



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 31 OF 2015

FRANCIS GITHAKA MUNENE

JOSPHAT KITHIGA MUNENE

STANLEY GAKONO MUNENE

PETERSON MUTHIKE MUNENE.....APPLICANTS

VERSUS

STEPHEN MURATHI NJOGU.....RESPONDENT

JUDGMENT

Land parcel No. L.R MUTIRA/KIANJEGE/290 (hereinafter the suit land) is a sub-division of land parcel No. L.R MUTIRA/KIANJEGE/102 which was until August 1991 registered in the names of **MUNENE MUTIGA** the deceased father to the plaintiffs herein who died on 19th April 1996. It is also not in dispute that land parcel No. L.R MUTIRA/KIANJEGE/102 was ancestral land registered in the names of the deceased at the time of demarcation on 27th October 1957 and the plaintiffs and their families numbering fifty nine (59) in total have always lived on the suit land since 1962 having developed it and planted coffee and bananas as well as other indigenous and fruit trees.

On 2nd August 1991 the respondent caused L.R No. MUTIRA/KIANJEGE/102 to be sub-divided into two parcels being MUTIRA/KIANJEGE/289 which remained in the names of the deceased and MUTIRA/KIANJEGE/290 which was transferred to the respondent on 4th May 1992. It is the plaintiffs' case that the said sub-division and transfer was done fraudulently as they were not consulted and even the sub-division was concealed as it was not effected on the ground.

The plaintiffs through their Originating Summons filed on 23rd July 2014 now seek a determination to the following issues:-

- 1. That they be declared to become entitled by adverse possession of over 12 years to all of that parcel of land registered under the Land Act No. 6 of 2012, the Land Registration Act No. 5 of 2012 and the Registered Land Act Cap 300 (repealed) and comprised in the title No. L.R MUTIRA/KIANJEGE/290.***
- 2. That they be registered as the sole proprietors of all the said parcel of land No. L.R MUTIRA/KIANJEGE/290.***
- 3. That the Land Registrar Kirinyaga do register the plaintiffs as proprietors of L.R No. MUTIRA/KIANJEGE/290.***

4. That the respondent be ordered to pay the costs of this suit.

5. That such further orders be made as may be just and expedient.

The Originating Summons is supported by the affidavit of **FRANCIS GITHAKA MUNENE** the 1st plaintiff sworn on behalf of his siblings the 2nd to 4th plaintiffs. It is deponed therein that the plaintiffs have since 1962 been in exclusive occupation of land parcel No. L.R MUTIRA/KIANJEGE/102 which since 1957 was registered in the names of their deceased father **MUNENE MUTIGA** who died on 19th April 1996. On 2nd August 1991, the respondent caused the said land parcel to be sub-divided into L.R No. MUTIRA/KIANJEGE/289 and MUTIRA/KIANJEGE/290 and registered the suit land in his names fraudulently. That the plaintiffs and their families have been in exclusive and un-interrupted occupation of the suit land where two of their relatives **PRISCILLA WANJIRU MUNENE** and their deceased father are buried. That since 4th May 1992 when the respondent was registered as the proprietor of the suit land, they have been in open, exclusive and un-interrupted occupation thereof and have therefore acquired it through adverse possession.

The respondent **STEPHEN MURATHI NJOGU** filed a replying affidavit in which he admitted that the plaintiffs are the children of the deceased who was the original proprietor of land parcel No. L.R MUTIRA/KIANJEGE/102. He however stated that the said land was the subject of **EMBU SENIOR RESIDENT MAGISTRATE'S COURT CASE NO. 72 of 1980** between **EPHRAIM NGUCHARA JOSHUA and JOSHUA KANGANGA NGUCHARA** – annexure **SMN 1**. During the pendency of that case, another case being **EMBU PRINCIPAL MAGISTRATE'S COURT CASE No. 115 of 1991** was also filed by **MUGUSHIAH C. COMMISSIONS COMPANY** Vs the 1st plaintiff and **MUNENE MUTIGA** (deceased) over two acres of the suit land. An application for eviction was filed on 12th April 1994 in **EMBU SENIOR RESIDENT MAGISTRATE'S COURT CASE No. 72 of 1980** against the 1st plaintiff and his deceased father who were evicted and therefore, if the 1st plaintiff is on the suit land, he is trespassing. That after the land parcel No. MUTIRA/KIANJEGE/102 was sub-divided, **JOSHUA KANGANGI NGUCHURA** sold the suit land to him and the same was registered in his names on 4th May 1992 and so he did not obtain the title fraudulently. That the plaintiffs have already been evicted from the suit land and so they have no cause of action. That the matter is res-judicata and even High Court Civil Appeal No. 111'A' of 1994 by the 1st plaintiff and the deceased was not prosecuted and an application for leave to file contempt proceedings against then was filed on 23rd October 1996 but the file went missing. That the suit land was fenced but the plaintiffs removed it and that is why they are alleging that no boundary was fixed. The plaintiffs' case therefore has no basis in law and they are in fact in contempt of a Court order.

Directions in the matter were taken on 1st October 2015 and on 9th February 2016, the parties through their counsel agreed that the plaintiffs' occupation of the suit land is not in dispute and the issue is whether the respondent has an order to evict the plaintiffs. It was further agreed that that issue be determined by the Court on the basis of the parties' affidavits and other documents filed herein. Counsel were given twenty one (21) days to file their submissions. Those submissions were duly filed.

I have considered the pleadings by the parties together with the relevant annexures and the submissions by Mr. Magee wa magee advocate for the plaintiffs and Mr. Gacheru advocate for the defendant.

The following are not in dispute:-

- 1. The suit land was part of ancestral land registered in the names of the plaintiff's deceased father MUNENE MUTIGA after the demarcation process in 1957.**
- 2. The plaintiffs and their families have developed and lived on the suit land since 1962.**
- 3. The suit land was registered in the names of the defendant and a title deed issued to him on 4th May 1992.**

What this Court has to determine, as agreed by the parties is whether the plaintiff's occupation of the suit

land meets the requirements of adverse possession as known in law in order to entitle them to the orders sought. In **KASUVE VS MWAANI INVESTMENT LIMITED & FOUR OTHERS 2004 1 K.L.R 184**, the Court of Appeal said the following in regard to what a party claiming land by adverse possession has to show:-

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”

It is now well established that the combined effect of the provisions of **Section 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of the adverse possessor of the same at the expiry of 12 years of the adverse possession of that land – **BENJAMIN KAMAU & OTHERS VS GLADYS NJERI C.A CIVIL APPEAL No. 2132 of 1996**. Similarly, the new Land Laws promulgated after 2010 recognize the doctrine of adverse possession. **Section 28 (h) of the Land Registration Act** recognizes such rights and states:-

“rights acquired or in process of being acquired by virtue of any written law relating to the Limitation of Actions or by prescription”

Similarly, **Section 7 (d) of the Land Act 2012** provides that:-

“Title to land may be acquired through:-

(a)

(b)

(c)

(d) prescription”

However, before I determine the merits or otherwise of the plaintiff’s claim, it is important to address the issue as to whether or not this suit is infact res-judicata. It is clear from the defendant’s response to this claim that among his objection to the claim is that it is res-judicata. In his replying affidavit, the defendant has referred the Court to various cases involving the suit land and pleaded in paragraph 14 as follows:-

“That I plead res-judicata and the 1st applicant is aware of the cases involved and then lost the deal”.

Both counsel have also addressed me on the issue of res-judicata in their respective submissions and referred to the previous cases.

The doctrine of res-judicata is anchored on **Section 7 of the Civil Procedure Act** in the following terms:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally determined by such Court”

From the above, the ingredients of res-judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should involve the same parties or parties under whom they or any of them claim, litigating under the same title and lastly, that the Court or tribunal

before which the former suit was litigated was competent and determined the suit finally – **KARIA VS ATTORNEY GENERAL 2005 1 E.A 83**. See also **KAMUNYE & OTHERS VS PIONEER GENERAL ASSURANCE SOCIETY LTD 1971 E.A 263**. In short, res-judicata is essentially a bar to subsequent proceedings involving the same issues that have been finally and conclusively decided by a competent Court in a prior suit between the same parties or their representatives – **JOHN FLORENCE MARITIME SERVICES LTD & ANOTHER VS CABINET SECRETARY FOR TRANSPORT & INFRASTRUCTURE & OTHERS C.A CIVIL APPEAL No. 42 of 2014 (MALINDI)**.

I will now examine the previous cases involving the parties herein and the suit land to determine whether this suit is infact res-judicata.

The first case is **EMBU SENIOR RESIDENT MAGISTRATE’S COURT CASE No. 72 of 1980** where the plaintiffs were **EPHRAIM NGUCHARA JOSHUA** and **JOSHUA KANGANGA NGUCHARA** and the defendant was **MWENE MUTIGA**. It is not clear whether **MWENE MUTIGA** and **MUNENE MUTIGA** the deceased in this case refer to one and the same person. This Court will presume that it is because that was never disputed and it may be a typographical error. The pleadings in that **EMBU** case were not availed but from the proceedings, it appears to have been an application to adopt an award of the elders regarding land parcel No. **MUTIRA/KIANJEGE/102** which was ordered to be registered in the names of **JOSHUA KANGANGA NGUCHARA** and the names of **EPHRAIM NGUCHARA JOSHUA** be deleted and a new title to issue. That award by the elders was adopted by the Principal Magistrate **R.M. MUTITU** on 30th May 1990. It is clear that res-judicata cannot be invoked for the following reasons. Firstly, none of the parties in **EMBU SENIOR RESIDENT MAGISTRATE’S COURT CASE No. 72 of 1980** are parties in this suit. Secondly, the case in **EMBU** involved land parcel No. **MUTIRA/KIANJEGE/102** which is not the subject of this suit.

And with regard to **EMBU PRINCIPAL MAGISTRATE’S CIVIL CASE No. 115 of 1991**, the defendant herein was not a party although it involved the 1st plaintiff and his deceased father and a company known as **MUGUSHIAH G. COMMISSIONS** as plaintiffs who are not parties to this suit. Further, the dispute also involved land parcel No. **MUTIRA/KIANJEGE/102** which is not the subject of this case. It is also important to remember that the issue before this Court is adverse possession which could not have been litigated in the subordinate Court on account of jurisdiction.

Res-judicata does not therefore arise to bar this suit.

As already stated above, the plaintiff’s occupation and possession of the suit land is conceded. What falls for this Court’s consideration is whether such occupation and possession was in accordance with the law and also as held in the **KASUVE** case (supra), it is clear from the defendant’s replying affidavit and his counsel’s submissions that the issue of un-interrupted occupation of the suit land is a matter for consideration. That is why both the defendant and his counsel have referred to the previous cases already referred to above. The defendant was registered as proprietor of the suit land on 4th May 1992 when the title was issued in his names. This suit was filed on 23rd July 2014 and so by that time, the plaintiffs and their families had been in occupation of the suit land for twenty two (22) years well in excess of the statutory period of twelve (12) years provided for in law. That occupation was with the knowledge of the defendant and certainly not with his consent as he had deponed to attempts to evict the 1st plaintiff and his deceased father by seeking vacant possession of the suit land in **EMBU SENIOR RESIDENT MAGISTRATE’S COURT CASE No. 72 of 1980**. That application for eviction was made on 14th April 1994 and granted on 16th April 1994 - see defendant’s annexures **SMN 3** and **SMN 4**. However, a closer look at the application for eviction and the orders granted disclose a fundamental error. That eviction could only have been as a consequence of the order by the Principal Magistrate **P.M. MUTITI** dated 30th May 1990 which as is now clear was an order adopting the elders award with respect to land parcel No. **MUTIRA/KIANJEGE/102**. It cannot be possible that an order for eviction can be issued in respect of a land parcel that was not the subject of litigation before the Court. Secondly, and as is clear from the defendant’s own annexure **SMN 1**, neither of the plaintiffs nor the defendant were parties in **EMBU SENIOR RESIDENT MAGISTRATE’S COURT CASE No. 72 of 1980**. It is therefore not clear how the 1st plaintiff and the defendant’s names appear on the eviction order (defendant’s annexure **SMN 4**) and also the application for contempt (defendant’s annexure **SMN 5**). As the plaintiffs’ counsel

Mr. Magee has rightly submitted, there is no explanation offered by the defendant for those glaring and material contradictions and inconsistencies in the defendant's exhibits. Even assuming in defendant's favour that he and the 1st plaintiff were subsequently enjoined in the proceedings in **EMBU SENIOR RESIDENT MAGISTRATE'S COURT CASE No. 72 of 1980**, the bottom line however is that the orders of eviction issued therein did not relate to the suit land nor affect the other plaintiffs who were not parties and who, it was conceded, have always been in occupation of the suit land since 1962. It is clear therefore that the eviction orders issued on 16th September 1994 cannot in law be considered as proper legal proceedings that could have interrupted the plaintiffs' occupation of the suit land. In my understanding of the decision in ***GITHU VS NDEETE (1984) K.L.R 776***, what the defendant ought to have done from 4th May 1992 when he became the registered proprietor of the suit land was to commence legal proceedings against all the plaintiffs and their families. That would have interrupted the plaintiffs' occupation of the suit land. However, the defendant's attempt to obtain an eviction order against strangers and in relation to land that was not the subject of litigation did not amount, in my view, to interruption of the plaintiffs' occupation of the suit land. It follows therefore that from 4th May 1992 when the defendant became the registered proprietor of the suit land upto 23rd July 2014 when this suit was filed, the plaintiffs and their families had been in open, exclusive and un-interrupted occupation of the suit land for twenty two (22) years. They are in law, therefore, entitled to the orders sought in their Originating Summons.

Ultimately therefore, and upon considering all the evidence in this case, I am satisfied that the plaintiffs have established their claim against the defendant with respect to the suit land. I would therefore determine the issues posed by the plaintiffs in the following manner:-

- 1. The plaintiffs are declared to have become entitled by adverse possession of over 12 years to all that parcel of land comprised in title No. L.R MUTIRA/KIANJEGE/290.***
- 2. The plaintiffs be registered as the sole proprietors of all the said parcel of land namely title No. L.R MUTIRA/KIANJEGE/290.***
- 3. That the Land Registrar Kirinyaga do register the plaintiffs as proprietors of L.R No. MUTIRA/KIANJEGE/290.***
- 4. That each of the parties meet their own costs of this suit.***

B.N. OLAO

JUDGE

19TH AUGUST, 2016

Judgment dated, delivered and signed in open Court this 19th day of August 2016

Ms Kiragu for Applicants present

Mr. Mwangi for Mr. Gacheru for Respondent present

Right of appeal explained.

B.N. OLAO

JUDGE

19TH AUGUST, 2016