



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 104 OF 2017**

**IN THE MATTER OF LIMITATION OF ACTIONS ACT (CAP. 22 OF LAWS OF KENYA)**

**-AND-**

**IN THE MATTER OF AN APPLICATION FOR REGISTRATION OF TITLE TO**

**LAND UNDER SECTION 3A8 OF THE LIMITATION OF ACTIONS ACT**

**- BETWEEN -**

**JAMES MUTUA NGUI.....APPLICANT**

**-AND-**

**CHANIA ENTERPRISES LIMITED & NOMINEES.....RESPONDENTS**

**JUDGMENT**

1) By his Originating Summons dated 10<sup>th</sup> February, 2010 and filed in court on 11<sup>th</sup> February, 2010 the Plaintiff/Applicant prays for orders:-

**1. That the Applicant, James MutuaNgui, be declared the lawful owner of all that parcel of land known as MAKUENI/KIKUMINI/460 by reason of adverse possession, and be registered as such owner.**

**2. That a permanent order of injunction do issue restraining the defendant, its agents and/or servants from alienating or charging land parcel No. MAKUENI/KIKUMINI/460, or in any other way interfering with the said parcel of land.**

**3. That costs of this suit be paid by the Respondent.**

2) The Originating Summons is supported by the affidavit of JamesMutuaNgui, theApplicant herein, sworn at Machakos on the 10<sup>th</sup> February, 2010.

3) The Originating Summons wasfiled together with chamber summons applications dated 10<sup>th</sup> February, 2010 for an order of interlocutory injunction. The application was allowed on the 25<sup>th</sup> February, 2010 subject to the Plaintiff/Applicant filing in court an appropriate undertaking as to damages within 7 days. The Plaintiff/Applicant filed the undertaking dated 1st March, 2010 on the 2<sup>nd</sup> March, 2010.

4) On the 13<sup>th</sup>August, 2010, the Defendant /Respondent filed the notice of motion application seeking the following orders;

**1. That honourable court be pleased to certify this application urgent and the same be heard during this courts vacation in the first instance.**

**2. That this honourable court be pleased top review and/or set aside the order of injunction of the honourable court made on the 25/2/2010 in respect of the applicant's (respondent to this application) application dated 10/2/2010.**

**3. That the respondent (applicant in this application) be granted leave to respond to the applicant's (respondent in this application) chamber summons dated 10/2/2010 and the same be heard a fresh.**

5) The application was however never fixed for hearing and on the 2<sup>nd</sup> October, 2010 the court gave directions that the Originating Summons be disposed off by way of viva voce evidence with parties being granted the liberty of filing witnesses' statements. The matter was fixed for hearing on the 2<sup>nd</sup> February, 2015 but come the hearing date, the case was adjourned at the behest of the Respondent. The Defendant/Respondent was granted leave to file a replying affidavit to the Originating Summons. The matter was fixed for hearing on the 5<sup>th</sup> March, 2015 when it was adjourned to 18<sup>th</sup> May, 2015 to enable the Applicant file a supplementary affidavit. Thereafter the matter went into a limbo until 27<sup>th</sup> October, 2016 when it was transferred from ELC Machakos to this court.

6) The Plaintiff/Applicant's case was that he is the son of the late Mbuvi Ngui who was the registered owner of land parcel number Makueni/Kikumini/460 first registered on 1<sup>st</sup> September, 1967. He revealed that the land measures 23.9 hectares. The Plaintiff went on to say that his elder brother requested their father to guarantee him to secure a loan facility of Kshs. 25,000/= from Kenya Commercial Bank which loan his brother did not repay. That on 26<sup>th</sup> August, 1975, the said land parcel number Makueni/Kikumini/460 was advertised for sale in the Standard Newspaper and subsequently auctioned by the Bank in 1976. The Plaintiff/Applicant produced a copy of green card as PEX No.1.

7) The Applicant went on to say that Chania Enterprises Limited and its nominees purchased the land in question at an auction was subsequently registered as the new owner on the 10<sup>th</sup> August, 1979. The Respondent and was issued with a title deed on the 25<sup>th</sup> May, 1990.

8) It was the Plaintiff/Applicants evidence that his father who died in 1996 as well as himself, his mother Beth Mukule Ngui (PW1), his other brother Muanga Joseph, one Ndaka and three(3) of his sisters by names of Phyllis Mumo, Beatrice Muendi and Joyce Nthenya were in occupation of the land. He added that the persons he mentioned work on the land and that he had livestock and a house on the said land as can be seen from his supplementary affidavit sworn at Machakos on the 20<sup>th</sup> September 2016 and filed in court on the 22<sup>nd</sup> September 2016. He revealed that he and his family were all settled on the land as at the time when the Defendant/Respondent acquired it and that the Respondent has never required him and others to vacate the said land. He added that he has never received any notice to vacate the land. He said that his occupation of the land was open and was never interrupted in any way and that the Respondent nor its agents have never set foot on the land.

9) The Plaintiff/Applicant further told the court that in the year 2010 he received a call from his nephew, one Musembi and his wife Justina Ndaka to the effect that people who claimed to be surveyor and others wanted to subdivide the land. He said that after obtaining an abstract of the green card on the 2<sup>nd</sup> February, 2010 he instructed his lawyer to take up this matter.

10) His evidence in cross-examination was that he did not know of anybody who was associated with Chania Enterprises until he obtained an extract of the green card. He said that his mother used to reside in the farm while he was working. He said that he is on the land by virtue of being a son to the late Ngui and Beth (PW1). He further said that he owns land in Kibwezi which he acquired in 1993 and that his family resides in Kibwezi most of the time even though he still farms in his father's land. He said that he was aware that his mother had not made a claim for adverse possession and pointed out that he was not aware that she was in touch with the Respondent.

11) His evidence in re-examination that while he was working as a Banker in Mombasa, his home remained in Kikumini and asserted that he was in occupation of the land even while he was still in Mombasa. He said that he did not vacate the land which is the subject matter of this case even after he acquired land in Kibwezi.

12) Beth Mukule Ngui (PW1) in her evidence in chief adopted her affidavit which she swore on the 16<sup>th</sup> September, 2015 and filed in court on the 22<sup>nd</sup> September, 2016 as her evidence.

13) The content of her affidavit can be summarized as follows:- That she and her family have lived on land parcel number Makueni/Kikumini/460 since 1960s and that she has never seen anyone claim ownership of it. That no one has ever interrupted the occupation of the land by herself and that of her family which includes the Plaintiff/Applicant. That she does not know Winfred Nyiva Mwendwa (DW1) and nor has she ever seen Winfred (DW1) on the land in question.

14) Beth's (PW1) evidence in cross-examination was that the land in question was sold by the Bank and that someone went to the land while claiming to have bought it but could not remember when the visit occurred. She was not re-examined.

15) John Ngovi Kioko (PW2) in his evidence in chief adopted his statement which he recorded on the 21<sup>st</sup> November, 2014 as his evidence. His evidence was that he resides in land parcel number Makueni/Kikumini/482 registered in the name of his deceased father and that he is a neighbour of the Ngui family which owns land parcel number Makueni/Kikumini/460. That he has never heard of anyone claim ownership of the said land which the Ngui family has peacefully occupied.

16) His evidence in cross-examination was that he has never heard of the sale of land parcel number Makueni/Kikumini/460. He also said that he did not know if the Plaintiff/Applicant has another home in Kibwezi. He admitted that he would not ordinarily know about the visitors who go to the Plaintiff/Applicant's homestead. He said that his home is the fourth one from that of the Plaintiff/Applicant.

17) His evidence in re-examination was that the Plaintiff/Applicant has settled on the land even though he was a second home elsewhere. He reiterated that he has never heard of the suit land having ever been sold.

18) On the other hand, the Respondent called Winfred Nyiva Mwendwa (DW1) as its witness. She too adopted her replying affidavit which she swore at Nairobi on the 2<sup>nd</sup> March, 2015 as her evidence. The witness told the court that she is one of the Directors of Chania Enterprises Limited. She went on to say that the suit land is owned by the Defendant/Respondent and that she has been to the land many times. She revealed that most of the times or at all the times it was Beth (PW1) whom she would find. She said that when the Defendant/Respondent acquired the land, Beth (PW1) had a home on it. She went on to say that she approached a valuer, one David Wambua Masika who is known to the Ngui family and that she had agreed to give 5 acres of the suit land to Beth (PW1) out of her own free will. She further stated that there

were graves in the homestead. She said that Beth (PW1) is on the land with her permission and knowledge. Lastly, the witness told the court that she first met the Plaintiff/Applicant in court.

19) Her evidence in cross-examination was that she is willing to give 5 acres to Beth Ngui(PW1).She said that she is aware that the suit property was registered in the name of the Defendant/Respondent on 10<sup>th</sup> August, 1979. She said that she did not write to Beth(PW1) to give her terms on how the latter would continue residing on the land and revealed that she only did so verbally. She also said that she did not file for eviction orders against the family of Ngui and neither did she object to them remaining on the land for close to 40 years. Even though the witness told the court that she had no chronology of her visits to the suit land, she disagreed with the Plaintiff/Applicant's counsel that she has never visited the land in question and reiterated that she would always meet Mrs. Ngui whenever she visited. She added that she would also meet other ladies. She said that she was informed that the other ladies were Beth's (PW1) daughters in law. It was also her evidence that she was told that the Plaintiff/Applicant had moved to Kibwezi.

20) The witnesses' evidence in re-examination was that the Ngui family has not been utilizing the whole land. She reiterated that she allowed Beth(PW1) to live on the and because of her age.

21) At the close of the Respondent's case, the parties starting with the Plaintiff/Applicant,were given 21 days to file and serve their submissions. The Defendant/Respondent was to file its submissions within 21 days upon being served with Applicant's submissions.

22) The Applicant's counsel's submissions were that the issue of whether a party's possession of a piece of land is adverse is a matter of evidence, and a decision thereon depends upon whether the party alleging adverse possession successfully establishes the particulars of adverse possession pleaded. The counsel cited the case of ***Parklands Properties Ltd Vs Patel [1981]*** KLR 53. The counsel went on to submit that in proving the claim based on adverse possession, the Plaintiff/Applicant must prove;

**1. State the precise period of adverse possession, which must be proved by clear and unequivocal evidence. (ITHONGO –vs- THINDIU (1981) KLR 53).**

**2. Precisely state and prove when the time of adverse possession started to run.**

**3. Prove that the plaintiff's adverse possession of the land in issue has been open, exclusive, continuous, uninterrupted and without force.**

**4. Prove that as at the time of filing the Originating Summons(suit), twelve (12) of such possession had lapsed and his right based on adverse possession had arisen, accrued and vested. SALIM-VS- BOYD AND ANOTHER. (T971E.A 550.**

23) The counsel pointed out that in the case of ***Peter MbirMichuki Vs Samuel MugoMichuki [2014] eKLR***the Court of Appeal emphasized that;

***“ThePlaintiffs have to prove that they have used this land which they occupy as of right:Nec vi, nec claim, precario (no force, no secrecy, no persuasion ...”***

24) The counsel submitted that the Plaintiff/Applicant herein has candidly and unequivocally demonstrated that;

**a) He entered thesubject land lawfully and without force when the same was still owned by his late father and was registered in his said father's name. That he was still in lawful occupation of the subject land as it 10/8/1979 when the same was acquired by the Defendant through purchase in a public auction and subsequently registered in its name.**

**b) That the Defendant did not require him (the Plaintiff) to vacate the land, did not object to his continued exclusive occupation and use of the subject land and did not in any way interrupt this occupation.**

**c) That he buried his father and his brother who died over the years on the subject land, and the Defendant did not raise any objection.**

**d) That his occupation of the subject land was exclusive, open, continuous, uninterrupted without force and with the Defendant's knowledge and consent. (SALIM –vs-BOYD AND ANOTHER(1971) E.A. 550)**

**e) That his (the Plaintiff's) period of adverse possession started running in on 10/8/1979 when the Defendant acquired title to the subject land, and continued to occupy the land openly, continuously, without any interruption and without force for a continuous and interrupted period of over thirty (30) years until February 2010 when the Defendant send people to view and to sub-divide the suit land, prompting the filing of the suit herein.**

**f) The Plaintiff has proved that as at the time of filing the suit herein, twelve(12) years of adverse possession of the suit parcel of land had lapsed and that his right based on adverse possession had arisen, accrued and vested.**

25) The counsel added that the Plaintiff's/Applicant's evidence and that of his witnesses was not in any way, rebutted by the Defendant/Respondent and pointed out that Winfred(DW1) in her evidence and particularly under cross-examination supported the Plaintiff's/Applicant's case. The counsel urged the court to grant the prayer's suit as prayed in the Originating Summons.

26) On the other hand the counsel for the Defendant/Respondent's counsel referred the court to the case of ***MistryValji v***

JanendraRaichand & 2 others [2016] eKLR where the Court of Appeal held that;

**“the following principles, among others, regarding adverse possession are now settled.**

**i. Adverse possession is not available to a party who is on the registered owner’s land with his consent or where the entry and occupation was lawful and based on some agreement. In other words where the title of the owner is admitted there can be no claim for adverse possession. See Samuel Miki v Jane Njeri Richu Civil Appeal No. 122 of 2001. The occupation of the land must be *nec vi, nec clam, nec precario*. See Mtana Lewa v Kahindi Ngala, Civil Appeal no. 56 of 2014.**

**ii. The adverse possessor must prove that through his occupation the true owner has been disposed or his possession discontinued. See Wambugu v Njuguna (1983) KLR 172.**

**iii. It is equally established that adverse possession does not arise merely by occupation and use. See Alfred Warimo v Mulaa Sumba Baraza, Civil Appeal No. 186 of 2011 (Ksm).**

**iv. The filing of a suit for recovery of land or any other recognized assertion of title to the land by the owner stops time from running for purposes of section 38 of the Limitation of Actions Act, see William Gatuhi Murathe v Gakuru Gathumbi, Civil Appeal no. 49 of 1996.**”

27) The counsel further cited the case of Alfred Welimo V Mulaa Sumba Baraza in Civil Appeal NO. 186 of 2011 (Ksm) and submitted that it is equally established that adverse possession does not arise merely by occupation and use.

28) He added that the mere fact that the Defendant/Respondent did not immediately start using the land does not imply abandonment or that the Plaintiff/Applicant had adverse possession and cited the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR.

29) The counsel further submitted that it must be borne in mind that the Plaintiff/Applicant was claiming as of his own right and not at the behest of anybody else as can be seen in the pleadings.

30) In conclusion the counsel was of the view that the Plaintiff fell far short of establishing a claim for adverse possession and urged the court to dismiss the action with costs to the Defendant.

31) Needless to say, the law on adverse possession is now settled. 12 years is the period prescribed under the Limitation of Actions Act Chapter 22 for one to acquire legal title over land in Kenya by way of adverse possession. In the case of Francis Gitonga Macharia Vs Muiruri Waitthaka in Civil Appeal no. 110 of 1997, the Court of Appeal stated that the Limitation period for purposes of adverse possession only starts running after registration of the land in the name of the Respondent.

32) In the case before me, the Plaintiff /Applicant is on record as having stated that land parcel number Makueni/Kikumini/460 which was initially registered in his father’s name in 1967 was auctioned by Kenya Commercial Bank in 1976. That during the auction, it was bought by the Defendant and its nominees who were subsequently registered as the new owners on the 10<sup>th</sup> August, 1979 and issued with title deed on 25<sup>th</sup> May, 1990. The Plaintiff/Applicant has further indicated that his mother Beth (PW1) and his siblings are in occupation and use of the property. As for him, the Plaintiff stated that he has a house and livestock on the same property. He asserted that his occupation was open and that neither the Respondent nor its agents have ever set foot on the land. Given those circumstances, has the Plaintiff/Applicant dispossessed the Defendant/Respondent of its Land? In the case of Itumbi Kiseli Vs James Muriuki Murithi [2013] eKLR, Angote, J had this to say on what constitutes dispossession:-

**“To constitute dispossession, the acts must have been done which are inconsistent with the enjoyment of the suit by the person entitled for the purposes for which he had a right to use it, thus the term adverse”**

33) From the evidence in cross-examination of the Plaintiff/Applicant, it is clear that he is on the suit land by virtue of being a son of Beth (PW1). The Plaintiff/Applicant said that he was aware that Beth (PW1) herself had not made a claim for adverse possession. He also said that he was not aware if she was in touch with the Respondent. Although Beth (PW1) told the court that she has never seen anyone claim ownership of the suitland, she admitted in cross-examination that someone had gone to the ground to claim ownership after the land was sold by the Bank. Even though she did not say who that person was, her evidence would tally with that Nyiva (DW1) that the latter had been onto the Suit Land.

34) John (PW2) in his evidence in cross-examination admitted that the Plaintiff/Applicant and his family reside most of the time in Kibwezi.

35) Nyiva’s (DW1) evidence in chief as well as in cross-examination was that she has been in the suitland and would always meet Beth (PW1). She further said that she had been informed that the Applicant moved to Kibwezi and that she allowed Beth (PW1) to continue living on the suit land on account of her age.

36) Given the above circumstances, my finding is that there is no evidence to show that the Plaintiff/Applicant ever dispossessed the Defendant off its land. It seems to me that the Plaintiff/Applicant is hiding behind Beth (PW1) and his siblings in an attempt to justify his claim for adverse possession. He cannot succeed in light of the glaring evidence that Beth (PW1) is on the suit land with permission from the Defendant/Respondent. There is no evidence of the Plaintiff/Applicant having occupied the Defendant/Respondent land openly and without force for a period of 12 years as he spends most of his time in Kibwezi.

37) From the foregoing reasons, I am not satisfied that the Plaintiff/Applicant has a cause of action on a balance of probabilities against the

Defendant/Respondent. His claim must fail and in the circumstances, I hereby proceed to dismiss his suit with costs to the Defendant/Respondent.

**Signed, dated and delivered at Makueni this 19<sup>th</sup> day of November, 2018**

**MBOGO C.G**

**JUDGE**

**In the presence of**

1. Mr.Muthiani holding brief for Mrs. Nzei for the Plaintiff
2. No appearance for the Defendants

Mr. Kwemboi Court Assistant.

**MBOGO C.G**

**JUDGE**