



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 44 OF 2013 (O.S) (CONSOLIDATED WITH ELC NO. 45 AND 46 OF 2013 (O.S))

DAVID JOHN MUNYAE APPLICANT

-VERSUS-

STELLAMARIS NGINA MUTAVI RESPONDENT

(IN ELC NO. 44 OF 2013)

CAROLINE NDUKU RESPONDENT

(IN ELC NO. 45 OF 2013)

DIANA KADOGO NDUVA RESPONDENT

(IN ELC NO. 46 OF 2013)

JUDGMENT

Background

1. The Applicant herein, **David John Munyae**, took up the summons dated **8th February 2013**, in the three files herein for determination of the following questions:-

- 1. Whether he has acquired prescriptive rights over all those parcels of land known as Makuyu/Makuyu/Block IV/71, 97 & 85;**
- 2. Whether he has acquired prescriptive rights over all those parcels of land known as Makuyu/Makuyu/Block IV/74, 75, 76, 83, 84, 96, 98, 99 and 100;**
- 3. Whether he has acquired prescriptive rights over all those parcels of land known as Makuyu/Makuyu/Block/IV/73;**
- 4. Who should bear the costs of the respective suits.**

2. The first prayer relates to ELC No.44 of 2013; the second to ELC No. 45 of 2013 and the third prayer to ELC No. 46 of 2013.

3. In support of his case in the respective suits, the applicant has deposed that he has been in use and occupation of the respective parcels of land since 1976; that his occupation of the respective parcels of

land has been uninterrupted since that time and that the respondents who are the registered proprietors of the suit properties are strangers to him. The applicant further contends that the registration of the respondents as the proprietors of the parcels of land in question (hereinafter referred to as the suit properties) was erroneously effected by the Land Registrar.

4. Despite having been served with summons to enter appearance, the respondents failed to enter appearance within the time stipulated in law and at all. Consequently, on application by the applicant, interlocutory judgment was entered against the respondents in the respective suits and the matters fixed for formal proof.

EVIDENCE

5. When the matter came up for hearing, the applicant informed the court that in early 1990's there was a presidential directive that a probe be done for all large scales parcels of land in Muranga.

6. Following that directive, he presented his documents for Makuyu/Makuyu/Block/IV/46 to 49 to the secretary. He obtained all the necessary approvals and the secretary gave him titles deeds for parcels number 46 to 48.

7. He stated that the Registrar retained Makuyu/ Makuyu/Block IV/49 out of which he issued 13 plots to other persons. He informed the court that he has been in exclusive use and possession of that parcel of land since 1975.

8. Despite having been in exclusive use and possession of the said parcel of land, upon conducting searches, he established that the property was sub-divided and titles in respect of the sub-divisions thereof issued to the respondents. Consequently, he registered cautions in respect of those sub-divisions.

9. In support his case, the applicant produced search certificates, copies of the caution he registered, letter dated 26th November, 1991 in respect of his application for sub-division of the parcel of land (Makuyu/Makuyu/Block IV/46- 49), mutation forms and further search certificates in respect of the suit properties.

10. On 20th March, 2017 the applicant produced original search certificates concerning the suit properties. Although the search certificates show that the registered owners are different from the respondents herein he maintained that he is entitled to the orders sought.

11. At the close of hearing, the applicant filed submissions in which he highlights the evidence adduced in support of his case and based on the principles set out in the case of **Kasuve v. Mwaani Investments Limited and 4 Others (2004) 1 KLR 184** concerning a claim for adverse possession submitted that he has made up a case for being granted the orders sought.

Analysis and determination

12. From the pleadings, the evidence and the submissions filed in this case, the sole issue for determination is whether the applicant has made up a case for being granted the orders sought.

13. As stated in the case of **Kasuve v. Mwaani Investments Limited & 4 Others** (supra), in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.

14. Although the applicant's claim is undefended, the evidence adduced in this matter shows that in respect of Makuyu/Makuyu/Block IV/73, 74, 75, 76, 83, 84, 96, 98, 99, and 100 the registered owners are merely leasees. The lessor is shown to be the defunct County Council of Muranga, which despite being a necessary party to the suits, the applicant did not make it or its successor in entitlement, the County Government of Muranga, a party to the suits. As the orders sought will definitely affect the lessor and

given the fact that the lessor was not given an opportunity to be heard on the issues raised and cognizant of the fact that an order of adverse possession cannot issue against the government, I find and hold that the applicant has not made up a case for being granted the orders sought in respect of those parcels of land. In this regard see the case of Pashito Holdings Limited & Another vs Paul Ndungu & 2 OTHERS[1197]eKLR where the Court of Appeal stated that:

“... The respondents could not have established a *prima facie* case with a probability of success which is an essential legal requirement in order to be entitled to an interlocutory injunction unless the Commissioner was a party to the proceedings. The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of “audi alteram partem”, which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)

“It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him”.

There is an unpronounceable Latin maxim which in simple English means: “He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right”.

The learned Judge quite erroneously in our view said:

“However, my view is, that in this particular case, it is not necessary to join the Commissioner of Lands as a basis of making such an order. In any case it was open to the defendants to join any party to these proceedings”.

With respect, he should have seen that it was not up to the appellants to fill up the gaping holes in the respondents’ case who alone should have suffered the consequences of not suing the party against whom they were seeking the relief”.

15. Also see the case of Francis Kangogo Cheboi v. Vincent Kiprono Kaino & 4 others (2013)e KLR where it was observed:

“Under Section 38(1) of the Limitation of Actions Act, CAP 22, where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

18. However, Section 41 of CAP 22 provides as follows:-

<i>This</i>	<i>Act</i>	<i>does</i>	<i>not</i>	<i>-</i>
(a)	<i>enable a person to acquire any title to, or any easement over</i>			<i>-</i>
(i)	<i>Government land or land otherwise enjoyed by the Government;</i>			
(ii)	<i>mines or minerals as defined in <u>the Mining Act</u>;</i>			
(iii)	<i>mineral oil as defined in the Mineral Oil Act;</i>			
(iv)	<i>water vested in the Government by <u>the Water Act</u>;</i>			
(v)	<i>land vested in the county council (other than land vested in it by section 120 (8) of <u>the Registered Land Act</u>);</i>			<i>or</i>

- (vi) *land vested in the trustees of the National Parks of Kenya; or*
- (b) *affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act or any Act repealed by that Act.*

19. It will be seen from the above, that the Limitation of Actions Act, does not apply *inter alia* to land vested in the County Council (except for land vested in it by Section 120(8) of the Registered Land Act which was repealed in 1972). It follows therefore that one cannot claim the reliefs provided for in the Limitation of Actions Act, including the relief of adverse possession, for land vested in County Councils. The suit land as we have seen is vested in the Elgeyo Marakwet County Council and there is no question that this entity is a County Council as its name suggests. The plaintiff cannot therefore claim the suit land by way of adverse possession.”

16. With regard to Makuyu/Makuyu/Block IV/71, 85 and 97 there being no evidence to contradict that of the applicant to the effect that he has been in exclusive use and occupation of those parcels of land for a period exceeding that stipulated in law for acquiring interest in land by adverse possession, I find and hold that the applicant has made up a case for being granted the orders sought in respect of those parcels of land.

17. Concerning the applicant’s contention that registration of the respondents was effected erroneously and/or fraudulently, I find the evidence adduced in this matter to be incapable of proving the alleged fraud either against the respondents or the Land Registrar. For that reason, despite the applicant having partially succeeded in his claim, I award no costs in his favour.

18. The upshot of the foregoing is that the applicant’s cases succeed to the extent contemplated herein above.

19. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 9th day of October, 2017.

L. N. WAITHAKA

JUDGE

In the presence of:

Mr. King’ori h/b for Mr. Mungata for the plaintiffs

N/A for the respondents

Court assistant – Esther