



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 274 OF 2011 (O.S)

MARY KASYOKA MBWII.....APPLICANT

VERSUS

PATRICK MUNYOKI MBWIIRESPONDENT

JUDGMENT

1. In the Originating Summons dated 4th October, 2011, the Applicant is seeking for the following orders:

a) That the Honourable Court be pleased to order that the Applicant be registered as the owner of Land Parcel Number Kyangwithya/Kaveta/117 by adverse of Adverse Possession.

b) That costs of this suit be in the cause.

2. The Originating Summons is premised on the grounds that the Applicant has lived on the suit land since the year 1985 to date; that initially, the land belonged to her father, Mbui Sila Ndumbu and that the land was later transferred to the Respondent by way of transmission.

3. In her Supporting Affidavit, the Applicant deponed that the grant that was issued to the Respondent was obtained fraudulently; that his late father had gifted her the suit land and that she realised the Respondent, who is her brother, had transferred the suit land to himself in the year 1988. According to the Applicant, she has been living on the suit land since the year 1985.

4. The Respondent filed a Replying Affidavit in which he deponed that the Applicant is his sister; that their late father never granted the Applicant the suit land as alleged; that a grant was confirmed by the court in P & A No.20 of 1986 which grant was confirmed and that the Applicant has her own home.

5. The Originating Summons proceeded for hearing by way of oral evidence on 17th May, 2018. Although the Respondent's advocate was served with the hearing notice for 17th May, 2018, the Respondent did not testify.

6. The Applicant, PW1, informed the court that the Respondent is his brother; that the suit land belonged to their late father and that she has lived on the suit land since 1984. It was the evidence of PW1 that her father attempted to transfer the land to her in 1985 and even obtained the consent of the Land Control Board to transfer the land but died before doing so. According to PW1, she is entitled to be registered as the proprietor of the suit land for having lived on the land for more than twelve (12) years.

7. The Applicant's sister, Pw 2, informed the court that the Applicant was gifted the suit land by their late father; that he attended the Land Control Board and that before the Board could give its consent for the transfer of the suit land, their father died. It was the evidence of PW1 that without consulting the rest of the family, the Applicant filed a succession cause in which he did not include the suit land and that it is her sister who have been using the suit land since 1985.

8. The Applicant's advocate submitted that the Applicant has proved that she has been in possession of the suit land for twelve years and that the Respondent fraudulently had the suit land registered in his name.

9. The evidence before me shows that the Applicant was registered as the proprietor of a parcel of land known as Kyangwithya/Kaveta/117 measuring 0.5Ha on 4th August, 1987. According to the extract of the register, the suit land was registered in favour of the Applicant pursuant to a succession cause.

10. The uncontroverted evidence by the Applicant is that the suit land was gifted to her by her late father who was in the process of transferring the land in her favour. PW1 produced in evidence the copy of the Application of the consent of the Land Control Board which was duly signed by her late father on 11th June, 1985.

11. Although the suit land was registered in favour of the Applicant in 1988, the Respondent has not denied that the Applicant has been living on the land since then until now. Indeed, by the time the Applicant filed this suit in the year 2011, the Applicant had lived on the suit land for 23 years.

12. Having lived on the suit land for more than twelve (12) years since the land was registered in favour of the Respondent, the Respondent's right to recover the suit land is time barred. According to Section 7 of the Limitation of Actions Act, 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.

13. Sections 37 and 38 of the Limitations of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished, but held in trust for the person in adverse possession until he obtains a court order vesting the land in him.

14. The Applicant has proved on a balance of probabilities that she has used the suit land as of right: *nec vi, nec clam, nec pre cario*. Her possession of the suit land has been continuous, exclusive, peaceful and with the knowledge of the Respondent.

15. For those reasons, the Originating Summons dated 4th October, 2011 is allowed as follows:

a) The Applicant, Mary Kasyoka Mbwi be registered as the proprietor of a parcel of land known as Kyangwithya/Kaveta/117 by virtue of adverse possession.

b) Each party to bear his/her own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16TH DAY OF NOVEMBER, 2018.

O.A. ANGOTE

JUDGE