



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 91 OF 2017

PETER GITHAIGA NJACI..... PLAINTIFF

-VERSUS-

MATHENGE GACHUBA.....1ST DEFENDANT

MURIITHI MATHENGE.....2ND DEFENDANT

MURIMI MATHENGE.....3RD DEFENDANT

JUDGMENT

BACKGROUND

1. By his plaint dated and filed herein on 24th May, 2017, Peter Githaiga Njaci (*the Plaintiff*) prays for Judgement against the three Defendants jointly and severally for:

(a) *An order that the Defendants (their) agents and/or servants do vacate from the suit land in default whereof they be forcefully evicted;*

(b) *General damages for trespass; and*

(c) *Costs and interests.*

2. Those prayers arise from the Plaintiff's contention that he is the registered owner of the parcel of land known as LR No. Magutu/Gatei/480 and that the Defendants have without any colour of right encroached thereon and started farming and erecting structures. As a result of the said acts of the Defendants, the Plaintiff avers that he has suffered and continues to suffer loss and damage.

3. But in their joint statements of Defence and Counterclaim dated 5th July, 2017 Mathenge Gachuba, Muriithi Mathenge and Murimi Mathenge (*the 1st, 2nd and 3rd Defendants respectively*) deny that the Plaintiff is the registered owner of the said parcel of land and they invite the Plaintiff to strict proof.

4. The Defendants deny encroaching upon the land and/or that as a result of the said encroachment the Plaintiff has suffered any loss and damage. The Defendants assert that save for the mere act of registration, the Plaintiff has never occupied the suit land.

5. By way of their counterclaim, the Defendants aver that they have been on the land since the year 1959 and that by reason of their uninterrupted occupation, they have since acquired title to the land by virtue of adverse possession. Accordingly the Defendants aver that the Plaintiff holds the title for the suit land in trust for themselves.

6. Arising from the foregoing, the Defendants pray for orders that:

(i) *The Plaintiff's claim be dismissed with costs;*

(ii) *There be an order that (the) Defendants (have) acquired title to land parcel No. Magutu/Gatei/480 by way of adverse possession;*

(iii) That the Plaintiff holds land parcel No. Magutu/Gatei/480 in trust for the Defendants;

(iv) That the trust be determined and the Defendants be registered (as the proprietors of) LR No. Magutu/Gatei/480; and

(v) Costs of the suit and counterclaim.

THE PLAINTIFF'S CASE

7. The Plaintiff testified as the sole witness in his case. Testifying as

PW1, the Plaintiff told the court that he is the registered proprietor of the suit property and that he purchased the same and fenced it. Thereafter the Defendants encroached on the land and started grazing cattle thereon.

8. PW1 told the court that as at the time he purchased the land, the title was in the name of Wamugunda Mwaniki. He obtained title in his name in the year 2017.

9. On cross-examination, PW1 testified that he was born in 1964 and that in the year 1982, he knew that the property belonged to Wamugunda Mwaniki and Paul Njogu. He denied instituting a succession cause for the said Wamugunda Mwaniki and told the court that the said cause was instituted by Wamugunda himself and Paul Njogu. At some point however, the two ran out of money and PW1 took over the succession cause. He was awarded the suit land by the court.

10. PW1 further testified that he purchased the land vacant in 1990. He would do farming on the land while the Defendants were only grazing thereon. By then no trees had been planted and no structures had been built. He did not however know when the Defendants built the structures currently on the land.

THE DEFENCE CASE

11. The Defendants called two witnesses in support of their case at the trial.

12. DW1 Mathenge Gachuba is the 1st Defendant herein and the father of the 2nd and 3rd Defendants. DW1 told the court that he only knew the Plaintiffs after he filed the current suit against them. Since 1958, they had constructed on the land, put water and planted crops and trees.

13. DW1 testified that they have never left the land since and that before his brothers died, they were all living on the land. He still lives with the children of his deceased brothers on the land. DW1 testified that they had filed HCCC No. 37 of 2012 (O.S) in respect of the suit property and that the same is still pending for the reason that they have been unable to substitute someone for Wamugunda s/o Mwaniki in whose name the land was registered.

14. On cross-examination, DW1 testified that they started living on the land before the 1960's. In 1990, they discovered that the land was no longer registered in the name of Wamugunda Mwaniki. The 2nd and 3rd Defendants were born on the land. DW1 further told the court his father had purchased land near the suit property in the 1960's.

15. DW2 - Irene Wairimu Mwai is the 1st Defendant's niece. She told the court that her father Stephen Mwai Gichuba was a brother to the 1st Defendant and that she was born on the suit property which they currently farm. They however live in an adjacent parcel of land.

ANALYSIS AND DETERMINATION

16. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

17. The Plaintiff prays for an order that the Defendants herein do vacate all that parcel of land known as Magutu/Gatei/480 and that in default an order be made for their forceful eviction therefrom. In addition, the Plaintiff prays for general damages for trespass.

18. The basis of the Plaintiff's prayers is that he is the registered proprietor of the suit property. It is his case that the Defendants have without any colour of right encroached on the suit property and that they have since started farming and erecting structures thereon.

19. Giving evidence in support of his case, the Plaintiff testified that he purchased the suit property in 1990 when the land was vacant and that he proceeded to fence the same. As at that time, the Plaintiff told the court the title was in the name of one Wamugunda Mwaniki before it was transferred to his name on 18th January, 2017.

20. This court notes however that while he claimed to have purchased the suit property in 1990, the Plaintiff did not produce a copy of the Sale Agreement through which he bought the property. A perusal of his pleadings and testimony at the trial reveals that he neither disclosed from whom he purchased the property nor the price at which he purchased the same.

21. Indeed while he accused the Defendants of encroaching on the suit property, he has not stated anywhere either in his pleadings or testimony before the court when the alleged encroachment started. Asked in cross-examination when the Defendants started putting up the so-called structures he complains about, the Plaintiff told the court he was unaware when the same were erected on the land.

22. On their part, the Defendants who are a father and his two sons told the court that they have lived on the land since 1959 and that they have cultivated the land and built their houses thereon ever since. I have looked at the photographs of the buildings erected on the suit land as exhibited by the Plaintiffs himself. While the same may not have been built as early as the Defendants claim, it was apparent to me that they were not newly erected on the land.

23. It was also clear to me that while they did not own the land, the Defendants had been on the suit land for a considerable period of time. That much is clear from the fact that some six (6) years

before the Plaintiff was issued with the title to the suit property, the 1st Defendant and his brother David Thairu had filed Nyeri HCCC No. 37 of 2011 (O.S) against the said Wamugunda s/o Mwaniki seeking a declaration that they had acquired title to the land by way of adverse possession.

24. A perusal of the affidavit in support of the originating summons which was later transferred to this court as ELC 658 of 2014 reveals that the Defendants claimed as they do herein that they had been on the land since 1959 and that they had tremendously developed the same by building semi-permanent houses, fencing, installing piped water and electricity.

25. While this court may not guess exactly when the Defendants put up the buildings, the fact that they were there in 2011 further negates the Plaintiffs claim that the Defendants had recently encroached upon the suit property.

26. At the trial herein, the Plaintiff denied instituting a succession cause in the name of the said Wamugunda s/o Mwaniki and one Paul Njogu in whose name the land was apparently previously

registered. He however told the court that he took over the case when the two ran out of money and proceeded with it to its conclusion. Neither party however produced any documents in relation to the succession cause and the circumstances under which the title to the suit property became registered in the Plaintiff's name on 18th January, 2017 remain unclear.

27. While the Defendants urged the court in their counterclaim to declare that they have acquired the suit property by way of adverse possession, I note that the said ELC 658 of 2014 wherein they seek orders of adverse possession remains pending for hearing and determination essentially on the basis that they were unable to substitute the original proprietor of the land – Wamugunda s/o Mwaniki. In my view, that suit is the right forum wherein the Defendants should seek the orders sought herein.

28. In the result, I find no merit in the Plaintiff's case and I dismiss the same. In the same breath, it is apparent to me that the Defendants' counterclaim is misconceived and I equally disallow the same.

29. The Defendants shall however have the costs of the Plaintiff's suit.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 20TH DAY OF JANUARY, 2022.

In the presence of:

Mr. C. M. King'ori for the Plaintiffs

Ms. Wambui Mwangi holding brief for Ndirangu for the Defendants

Court assistant - Wario

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J. O. OLOLA

JUDGE