



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 14 OF 2015**

**MARY STEPHEN MUTHIANI KILAKA.....APPELLANT**

**VERSUS**

**JULIUS NZIOKA VINI.....RESPONDENT**

***(Being an Appeal from the Judgment of Honourable E.M. Muiru (RM) in Makindu Principal Magistrate's Civil Suit No.97 of 2010 delivered on 26/08/2015)***

**JUDGMENT**

1. This Judgment is in respect to an Appeal against the decision of the learned Magistrate in which she allowed the Respondent's claim. In his Memorandum of Appeal, the Appellant averred that the learned Magistrate erred in law and fact when she failed to appreciate that the Respondent had not proved his case on a balance of probabilities; that the learned Magistrate relied on extraneous and irrelevant matters and that the learned Magistrate erred in law and facts by ignoring the applicable law on a matter affecting a deceased person's estate.
2. The Appeal proceeded by way of written submissions. The Appellant's advocate submitted that the Appellant was sued by the Respondent in the lower court in her own capacity and yet the suit belonged to her late husband; that the Appellant lacked capacity to be sued in the lower court; that the Makueni County Government is the allocating entity of the and that the failure to call a representative from the County Government to testify in the matter was fatal to his case.
3. The Appellant's advocate submitted that the County Government confirmed that Plot number 102 belonged to the Appellant's deceased husband; that the Appellant produced in evidence the approved development plans of plot number 102 from the Makueni County Council in favour of the deceased husband and that the learned Magistrate ignored all that evidence.
4. The Appellant's advocate submitted that the Respondent did not produce any evidence to show the relationship between Plot No.171 and 102 and that the Respondent neither pleaded nor proved fraud in respect of the suit land.
5. The Appellant's advocate finally submitted that for one to succeed in a claim of adverse possession, the suit land must have been registered; that a claim for adverse possession can only be commenced by way of an Originating Summons and that the Appeal should succeed.
6. The Respondent's advocate submitted that the Appellant was sued because she is the one who issued instructions to have the Respondent evicted from the suit land and that the Appellant started claiming for the suit land after the death of her husband. Counsel submitted that it is the Appellant who raised the defence of Legal Representative of the Estate of her late husband.
7. The Respondent's advocate finally deponed that the Respondent had proved that he had legally acquired the suit land and that the Appeal should be dismissed. This being a first appeal, the court shall evaluate the evidence that was tendered in the lower court and arrive at its own conclusion.
8. The Respondent commenced this suit in the lower court by way of a Plaintiff. In the said Plaintiff, the Respondent averred that he is the owner of a plot in Makindu measuring 29 feet x 100 feet of the said land since 1998 after buying it from Kamau Kinyanjui and that the land was later registered as Plot number 171 Makindu Town in his favour. The Respondent finally averred in the Plaintiff that in the year 2009, the Appellant claimed that the land was registered as Plot No.102 in his husband's favour. The Respondent prayed to the court for an order that he is the owner of Plot No. 102 or 107 Makindu Township by virtue of long use, occupation and possession.
9. The Appellant filed a Defence in which she stated that Plot No.102 belonged to her late husband; that the said plot was registered in her husband's name in the year 1994 and that the Respondent's claim was baseless.
10. So what was the evidence that was placed before the Trial Court? The Respondent (Plaintiff) informed the trial court that he purchased Plot No.171 from Mr. Kinyanjui in 1998; that the plot measures 29 x 70 feet; that the seller informed him that the Appellant's husband had

claimed the same plot and that the dispute was resolved in his favour by the Market Committee.

11. After the plot was captured in the records of the then Makueni County Council, the Respondent stated that he developed the land in 1998 and that it was only after the Appellant's husband died that the Appellant started lying a claim on the plot. It was the evidence of the Respondent that Mr. Kinyanjui had lived on the plot for more than 13 years before he sold it to him.

12. The former Sub-Chief of the area informed the court that the Appellant's husband had a dispute with Mr. Kinyanjui; that it is Mr. Kinyanjui who actually lived on the land and that they made a decision in favour of Mr. Kinyanjui.

13. Mr. Kinyanjui, Pw 3, informed the court that he was allocated the Plot by Mr. Salim Maweu who was a Councilor and that he built on it. It was the evidence of PW3 that he lived on the land for more than thirteen (13) years and that the land measures 30x100 ft. After the dispute between him and the Appellant's husband was settled, PW3 stated that he sold the land to the Respondent.

14. Mr. Kinyanjui's neighbour, PW4, stated that Mr. Kinyanjui was allocated the land by the then County Council of Makueni; that he was allocated the neighbouring land and that they both developed their respective portions of land.

15. On her part, the Appellant (DW1) stated that her late husband's land was plot number 102; that no one lives on her plot; that Mr. Kinyanjui entered her plot in the year 2009 after the death of her husband and that the land was allocated to them by Councilor Salim in 1989.

16. Although Mr. Kinyanjui stopped developing the suit land after being told to do so by the County Council, the Appellant stated that the Respondent finished developing the suit land and that it is the Council that demolished the house on the suit land after the Respondent failed to adhere to its Summons.

17. The former Councilor of the Council, DW3, informed the court that the documents which the Appellant's husband held were genuine; that the Respondent's documents did not emanate from the Council and that the suit should be dismissed.

18. In its decision, the court was unable to state whether it is the Appellant's husband or the Respondent who was lawfully allocated the land. However, it was the court's view that because the allocation to the Plaintiff (*Respondent*) was first in time, he should have the plot.

19. The Plaintiff (*Respondent*) produced in evidence a letter dated 20<sup>th</sup> August, 1997 in which the Chief heard the dispute between the Appellant's husband and himself. After hearing the dispute with two Market Committee Members, they decided that the Appellant's husband had not proved ownership of the suit land. They allowed the Respondent's predecessor to continue developing the suit land. The Respondent's predecessor then sold the said land to the Respondent vide an agreement dated 28<sup>th</sup> January, 1998.

20. The Respondent (*Plaintiff*) also produced in evidence a letter dated 30<sup>th</sup> September, 2003 addressed to the then clerk to the Council in which he sought to be registered as the proprietor of a plot measuring 29ft by 100ft. It would appear that the clerk to the Council did not respond to the said letter. Indeed, the Appellant produced the letter dated 28<sup>th</sup> June, 1999 in which the Plaintiff predecessor was informed by the Council that he was putting up structures on Plot No.102 illegally.

21. It is therefore obvious that neither the Appellant's husband nor the Respondent was allocated Plot number 102 or 107 by the then County Council of Makueni. If indeed the Respondent was in possession of the land as claimed, then he was there as a tenant of the County Council who could be evicted at any time by the Council.

22. Considering that the Respondent's claim was for a declaration that he is the owner of Plot No.102 of 171 Makindu Township, the learned Magistrate erred finding that he had proved his case on a balance of probabilities. The Respondent did not produce any letter of allotment from the County Council of Makueni allocating him the suit land.

23. Even if the Respondent's claim was predicated on the claim of adverse possession, the claim could still not have succeeded because the suit land was not registered under the then Registered Land Act or the Registration of Titles Act. Section 38 of the Limitation of Actions Act provides as follows:

***“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.***

***(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.***

***(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.***

***(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.***

***(5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.”***

24. From the above provision of the Act and Order 37 of the Civil Procedure Rules, one can only succeed in a claim for adverse possession in respect of registered land. However, as I have stated above, the judgment of the court was not hinged on the fact that the Respondent had been on the land for more than twelve (12) years, but rather; that the Respondent was the first one to be allocated the suit land.

25. Having not proved that he was allocated the suit land by the then County Council of Makueni, the proper order that the court should have made was to dismiss the Respondent's claim. Considering that the Appellant did not also prove that her late husband or Mr. Kinyanjui was legally allocated the suit land, she is not entitled to claim the said land or to be awarded the costs of the suit. Indeed, the suit land should revert to the County Government of Makueni.

26. For the reasons I have given above, I allow the Appeal and set aside the judgment of the Resident Magistrate in Makindu PMCC No.97 of 2010 dated 26<sup>th</sup> August, 2015. Each party will bear his or her own costs in the lower court and in respect to this Appeal.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2018.**

**O.A. ANGOTE**

**JUDGE**