



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 130 of 1990

JOHNSON WACHIRA MUSA.....PLAINTIFF

Versus

NYERI COUNTY COUNCIL.....1st DEFENDANT

NGAMWA FARMERS CO-OP. SOCIETY LTD.....2ND DEFENDANT

J U D G M E N T

By leave granted to **Johnson Wachira Musa Muriuki** (*Muriuki*), by this court on 22nd September, 1995, he filed an amended originating summons (*O.S*) dated 3rd October, 1995. In the amended *O.S*, Muriuki claimed as against Nyeri County Council (*the council*) that he was entitled to;

“a declaration that he is the registered proprietor of land parcel Lower Muhito/

Ngamwa/143 comprising 8.5 acres and had acquired title to all that piece of land precisely 1.5 acres constituted in his 0.4 acres land certificate which encroaches the Nyeri County Council adjoining land parcel number Lower Muhito/Ngamwa/391 by virtue of adverse possession thereof since 1959 and by virtue of the Limitation of Actions Act, Chapter 22 Laws of Kenya. That the register in the Nyeri Land Office be rectified to include this portion of land into the applicant’s land by entering 1.5 acres.... ALTERNATIVELY, the court should order that the Nyeri County Council pay to the applicant by way of compensation such amount towards the applicant’s development on the 1.5 acres which he has erected on the county council land parcel Lower Muhito/Ngamwa/

391 after proper valuation has been carried by the parties.....”

Muriuki also wished to have the question as to who should bear the burden of costs determined.

In support of the *O.S*, **Muriuki** deponed that he was the registered proprietor of **Lower Muhito/Ngamwa/143** (143) which abuts council’s land parcel **Lower Muhito/Ngamwa/391** (391). His parcel of land aforesaid measured 8.4 acres at the time of land demarcation. In September, 1967 the council’s surveyor declared a portion of his said land and where he had built his homestead, cattle boma, water reservoir, poultry, planted coffee, measuring 1.5 acres to be part of council’s land reserved for Karuiro village. He protested this decision severally to no avail. He also appealed over the decision albeit unsuccessfully to Nyeri District Commissioner. The council by a letter dated 6th June, 1988 asked him to vacate the council land. By virtue of Limitation of Actions Act, however he had become entitled

to the disputed 1.5 acres by adverse possession or alternatively to compensation for the improvements made thereon.

If I understand Muriuki's case properly, he is saying that he is entitled to 1.5 acres out of 391 which belongs to the council as an adverse possessor. That having been in occupation of the same from the year 1959 mistakenly thinking that it formed part and parcel of his land parcel 143 to the present date, he had become entitled to that portion by adverse possession or alternatively to compensation for the improvements made thereon.

In reply to the O.S the council filed a replying affidavit on 4th January, 1991. Through **Daniel Ngaruri Mwangi**, the then Ag clerk to council, he deponed that the applicant was non-suited as the council had always been the registered proprietor of the portion of land in dispute. Muriuki had never been in continuous, uninterrupted and exclusive possession of the portion and had always recognized the rights of the council. Muriuki filed this suit only after the council declined his offer to exchange his much unfavourable land with the portion and he cannot now claim to be in adverse possession. Muriuki had deliberately trespassed on to public land held by the council in trust for the commissioner for lands and therefore is estopped from asserting such adverse claim against the council. The local community had always objected to Muriuki's encroachment on the strategic public land abandoning his when it had been pointed to him all along and cannot now claim any compensation. Accordingly Muriuki was not entitled to the prayers sought as all the requirements of adverse possession had not been satisfied at all. The council therefore prayed for the O.S to be dismissed.

In a nutshell, the council's case is that Muriuki had never been in continuous, uninterrupted and exclusive possession of the portion in dispute. That Muriuki had deliberately trespassed onto a portion of public land and filed this suit after he had made unsuccessful attempts to have that portion exchanged with his unfavourable portion of land. With regard to compensation, it is the council's case that in fact it should be Muriuki who should compensate the council for trespass and illegal use of its land.

In or about 11th May, 2006, Ngamwa Farmers Co-operative Society Ltd (**Ngamwa**) filed an application seeking to be enjoined in these proceedings. That application was by consent allowed by **Okwengu J.** on 12th June, 2006. Subsequent thereto, through its chair, **Johnson Mutahi Waithumbi**, Ngamwa filed an affidavit in opposition to the application. He deponed that Ngamwa was the registered proprietor of land parcel **Lower Muthito/Ngamwa/967 (967)** which borders 143 registered in the name of Muriuki. That 967 was part of the bigger 391. On 3rd November, 1982, 391 was subdivided into **Lower Muhito/Ngamwa/584, 586 and 618**. That 586 was further subdivided and one of the resultant subdivision, 967 was registered in the name of Ngamwa. It borders 143 in which Muriuki has encroached onto and continues to trespass. Finally he deponed that the prayers sought by Muriuki were untenable in the circumstances.

Essentially what Ngamwa is saying is that 391 ceased to exist in 1982 when on 3rd November, 1982 it was sub-divided into 584, 586 and 618. Ngamwa was the registered proprietor of a further subdivision of 586. The issue is whether Muriuki's suit is maintainable in view of the fact that by 1990, when the suit was filed, the original land parcel had ceased to exist.

It would appear from the record that directions in terms of order XXXVI rule 8A of the Civil Procedure Rules were not taken. However parties appear to have taken this suit as though it was an ordinary suit commenced by plaint for on 24th May, 1996 parties obtained orders from **Musa Apondi**, the then Deputy Registrar on summons for directions. That mistake was never to be rectified at all. I do not wish to make an issue out of time since the O.S eventually proceeded to hearing by way of viva voce. However this should not be taken to mean that litigants should ignore with abandon the strict procedural requirements in certain proceedings.

Muriuki testified that he resides on 143 having had it registered in his name sometimes in 1959. Council's surveyor however came in or about 1967 and declared a portion of the land as part of council's land reserved for Karuiro village. He objected and demanded the council to rectify the boundary so that

the portion reverts to him. His demands fell on deaf ears. He took up the matter with the D.C but to no avail as well. He had resided on the portion since 1963. The portion of 1.5 acres had since been subdivided and transferred to other people. It was valued at Kshs.478,000/= through a valuation undertaken by Messrs Mureithi & Co. Advocates on his instructions. He had offered to give the council 1.5 acres from the other side of his land in exchange but the council had refused the offer. The council had since sought his eviction, hence the suit.

In answer to questions to put to him by **Mr. Mugambi**, learned counsel for the council, he stated that his land was 8.4 acres which was shown to him by his father when he came out of detention. He did not know the boundaries for 391. He had offered a portion of his land in exchange because he had extensively developed the portion in dispute. He conceded that he had constructed a house in the portion in 391 unknowingly. He became aware of the fact in 1967. He had been a chief of the area though since 1976. He conceded too that 391 belonged to the council.

Cross-examined by **Mr. Kiminda**, learned counsel for Ngamwa, he conceded that Ngamwa was a neighbour. That 391 had been subdivided and no longer existed. One of the subdivisions went to Ngamwa. The valuation report was in respect of his 143. The house on the portion in dispute was temporary. Otherwise his permanent house was in his 143. Finally he conceded that he had not subdivided his land though initially he had said that he had. With that he closed his case.

The case for the council was presented by **Justus Gichobi Muchira**, an administrative officer. He knew that Muriuki was the registered proprietor of 143. Council's land 391 abuts Muriuki's land aforesaid. The council's land was about 14 hectares and had been reserved for Karuiro village since adjudication. It was trust land. It had since been allocated to public utilities on request. After subdivision the land adjacent to 143 is 967 allocated to Ngamwa for purposes of a coffee factory. Muriuki was currently in occupation of part of Ngamwa's land. Muriuki had requested that the council agrees to exchange that portion he occupies with another portion of his land. The council refused the offer and asked Muriuki to move out. The council could not take the land offered by Muriuki as aforesaid as it was hilly.

Cross-examined by **Mr. Mahan**, learned counsel for Mr. Muriuki, the witness answered that the green card showed that Muriuki had been registered as proprietor of 143 on 1st June, 1959. However he did not know when Muriuki occupied the disputed portion.

The council called the district Land Registrar, Nyeri as its second witness. She was called **Nancy Nyambura Njenga**. She had records of land parcel numbers 143 and 391. 391 was owned by the council whereas 143 was owned by Muriuki. 391 was on 3rd November, 1982 subdivided into 284, 385, 286 and 618. She recalled that at some point there was a boundary dispute referred to her office concerning the alleged encroachment. The land parcels involved were 143 and 391. The decision was that the owner of 143 was occupying the council's land to the extent of 1.5 acres. Muriuki had moved his boundary and encroached on the council's land.

Cross-examined by **Mahan**, she stated that Ngamwa became registered owner of 967 and records showed that the council allocated 967 to Ngamwa in 2002.

That marked the close of council's case.

Ngamwa defended itself through its chair, **Julius Maina Karanja**. His evidence was to the effect that since 2nd October, 2002 they had owned 967. Prior to that it had been owned by the council. Muriuki's land bordered theirs on which he had encroached. Muriuki had put up semi permanent house and planted coffee in the portion. His permanent house was however in his proper parcel of land.

Cross-examined by **Mugambi**, he stated that one could tell the boundary between 143 and original 391 on the ground. Muriuki's permanent house was on 143. Whatever was in 967 was a mere semi permanent structure.

Cross-examined by **Mahan**, he stated that Muriuki still occupied the disputed portion of land. There is a semi-permanent structure thereon. He did not know when Muriuki occupied the disputed portion.

That marked the close of Ngamwa's case.

Thereafter parties agreed to file and exchange written submissions. That was subsequently done. I have carefully read and considered them alongside cited authorities.

This suit is bound to fail on three grounds namely:-

- (a) **Failure by the applicant to comply with the mandatory provisions of Order XXXVI Rule 3D (2) of the Civil Procedure Rules**
- (b) **Orders sought if granted are likely to be in vain and**
- (c) **Whether there can be adverse possession over public land.**

Order XXVI rule 3D (2) of the Civil Procedure Rules is couched in mandatory terms. It is in terms that; **"...The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed."** In this case the supporting affidavits of the original and amended O.S have no extract of the title annexed. This omission on the part of Mr. Muriuki rendered the O.S fatally defective. The court of appeal had occasion to interpret the purport of this provision of the law in the case of **Kagure V Mwaani Investment Ltd & 4 others (2004) 1 KLR 184**. It observed **"....rule 3D (2) of the order XXVI of the Civil Procedure Rules require that a certified extract of the title to the land in question should be annexed to the affidavit supporting the originating summons....."**

Further in the case of **Kweyu V Omunto (1990) KLR 709** the court observed;

"....The applicant's affidavit makes no reference to a certified extract to title to land parcel No. E Wanga/Isongo/1512 out of which the suit land is claimed. None appears to have been annexed thereto. Procedurally therefore, the appellant's original summons was from the outset defective. The record of proceedings in the superior court does not indicate that this defect was rectified...."

The same situation obtains here. From the foregoing it is quite apparent that compliance with rule 3D (2) aforesaid is mandatory. Non compliance would therefore render the O.S fatally and incurably defective. This issue was raised by both the counsel for the council and Ngamwa in their respective written submissions which I believe were served on Muriuki's counsel. One would therefore have expected that Muriuki's counsel would counter the same. However as it is **Mr. Mahan** gave the issue a wide berth. This can only mean one thing, he had no response to the same.

Perhaps it was impossible for Muriuki to annex an extract of the title since at the time when the O.S was taken out on 4th October, 1990 land parcel 391 had ceased to exist. It ceased to exist on or about 3rd November, 1982 when it was subdivided into three parcel – 584, 586 and 618. Muriuki in his own testimony admitted that much so was the District Land Registrar from her records. Muriuki did not bother to amend the O.S to capture this changed scenario. So that as it is now the subject matter of this O.S is non-existent. If the court was to grant the prayers sought in the O.S, as it is, it will be acting in vain. Courts of law do not generally act in vain. The O.S in my view on the basis of the foregoing is fatally incompetent and defective. It is unsustainable.

The evidence on record also show that the original 391 was public land held by the council on behalf of Karuiro village. The council therefore held the said parcel of land in trust for and on behalf of the commissioner of lands. Under section 41 (1) (v) of the Limitation of Actions Act, public land cannot be the subject of adverse passion. It provides interlia;

“Section 41 This Act does not:

(a) Enable a person to acquire any title to, or any easement over

(i).....

(ii).....

(iii).....

(vi).....

(v) Land vested in the county council (other than land vested in it by section 120 (8) of the Registered Land Act”

I quite agree with the observations of **Musinga J** on the subject in the case of **David Toroitich & Others V County Council of Kaibateic & Others (2005) eKLR** when he states that;

“...The land in question is trust land and section 115 (1) of the constitution vests all trust land in the respective county councils within whose are of jurisdiction the land is situated. The county council holds the land for the benefit of the person ordinarily resident on the same. In the circumstances, the plaintiffs’ claim based on adverse possession cannot be sustained....”

The same situation obtains here. To put the issue beyond any doubt, the court of appeal in the case of **Faraj Maharus vs J.B. Martin Glass Industries & 3 others (2005) eKLR** observed;

“...Secondly, there can be no adverse possession on public or Government Land however long one may have been squatting thereon without let or hindrance from the government. Therefore the appellant cannot benefit from the long period of his occupation of the property.”

On these three grounds therefore, the O.S has to fail. However, Muriuki alternatively prayed that he should be compensated for the developments he has effected in the disputed portion. Muriuki testified that he has only build a temporary structure in the portion and it is in his proper parcel of land 143 that he has built a permanent house. DW3 also confirmed that Muriuki’s permanent house was on 143 and that only a semi permanent structure and coffee bushes are on the encroached portion. As correctly submitted by **Mr. Mugambi** this was a clear indication that Muriuki distinguished the encroached land from his rightful parcel and as such, he is not entitled to any compensation. Muriuki cannot be allowed to benefit from his own mischief. He knew that the said portion did not belong to him and yet he went ahead to plant coffee bushes and put up a semi permanent structure. If anything it should be the council demanding from Muriuki compensation for trespass and illegal use of its portion of land. Whatever **Mr. Muriuki** has reaped from his continued use of the portion of the land if anything is sufficient recompense. For now he must be told that his illegal occupation and use of the portion of land has come to an end. He must pack his bags and move to his 143 once and for all.

The valuation report tendered in evidence by Mr. Muriuki is of no evidential value at all to these proceedings. The report was in respect of **Lower Muhito/Ngamwa/994** which is neither Muriuki’s parcel of land or the disputed portion. Indeed under cross-examination by **Mr. Mugambi**, Muriuki conceded that there was no land known as such on which the valuation report was in respect of. The report is thus irrelevant and of no consequence.

Muriuki questioned the validity of the replying affidavit dated 4th January, 1991 filed by the council. He questioned its validity on the basis that the deponent did not sign the jurat on page 2 at the end, but he did so on a separate page. Thus the affidavit was defective, bad in law and inadmissible. For this submission he relied on the case of **National Industrial Credit Ltd V Samuel Njoroge Kinyanjui,**

HCC No.1892 of 1999 (UR). That may well be so. However Mr. Muriuki did not apply as expected to have the affidavit struck out during the hearing. In any event the alleged defect was cured when DW1 testified on behalf of the council.

In the upshot I find the O.S to be unsustainable. Accordingly it is dismissed with costs to the council and Ngamwa.

Dated and delivered at Nyeri this 19th day of November, 2009.

M.S.A. MAKHANDIA

JUDGE