



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 4 OF 2014 (O.S)**

PIUS MUSIMBA MUASYA.....1<sup>ST</sup> APPLICANT  
GABRIEL MUTUKU NZUKI.....2<sup>ND</sup> APPLICANT  
MALITA NDILA MUASYA.....3<sup>RD</sup> APPLICANT  
BENARD KYALO NZAU.....4<sup>TH</sup> APPLICANT  
FRANCIS MAKAU MUASYA.....5<sup>TH</sup> APPLICANT  
MONICAH MUENI MUTUA.....6<sup>TH</sup> APPLICANT  
ROBERT MUINDE MUINDI.....7<sup>TH</sup> APPLICANT  
CONSOLATA MUENI MUTIE.....8<sup>TH</sup> APPLICANT  
SYOMBUA MUTUA MATINA.....9<sup>TH</sup> APPLICANT  
ALPHONCE MULI MBUVI.....10<sup>TH</sup> APPLICANT  
SALOME NDUNGE MATHEKA.....11<sup>TH</sup> APPLICANT  
MICHAEL NZUKI MUTUA.....12<sup>TH</sup> APPLICANT  
JUSTINA NGONYO NDOLO.....13<sup>TH</sup> APPLICANT  
JOSEPH MUTINDA NDOLO.....14<sup>TH</sup> APPLICANT  
ANCIENT KAVUU MUASYA.....15<sup>TH</sup> APPLICANT  
DAMION PETER MUASYA.....16<sup>TH</sup> APPLICANT

**VERSUS**

ONESMUS NDOLO NGETA.....1<sup>ST</sup> RESPONDENT  
BERNARD ARUBANUS NDUBA.....2<sup>ND</sup> RESPONDENT  
JOHN KIBAI KIKOLE.....3<sup>RD</sup> RESPONDENT  
STANLEY MUNYAO KIKOLE.....4<sup>TH</sup> RESPONDENT

## JUDGMENT

1. In the Originating Summons dated 15<sup>th</sup> January, 2014, the Applicants are seeking for the determination of the following questions:

***a. Whether the Applicants have acquired prescriptive rights over all that parcel of land known as Kangundo/Kitwii/1313 registered in the names of the Respondents herein.***

***b. Whether the Respondents should provide costs of this Application.***

2. According to the 1<sup>st</sup> Applicant's Affidavit, the Applicants are related by blood and marriage; that parcel of land known as Kangundo/Kitwii/1313 registered in the name of the Respondents is ancestral land and that the same was owned by their four (4) grandfathers.

3. The 1<sup>st</sup> Applicant has deponed that he was born on the land in the year 1939; that all the Applicants and himself have been on the suit land since time immemorial and that all their four (4) grandfathers and fathers were buried on the land.

4. According to the 1<sup>st</sup> Applicant, the Respondents' father, who is their neighbour, instructed surveyors to sub-divide the suit land; that there are more than fifteen (15) families living on the suit land and that the wrangles between the Applicants and the Respondents started in the year 1976. According to the Applicants, the Respondents have never occupied the suit land.

5. In response, the 1<sup>st</sup> Respondent deponed that the Respondents are the registered proprietors of the suit land; that the Respondents are the sons of the late Elijah Kikole and that the suit land is their ancestral land. According to the Respondents, the suit land was registered in favour of their father that during the adjudication process and that when their father died, the land was transferred to them by way of transmission.

6. The Respondents deponed that they have never allowed the Applicants to utilize the suit land; that none of the Applicants or the lineage of Matina Kilome have been in occupation of the suit land and that the suit land has been a subject of disputes between their lineage and the Applicants' lineage.

7. According to the Respondents, the Applicants' fathers filed a claim in Machakos Land Dispute Tribunal in 1998; that the Respondents filed Judicial Review Application Number 88 of 2002 challenging the decision of the Tribunal and that the court quashed the decision of the Tribunal; that it is only a portion of the 2<sup>nd</sup> Applicant's house that is on the suit land and that there is also one house which was built on the suit land by the Applicants illegally.

8. The suit proceeded by way of *viva voce* evidence. The 1<sup>st</sup> Applicant, PW1, informed the court that he was born on the suit land in the year 1939; that the suit land is their ancestral land and that when their grandfather died in the year 1960, he was buried on the land.

9. When they discovered that the Respondents' father had acquired a portion of their land, PW1 stated that they lodged a complaint at the Land Adjudication in Kitwii in the year 1986; that when they lost the case, they appealed to the Minister where they also lost. They then filed a dispute with the District Land Disputes Tribunal. According to PW1, the Respondents have never taken possession of the suit land.

10. The 2<sup>nd</sup> Applicant, PW2, informed the court that he was born on the land in 1946; that his family moved on the land in 1973 and that they live on the suit land to date. It was the evidence of PW2 that his late father was involved in the dispute in respect of the suit land. The statements of PW5, PW6, PW7, PW8 and PW9 were admitted in evidence by the consent of the parties. All the Applicants claimed that they were born on the suit land on diverse dates. PW5 stated that he was born on the land in 1958 while PW6, PW7, PW8 and PW9 stated that they were born on the land in 1938, 1982, 1937 and 1949 respectively.

11. The 1<sup>st</sup> Respondent, DW1, informed the court that he is the son of Kikole Ndolo; that his father inherited the suit land from his great grandfather and that during demarcation, their land was separated from the Plaintiffs' fathers' land. According to DW1, the family of the Applicants have always occupied parcel of land known as Kangundo/Kitwii/484 and not the suit land.

12. DW1 stated that when the Applicants' father lodged an appeal with the Minister, he lost; that in the year 1992, he found the 2<sup>nd</sup> Applicant had put up a house on a portion of the suit land; that in the year 2001, the 1<sup>st</sup> Applicant filed a suit in the Tribunal; that the Applicants have settled on parcel of land number 484 and that it is only Nzuki Kiendi's family that has illegally settled on a portion of the suit land.

13. In his evidence, DW1 stated that the 1<sup>st</sup> Applicant built a house on the land between 1986-1992 and that they could not sue him for eviction because they were still processing the letters of administration.

14. It was the evidence of DW1 that the decision of the Minister has never been set aside; that the High Court quashed the decision of the Tribunal and that the 1<sup>st</sup> Applicant put up another house for his second wife in 1989/1990. According to DW1, the Applicants have denied them entry on the land.

15. The 4<sup>th</sup> Respondent, DW2, stated that the Minister declared that the suit land belonged to their father and that the Respondents are not entitled to the suit land. According to DW2, three of the Applicants are living on the land and that other than the 1<sup>st</sup> Applicant, the other two Applicants have been on the land for only two (2) years. It was the evidence of DW2 that none of his family members lives on the land.

16. In his submissions, the Applicants' advocate submitted that the Respondents have acknowledged that the Applicants are in possession of the suit land; that the Respondents have never asserted their right over the suit land; that the Applicants have been on the suit land since 1939.
17. The Respondents' counsel submitted that the Respondents are the rightful owners of the suit land; that the fact that they do not reside on the land is not sufficient reason to take the title away from them and that the Applicants have only put up two (2) houses on the land.
18. Counsel submitted that the Respondents have been vigilant in protecting their title by filing numerous cases in court and that the Applicants' claim has been interrupted due to the various disputes filed in court.
19. The Applicants are seeking to be declared the owners of land known as Kangundo/Kitwii/1313 (*the suit land*) by way of adverse possession.
20. Limitation period for purposes of adverse possession begins to run on the day the claimant is in possession of the suit land. Time ceases to run under the Limitation of Actions Act either when the owner asserts his right by taking legal proceedings or by an effective entry on the land or when the right is admitted by the adverse possessor. (*See Nairobi Civil Appeal No. 27 of 2002; Mbugua Njuguna & Another vs. Elija Mburu*).
21. The evidence before this court shows that the suit land was registered in favour of the Respondents on 4<sup>th</sup> May, 2000. Both parties claim that the suit land is their ancestral land, and that the Applicants' father and the Respondents' father have had long standing disputes in respect to the land.
22. Although the Respondents stated that the land was adjudicated in favour of their father, they did not attach a copy of the green card to enable the court to know when the land was first registered. Indeed, in the absence of the green card, the court can only compute time for the purpose of this claim to ascertain when the Respondents were registered as the proprietors of the land.
23. The Respondents have argued that even if the Applicants have been in possession of the suit land, the said possession has not been quiet and peaceful. According to the Respondents, there have been numerous disputes in court which have always ended up in their favour.
24. The Respondents have exhibited the proceedings of the Minister being the Minister's Appeal Case No. 344 of 1986. In that matter, the dispute was between the Applicants' father and the Respondents' father. Indeed, the 1<sup>st</sup> Applicant was also a party to those proceedings.
25. In the proceedings, the Applicants' father was challenging the registration of the suit land in the name of the Respondents' father. It is not clear what the decision of the Minister was. However, it would appear that the Minister agreed with the decision of the Land Adjudication Officer to have the land remain in the name of the Respondents' father.
26. After the Minister's decision, the Applicants herein filed another dispute in the then District Land Disputes Tribunal in 1999. The Tribunal recommended that the Title Deed that had been issued to the Respondents' father should be cancelled. This decision was quashed by the High Court in Judicial Review Application Number 88 of 2002. The said decision was made on 2<sup>nd</sup> May, 2013.
27. Although the Respondents were registered as the proprietors of the suit land in the year 2000, it was not until the year 2013 that the High Court dealt with the issue of the Respondents' title.
28. The evidence before me shows that since the year when the suit land was adjudicated, there have been disputes in courts between the parties herein or their parents, and the said disputes went on until the year 2013.
29. For one to succeed in a claim of adverse possession, he must prove that he has been in possession of the suit land continuously and without any interruption from the true owner for the statutory period. As was stated by the Court of Appeal in the case of *Mbugua Njuguna (supra)*, time ceases to run under the Limitation of Actions Act either when the owner asserts his right by taking legal proceedings or by an effective entry into the land.
30. There have been numerous proceedings in respect of the suit land culminating in the decision that was made in the year 2013. Consequently, the occupation of the suit land by some of the Applicants cannot be said to have been peaceful and quiet for twelve (12) years.
31. Due to those disputes, which were all decided in favour of the Respondents, the Respondents' right to recover the suit land has not been extinguished as argued by the Applicants.
32. For those reasons, I find that the Applicants have not proved their case on a balance of probabilities. I therefore dismiss the Originating Summons dated 15<sup>th</sup> January, 2014 with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13<sup>TH</sup> DAY OF APRIL, 2018.**

**O.A. ANGOTE**

**JUDGE**