



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

NAIROBI ELC NO. 453 OF 2013 [OS]

STEPHEN MUTINDA KIMANZI PLAINTIFF

VERSUS

JAMES NZAU MBATHI 1ST DEFENDANT

RICHARD MUSILI MUTHENGI 2ND DEFENDANT

HENRY MULI MBATHI 3RD DEFENDANT

ROSE KATUKU MBATHI 4TH DEFENDANT

TITUS KIMANTHI MUTHENGI 5TH DEFENDANT

OLIVER KYALO MUTHENGI 6TH DEFENDANT

JUDGMENT

1. The dispute in this suit relates to Land Title Number: *NZALAE/MUTONGUNI/835 [the suit property]*, previously registered in the name of the late **DAVID MUTHENGI MBATHI**. The 1st defendant is a brother to the said David Muthengi Mbathi and executor of his will. The 2nd, 3rd, 4th, 5th and 6th defendants are the current registered proprietors of the suit property. They became proprietors pursuant to a disposition effected by the 1st defendant [*executor*] on 13/12/2011.

2. On 15/4/2013, the plaintiff, **STEPHEN MUTINDA KIMANZI**, took out an originating summons dated 11/4/2013 seeking a declaration that he has acquired title to the suit property by way of adverse possession and that the respondents be ordered to transfer the suit property to the plaintiff. The originating summons was amended on 13/6/2013 to enjoin James Nzau Mbathi as the 1st defendant. Both the original and the amended originating summons are supported by affidavits sworn by the plaintiff. The content of the two affidavits is the same.

3. The defendants opposed the originating summons through affidavits sworn by Oliver Kyalo Muthengi and James Nzau Mabthi on 16/6/2013 and 6/5/2016 respectively. *Viva voce* evidence was led at the hearing of the originating summons. At the hearing, all the witnesses adopted their respective affidavits as part of their sworn evidence in chief.

4. The plaintiff's case is that, from 1970 to 1986, he resided on the suit property together with his father, Kimanzi Mutui. In 1986, his father moved to Land Title Number Nzalae/Mutonguni/278 and left the suit property to him. He has been residing on the suit property with his family since then. He contends that he has a permanent residential house on the suit property. In summary, he contends that he has had uninterrupted occupation of the suit property since 1986. He states that he has acquired title to the suit

property under the doctrine of adverse possession.

5. The respondents' case is that the suit property is a sub-division out of Land Title Number Nzalae/Mutonguni/278 which was originally owned by James Ngotho Katumo. James Ngotho Katumo subdivided the land and sold the suit property to the late David Muthengi Mbathi.

6. The respondents further contend that prior to the sale of the suit property to the late David Muthengi Mbathi, the plaintiff's father, Kimanzi Mutui, had trespassed onto James Ngotho Katumo's land, prompting the latter to initiate legal proceedings leading to obtention of a court eviction order against the plaintiff's father. They further contend that in the year 2004, the plaintiff herein trespassed onto the suit property by relocating from the portion of land on which he had been living together with his father. This prompted the 1st defendant to issue the plaintiff with a demand letter requiring him to vacate the suit property and stop an illegal sale of a part of the suit property to one Mutukaa wa Kisami. They further state that the plaintiff has on several occasions violently resisted attempts to remove him from the suit property. The defendants contend that the actions of the plaintiff constitute a breach of the law and that the plaintiff should not be allowed to benefit from illegalities intended to unlawfully deprive the respondents their property. They urge the court to dismiss the originating summons.

7. The parties' oral testimonies replicate the above contentions.

8. I have carefully examined the evidence tendered by the parties in this suit in support of their respective positions. Similarly, I have considered the parties' rival submissions. I have also considered the legal framework on the doctrine of adverse possession and the key common law features of the doctrine.

9. There are two key issues to be determined in this suit. The first issue is whether the plaintiff has satisfied the criteria for grant of a declaration conferring title under the doctrine of adverse possession. The second issue is whether an original suit predicated upon a plea of adverse possession can be maintained against the current proprietors of the suit property while the vesting orders issued by the High Court in Machakos High Court Succession Cause No. 83 of 2001 remain in force. I will dispose the latter issue before I deal with the first issue.

10. Annexed to the plaintiff's originating summons is a copy of the land register of the suit property. The register shows that on 13/12/2011, pursuant to orders made in Machakos High Court Succession Cause No. 83 of 2001, the suit property was registered in the name of the 1st defendant, James Nzau Mbathi. On the same day, the land was transferred and registered in the names of the 2nd, 3rd, 4th, 5th and 6th defendants. It is clear from the land register that change of ownership from David Muthengi Mbathi was effected through succession proceedings.

11. The Law of Succession Act provides an elaborate legal framework through which a party claiming an overriding interest in land under **Section 28 (h) of the Land Registration Act** is granted a forum through which to ventilate the interest. The plaintiff in this suit has invited this court to proceed to grant his claim without regard to the existing orders made in Machakos High Court Succession Cause No. 83 of 2001. In my view, to do so would be contrary to the law. The plaintiff is not entitled to seek the declaration envisaged in this suit before vacating the court order which granted the defendants the suit property. To grant the declaration would be against the law and against public policy. This is so because it would result in two court orders from courts of equal status conferring a single title to different individuals. On this ground alone, the plaintiff's suit fails.

12. I am alive to the fact that a succession court faced with an objection to confirmation of grant on a plea of adverse possession will be pondering over the question of jurisdiction to pronounce itself on a claim of adverse possession. In my view, this challenge should be overcome through an order of stay or suspension of proceedings or orders [if already issued] pending determination of that question by a court vested with jurisdiction. To do otherwise would undermine the administration of justice.

13. I now turn to the principal issue in this suit, which is whether the plaintiff has satisfied the criteria for grant of title under the doctrine of adverse possession.

14. The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of land. To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land [*animus possidendi*]. Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion [*nec vi, nec clam, nec precario*] for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge [*or the actual or constructive means of knowing*] that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted. In **TITUS KIGORO MUNYI V PETER MBURU KIMANI, CA NO. 28 OF 2014**, the Court of Appeal held that computation of time starts from when there is actual or constructive knowledge by the registered proprietor.

15. The doctrine of adverse possession has its statutory underpinning in ***Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act***. The Court of Appeal examined the constitutionality of the doctrine of adverse possession in the context of the Constitution of Kenya 2010 in **MTAMA LEWA V KAHINDI NGALA MWAGANDI, [2015] eKLR** and held that the doctrine does not offend the spirit and letter of the present constitutional framework on protection of the right to property.

16. The plaintiff's evidence is that he was born in 1968 and he has lived on the suit property since 1970. He further contends that in 1986 his father moved out of the suit property and left it to him. The defendants contest the above contention by the plaintiff. The DW1's and DW2's evidence is that the suit property was carved out of Land Title Number Nzalae/Mutonguni/278 by James Ngotho Katumo and sold to the late David Muthengi Mbathi. They testified that prior to the purchase of the suit property by the late David Muthengi Mbathi, the plaintiff's father, Kimanzi Mutui had unlawfully encroached on James Ngotho Katumo's land, prompting the latter to initiate court proceedings culminating in the obtention of an eviction order against the plaintiff's father. They have produced court papers to support this contention. Both DW1 and DW2 testified that in the year 2004, the plaintiff relocated from the portion of James Ngotho Katumo's land where he had been living together with his father in defiance of a court order and trespassed onto the suit property. This prompted the defendants to instruct M/s BM Mung'ata & Company Advocates to write to the plaintiff on 1/9/2004, requiring the plaintiff to vacate the suit property.

17. A scrutiny of the land register of the suit property reveals that the land register was opened on 15/1/2001 and on the same day the suit property was registered in the name of David Muthengi Mbathi. On 13/12/2011 the suit property was registered in the name of James Nzau Mbathi [1st defendant] pursuant to a court order issued in Machakos High Court Succession Cause No. 83 of 2001. On the same day, the 1st defendant transferred the suit property to the 2nd, 3rd, 4th 5th and 6th defendants. It is not in dispute that in September 2004 the defendants wrote to the plaintiff requiring the plaintiff to vacate the suit property. Prior to registration of the suit property, it was part of a bigger parcel belonging to James Ngotho Katumo. The said Ngotho Katumo had asserted his right to the bigger parcel by initiating court proceedings and obtaining an eviction order against the plaintiff's father.

18. From the year 2001 when the suit property was registered to 2004 when the defendant took a step to get the plaintiff out of the suit property is a period of about 4 years. From 2004 to 2013 when the present originating summons was filed is a period of about 9 years. Prior to 2001, James Ngotho Katumo had fully asserted his right to the larger parcel through initiation of appropriate court proceedings to protect his title to the land.

19. From the foregoing, it is clear that the plaintiff's occupation of the suit property does not satisfy the mandatory requirements for acquisition of title under the doctrine of adverse possession because the essential features of the doctrine are missing in the circumstances of the present suit. Those mandatory requirements are set out in paragraph 14 of this judgment.

20. The net result is that I am not satisfied that the plaintiff has proved his case on a balance of probabilities to establish title by adverse possession. Consequently, the suit herein is dismissed for lack of merit. The defendants shall have costs of the suit.

Dated, signed and delivered at Nairobi on this 17th day of November, 2017.

B M EBOSO

JUDGE

In the presence of:

Waweru h/b for Kinga Advocate for the Plaintiff

Kiiru h/b for Oduor Advocate for the Defendants

Halima Abdi: Court Assistant