



**REPUBLIC OF KENYA**

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

**E&L CASE NO. 2 OF 2012**

**TIRIKI FARMERS COMPANY LIMITED**

**TIMATEO MADEGWA & 50 OTHERS.....PLAINTIFFS**

**VERSUS**

**HARRY JAMES ONAMU.....1<sup>ST</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 2<sup>nd</sup> June 1995 and amended on 15<sup>th</sup> October 1999, 9<sup>th</sup> November 2000 and further amended on 26<sup>th</sup> September 2017 respectively the plaintiff sued the defendants seeking for the following orders:

- a) An order for cancellation of title deed issued out of LR No. 1898 Kaimosi Area, Nandi District.
- b) That the 51 bona fide members of the plaintiff company be declared lawful owners of their respective portions occupied on LR. No. 1898 Kaimosi Area Nandi District by way of adverse possession and the register to be rectified accordingly
- c) General damages
- d) Costs of the suit
- e) Any other or further relief as the honourable court may deem fit to grant.

I wish to state from the onset that this case has seen better days in the court corridors. It was initially filed as High Court Civil Suit No. 83 of 1995. It also had issues of representation by different Counsels at one point or the other.

At one point the plaintiff's Counsel purported to have withdrawn the suit which was not endorsed and the same was objected to by the plaintiffs and it was arrested by the court before the same was effected. The court therefore ordered the matter to proceed. The suit was later transferred to the Environment and Land Court and given a new No. as EIC No 2 of 2012.

The plaintiffs gave evidence and stated that in 1973 the plaintiff company raised the sum of Kshs. 80,000/through its 51 members and purchased a parcel of land known as LR. No. 1898 measuring 324.5 acres in Kaimosi area Nandi District from one Ernest Floyer.

The plaintiffs further stated in their evidence that in 1973 the Tiriki Farmers Company Ltd was incorporated and appointed Mr. Harry James Onamu the then Member of Parliament for Hamisi Constituency to be their Trustee though he was not a shareholder of Tiriki Company ltd. It was further PW1's testimony that all the 51 members of Tiriki Farmers Company Ltd took possession of the land and settled in 1995.

It was further the plaintiffs evidence that the 1<sup>st</sup> defendant secretly and unlawfully obtained certificates /title deeds in persons names who are not bona fide members of the company. That the 1<sup>st</sup> defendant invited his relatives to occupy the suit land in 1995 without the consent of the bonafide members.

The plaintiff listed the particulars of fraud in respect of the actions of the 1<sup>st</sup> and 2<sup>nd</sup> defendant and urged the court to grant the orders as prayed in the plaint.

## **Analysis and determination**

As I had stated on the onset that this is a case that has seen better days in the court corridors with the plaintiffs changing Counsel and later acting in person. The issue for determination in this suit is as to whether we have a party against whom the suit can stand.

From the court record, it is clear that on 16<sup>th</sup> October 2006, Counsel for the 1<sup>st</sup> defendant Mr. Kuloba informed the court that his client had passed on 4 years ago. It means that at the time of writing this judgment the 1<sup>st</sup> defendant had been long dead for 16 years. Further that one Timoteo Achula who is one of the 51 members of Tiriki Farmers Company Ltd swore an affidavit on 15<sup>th</sup> October 2014 and filed in court on 24<sup>th</sup> November 2015 at paragraph 6 indicating that they are not responsible for the delay of the case as it has been caused by transfer of judges and the death of the 1<sup>st</sup> defendant. This means that they were well aware of the death of the 1<sup>st</sup> defendant and they did not take any steps to substitute or abandon the suit against a deceased person as it abates after one year.

This is the reason why I will not go any step further to deliberate on the issues as to whether the plaintiffs are entitled to the orders sought for cancellation of title and adverse possession. I find that the suit as against the 1<sup>st</sup> defendant abated more than 15 years ago as no substitution was done within one year according to the law and procedure. The plaintiffs did also not apply to revive the suit in any way.

What the plaintiffs did was to file an application to substitute the Commissioner of Lands with the National Land Commission who were brought in and urged the court in their suit papers to dismiss the plaintiffs' claim against then as it did not disclose a cause of action.

From the plaint, this suit is anchored on the actions of the 1<sup>st</sup> defendant whom as it were the suit abated against him. Without the 1<sup>st</sup> defendant on board or his replacement/substitution, then we do not have a defendant whom we can issue orders against.

Further the plaintiffs stated that they have been in occupation since 1973 which is not disputed and therefore claim that they have acquired the land by way of adverse possession. I had indicated that I will not go into the merits of the case because we do not have a defendant but proving adverse possession is not a walk in the park. There are stringent procedures and requirements to be proved by an applicant one of them being in continuous, uninterrupted possession of the suit land. The possession or occupation must be hostile and /or inconsistent with the owners' interest and/or rights in regard to the use of the land.

In this case who is the owner whom the plaintiff claims its possession has been hostile and or inconsistent with his rights? It is trite law that a claim of adverse possession must be against a registered owner. Who is the registered owner of the suit land. In the case of **Johnson Kinyua v Simon Gitura Rumuri [2011] eKLR** the court found that proprietorship can be established by producing a copy of an official search certified by the Land Registrar or a certified copy of an extract of the green card which gives the details of the entries. In this case the plaintiff produced a memorandum of registration of transfer which was presented on 24<sup>th</sup> July 1975. There was no extract of a copy of the register or an official search to show the current entries. If the court were to cancel the original title which they allege to have been subdivided and transferred to 3<sup>rd</sup> parties then it need proof of the owners of the titles and the exact numbers.

The other issue which should not escape the courts mention is that the Tiriki Farmers Company ltd is a limited liability company which is a legal person in its own right and there was no proof directors having authority to institute this suit.

I therefore find that the suit against the 1<sup>st</sup> defendant abated more than 15 years ago and the claim against the 2<sup>nd</sup> defendant has not been proved and it fails. Even though costs follow the event I will not order that the plaintiff pays costs as there is no defendant to be paid costs.

**DATED and DELIVERED at ELDORET this 20<sup>TH</sup> DAY of DECEMBER, 2018.**

**M. A. ODENY**

**JUDGE**

Judgment read in open court in the presence of the Plaintiffs and in the absence fo the defendants.

Mr. Koech: Court Assistant.