



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 73 OF 2014(O.S)

IN THE MATTER OF SECTIONS 7 AND 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF CLAIM TO TITLE TO LAND BY ADVERSE POSSESSION

OVER

TITLE NO. ATHI RIVER/ATHI RIVER BLOCK 1/1230 (PREVIOUSLY KNOWN AS PLOT NO. 1561)

KATELEMBO ATHIANI MUVUTI CO-OPERATIVE SOCIETY LTD

BETWEEN

JUDITH NZULA MUTUA.....PLAINTIFF

VERSUS

ROSE KAKUVI KIMEU.....DEFENDANT

JUDGMENT

1. In the Originating Summons dated 3rd September 2014, the Plaintiff is seeking for the following orders:

a. That Judith Nzula Mutua be declared to have acquired by adverse possession title No. Athi River/Athi River Block 1/1230 previously known as plot number 1561 Katelembo Athiani Muvuti Co-operative Society Ltd and consequently be registered as the proprietor thereof.

b. That the land register relating to title number title No. Athi River/Athi River Block 1/1230 or alternatively the records of Katelembo Athiani Muvuti Co-operative Society Ltd be rectified in

such a manner as will reflect the Plaintiff herein as the registered owner of the title No. Athi River/Athi River Block 1/1230.

c. That in alternative and without prejudice to (1 and 2) above, the Plaintiff be declared to have a beneficial interest in title No. Athi River/Athi River Block 1/1230 which is part of estate of Kimeu Nzioka (now deceased) who estate ought to be held for the benefit of the Defendant's family including the Plaintiff and the six children.

d. That this Honourable Court be pleased to restrain the Defendant by an order of permanent injunction from entering, alienating, disposing or in any other manner interfering with Plaintiff's exclusive possession, use and occupation of title No. Athi River/Athi River Block 1/1230.

e. That such other questions as may be pertinent to the case be determined and appropriate directions and orders be given.

f. That the costs of these proceedings be borne by the Defendant.

2. The Originating Summons is premised on the ground that the Plaintiff has been in actual, open, physical and uninterrupted possession of the suit land for a period in excess of twelve (12) years and has thus acquired the title to the land by adverse possession.

3. According to the Plaintiff's Affidavit, since the year 1986 until 2005, she stayed with the Defendant's father's son, one Jones Mulwa Kimeu, as a husband and wife and that they were blessed with six children.

4. It is the Plaintiff's deposition that she established her matrimonial home on the suit land in 1992; that the suit land was allocated to the late Kimeu Nzioka, the father of her husband and that since her entry on the land in the year 1992, she has been in actual occupation of the land for a period of more than twelve (12) years.

5. The Plaintiff has further deponed that her husband abandoned her in the year 2005 and that after the demise of her father-in-law, the Defendant has declined to have the suit land registered in her favour.

6. In her Replying Affidavit, the Defendant deponed that she is a stranger to a parcel of land known as Athi River/Athi river Block 1/1230; that she has been dragged into issues that do not concern her and that in any event, this court does not have the requisite jurisdiction to determine the matter since the registered owner of the suit land is Kimeu Nzioka who is deceased.

7. In her Supplementary Affidavit, the Plaintiff deponed that the Defendant is the personal representative of the estate of the deceased and that she should be declared as the beneficial owner of the suit land.

8. In his submissions, the Plaintiff's advocate submitted that the land is registered in the name of Kimeu Nzioka (*deceased*); that the deceased is the father of the Defendant and her former husband and that she is entitled to the share of the land by adverse possession.

9. The Plaintiff's advocate relied on the case of ***Ramco Investment Limited vs. In-Driver-In Theatre Limited (2014) eKLR and Mbira vs. Gachuhi (2002) 1 EALR 137*** which I have considered.

10. The Defendant's counsel submitted that the Plaintiff has not demonstrated that the suit land is registered in the name of Kimeu Nzioka; that the Plaintiff's husband is the registered proprietor of parcel number 1232 which the Plaintiff is aware of and that the suit has been filed in respect to a non-existing parcel of land.

11. The Defendant's counsel relied on several authorities which I have considered.

12. The Plaintiff is seeking to be declared the owner of the parcel of land known as Athi River/Athi River

Block 1/1230 (*the suit land*).

13. According to the copy of the extract of title that has been annexed on the Plaintiff's Affidavit, the suit property is registered in favour of the "Government of Kenya". The said register was opened on 24th February, 1997.

14. Although the Plaintiff has deponed that the suit land is registered in favour of the Defendant's deceased father, there is no evidence to show that position.

15. Considering that one cannot succeed in a claim of adverse possession against the Government, and in view of the fact that there is no evidence to show that the suit land is registered in favour of Kimeu Nzioka (*deceased*) and that the Defendant is the legal representative of the said Kimeu Nzioka, the suit before the court is incompetent and should fail on that ground alone.

16. In any event, even if the suit land is registered in favour of the late Kimeu Nzioka, the Plaintiff's claim would not succeed because she is on the suit land by virtue of having been permitted to stay on the land by the said Kimeu Nzioka.

17. It is trite that a claim for adverse possession cannot succeed if the person asserting the claim is in possession of the land with the permission of the owner of the land or in pursuance to an agreement for sale or lease (*See Samuel Miki Waweru vs. Jane Njeri Richu (2007) eKLR*).

18. Having admitted that she has lived on the suit land by virtue of her marriage to the son of the late Nzioka, the Plaintiff was on the land with the permission of Mr. Nzioka. Consequently, her claim in respect to the estate of Mr. Nzioka can only succeed in succession proceedings and not in the manner she has approached the court.

19. For those reasons, I dismiss the Originating Summons dated 3rd September, 2014 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 16TH DAY OF JUNE, 2017.

O.A. ANGOTE

JUDGE