



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 233 TO 241 OF 2017**

**MUEMA KITULU.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**ELIZABETH KAMENE NDOLO.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**JUDGEMENT**

1. By their Originating Summons in ELC numbers 233 of 2017 to 241 of 2017, the plaintiff's have in their respective suits sued the defendant herein in her capacity as executrix and beneficiary of the estate of the late Maj Gen Joseph Musyimi Lele Ndolo for orders:-

**a) That this honourable court do direct that the plaintiffs be registered as the proprietors of all those portion of all that portion of 40 acres or thereabouts within L.R No.1757/6 (formerly L.R No.1757 hereinafter the "suit property") which they occupy reason of adverse possession.**

**b) That a permanent injunction do issue to restrain the defendant, by herself, her agents or servants from trespassing into, alienating, or in any manner interfering with the plaintiffs' use and enjoyment of the suit property.**

**c) An order directing the Registrar of Titles to excise each of the plaintiffs parcel out of LR No. No.1757/6 registered in the name of the defendant and to transfer and vest the same to the plaintiffs herein.**

**d) Cost of the suits.**

2. The Originating Summons are supported by the affidavits and supplementary affidavits of the plaintiffs herein. Three (3) of the plaintiffs namely Muema Kitulu, Hon. Mr. Justice Musinga and Emily Mwelu Gatugata testified on behalf of the other six (6) plaintiffs.

3. The defendant opposed each of the Originating Summonses vide her replying affidavits. She denies the plaintiffs' claims in their entirety.

4. The plaintiffs' case was that they have sued the defendant in her capacity as the executrix and beneficiary of the estate of the late Maj Gen. Joseph Musyimi Lele Ndolo. Muema Kitulu, Justice Musinga and Emily Gatugata told the court that they have been in occupation of parcels of which they claim by way of adverse possession since 1992 and 1989 respectively. They went on to say that their occupation of their respective parcels of land has been with the knowledge of defendant. They added that their occupation of their respective parcels of land has not been interrupted in any way by the defendant or her agents. They went on to say that the defendant's parcel of land is approximately 1296 hectares registered as LR1757/6. Mwema Kitulu and Justice Musinga revealed that they own 20 acres, 52.07 acres respectively while Emily told the court that there were no sale agreements back in 1989 when she bought her land from Kaumbulu. She however said that she was shown her parcel of land and its boundaries whereupon she moved in and that its size is as per the sketch plan by Geosites Surveyors.

5. The plaintiffs further told the court that they did not buy their land from the family of the late Maj Gen Ndolo. They said that they bought their respective parcels of land from Jerome Kaumbulu who informed them that he had acquired 3000 acres from the late Maj Gen Ndolo. Mwema Kitulu went on to say that he was privy to this information since he and Justice Willy Mutunga acted for the family of Kaumbulu.

6. It was also the plaintiffs' case that they discovered that the transaction between Kaumbulu and the defendant was scuttled and that no transfer was ever made. They pointed out that Jerome Kaumbulu thereafter took off to the United States of America where he now resides.

7. The plaintiffs told the court that they have never acknowledged the defendant's title over the properties that they occupy since she knew how they came to be in possession of the properties in question. The plaintiffs further stated that the meetings they had with the defendant and her agents were not meant to acknowledge her superior title.

8. Further the plaintiffs told the court that they were parties in HCC (ELC) 226 of 2014 between Elizabeth NdoloVs Mwema Kiulu and 84

others where the defendant who was the applicant in the aforementioned suit sought a prayer to file suit out of time so as to recover land. The plaintiffs told the court that they opposed the application based on Section 7 of the Limitation of Actions Act. The plaintiffs added that the application in ELC.226/2014 gave a detailed history of their parcels of land and the subsequent negotiations which led to the settlement of 100 families in the said land. They pointed out that the defendant's application in ELC.226/2014 was dismissed on 12<sup>th</sup> February, 2015. They added that the ruling in the said ELC.226/2014 has not been appealed against.

9. Mwema Kitulu's evidence in cross-examination was that his entry into the defendant's land was on the basis of the agreement he had with Jerome Kaumbulu. He went on to say that Kaumbulu did not have any title to the land at the time when the two entered into the said agreement. He pointed out that he knew that Kaumbulu had an interest over the defendant's land. Mwema went on to say that at the time of his entry into the said land, the title was in the name of late Gen Ndolo while the defendant was the executrix. He added that no excision of 3000 acres in favour of Kaumbulu was ever done. He reiterated that the defendant was aware that he had purchased land from Jerome Kaumbulu. He said that Jerome did not take any steps to register his interest in the Succession Cause that the defendant's family had. He went on to say that his adverse possession accrued in 2003. He also said that he was aware that the defendant was registered as proprietor of LR 1757/6 in 1996 following Civil Appeal No.128/98. He added that in the said appeal case there was no reference to 1000 acres which had been sold to an individual who was not mentioned by the Court of Appeal and could not tell if the 1000 acres went to Jerome Kaumbulu. He said that the defendant's title arose from the decree marked as EKN 3 of his supplementary affidavit.

10. He said that the vesting orders are dated 30<sup>th</sup> September, 1996. He went on to say that the issues raised in their meetings of 2006 were never resolved but agreed that surveying of their respective parcels of land was subject to the instructions from the defendant.

11. Justice Musinga's evidence in cross-examination was that when he met Jerome Kaumbulu in 1991 or thereabout whereby the latter represented to him that he was a beneficial owner of a parcel of land measuring 3000 acres. He said that he was not aware of the dispute between the Ndolos and Kaumbulus in case number 154 but he got to know of the Court of Appeal's case number 128/95 while he was in occupation of his parcel of land. It was also his evidence that he became aware of the consent that was recorded between Kaumbulu and the defendant when he and others started holding meetings with the sons of the defendant. He said that he initially moved into the land on the basis of the agreement he had with Jerome Kaumbulu and that he got to know the defendant after he had already done the developments on the land. He pointed out the consent order was to excise 3000 acres in favour of Kaumbulu. He said that he did not know if the excision was ever carried out. He revealed that he purchased 20 acres out of the 52.07 acres that he owns from his uncle whom he knew had also purchased the said 20 acres from Kaumbulu under similar circumstances as his and added that there was no dispute as to who was in occupation of the land in question. He said that the land had been demarcated by Jerome who showed him and others their respective boundaries. It was also his evidence that he has cleared the land, cultivated nearly 15 acres, put up a permanent house, planted thousands of trees, piped water and reared livestock on the land which he fenced shortly after he purchased it. He said that he became aware that the defendant had become registered owner by the time they were in meeting in 2006 and added that those meetings were not in recognition of her title. According to him, the reason for the meetings was his and others refusal to be blackmailed to repurchase the land from the defendant.

12. Emily Mwelu Gatugata's evidence in cross-examination was that she had no agreement at all and she believed that the land she was buying was Kaumbulus. She added that she paid Kaumbulu in full for the land that she bought from him. She said that she has identified the property that she is claiming. She added that she only learnt that the mother title was in the name of the late Gen. Ndolo after she settled on the land. It was also her evidence that the several meetings she and others had with the Ndolos centered on how they would get their own title deeds. She revealed that acquisition of title deeds did not materialize and that the issue of reselling the land arose around the year 2006. She went on to say that she later got to learn that the defendant was the registered owner of the land.

13. On the other hand, Elizabeth Kamene Ndolo's (defendant) evidence in chief was that Muema Kitulu, Judge Musinga and Emily Mwelu are her neighbours. She said that she was hospitalized when the three entered into the land which had only one title in the name of her husband, Maj Gen Ndolo. She added that the size of the land is 9400 acres. It was her evidence that she was allocated 3200 acres after the land was demarcated following a family dispute over the said land. She went on to say that she did not enquire from the three claimants how they came to take possession of the land that they occupy as she was waiting for them to approach her. She said that she knew Mzee Kaumbulu as a friend of her late husband. She revealed that she found him having occupied the land when she was discharged from the hospital. She said that she could not remember of any suit between Kaumbulu and her family. It was her evidence that the claimants were already in occupation of the land that was eventually allocated to her following the family dispute. She could not tell for how long they had been in occupation. She said that after she acquired her title, she sent her sons to go and talk to the claimants since the latter had purchased the land from a person she did not know. She said that she herself did not attend the meetings in question but primarily, she wanted the claimants to purchase land from her as she did not know how they entered into agreements with Kaumbulu. She said that she opposes the claimants bid to acquire title. According to her, the claimants should direct their claim to Kaumbulu.

14. Her evidence in cross-examination was that Gen.Ndolo could sell land since it was his. She said that consent was issued on 18<sup>th</sup> January, 1981 after her husband and Kaumbulu entered into a sale agreement. She pointed out that her husband died before he could transfer the land in favour of Kaumbulu. She admitted that Kaumbulu sued her in HCCC No.5041/88 and added that she did not enter into a consent to transfer 3000 acres to him and nor did she transfer the 3000 acres to his family. She said that she sued 85 people in the case referred to by Mwema. According to her, minutes of the meetings her sons and the claimants attended show that the issue of purchase of land was discussed.

15. The defendant said that the step she took to evict the claimants from her land was to ask them to pay for the land that they occupy. She admitted she was aware that her husband sold land to Kaumbulus and that she also learnt that Kaumbulu sold land to other people.

16. Her evidence in re-examination was that there was nothing from the consent that was issued in 1981 that showed that Gen Ndolo sold land to one Kaumbulu. On being shown an agreement, the defendant said that it shows that one Kaumbulu purchased land from the General.

17. In the Originating Summons, the plaintiffs had the following questions for determination:-

1. Whether or not the plaintiffs have been in occupation of their respective portions of suit land for a period in excess of 12 years;
2. Whether or not the plaintiffs occupation of the suit properties is adverse to the defendant's right to the suit property;
3. Whether or not the plaintiffs have acquired registrable interest in the respective parcels by way of adverse possession;
4. Whether or not the plaintiffs are entitled to peaceful use and enjoyment of their respective parcels of suit property without interference by the defendant, her agents and/or servants.

18. The defendant's counsel framed the issues for determination in his written submissions dated 7<sup>th</sup> December, 2017 and filed in court on 8<sup>th</sup> December, 2017 as follows;

1. Whether the occupation of the land was adverse,
2. Whether the plaintiffs are guilty laches,
3. Whether the plaintiffs are entitled to remedy of permanent injunction.

19. The plaintiffs' counsel filed his submissions on the 23<sup>rd</sup> November, 2017 the same being dated 20<sup>th</sup> November, 2017.

20. The defendant's issues number 1 and 2 are more less captured by the issues framed in the plaintiffs' Originating Summons and I will therefore consider the issues by both sides together.

**1. Whether the plaintiffs have been in occupation of the suit land for a period in excess of 12 years.**

21. The plaintiff's counsel in his submissions referred to ELC 226 of 2014 Elizabeth K. Ndolo vs Muema Kitulu and 84 others where J. M. Mutungi J. observed as follows:-

*“in the present matter it is not in dispute that the respondents have been in possession and occupation of a portion of the Applicant's parcel of land for periods in excess of 20 years the letter exhibited as “MK6” from the firm of Mulwa and Mulwa Advocates to M/S Khaminwa & Khaminwa Advocate's way back in 1988 points to the respondents entry into the suit land at around that time. At any rate the applicant acknowledges the respondents have occupied suit land for a period in excess of 12 years ..... the applicant from 1984 when her husband died up to 2014 (30 years later) did not take any action to repossess the subject land from the respondent who from the material placed before the court engaged in and undertook various developments on the land they occupied consisted with their being in adverse possession”*

22. The counsel went on to submit that from the above analysis, it is clear beyond per adventure that the defendant herein acknowledged not only the 9 plaintiffs herein but all the 76 other respondents as having entered and occupied the suit property without her consent since 1984 yet no action was taken by her to evict them from the property for over 30 years. The counsel pointed out that no appeal has been preferred by the defendant herein against the ruling of Mutungi, J in ELC 226 of 2014.

23. The plaintiffs' counsel went on to submit that in the ruling dated 20<sup>th</sup> December, 1999 and marked 5(b) in the supplementary affidavit of Muema Kitulu filed in court on 28<sup>th</sup> September, 2017 Kiloba J in Mwaani Enterprise Ltd Vs Margaret Kyalo & another in HCC No. 2104 of 1999 observed that the applicants in that suit had lied when they claimed there were no people settled on Josiah Kaumbulu's land while pictures and evidence supplied showed various developments and farms within clear view of the applicant and members of her family.

24. The counsel urged the court to find that over 20 years have elapsed since the plaintiffs herein took up possession and occupation of the subject parcels of land and hence they have acquired a right for legal basis to pray for the defendant's title to those parcels of land that they occupy be extinguished by virtue of adverse possession and that the suit property be registered in their favour as prayed in their respective suits.

25. On the other hand the defendant's counsel submitted that there is no dispute that the plaintiffs had an uninterrupted occupation and possession of the suit property but the issue in contention is whether the possession was by an agreement for sale between the plaintiffs and the deceased (one Josiah Kaumbulu/his estate) and whether their possession was hostile.

26. The defendant's counsel further submitted that it is clear that the adverse parties entered the suit land with permission emanating from an agreement for sale between themselves and the vendors (J.S Kaumbulu and Jerome Mwanthi Kaumbulu). The counsel pointed out when the sale agreement was entered into in the early 1990's neither the defendant nor J.S Kaumbulu and Jerome Mwanthi Kaumbulu were registered proprietors of the suit property. The counsel cited the case of Francis Gitonga Macharia Vs Muiruri Waithaka in Civil Appeal No. 110 of 1997 where the Court of Appeal stated that the limitation period for purpose of adverse possession only starts running after registration of the land in the name of the respondent.

27. Regarding the reference made by plaintiffs on **HCCC 226 of 2014**, the defendant counsel termed it as misleading since the court never delved into the merits and demerits of the case.

## **2. Whether the Plaintiffs have acquired registered interest in respect of each of their respective parcel of land?**

28. The counsel submitted that having found that the plaintiffs have occupied the defendant's land for periods in excess of 20 years, openly and without force the court should hold that they have acquired rights to their respective parcels by way of prescription, the conclusion is registrable interests in respect of each of their respective portions. The counsel further submitted that the court do direct the defendant herein to execute transfers in favour of each of the 9 plaintiffs herein in respect of the respective parcels of land that they occupy.

29. The counsel added that since there is an attached survey plan marked as "MKII" to the supplementary affidavit of Mwema Kitulu sworn on 27 September, 2017 and filed in court on 28<sup>th</sup> September, 2017 which has picked all the existing boundaries of each parcel of land occupied by the plaintiffs, there is nothing that bars the court from directing the transfer of the aforementioned portions to the plaintiffs as prayed.

30. The defendant's counsel further submitted that it is only after the consent judgement was entered into in **HCCC No. 5041 of 1988** that one JS Kaumbulu and Jerome Mwanthi Kaumbulu acquired capacity to pass their interest in the suit land to the plaintiffs and that the only thing required of them was to extract a decree and serve it upon the Registrar of Lands at the Land Offices in order to make their interest registered which was not done. The counsel added that the applicability of section 4(4) of the Limitation of Actions Act in this context means that the plaintiffs after the judgment in **HCCC No. 5014 of 1988** had in their possession agreements for sale between them and the estate of J.S Kaumbulu which remained valid till the expiry of 12 years which in this case was till the 19<sup>th</sup> July, 2003 when the judgement awarding the estate of J.S Kaumbulu 3000 acres became unenforceable reason being that the said judgement was never extracted nor a decree taken to the Registrar of Lands at the Land Office Makueni for enforcement in order to make their interest in the late Gen Ndolo's estate legalized.

## **3. Whether or not the plaintiffs are entitled to peaceful use and enjoyment of the respective portions of suit property without interference by the defendant, her agents and/or servants**

31. The plaintiffs' counsel submitted that the plaintiffs have demonstrated a prima facie case with high probability of success as disclosed by the evidence before the court or prove that they have been in continuous enjoyment of their respective parcels of land after purchasing the same from the late Josiah Salvin Kaumbulu. The counsel added that on a balance of convenience permanent injunction should be granted because it is the plaintiffs who stand to suffer irreparable loss and damage if the defendant was to be let free to interfere with the plaintiffs' occupation of their properties.

32. The counsel submitted that the plaintiffs have heavily invested in their parcel of land by building permanent homes, developing farms, growing trees, digging water dams and borehole, connecting piped water and electricity, developing schools, churches and markets among other developments running into millions of shillings and that their loss and damage cannot thus be compensated through damages. He pointed out that the plaintiffs have never acknowledged the defendant's legal rights and title over land parcel number 1757/6 since they purchased the land from the late J.S Kaumbulu and not her.

33. The counsel referred the court to the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 others in CA no. 77 of 2012 [2014] eKLR** which restated the principles in which courts will grant a permanent injunction as follows:-

***"... the applicant has to satisfy the triple requirements to;***

- i. establish his case only at a prima facie level;***
- ii. demonstrate irreparable injury if a temporary injunction is not granted, and;***
- iii. allay any doubts as to (b) by showing that the balance of convenience is in his favour;***

***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent."***

34. The counsel further referred the court to the principles of injunction by Kuloba J where he discusses perpetual injunctions and lays out the principles of such injunction as follows:-

***"a perpetual injunction is a decree granted at the final hearing on the merits of the case and on the conclusive determination of the rights of the parties. The injunction is also called a 'final' or 'permanent' injunction because in its technical sense it is a decree and not an order..."***

***The principles of perpetual injunction are;***

- i. There must be a legal right to protect;***
- ii. Plaintiff must establish the probability or future serious injury;***
- iii. Injunction as a discretionary remedy.***

35. The defendant's counsel submitted that the status of the plaintiffs on the suit land became hostile once the judgement in HCCC No.

5041 of 1988 became unenforceable against J.S Kaumbulu rendering the sale agreements held by them void. The counsel pointed out their status as adverse possessors began on the 20th July, 2003 which was exactly 12 years after the consent judgement was entered into. The counsel submitted that by the time the adverse parties were filing this suit to claim adverse possession on the 5<sup>th</sup> April, 2014, it was exactly 11 years and that the requirement under section 7 of the Limitation of Actions Act was not met since 12 years had not lapsed as their hostile status on the suit land had only began on the 20<sup>th</sup> July, 2003 when their agreements for sale became unenforceable against the estate of J.S Kaumbulu. The counsel added that the judgement had never been stayed nor challenged, and therefore the suit for adverse possession is premature. The counsel added that the stay of the plaintiff was not peaceful since they admit there was a meeting between them and the defendant's sons which the plaintiffs admit that the meeting did not bear fruit because the defendant's sons wanted them to buy the suit land from them at the current market price rate as at 2006.

36. Needless to say, it is common ground that the law on adverse possession is now settled. To buttress their submissions, the plaintiffs rely on the the cases of *Ann Itumbi Kiseli Vs James Muriithi (2013) eKLR, Mbira Vs Gachuhi(2002) (Nairobi) ENLR 137, and Francis Gicharu Kariri Vs Peter Njoroge Mairu, in Civil Appeal no. 293 of 2002 (Nairobi)*. They further rely on the Blacks' law Dictionary, 9<sup>th</sup> Edition at page 62 as well as section 7 of Limitation of Action Act chapter 22 of the laws of Kenya. The defendant relies on the cases of *James Mwangi and others Vs Mukinye Enterprises Ltd in Nairobi Civil Case no. 3912 of 1986 and Benjamin Kamau Murima & others Vs Gladys Njeri in Civil Appeal No.213 of 1996*.

37. 12 years is the period prescribed under the Limitation of Actions Act Chapter 22 for one to acquire legal title over land in Kenya by way of adverse possession. Angote J correctly summed it up in the case of *Ann Itumbi Kiseli Vs James Muriuki Murithi [2013] eKLR*.

***“To constitute dispossession, the acts must have been done which are inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it, thus the term ‘adverse’”***

I fully associate myself with the holding of Angote J.

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

39. In the case before me, the defendant is on record as having stated that she found the plaintiffs and others in occupation of their respective parcels of land when she was discharged from the hospital where she had been admitted for one year and five months.

40. The defendant said that she did not bother to find out from the plaintiffs how they came to be in possession of their respective parcels of land as she was waiting for them to approach her. She further says that she is not interested in kicking out the plaintiffs from her land but rather she would like them to repurchase their respective parcels of land at the current market rate. In my view this demonstrates the fact that the plaintiffs dispossessed the defendant of their respective parcels or portions of land that they occupy. The plaintiffs occupation of their respective parcels of land has been open, notorious and it is clear that the same has been without permission from the defendant who all along sat to observe the events as unfolded without taking any action to recover her land. I am in agreement with Justice Mutungi's observation in *Elizabeth K. Ndolo Vs Muema Kitulu and 84 others in HCC (ELC) no 226 of 2014*

41. The above being the case, limitation period for purposes of adverse possession could not run against the defendant herein until 4<sup>th</sup> October, 1996 when she became registered the owner of LR number 1757/6 as can be seen from a certificate of title annexed to the supporting affidavits of Mwema Kitulu, Hon. Mr. Justice Musinga and Emily Mwelu Gatugata as MK “F” “DKM5” and “EMG3” respectively.

42. The three plaintiffs and 6 others have occupied the defendant's land openly and without force since 4<sup>th</sup> October, 1996 when the defendant was registered as the owner of the suit land.

43. From the evidence on record, the plaintiffs occupied their respective parcels in the same land way before the defendant was registered as the owner.

44. The fact that the estate of Josiah Salvin Kaumbulu failed to register their interest within 12 years after the consent judgement dated 19<sup>th</sup> July, 1991 cannot be ground for holding the plaintiffs guilty of laches because of limitation period for purposes of adverse possession by the plaintiffs against the defendant started running when she became the registered owner of L.R 1757/6. And besides, the estate of Josiah Salvin Kaumbulu had not been registered as the owner of the 3000 acres that they bought from the defendant in order for adverse possession to run against the estate. In any case, the plaintiffs entered into the said land upon the agreement they had with the Josiah Salvin Kaumbulu and Jerome Kaumbulu.

45. There is evidence to show that the plaintiffs have heavily invested in their respective parcels of land by building permanent homes, developing homes amongst other developments and hence the need for permanent injunction against the defendant.

46. Arising from the above, my finding is that the plaintiffs have on a balance of probabilities satisfied this court that they have a cause of action against the defendant. In the circumstances, I hereby proceed to enter judgement for the three in plaintiffs and six others in ELC nos. 233 to 241 of 2017 (Originating Summons) in terms of prayers (a), (b), (c) and (d) of her Originating Summons.

47. Further I direct that for full measure a default order ought do hereby issue to the effect that should the defendant decline to sign the several transfers in favour of the nine (9) plaintiffs the Deputy Registrar of this court is authorized to sign the same.

**Signed dated and delivered at Makueni this 19<sup>th</sup> day of March,2018.**

**MBOGO C.G**

**JUDGE**

**In the presence of:**

Court Assistant- Kwemboi

Plaintiff

Defendant

Mr. Kyengo holding brief for Mr. Kyalo Mboobo for the plaintiff present

Mr. Alenya holding brief for Mr. Onduso for the Respondent present.

**MBOGO C.G**

**JUDGE**

**19/3/2018**