



**REPUBLIC OF KENYA**

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

**ELC CIVIL SUIT NO. 802 OF 2015(O.S)**

**MICHAEL MWONGELA MUSOMBA .....APPLICANT**

**VERSUS**

**MAGDALENE NDINDA RAPHAEL .....1<sup>ST</sup> RESPONDENT**

**KATELEMBO ATHIANI MUPUTI**

**FARMING & RANCHING CO-OPERATIVE SOCIETY.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTIONS.....3<sup>RD</sup> RESPONDENT**

**THE LAND REGISTRAR MACHAKOS.....4<sup>TH</sup> RESPONDENT**

**THE DISTRICT LANDS SURVEYOR MACHAKOS.....5<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**RULING**

1. This suit was brought by way of Originating Summons dated 20<sup>th</sup> August, 2015. The Applicant sought amongst others, the determination of the following issues; whether Criminal Case No.253 of 2015 pending before the Chief Magistrate’s Court at Machakos should be permanently stayed, whether the agreement for sale dated 9<sup>th</sup> December, 2013 between the 1<sup>st</sup> respondent and one, Hawa Taib with respect to Plot No.650(hereinafter referred to as “the suit property”) is null and void for want of the Land Control Board Consent, whether the Applicant has acquired ownership of the suit property by adverse possession and whether the Applicant has an overriding interest over the suit property which is located at Katelembo, within Machakos County. In his affidavit in support of the Originating Summons, the Applicant stated that the suit property was in the possession of his deceased mother from 1978 until the date of her demise and that he continued to cultivate the same after the death of his mother. The Applicant contended that together with his deceased mother, they cultivated the suit property for a period of over 40 years openly without interference from any one. The Applicant contended that he has acquired prescriptive rights over the suit property. The Applicant stated that in January, 2015 he was arrested at the instance of the 1<sup>st</sup> Respondent who claimed to be the owner of the suit property and charged with the offence of forcible detainer contrary to section 91 of the Penal Code in the Chief Magistrate's Court at Machakos Criminal case No. 253 of 2015(hereinafter referred to as “the criminal case” where the context so admits). The Applicant contended that the 1<sup>st</sup> Respondent’s claim over the suit property is legally untenable for various reasons.

2. Together with the Originating Summons, the Applicant filed a Chamber Summons application dated 20<sup>th</sup> August 2015 seeking a temporary stay of the proceedings of the said criminal case No. 253 of 2015 pending the hearing and determination of this suit. In his affidavit in support of the application, the applicant has reiterated the contents of his affidavit filed in support of the Originating Summons. The Applicant has stated that on 13<sup>th</sup> February 2015, he was arrested and arraigned in court at Machakos where he was charged with the offence of forcible detainer contrary to section 91 of the Penal Code as aforesaid. His arrest and arraignment in court followed a complaint that was lodged by the 1<sup>st</sup> Respondent who claimed ownership of the suit property. The particulars of the charge were that, on diverse dates between January, 2014 and 13<sup>th</sup> February, 2015 at Katelembo, Kathekani Location within Machakos County, he was in possession of the suit property which belongs to the 1<sup>st</sup> Respondent without colour of right and held the said parcel of land in a manner likely to cause a breach of peace against the 1<sup>st</sup> Respondent who was entitled to possession thereof. The Applicant has contended that the 1<sup>st</sup> Respondent does not have a valid title to the suit property and as such the dispute between the Applicant and the 1<sup>st</sup> Respondent over the ownership to the suit property should be determined by this court before criminal proceedings are undertaken. The Applicant has contended that he made an application before the magistrate trying the said criminal case for the discontinuation of the said case so that the dispute can be referred to this court but his application was dismissed. The Applicant has contended that the dispute between him and the 1<sup>st</sup> Respondent is of a civil nature and that the 1<sup>st</sup> Respondent has preferred criminal process over civil process due to the challenge that would be mounted by the Applicant against her claim to the suit property. The Applicant has contended that the 3<sup>rd</sup> Respondent should exercise its prosecutorial powers in good faith and must give due deference to the laid down procedures for dispute resolution. It is on account of the foregoing that the Applicant has sought a temporary stay of the said criminal proceedings pending the determination of the issue of ownership of the suit property as between the 1<sup>st</sup> Respondent and the Applicant by this court.
3. The application was not opposed by any of the Respondents who were all served but failed to file any response. I have carefully considered the application and the affidavit filed in support thereof together with the annexures thereto more particularly the charge sheet and statement of the 1<sup>st</sup> Respondent in the criminal case. Section 7(d) of the Land Act, 2012 provides that title to land can be acquired through prescription. Section 38 of the Limitation of Actions Act provides that any person who claims that he is entitled to land by adverse possession may apply to the High Court to be registered as the proprietor of the land in place of the person who is registered as the proprietor thereof. The Applicant has claimed that he has acquired title to the suit property by adverse possession having been in possession of the same for a period of over 40 years and as such he should be registered as the proprietor thereof. The Applicant moved to this court when he was confronted with a charge of forcible detainer of the suit property by the 2<sup>nd</sup> Respondent at the instance of the 1<sup>st</sup> Respondent who claims to have purchased the suit property from one, Hawa Taib in the year 2012. The Applicant has contended that the fundamental issue that the trial court would be called upon to determine in the criminal case is the ownership of the suit property. The Applicant has contended that a dispute as to the ownership of land is civil in nature and can only be determined by this court and not through criminal proceedings. The Applicant has contended that he will be gravely prejudiced if the criminal proceedings are allowed to continue while this suit is pending because there may be contradictory findings by the criminal court and this court. His concern is that the criminal court may find him guilty while this court may find that he has acquired the suit property by adverse possession. As I have stated above, one of the ways in which title to land may be acquired is through adverse possession (prescription). A prescriptive right over land accrues by operation of law and attaches to land. It is not conferred by the High Court under Section 38 (1) of the Limitation of Actions aforesaid. A person who claims to have acquired land by adverse possession approaches the court only for the purposes of having the land registered in his name. As stated above, the Applicant has claimed that he has acquired the suit property by adverse possession and as such should be registered as the owner thereof. In the meantime, the Applicant is facing a criminal charge of forcible detainer of the suit property. It should be noted that it is the alleged detainer of the suit property which is the basis of the Applicant's claim herein. The issues which I need to determine are, whether the criminal court is in a position to determine

the issue of the ownership of the suit property which is central in that court and before this court and whether the Applicant will be prejudiced if the criminal case is not stayed pending the hearing of this suit.

4. I am in agreement with the submission by the Applicant that it is only this court which has jurisdiction to determine a dispute as to the ownership of or title to land. That jurisdiction is conferred upon this court by section 13 of the Environment and Land Court Act, 2011. As I have stated above, it is also only this court which can determine whether or not a person has acquired land by adverse possession. The criminal court would not therefore be in a position to determine these issues if raised before it by the Applicant. I am in agreement with the contention by the Applicant that he will be prejudiced if the pending criminal proceedings are not stayed. Since the criminal court would not be able to determine the crux of the Applicant's defence in that case namely, that he has acquired title to the suit property by adverse possession, the Applicant would not receive a fair hearing guaranteed under Article 50 of the Constitution of Kenya. I am of the view that when a dispute arises touching on the ownership of or title to land said to have been forcibly detained, a criminal charge should not be preferred rather; the complainant should be directed to lodge his complaint with this court for the determination of the issue. It is after the issue is laid to rest by this court that a criminal charge can be considered.
5. The upshot of the foregoing is that the Applicant has made out a case for granting the prayers sought in the Chamber Summons application dated 20<sup>th</sup> August, 2015. The said application is allowed in terms of prayer 3 thereof. Consequently, Machakos Chief Magistrates Court Criminal Case No. 253 of 2015 is hereby stayed pending the hearing and determination of this suit. To avoid abuse of the process of this court, the stay order shall last for a period of eighteen (18) months from the date hereof within which the Applicant should take steps to prosecute this suit. The costs of the application shall be in the cause.

**Delivered, Dated and Signed at Nairobi this 2<sup>nd</sup> day of October, 2015.**

**S.OKONG'O**

**JUDGE**

**In the presence of**

Mr.Mbaya For the Applicant

N/A For the Respondent