



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 47 OF 2016**

**(Formerly Nairobi ELC. Case No. 123 of 2007)**

**BENARD NDICHU NDUNGU.....1<sup>ST</sup> PLAINTIFF**

**GEORGE KAIGAI MUIRURI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**LUCAS KINGANGI ALIAS MAMBA.....1<sup>ST</sup> DEFENDANT**

**JOHN GATHORITHU.....2<sup>ND</sup> DEFENDANT**

**GABRIEL WAMBU.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction:**

1. In the Plaint dated 17<sup>th</sup> May, 2007, the Plaintiffs averred that they are the grandchildren of the late Makenyua Gatebu; that the late Gatebu is the registered proprietor of land known as Ngenda/Gatukuyu/T.27 and that on or about the year 1999, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespassed on the suit land. The Plaintiffs averred that the 3<sup>rd</sup> Defendant also trespassed on the land started cultivating it.
2. The Plaintiffs are seeking for an order of mandatory injunction requiring each of the Defendants to vacate from the suit land and damages for trespass.
3. In their Defence and Counter-claim, the Defendants stated that they are in possession of the suit land; that their father, Murote Gaithonge purchased the suit land from the Plaintiffs' grandfather and that their father resided on the suit land since 1959 until 1974 when he moved from the land and left them on the land. The Defendants averred that they have developed the suit land and that they have been in exclusive possession of the land.
4. In the Counter-claim, the Defendants have sought for a declaration that they are entitled to the suit land by way of adverse possession and that they should be registered as the proprietors of the land jointly.

**The Plaintiffs' case:**

5. The 1<sup>st</sup> Plaintiff, (PW1), informed the court that the 2<sup>nd</sup> Plaintiff is his cousin; that they live in Thika and that their late grandfather, Gatebu, is the proprietor of land known as Ngenda/Gatukuyu/T.27 (*the suit land*).
6. According to PW1, the 2<sup>nd</sup> Plaintiff's father died in the year 1978 while his father died in the year 2002; that the Defendants invaded the suit land in the year 1999 and that they have been living on the suit land since then on the pretext that their father purchased the land.
7. It was the evidence of PW1 that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have since built two houses on the land and that the 3<sup>rd</sup> Defendant has been cultivating the suit land; that the Defendants' father sued their grandmother over the suit land in Thika PMCC No. 5 of 1985 and that the suit was dismissed by the court. According to PW1, it is their parents who used to use the land until the year 1999 when the Defendants invaded it. PW2 confirmed what PW1 had stated.

**The Defendants' case:**

8. The 2<sup>nd</sup> Defendant (DW1), informed the court that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants are his brothers; that he has lived on the suit land since 1962 when he was born and that he was raised on the suit land. It was the evidence of DW1 that the Plaintiffs are their neighbours and that they have grown up together.

9. DW1 informed the court that their father bought the suit land from the Plaintiffs' grandfather in 1959 but never managed to obtain a Title Deed. It was the evidence of DW1 that they have permanent houses on the land and that they should be declared as the proprietors of the suit land. It was the evidence of DW1 that no one else has occupied the land since 1959 except them.

10. DW1 stated that their father left them on the land in 1974 and that they have been living on it with their late grandmother. DW1 stated that he was not aware of Thika PMCC No. 5 of 1985.

11. It was the evidence of DW1 that he was given the agreement of 25<sup>th</sup> January, 1959 between his father and the Plaintiffs' grandfather by his late father.

12. DW2 stated that he grew up with the Plaintiffs' grandfather and the Defendants' father; that he is aware that the Plaintiffs' grandfather sold the suit land to the Defendants' father and that he is a neighbour of the two families. DW2 informed the court that he is 87 years old.

13. In cross-examination, DW2 stated that the Plaintiffs' father was his age mate and that he was present when the Defendants' father bought the land; that there were no Title Deeds in 1959 when the land was sold and that he was not aware of any court proceedings between the two families. According to DW2, the Defendants' father left the land in 1974 leaving behind the Defendants.

#### **Submissions:**

14. The Plaintiffs' advocate submitted that the Plaintiffs' grandfather died on 25<sup>th</sup> January, 1959 and not later; that the purported agreement of sale that was entered into on 25<sup>th</sup> January, 1959 is a false document made by the 2<sup>nd</sup> Defendant and that the purported person who received the balance of the purchase price of Kshs. 100 was deceased.

15. Counsel submitted that the Plaintiffs' PMCC No. 5 of 1985 shows that the Defendants' father was in possession of the land in 1985 and could not have left the land in 1974 as stated by the Defendants. According to the Plaintiffs' advocate, the 2<sup>nd</sup> Defendant having been born in 1962 must obtain the letters of administration in respect of his father's estate and that he does not have the *locus standi* to file the Counter-claim.

16. Counsel submitted that a suit claiming title by adverse possession must be commenced by way of Originating Summons and not by way of a Counter-claim; that the other Defendants never testified in this matter and that having not obtained the consent of the Land Control Board, their remedy lies in the recovery of damages.

17. The Plaintiffs' counsel finally submitted that the Defendants cannot on one hand claim to ride on an agreement of sale and on the other hand allege that they have obtained the title by adverse possession. Counsel relied on several authorities which I have considered. The Defendants' advocate did not file submissions, and if he did, they are not on record.

#### **Analysis and findings:**

18. The Plaintiffs, who are the grandchildren of the late Makenyua Gatebu are seeking for the eviction of the Defendants from the suit land. According to the Plaintiffs, the Defendants invaded a parcel of land known as Ngenda/Gatukuyu/T.27, which is registered in the name of their grandfather, in the year 1999. On the other hand, the Defendants have claimed that their late father purchased the land from the Plaintiffs' grandfather in 1959 and that in any event, they have been in possession of the land for more than twelve (12) years.

19. The Plaintiffs' advocate submitted that for one to succeed in a claim for adverse possession, he should file an Originating Summons and not a Counter-claim. That is no longer good law. In the case of *Gulam Miriam Noordin & Another vs. Julius Charo Karisa (2015) eKLR*, the Court of Appeal stated as follows:

***“Where a party like the Respondent in this appeal is sued for vacant possession, he can raise a Defence or a Defence and a Counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by Originating Summons.”***

20. The Court of Appeal in the *Gulam case (supra)* further quoted the decision in the case of *Teresa Wachika Gachira vs. Joseph Mwangi, CA No. 325 of 2003* in which the court held that irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he has used the land he is claiming *nec vi, nec clam, nec precario*.

21. Indeed, in the *Gulam case (supra)*, the Court of Appeal went further to state that even in a situation where the Defence of adverse possession has been raised without a Counter-claim, the court can still order for the rectification of title to have the person claiming the land by adverse possession registered as the owner. The court held as follows:

***“When the Respondent elected to raise the Defence of adverse possession without a Counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the Respondent's occupation of the suit property was adverse to that of the Appellant; and that the latter's title was so extinguished.”***

22. The Defendants' Defence and Counter-claim raising the Defence of adverse possession is therefore valid.

23. The copy of the green card produced by the Plaintiffs shows that the suit land measuring 0.76 acres was registered in favour of the Plaintiffs' late grandfather on 31<sup>st</sup> December, 1958. The same green card shows that the Defendants' father, the late Murote Gaithonge registered a caution against the title on 28<sup>th</sup> December, 1985 as a purchaser. That caution has never been lifted to date.

24. The evidence of DW1 was that he has been on the land since 1962 when he was born. According to DW1, his late father purchased the suit land from the Plaintiffs' grandfather in 1959 and that because the land was small, their father moved out of the land in 1974 but left a few of his family members, including the Defendants, on the suit land.

25. DW2, who is an old man of 87 years, stated that indeed the Defendants' father purchased the suit land from the Plaintiffs' grandfather. According to DW2, he has been a neighbour of the two families for many years. It was his evidence that the Defendants have always lived on the suit after their father purchased it.

26. PW1 informed that court that the Defendants' father could not have purchased the land in 1959 because their grandfather died on 25<sup>th</sup> January, 1959. The Plaintiffs produced in evidence two Applications for registration of a late death of Mzee Gatebu. One of the Application by his son dated 2<sup>nd</sup> October, 1994 shows that the late Gatebu died on 25<sup>th</sup> January, 1959. The second Application by his grandson dated 28<sup>th</sup> May, 2002 shows that the late Gatebu died on 25<sup>th</sup> May, 1965. None of the family members is therefore certain the date and year that Mr. Gatebu died. In the absence of a death certificate, this court cannot ascertain the year that Gatebu died. However, that is immaterial for the purposes of the Defendants' claim.

27. There is evidence before me to show that the Defendants are in occupation of the suit. According to the Plaintiffs, the Defendants took occupation of the suit land in 1999. I do not think that is true. I say so because the Defendants' father sued the Plaintiffs' grandmother in Thika PMCC No. 5 of 1985. In that suit, the Defendants' father averred that he took possession of the suit land in January, 1959 and has been in such possession since then. The Defendants' father further averred that the late Gatebu died in 1960 before transferring the said land to him.

28. None of the parties informed the court what transpired in Thika PMCC No. 5 of 1985. It is not clear to this court if the Plaintiffs' grandmother filed a Defence in that matter. However, what is clear to me is that there was a dispute in respect of the suit land in 1985 in which the Plaintiffs' father sought to be registered as the proprietor of the suit land. Other than filing the suit, the Defendants' father also lodged a caution on the title which the Plaintiffs have never bothered to have lifted.

29. The evidence of DW2, who is aged 87 years, collaborated with the Defendants' evidence that the Defendants' father purchased the suit land from the Plaintiffs' grandfather and that his family has always lived on the land. The Plaintiffs did not call a neighbour to contradict that assertion. On the basis of the evidence of DW2, the Plaintiffs' PMCC No. 5 of 1985 and the caution that was registered on the suit land, I am convinced that the Defendants have been on the land at least since 1985.

30. Indeed, the Plaintiffs acknowledged that they live in Thika. None of them has ever lived on the suit land, and being grandchildren of the late Gatebu, cannot know what transpired in 1959. Having not attempted to lift the caution that was registered on the title in 1985, the claim by the Defendants that their father purchased the land is plausible.

31. Of course, the Defendants cannot succeed in a claim of recovery of the land on the basis of a 1959 sale, and especially in view of the fact that there is no consent of the Land Control Board. That is why their claim is for adverse possession.

32. In order to acquire land by adverse possession, the owner of the land must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it for a period of twelve (12) years. As was held in the case of *Taura Mtsanganyiko vs. Julius Mundu (2017) eKLR*, under Section 7 as read together with Section 13 of the Limitation of Actions Act, the owner of a property loses the right to claim his property after it is occupied continuously without interruption by an adverse possessor for a period of twelve (12) years. That is what happened in this matter. The Defendants have been on the land for more than twelve (12) years peaceful, exclusively and without the permission of the Plaintiffs.

33. It is for those reasons that I find that the Plaintiffs have not proved their case for the eviction of the Defendants or their families from the suit land. The Defendants on the other hand have proved their claim to have the land registered in their names jointly by way of adverse possession. Consequently, the court makes the following orders:

**a. The Plaintiffs' suit be and is hereby dismissed with costs.**

**b. The Defendants' Counter-claim is allowed as follows:**

**i. A declaration be and is hereby issued that the Defendants have jointly become entitled to land parcel number Ngenda/Gatukuyu/T.27 by way of adverse possession.**

**ii. An order be and is hereby issued that land parcel number Ngenda/Gatukuyu/T.27 be registered in the names of the Defendants as tenants in common.**

**iii. The Plaintiffs to pay the costs of the Counter-claim.**

**DATED AND SIGNED AT MACHAKOS THIS 12<sup>TH</sup> DAY OF JULY, 2018.**

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19<sup>TH</sup> DAY OF JULY, 2018.

J.O. OLOLA

JUDGE