



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 126 OF 1999**

**ESTHER KAKUNYU MWAMBETU .....PLAINTIFF**

**VERSUS**

**BENSON MUTISYA MWAMBETU.....1<sup>ST</sup> DEFENDANT**

**WAMBUA MWILU .....2<sup>ND</sup> DEFENDANT**

**MUSILA MUIA .....3<sup>RD</sup> DEFENDANT**

**GRACE MWAMBETU .....4<sup>TH</sup> DEFENDANT**

**TEVE MWAMBETU .....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. In the amended Originating Summons dated 10<sup>th</sup> July, 200 and filed on 24<sup>th</sup> August, 2000, the Applicant is seeking for the following orders:

***a. An order that the portion occupied by the Applicant being Wamunyu/Kambiti/675 sub-divided on 29<sup>th</sup> April, 2000 out of Wamunyu/Kambiti/170 being half of the land approximately 5.0Ha known as Wamunyu/Kambiti/675 be registered as the proprietor of half of the said land approximately 5.0Ha arising out of sub-division of parcel of land situated and known as Wamunyu/Kambiti/170 with clearly marked boundary in place of Administrators and beneficiary of Mwambetu Mutisya namely:-***

***i. Benson Mutisya Mwilu***

***ii. Wambua Mwilu***

***iii. Musilu Muia***

***iv. Grace Mwambetu***

***v. Teve Mwambetu the proprietors of the said land.***

***b. An order that the Registrar of lands, Machakos District registry do alter the register by registering the Applicant as the proprietor of the said portion of land being Wamunyu/Kambiti/675 half of the land measuring 5.0Ha instead of Grace Syekonyo M.***

***Mutisya.***

***c. An order that the Defendants do execute all necessary documents and/or transfer documents to effect transfer to the Applicant in default the Deputy Registrar of the court to execute the same to effect transfer into the Applicant's name.***

***d. An order that costs of this Application be awarded to the Applicant.***

***e. Such further or other relief as the nature of the suit requires which this Honourable Court may deem just to grant.***

2. The Originating Summons is supported by the Affidavit of the Applicant who has deponed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are executors and administrators of the Estate of Mwambetu Mutisya, whereas the 4<sup>th</sup> and 5<sup>th</sup> Defendants are claiming to be the beneficiaries of the said Estate.

3. The Applicant has deponed that a parcel of land known as Wamunyu/Kambiti/170 measuring 10.5Ha was registered in the name of the late Mwambetu Mutisya; that she was married to the late Mwambetu in 1946 under Kamba customary law and that she moved on the suit land in 1969 and started using half of the land whereas the 5<sup>th</sup> Defendant moved onto the other half.

4. The Applicant deponed that while the late Mwambetu was in England, and during the adjudication process in 1969, his family share of the suit land was registered as Wamunyu/Kambiti/170 on which she and the 5<sup>th</sup> Defendant had settled on; that the 4<sup>th</sup> Defendant has never settled on plot 170 and that the late Mwambetu never prosecuted the suit he had filed for divorce.

5. The Applicant's case is that she has always utilized half the share of Plot No. 170 and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are seeking to transfer the land to the 4<sup>th</sup> and 5<sup>th</sup> Defendants with a view of depriving her of the suit land.

6. According to the Applicant, after filing this suit, the Respondents caused Plot No. 170 to be sub-divided into plot numbers 674 and 675 and that she has always utilized plot number 675.

7. In the Replying Affidavit, the 1<sup>st</sup> Respondent deponed that the only lawful wives of the late Mwambetu are the 4<sup>th</sup> and 5<sup>th</sup> Respondents; that the late Mwambetu did not provide for the Applicant in his Will and that the Applicant did not object to the Probate or Confirmation of Grant.

8. The 1<sup>st</sup> Respondent finally deponed that the two suit properties have already been registered in favour of the 4<sup>th</sup> and 5<sup>th</sup> Respondents and Title Deeds issued and that the administration of the Estate is complete.

9. The matter proceeded for hearing on 17<sup>th</sup> December, 2014.

10. The Plaintiff, PW1, informed the court that she was married to Mr. Mwambetu who died in 1988; that the late Mwambetu settled her on land known as Wamunyu/Kambiti/170 in 1969 and that she has always utilized half of that portion.

11. According to PW1, her co-wife, the 4<sup>th</sup> Respondent, was settled at Shimba Hills and that she is entitled to 5 acres of Plot No. 170 which has since been sub-divided into Plot Nos. 674 and 675.

12. The Applicant produced in evidence the Certificate of Confirmation, the abstract of title and the official search of parcel number Wamunyu/Kambati/170, 674 and 675.

13. The Applicant's daughter, PW2, informed the court that she was born on parcel of land known as Wamunyu/Kambiti which has since been sub-divided; that her mother lives on portion number 675 with

her daughter-in-law and children and that the 4<sup>th</sup> Defendant has never lived on the suit land.

14. The Respondents did not adduce evidence.

15. The Plaintiff's advocate submitted that adverse possession is a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner.

16. Counsel submitted that the Applicant has been in actual, open, hostile, exclusive and continuous possession of the suit land to the exclusion of its true owner.

17. The suit by the Applicant seems to be a two pronged attack on the title in respect of parcel of land number Wamunyu/Kambiti/170 which has since been sub-divided into portion numbers 674 and 675.

18. The first attack on the said title is grounded on the fact that being the wife of the late Mwambetu, the Applicant is entitled to 5 acres of plot number 170, which is now portion number 675.

19. It will appear that the Applicant's counsel did not pursue this limb in his submission, and for obvious reasons.

20. The Applicant's entitlement to the suit land as the wife or beneficiary of the Estate of the late Mwambetu should have been pursued in Mombasa Succession Cause No. 674 of 1994 where the Estate of the late Mr. Mwambetu was distributed.

21. Having not contested the Will of the late Mwambetu or the Probate and the subsequent issuance of a Certificate of Confirmation, the Applicant cannot succeed in the current suit to disturb the decision of the court in Succession Cause No. 674 of 1994.

22. On the issue of whether the Applicant is entitled to the suit land by way of adverse possession, the Plaintiff's counsel submitted that the Applicant has been in possession of the land for over forty five (45) years.

23. That might be true. However, the Applicant's evidence was that it is the late Mwambetu who settled her on the land by virtue of marriage, meaning that she was on the land by virtue of her marriage to Mr. Mwambetu.

24. It is trite that for one to succeed in a claim of adverse possession, the claimant must show that his possession was hostile to the true owner for a period of twelve. Such occupation must not be with the permission of the true owner.

25. If the Applicant's case is that she entered the land by virtue of her marriage, it implies that she was on the suit land with the permission of her husband. She cannot therefore plead adverse possession.

26. For those reasons, I find that the Applicant has not proved her case on a balance of probabilities and I dismiss it with no order as to costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2017.**

**O. A. ANGOTE**

**JUDGE**