



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 32 OF 2004

ISAIAH NDOLO MUTISYA.....PLAINTIFF

VERSUS

STEPHEN MUSYIMI KIILU.....DEFENDANT

JUDGMENT

1. In his Complaint dated 16th March, 2004, the Plaintiff averred that at all material times, he was the absolute owner of land known as Kangundo/Muisuni/1277 measuring approximately 0.08 Ha (*the suit land*); that on or about the year 2000, the Defendant secretly and unlawfully obtained a Title Deed in respect of the suit land and that the Defendant moved on the suit land in the year 2001.

2. The Plaintiff is seeking for a declaration that he is the sole lawful owner of the suit land and for an order that the Defendant be forcefully evicted from the suit land.

3. In his Statement of Defence, the Defendant averred that he owns the suit land jointly with his brothers, David Mumo Kiilu and Michael Muthini Kiilu; that they own the said land as beneficiaries of their late father's Estate and that the first registered proprietor of the suit land was one Daud Nguli alias David Mutisya Petero who sold it to their father, Kiilu Waita on 18th July, 1977.

4. The Defendant finally deponed that they have been in exclusive possession and occupation of the suit land since 1977 and that they are entitled to the land either as innocent purchasers or by way of adverse possession.

5. According to the Defendant, it is the Plaintiff who had the suit land secretly and fraudulently registered in favour of himself.

6. In the Counter-claim, the Defendant has sought for a declaration that he is the lawful owner of the suit land.

The Plaintiff's case:

7. The Plaintiff, PW1, informed the court that the Defendant invaded his land; that the suit land was given to his father David Mutisya Nguli (*deceased*) and that when his father died in 1995, he was (*the Plaintiff*) registered as proprietor of the land. It was the evidence of PW1 that he was using the land until 1991 when the Defendant entered on the land.

8. According to PW1, the Defendant has been using the land since then for cultivation and that when he ordered him to leave, he registered a caution against the title.

9. In cross-examination, PW1 stated that he was not aware that his father had sold the suit land to the Defendant's father and that he has no brother.

10. PW2 informed the court that the Plaintiff is his brother; that the Plaintiff inherited the suit land from their father and that their father gave him the land as a gift *inter vivos*. It was the evidence of PW2 that she has four (4) brothers and that their late father gave them different portions of land; that the Defendant started using the land before their father died and that it is the Defendant who has been cultivating the suit land.

11. In cross-examination, PW2 stated that she did not know when the Defendant started cultivating the land.

The Defence case:

12. The Defendant informed the court that he is the son of the late Kiilu Waita who bought the suit land in the year 1977 from the Plaintiff's father; that the Plaintiff's father and his father appeared before the Kangundo Land Control Board on 23rd May, 1980 and were issued with a

letter of correction of names for the suit land and that his father then paid for the land and then gifted it to him.

13. According to DW1, he has been using the land since 1977 upto date and that he was surprised when he conducted a search in 1999 just to discover that the suit land was in the Plaintiff's name.

Submissions:

14. In her oral submissions, the Plaintiff's advocate submitted that the suit land originally belonged to the Plaintiff's father; that the land was transferred to the Plaintiff by his late father and that the Defendant illegally registered a caution against the title.

15. Counsel submitted that the Plaintiff has proved his case and that the Plaintiff should be allowed. On the other hand, it was submitted that the Defendant had not proved his Counter-claim.

16. The Defendant submitted that he has been using the land since 1977; that the land was purchased by his father from the Plaintiff's father in 1977 and that he is entitled to the suit land.

Analysis and findings:

17. The documents before me shows that the Plaintiff was registered as the proprietor of the land known as Kangundo/Muisuni/1277 (*the suit land*) on 7th June, 1991. However, the register for the suit land shows that the same was opened on 18th March, 1977.

18. According to the copy of the green card, the suit land was initially registered in favour of the Plaintiff's father, David Nguli on 18th March, 1977 before it was transferred to the Plaintiff as a gift in 1991.

19. The Defendant's case is that his father purchased the land in 1977 and that they have always used the land since then. According to the Defendant, the Plaintiff's father died before he could transfer the land.

20. The Plaintiff, PW1, admitted that the Defendant has been using the land since 1991. According to the Plaintiff, his efforts to evict the Defendant from the land have been futile. The Plaintiff's sister, PW2, stated that indeed, the Defendant has been using the land. Although she was not sure when the Defendant entered the land, she informed the court that he had been utilizing the land even before her father died in 1995.

21. From the Plaintiff's evidence, and the evidence of PW2, they confirmed that the Defendant was on the land for twelve (12) years before filing the current suit. Indeed, the Plaintiff has never occupied the suit land since it was registered in favour of his father in the year 1977.

22. The Defendant has proved that indeed he is the one who has been in possession and occupation of the suit land since 1977. Neither the Plaintiff nor his late father took any step to evict the Defendant from the suit land until the year 2004 when this suit was filed. It is trite that for one to acquire title by the statute of limitation for land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it (*See Littledale vs. Liverpool College (1900) 1 Ch. 19*). That is still the law in this country (*See Sections 7, 13, 17 and 38 of the Limitation of Actions Act*).

23. The Defendant in this matter is entitled to the suit land for having used it *nec vi, nec clam, nec precario* (*neither by force, not secretly and without permission*). The Defendant has therefore proved his Counter-claim on a balance of probability.

24. For those reasons, I dismiss with costs the Plaintiff's Plaintiff dated 16th March, 2004 and allow the Defendant's Counter-claim in the following terms:

a. A declaration be and is hereby issued that the Defendant is the lawful proprietor of parcel of land known as Kangundo/Muisuni/1277 by way of adverse possession.

b. The Machakos Land Registrar to cancel the Plaintiff's name from the register and instead register the Defendant as the proprietor of parcel of land known as Kangundo/Muisuni/1277.

c. The Plaintiff to pay the costs of the Counter-claim.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20TH DAY OF JULY, 2018.

O.A. ANGOTE

JUDGE