



Kenya African National Traders & Farmers Union (suing through its office bearers Kimani Wanyoike (Chairman) Peter Mugeka Maina (Secretary General) & Ibrahim Wanene (Treasurer) v Mbelenzu & 2 others (Environment & Land Case 307 of 2012) [2024] KEELC 1445 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1445 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 307 OF 2012
CA OCHIENG, J
MARCH 19, 2024
IN THE MATTER OF CLAIM TO TITLE TO LAND BY ADVERSE
POSSESSION OVER L.R NO. MAVOKO TOWN BLOCK 3/2121
(PREVIOUSLY KNOWN AS PLOT NO. 365 IN LUKENYA
RANCHING AND FARMING CO-OPERATIVE SOCIETY LIMITED)

BETWEEN

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KENYA AFRICAN NATIONAL TRADERS & FARMERS UNION (SUING THROUGH ITS OFFICE BEARERS KIMANI WANYOIKE (CHAIRMAN) PETER MUGEKA MAINA (SECRETARY GENERAL) & IBRAHIM WANENE (TREASURER) PLAINTIFF

AND

MUTISYA MUTUA MBELENZU 1ST DEFENDANT
FRANCIS NGIGE WAWERU 2ND DEFENDANT
LUKENYA RANCHING AND FARMING CO-OPERATIVE SOCIETY LIMITED 3RD DEFENDANT

JUDGMENT

1. By an Originating Summons dated the 13th August, 2012 and amended on 28th August, 2012, the Plaintiff seeks the following Orders against the Defendants:-



1. That Kantafu Company Limited be declared to have acquired title by adverse possession to the suit premises previously known as Plot No. 365 at Lukenya Ranching and Farming Cooperative Society Limited and now known as Mavoko Town Block 3/2121.
 2. That the registration of Mutisya Mutua Mbelenzu and Francis Ngige Waweru as proprietors of LR No. Mavoko Town Block 3/2121 and the persons deriving title from Mutisya Mutua Mbelenzu being Francis Ngige Waweru or Lukenya Ranching & Farming Cooperative Society Limited based on the land previously known as Plot No. 365 and now known as Mavoko Town Block 3/2121 be cancelled and the Land Registrar Machakos do rectify the register to enter the name of the Plaintiff as registered proprietor free of all encumbrances.
 3. The costs of these proceedings be borne by the Defendants.
2. The Amended Originating Summons was premised on the grounds on the face of it and the Supporting Affidavit of Kimani Wanyoike.
 3. The 1st Defendant opposed the Amended Originating Summons and filed a Replying Affidavit sworn by Mutisya Mutua Mbelenzu. He deposes that the said Amended Originating Summons is full of malicious falsehoods cunningly crafted to mislead the court. He insists that the suit herein is bad in law, wanting, ex facie incompetent without any merits and is an abuse of the court process. He claims that he has been a member of the 3rd Defendant since the year 1967 and was issued with a Title Deed for the parcel of land known as Mavoko Town Block 3/2121, hereinafter referred to as the 'suit land', on the 1st April, 2005. He confirms that in the year 2007, he sold the entire parcel to the 2nd Defendant, Francis Ngige Waweru. He insists that by 2007, he was openly, occupying the suit land wherein he cultivated it and grazed his cattle and no one including the Plaintiff's herein have laid claims on it. Further, at the time of sale of the suit land to the 2nd Defendant, it was vacant. He states that on 26th October, 2007, a new title deed was issued in favour of the 2nd Defendant and having sold the said land, he no longer has any proprietorship, over the suit land. He avers that he has seen the purported Sale Agreement between the Plaintiff and himself and insists that the purported signature and mark is a forgery. Further, that he does not know how to write as he affixes his thumbprint and denied entering into a Sale Agreement with the Plaintiff. He further explains that he has never had his son Josephat Mbodo Mutisya witness any agreement between Kantafu Company Limited and himself relating to Plot No. 365 and that the purported Sale Agreement was done on a Kantafu Company Limited letterhead which is distinct from the Plaintiff. He denies that the Plaintiff or its members have been in exclusive possession of the suit land. He argues that if indeed the Plaintiff had proprietary interest over the suit land, then nothing prevented it from registering a caution. He challenges the allegation by the Plaintiff that the Department of Lands had duly approved their subdivision of the original parcel number of the suit land, as he is aware that, at the time of the purported letter, the process of demarcation including surveying had not been conducted in Lukenya Ranching and Farming Co-operative Limited and as such no approval for subdivision could have been issued by the Department of Lands. Further, that the first registration of the parcel of land known as Mavoko Town Block 3/2121 was done on 26th August, 2004 in favour of the Government of Kenya.
 4. The 2nd Defendant opposed the Amended Originating Summons by filing a Replying Affidavit sworn by Francis Ngige Waweru where he deposes that the same is frivolous, vexatious and an abuse of the court process. He confirms that the suit land was sold to him by the 1st Defendant on 12th October, 2007 for Kshs. 3,600,000 and annexed a copy of the Sale Agreement to that effect. He explains that he paid the full purchase price and the 1st Defendant transferred the suit land to him and it is currently registered in his name. He contends that he has since subdivided the said parcel of land and sold the resultant subdivisions to over 250 people. Further, that most of the purchasers are settled on the suit



land. He denies knowledge of the Plaintiff's claim over the suit land. He disputes that the Plaintiff and its members are residing on the suit land nor that they have been in continuous and uninterrupted occupation thereon for over twelve (12) years.

5. The matter proceeded for hearing where the Plaintiff had one witness while the Defendant's also had one (1) witness.

Evidence of the Plaintiff

6. PW1 Peter Kigia the current Chairman of the Plaintiff claims they bought the suit land which was known as Plot No. 365 under Lukenya Ranching Company Limited, in 1994 from the 1st Defendant vide a Sale Agreement dated the 24th March, 1994 and paid the full purchase price. He confirmed that after purchase of suit land, the Share was transferred to them and registered at Lukenya Ranching. It was his testimony that they took possession of the suit land, subdivided it into sub plots and got approval from the Commissioner of Lands on 10th August, 1995 after which they awaited the processing of the titles. He contended that in October, 2011 when they went to follow up on their title, they discovered that the same had been issued to the 1st Defendant on 17th March, 2005 and later transferred to the 2nd Defendant on 26th October, 2007. He averred that their members are in possession of the suit land. The Plaintiff produced the following documents as exhibits: Sale Agreement dated the 24th March, 1994 between the Plaintiff and the 1st Defendant; Receipt, records and acknowledgement of payment of the Purchase Price to the 1st Defendant; Letter of Approval dated the 10th August, 1995 from the Commissioner of Lands and related subdivision scheme; Extract of title and Certificate of Official Search on LR No. Mavoko Town Block 3/2121 and Order Granting Leave to Commence Proceedings against Lukenya Ranching & Farming Cooperative Limited.

Evidence of the Defendants'

7. The 2nd Defendant confirmed that he purchased the suit land from the 1st Defendant and paid Kshs. 3.6 million in full. He stated that they executed a Sale Agreement which was annexed to his Replying Affidavit. He averred that after purchase of the suit land, he took possession, subdivided it and disposed of the plots to third parties who are currently on the said land. He explained that before purchasing the suit land on 5th October, 2007, he undertook a search which he annexed to his Replying Affidavit. He insisted that the people in possession of the suit land are the ones he sold to the land.

Analysis and Determination

8. Upon consideration of the Amended Originating Summons, Witness testimonies, exhibits and the rivalling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of adverse possession in respect to land parcel number MAVOKO BLOCK 3/2121.
9. Adverse possession is governed by the provisions of Section 38(1) and (2) of the Limitation of the Actions Act which provides that:-

Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

10. For adverse possession, to crystallize into title to land, the claimant must demonstrate that there was actual, open, continuous, notorious, exclusive and uninterrupted possession for a period of at least



twelve (12) years. Further, in order to qualify as an adverse possessor, a party has to prove that it did not have permission of the registered owner before entering the suit land. Further, that claimant's interest has to be inconsistent to the registered owner's interests.

11. In this instance, PW1 testified that the Plaintiff, had purchased the suit land from the 1st Defendant in 1994 when the said land did not have a title deed. He contended that they paid the full purchase price but did not get their title. Further, in 2011, they discovered that the 1st Defendant had been issued with a title which he transferred to the 2nd Defendant. On cross-examination he claimed their members had built on the suit land but did not furnish court with the list of the said members. Further, he was not aware if the title deed to the suit land had been closed. I note he claimed that they had signed a Transfer at Lukenya Ranching but did not produce the same in court. However, in the 1st Defendant's Replying Affidavit, he denied selling the suit land to the Plaintiff. In re-examination PW1 confirmed that they purchased the suit land together with Kimani Wanyoike from the 1st Defendant. The 2nd Defendant confirmed having bought the suit land from the 1st Defendant, subdivided it and sold resultant plots to third parties who are now in possession of the said suit land.

12. In the case of Daniel Kimani Ruchine vs. Swift Rutherford Co. Ltd & Another (1977) eKLR Kneller J held that:-

The Plaintiffs have to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec plecario (no force, no secrecy, no evasion). So, the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession of occupation. The possession must be continuous. It must not be broken for any temporary purposes of by any endeavours to interrupt it or by any recurrent consideration....”

13. While in the case of Wambugu V Njuguna (1983) KLR 173 the Court of Appeal articulated the requirements a party is expected to fulfill in a claim for adverse possession and held thus:-

Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.”

14. Further, in the case of Public Trustee -v- Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve (12) years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession.

15. In the evidence presented herein, the Plaintiff bought an unregistered land in 1994. From perusal of the Sale Agreement dated the 24th March, 1994, it was on the letterhead of Kantafu Company Limited. I note there was a letter dated the 10th August, 1995 to Kantafu Company Limited by the Chairman/ Central Authority, Ministry of Lands and Settlement, which subject matter refers to the suit land and subdivision scheme but from the Green Card, I note the register for the suit land was initially opened on 26th August, 2004. The Plaintiff has not explained this discrepancy. From the Green Card, it indicates the 1st Defendant was registered as owner of suit land on the 17th March, 2005 while the 2nd Defendant was later registered as its proprietor on 26th October, 2007. The Plaintiffs' filed the Originating Summons on 12th August, 2012. Both the Plaintiff and 2nd Defendant claim they are on the suit land. I note PW1 during examination in chief confirmed that there were other people on the suit land. It is trite that in a claim where a purchaser seeks to claim land through adverse possession,



the burden of proof is upon him/her to confirm that he/she entered into a Sale Agreement over a registered land. That way time starts running immediately the purchaser takes possession. In respect to computation of time, I wish to make reference to the case of *Wines & Spirits Kenya Limited & another v George Mwachiru Mwangi* [2018] eKLR, where the Court of Appeal held that:-

The law is clear on when time starts running for purposes of adverse possession. The possession or occupation must be with the knowledge of the registered owner (See *Kimani Ruchine & Another vs. Swift Rutherford & Co. Ltd* (1980) supra. Time cannot therefore start running until the registered owner becomes aware that there is a trespasser occupying his/her property and does nothing to assert his rights on the property for at least 12 years. That being so, time in this case only started running in 2012.”

16. In the current scenario, the Plaintiff purchased land which was not registered and I opine that time only started running at the point when the register was opened which in this instance was in 2004 and not on 14th March, 1996 as claimed. The Plaintiff in its submissions relied on various decisions to support its case. In the case of *Public Trustee -v- Wanduru*, (1984) KLR 314, I note it dealt with registered land which is not the position herein. Further, in the case of *Kenya African National Traders & Another v Kimundu Ndunda Nthei & 43 Others* (2019) eKLR, the Plaintiff therein demonstrated it was in possession of the suit land but in this instance, the Plaintiff has failed to do so. Even though the Plaintiff has claimed the suit land through adverse possession, I note it only filed this suit, eight (8) years after the register on the said suit land was opened. It is further trite that in a claim for adverse possession time stops running when a suit is filed and this in essence means that time herein stopped running in August, 2012 and will disregard the Plaintiff’s argument in its submissions, that it has been on the suit land for more than twenty five (25) years.
17. Based on the evidence presented in court while associating myself with the decisions cited above, I find that even if the Plaintiff had paid the full purchase price as claimed, its claim for adverse possession could only have crystallized at the point the register to the suit land was opened in 2004 and not in 1996 when it paid the purchase price. Further, time stopped running in 2012 when it filed the suit. In the circumstances, I hence find that the Plaintiff has indeed not proved that it acquired the suit land through adverse possession.
18. On the issue of costs, I note the 1st and 2nd Defendants opposed this suit but it is only the 2nd Defendant who came and testified. In the foregoing, I find that it is only the 2nd Defendant entitled to costs.
19. It is against the foregoing that I find the Plaintiff has not proved its case on a balance of probability and will dismiss it with costs to the 2nd Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF MARCH, 2024.

CHRISTINE OCHIENG

JUDGE

In the presence of;

Mugo for Plaintiff

No appearance for Defendants

Court Assistant – Simon/Ashley

