



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 299 OF 2009 (O.S)

JOSEPH MBATHA NZAVI.....APPLICANT

VERSUS

AMBROSE MWIKYA NZAVI.....1ST RESPONDENT

JANE KAVINDU KATHUKA.....2ND RESPONDENT

RHODA NDULU KATHUKA.....3RD RESPONDENT

BROWN NZAVI KATHUKA.....4TH RESPONDENT

JUDGMENT

1. This matter was commenced by way of an Originating Summons dated 2nd October, 2009. In the said Summons, the Applicant is seeking for the following orders:

- a. That the Applicant, Joseph Mbatha Nzavi, be declared the lawful owner of all that parcel of land known as Kangundo/Isinga/784, and be registered as such owner.*
- b. That a permanent order of injunction do issue against the 1st Respondent restraining him from selling, charging, or transferring land parcel No. Kangundo/Isinga/784, or in any other way interfering with the said parcel of land or the title thereof.*
- c. That a permanent order of injunction do issue against the 1st, 2nd, 3rd and 4th Respondents restraining them, their agents and/or servants from entering land parcel No. Kangundo/Isinga/784 and cultivating, ploughing, cutting down trees/coffee trees, planting crops thereon in any other way interfering with the said parcel of land.*
- d. That in the alternative to prayers 1, 2 and 3 herein-above, the 1st Respondent do refund to the Applicant Kshs. 350,000 paid to the 1st Respondent by the Applicant in full.*
- e. That costs of this suit be paid by the Respondents.*

2. The suit is supported by the Affidavit of the Applicant who has deponed that the 1st Respondent is his younger brother and the registered proprietor of land known as Kangundo/Isinga/784 (*the suit land*); that the 1st Respondent has never lived on the suit land and that in 1978, the 1st Respondent allowed him to occupy and develop the suit land. According to the Applicant, the suit land was gifted to him by the 1st Respondent for having taken care of him and educated him.

3. The Applicant has deponed that in the year 2007, the 1st Respondent asked him to pay Kshs. 350,000 as consideration for the suit land; that his son deposited the Kshs. 350,000 on the 1st Respondent's bank account and that the 1st Respondent is yet to transfer the suit land to him.

4. The Applicant finally deponed that in July, 2009, the 2nd, 3rd and 4th Respondents unlawfully moved on the suit land and harvested crops thereon.

5. In reply, the 1st Respondent deponed that it is not true that the Applicant has occupied the suit land for over thirty (30) years; that he never allowed the Applicant on the suit land and that it is not true that he gifted him with the land. According to the 1st Respondent, the Kshs.

350,000 that the Applicant paid him was in respect of the rent for having used the land since 2005 and that it was his sister's son who used to cultivate the land until the year 2005 when he authorized the 1st Respondent to use it. The Originating Summons proceeded by way of *viva voce* evidence.

6. The Plaintiff, PW1, reiterated the depositions that are contained in his Affidavit. The Applicant informed the court that the 1st Applicant is his last born brother; that his parcel of land borders the suit land which is registered in favour of the 1st Respondent and that he has always used the suit land since 1978.

7. It was the evidence of PW1 that the 1st Respondent works in Kisii and that he is the one who paid for him the school fees; that he gifted him the suit land and that the 1st Respondent allowed him to use the suit land. Although he does not have a house on the land, PW1 stated that he has bananas, maize, beans and other crops on the land and that he has been cultivating the land since the year 1978 until 2007 when the 1st Respondent agreed to transfer to him the land.

8. It was the evidence of PW1 that he deposited on the 1st Respondent's bank account Kshs. 350,000 being the purchase price and that it is not true that the 1st Respondent leased the suit land to him.

9. The Applicant's son, PW2, informed the court that the Applicant has been using the land since 1978; that the Applicant was given the land as a gift by the 1st Respondent and that the Applicant later on bought the land from the 1st Respondent. According to PW2, he is the one who deposited the purchase price on the 1st Respondent's account in the year 2007.

10. The 1st Respondent, DW1, informed the court that he is the registered proprietor of the suit land; that he allowed his sister, Beth, to utilize the land between 1979 and 2003 and that after his sister died, his nephew, Reuben Mutua, occupied the land. However, when he heard that Reuben wanted to sell the land, he allowed the Applicant to use the land and pay him a token.

11. According to the 1st Respondent, the Applicant never told him why he deposited Kshs. 350,000 and that he has since sold the land to his niece.

12. The Applicant's advocate submitted that the issue of whether a party's possession of a piece of land is adverse is a matter of evidence; that the Applicant has met the pre-requisites of being declared the owner of the suit land by way of adverse possession and that the Applicant has proved that the period of adverse possession commenced in the year 1978 when the 1st Respondent gave him the land as a gift in consideration of having educated him.

13. The Respondents' counsel submitted that the Applicant's suit cannot succeed because there is no evidence that the alleged Sale Agreement was ever repudiated; that adverse possession cannot arise out of the consent or permission of the owner of the land and that if the Respondent donated the suit land to the Applicant as a gift, he cannot be compelled by the court to transfer the suit to the Applicant.

Analysis and findings:

14. The Applicant's Originating Summons has been filed pursuant to the provision of Section 38 of the Limitation of Actions Act. Section 38 of the Act provides that where a person claims to have become entitled by adverse possession to land registered under any Act of Parliament, he may apply to the High Court (ELC) for an order that he be registered as the proprietor of the land in place of the person then registered as proprietor of the land.

15. For one to succeed in a claim of adverse possession, he must have made physical entry on the land for the statutory period of twelve (12) years; the entry and occupation must be with or maintained under some claim; the occupation must be non-permissive; and the acts of the adverse possessor must be inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it (*See James Ritei vs. Harchi Tranjan & 2 others, Machakos ELC. No. 334 of 2009*).

16. The Applicant herein stated in his Affidavit and evidence in chief that the 1st Respondent gifted him with the suit land in 1978 for having paid for him the school fees. The Applicant deponed as follows:

"5. That in 1978, the 1st Respondent asked me to take up occupation and development of the suit land as he had no intention of ever settling thereon or using it; that this was a gift to me for having taken care of him and educated him."

17. The Applicant further informed the court that it was not until the year 2007 that the 1st Respondent, who is his brother, asked him to pay Kshs. 350,000 as consideration for the suit land before he could transfer the land to him. That is when he deposited Kshs. 350,000 in his bank account.

18. The 1st Respondent admitted that Kshs. 350,000 was deposited on his bank account but stated that the said money was for the period the Applicant had used the land. The letter by the 1st Respondent dated 20th November, 2008 confirms that the 1st Respondent was willing to sell to the Applicant the suit land for Kshs. 350,000 until he discovered that the land was being purchased by a third party and not the Applicant. According to the said letter the 1st Respondent stated that he was willing to refund to the Applicant the purchase price.

19. The Applicant has admitted that he was on the suit land with the permission of the registered proprietor, and he only attempted to acquire it by way of a sale in the year 2007. As was held by the Court of Appeal in the case of *Wilson Katana & 101 others vs. Salim Abdalar & Another (2015) eKLR*, a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of

the owner of or in accordance with the provisions of an agreement of sale or lease or otherwise. The court further quoted with approval the decision of **Jandu vs. Kirpal (1975) E.A 225** where it was held that possession does not become adverse before the end of the period for which permission to occupy has been granted.

20. From the above decisions, it follows that even if it is true that the Applicant has been in possession of the suit land since 1978 until the year 2007 when he purported to buy it, he is not entitled to the land by way of adverse possession because he had been permitted to occupy it by the 1st Respondent. His occupation was therefore not hostile or adverse to the 1st Respondent's title.

21. The Applicant's adverse possession of the land only commenced when the 1st Respondent repudiated the oral agreement for the sale of the land vide his letter dated 20th November, 2008. Considering that this suit was filed on 2nd October, 2009, a period of twelve (12) years had not lapsed from the time when the oral Sale Agreement of the suit land was repudiated and when the suit was filed.

22. In the circumstances, the Applicant's claim for adverse possession cannot succeed. I am however convinced that the 1st Respondent received Kshs. 350,000 from the Applicant as the purchase price. Having repudiated the oral Sale Agreement, and having agreed vide his letter dated 20th November, 2008 to refund the Kshs. 350,000, it follows that the Applicant is entitled to a refund of the said money.

23. For those reasons, I dismiss the prayers in the Originating Summons for a declaration that the Applicant is the owner of the suit land and for an order for permanent injunction with no order as to costs. I however allow the Applicant's alternative prayer for a refund of Kshs. 350,000 with interest at court rates from the date of this Judgment until when the full payment will be made.

24. Each party will bear his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE