



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC CASE NO.107 OF 1999 (O.S)**

**(SITTING AT MAKUENI)**

**WILSON MUTHOKA MUTUNGA.....PLAINTIFF**

**VERSUS**

**TITO NDIKU *alias* JOHN NTHIWA.....1<sup>ST</sup> DEFENDANT**

**DANIEL NDIKU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Wilson Muthoka Mutunga who is the Plaintiff herein is a business man residing in Mtito Andei. He says that he bought a parcel of land from Tito Ndiko *aka* Daniel Ndiku in 1976. He further says that upon purchasing the land, he constructed some premises from where he used to conduct business until when he was ordered by Mtito Andei Town Council to stop doing so.

2. By his Originating Summons dated 16<sup>th</sup> March, 1999 and filed in court on even date, the Plaintiff prays for judgment for orders;

**1. That he be declared as having acquired the leasehold title in LR No. 13216 by adverse possession and consequently be registered as proprietor thereof.**

**2. That the costs of the suit abide the result thereof.**

3. The claim is denied by the two Defendants vide what is referred to as further replying affidavit of John Nthiwa Ndiku, the 1<sup>st</sup> Defendant herein, sworn at Makindu on the 28<sup>th</sup> November, 2012 and filed in court on the 6<sup>th</sup> December, 2012. There is no record of a replying affidavit having been filed by the Defendants. Be that as it may, the further replying affidavit will suffice for the purpose of the response by the Defendants.

4. The Plaintiff's evidence was that he bought land from Tito Ndiku *aka* Daniel in 1976. He said that he took possession of the land which is the subject matter of this suit. He produced a land sale agreement between himself and Tito Ndiku signed in the presence of G.M Kakuli advocate as PEX no. 2. He went on to say that he built a house on the premises and that he started to sell meat from therein until he was served with a court injunction barring him from conducting business from the said premises. It was also his evidence that he has been paying rates to the relevant local authority an example of which is a receipt issued by Makueni County Government dated 30/7/2015 (PEX no. 3).

5. His evidence in cross-examination was that he did not know that Tito Ndiku is also the father of John Nthiwa and that he could not be able to differentiate between Tito Ndiku from his son. He disagreed with the Defendants' counsel suggestion that Tito did not have any proprietary rights to transfer to him in 1976. He said that he does not know the registered owner of land parcel number LR 13217. He reiterated that he built a structure in 1976 and that no one stopped him from constructing the structure in question. He revealed that he stopped conducting business in the said plot after he was served with a court order on 8/3/1999. He said that he also received a letter from the County Council accusing him of building on Tito Ndiku's land.

6. John Tito Nthiwa Ndiku's (DW1) evidence in chief was that land parcel number LR 13216 is his. He said that he is also known as Tito Ndiku *alias* John Nthiwa while his father's name was Daniel Ndiku Kilonzo. He went on to say that he complained to the County Council in 1999 when he came to learn that the Plaintiff had trespassed into his land. He added that he never sent his father to sell his land. He produced the title deed for his land as DEX No.1.

7. His evidence in cross-examination was that he could not deny the suggestion that the land in question belongs to his father. He further denied having changed his name so as to defraud the Plaintiff. He also said that he was aware that the Plaintiff was in the land in question

for over 20 years.

8. At the close of the Defendants' case on 20/11/2017, the parties herein starting with the Plaintiff, were directed to file their submissions within 21 days. The Plaintiff's counsel filed his submissions on the 5/1/2018 the same being dated 2/1/2018. On the other hand, the Defendants filed their submissions on 20/11/2017.

9. The Plaintiff's counsel's submissions were that Article 40 of the Kenya Constitution 2010 protects the right to acquire and own property of any description in any part of Kenya. He urged the court to be guided by Article 10 of the Constitution that binds all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution or who enacts, applies or interprets any law or makes or implements public policy decisions. The Article relates to national values and principles of governance.

10. The counsel referred to Section 38(1) of the Limitations of Actions Act (Cap 22) which provides as follows;

***“ where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, 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.”***

11. The counsel further referred to the Section 28(h) of the Land Registration Act, 2012 which is to the effect that;

***“all registered land is subject to the overriding interests of rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”***

12. The counsel relies on the case of Ramco Investments Ltd VS In Drive In Theatre Ltd [2014] eKLR where the court quoted with approval the case of Mbira Vs Gachuhi (2002) 1 EALR 137 and held thus;

***“ ... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open , notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption ...”***

13. The counsel also relies on the case of Hosea Vs Njiru and others (1974) EA 526, where it was held that;

***“on payment of purchase price by a purchaser in occupation his occupation becomes adverse to that of the vendor”***

14. In light of the foregoing, the counsel submitted, the Plaintiff produced all the necessary documents including sale agreements dated 6/5/1976 to confirm that he bought LR No. 13216 from the first Defendant. The counsel went on to submit that the first Defendant is the registered proprietor of leasehold title in LR No. 13216 as is evidenced by the copy of grant produced by the Plaintiff. The counsel further submitted that the Plaintiff has been in continuous undisturbed occupation of the suit land.

15. The counsel further submitted that the grant for LR no. 13216 which is the subject of these proceedings is in the name of Tito Ndiku and that the agreement of sale is signed by the said Tito Ndiku while the person challenging the Plaintiff's case has always been John Nthiwa Ndiku.

16. Lastly the counsel submitted that the Plaintiff has proved his case on a balance of probabilities and urged the court to enter judgment in his favour.

17. On the other hand, the counsel for the Defendants submitted that the Plaintiff's evidence in court contradicted his affidavit sworn on 16/3/1999. The counsel went on to submit that it is clear that the Plaintiff all along knew that Tito Ndiku and John Nthiwa is one and the same person. The counsel pointed out that the contradictions are material to the Plaintiff's claim and greatly erode the credibility of his evidence. The counsel ended his submissions by taking the court through the law of adverse possession. The counsel relies on the case of Gabriel Mbui Vs Mukindia Manyara (1993) eKLR.

18. The law of adverse possession is now settled. The Black's Law Dictionary, 9<sup>th</sup> Edition at page 62 defines adverse possession as;

***“ the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, hostile, open and notorious.”***

19. In Kenya, the prescribed period under the Limitation of Actions Act Chapter 22 for one to acquire legal title over land by way of adverse possession is 12 years. In the case of Ann Itumbi Kiseli Vs James Muriuki Murithi [2013] eKLR, Angote, J had this to say regarding adverse possession;

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

20. In the case before me, the Plaintiff says that he bought the suit land in 1976 from Tito Ndiku. As earlier on stated in my judgment, the Plaintiff says that he built a house from where he started running a butchery until when he was served with an injunction order dated 8<sup>th</sup> March, 1999 after John Nthiwa Ndiku lodged a claim against him. In his affidavit in support of the Origination Summons sworn on the

16<sup>th</sup> March, 1999 the Plaintiff has deposed in paragraph 4 that he entered into the agreement dated 6<sup>th</sup> May, 1976 with the 2<sup>nd</sup> Defendant (who is now deceased) in the name of the 1<sup>st</sup> Defendant.

21. From the evidence of the first Defendant, It is clear that he says that he never sent his father to sell his land. The Defendant further says that upon learning that the Plaintiff had trespassed upon his land, he complained to the county council in 1999. The Plaintiff has acknowledged that in 1976 when he and the 2<sup>nd</sup> Defendant entered into sale agreement of the suit land, the grant (PEX No. 1) in the name of Tito Ndiku was not in existence and that it was brought to his attention in 1982.

22. Whereas it is clear from the evidence on record that the second Defendant did not have legal capacity to sell the suit land to the Plaintiff in 1996, for purposes of adverse possession, time began running in 1982 when the Plaintiff became aware of the grant in the name of Tito Ndiku. It stopped running on 8<sup>th</sup> March, 1999 when he got an order of injunction issued in favour of the Defendant herein. A quick calculation shows that the Plaintiff was in occupation of the premises for a period of about 17 years. The Plaintiff says that during the period in question, he used to run butchery from the suit land. By building and running a butchery since 1976 running up to 1999, it is clear that the Plaintiffs claim against the Defendant was continuous, hostile, open and notorious as there is nothing to show that the Defendant took any step to stop the Plaintiff from running the business. 12 years had elapsed by the time the Defendant moved against the Plaintiff.

23. The upshot of the above is that I am satisfied that the Plaintiff has on a balance of probabilities satisfied this court that he has a cause of action against the Defendants. In the circumstances, I hereby proceed to grant prayers 1 and 2 of the Originating Summons. It is so ordered.

**Signed, dated and delivered at Makueni this 28<sup>th</sup> day of December, 2018.**

**MBOGO C.G,**

**JUDGE**

**IN THE PRESENCE OF**

Mr. Kyalo holding brief for Mr. F.M Mulwa for the Plaintiff

No appearance for the Defendant

Mr. Kwemboi - Court Assistant

**MBOGO C.G, JUDGE**

**28/12/2018**