



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 288 OF 2017

NGUMBI MUASYA.....PLAINTIFF

VERSUS

MONICA TULU NDULU.....DEFENDANT

JUDGMENT

1. In the Originating Summons dated 21st January, 2008, the Applicant has sought for the following orders:

a. The Plaintiff has become entitled by adverse possession or prescription over a period of over twelve (12) years to all the parcel of land measuring approximately 59.64Ha and comprised in land Title No. Nzalae/Mutonguni/749 which rights and interests have been subsisting as a matter of law after the lapse of twelve (12) years from 1945 when the Plaintiff took sole possession occupation and use of the land.

b. The Plaintiff accordingly be registered as sole absolute proprietor of Plot No. Nzalae/Mutonguni/749 in place of the Defendant, the current registered owner, and further that the Defendant do transfer the said land to the Plaintiff and in default the Deputy Registrar of this court do execute all necessary documents to effect transfer.

2. The Summons are supported by the Affidavit of the Applicant who has deponed that the Defendant is registered as the proprietor of land known as Nzalae/Mutonguni/749; that him, together with his family members took possession of the suit land in 1945 and that since then, they have been grazing livestock and cultivating the land.

3. According to the Plaintiff, the land was initially part of his land which was subsequently sub-divided into Nzalae/Mutonguni/36 and 749 and that after the said sub-division they remained on the suit land to date. It is the Plaintiff's case that in 1970, following the commencement of the adjudication process, the Defendant had the suit land wrongfully registered in his favour.

4. The Plaintiff finally deponed that although the suit land was registered in favour of the Defendant, his constant, continuous and sole possession, occupation and use of the land since 1945 has conferred on him title by way of adverse possession.

5. The Plaintiff's grandson, Josiah Musyoki Ngumbi, filed an Affidavit on 10th August, 2016 in which he deponed that the Plaintiff died on 12th June, 2015. The said son went into great details on how the

Plaintiff and his father settled on the land since 1945. The deponent also annexed a copy of the certificate of death showing the date the Plaintiff died, together with copies of the proceedings which were filed in different courts in respect to the suit land.

6. The Defendant filed a Notice of Preliminary Objection on 17th March, 2008 in which he averred that the suit is incompetent; that adverse possession can only be raised with respect to registered land and that the suit having been first registered in the year 2001, the suit was filed prematurely.

7. The suit proceeded for hearing by way of written submissions. The Plaintiff's grandson submitted that the Plaintiff's suit in Land Appeal Case Number 206 of 1987 and Nairobi HCCC No. 758 of 1991 were dismissed without merit; that the Defendant has never taken possession of the suit land since 1945 and that they have been in possession of the land despite the decisions in Land Adjudication Case Number 116 of 1977 and Land Appeal Case Number 206 of 1987 which was in favour of the Defendant's deceased husband.

8. On the other hand, the Defendant's advocate submitted that the Plaintiff's claim abated on 12th June, 2016, being one (1) year after his death; that there was no order of the court allowing the substitution of the Plaintiff and that there is no competent suit before the court.

9. The Defendant's counsel finally deponed that the limitation period for purposes of adverse possession starts running after registration of the land in the name of the Defendant and that the suit property having been registered in favour of the Defendant in the year 2001, the suit was prematurely filed. Both the Plaintiff and the Defendant filed authorities which I have considered.

10. The Plaintiff's grandson, Josiah Musyoki Ngumbi, filed an Affidavit sworn on 10th August, 2016. The said deponent annexed on the Affidavit a copy of the Certificate of Death which shows that the Plaintiff died on 12th June, 2015. Since the Plaintiff died on 12th June, 2015, there has been no Application filed by either party to substitute the Plaintiff or to revive the suit.

11. Order 24 Rule 3(1) and (2) of the Civil Procedure Rules provides as follows:

“3. (1) where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues, the court, on an Application made in the behalf, shall cause the legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit.

(2) Where within one (1) year no Application is made under subrule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and, on the Application of the Defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the Estate of the deceased Plaintiff.

Provided the court may, for good reason on Application, extend the time.”

12. It is more than one (1) year since the Plaintiff died, and since then, the Plaintiff has never been substituted by his legal representative within the stipulated time. The effect of the failure to substitute the Plaintiff and application for the revival of the suit means that the suit herein abated, one (1) year after the death of the Plaintiff. Consequently, there is no suit before the court for trial.

13. Even if, for the sake of argument, the suit is properly before the court, the same cannot succeed because the period of twelve (12) years had not lapsed from when the suit land was first registered and when the suit was filed.

14. I say so because the copy of the extract of the title (*the green card*) shows that the register in respect of the suit land was opened for the first time on 15th January, 2001. It is trite that for one to succeed in a

claim of adverse possession, he has to prove that a period of twelve (12) years have lapsed from the time when the suit land was registered in favour of the Defendant. The Court of Appeal in the case of *Karuntimi Raiji vs. M'makinya M'itunga (2013) eKLR* quoted with approval the decision in *Francis Gitonga Macharia vs. Muiruri Waithaka, Civil Appeal No. 110 of 1997* where it was held as follows:

“That the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the Respondent. In this case, the Appellant was registered as proprietor of the suit property on 22nd March, 1973; we find that the claim for adverse possession against the Appellant starts to run from this date and not 1954.”

15. In the case of *Ann Itumbi Kiseli vs. James Muriuki Muriithi (2013) eKLR*, this court held that a claim for adverse possession could only run from the time when the Title Deed was issued for the first time. Indeed, although the Defendant herein was registered as the proprietor of the suit land on 18th June, 2007 by way of transmission, time started running as from 15th January, 2001 when the suit land was registered in favour of Nduu Maingi (*deceased*). However, considering that this suit was filed in the year 2008, a period of twelve (12) years had not lapsed from the time when the land was first registered in favour of the late Nduu Maingi.

16. In the circumstances, the Plaintiff has not proved one of the salient elements for one to succeed in a claim of adverse possession: that of being on the land for twelve (12) years from the time when the suit land was registered in favour of either the Defendant or his predecessors.

17. For those reasons, I dismiss the Originating Summons dated 21st January, 2008 with costs.

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

O.A. ANGOTE

JUDGE