



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 283 OF 2010

PRISCILLA MUTUKU (*Personal representative of*

ABEDNEGO MUTHUKU.....1ST PLAINTIFF

SEBASTIAN MAINGI.....2ND PLAINTIFF

VERSUS

FRANCIS THOROBA MUNGAI.....DEFENDANT

JUDGMENT

1. In the Originating Summons dated 21st December, 2010, the Plaintiffs are seeking for the determination of the following questions:

a. The Plaintiffs individually and severally having been in continuous quiet and or uninterrupted actual occupation and possession of portions of land as follows: Priscilla Mutuku 60" x 100" and Sebastian Maingi 50" x 100" within land parcel number Yatta/Ekalakala/4408 for a period of over twelve (12) years each of the Plaintiffs be declared having acquired proprietary rights in their respective said portions of land.

b. The registration of the Defendant as proprietor of the said portions of land within parcel Yatta/Ekalakala/4408 being a first registration which is subject to prescriptive rights were in the process for being acquired by the Plaintiffs and the prescriptive period having expired, then the Defendant be declared to hold the said portions of land and the subject matter of this suit in trust for the Plaintiffs.

c. The said portions of land containing by measurements 60" x 50" and 50" x 100" be surveyed and hived from parcel Yatta/Ekalakala/4408 and each portion be registered in the names of the Plaintiffs as hereinabove provided individually and severally.

2. The Originating Summons is supported by the Affidavit of the 1st Plaintiff who has deponed that she is the wife of the late Abednego Muthuku Kikubi who died on 1st October, 2007; that before he died, he had acquired a piece of land which he held under Kamba customary law for over sixty (60) years and that the suit land falls within an area that was declared an adjudication section in the year 1982.

3. According to the 1st Plaintiff, the deceased was in possession of parcel of land known as Yatta/Ekalakala/4408 (*the suit land*) measuring 60feet x 100feet; that he build a shop on the said land between 1988-2006 and that upon his death, he took possession of the same.

4. The 1st Plaintiff deponed that her late husband sold other portions of land of the suit land measuring 60feet by 100feet to Sebastian Maingi (*the 2nd Plaintiff*), Mueni Mwanja, Ngite Maundu, Patrick Saku, Sammy Kingola, Joana Nzue, Mwendwa Mutiso, Jonathan Munywoki Kiliko and Paul Ndongye, amongst other people, who all took possession of the land.

5. The 1st Plaintiff finally deponed that the Defendant was a clinical officer who worked in the area and that after he retired from the government in the year 2004, he went away; that the Defendant was present when the deceased put up shops on the suit land and that the deceased sold to the 2nd Plaintiff a portion of the suit land in the year 1982.

6. The 2nd Plaintiff swore an Affidavit in which he deponed that the Ekalakala area was declared an adjudication area between the years 1982-1988; that deceased owned land adjoining the market and that he offered him a portion of the land measuring 50 feet by 100 feet between 1982-1988 which he took possession by clearing it.

7. It was the deposition of the 2nd Plaintiff that the Defendant who was working as a clinical officer in the area was aware that the deceased

had sub-divided the land and sold a portion to him and that all the buyers of the plots within the suit land have developed them.

8. In reply, the Defendant deponed that he was registered as the proprietor of the suit land on 13th October, 2008; that he bought the land from Abednego Muthuku, the 1st Plaintiff's late husband in 1992 and that the said Abednego was the owner of the land known as Yatta/Ekalakala/603 which was adjacent to the market which he sub-divided into various small portions.

9. According to the Defendant, he bought two plots each measuring 42 feet by 100feet which he merged to form one plot (*the suit land*) and that when he bought the two plots, the titles had not been issued.

10. The Defendant deponed that during the demarcation process, he was registered as the owner of the suit land; that he thereafter fenced the said land and that it was only when he left Ekalakala in the year 2005 that he received a report that the deceased was putting up a shop on the land he had purchased from him.

11. Upon deliberation, the Defendant deponed that the deceased agreed to give him an alternative plot which was next to the land he had bought; that however, the deceased sold the land he had offered to give him to the 2nd Plaintiff and that the Plaintiffs have not been on the land for twelve (12) years as alleged. The surveyor who worked in the Ekalakala Adjudication Scheme filed an Affidavit in support of the Defendant's case.

12. The 1st Plaintiff filed a Further Affidavit in which she deponed that she settled on the suit land in 1963 with her husband; that when the land was declared an adjudication section, they were registered as the proprietors of parcel numbers 603, 604 and 474 and that Musyoka Mailu was not the surveyor during the adjudication exercise.

13. According to the 1st Plaintiff, the only land that they sub-divided was 474; that plot 603 has never been sub-divided; that plot number 4408 was not hived from plot 603 as alleged by the Defendant and that after seeking the sub-division of plot 474, her husband left a plot number 4408 for putting up a shop. According to the 1st Plaintiff, her late husband was not aware that the Defendant had caused plot number 4408 to be registered in his favour. The Summons proceeded by way of *viva voce* evidence.

The Plaintiffs' case:

14. The 1st Plaintiff, PW1, relied on her Supporting Affidavit and Further Affidavit which I have already summarized above. In addition PW1 produced in evidence the Title Deed that was issued to her late husband for land known as Yatta/Ekalakala/474; the Certificate of Confirmation of Grant; the registration sheet for Ekalakala registration section; the official search for parcel of land known as Ekalakala/603; the photographs showing the shops on the suit land and the sketch plan of the area.

15. In cross-examination, PW1 maintained that she has been on the land since 1963; that the Defendant was registered as the proprietor of the land in the year 2008 and that the shops on the suit land were put up in 1992.

16. PW1 denied that her late husband sold the suit land to the Defendant in 1992 and that they owned Plot Nos. 602, 603, 604 and 474 in the area.

17. It was the evidence of PW1 that the shop she built with her late husband stands on Plot No. 474 and not 4408 and that plot number 4408 does not exist on the ground. It was the evidence of PW1 that she was not aware of any dispute in respect to the suit land that was handled by the adjudication officer.

18. PW1 finally stated that they sub-divided Plot No. 474 and sold some of the plots and that the defendant is not one of the people who purchased the sub-divisions.

19. PW2 stated that he started living in Ekalakala in the year 1960 and acquired a piece of land fronting the market in the year 1963; that he was the market Chairman when the area was declared an adjudication section and that parcel number 474 fronting the market was adjudicated in favour of the late Abednego.

20. It was the evidence of PW2 that as the market Chairman, he witnessed the sale of the plots within the market by the late Abednego and that Abednego never sold a plot to the Defendant. It was the evidence of PW2 that the parcel of land now known as 4408 belongs to Abednego; that all the plots were surveyed by one Githae and that plot number 4408 was not hived from Plot No. 474.

21. PW3 stated that he was a trainee surveyor for four (4) years at Ekalakala Adjudication Section between 1989 and 1993; that Musyoka Malii was neither a surveyor nor a demarcation officer and that only the land adjudication officer can change the records once demarcation has been done and completed.

22. According to PW3, to excise any land from parcel numbers 603 or 474 to create parcel number 4408, one must have gone through a successful objection which does not exist and that parcel number 4408 could not have been excised from parcel number 603 which is jointly registered in the name of the 1st Plaintiff and her late husband.

23. The 2nd Plaintiff, PW4, stated that he bought a portion of plot number 474 from the 1st Plaintiff's husband in 1982; that the formal agreement was done in the year 2006 and that is when he took possession of his portion of land. According to PW4, his portion of land does not have a title document.

Defence case:

24. The Defendant, DW1, adopted his Affidavit which I have already summarized. According to DW1, he bought the suit land from the late Abednego in 1992 during the adjudication process; that the main parcel of land was parcel number 603 and that land he purchased was known as parcel number 4408.

25. According to DW1, he was in possession of the land since 1992 until 2005 when he received a report that the late Abednego was developing his land.

26. In cross-examination, DW1 stated that he did not reduce the agreement with Abednego into writing and that the 2nd Plaintiff entered on the land in the year 2006.

27. DW2 informed the court that he is a retired surveyor; that he worked in the Ekalakala Adjudication Scheme as a surveyor and that he was involved in the demarcation of land in that scheme. According to DW2, the 1st Plaintiff's late husband hived off a portion of his land in 1992 and sold the portions to third parties; that in 1992, the Defendant reported to them that the 1st Plaintiff's husband had sold to him two plots and that he is the one who demarcated land measuring 84feet by 100feet that the Defendant had bought.

28. The Assistant Chief of Ekalakala sub-location DW3, stated that on 20th May, 2005, the deceased and the Defendant appeared before him and the adjudication officer; that it emerged that indeed the late Abednego had sold to the Defendant the suit land for Kshs. 30,000 and that they resolved that since the late Abednego had already developed the suit land, he should offer him an alternative plot.

29. It was the evidence of DW3 that the shops on the suit land were put up in 2005 and that it is not true that the Plaintiffs have been in occupation of the suit land since 1982.

Submissions:

30. The 2nd Plaintiff's advocate submitted that the 2nd Plaintiff is an innocent purchaser of land measuring 50feet by 100feet situate on the suit land and that despite the allegation that the deceased sold the suit land to the Defendant, the deceased still remained in possession of the land and he made several developments on the land.

31. The Defendant's counsel submitted that for the Plaintiffs' claim to succeed, they must prove that the parcel of land which they claim exists and that they have been in occupation of the said land; that the 1st Plaintiff denied that her shop and the shop of the 2nd Plaintiff stand on parcel number 4408 but instead stand on parcel number 474 and that the Plaintiffs have denied the existence of parcel number 4408. The Defendant's counsel relied on numerous authorities which I have considered.

Analysis and findings:

32. The Plaintiffs are seeking to be declared the owners of land known as Yatta/Ekalakala/4408 for having been in continuous, quiet and uninterrupted actual occupation for a period of over twelve (12) years.

33. Although the 1st Plaintiff deponed in her Affidavit that parcel of land number 4408 was one of the parcels of land that was adjudicated in the year 1982 (1992), and that her husband built a shop on the said land between 1988-2006, she stated while testifying that parcel of land number 4408 does not exist on the ground.

34. The Plaintiffs went to great length to explain why the acquisition of the Title Deed for parcel of land number 4408 was fraudulently obtained by the Defendant. In summary, it was the Plaintiffs' position that the said land does not exist on the ground; that the late Abednego did not sell the suit land to the Defendant and that in any event, their shops are on plot number 474 and not 4408.

35. On the other hand, the Defendant informed the court that he purchased a portion of parcel of land known as 603 from the deceased during the adjudication period; that the demarcation officer caused a number to be issued in his favour in 1992 and that a Title Deed was issued in his name in the year 2010. According to the Defendant, he was in occupation of the suit land until the year 2005 when he relocated from Ekalakala. It was upon the said relocation that the Plaintiffs put up shops on the suit land.

36. The issue of whether the Defendant acquired the Title Deed for Yatta/Ekalakala/4408 fraudulently or not is not before the court. The only issue that is before the court is whether the Plaintiffs are entitled to the suit land by virtue of having occupied it exclusively, continuously and without the permission of the registered proprietor for twelve (12) years.

37. Section 7 of the Limitation of Actions Act provides that an action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. Section 38 of the Act provides that where a person claims to have become entitled by adverse possession to land under any law, he may apply to the High Court (ELC) for an order that he be registered as the proprietor of the land in place of the person then registered as proprietor of the land. That is what the Plaintiffs have done.

38. So what is the substantive law relating to the common law doctrine of adverse possession? Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such a person in assertion of his title for twelve (12) years. In the case of *Mtana Lewa vs. Kahindi Ngala (2015) eKLR*, the Court of Appeal held as follows:

“The process springs into action essentially by default or in action of the owner. The essential pre-requisites being that the possession of the adverse possession is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act...”

39. The limitation period of twelve (12) years starts running from the time when the Respondent was registered as the proprietor of the suit land. In the case of *Chevron (K) Ltd vs. Harrison Charo Wa Shutu (2016)* the Court of Appeal stated as follows:

“It is a settled principle that a claim for adverse possession can only be maintained against a registered owner... The relevant period would therefore be between 1994, the date of registration of the Appellant as the proprietor and 2008 when the suit was filed.”

40. The position that time starts running from the time when a Respondent or his predecessor becomes registered as the proprietor of the suit land was further confirmed by the Court of Appeal in the case of *Karuntimi Raiji vs. M’Makinya M’itunga (2013) eKLR* in which the court quoted with approval the case of *Francis Gitonga Macharia vs. Muiruri Waitthaka Civil Appeal No. 110 of 1997* where the court stated 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.”

41. In the case of *Ngumbi Muasya vs. Monica Tulu Ndulu, Machakos ELC. No. 288 of 2017*, this court held as follows:

“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.”

42. The copy of the green card that was produced in evidence shows that the Defendant was registered as the proprietor of parcel of land number Yatta/Ekalakala/4408 on 13th October, 2008 and a Title Deed was issued to him on 8th April, 2010. Indeed, the Defendant was the first registered owner of the said land.

43. Although the Plaintiffs claimed that parcel number 4408 was a sub-division from parcel number 474, there was no evidence to prove that assertion. Indeed, there was no evidence before the court to also prove the Defendant’s assertion that the suit land was a sub-division of parcel of land number 603. Even if the suit land was hived from any of the two plots, the evidence before me shows that all the plots were registered in the names of their respective proprietors in the year 2008.

44. Considering that this suit was filed on 21st December, 2010, and the suit land was registered for the first time in the name of the Defendant in the year 2008, I find that the suit for adverse possession was prematurely filed. A period of twelve (12) years had not lapsed from the time when the register in respect of the suit land was opened and when the suit was filed. On that ground alone, the Plaintiffs’ suit fails.

45. In any event, the Plaintiffs did not prove on a balance of probability that they have been on the suit land for more than twelve (12) years. The 1st Plaintiff informed the court that indeed her husband sold several portions of parcel number 474 to different people, including the 2nd Plaintiff, and that the suit land is one of the portions that he retained. However, she did not produce the copies of the agreements between the late Abednego and the people who purchased portions of parcel number 474, including the agreement that the late Abednego entered into with the 2nd Plaintiff.

46. The 1st Plaintiff also failed to produce evidence, either by way of approved drawings or otherwise, to show the period that the late Abednego put up a shop on the suit land. In her Affidavit, she deposed that the shop was put up on the suit land between 1988-2004. It does not make sense that the Plaintiffs’ husband could have taken more than sixteen (16) years to put up a shop on the suit land. Considering that the Defendant raised the issue of the shop coming up in the year 2005, a year after leaving Ekalakala market, the shop must have been put up between the year 2004-2005.

47. It is on those two grounds that I find that the Plaintiffs have not proved their claim for adverse possession. Because the claim before me is not for annulment of the Title Deed on the ground of fraud or mistake, I shall not delve into that issue.

48. For those reasons, I dismiss the Originating Summons dated 21st December, 2010 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF MAY, 2018.

O.A. ANGOTE

JUDGE