



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 219 OF 2015

MUTANU MWANZAPLAINTIFF

VERSUS

PETER MUTUA NGUI.....1ST DEFENDANT

MICHAEL MBITHI NGUI2ND DEFENDANT

JUDGMENT

1. In the Originating Summons dated 15th September, 2015, the Plaintiff is seeking for the determination of the following questions:

- a. Has the Plaintiff been in occupation and possession of the parcel of land known as Kangundo/Isinga/2178 which originally was part of Kangundo/Isinga/465 for a period exceeding over twelve (12) years since 1972/1973 or not?*
- b. Has the Plaintiff been in occupation and possession on this land with the knowledge of the Defendants?*
- c. Has the Plaintiff been cultivating the land without any interruptions or disturbance from the Defendants for a period exceeding over twelve (12) years?*
- d. Has the Plaintiff developed her permanent residences on the said parcel of land where she lives with a family?*
- e. Is the 2nd Defendant entitled in law to transfer the said parcel of land to the Plaintiff and in default, the Deputy Registrar to sign the transfer form and get a consent of the Land Control Board to transfer the said parcel of land to the Plaintiff?*
- f. Is the Plaintiff entitled to the prayers sought and cost of the suit?*

2. The Originating Summons is supported by the Affidavit of the Plaintiff who has deponed that the Defendants are sons of his brothers who were originally living on land known as Kangundo/Isinga/465 which was registered in the name of Mutio Ikonyo on 3rd March, 1978; that the Defendants registered themselves as the owners of the land on 19th August, 1978 after obtaining the letters of administration and that he started living on the land in 1972/1973 before the land was sub-divided by the Defendants in 1998.

3. The Plaintiff has deponed that the sub-division of the land that he has been living on is Plot No. 2179 and that he has developed four (4) permanent houses on the said land; that he has been cultivating the land without any interruption and that he has acquired prescriptive rights on the land.

4. It is the deposition of the Plaintiff that she has always lived on the suit land which was registered in the name of her late father and the late Mutio Ikonyo since 1972 and that she is entitled to be registered as the proprietor of land known as Kangundo/Isinga/2179.

5. In reply, the 1st Defendant deponed that it is not true that the Plaintiff has been in occupation of the suit land for a period of twelve (12) years; that the said land was originally registered in the name of Mutio Ikonyo (*deceased*); that the Plaintiff's objection in the succession cause was dismissed; that the 2nd Defendant was registered as the proprietor of the suit land on 14th May, 2008 and that twelve (12) years have not lapsed since the said registration was effected.

6. Both the Plaintiff and the 1st Defendant relied on their respective Affidavits and statements which I have already summarized above.

7. The Plaintiff's advocate submitted that the Plaintiff is the aunt of the Defendants; that the Applicant was given the suit land by her father in 1972/1973 when she disagreed with her husband and that she constructed her houses on the said land.

8. Counsel submitted that in the succession cause, the High Court agreed with the Respondents and held that she was not a beneficiary of the Estate of her father.

9. The Plaintiff's advocate submitted that the law does not allow the Respondents to disinherit the Plaintiff and that there is no dispute that the Plaintiff has been living on the suit land since 1973. The Plaintiff's counsel relied on numerous authorities which I have considered.

10. The Defendants' counsel submitted that the Plaintiff has not proved that she has been living on the land for twelve (12) years; that even if she started living on the suit land in 1972/1973, she was on the land with the permission of her father; that twelve (12) years have not lapsed since the Defendants acquired the title to the suit land and that the Plaintiff has not been in adverse possession of the suit land.

11. The Plaintiff's claim is that she should be registered as the proprietor of land known as Kangundo/Isinga/2178 by virtue of having lived on the land for twelve (12) years.

12. According to the Plaintiff, the suit land is a portion of land known as Kangundo/Isinga/465 which was initially registered in favour of her late father. After the succession cause was finalized, the said land was sub-divided into several portions, including the suit land.

13. The Plaintiff informed the court that he applied in the Succession Cause No. 203 of 1996 to be declared a beneficiary of her late father's Estate, which Application was dismissed by the court.

14. The evidence before me shows that parcel of land known as Kangundo/Isinga/465 was registered in the name of the late Mutio Ikonyo on 3rd March, 1978. The land was then registered in favour of the Defendants by way of transmission on 19th August, 1998. On 19th March, 2008, the suit land was sub-divided into three portions, to wit, parcel numbers 2178, 2179 and 2180. The Plaintiff claims that she has always lived on parcel number 2178.

15. The record in Machakos Succession Cause No. 203 of 1996 shows that when the Defendants applied to be confirmed as the beneficiaries of the Estate of the late Mutio, the Plaintiff filed an objection alleging that she is one of the beneficiaries to the Estate. After hearing the objection, Mwera J. found that having been married, the Plaintiff was not entitled to a share of her father's Estate. The Judge held that being a Mkamba by tribe, only unmarried daughters or those divorced can claim to inherit their father's land.

16. The Plaintiff did not file an appeal against the decision of the court in Succession Cause No. 203 of 1996. Indeed, as much as I agree that the decision of the court in the succession matter is not in accordance with the Law of Succession Act and the Constitution, I am alive to the fact that the Plaintiff never sought to have the said Judgment set aside on appeal. However, she continued living on the land.

17. The Defendants did not dispute in their Affidavit that the Plaintiff has been living on a portion of land that was initially portion number 465. After the said land was sub-divided, the Plaintiff found herself living on portion number 2178.

18. Indeed, it does not matter that parcel of land number 465 was sub-divided in the year 2008. The principles governing the doctrine of adverse possession are clear: time does not stop running on the sub-division of the land or transfer of the land to a third party. For the purpose of computation of time, the Plaintiff will be entitled to the portion of land she is occupying from 3rd March, 1978 when parcel number 465 was registered in favour of Mutio Ikonyo.

19. However, can a sibling who has been invited on a piece of land by his father, mother, brother or any other relative or person succeed in a claim of adverse possession?

20. The law is now settled that a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use of the land. (*See Ramco Investments Limited vs. Ini-drive-in Theatre Limited (2014) eKLR, Wilson Kazungu Katana & 101 others vs. Salim Abdalla Bakshwein & another (2015) eKLR*). Indeed the Black's Law Dictionary, 9th edition, has defined adverse possession as the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious.

21. The Plaintiff informed the court that she was invited on the suit land by her father, and that she lived and utilized the suit land with his permission. Considering that the Plaintiff's occupation of the land was consensual, she cannot succeed in a claim for adverse possession.

22. Indeed, where a son or a daughter occupies land registered in the name of his/her father, the rebuttal presumption is that he/she is on that land with the permission of the father. He/she cannot claim that the land should be registered in his/her favour just because he/she has been in occupation of the land for twelve (12) years. If that were the case, then most parents would loose their parcels of land to their children under the doctrine of adverse possession.

23. The occupation of the suit land by the Plaintiff was with the permission of her father. When the father died, the Plaintiff's entitlement to the suit land could only be acquired in a succession cause and not otherwise. Consequently, although the Plaintiff has proved that she has occupied the suit land for twelve (12) years, she has not proved that she has been on the land without the permission of the registered proprietors for the requisite statutory period.

24. For those reasons, I dismiss the Originating Summons dated 15th September, 2015 but with no order as to costs.

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

O.A. ANGOTE

JUDGE