



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC ORIGINATING SUMMONS NO. 17 OF 2019

JACOB MUGAMBI M'MUGWIKI (Suing as legal representative of the estate of

DUNCAN M'MUGWIKI MUTIGA (Deceased).....1ST PLAINTIFF

JOHN MBAABU M'MUGWIKI.....2ND PLAINTIFF

VERSUS

ESTHER MWENGWA (Sued as legal representative of the estate of

RAIJI RAIJI alias RAIJI RAIJI (Deceased)..... DEFENDANT

JUDGMENT

1. By an originating summons dated 1.4.2019 the plaintiffs urged the court to determine five questions: - if they have occupied **L.R No. Nyaki/Munithu/208** for over 12 years; if the occupation has been open, unhindered, notorious, undisturbed and uninterrupted; if the occupation has been alongside their families since 1964 and on account of the 2nd plaintiff since 1988.

2. Further the plaintiffs urge the court to declare them entitled by way of adverse possession to the whole of the subject land; to be registered as sole proprietors and an order do issue for the defendant's to execute all the required instruments to effectuate the transfer in their favour in default the Deputy Registrar to step in. The originating summons is supported by the affidavit of the 1st plaintiff sworn on 2.4.2019.

3. By a statement of defence dated 8.10.2019 the defendant admits the suit land is registered in the name of her father the late Raiji Raiji; the plaintiffs took advantage of the deceased to wrongfully and without justification enter into and remain on the land; denied there was any alleged exchange of land especially **L.R No. Nyaki/Chugu/499** and lastly maintained that **L.R No. Nyaki/Chugu/307** was solely gathered and adjudicated in the name of the deceased.

4. Upon compliance with the pre-trial directions, parties by consent took a hearing date on 6.5.2021 for 29.9.2021. The defendant did not attend the hearing.

TESTIMONY

5. The plaintiffs' testimony was that their late father Duncan M'Mugwika gave the defendants' grandfather his **Parcel No. 499** at **Nyaki, Chugu area** in 1964 which was consolidated with **Parcel No. 363** to become **L.R No. 301**. It was their testimony that after the exchange, the plaintiffs' late father took vacant possession.

6. Similarly the defendant's deceased grandfather assumed possession of the portion given till to date. The plaintiffs' testified they have made extensive development on the suit land including establishing a permanent homestead for PW1.

7. Further PW1 stated he lodged an objection in **Meru High Court Succession Case No. 462/2008** but the court declined at the confirmation stage. The court was also told the dispute went before the area chief but the defendants alleged they had changed their minds in transferring the land to the plaintiffs. The plaintiffs insisted the defendants had not stepped on the land nor had they evicted or gave them a notification to vacate the land.

8. PW1 adopted his affidavit in support of the summons and produced copies of record for **L.R 208**, judgment in the succession cause, certificate of confirmation of grant and an extract for adjudication record regarding **Parcel No. 499** as **P exh 1 – 4** respectively.

9. PW1 insisted he had been on the suit land openly and uninterruptedly since 1990.

10. PW2 told the court that PW1 had been in constant use and occupation of the suit land unlike the defendant. He stated the plaintiffs' late father had also been on the land since 1965. Similarly PW3 like PW2 confirmed PW1 had been in uninterrupted use and occupation of the suit land since 1965 with no complaint or threats to vacate from the defendants.

11. In their written submissions dated 1.11.2021 the plaintiffs maintain their use and occupation of the suit land is admitted in the statement of defence with effect from 1979.

12. Further it was submitted the defendants had failed to attend court and or call any evidence to rebut the plaintiffs' evidence.

13. Concerning the implication on not attending court and testifying in support of the statement of defence, the plaintiff's relied on *Kenya Power & Lighting Co. Ltd -vs- Pamela Owino Ogungyo [2015] eKLR and C. Chepkwony -vs- Kiptagich Tea Estate Ltd & Another [2017] eKLR.*

14. For the plaintiffs to prove adverse possession, they must establish their acts were neither by force, nor secret and was without permission by the defendant for the long continued possession.

15. In *Mweu -vs- Kiu Ranching & Farming Cooperative Society Ltd [1985] KLR,* the court held adverse possession is a fact to be observed upon the land for over 12 years after which the occupant acquires the land in line with **Sections 13 and 38** of the **Limitation of Actions Act.**

16. Given the principles above, the issues for determination are:-

a) If the plaintiffs have proven adverse possession.

b) When did time start to run.

17. The plaintiffs have testified the exchange of the two parcels of land took place between their deceased parents in 1960s. The copy of green card produced indicates the deceased defendants' grandfather was registered as the owner in 12.8.1970 one Raiji Raiji.

18. Further **P exh 4** shows **Parcel No's 301 and 499** was indeed consolidated in the name of Raiji Raiji. This lends credence to that the plaintiffs' evidence that there was indeed some transaction following which the plaintiffs took vacant possession upon the exchange of the two parcels of land.

19. As regards computation of time, the plaintiffs' late father took vacant possession in 1964 and as at 1979 when PW1 took over possession the land he had not been interrupted by the deceased registered owner Raiji Raiji. The occupation was therefore adverse to the deceased recorded owner.

20. From 1979, PW1 and PW3 have testified they have been in occupation throughout and with no interruption from the defendants. As at the time the defendants took out letters of administration, the rights of the plaintiffs had already crystallized as against the registered owner. The confirmation of grant therefore did not extinguish the rights over the land which the plaintiffs had already acquired.

21. The plaintiffs have asserted they were formally given the land by their late father in 1988 where after they built on the land from 1991.

22. As stated above a person who claims adverse possession must show:-

a) The date he came into possession

b) Nature of his possession

c) If the possession was known to the other party

d) Length of continuation

e) Possession was open and undisturbed for the requisite 12 years.

23. In my view, the plaintiffs' must choose one route but not both. They cannot found their claim to possession of the suit property on a gift from their late father and at the same time assert a claim over adverse possession. The above notwithstanding the plaintiffs have testified they started using the land as of right and without the consent of the defendants. That evidence has not been controverted at all.

24. The plaintiffs have also testified they have been consistent over their rights as to adverse possession up to and including at the succession suit. My finding therefore is the plaintiffs have proved adverse possession even though an issue of a gift was raised in PW1's testimony. The said issue is also not pleaded in the originating summons. See *Richard Wefwafwa Songoi -vs- Ben Munyifwa Songoi [2020] eKLR.*

25. The plaintiffs aver they are still in occupation of the property up to the time they testified in court. The defendant by default or inaction failed to assert her rights. See *Kasuve -vs- Mwaani Investments Ltd & 4 Others [2004] 1 KLR 184.* The defendant did not make any peaceful and effective entry or sue for the recovery of the land. So at the time the grant was confirmed on 6.4.2014 the title had extinguished

in favour of the plaintiffs and she therefore held the land in trust for them. There is neither evidence that the defendant retook possession of the suit land nor that she successfully removed or ousted the plaintiffs from its possession.

26. In view of the foregoing, I have no hesitation in finding the plaintiffs have on a balance of probabilities established their claim. I allow the originating summons dated 1.4.2019 in terms of prayers 1, 2 and 3.

27. Costs to the plaintiffs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19TH DAY OF JANUARY, 2022

In presence of:

Mutuma for plaintiffs

Mukua for defendant – absent

Court assistant - Kananu

HON. C.K. NZILI

ELC JUDGE