



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

CIVIL SUIT NO. 89 OF 2008 (O.S)

JANE WANJIRU GITONGA1ST APPLICANT

WAMBUA MWITHI KILOVOO2ND APPLICANT

VERSUS

MACHAKOS RANCHING COMPANY LTDRESPONDENT

JUDGMENT

1. This suit was commenced by way of an Originating Summons dated 19th June, 2008 which was amended on 8th September, 2016.

2. In the amended Originating Summons, the Applicants are seeking for the determination of the following issues:

- a. Whether the Applicants should be registered as the proprietors of all that parcel of land situated in Athi River Township, known as Plot No. 337/648 by adverse possession.*
- b. Whether the Respondent's title to the suit property has been extinguished by the Applicants' adverse possession thereof.*
- c. Whether the Applicants should be registered as the proprietors of the suit property in place of the Defendant.*
- d. Whether a permanent injunction should issue restraining the Respondent by themselves, their agents, their servants and/or employees from trespassing, entering, breaking into or in any other way interfering with the Applicants' quiet possession and enjoyment of all that parcel of land situated in Athi River Township, known as Plot No. 337/648.*
- e. In the alternative, to (1) to (4) above, whether the Respondent should be ordered to pay the Applicants the market value of the suit property and the developments they have effected thereon amounting to Kenya shillings thirty million (Kshs. 30,000,000/-).*

3. The Application is supported by the Affidavit of the 2nd Applicant who has deponed that she has been in occupation of parcel of land known as L.R. No. 337/648 together with his family since 1965; that the suit property was later on registered in favour of the Respondent in the year 1975 and that his four (4) children and the 1st Applicant's eight (8) children were born on the suit land.

4. The 2nd Applicant deponed that the Respondent has never been in possession of the suit land at all; that

he has never obtained the Respondent's permission to occupy the land and that the suit land has been their main source of income.

5. The 2nd Applicant finally deponed that they have extensively developed the suit land by putting up permanent houses and planting a variety of trees and other seasonal crops.

6. The Defendant filed a Defence in which he averred that the suit is bad in law because the subject matter is *res judicata* Machakos CMCC No. 175 of 2005; that it is the Defendant which has been in occupation of the suit land all along and that if the Applicants are in occupation of the suit land, then they are trespassers.

7. The suit proceeded by way of *viva voce* evidence.

8. PW1 informed the court that the 1st Applicant is his parent; that he was born in 1962 and that his parents entered on the land in 1965.

9. According to PW1, other than living on the land, they have carried out business on the land since then and that it was not until the year 2005 that the Defendant informed them the suit property belonged to it.

10. It was the evidence of PW1 that all the water and electricity bills are in the name of his father and that in 1981, his father applied to then President to allocate him the suit property. PW1 produced in evidence the Water Bills, the photographs and the business permit as PEXB 1, 2 and 3 respectively.

11. In cross-examination, PW1 stated that he was born in 1962 in Athi River, "*Kisumu Ndogo*"; that he has never been to their ancestral home and that they have connected water on the suit property.

12. PW1 informed the court that the Water Bills and the business permit do not indicate the plot number; that they have paid for the land rates and that he was not aware that the late General Mulinge was the owner of the suit land.

13. It was the evidence of PW1 that his family comprises seven (7) people and that the land they occupy and utilize for cultivation measures approximately two (2) acres.

14. The 2nd Applicant, PW2, informed the court that he moved on the suit land in the year 1965; that he married his wife and had children while on the suit land and that he has been running shops which are on the suit land.

15. It was the evidence of PW2 that he has been paying for the Water Bills since 1965 in respect to the water that was connected to the suit property; that he has licences for his shops and that he has substantially developed the suit land.

16. According to PW2, it was not until the year 2005 that he was informed by the District Officer to move out of the land. On conducting a search, he realized that the suit property had been registered in favour of the Defendant. In cross-examination, PW2 stated that he is not related to PW1; that the land measures 1 $\frac{3}{4}$ acres and that they all live on the said land.

17. It was the evidence of PW2 that he lives with his six (6) children on land measuring 100ft by 200ft; that he runs a shop and a kiosk for selling food and that when they moved on the suit land, no one attempted to evict them.

18. PW2 stated that he knew the Defendant in the year 2005 and that he was not aware that the late General Mulinge was a Director in the Defendant's company.

19. The 1st Applicant, PW3, informed the court that she is the wife of the initial 1st Applicant (*deceased*); that she moved on the suit property in the 1960's and that she has seven (7) children.

20. According to PW3, she started hearing about the Defendant ten (10) years ago.
21. In cross-examination, PW3 stated that she was born in Nyeri and so was her late husband; that she has been living on the suit land for the last sixty (60) years and that she has always lived on the suit land with her children.
22. According to PW3, there are so many people living on the suit property and that she has more than ten (10) neighbours.
23. PW3 informed the court that she occupies 2 acres of the suit land with the 2nd Applicant.
24. The Defendant's Director, DW1, informed the court that his parents were formally the Directors of the Defendant's company; that the Defendant was issued with the title document for the suit land in the year 1979 and that it is the Defendant who has been paying the requisite land rates.
25. DW1 informed the court that in the year 2005, the Defendant sued the Applicants for vacant possession.
26. DW1 stated that the Applicants have been on the land but could not tell for how long they had occupied the land.
27. The Applicants' advocate submitted that the Applicants have been in open and continuous occupation of the suit land for the past fifty (50) years; that the Defendant has never been in occupation of the land and that the Applicants have proved their claim of adverse possession.
28. The Applicants' counsel submitted that the Defendant has never attempted to enter the suit property since it obtained the title in 1979; that the Defendant's witness did not provide any evidence to show that he is a director of the Defendant and that the Defendant did not produce receipts for the previous years to show that it has been paying rates.
29. The Respondent's counsel submitted that PW1 was unable to connect the bundle of receipts issued by Mavoko Municipal Council Water and Sewerage supply to the suit land and that the business permit issued to PW1 was in respect to Plot No. 205 and not the suit land.
30. Counsel submitted that the Applicants do not have permanent structures on the land, an indication that they knew the land does not belong to them.
31. Counsel submitted that the Applicants did not produce any birth certificates to show that they were born on the land; that there is no evidence to show that they have been on the land for more than twelve (12) years and that this suit was consolidated with Machakos CMCC No. 175 of 2005 in which the Respondent had sued the Applicants for eviction from the suit property.
32. The Applicants are seeking to be declared the owners of the suit property by virtue of having lived on the suit property for more than twelve (12) years.
33. Before the hearing of this matter, Kamatu Mwathi, the 1st Applicant, died and was substituted with Jane Wanjiru Gitonga Wachira.
34. Although the Respondent was supposed to file a Replying Affidavit in response to the Originating Summons, he opted to file a "Defence" in which he denied the depositions in the Originating Summons and the Applicants' Affidavit.
35. Although the Defendant's advocates submitted that this matter was consolidated with Machakos CMCC No. 175 of 2005, I have perused this file and I have not seen the order for consolidation of the two suits. I have also not seen the file in respect to CMCC No. 175 of 2005.

36. The subject suit property is a parcel of land situated in Athi River Township measuring 0.6153 of a hectare (*approximately 1.5 acres*).

37. The Applicants' case is that they have been living on the land since 1965. Although the Respondent's witness, DW1, did not tell the court when the Applicants entered the suit, the burden of proving that the Applicants have used the land as a right *nec vi, nec clam, nec precario* (*no force, no secrecy, no persuasion*) for a period of more than twelve (12) years lies with the Applicants.

38. Indeed, it does not matter that the Defendant did not file a Replying Affidavit. It is the Applicants who must discharge that burden pursuant to the provisions of Section 107 of the Evidence Act which provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability on the existence of facts which he asserts must prove that those facts exist.”

39. The Applicants' case is that they have been in occupation of the suit land to the exclusion of the Defendant for over fifty (50) years.

40. Although the 2nd Applicant deponed that she has been in possession of the land since 1965, and that her four (4) children were all born on the land, she did not tell the court the circumstances under which she entered the land.

41. The plea of adverse possession is always based on facts, and the facts must be asserted, pleaded and proved. The factual proof requires the Applicant to show on what date he took possession and the nature of his possession.

42. It is trite that for one to succeed in a claim of adverse possession, the Applicant must prove that the entry and occupation was with, or maintained under some claim or colour of right or title. He must have some apparent right which affords him some semblance of title under which he claims.

43. Consequently, the circumstances under which one enters a property, and occupies it for a period of more than twelve (12) years is critical in a claim for adverse possession.

44. According to the testimony of the 2nd Applicant (PW2), she first entered on the land alone in 1965 and that she has businesses on the suit property.

45. PW2 did not produce in evidence the business permits that would prove the allegation that she has been carrying out businesses on the suit property since the year 1965. The 2nd Applicant, PW2, did not also produce the business permits in respect of the businesses she claims to be carrying on the suit premises.

46. Indeed the only copy of the Single Business permit for the year 2000 that was produced by the Applicant shows that the alleged business was situate on Plot No. 205, Athi River old town, and not on the suit land.

47. The 1st Applicant produced in evidence a letter dated 9th February, 1981 in which it is purported that the 1st Applicant's husband (*deceased*) had applied to be allocated the suit property.

48. Indeed, the said letter states that the 1st Applicant and others have lived “*in Athi River*” for the last twenty (20) years, and that they had been granted plots on the basis of temporary occupation licences.

49. In the said letter, the 1st Applicant's husband stated that he “*bought all the interests in Plot No. 3 which included a business for Kshs. 200,000 in 1964.*”

50. The 1st Applicant did not produce in evidence any document to show the nexus between Plot No. 3

that her husband had applied to be allocated with the suit property which was registered in favour of the Defendant in 1985.

51. Although the Applicants deponed that they have erected permanent buildings on the suit property, they did not produce in evidence photographs of the said buildings to enable the court establish if indeed that allegation is true.

52. In any event, the suit property herein measures approximately 1.5 acres. The evidence of PW3 was that the land is occupied by more than ten (10) families. The Applicants have not explained to this court what would happen to their neighbours in the event that a title is issued to them.

53. To succeed in a claim of adverse possession, the Applicants should have specifically stated the acreage of the land that they claim to have occupied for more than twelve (12) years. They failed to do so.

54. The Applicants have therefore failed to prove that they have been in occupation of the entire suit land continuously for more than twelve (12) years to the exclusion of the Defendant and without the Defendant's permission.

55. For those reasons, the Applicants' amended Originating Summons dated 8th September, 2016 is dismissed with costs.

DATED AND DELIVERED AT MACHAKOS THIS 31ST DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE