sold the suit land and that the Applicant has been on a portion of land as a licensee.

21. Counsel submitted that the Title Deed having been issued to the Respondents in the year 2002, twelve years had not lapsed; that the Applicant did not annex on his pleadings a certified extract of title and that at no point did the Applicant dispossess the Respondents of the suit land.

22. The Respondents' counsel relied on the cases of *Ann Itumbi Kiseli vs. James Muriiki Muriithi (2013) eKLR* and *Kimoi Ruto & Another vs. Samwel Kipkosgei Keitany & Another (2014) eKLR* which I have considered.

Analysis and findings:

23. The Applicant is seeking to be declared the owner of a parcel of land known as Machakos/Ulu/31 by virtue of the doctrine of adverse possession.

24. According to the Applicant's Supporting Affidavit, he has been in occupation of the suit land since 1966 without any interruption or permission from the Respondents.

25. Although the Respondents have admitted that the Applicant has been in occupation of a small portion of land, they have deponed that the said occupation was with the permission of the late Jackson Mwovu Mbusya, who purchased the suit land from the Applicant's father.

26. Indeed, the evidence before me shows that the 2nd Respondent's father, the late Jackson Mwovi Mbusya, bought the suit land way back in the early 1970's. The 2nd Respondent produced in evidence a copy of the consent of the Masaku/Donyo Sabuk Divisional Board dated 29th September, 1970 authorizing the transfer of the suit land from the Applicant's father, Matili Wangu, to the 2nd Respondent's father, Mwovi Mbusya.

27. This position was confirmed by the District Land Adjudication and Settlement officer who stated that although the plot was allocated to Matili Wangu, he later transferred it to Mwovi Mbusya and the transfer forms were registered in 1974. Indeed, until his demise in 1991, the Applicant's father never complained about the fact that the 2nd Respondent's father was registered as the proprietor of the suit land.

28. The certified copy of the extract of title of the suit land annexed on the Applicant's Supplementary list of documents shows that the suit land was registered in favour of the 2nd Respondent's father on 16th May, 1974.

29. Upon his demise, the suit land was transferred to the Respondents by way of transmission on 5th May, 2002 and a Title Deed was issued in their joint names on 28th June, 2002.

30. As correctly submitted by the Respondents' counsel, in respect for registered land, the time for purposes of claiming land by way of adverse possession starts running from the date that the land is registered.

31. In this case, the land was registered in favour of the 2nd Respondent's father in 1974. This is the relevant period in computing time in this matter, and not in the year 2002, when the suit land was transferred to the Respondents by way of transmission.

32. The Applicant's case is that he has been on the suit land since 1954 and that even after the land was registered in favour of the 2nd Respondent's father in 1974 until when he was charged in court for trespass in 1996, he never lost possession of the said land.

33. I have perused the Judgment in the Kilungu District Magistrate's Court Criminal Case No. 445 of 1996. In the said matter, the Applicant was charged with Nduleve Matili for forcible retainer. According to the particulars of the charge, the two were found in actual possession of land parcel number Machakos/Ulu/31 *"without colour of right and in a manner likely to cause a breach of the peace against Jackson Mwovi entitled (sic) by law to the possession of the said...."*

34. In his Judgment, the learned Magistrate found as follows:

"On reviewing the evidence adduced by both the prosecution and the Defence and their witnesses plus their demeanours, I have found that the accused persons are actually occupying the land they are alleged to have forcefully retained..."

35. In the said Judgment, the Magistrate further observed that it would have been better if the complainant

settled the dispute by filing a civil case. The court went ahead to acquit the two.

36. The evidence which is before me shows that by the time the Applicant was charged in Kilungu Criminal Case No. 445 of 1996, he had already occupied the suit land for more than twelve years. Indeed, even after being advised by the court to file a civil case to recover the land, the Respondents' father never did so until when the Applicant filed the present claim seeking the land by adverse possession.

37. Even if it is argued that the issue of occupation of the suit land by the Applicant was interfered with in 1996 after they were charged in court, twelve years have lapsed since 29th August, 1997 when the court rendered its decision and when the current suit was filed. Consequently, the Respondents are time barred, pursuant to the provisions of Section 7 of the Limitation of Actions Act, from recovering the suit land.

38. Although the Respondents' evidence was that the Applicant entered a portion of the suit land with the permission of their late father, there is no evidence that was placed before me to prove that allegation. The evidence before me shows that even after purchasing the suit land, the Respondent's father did not evict the Applicant from the land for more than twelve years.

39. The Applicant in this matter has satisfied the court that he has been in continuous and uninterrupted possession of the suit land since 1974 when it was registered in favour of the Respondent's father. The said possession has been open, notorious and with the knowledge of the registered owners, and without their permission.

40. Consequently, and in accordance with the provisions of Section 38 of the Limitation of Actions Act, the Applicant should be registered as the proprietor of the suit land.

41. I therefore I allow the Applicant's Originating Summons dated 21st February 2011 as prayed.

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

O.A. ANGOTE

JUDGE