



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC 252OF 2017(O.S)

CHRISTOPHER MUSYOKA MUSAU.....-PLAINTIFF

VERSUS

JONATHAN KITUU KIIA.....DEFENDANT

JUDGMENT

1. Christopher Musyoka Musau who is the plaintiff herein is businessman in the hotel industry. In 1985 he purchased land parcel number Kiteta/Kiambwa/362 from the defendant. Owing to the defendant's persistent failure to appear before the appropriate Land Control Board, the suit property, Kiteta/Kiambwa/362 is yet to be transferred from the defendant to the plaintiff.

2. By his Originating Summons dated 3rd May, 2012 and filed in court on even date, the plaintiff prays for orders:-

1) THAT the plaintiff/applicant be found to be entitled to all that piece of land measuring 0.5 hectares comprised in the title No. Kiteta/Kiambwa/362 by virtue of adverse possession against the defendant/Respondent.

2) THAT costs of this originating summons be provided for.

3. The Originating Summons is supported by the affidavit of Christopher Musyoka Musau, the plaintiff herein, sworn on the 3rd May, 2012 and filed in court on the same day together with the Originating Summons.

4. This matter suit proceeded as undefended suit after the defendant failed to file his reply to the Originating Summons despite being served with summons on the 3rd November, 2016 and on 8th September, 2017 respectively.

5. On the 16th November, 2017 the court directed that the Originating Summons be disposed off by way of viva voce evidence. Consequently, the matter was fixed for hearing on the 23rd January, 2018 when the plaintiff appeared in court to testify.

6. The plaintiff's evidence in chief was that he bought land parcel number Kiteta/Kiambwa/362 from the defendant in 1985. He added that the defendant signed the forms for consent which the plaintiff presented before the appropriate Land Control Board. The plaintiff pointed out that the Land Control Board declined to give consent for the transfer of the land in question on the grounds that the defendant was required to appear in person. The plaintiff further testified that before the expiry of the 6 months prescribed for obtaining consent from the appropriate Land Control Board, he asked the defendant to appear before the board. He said that the defendant instead wrote a letter to the board indicating that he had sold his land to the plaintiff. It was the plaintiff's evidence that the defendant gave him the original title deed for land parcel number Kiteta/Kiambwa/362 (PEX no. 1). He said that the defendant was yet to transfer the land in question to him. Further the plaintiff produced certificate of search dated 30th March, 2012 as PEX no. 2 to show that land parcel number Kiteta/Kiambwa/362 is still registered in the defendant's name. The plaintiff also produced consent forms and the letter dated 28th August, 1985 that the defendant wrote to him as Pex nos. 3 and 4 respectively.

7. The plaintiff added he is in active possession and use of the land in question. He revealed that he has been in quiet possession of the land for over 30 years since 1985 and asked the court to hold that he is in adverse possession of it. The plaintiff declined an order for costs.

8. Mr. Mutuku advocate for the plaintiff filed written submissions whereby he summed up what the law on adverse possession presupposes anybody claiming land must prove namely:-

1) That the claimant must be in the land without lawful reason,

2) The stay is over 12 years.

3) That the stay is peaceful and continuous.

9. The counsel submitted that even though the plaintiff entered into the land by virtue of sale agreement, the land control board consent was not obtained and hence the transaction became void ab initio. The counsel relies on the Land Control Act Chapter 302. The counsel added that the plaintiff had no reason to be on the land and his continued stay was unlawful but nevertheless he was on the land for over 26 years before filing this suit. The counsel also relies on the cases of public Trustee vs Wanduru[1984] eKLR, Simon Pkite Chameltor Vs William Loishakou [2016] eKLR and Peter Mbiri Michuki Vs Samuel Mugo Michuki[2014] eKLR .

10. I have read the three authorities that touch upon the law of adverse possession and I wish to state that the law of adverse possession is now settled. The Limitation of Actions Act Chapter 22 of the Laws of Kenya prescribes 12 years as the period for one to acquire legal title by way of adverse possessions.

11. Black's Law Dictionary, 9th Edition at page 62 defines adverse possession as ,

“ the enjoyment of real property with a claim of right when that enjoyment is opposed to another persons claim and is continuous, hostile open and notorious.”

12. In the case of Francis Gitonga Macharia Vs Muiruri Waithaka in Civil Appeal no 110 of 1997, the Court of Appeal stated that limitation period for purposes of adverse possession only starts running after the registration of the land in the name of the respondent.

13. In the case before me there is evidence to show that the plaintiff has been in a possession of land parcel number Kiteta/Kiambwa/362 for over 30 years. The same evidence shows that he has been farming on it without anybody disturbing him. The plaintiff could not have the land in question registered in his name after the defendant failed to appear before the appropriate land control board on a date that the plaintiff did not disclose. Section 6(1) (a) of the Land Control Act Chapter 302 of the laws of Kenya provides as follows;

“sale, transfer... or other disposal of or dealing with any agricultural land which is situated within a land control area is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of the transaction in accordance with the Act.”

14. It would appear that though the application to transfer the suit land to the plaintiff was made before the expiry of 6 months as is required under section 8(1) of the Land Control Act going by what the plaintiff told the court, no consent was given for non-appearance of the defendant before the board. It is therefore clear that the transaction between the plaintiff and the defendant became void at the expiry of 6 months from the date when the two entered into the said transaction. However, I do note that the plaintiff has been in continuous occupation of the defendant's land parcel number Kiteta/Kiambwa/362 for over 30 years. The same has been open and notorious judging from the farming activities that the plaintiff has undertaken on the said farm. The plaintiff has met the threshold set out in the Limitation of Actions Act Chapter 22 of the laws of Kenya for him to acquire legal title

15. over the defendant's land parcel Kiteta/Kiambwa/362 by way of adverse possession. In the circumstances. I hereby proceed to enter judgement for the plaintiff and against the defendant in terms of prayer 1 of the Originating Summons. Should the defendant decline to transfer the transfer forms for the said land parcel number Kiteta/Kiambwa/362, the Deputy Registrar of this court is authorized to sign the same .

Signed, dated and delivered at Makueni on this 20th day of March, 2018.

Mbogo C.G

Judge

In the presence of :

1. Mr. Mutua Makau holding brief for Mr. P.M Mutuku for the plaintiff.
2. Mr. Kwemboi Court Assistant.

MBOGO C.G, JUDGE

20/3/2018