



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 144 OF 2013**

**JONATHAN MATANO MWENI.....APPLICANT**

**VERSUS**

**KAZUNGU MUTHENGI .....1<sup>ST</sup> RESPONDENT**

**J G .....2<sup>ND</sup> RESPONDENT**

**ABDULAZIZ SAID .....3<sup>RD</sup> RESPONDENT**

**MOHAMED MUSTAFA YUSUF ALI.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. In the Originating Summons dated 16<sup>th</sup> August, 2013, the Applicant is seeking for the following orders:

***a. That the Applicant is entitled to be declared as proprietor of the land parcel known as Mijomboni/615 which he has acquired by adverse possession, having lived and worked thereon for over 15 years since late 1997 well beyond the statutory 12 years and used it peacefully and uninterrupted without any interference from the Respondents and in particular the 1<sup>st</sup> Respondent or the Respondents/their agents/predecessors.***

***b. That the Applicant is entitled to be registered and issued with certificate of title over the same in place of the Respondents.***

***c. That in the interim the Respondents be restrained by injunction from alienating, sub-dividing, taking possession or in any manner whatsoever interfering with the said parcel of land until the suit herein is determined.***

***d. That the Applicant be granted the costs of the suit.***

2. The 1<sup>st</sup> Respondent filed a Replying Affidavit opposing the suit. In the said Affidavit, the Respondent deponed that the suit land originally belonged to him; that he sold the land to M I in 1990 and that the said M bought the land on behalf of his adopted and or foster child, J G K, the 2<sup>nd</sup> Defendant.

3. According to the 1<sup>st</sup> Respondent, it was not until November, 2011 that he transferred the land to the 2<sup>nd</sup> Respondent.

4. The 1<sup>st</sup> Respondent deponed that even after the sale of the said land, M allowed him to continue living on the land; that he was to live on the land until when the 2<sup>nd</sup> Respondent was to attain the age of majority and that when he was taken ill and went to Mombasa, he left his son, D K, to take care of the suit land.
5. According to the 1<sup>st</sup> Respondent's Affidavit, Mr. M later on requested him to allow the Applicant to live on the land on condition that he shall hand over the suit land to the 2<sup>nd</sup> Respondent upon the 2<sup>nd</sup> Respondent attaining the majority age.
6. The 1<sup>st</sup> Respondent finally deponed that in November, 2013, the 2<sup>nd</sup> Respondent sold the suit land to the 3<sup>rd</sup> Respondent and that as far as the Applicant was allowed to live on the suit land, the suit land cannot be acquired by adverse possession.
7. It is the 1<sup>st</sup> Respondent's case that the Applicant wants to take advantage of the death of Mr. M and the young age of the 2<sup>nd</sup> Respondent to deprive the 3<sup>rd</sup> Respondent his property.
8. On his part, the 2<sup>nd</sup> Respondent deponed that his step father, M I purchased the suit property for him when he was a child; that he decided to sell the suit property when he became an adult and that he informed the Applicant to vacate the land after selling the land.
9. According to the 2<sup>nd</sup> Respondent, he was informed by the late M that he had entrusted the Applicant to take care of the land on his behalf and that he was to use the land for cultivation.
10. The 3<sup>rd</sup> Respondent deponed that he purchased the suit land from the 2<sup>nd</sup> Respondent in November, 2012 whereafter he informed the Applicant to look for alternative land.
11. In response, the Applicant deponed that the 2<sup>nd</sup> Respondent is not a step son of the late M I; that Mr. M never married the mother of J G and that the 2<sup>nd</sup> Respondent colluded with the 1<sup>st</sup> Respondent in regard to the registration of the land.
12. According to the Affidavit of the Applicant, the agreement between the 1<sup>st</sup> Respondent and M expired during his lifetime and that the 1<sup>st</sup> Respondent never lived on the land after he sold it to M.
13. The matter proceeded for hearing by way of *viva voce* evidence.
14. The Applicant, PW1, informed the court that he lives on the suit property. It was the evidence of PW1 that his 5<sup>th</sup> born is 24 years old and that he settled on the suit land in 1990 after Kazungu sold the land to Mr. M (*deceased*).
15. Although the Applicant informed the court that he was relying on the filed witness statement, the court did not see the said statement, save for the Affidavit that was sworn on 16<sup>th</sup> August, 2013 and the Supplementary Affidavit of 3<sup>rd</sup> October, 2013.
16. In cross-examination, PW1 stated that he was born in Magarini, Marafa and that he was taken on the suit property by Mr. M who was his boss.
17. According to PW1, he was Mr. M's cook and that is why he allowed him to live on the suit land after he purchased it and that he was still his employer when he died in 1999.
18. Other than his girlfriend Margaret who died before Mr. M died, PW1 informed the court that Mr. M did not have any other relative.
19. PW1 informed the court that he is the one who used to harvest the crops on the suit land during Mr.

M's lifetime and that he never mentioned to him about the 2<sup>nd</sup> Respondent.

20. PW1 informed the court that Mrs. S is her foster mother and that she lives on plot number 614; that he was raised by the said Mrs. S on plot number 614 and that he has been living on the land after Mr. M allowed him to do so in the year 1994.

21. According to PW1, his son Nelson also lives on the suit land.

22. PW2 informed the court that the Applicant is a son to her husband; that she lives on her husband's land which is Gede/Mijimboni/614 which borders plot 615.

23. PW2 stated that the 1<sup>st</sup> Respondent sold the suit property to M and that her step-son, the Applicant, was allowed to stay on the land by Mr. M as a shamba boy and a cook.

24. It was the evidence of PW2 that it is the Applicant who used to harvest the cashew nuts, coconuts and mangoes on the suit land and the he also grazed Mr. M's goats on the land.

25. According to PW2, when Morosseti died, it is the Applicant who remained on the land to date.

26. The Plaintiff's neighbour, PW3, informed the court that the Applicant has stayed on the suit land for more than 15 years; that it is the Applicant who has been harvesting crops on the land for all those years and that the Applicant was allowed on the land after Morosseti purchased it from the 1<sup>st</sup> Respondent.

27. Another neighbour, PW4 reiterated what PW3 had informed the court.

28. The Applicant's son, PW5, stated that he does not know the Respondents; that he stays on the suit land which has three houses; that he is 29 years old and that he started living on the land in the year 2000.

29. In cross-examination, PW5 stated that he put up his house on the land in the year 2009 and that all along, he knew that his father was working for Mr. M.

30. According to the evidence of PW5, the first time the 1<sup>st</sup> Respondent raised the issue of ownership of the land was in the year 2011 when the 1<sup>st</sup> Respondent complained about the felling of a tree on the suit land by his father.

31. The 1<sup>st</sup> Respondent relied on his Replying Affidavit which I have already summarized above.

32. In cross-examination, DW1 informed the court that he sold the suit property to Mr. M for Kshs. 450,000 and that he never went back to the land after the said sale.

33. According to DW1, he neither obtained the consent of the Board nor transferred the suit land to Mr. M and that Mr. M used to visit the land and go away.

34. Although DW1 stated that Mr. M purchased the suit land for the 2<sup>nd</sup> Respondent who was a minor then, he informed the court that he did not have documents showing that Mr. M adopted the 2<sup>nd</sup> Respondent as his son; that he has never sold the suit property twice and that he sold the suit property 20 years ago to Mr. M.

35. According to DW1, after selling the suit property, he left it in the hands of his son, David Katana and the Applicant and that the Applicant has been on the land for more than ten (10) years.

36. DW1 stated that although Mr. M died more than ten (10) years ago, the 2<sup>nd</sup> Respondent has never filed succession proceedings in respect to his Estate; that he transferred the suit land to the 2<sup>nd</sup> Respondent in the year 2011 because it was bought for him and that he never obtained the consent of the

Board before the said transfer.

37. In re-examination, DW1 did not remember the exact date or year that the Applicant entered the land.

38. The 3<sup>rd</sup> Respondent, DW2, relied on his Replying Affidavit and informed the court that he knew the 1<sup>st</sup> and 2<sup>nd</sup> Respondents when he wanted to buy the suit land.

39. As at the time of the purchase, DW2, informed the court that the suit land was still registered in the names of the 1<sup>st</sup> Respondent; that the 1<sup>st</sup> Respondent had sold the land to Mr. M and that the 2<sup>nd</sup> Respondent was the foster son of Mr. M.

40. According to DW2, the land had to be transferred to the 2<sup>nd</sup> Respondent before the same was transferred to him; that a Title Deed was issued to him in December, 2012 and that the 2<sup>nd</sup> Respondent informed him that the Applicant was a caretaker looking after the land.

41. The 2<sup>nd</sup> Respondent did not testify in the matter.

42. The Applicant's counsel submitted that having failed to apply and obtain the Land Control Board consent to transfer the suit land from the date of execution of the agreement, the agreement between the 1<sup>st</sup> Respondent and Mr. M I became null and void.

43. Counsel submitted that the land remained in the name of the 1<sup>st</sup> Respondent; that the Applicant has been on the land for more than 15 years and that he is entitled to the land.

44. Counsel submitted that after the agreement between the 1<sup>st</sup> Respondent and Mr. Morosseti became void, the Applicant ceased to be an employee of Mr. M; that the 2<sup>nd</sup> Respondent did not produce the letters of administration in respect to the Estate of Mr. M and that the Applicant has proved that he has been on the land for more than 12 years.

45. The Respondents' advocate submitted that the Applicant failed to annex the certificate of title of the suit land on the Supporting Affidavit contrary to the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules; that the green card that was produced in evidence is not a certificate of title and that the suit should be dismissed on that account.

46. The Respondents' counsel submitted that the late Mr. M bought the suit land and requested the Applicant to look after the land until his foster child, the 2<sup>nd</sup> Respondent, becomes of age; that the Applicant's occupation of the suit land was neither adverse nor an entry under any colour of right and that the Applicant has not proved that he has been in adverse possession of the suit land for the requisite period.

47. According to the Respondents' advocate, the Applicant has been in possession of the suit land as against the 3<sup>rd</sup> Respondent for only three (3) months.

48. The Respondents' advocate submitted that it is irrelevant how the 3<sup>rd</sup> and 4<sup>th</sup> Respondents acquired the suit land.

49. It is not in dispute that the 1<sup>st</sup> Respondent was registered as the proprietor of parcel of land known as Gede/Mijomboni/675 on 6<sup>th</sup> June, 1975. However, it was not until 29<sup>th</sup> June, 1990 that he was issued with a Title Deed in respect to the suit property.

50. The Applicant produced in evidence an extract of title, otherwise known as a green card to show the transactions that have been undertaken in respect to the suit land since 1975.

51. Although Order 37 Rule 7(2) of the Civil Procedure Rules provides that an Applicant should annex an

extract of title or the Affidavit in support of an Originating Summons, it is not fatal if the extract of title on is not annexed on the Affidavit but is produced in evidence.

52. Although the Court of Appeal in the case of *Kweyu vs. Omuto (1990) eKLR* restated the law by holding that a certified extract of the title of the suit property ought to be annexed on the supporting in a claim for land by way of adverse possession, the court went further to hold as follows:

**“...the certainty of the existence and proprietorship of the suit land could not have otherwise be guaranteed...”**

53. The annexing of a certified extract of the title is to enable the court ascertain the registered proprietor of the land and to compute time for the purpose of establishing if indeed the claimant has been occupying the land as of right, *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion) for the requisite period of twelve (12) years.

54. Even if the certified copy of the title is not annexed on the Affidavit but is produced in evidence like in this case, then the Applicant would have complied with the provisions of the law. I say so because what the court is concerned with is to establish that indeed the suit property is registered in the name of the Defendant and nothing more.

55. Section 7 of the Limitation of Actions Act bars a registered land owner from bringing an action to recover land after the end of twelve (12) years from the date on which the right of action accrued to him.

56. For a claim of adverse possession to succeed, the Applicant must demonstrate that the possession has been actual, exclusive, continuous, open and notorious.

57. The undisputed facts of this case are that the 1<sup>st</sup> Respondent was registered as the proprietor of the suit property on 6<sup>th</sup> June, 1975 and a Title Deed was issued to him on 29<sup>th</sup> June, 1990. In the same year the Title Deed was issued, the 1<sup>st</sup> Defendant sold the land to the late M I.

58. The 1<sup>st</sup> Respondent did not produce the agreement that he entered into with Mr. M. However, he deponed in his Replying Affidavit and in his testimony that he sold the suit property in early 1990.

59. According to the 1<sup>st</sup> Respondent, (DW1) and the Applicant (PW1), the 1<sup>st</sup> R moved out of the land immediately he sold the land to Mr. M in 1990.

60. The 1<sup>st</sup> Respondent informed the court that Mr. M bought the land on behalf of his foster son, the 2<sup>nd</sup> Respondent, who was a minor by then, and that he transferred the suit property to the said son in the year 2011 when he reached the age of majority. The agreement between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent dated 24<sup>th</sup> November, 2011 has been exhibited.

61. After the transfer of the land to the 2<sup>nd</sup> Respondent, the land was transferred to the 3<sup>rd</sup> Respondent by way of an agreement dated 4<sup>th</sup> October, 2012.

62. The copy of the extract of the register (*the green card*) shows that a Title Deed was issued to the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> and 4<sup>th</sup> Respondents on 9<sup>th</sup> December, 2011 and 13<sup>th</sup> December, 2012 respectively.

63. Although the 1<sup>st</sup> Respondent informed the court that after selling the land to Mr. M, he left the land in the care of his son Zawadi Kazungu, he also informed the court that Mr. Morosseti informed him to allow the Applicant, who was his cook and or gardener on the land, which request he agreed to.

64. The 1<sup>st</sup> Respondent did not inform the court when he allowed the Applicant on the land. The 1<sup>st</sup> Respondent did not also call his son, Zawadi Kazungu, to testify on when the Applicant joined him on the

suit land and when he actually left the land.

65. The evidence by the Applicant, PW2, PW3, and PW4 (*the Applicants' neighbours*), informed the court that the Applicant used to work for Mr. M and that Mr. M allowed him on the suit land immediately he purchased the land.

66. PW1, PW3, and PW4 stated that the suit land had mature mangoes, coconut trees and cashew nuts as at the time Mr. M bought the land and that it is the Applicant who has always harvested the fruits from those trees.

67. The evidence before the court shows that it is the Applicant who has always occupied the suit land and harvested the fruits thereon since 1990 when the late Mr. M bought the land.

68. Indeed, the evidence before the court shows that immediately after the 1<sup>st</sup> Respondent sold the suit land to M, he left the land and the Applicant took possession. There is no evidence that the Applicant's son, Zawadi Kazungu, ever took possession of the land after the said sale either alone or together with the Applicant as alleged by the 1<sup>st</sup> Respondent.

69. Although the 1<sup>st</sup> Respondent alleged that Mr. M bought the land for his foster son, the 2<sup>nd</sup> Respondent, and that he transferred the said land to him in the year 2011 after attaining the age of majority, there is no evidence before me to show that the 2<sup>nd</sup> Respondent was the foster or adopted son of the late M.

70. In any event, the 1<sup>st</sup> Respondent did not produce the agreement that he entered into with Mr. M, which would have shown the capacity in which Mr. M bought the land.

71. The 2<sup>nd</sup> Respondent did not testify in this matter. The 2<sup>nd</sup> Respondent did not therefore prove his claim that he was related in any way to Mr. M to be entitled to the suit property.

72. Considering that the Applicant entered the land in the year 1990 when the land was bought by his boss, Mr. M, and in view of the fact that the said land was never transferred to Mr. M but remained in the name of the 1<sup>st</sup> Respondent, the agreement between the 1<sup>st</sup> Respondent and Mr. M became null and void after the lapse of six (6) months due to want of the consent of the Land Control Board (*See Section 8 of the Land Control Act*).

73. Consequently, the 1<sup>st</sup> Respondent was entitled to repossess his land after the lapse of the said six (6) months from the date of the agreement which he did not do. The Applicant continued occupying the suit as of right and without any interruption until the year 2011 when the 1<sup>st</sup> Respondent purported to transfer the suit land to the 2<sup>nd</sup> Respondent who then transferred it to the 3<sup>rd</sup> Respondent in the year 2012.

74. By the time the 1<sup>st</sup> Respondent transferred the land to the 2<sup>nd</sup> Respondent, the Applicant had occupied the suit land as of right, continuously, exclusively, openly and in a manner that was hostile to the 1<sup>st</sup> Respondent's title. The 1<sup>st</sup> Respondent's right to recover the suit land or to transfer it to a third party lapsed sometimes in the year 2002.

75. In the circumstances, the Applicant has proved on a balance of probabilities that he should be registered as the proprietor of the land which he has acquired by adverse possession.

76. For those reasons, I allow the Applicant's amended Originating Summons dated 3<sup>rd</sup> October, 2013 as follows:

***a. That the Applicant is entitled to be declared as proprietor of the land parcel known as Mijomboni/615 which he has acquired by adverse possession, having lived and worked thereon for over 15 years since late 1997 well beyond the statutory 12 years and used it peacefully and***

*uninterrupted without any interference from the Respondents and in particular the 1<sup>st</sup> Respondent or the Respondents/their agents/predecessors.*

*b. That the Applicant is entitled to be registered and issued with a certificate of title over the said land in place of the Respondents*

**DATED AND SIGNED AT MACHAKOS THIS 2<sup>ND</sup> DAY OF MAY, 2017.**

**O. A. ANGOTE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT MALINDI THIS 12<sup>TH</sup> DAY OF MAY, 2017.**

**J. O. OLOLA**

**JUDGE**