



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 55 OF 2013

MUA FARMERS CO-OPERATIVE SOCIETY LTD.....APPLICANT

VERSUS

MUKII MUTISO.....RESPONDENT

JUDGMENT

1. This suit was commenced by way of an Originating Summons filed on 10th February, 2011. In the said Originating Summons, the Applicant is seeking for the following orders:

i. a. That it be declared that the Applicant duly discharged

their obligations under the sale of agreement made between the Applicant (purchaser) and the Respondent (Vendor) on 19th April, 1982 and any other such previous and subsequent covenants regarding the purchase of 7 acres of land or thereabout originally from Land Parcel Number Machakos/Mua Hills/94 and now Land Parcel Number Machakos/Mua Hills/648, upon which the Applicant has already constructed a coffee factory.

b. That it be declared that the Respondent has not fully discharged her obligations under the sale of agreement made between the Applicant and the Respondent on 19th April, 1982 and any other such previous and subsequent covenants regard the purchase of 7 acres or thereabouts of land originally from Land Parcel Number Machakos/Mua Hills/94 and now Land Parcel No. Machakos/Mua Hills/648, specifically by not taking the necessary steps to transfer the said purchase land to the Applicant (purchaser).

c. That an order of specific performance do issue against the Respondent to take expeditiously and without further delay the necessary steps and transfer to the Applicant legal title for 7 acres or thereabouts which are subject to the sale agreements aforementioned in paragraphs 1(a) and (b) hereinabove.

d. That the Applicant be registered as the owner of a portion consisting of 7 acres or thereabout of parcel of land known as Land Parcel Number Machakos/Mua Hills/684, upon which the Applicant has constructed a coffee factory.

ii. Or in the alternative and without prejudice to (1) (a), (b), (c),(d) and (above);

a. That it be declared that the Applicant has acquired ownership rights of 7 acres of land or thereabout originally from Land Parcel Number Machakos/Mua Hills/94 and now Land Parcel No. Machakos/Mua Hills/648, upon which the Applicants have already

constructed a coffee factory by way of prescription/adverse possession.

b. That the Applicant be registered as owners of all 7 acres of land or thereabout originally from Land Parcel Number Machakos/Mua Hills/94 and now Land Parcel No. Machakos/Mua Hills/648, upon which the Applicant has already constructed a coffee factory subject to rights, privileges, liabilities and conditions as enumerated in the Registered Land Act Cap 300.

2. The Summons are supported by the Affidavit of the Applicant's Chairman who has deponed that on 19th April, 1982, the Applicant's officials executed an agreement of sale with the Respondent for the purchase of seven (7) acres of land known as plot 94 in Mua Hills Scheme "A" for Kshs. 14,000.

3. It is the Applicant's case that the parties established the boundaries of the suit land; that the Applicant later on constructed a coffee factory comprising factory houses, offices, drying bins and tables, water storage tanks, fermenting tanks, a pump house and a water pond on the suit land.

4. The Applicant's Chairman deponed that the officials of the Applicant have sought the Respondent to fill and sign the necessary forms for issuance of a title which she has refused to do and that Plot No. 94 was subsequently adjudicated and registered in the Respondent's name as parcel number Machakos/Mua Hills/94.

5. According to the Applicant's Chairman, the Respondent has since sub-divided the parcel number 94 and sold the portions to third parties and that the land that the Applicant purchased is now known as parcel number Machakos/Mua Hills/648 which is still registered in the name of the Respondent. It is the Applicant's case that it is entitled to an order of specific performance.

6. Although the Respondent entered appearance through her advocate on 7th March, 2011, she did not file an Affidavit in response to the Originating Summons. The Originating Summons is therefore unopposed.

7. The matter proceeded for hearing before Mutende J. The Applicant called a total of three (3) witnesses.

8. PW1 informed the court that he has been a member of the Applicant since the year 1982; that the Applicant purchased the suit land from the Respondent and that even after the full purchase price paid, the Respondent has declined to transfer the land to the Applicant.

9. It was the evidence of PW1 that after purchasing the land, they developed the same by building the factory with the other amenities listed in the Affidavit; that the Respondent was also a member of the Applicant and that she never complained when the factory was put up on the land.

10. The Chairman of the Applicant, PW2, informed the court that he has been a member of the Applicant since 1990; that the Applicant purchased from the Respondent a portion of Plot No. 94 which after sub-division, it became parcel number 648 and that they have built on the land a processing factory.

11. According to PW2, the agreement that the parties entered into is dated 19th April, 1982 and that the Respondent was paid in full.

12. PW2 stated that the Respondent has refused to apply for the consent of the Land Control Board and to transfer the land to the Respondent.

13. The surveyor, PW3, produced the copy of the Green card in respect of parcel of land known as Mua Hills/648.

14. According to PW3, he surveyed the area that the Applicant purchased which was fenced and ascertained that it measures 7.4 acres; that the Respondent was present when he took the measurements

and that he indicated the portion that the Applicant bought as portion number “B”.

15. The Applicant’s advocate submitted that the Applicant discharged its obligations as contemplated in the Sale Agreements and that the Respondent refused to transfer the said land and refused to take out the requisite consent of the Land Control Board thus rendering the agreement of sale as null and void.

16. Counsel submitted that the Applicant should be declared to have acquired land measuring approximately 7 acres by way of adverse possession.

17. It is not in dispute that the Applicant purchased a portion of land known as Machakos/Mua Hills/94 on 19th April, 1982. After entering into the said agreement and paying the purchase price, the Applicant built on the land a coffee processing factory, amongst other facilities.

18. The Plaintiff has been using the said land since 1982 without the permission of the Respondent openly, exclusively and with the knowledge of the Respondent.

19. Although the Applicant had prayed for an order of specific performance, it abandoned that prayer because when the Respondent declined to obtain the consent of the Land Control Board, the agreement of sale became null and void. Consequently, an order of specific performance could not have been issued by the court.

20. Instead, the Applicant has pursued the alternative prayer of being declared the owner of land measuring approximately seven (7) acres by way of adverse possession.

21. For an Applicant to succeed in a claim of adverse possession, he has to show that he has been in continuous and un-interrupted occupation and possession of the land in dispute for twelve (12) years; and the possession must have been open, notorious and with the knowledge of the owner but without his permission.

22. The Applicant in this case has fulfilled the above conditions.

23. The surveyor, PW3, informed the court that he surveyed the land that the Applicant purchased, which land has been fenced off. According to PW3, the Applicant is entitled to land measuring 7.4 acres, which is a portion of land known as Machakos/Mua Hills/648.

24. In the circumstances, I find that the Applicant has proved on a balance of probabilities that he is entitled to a portion of parcel of land known as Machakos/Mua Hills/648 measuring 7.4 acres.

25. I therefore allow the Originating Summons filed on 10th February, 2011 as follows:

a. The Applicant be registered as the proprietor of all the 7.4 acres of land that it has been in occupation for twelve (12) years being a portion of land known as Machakos/Mua Hills/648.

b. The County Surveyor is hereby directed to sub-divide land known as Machakos/Mua Hill/648 into two portions, with one portion measuring 7.4 acres, which should be registered by the County Land Registrar in favour of the Applicant forthwith, while the other portion to remain in the name of the Respondent.

c. The Respondent to pay the costs of the suit.

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

O.A. ANGOTE

JUDGE