



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 111 OF 2011(0.S)**

**IN THE MATTER OF LAND PARCEL NO. 1948/10**

**BETWEEN**

**SILAS SILE SISIMWO.....1ST PLAINTIFF**

**DAVID SISIMWO STEPHEN..... 2ND PLAINTIFF**

***(SUING AS ADMINISTRATORS OF THE ESTATE OF STEPHEN SISIMWO)***

**AND**

**SUSAN MOSS..... DEFENDANT**

***(SUED AS ADMINISTRATOR OF THE ESTATE OF DANIEL***

***CHEPNOI NAIBEI MOSS)***

**J U D G M E N T**

**INTRODUCTION**

1. The two plaintiffs are the administrators of the estate of **Stephen Baron Sisimwo** who died on 12/6/1998 (the deceased). The defendant is the administratrix of estate of **Daniel Chepnoi Naibei Moss (D.C.N. Moss)** who was the registered owner of **L.R.No. 1949/10 (IR 350/19)**. D.C.N. Moss had bought the land from **Lands Limited** who financed him and registered a first charge on the same property. The land was **490 acres**.

2. D.C.N. Moss tried to manage the property but it became difficult for him as he was busy elsewhere. D.C.N. Moss is said to have been a member of Parliament in the 1960's. He entrusted the property to various entities and persons to manage it on his behalf with little success. As a result of this, he ran into problems when Lands Limited discovered that he had leased out the property which had been charged to Lands Limited without their knowledge. Lands Limited threatened to repossess the land for non payment of the loan. D.C.N. Moss entered into an arrangement with Lands Limited who allowed him to lease out part of the farm to a group of persons calling themselves Museng Group on the understanding that Museng Group directly paid a certain percentage of the loan due directly to Lands Limited out of the lease proceeds. D.C.N. Moss was also to pay a particular percentage.

3. Museng Group met their part but D.C.N. Moss could not meet his part as agreed. Lands Limited again threatened to repossess the property. It is after this that D.C.N. Moss reached an agreement with Lands Limited that he was to sell 225 acres of the property to Museng Group on condition that

Museng Group were to pay the purchase price directly to Lands Limited with the balance going to D.C.N. Moss. Museng Group comprised five individuals who agreed among themselves about the acreage each of them was to pay for to the Lands Limited. D.C.N. Moss had agreed to sell each acre for Kshs.6300/=. One of the members of Museng Group was the deceased father of the plaintiffs.

### **PLAINTIFFS CASE**

4. The first plaintiff Silas Sile Sisimwo testified that his father died on 12/6/1998. Following the death of his father Letters of Administration were given to his brother David Stephen Sisimwo and Agness Nafula Stephen. He was later brought in as a co-administrator in place of Agness Nafula Stephen pursuant to a consent recorded in the Succession Cause in Bungoma High Court. He produced Grant of Letters of Administration and Consent Order in the succession cause as exhibit 1 and 2 respectively.

5. He testified that the deceased came to occupy 125 acres vide a sale agreement dated 2/2/1983 as a purchaser. He testified further that the deceased and four others bought 225 acres. Each of the five purchasers who were calling themselves Museng Group was indicated in the document attached to the agreement. The defendant and other family members of D.C.N. Moss signed a document confirming the sale. He produced the documents as exhibit 4(a) (b) (c) and (d).

6. In 1988 there arose a dispute concerning which portion the Museng Group were to occupy. The dispute went before the Land Disputes Tribunal which gave its verdict. The Tribunal verdict was brought to court and registered as Kitale Senior Resident Magistrate Land Case No. 25 of 1988. A decree was produced (exhibit 5). It was decreed that the Museng Group were entitled to 225 acres and that the boundary which existed between Museng Group and D.C.N. Moss family during the life time of D.C.N. Moss be maintained. The family of D.C.N. Moss was aggrieved by this verdict. They preferred an appeal to High Court at Eldoret which appeal was summarily rejected as per decree of High Court (exhibit 6). Following the summary rejection of the appeal by the family of D.C.N. Moss, the Group obtained three eviction orders on 18/5/1989, 17/10/1991 and 16/12/1991. The eviction orders were produced as exhibit 7(a) (b) and (c) respectively. The family of D.C.N. Moss were evicted from the 225 acres and there have been no any other suits since 1991.

7. The first plaintiff testified that he was born and brought up on the 125 acres and that he has been on the said land together with his uncle Geoffrey Sisimwo who was the manager of the deceased. He also stays on the land with his brother David Stephens. When the first plaintiff realized that the defendant had filed a succession cause for the estate of D.C.N. Moss, he filed an objection which objection was dismissed for want of prosecution. His bid to have it reinstated was dismissed in a ruling delivered on 28/10/2011 (exhibit 9).

8. The first plaintiff testified that he has been living peacefully on the land since January, 1992 until he filed this case. He now wants to be declared owner of the 125 acres by adverse possession. He says he has put up a three bedroomed house on the property, put up a maize store and has a cowshed. He says he has occupied the land for over 15 years uninterrupted.

### **DEFENDANT'S CASE**

9. The defendant testified that she is the Administrator of the Estate of D.C.N. Moss. She produced a copy of a Confirmed Grant (defence exhibit 1). She stated that the plot in issue is part of L.R. No. 1948/10 which is in the name of D.C.N. Moss as per copy of title (defence exhibit 2). She testified that the deceased and his group calling themselves Museng Group came into the property as sub-lessees as per the lease agreement (defence exhibit 3). The agreement was to be in force for 5 years and was to terminate on 22/11/1984. She testified that the agreement terminated before D.C.N. Moss died. They asked the Museng Group to move out but they refused. She testified that there have been long running legal battles and that she and her family have never had peace.

10. The defendant testified that the agreement with Museng Group was just a proposal and that the

proposed sale did not receive the consent of the Land Control Board. She testified that the plaintiffs have never been on the land and that the first plaintiff stays at Museng Farm and the second plaintiff resides at Machewa Farm. The plaintiffs mother live at Saboti. The deceased died in 1998 and was buried at Saboti. She testified that the second defendant started constructing on the suit land in the year 2011.

### **ANALYSIS OF EVIDENCE AND THE LAW**

11. The plaintiffs are claiming 125 acres out of L.R. No. 1948/10. They are claiming the same on the ground that they have been on the land uninterrupted since 1992. The law regarding adverse possession is that for a claim of adverse possession to succeed the possessors must show that the possession was a adequate, continuous and exclusive. In other words, such possession, to be adverse, it must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor. See *Nakuru Court of Appeal Civil Appeal No. 231 of 1999 between Njuguna Ndatho and Masai Itumo & 2 Others [2002] eKLR at page 2*. The plaintiffs gave a background on how they got into the 125 acres which they are now claiming. Though the plaintiffs brought this suit as administrators of the estate of the deceased they were categorical in their evidence that they are claiming adverse possession as from 1992. The deceased being one of the members of Museng Group was on the suit land on lease basis until the lease expired on 22/11/1984. Upto to this time the deceased's occupation of part of the suit land was on the basis of a licensee and time could not run in favour of a licensee in a claim of adverse possession.

12. The plaintiffs could not again claim adverse possession between 22/11/2984 and 12/6/1998 on behalf of the estate of the deceased because the deceased did not enjoy continuous peaceful possession of the suit land for a period of 12 years. This is because the deceased's possession was interrupted in 1988 when the D.C.N. Moss family filed an appeal in Eldoret seeking to overturn a verdict in favour of the Museng Group. This appeal was however summarily rejected on 2/8/1988. There is no evidence to show that the family of D.C.N. Moss made any attempt to interrupt the possession of the deceased until the time he died on 12/6/1998. As at the time of the death of the deceased, he had been in continuous occupation of the suit land for 10 years. This is less than the statutory period of 12 years. It is therefore clear that whichever time line one choses to compute the twelve years period, the deceased would not have acquired the suit land on account of adverse possession and his estate cannot therefore seek to be declared to have acquired the suit land by effluxion of time.

13. The plaintiffs are contending that they have been in continuous possession of the suit land since 1992. The plaintiffs testified that they last evicted the family of D.C.N. Moss from the suit land following an eviction order of 16/12/1991. Since then, they have enjoyed continued and peaceful possession of the suit land until the time they filed this claim including until the present time. The first plaintiff testified that he has constructed a permanent house on the suit land and he has a cow shed and a granary. He testified that the defendant or any member of D.C.N. Moss has never tried to remove him from the suit land. In his further affidavit he annexed photographs showing both permanent and temporary structures. The defendant acknowledged in her defence testimony that the houses were on the suit land but that the same were put up in 2011. Whether the houses were put up starting from the year 2011 or not is not an issue. The issue is whether the acts of the plaintiffs were inconsistent with the enjoyment of the defendants land and thus constituted dispossession of the proprietor. The Court of Appeal in the case of *Wambugu -vs- Njuguna [1983] KLR 172 referred to the case of Wallis Caytor Bay Holiday Cap Limited -vs- Shell Mex and B.P. Limited [1975] QB 94* with approval and cited the following passage therefrom:

***“ The next question, therefore is what constitutes dispossession of the proprietor. Bramwell L.J. In Leigh -vs- Jack [1879] 5 Ex D 264) said at page 273 that to defeat a title by dispossession the former owner “acts must be done which are inconsistent with is enjoyment of the soil for the purpose for which he intended to use it”***

14. In the present case it is clear that the plaintiffs possession of the land since 1992 was open, uninterrupted and adverse to the title of D.C.N. Moss. The family of D.C.N. Moss did not take any active

step to evict the plaintiffs. The only step taken by the defendant to lay claim to the estate of D.C.N. Moss and by extension the suit land was in 2009 when the defendant filed Succession Cause No. 71 of 2009. By this time the period of 12 years was long over and the title holder had been dispossessed of the same, the plaintiffs having been in continuous occupation uninterrupted since 1992.

15. The defendant in her own evidence said that there have been wrangles between the deceased family and the family of D.C.N. Moss. She wished that the plaintiffs claim be dismissed so that she can distribute the estate of D.C.N. Moss. There was no evidence from her part that she had taken any step to regain the suit land. She acknowledged that besides the family of the deceased there are other families on the land registered in the name of D.C.N. Moss. Though she claimed that she had filed cases against the deceased family, there was no evidence of any such case filed except the appeal which was summarily rejected and the succession cause. The plaintiffs have never acknowledged title of D.C.N. Moss with respect to the 125 acres they are claiming.

16. In the case of *Njuguna Ndathatho and Masai Itumo* (supra) the Court of Appeal had to say this regarding when time stops to run for a person seeking to claim land by adverse possession:-

***“ The position in Kenya as regards when time would stop running against an adverse possess or has been amply set out. In the case of William Gatuhi Murathe -vs- Gakuru Gathimbi [Civil Appeal No. 49 of 1996](unreported) this court followed the decision in the case of Joseph Gahumi Kiritu -vs- Lawrence Munyambu Kabura [Civil Appeal No. 20 of 1993] (unreported) which reviewed previous judgments of this court on the issue of time and it was held that the filing of a suit for recovery of land would stop time from running for the purposes of Section 38 of the Limitation of actions Act under which a person may claim to have become entitled to land by adverse possession”.***

As I have already said hereinabove, the plaintiffs cannot claim to be entitled to adverse possession on account of possession by the deceased. The plaintiffs are claiming land by adverse possession from 1992. There is no evidence that the D.C.N. Moss family filed any suit against the plaintiffs which would have stopped time from running. Time continued to run uninterrupted for a period of 12 years. By the time the defendant filed for Grant of Letters of Administration in respect of the estate of D.C.N. Moss, his title had been dispossessed by the occupancy of the plaintiffs. The plaintiffs are claiming 125 acres out of D.C.N. Moss land.

### **DETERMINATION**

17. Based on the evidence adduced, I find that the plaintiffs have acquired 125 acres of D.C.N. Moss land by adverse possession. The two should be registered as proprietors of 125 acres by the defendant voluntarily signing documents to facilitate transfer failing which all necessary documents to effect such transfer to be signed by the Deputy Registrar of this Court. The plaintiffs shall have costs of this suit.

Dated, signed and delivered at Kitale on this 28th day of May, 2015.

**E. OBAGA**

**JUDGE**

In the presence of Mr. Wafula for Mr. Barongo for Plaintiff.

Court clerk – Isabellah.

**E. OBAGA**

**JUDGE**

**28/5/2015**