



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 48 OF 2012 (O.S)

SUNDIATA NATHAN MUTENDEPLAINTIFF

VERSUS

WILLY MWOLOLO MUINDI.....DEFENDANT

JUDGMENT

1. In the Originating Summons dated 23rd February, 2012, the Plaintiff is seeking for the determination of the following questions:

a. Whether the Plaintiff has been in exclusive and uninterrupted possession and occupation of the suit property known as Title Number Machakos/Konza North Block 1/244 for a period of over twelve (12) years?

b. Whether the Defendant's interest and title to the suit property occupied by the Plaintiff have been extinguished by virtue of the continuous adverse possession of the property by the Plaintiff?

c. Whether the Land Registrar of Machakos should be ordered and directed to delete the name of the Defendant and register the Plaintiff absolutely as registered owner of the property known as Machakos/Konza North Block 1/244?

2. The Originating Summons is supported by the Affidavit of the Plaintiff who has deponed that one Nathan Mutisya Ndolo, who was member number 1247 of Konza Ranching and Farming Co-operative Society Ltd (*the Society*) was allocated Plot number 1247 by the Society; that he acquired the plot number 1247 in 1982 from the said Nathan who was his father and that the Society transferred the land to him in 1984.

3. According to the Plaintiff, Plot No. 1247 was surveyed and a Title Deed was issued with the new number being Machakos/Konza North Block 1/243; that parcel number Machakos/Konza North Block 1/244 (*formerly Plot No. 1248*) was registered in favour of the Defendant and that he (*the Plaintiff*) unknowingly took possession of both plots in the year 1984.

4. It is the deposition of the Plaintiff that he developed parcel number Machakos/Konza North Block 1/244 (*the suit land*) and even built his house on the land; that he has been living on the suit land for over thirty (30) years and that the Defendant's interest in the suit land was extinguished after the lapse of twelve (12) years of his continuous adverse possession of the same.

5. In his response, the Defendant deponed that he was allocated parcel number 244 by the Society; that he has never occupied or taken possession of the said land since it was allocated to him and that having occupied the suit land unknowingly, the Plaintiff cannot claim to have occupied it as of right. It is the Defendant's case that the Plaintiff's claim for adverse possession which is founded on mistake cannot succeed because it was not based on any right to use the land.

6. The Plaintiff filed a Supplementary Affidavit in which he deponed that whereas he took occupation of the suit land on a mistaken belief that the land was his, it became apparent in 1989 that the property actually belonged to the Defendant; that he still continued occupying the land and that by the time the Defendant registered a charge over the land in the year 2006, he had been on the land uninterrupted for twelve (12) years.

7. The Originating Summons proceeded by way of *viva voce* evidence. The Plaintiff, PW1, adopted the evidence in his Affidavit which I have summarized above. In addition to the depositions in the Affidavit, PW1 stated that he started receiving threats in respect to the suit land from the Defendant in the year 2012. That is when he confirmed that the land he had settled on comprised of two parcels of land: Machakos/Konza North Block 1/243 and 244.

8. It was the evidence of PW1 that he has put up three dams and one water well on the suit land and that his house is also on the suit land. In cross-examination, PW1 stated that the land that is registered in his name is 10 acres and so is the land that is registered in the name of the Defendant; that although he was shown Plot No. 243 by the officials of Konza Ranch, he has settled on parcel number 244; that the demarcation of the suit plot came after he had settled on the land and that he settled on parcel number 244(*the suit land*) by mistake.

9. It was the evidence of PW1 that he has developed both plots; that the dams and the water well are on parcel number 243; that he discovered that he had built his house on parcel number 244 in the year 2012 and that before then, he had believed that both plots belong to him.
10. PW2 informed the court that he has known PW1 as his neighbour since 1982; that there has been no dispute over the suit land and that the Plaintiff has been on the land since 1982. In cross-examination, PW2 stated that his father was a member of Konza Ranch; that each member was allocated ten (10) acres in the Ranch and that he did not know how big the Plaintiff's land is. It was the testimony of PW2 that he found the Plaintiff had already settled on his portion of land.
11. The Defendant (DW1) relied on his Replying Affidavit whose depositions I have already summarized. It was the evidence of DW1 that the Plaintiff has built a house on his land and that he did not know that the Plaintiff had occupied his land. However, it was not until when he retained a Surveyor that he noticed the land occupied by the Plaintiff (*parcel number 244*) was actually his.
12. In cross-examination, DW1 stated that he realised the Plaintiff had occupied his land in the year 2012; that the boundaries of the plots within the Ranch kept on shifting and that although he had a Title Deed, he did not see the need of going to the Ranch oftenly. DW1 stated that the Plaintiff started utilizing the suit land in the year 1984.
13. DW2 stated that he was a Manager of Konza Ranch for twenty four (24) years, that is, since 1975 until 1999; that the Defendant lodged a complaint with his office sometimes in 1987/1988 that the Plaintiff had encroached on his land and that he summoned the Plaintiff and informed him about the encroachment. DW2 stated that the Plaintiff assaulted him and that is when he informed the Defendant about the violent nature of the Plaintiff.
14. The Plaintiff's advocate submitted that the Plaintiff has produced credible evidence to show that he started occupying the suit property in 1982; that the Defendant did nothing to assert his right even after the dispute of 1987/1988 and that the Plaintiff has had uninterrupted occupation and use of the land for a period of more than thirty (30) years.
15. The Defendant's advocate submitted that the dispute of 1988 between the Plaintiff and the Defendant was about the boundary and not ownership of the suit land; that the Plaintiff developed plot number 244 under the mistaken belief that it was his property and that it became evident to the parties that each party had occupied different portions of land by mistake in the year 2012.
16. The Defendant's counsel submitted that the Plaintiff was not a trespasser on Plot No. 244 having occupied it by mistake; that the Plaintiff had no intention of dispossessing the Defendant the suit land and that the Plaintiff's entry and occupation of the suit property in 1982 was with the consent and authority of the allocating previous owner. The Defendant's counsel finally deponed that the possession of the suit land by the Plaintiff became adverse to the Defendant's ownership when the Defendant discovered that the Plaintiff was occupying his land in the year 2012.
17. It is not in dispute that the Plaintiff inherited parcel of land Machakos/Konza North Block 1/243 from his father in 1982. It is also not in dispute that parcel of land known as Machakos/Konza North Block 1/244 registered in the name of the Defendant abutts parcel number 244. Although parcel number 244 is registered in the name of the Defendant, the Plaintiff has been using the land. Indeed, the Plaintiff has built his house on the said land.
18. It was the evidence of the Plaintiff that he started utilizing both parcels of land under the mistaken belief that he owns both and that the Defendant did not take any step to evict him. On the other hand, the Defendant's case is that he only discovered that the Plaintiff had actually taken possession of his land in the year 2012 and that the dispute which existed in the year 1987/88 was not about ownership of the land but a boundary dispute.
19. Considering that both parties are in agreement that indeed the Plaintiff is in possession and occupation of parcel number 244, the only issue that I am supposed to determine is whether the Plaintiff has proved the elements required for one to be entitled to land by way of adverse possession. The elements of adverse possession that an adverse possessor must prove were stated in the case of ***Wilson Kazungu Katana & 101 others vs. Salim Abdalla Bakshwein & Another (2015) eKLR*** in which the Court of Appeal held as follows:
- “From all these provisions, what amounts to adverse possession. First, the parcel of land must be registered in the name of a person other than the Applicant, the Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve (12) years having disposed the owner or there having been discontinuance of possession by the owner... What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner.”***
20. In the case of ***Wanje vs. Saikwa (No.2) (1984) KLR 284***, the Court of Appeal held that in order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. The court further held that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
21. The above decisions of the Court of Appeal shows that for one to prove that he has dispossessed a proprietor of his land, he only needs to show that he has done acts which are inconsistent with the proprietor's enjoyment of the soil for the purpose for which the owner intended to use it. It does not matter that the adverse possessor did not know that indeed the land did not belong to him.
22. he above position conforms with the provision of Section 7 of the Limitation of Actions Act which bars a proprietor of land from recovering his land after twelve (12) years. The said Section provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

23. The official search of parcel of land known as Machakos/Konza North Block 1/244 shows that the land was registered in favour of the Defendant on 28th May, 1991. On the other hand, the Plaintiff was registered as the owner of the neighbouring land known as Machakos/Konza North Block 1/243 on 1st April, 1992. However, both the Plaintiff and the Defendant had been allocated their respective plots by Konza Ranching and Farming Co-operative Society Limited in early 1980's.

24. The evidence before this court shows that the Plaintiff developed the suit land by constructing his dwelling house around 1984. The Plaintiff at the same time did a dam and a well on parcel number 243. The Plaintiff has been utilizing both parcels of land to date as his residence and for farming purpose.

25. In his evidence and statement, the Defendant stated that he realized that the Plaintiff, who was his neighbour, *“had developed his parcel of land and had actually encroached on his land which borders his.”* It was his evidence that he reported to the Society's offices about the encroachment on his land by the Plaintiff.

26. he former Manager of the Society, (DW2), collaborated the Defendant's evidence that the Defendant had reported to him about the encroachment of the Plaintiff on the Defendant's land in 1987/1988, and that when he sought for an explanation from the Plaintiff about the encroachment, the Plaintiff became violent and assaulted him in his office.

27. The Defendant therefore knew about the possession of his land by the Plaintiff as early as 1987/1988 but did nothing to have him evicted. Even after obtaining the Title Deed for parcel number 244 in 1991, the Defendant did nothing to recover his land. Indeed, the time in respect to a claim of adverse possession began to run in favour of the Plaintiff in 1991 when the Title Deed was issued to the Defendant in 1991. (*See Section 38 of the Limitation of Actions Act*).

28. The Plaintiff having used the suit land in a manner that was inconsistent with the Defendant's enjoyment of the soil since 1991 when a Title Deed was issued to the Defendant for twelve (12) years, and without the Defendant's permission, I find that the Plaintiff has acquired title to the suit land by the statute of limitations.

29. For those reasons, I allow the Plaintiff's Originating Summons dated 23rd February, 2012 as follows:

a. The Plaintiff has been in exclusive and uninterrupted possession and occupation of the suit property known as Machakos/Konza North Block 1/244 for a period of twelve (12) years.

b. The Defendant's interest and title to the suit property occupied by the Plaintiff has been extinguished by virtue of the doctrine of adverse possession.

c. The Machakos County Land Registrar is hereby ordered and directed to rectify the register for Machakos/Konza North Block 1/244 by deleting the name of the Defendant and register the said property in the name of the Plaintiff, and thereafter issue to the Plaintiff with a Certificate of Title.

d. Each party to bear his own costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE