



**REPUBLIC OF KENYA**

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

**ELC. APPEAL NO. 9 OF 2012**

**RAPHAEL MUYU MAKANDA.....APPELLANT**

**VERSUS**

**JOHNSON UTU KITHEKA.....RESPONDENT**

**AND**

**PRISCILLAH MUKAMI MUSYOKI....INTENDED APPELLANT**

*(Being an appeal from the Judgment of Kitui Principal Magistrate's Court in*

*Civil Case No. 178 of 2003 delivered on 26<sup>th</sup> January, 2012 by*

*Hon. B.M. Kimemia (Mrs) – P.M)*

**JUDGMENT**

1. The Respondent herein sued the Appellant in the Principal Magistrate's Court in Kitui PMCC No. 178 of 2003.
2. In the Plaintiff that was filed in the lower court, the Respondent averred that he is the registered proprietor of land known as Kyangwithya/Misewani/632 and that the Appellant had trespassed on the said land. The Respondent sought for an order of eviction of the Appellant, which order was granted by the learned Magistrate.
3. The Appellant was dissatisfied with the decision of the learned Magistrate and lodged a Memorandum of Appeal challenging the Judgment of the court. In the Memorandum of Appeal, the Appellant averred that the Magistrate erred by disregarding the fact that the suit was time barred; that the Magistrate had no jurisdiction to entertain the claim and that he Magistrate erred by finding that he was a trespasser.
4. The Appellant finally averred that the learned Magistrate erred by disregarding the Sale Agreement of August, 1982 and that the Respondent registered himself as the owner of the land through fraud by claiming that he was Nduku Kamene.
5. This being a first appeal, the court is under a legal duty to evaluate the evidence that was tendered in the lower court and arrive at its own conclusion.
6. In the lower court, the Respondent (PW1) informed the court that the Appellant is his neighbour; that he has a Title Deed for parcel of land known as Kyangwithya/Misewani/632 and that the Appellant was in occupation of a portion of the land.
7. It was the evidence of the Respondent that he did not allow the Appellant to occupy the suit land and that the Appellant has refused to vacate the suit land even after giving him several notices to vacate. It was his evidence that it was his late grandfather, Charles Kameme, who used to occupy the suit land and that "Nduku Kameme" was his nickname.
8. PW1 stated that during the adjudication process, his grandfather caused the land to be registered in his (PW1) nickname and that he had the name in the title rectified in the year 1994; that the Appellant occupied the land in 1988 and that indeed, the letter of 28<sup>th</sup> October, 1994 by him stated that he was ready to refund to the Appellant the money that the Appellant had paid his grandfather for the purchase of the land. It was the evidence of the Respondent that his grandfather was known as Kamene and not Nduku Kamene
9. On the other hand, the Appellant, (DW1), informed the court that in 1982, the Respondent's grandfather agreed to sell to him the disputed land and that on 28<sup>th</sup> August, 1982, they entered into a Sale Agreement which was duly signed and witnessed. It was the evidence of the Appellant that he immediately took possession of the land and built a permanent house on the land and has been living on it since then.

10. The Appellant informed the court that it was not until 19<sup>th</sup> November, 1994 that he received a letter from the Respondent informing him to vacate the land and that is when he realised that the suit land was registered in the name of the Respondent; that during the adjudication process, the suit property was registered in the name of Nduku Kameme; that he has been on the land for more than twelve (12) years and that he had filed HCCC No. 39 of 2003 claiming the suit land by way of adverse possession.

11. DW2 informed the court that just like the Appellant, he bought a portion of the suit land measuring 50 x 100 from the Respondent's grandfather and that when the old man died, the Respondent offered to refund her the purchase price. According to DW2, she took the money and left the piece of land which he had not taken possession. DW2 informed the court that by the time she was refunded her money, the Appellant had already developed the portion he bought from the Respondent's grandfather.

12. While allowing the Respondent's suit, the court observed that even after the deceased died, the Appellant did not seek to enforce the agreement he alleges to have had with the deceased; that the Respondent was registered as the proprietor of the suit land in 1976 and that rectification of the Respondent's name in the title was not fraudulent.

13. Both the Appellant's and the Respondent's advocates filed their respective submissions which I have considered.

14. In his Defence in the lower court, the Appellant averred that he had acquired the suit land by adverse possession and that he had filed in the High Court Machakos HCCC No. 39 of 2003(O.S). When the matter came up for hearing, the Respondent sought to have the Appellant's Defence struck out on the ground that it does not raise triable issues. In his Ruling of 15<sup>th</sup> July, 2004, the learned Magistrate held as follows:

***“It also seems that there is an allegation of fraud in such registration. It also seems that there is another suit which has been filed in the High Court where the Defendants claim the suit land through adverse possession. It seems to me that this suit must however be withdrawn because one cannot have two suits pending in respect of one parcel of land.”***

15. It would appear that even after the above order was made, the Respondent neither withdrew the suit nor had the matter stayed. Instead, the matter proceeded for hearing notwithstanding the pendency of the suit in the High Court. That in my view was unprocedural.

16. Considering that under Section 38(1) of the Limitation of Actions Act, it is only the High Court that can hear and determine a claim of adverse possession, the lower court should have stayed the Respondent's suit and await the outcome of the suit that was pending in the High Court in respect to the same land. On that ground alone, I find the present Appeal to be meritorious.

17. In any event, the learned Magistrate did not consider at all if indeed the Appellant had been on the suit land for more than twelve (12) years and whether the suit was time barred. Instead, the learned Magistrate held that it is the Appellant who should have filed a suit to enforce the agreement that he allegedly entered into with the deceased.

18. That was a misapprehension of the law. Having filed a suit to evict the Appellant, on the ground that he is the registered owner, the Appellant was entitled to raise a defence of Limitation of time. The court was then under an obligation to determine if indeed the Respondent's suit was time barred or not. This did not happen at all, meaning that the issue of whether the suit was time barred or not was not addressed at all.

19. Considering that the claim for adverse possession is still pending in this court, I shall not venture into determining whether the suit in the lower court was time barred by the time it was filed or not. Doing so will in effect prejudice the parties in HCCC No. 39 of 2003 (O.S).

20. I will however address the issue of whether the Respondent had the suit land fraudulently registered in his name. In his Defence, the Appellant averred that the Respondent lied when he stated that the name Ndutu Kameme refers to him and that rectification of the Title Deed and the register to read Johnson Utu Kitheka instead of Ndutu Kameme was fraudulent in nature.

21. The Appellant did not adduce any evidence to show that the name Nduku Kameme in the register refers to the Respondent's grandfather, and not the Respondent, and that the correction of names that was undertaken by the Land Registrar was wrong.

22. Having not shown that the two names do not belong to the Respondent, or that by 1976 when the adjudication of the land was done the Respondent was a minor, I dismiss the claim that the suit land was fraudulently registered in the Respondent's name.

23. However, having stated that the lower court did not determine the issue of whether the Respondent's suit was time barred, and in view of the pending HCCC No. 39 of 2003 (O.S), I partially allow the Appeal in the following terms;

***a. The Judgment of the court in Kitui PMCC No. 178 of 2003 be and is hereby set aside.***

***b. Kitui PMCC No. 178 of 2003 be and is hereby stayed pending the hearing and determination of Machakos HCCC No. 39 of 2003 (O.S).***

***c. The Respondent to pay the costs of the Appeal.***

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

**O.A. ANGOTE**

JUDGE