



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 68 OF 2012 (O.S)

EMMY ELIVIZA MBIHYA PLAINTIFF

VERSUS

COLLINS LUKARO MULOMA..... 1ST DEFENDANT

SYLVIA MUREKE MULOMA 2ND DEFENDANT

DINAH MUSIMBI MULOMA 3RD DEFENDANT

J U D G M E N T

I N T R O D U C T I O N

1. The defendants are the registered owners of **L.R. No. Waitaluk/Mabonde Block 2/Machungwa/352** (suit land) which is **0.60 Hectares**. The suit land was a subdivision of **L.R. No. Waitaluk/Mabonde Block 2/Machungwa/15**. The plaintiff brought this suit against the defendants seeking to be registered as owner of **1.05 acres** of the suit land by adverse possession.

PLAINTIFF'S EVIDENCE

2. The plaintiff testified that on diverse dates in 1998, she bought 3 ½ points from the defendant's mother. She also bought other points from persons who had bought the same from the defendants parents. As at 1998 she had bought a total of **10.05 points** which are equivalent to **1.05 acres**. The portion of land borders her own land which is **Waitaluk/Mabonde Block 2/Machungwa/353**. She fenced off the 1.05 acres. She has planted eucalyptus trees on part of the land. The other part is used for nappier grass and the rest of the land has vegetables.

3. In 2009 the defendants ploughed part of the land. She came to court and filed Kitale **HCCC No. 54** of **2009** against the defendants and their mother **Felisters Iminza**. This case was however dismissed for want of prosecution. The plaintiff called **PW2 Simiyu E.D. Wekesa** a land surveyor who testified that he visited the suit land at the invitation of the plaintiff. He was asked to determine the acreage of the land being utilized by the plaintiff. There were clearly marked boundaries separating the portion being utilized by the plaintiff and the one held by the defendants. He found that the portion being utilized by the plaintiff was 1.05 acres.

DEFENDANTS EVIDENCE

4. The defendants testified through **Sylvia Mureke Muloma**, the second defendant in this case. She testified that she was born in **1984**. Her brother **Collins Muloma** was born in **1986** and her sister **Dianah Muloma** was born in **1988**. She testified that the entire suit land is **1.7 acres** and that the plaintiff is

utilizing the lower part of the suit land whereas they are utilizing the upper part. She stated that she and her sister and brother were minors when the plaintiff alleges to have bought part of the suit land. She took issue with some of the plaintiff's exhibits which are in respect of sale of land which is different from the suit land.

5. In 2009 she ploughed the suit land which prompted the plaintiff to file a suit against herself, sister, brother and their mother. This suit was dismissed for want of prosecution. She stated that the plaintiff has not been in peaceful and continuous occupation of the portion she now seeks to be registered as owner.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

6. The defendants were registered as owners of the suit land on **19/5/1998**. A look at the sale agreement dated **4/5/1998** shows that **Kennedy Muloma Swaka** the defendants' father sold **3 points** to **Charles Khaoya** from **Plot No. 178(B)**. On **29/10/1994**, he sold **two points** from **Plot No. 3766/1/15** to **Gladys Kibone Namonya** and on **1/6/1997** he sold **two points** to **Gladys Kibone Namonya** from his **Plot No. 3766/1/15**.

7. On **10/6/1997** **Felister Iminza Muloma**, the defendants' mother sold **0.01 points** to **Adriano Nandoya** from **Plot No. 3766/1/15**. On **22/4/1998**, she sold **two points** to the plaintiff herein from **Plot No. 3766/1/15**. On **16/5/1998** she sold **one point** to the plaintiff. This point was from **L.R. No. 3766/1/15**.

8. On **8/2/1998** **Alphonse Mbiti Masya** sold **two points** to the plaintiff. These **two point** were from **L.R. No. 3766/1/15**. On **1/7/1998** the plaintiff bought **six points** from **Charles Wanjema Khaoya**. **Five points** were at **Machungwa "B"** farm whereas **one point** was at **Machungwa "A"** farm. On **15/6/1998** **Adrian Nandoya** agreed to exchange his **three points** at **Plot 3766/1/15** with the plaintiff. **Adrian Nandoya** had bought the **three points** from **Felister Iminza**.

9. There is evidence that the suit land was a subdivision of **L.R. No. Waitaluk/Mabonde Block 2/Machungwa/15**. The plaintiff stated in her evidence that she bought **3 ½ points** from the defendants' mother and that the rest of the points were bought from third parties who had bought the same from the parents of the defendants. From the documents produced by the plaintiff, it is clear that the said third parties bought their plots from the parents of the defendants from **L.R. No. 3766/1/15** and **L.R. No. 178 "B"**. None of the purchase was from either the suit land or Plot 15 which resulted in the suit land. There appears to be two Machungwa Farms. One is **Machungwa "A"** and the other **Machungwa "B"**. Some points were bought from Machungwa "A" and some from Machungwa "B". It is therefore not clear how the plaintiff came to own the 10.05 points at one place yet her own documents do not show that the said points were bought from the suit land. PW2 while under cross-examination stated that **Plot No. 3766/1/15** was not included in the mutation form. He stated in re-examination that the subdivisions from **Plot No. 15** were registered in **1993**. It is therefore untenable that the plaintiff could buy land from **LR. No. 3766/1/15** and **178 "B"** and yet base her claim on the suit land which is quite different from the portions she bought. However be that as it may the issue for determination is whether she has acquired 1.05 acres of the suit land by adverse possession.

10. The defendants were registered as owners of the suit land on **19/5/1998**. This is the same time she took possession of the portion she is now claiming. By her own evidence, the plaintiff stated that she took possession of the 1.05 of an acre in 1998. According to the documents produced by the plaintiff, she bought the last points on **1/7/1998**. There is evidence that the portion she is utilizing is clearly fenced and there are blue gum trees, nappier grass and vegetables being grown on the portion. The second defendant admitted in her evidence that the plaintiff is utilizing the upper part of the suit land. I find that the plaintiff has been and is in possession of 1.05 acres. For a claim of adverse possession to succeed the possessor must show that the possession was adequate, continuous and exclusive. Such possession to be adverse 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 ECLR*].

11. The second defendant was born on 20/10/1984, the first defendant on 12/12/1986 and the third defendant on 29/9/1987. As at the time they were registered as owners of the suit land, they were all minors and as per Section 22 of the Limitation of Actions Act, they were under disability on ground that they were not yet adults. They could not therefore bring a suit against the plaintiff to assert their claim over the land the plaintiff is now claiming. By virtue of Section 22 of the Limitation of Actions Act the defendants were allowed six years within which to bring an action to recover the land from the plaintiff upon their disability ending. The second defendant's disability ended on her **18th birthday** on **18/10/2002**. She had until **18/10/2008** to file a claim to recover the land. She did not do so and she therefore lost her claim to file a suit to recover the land.

12. The question which then arises is whether the plaintiff has been in continued and peaceful possession of the land she is now claiming. There is evidence that in **January, 2009** the second defendant ploughed the suit land. This prompted the plaintiff to file Kitale HCCC No. 54 of 2009 to restrain the defendants and her mother as well as her brother and sister from interfering with the land. The second defendant's action was an effective step taken to assert her right to the suit land. As at the time the second defendant took this action the period of 12 years had not elapsed. The second defendant's action effectively stopped time from running in favour of the plaintiff. The plaintiff had been on the suit land for 11 years one; year less than the statutory twelve years period. In **Nairobi Court of Appeal Civil Appeal No. 19 of 1997 between Harrison Mbaria Mbogo & Another -vs- Mbutu Mutungi (1997) eKLR** the Judges of Appeal stated as follows:-

“It is the owner of the land who is obliged to take reasonable steps to re-enter his land. This he can do by use of peaceful means or by instituting action to exert his rights over the land”.

DECISION

13. The second defendant in entering the land and ploughing it though not a peaceful action nevertheless exerted her right to the land. This interrupted time from running in favour of the plaintiff. Plaintiff cannot therefore be said to have been on the land peacefully and uninterrupted for a period of 12 years. She had been on the land for only 11 years and she cannot therefore claim to have acquired it by adverse possession. I find that her claim against the defendants cannot succeed. The same is hereby dismissed with costs to the defendants.

Dated, signed and delivered at Kitale on this **10th** day of **June, 2015**.

E. OBAGA

JUDGE

In the presence of Mr. Kiarie for plaintiff and Mr. Barongo for Mr. Wafula for defendants. Court clerk Isabellah.

E. OBAGA

JUDGE

10/6/2015