



**Mugambi & 2 others v Rutere & 2 others (Environment & Land Case
27 of 2018) [2022] KEELC 15358 (KLR) (14 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15358 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 27 OF 2018**

CK NZILI, J

DECEMBER 14, 2022

BETWEEN

MARTIN MUGAMBI 1ST PLAINTIFF

MARTIN MUGAMBI 2ND PLAINTIFF

MARTIN MUGAMBI 3RD PLAINTIFF

AND

MARTIN KINOTI RUTERE 1ST DEFENDANT

MARTIN KINOTI RUTERE 2ND DEFENDANT

MARTIN KINOTI RUTERE 3RD DEFENDANT

JUDGMENT

1. The plaintiff by an originating summons dated 19.7.2018 seeks the court; - to find and declare him as entitled to the defendant's Land Registration No. Kiirua/Kiirua/Nkando/777 (hereinafter the suitland) by virtue of adverse possession; to nullify any purported fraudulent sale and or transfer of the said land to third parties and lastly, for a permanent injunction against the defendant, his servants or employees from interference with his quiet and peaceful possession. The originating summons was supported by an affidavit sworn on the even date annexing copies of records, sale agreement, photos, receipt for instructions to lodge a caveat and a chief's letter marked as MM 1 – 6 respectively.
2. Similarly, the plaintiff attached copies of witness statements, a list of documents and further supplementary list dated February 19, 2018, October 19, 2018 and June 6, 2019 respectively.
3. The defendant has opposed the originating summons by a replying affidavit sworn on November 19, 2018. The defendant averred that he was the registered owner of L.R No. Kiirua/Kiirua Nkando/777 as per a copy of title deed marked MKR – 01. He averred his land was next to the plaintiff's LR No. Kiirua/Kiirua Nkando/838 wherein the plaintiff lived, which he obtained during adjudication process.



- He annexed a copy of the adjudication record as MKR - 02. The defendant averred that one of his names Ruteere was omitted at adjudication stage but was eventually corrected as per the annexed title deed, consent and receipt marked MKR 2 – 05.
4. Therefore, he denied the alleged sale of the land from one Stephen Kiambi M’Amakia. The defendant averred that the developments alleged by the plaintiff were not on the suit land and that attempts to establish the boundary in June 2017 triggered the dispute leading to summons to the land surveyor. He attached copies of the private surveyor’s map, summons by the land surveyor and letter confirming ownership marked as MKR – 06 – MKR 07 respectively. The defendant also filed a list of witness statements, list of documents dated November 19, 2018, and a supplementary list of documents dated July 4, 2019
 5. In his testimony, the plaintiff adopted his witness statement dated July 19, 2018 as his evidence in chief and produced the sale agreement as P. Exh No. (1), copy of official search as P. Exh No. (2), chief’s letter dated June 4, 2013 as P. Exh No. (3), photographs as P. Exh (4), caution as P. Exh No. (5), receipt as P. Exh No. (6), Land Adjudication letter dated 28.8.2018 as P. Exh No. (7), adjudication record as P. Exh No. (8), scene visit report, chief’s letters dated August 12, 2018 and September 28, 2018 as P. Exh (10) and (11) and an adjudication record as P. Exh (12) respectively. He insisted that he was the one on the suit land with effect from 1990. In cross examination, the plaintiff stated that he had bought the land from PW 2 who took him to the land and showed him the beacons. He continued to state that the land at the time was registered in the name of PW 2, a minor then. He said that the physical boundary between the two parcels of land was non-existent.
 6. In his view, he did not know Parcel L.R No 777 existed since he was buying the two parcels though he only got title for Parcel L.R No. 838 otherwise Parcel L.R No 777 must have been fraudulently changed and obtained which he only discovered in 2018.
 7. PW 2 adopted his witness statement dated July 19, 2018 as his evidence in chief. He confirmed that he sold the suit land to the plaintiff on April 19, 1990 who paid the entire amount of KShs.20,000/=, took vacant possession and has been living therein.
 8. PW 2 said that he was at the time working at the land office as a demarcation officer and that he had registered the suit land under his son’s name PW 3 who eventually permitted him to sell the land. He confirmed that he knew the defendant since they were at the time working with him at the land’s office.
 9. PW 3 Martin Kinoti Kiambi adopted his witness statement dated July 19, 2018 as his evidence in chief and confirmed that his father PW 2 was the owner of Parcel No 777 which was at the time of demarcation recorded under his name Martin Kinoti and not Martin Ruteere.
 10. In cross examination, PW 3 said that he was born in 1972 as per his identity card. He admitted that he authorized the sale in order to get school fees. He wondered how the land changed from his name to Martin Kinoti Ruteere.
 11. PW 4 was the area chief Kithima sub-location. He confirmed that he authored P. Exh No’s (3) after an incident in 2018 when the defendant came to cause havoc on the land occupied by the plaintiff. PW 4 confirmed that the plaintiff has been on the suit land where he had built a permanent house crossing the two parcels of land. He confirmed that the suit land had no separating beacons or physical boundary.
 12. Further, PW 4 confirmed that he authored a letter dated June 12, 2018 since he came from the area and had never seen the defendant occupying the land.
 13. DW 1 adopted his replying affidavit and witness statement dated November 30, 2018 as his evidence in chief. He produced a copy of the title deed, adjudication register as D. Exh No. (1) and (2), copy of



- title before rectification of names as D. Exh No. (3), application for rectification of name, application for land control board consent, letter of consent and receipt, chiefs letter as D. Exh 4 (a) – (e), copy of map as D. Exh (5), letter dated June 11, 2018 as D. Exh (6), chiefs letter as D. Exh No. (7) and the original map as D. Exh No (8) respectively.
14. In cross examination, the defendant stated that the two parcels of land were distinct, separate and each was one acre in size. He stated that he acquired the land in 1990 and started utilizing it through farming. DW 1 said that the land registrar summoned them to his office since someone was occupying his land and had erected a tank on it. DW 1 said that the two parcels lacked a permanent boundary between them though the plaintiff had erected a barbed wire therein.
 15. According to him, the plaintiff erected the tank many years ago. DW 1 confirmed that he used to work as a clerk at the lands and settlement office. He denied committing any alleged fraud, irregularity, misrepresentation or illegality in the manner the land was changed and registered from the name of PW3 to his name.
 16. Regarding the scene visit report, DW 1 admitted that he was present when the executive officer visited the parcels but said that the report was lacking vital details about his parcel number, the locality and presence of the erected tank.
 17. DW 2 was a land surveyor working with Land Meter Surveyors. He told the court that he visited the suit land in 2018 seeking to establish the boundary between parcel L.R No's 838 and 777 as per registry sheet map No. 50 which he produced as D. Exh No. (8). He further told the court that he was able to re-establish the boundary since there was no fixed boundary. DW 2 said that he found out that the boundary passed through the erected water tank and advised the parties to visit the land registrar's office to check if the boundary was the correct one. He did not however prepare any report to that effect.
 18. In cross examination, DW 2 said that the plaintiff did not agree with his findings since he alleged that the two parcels of land belonged to him. DW 2 said the plaintiff's portion was already developed unlike Parcel L.R No 777 which was bushy.
 19. With leave of court, parties filed written submissions on September 20, 2022 and September 12, 2022 respectively.
 20. The plaintiff submitted that his evidence was clear that there was a permissive entry into the suit land on account of a sale agreement and since he cleared the last installment, thereafter, he was on the land on account of adverse possession whose ingredients he had established as per the case of law of *Public Trustee v Wanduru Ndegwa* (1984) eKLR and *Hosea v Njiru* (1974) EA 526.
 21. As regards fraud, the plaintiff submitted that the initial entry during the demarcation stage was under the name Martin Kinoti and any entry of the name Rutere was illegal, irregular, through misrepresentation and fraudulent since the defendant was unable to offer any explanation to the contrary. In his view, the defendant had passed himself as the proprietor of the land without any lawful justification. Reliance was also placed on *Stephen Mwangi Gatunga v Edwin Onesmus Wanjau Muranga* ELC No 7 of 2021 (OS).
 22. On the other hand, the defendant submitted that the two parcels of land were distinct with separate title deeds and sharing a common boundary as per the evidence of DW 2 and D. Exh's No. 5 and 6 respectively.
 23. The defendant submitted that D Exh No (1) and (2) were genuine title deeds protected under sections 24 and 26 (1) of the *Land Registration Act* which the plaintiff has not challenged through tangible evidence on account of fraud. On the contrary, the defendant submitted that PW 2 could not purport



- to sell the land without his consent and knowledge to the plaintiff. In absence of failing to join the 3rd party who sold the land, the land registrar and the land adjudication officer, the defendant submitted the allegations of fraud and collusion remained unsubstantiated.
24. Regarding participation in or facilitation on acquisition of the land through fraud, the defendant relied on *Kuria Kiarie and 2 others v Sammy Magera* (2018) eKLR cited with approval in *Muriungi M'Chuka alias Murinugu M'Gichuga v M'Chabari Kinoro* (2022) eKLR.
 25. It was submitted that in absence of contrary documents from the land registrar, the court had no reason to doubt the prima facie evidence that the title deed was genuinely acquired. The defendant submitted that the plaintiff had failed to prove that he was privy to any mistake, fraud or omission in the process of its acquisition or that he substantially contributed to the fraud. Reliance was placed on *Koinange & 13 others v Koinange* (1986) KLR 23 on the burden of proof in fraud.
 26. The court has gone through the pleadings, evidence tendered, written submission and the law. The issues for determination are:
 - a. If the plaintiff has established the ingredients of adverse possession.
 - b. If the registration of the suit land in to the defendant's name was lawful.
 - c. If the plaintiff is entitled to the prayers sought.
 - d. What is the order as to costs?
 27. It is trite law that parties are bound by their pleadings and issues flow from pleadings. A party seeking adverse possession has to prove dispossession and discontinuance of possession of the registered owner for a period of un interrupted statutory period of twelve years, without force, exclusively, openly, with full knowledge of the true owner and with the intention of possessing the land. See *Wambugu vs Njuguna* (1983) KLR 173 and *Chevron (K) Ltd v Harrison Charo Wa Sbutu* (2016) eKLR
 28. As regards permissive entry on an aborted sale, the law is that the possession becomes adverse after the last installment is cleared. See Public Trustee case supra.
 29. Applying the foregoing caselaw, the plaintiff's evidence is that he purchased the suit land on April 19, 1990, cleared the entire purchase price which was acknowledged receipt of by the seller, PW2. The evidence of PW2 was that during the adjudication process, he registered the suit land in the name of his son, PW3. He produced the adjudication record as evidence before this court. The plaintiff's evidence was that he took vacant possession immediately and started developing the suit land up to the date he filed this suit. PW3 confirmed before the court that the land was under his name during the adjudication process and when he was requested by his father, PW3 to have it sold to the plaintiff, he willingly agreed to it and appended his signature to the sale agreement. He further confirmed that it was PW1 who has been on the land throughout and not the defendant.
 30. Additionally, PW3 stated that he was never informed, summoned or notified by the land registrar when the title deed was rectified, corrected and issued to the defendant. Indeed, he stated that he had never met the defendant or given permission to the defendant to take away his land or divide it into Parcel No.777. He could not therefore explain how the changes to his title were made. According to him, it is his father who gave him the name Martin Kinoti, which name are the ones appearing on the title deed attached to the defendants replying affidavit.
 31. On his part, DW1 in his replying affidavit to the originating summons, averred that LR No Kiirua/Nkando/777 was adjoining the plaintiff's L.R No Kiirua/Nkando/838 which was a first registration



- according to the adjudication record. He admitted at paragraphs 8 and 9 in the affidavit that his third name Rutere was missing at the adjudication stage and he only discovered the anomaly when the title deed came out, where after he applied for the correction of the name. He produced the two title deeds, the application for correction of name, receipts for payment and land control board application for consent, the consent and a chief's letter as D Exhs 2, 3, and 4a, b, c, d, e respectively.
32. Further, DW1 stated that the plaintiffs land was bushy and undeveloped with no visible fixed boundary. It is trite law that when a title deed is under attack, the title holder cannot just waive the document but must show the root cause of his ownership. See *Dr. Joseph Arap Ngok vs Justice Moiwo Ole Keiwua & 5 others* Civil Appeal No. Nai 60 of 1997.
 33. In *Public Trustee v Wanduru Ndegwa supra*, the court cited with approval *Mukindia Mbui v Maranya* (1993) eKLR, where it was held that there must be facts showing a clear intention to hold adversely and under a claim of right. The court went on to say that there must be defacto use and defacto occupation. Section 7 of the *Limitations of Actions Act* places a bar on action to recover land to 12 years from the date on which the right accrued. In *Wambugu vs Njuguna* (1983) KLR 172 the court held that for one to acquire land through adverse possession the owner must have lost the land by either being disposed of it or by having discontinued possession of it.
 34. The defendant has admitted that the plaintiff's developments are on his land Parcel No. 777. This has been confirmed by DW2. The defendant has not brought any contrary evidence to substantiate his defence that it is him who has been on the land since 1990 and not the plaintiff. D. Exh 2 and 3 bear the name Martin Kinoti. The P. Exhs 11 and 12 show that the names of the land owner for Parcel No 777 as Martin Kinoti c/o Chief Kiirua location. The thumb print of the owner is indicated therein which was witnessed by one Josphat Guthua.
 35. The application to correct the name in the register is accompanied by a statutory declaration sworn on March 27, 2017. The defendant states therein that he is Martin Kinoti and also known as Martin Kinoti Rutere. The chiefs letter confirms that the two names refer to one and the same person.
 36. Coming to the application for consent of the land control board, the same relates to correction of names to read Martin Kinoti Rutere. Regarding the letter of consent dated March 29, 2017, the same relates to change of name.
 37. It is trite law that the process by which a person changes name is through a deed poll. Other than the defence exhibits, the defendant has not brought any deed poll duly registered in law.
 38. The defendant was unable to tell how the plaintiff has trespassed into and developed his land if at all he has been in occupation for all those years as he alleges. Further, the defendant was unable to explain why he did not evict, issue notice to vacate and or make an effective entry to dispossess the plaintiff of his land.
 39. Regarding whether the defendant was the first registered owner of the land, the defendant was unable to give a satisfactory account of why his last name was left out during the adjudication process only to be discovered at the time of issuance of the title deed. Ordinarily, at the publication of the register, parties are able to detect any errors and apply for correction at that stage. If at all the defendant was actually the recorded owner and diligent at the time, he would have detected the anomaly when P. Exh 12 was published.
 40. The defendant failed to call any evidence to support his defence that he was the true, genuine and the occupier of the suit land with effect from 1990. P Exh 12 has more probative value than the defendants extract of the register. The defendant failed to call any officers from both the land adjudication office and the land registrar's office to support his claim that the error of his names emanated from and were



corrected lawfully by the land registrar under section 79 of the [Land Registration Act](#). For instance, the land registrar would have clarified whether there was full compliance with the conditions set out under section 79 of the Act, including the publication of the mandatory statutory notice of ninety days before any rectification could occur. Under section 79 Sub-rule 2, all affected parties including PW1, 2 and 3 ought to have been summoned by the land registrar before the rectification of the register. This evidence was lacking. Section 80 of the [Land Registration Act](#) grants the court powers to determine material entries affecting proprietorship.

41. To my mind, the inclusion of the surname of the defendant was a material entry affecting the title to the suit land which apparently the land registrar appears to have handled without compliance to the law. Article 40 of the [Constitution](#) provides that the right to land must be upheld and any material change can only occur with notice to the registered owner.
42. PW1, 2 and 3 have testified that they were never informed and or involved in the processes leading to the rectification of the title to the suit land. See [Republic v Chief Land Registrar & anor ex parte Yosabia Kerubo Manyura](#) (2018) eKLR.
43. The defendant has admitted both in his replying affidavit and documents that he is the one who presented his exhibits to the land registrar to have the title deed rectified and or changed. In my view this was done unprocedurally and without following the law. The law abhors a party from benefiting from an illegality particularly where it is the same party who has orchestrated the illegality.
44. As regards the assertion that the plaintiff obtained the suit land wrongfully, the defendant failed to take third party proceedings against PW2 and PW3 if at all they allegedly and illegally sold his land and put the plaintiff into possession and occupation.
45. PW2 and PW3's evidence was consistent, credible and genuine on the circumstances of registration to PW3, sale, transfer and taking of possession by the plaintiff. In [Mary Wangui Muthoga v Samuel Ndungu Chege & anor](#) (2016), the court held that the land was mistakenly registered and proceeded to cancel the title deed.
46. Given the foregoing evidence, I find that the plaintiff has proved to the required standards his entitlement to the suit land by virtue of adverse possession as well as against the defendant whose title deed was also unprocedurally and irregularly issued after passing himself as PW3. The same is cancelled and the land registrar ordered to register the plaintiff as the owner.
47. Costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS

THIS 14TH DAY OF DECEMBER, 2022

In presence of:

C/A: Kananu

Mukamburu for plaintiff

Ondari for defendant

HON. C.K. NZILI

ELC JUDGE

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