



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. CASE NO. 249 OF 1999**

**JULIUS KYENGO NDILE.....PLAINTIFF**

**VERSUS**

**THE HEADMASTER**

**THE SCHOOL COMMITTEE/BOARD OF GOVERNORS**

**MUMELA PRIMARY SCHOOL**

**THRO' HEADMASTER –JULIUS NTHUKA.....1<sup>ST</sup> DEFENDANT**

**JOSEPH KIMULI MAITHYA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Amended Complaint dated 18<sup>th</sup> December, 2000, the Plaintiff averred that he is the legal owner of a parcel of land known as L.R. 1351/1 Mumela Farm, a freehold parcel of land in Makueni County measuring 140.39 acres; that he acquired the suit land in 1965 through purchase and that the Defendants and the school they represent are claiming ownership of the said land. The Plaintiff averred that by reason of their acts of trespass, the Defendants have denied him the use of a portion of the suit land. The Plaintiff has sought for orders of eviction of the Defendants and for a permanent injunction restraining the Defendants or their agents from trespassing on the land. The Plaintiff also prayed for general damages for trespass.

2. In their Defence, the Defendants denied the Plaintiff's assertion that he acquired the suit land by purchase; that the portion of the suit land on which the school stands was donated to the school way back in 1938 by Ndambuki Ivai; that the school has been in peaceful, uninterrupted and continuous occupation of the said portion of land measuring 13 acres and that the Defendants are entitled to 13 acres of the suit land by way of adverse possession.

3. The Defendants also filed a Notice of Preliminary Objection dated 19<sup>th</sup> January, 2001 in which they averred that the Plaintiff's suit is time barred and contravenes the provisions of the Limitation of Actions Act; that the Plaintiff did not seek nor obtain consent to institute the present suit from the Land Adjudication and Settlement Officer and that the Verifying Affidavit as filed offends the provisions of the Civil Procedure Rules.

4. This suit proceeded for hearing on 6<sup>th</sup> September, 2002 before Nambuye J. (*as she was then*). PW1 informed the court that he was an advocate of the High Court; that he was a civil servant attached to the Lands department as a Registrar of Title and that Land Reference No. 1351 is within Machakos District.

5. It was the evidence of PW1 that the Plaintiff purchased the suit land from Mohamed Dala Ismael; that the suit land was transferred to the Plaintiff by way of an Indenture dated 18<sup>th</sup> November, 1965 and that the land was not open to the adjudication process.

6. According to PW1, the Plaintiff obtained the consent of the Land Control Board to sub-divide the land into two portions, namely, L.R. Nos. 1351/1 and 1351/2 and that he sold L.R. No. 1351/2 measuring 140 acres to Dr. Paul Makute Katisha on 12<sup>th</sup> March, 1986. The Plaintiff then retained L.R. No. 1351/1 measuring 140.39 acres.

7. PW1 informed the court that Mumela Primary School requested the Commissioner of Lands, vide a letter dated 2<sup>nd</sup> September, 1998, to give them a portion of the suit land and that the Commissioner of Lands did not heed to their request because the suit land is private land. It was the evidence of PW1 that according to the records held by the Ministry of Lands, there is no school on the suit land and that he came to

know of the school when they did the letter of 2<sup>nd</sup> September, 1998.

8. The Plaintiff, PW2, stated that he bought the suit land from Mohamed Dala Ismael for Kshs. 5,000; that he sold a portion of the land to the late Dr. Katisha and that the Defendants have encroached on L.R. No. 1351/1 measuring approximately 2 acres. It was the evidence of PW2 that the Defendants trespassed on the suit land in the year 1998 and that the area was exempted from the adjudication process because the suit land had a title document.

9. PW2 stated that although he obtained the consent of the Land Adjudication Officer to institute the current suit, it was not necessary because the land already had a freehold title; that the Defendants requested the Commissioner of Lands to allow them put up a Primary and Secondary school on the suit land and that their request was not accepted.

10. PW2 produced in evidence photographs of the construction of the classrooms put up by the Defendants on the suit land which were opened in 1999. PW2 denied that the Defendants have been on the land since 1938. According to PW2, the only squatters who were on the land were evicted from the land by the court in 1967.

11. The Land Adjudication and Settlement Officer, PW3, informed the court that the suit land is registered land; that the Mumela area was declared an Adjudication Section on 13<sup>th</sup> May, 1998 and that the suit land is private land. It was the evidence of PW3 that although a consent to file the current suit by the Plaintiff was given by him, it was not necessary because the suit land was not under adjudication.

12. An employee of the Ministry of Lands, PW4, informed the court that he was in possession of a letter dated 2<sup>nd</sup> September, 1998 authored by Mumela Primary School and addressed to the Commissioner of Lands.

13. Despite the Defendants being given numerous opportunities to present their Defence, they never attended court to testify.

14. The Plaintiff's advocate submitted that the Plaintiff produced in evidence the title of ownership of the suit land; that the Defendants have encroached on the suit land; that the Defendants did not offer any evidence in support of their case; that the Defendants have been and remain trespassers on the suit property and that the Plaintiff is entitled to damages for trespass to the tune of Kshs. 10,000,000.

15. The Defendants' advocates submitted that in the Sale Agreement dated 27<sup>th</sup> January, 1986 and produced by the Plaintiff, Mumela Primary School was standing on a portion of the suit land; that from 1986 until 1999, a period of thirteen (13) years had lapsed and that the Plaintiff allowed the Defendants to occupy, settle and develop the suit land extensively. Counsel submitted that the Plaintiff is estopped from evicting the Defendants from a portion of the suit land.

16. The evidence before this court shows that L.R. No. 1351 was conveyed by the Crown (*the government*) to one Maurice Green on 18<sup>th</sup> August, 1908 who then transferred it to Dala Ismael on 3<sup>rd</sup> March, 1909. The whole land whose title was issued in 1908 measured 280.39 acres (*freehold*). The land was eventually purchased by Julius Kyengo Ndile for Kshs. 5,000 by way of an Indenture dated 18<sup>th</sup> November, 1965.

17. The last entry that was made on the title in respect of L.R. No. 1351 shows the land was sub-divided into two portions, being L.R. No. 1351/1 and L.R. No. 1351/2. Vide a conveyance dated 14<sup>th</sup> November, 1986, L.R. No. 1351/2 measuring 56.75Ha was sold by Mr. Kyengo to Paul Mukita Katisya.

18. In their Defence, the Defendants have claimed that Mumela Primary School has been in occupation of a portion of the suit land since 1938; that the said portion was donated to the school by one Ndambuki Ivai and that they are entitled to the said portion which measures approximately 13 acres.

19. The Defendants did not call any evidence to prove that indeed the school has been in occupation of a portion of the suit land since 1938. Indeed, there is no evidence to show when Mumela Primary School was registered as a school by the Ministry of Education or if indeed it was in existence in 1938. There is also no evidence to show the capacity in which Mr. Ndambuki donated the portion of the suit land to the school considering that the land was already registered in the name of Mr. Mohamed Ali Dala Ismael who transferred the land to the Plaintiff (*deceased*) in 1965.

20. The Plaintiff produced in evidence a letter dated 11<sup>th</sup> November, 1998 which shows that when the school encroached on a portion of his land, he instructed his advocates to inform the school to vacate the land within fourteen (14) days. Indeed, the Plaintiff produced a letter dated 2<sup>nd</sup> September, 1998 authored by eighty five (85) parents of Mumela Primary School and addressed to the Commissioner of Lands.

21. In the said letter, the parents informed the Commissioner of Lands that the school was started in 1938, and that the land on which the school stands was given to them by a neighbour, one Ndambuki, in 1944. It would therefore appear that the land that the school is entitled to is the one that Ndambuki donated to them in 1944, which cannot be the suit land.

22. The photographs produced by the Plaintiff shows that the office block for Mumela Primary School which stands on a portion of L.R. No. 1315/2 was opened on 13<sup>th</sup> May, 1999 by the Education Officer of Kasikeu Division. This shows that indeed the Defendants encroached on a portion of the suit land around the year 1998 as stated by the Plaintiff.

23. The evidence before this court clearly shows that the Defendants have not acquired rights over the suit land by way of adverse possession. The Defendants in any event failed to testify in this matter to prove that the school has been on the suit land continuously, exclusively and uninterrupted and without the permission of the Plaintiff for twelve (12) years for it to be entitled to the land by way of adverse possession. The Defendants' only recourse in law is to have the government to acquire the portion of the suit land as provided for

under the Constitution and the Land Act, and not otherwise.

24. For those reasons, I allow the Plaintiff's claim, save for the claim for general damages, which was not proved, in the following terms:

*a. An order of permanent injunction be and is hereby issued restraining the Defendants from entering or trespassing on a portion of land known as L.R. No. 1351/1, Mumela Farm situate in Makueni County.*

*b. An eviction order be and is hereby issued, evicting the Defendants from L.R. No. 1351/1, Mumela Farm, in compliance with the above order.*

*c. The above orders to be implemented by the Plaintiff and police in charge of the area where the suit land falls within six (6) months from the date that this order will be served on the Defendants.*

*d. Each party will bear his/its own costs.*

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7<sup>TH</sup> DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE