



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. 121 OF 2009 (O.S)

RASHID SAID.....1ST PLAINTIFF

JANE KANINI SAID.....2ND PLAINTIFF

IBRAHIM SAID.....3RD PLAINTIFF

JOHN CONLUMBUS GIKUNDA.....4TH PLAINTIFF

REHEMA BILALI.....5TH PLAINTIFF

ABDAH AH MURIUNGL.....6TH PLAINTIFF

AMIN BILALI.....7TH PLAINTIFF

VERSUS

STEPHEN KIMONYE IBUTU.....DEFENDANT

JUDGEMENT

BACKGROUND

The Plaintiffs commenced this suit by way of an originating summons seeking the following orders:

a. A declaration that the Plaintiffs have become entitled under Section 38 of the Limitation of Actions Acts (Cap.22) Laws of Kenya to be registered as the proprietors by Adverse Possession in lien of the present registered proprietor of all that parcel of land known as LR No. NKUENE/MITUNGUU/180 on which the Plaintiffs have been in peaceful, undisturbed, uninterrupted and continuous possession user and occupation for more than 12 years and an order that the Plaintiffs be registered as the owners of land Parcel no. NKUENE/MITUNGUU/180.

b. An order of inhibition prohibiting the Defendant from alienating or disposing of whether by way of sale, change, transfer or lease land parcel No. NKUENE/MITUNGUU/180 until this suit is heard and determined.

The suit is supported by the affidavits of all the seven (7) Plaintiffs. Attached to the affidavits is a copy of the certificate of title issued on 12th May, 1980. The first Plaintiff in his affidavit stated that he was born in 1968 and that he has lived on three (3) acres of the suit property with his family since he was born. He also stated that his late father lived on the suit land where he was also buried. He has made extensible developments on the suit property including building permanent house, planting 100 gravellia trees, 6 mango trees and 250 banana stems. He has also installed piped water on the suit property and connected electricity. He further deponed that the defendant has never lived on the suit land but that he has been in peaceful, open and continuous occupation of the property for over thirty (30) years. The second Plaintiff made almost similar averments save that she occupies 1 ½ acres of the suit property. The 3rd Plaintiff also made similar deposition and stated that he occupies 3 acres of the suit land. The 4th Plaintiff in his part occupies 2 acres while the 5th Plaintiff is in possession of 1 ½ acres. The 6th and 7th Plaintiffs each occupy 3 acres of the suit property described as NKUENE/MITUNGUU/180.

In a replying affidavit sworn on 21st October, 2009, the Defendant confirmed that he is the proprietor of the suit land parcel No. NKUENE/MITUNGUU/180 and that there has been several previous proceedings pertaining to the suit property where some of the Plaintiffs were parties. The Defendant further deposed that there is another suit between him and some of the Plaintiffs in Misc. Application No.

203/2004 which is still pending hearing and determination.

PLAINTIFF'S CASE

The Plaintiffs filed a list of the following witnesses

1. Rashid Said
2. John Columbus Gikunda
3. Josphat John Murira M'Marigu and
4. Gilbert Gatobu M'Kuraru

When the case came up for hearing the Plaintiffs called Gilbert Gatobu M'Kuraru who stated that he lives in Mitunguu and works as a farmer. He stated that the Plaintiffs are daughters and sons of Bilali who is the original proprietor of the suit property. The said Bilali has since passed on leaving the same to Said as trustee for the other siblings. He said that he does not know the Defendant in this case but he has come to know him in the course of a dispute in the Land Disputes Tribunal. His house is almost 1 ½ kilometres from where the Plaintiffs live. He stated that the Plaintiffs have lived in the suit land since 1965 to date. The witness also stated that the Plaintiffs have lived in the suit land and have done developments. The witness said that there was a dispute involving the suit property in Nkubu LDT where the Elders ruled in favour of the Plaintiffs but the Defendant appealed against the decision.

DEFENDANT'S CASE

The Defendant also gave sworn testimony and stated that sometime in 1976 or thereabouts he was approached by one Said Bilali who wanted to sell a portion of his land situate at Mitunguu. He recalled that on 03/08/97, they entered into a written sale agreement in the firm of Mbaya & Rimita Advocates for the sale of 9 acres from land parcel No. Nkueme/Mitunguu/180 at an agreed price of Kshs.7,200/=. After he took occupation of his portion of land, one Joses Mwindi discovered the land was sold to him and he filed a case No. 61 of 1977 against Saidi Bilali for a debt he owed to him. The case was finally determined in favour of the said Joses Mwindi and an order of prohibition was issued by attachment and sale of the remainder portion of land No. Nkueme/Mitunguu/180 measuring 8.1 acres. In 1977 or thereabouts, the said Said Bilali with other members of his family approached him to buy the remaining 8.1 acres to enable him settle his debt with the said Joses Mwindi. On 30th September, 1977, they entered into another sale agreement for the remainder 8.1 acres at a consideration of Kshs.6,000/= which he paid in full.

The Defendant also stated that in 1987, he filed case No. 68/1987 against the Plaintiffs and their occupation has not been continuous and uninterrupted. He also stated that he filed Judicial Review No. 203/2004 seeking to quash the proceeding in LTD No. 47 of 2003. The Defendant further stated that the High Court in Meru quashed the proceedings and the decision of the LDT No. 47 of 2003 with costs which the Plaintiffs refused to pay.

PLAINTIFF'S SUBMISSIONS

The Plaintiffs through the firm of Mithiga & Kariuki submitted that the Plaintiffs have set out their respective developments on the subject portions they occupy. He stated that all the Plaintiffs have been in exclusive and uninterrupted occupation of LR NKUENE/MITUNGUU/180 since they were born and that the Defendant has never occupied the same. The Plaintiff's counsel also submitted that the Defendant could not prove that he was in occupation of the suit property at any point in time. He did not also prove that the developments on the suit land were done by him. The Defendant did not also disprove the fact that it is the Plaintiffs who have been in open and continuous occupation of the suit property. In conclusion, the Plaintiff's Counsel submitted that an analysis of the evidence tendered by all the parties reveals that the Plaintiffs have been in occupation of the suit land for over 12 years and that a finding of adverse possession is tenable. He cited the following cases:-

1. **Munyaka Kuna Company Ltd –Vs- Bernado Vicezo De Masi (The Administrator of the Estate of Demico De Masi (Deceased) (2018) eKLR.**
2. **Chevron (K) Ltd –Vs- Charo was Shulu (2016) eKLR**

DEFENDANT'S SUBMISSIONS

The defendant through the firm of Maitai Remita & Co. Advocates submitted that the Defendant bought the suit property in 1976 and 1977 respectively. It is further submitted that at the time of the whole process leading to registration and issuance of title deed, the Plaintiffs were not in physical possession and occupation of the suit property. The Defendant also submitted that in the year 1987, the Defendant filed a case No. 68/1987 in SRMCC (Meru) where he was seeking orders of eviction against the Plaintiff who had trespassed into the suit land. It is further submitted that the Plaintiffs filed LDT No. 47 of 2003. Thereafter, the Defendant moved to the High Court in JR No. 203/2004. The learned counsel relied in the case of **Benjamin Kamau Murima & Another –Vs- Gladys Njeri CA No. 213 of 1996.**

In conclusion, the Defendant submitted that there have been several cases filed regarding the suit property and that the Plaintiffs claim that they have been in exclusive and uninterrupted occupation of the suit property is not true. It is further submitted that the Plaintiffs only entered the suit property in 2004 which was interrupted by the High Court in Judicial Review Application No. 203/2004.

ANALYSIS AND DECISION

The Plaintiffs claim is based on the doctrine of adverse possession. The ingredients required in proving a claim based on adverse possession were set out in the case of **Munyaka Kuna Company Limited –Vs- Bernado Vicezo De Masi (the Administrator of the Estates of Demenico De Masi (deceased) 2018 eKLR** where it was held:

“To establish adverse possession a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (*animus possidendi*). Secondly, one must prove that he has used the suit land without force without secrecy, and without persuasion (*nec vi nec clam nec precario*) for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge (or the actual or constructive means of knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

From the evidence adduced by the Defendant, he bought a portion of the suit property measuring 9 acres on 3rd August 1976 and the remainder measuring 8.1 acres on 30th September, 1977 respectively. According to the sale agreements attached to his statement in this case, he was to take possession upon execution of the sale agreement. The Defendant has not said anywhere that he took possession of the suit premises after he bought the same. In his plaint dated 10th February, 1987 (SRMCC No. 68/87) Meru, the Defendant who was suing as the Plaintiff was seeking orders for evictions of one Said Bilali Amuda, Abdulla and Amina Bilali. It is not stated from that plaint when the said “trespassers” entered into the suit property or how they found themselves in the suit property.

The Defendant has not explained how he was displaced from the suit property by the said trespassers, if he ever took possession and occupation of the suit property after he bought the same. Since the Defendant has not made any averments that he took possession and occupation of the suit property after he bought it in 1976 and there being no challenge to the Plaintiffs evidence that they have lived in the suit property since they were born in 1965, this court finds and holds the view that the Plaintiffs are candid, truthful and their evidence is believable.

From the totality of the evidence adduced by the Plaintiffs and the defence, it is clear that the Plaintiffs have possession and occupation of the suit property. It has also been demonstrated that they have used the land openly without force and without secrecy or persuasion for a period of twelve years. The filing of suit SPMCC No.68/87 by the Defendant in the year 1987 did not interrupt/break the Plaintiffs possession/occupation in any way as they had been living on the suit property before then.

The submission by Mr. Rimita, Learned Counsel for the Defendant that the filing of SPMCC No. 68/87 (Meru) by the Defendant (seeking orders for trespass and eviction against some of the Plaintiffs) was an indication of the Defendant disputing the Plaintiff’s occupation and possession of the suit property did not in any way interrupt or break the Plaintiff’s continuous occupation and possession of the suit property. The court did not order for the eviction of the Plaintiffs in that suit, therefore leaving their occupation and possession uninterrupted.

In the upshot, I find and hold that the Plaintiffs have proved that they have both the factual possession of the land and the requisite intention to possess the same. I also find and hold that the Plaintiffs have used the suit land without force, without secrecy and without persuasion (*nec vi nec clam nec precario*) for the prescribed period of twelve (12) years. I further hold and find that the registered owner had knowledge (or the actual or constructive means of knowing) that the adverse possessor was indeed in possession of the suit property. Finally, I find and hold that the possession has been continuous and not broken or interrupted. In the upshot, I am satisfied that the Plaintiffs have proved all the ingredients for acquisition of the suit property by way of adverse possession. Consequently, I allow the suit and grant orders in terms of the Notice of Motion (O.S) dated 7/9/2009. Since the Defendant has lost the suit, it will be unfair to condemn him for costs. I therefore order each party to bear his own costs of this suit. It is so ordered.

DATED AND SIGNED IN THIS 18TH DAY OF OCTOBER, 2018.

E. C. CHERONO

ELC JUDGE - KERUGOYA

DELIVERED IN OPEN COURT AT MERU THIS 31ST DAY OF OCTOBER, 2018

LUCY N. MBUGUA

ELC JUDGE - MERU

In the presence of:

Thangicia H/B for M. Kariuki fo plaintiff

Miss Rimita for defendant

1st, 3rd, 4th, 6th and 7th plaintiffs

Defendant