



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**civ case 467 of 98**

**ISAACK MWANGI & EIGHTEEN OTHERS.....PLAINTIFFS**

**VERSUS**

**DR. RUTH WANJIRU NDUATI & TWO OTHERS .....DEFENDANTS**

**JUDGMENT**

On 16.11.70, L.R. No 5842/2 Karen comprising of 140 acres was conveyed to fourteen persons as tenants in common in equal shares. Mr. Francis Thombe Nyamo and Mr. Person Kariithi Munuhe are among the fourteen co-proprietors in common.

The land was later sub-divided and each of Co-proprietors was shown his own portion but the transfer of the sub divisions was not completed before the death of Peterson Kareiithi Munuhe on 20.9.77. Upon sub division, Francis Thombe Nyamo got two portions namely LR No. 5842/13 – 4.196 HA and L.R, No. 5842/8 of 2.039 HA.

Mr. Peterson Kariithi Munuhe was allocated LR No. 5842/3 and LR No. 5842/4 each comprising of about 5 acres – total 10 acres. The other Coproprietors also got their respective portions but the transfers of the respective portions were not effected. Upon the death of Peterson Kariith Munuhe, his widow Rachael Wachera Kareithi was given a Grant of Letters of Administration on 18.1.83. But Rachiel Wacera Kariithi died on 17.2.91. On 20.8.92, the Grant of Letters of Administration to the estate of Peterson Kariithi Manuhe was given to Dr. Ruth Wanjiru Nduati; Wahu Kariithi and David Munuhe Kariithi. David Munuhe Kariithi has since died leaving Dr Ruth Wanjiru Nduati and Wahu Kariithi as the sole administratrices of the estate of Peterson Kariithi Munuhe.

On 15.3.95, Dr. Ruth Wanjiru Nduati; David Kariithi and Dr Wahu Kareithi lodged a caveat against LR No. 5842/2. That caveat was presented at the land Registry on 16.3.95

As a result of that caveat two suits were filed against the administrators of the estate of Peterson Munuhe Kariithi. The first suit is HCCC NO 467 of 1998 (O.S) It was filed on 27.2.98 by the co-proprietors and subsequent purchasers from some co-proprietors Mr. Francis Thombe Nyamo is one of the plaintiffs in that suit.

The plaintiffs in that suit aver, inter alia, that all the plaintiffs had executed mutual conveyances conveying to each other the respective portions so that each would obtain individual title to his respective portion. The plaintiffs further averred that legal representatives of the estate of late Peterson Munuhe

Kariith had refused to execute mutual conveyances. The relief sought is an order that the caveat be removed and the respondents be ordered to execute the conveyances.

That suit by 19 plaintiffs was filed by the firm of Waruhiu and Muite Advocates. On 18.5.98 Mary Nyaguthii Thagana (18th plaintiff in HCC NO, 467/98 (O.S) filed a similar suit no. 1151/98 (O.S) by error. By an order dated 4.12.98 made in HCCC No. 1151/98 (O.S) that suit was consolidated with HCCC No. 467/98 (O.S) On 16/7/98 the administrators of the estate of Peterson Kariithi Manuhe filed HCCC NO. 1574/98 (O.S) against the thirteen Co-proprietors including Mr. Francis Thombe Nyamo. By that suit the administrators sought an order to compel the Respondents to produce original title (conveyance) of original land LR 5842/2; all documents relating to the sub division of the land and all original documents affecting registration of sub divisions. More importantly, the administrators sought an order that the respondent do execute conveyance of sub divisions parcel nos L.R 5842/3 and L.R 5842/4 in favour of the administrators.

A consent letter dated 1.7.99 was filed in court on 22/7/99 Consent orders in terms of the consent letter dated 1/7/99 were recorded in HCC NO. 467/98 (O.S) on 26.7.99. By that consent order the consolidated suits HCCC No.407/98 (O.S) and HCCC NO, 1151/98 were further consolidated with HCCC NO. 1574/98 (O.S). The consent orders resolved the disputes about the conveyance of the sub divisions except sub divisions LR no 5842/3 and LR No. 5842/4. The disputes in HCCC No 4767/98 (O.S); 1151/98 (O.S) were resolved. The order for production of the documents sought by administrators in HCCC No 1574/98 (O.S) was also given. There was a previously instituted suit HCCC NO. 1664/96 (O.S) filed on 9.7.96 by Francis Thombe Nyamo against the administrators of the estate of Peterson Kareithi Munuhe. In that suit Mr. Francis Thombe Nyamo claims absolute ownership of LR nos 5842/3 and 4 by way of adverse possession and seeks the following orders viz:

1. That L.R no 5842/3 and 4 situate in Karen be registered in the name of Francis Thombe Nyamo who has been in exclusive possession of the same since 1976
2. That Dr, Ruth Wanjiru Nduati; David Munuhe Kareithi and Dr. Wahu Kareithi do execute the conveyance and other documents affecting the transfer of L.R No 5842/3 and 4 to the plaintiff
3. That Dr. Ruth Wanjiru Nduati, David Manuhe Kareithi and Dr. Wahu Kareithi do execute conveyances in favour of plaintiff in respect of to L.R nos 5824/8 and 13 Karen.

The Originating summons is supported by the affidavit of Francis Thombe Nyamo Sworn on 6.6.96. He deposes, inter alia, that

(i) After the sub division of L.R 5842/2, Peterson Munuhe Kareithi was allocated two parcels land comprising 5 acres each being L.R no 5842/3 and 5842/4 measuring a total of 10 acres

ii. That by Agreements in writing dated 12.3.74 and 13.7.76 Peterson Munuhe Kareithi agreed to sell LR No 5842/3 and L.R No. 5842/4 at a consideration of shs 100,000/=

iii. That he paid in full and was put in possession of the two parcels of land in 1976 and that he has been in exclusive possession of the two pieces of land since 1976.

iv. Respondents have refused to sign the necessary conveyances to transfer L.R No. 5842/3, 4, 8, 12, to his name.

The plaintiff in that suit filed a supplementary affidavit on 31.7.97 in which he annexed documents to show that he indeed bought the two pieces of land. One for shs 60,000 and the other for shs 40,000.

On 26.9.2002, an application for consolidation of HCC No 1664/96 (O.S) with the other consolidated suits was filed by advocates for the administrators of the estate of Peterson Munuhe Kareithi. Thereafter, a consent letter dated 7.10.2002 was filed on 18.10.2002 By the consent letter and as ordered on 18.11.2002, HCCC No. 1664 of 1996 (O.S) was consolidated with the consolidated suits and HCCC NO.

467/98 (O.S) was to proceed as one main consolidated suit with M/S Francis Thombo Nyamo as plaintiff and M/S Dr Ruth Nduati and Dr Wahu Kariithi as defendants

On 17.7.2002 a hearing date was taken at the Registry by consent for 30th and 31st October 2002.

On 30.10.2002 Miss Munene applied for adjournment on the ground that Mr Kowade for Mr F. T Nyamo was indisposed.

The application for adjournment was allowed. It was again fixed for hearing for 15th and 16th January, 2003. On 14.1.2003 M/S Mohammed and Muigai Advocates filed a notice of change of Advocates on behalf of F.T. Nyamo. On 15.1.2003

Mr. M.G. Njanja for F.T. Nyamo applied for adjournment for one week on the ground that he got instructions on the previous day and needed time to prepare for the case.

The application for adjournment was vehemently opposed as a delaying tactic. However the court allowed the application for adjournment and stood over the suit to 10.2.2003 for hearing. On 10.2.2003 Mr. M. G. Njanja and Mr. F. T Nyamo did not attend the hearing although court waited for them until 10.45 a.m.

Dr. Ruth Wanjiru Nduati then proceeded with the suit. Dr. Ruth Wanjiru Nduati relied on her supplementary affidavit sworn on 25.11.2002 and filed on the same day Leave to file that affidavit was given on 18.10.2002. Although Mr. F. T. Nyamo was also given leave to file affidavit he did not file any. Dr. ruth Wanjiru Nduati further relies on her affidavit sworn on 9.7.98 to support the originating summons in HCCC NO 1574/98 (O.S). In those two affidavits, she has referred to another suit HCCC NO. 1226/82 filed by her mother Racheal Wacera Kareithi against Francis Thome Nyamo. That record is annexed to these files. That suit was filed on 10.7.82. The claim against F. T. Nyamo in that suit is that he had trespassed on plaintiffs share of LR No. 5842/2 by way of cultivating, grazing cows on it and by erecting structures on the land. Mr F.T. Nyamo filed a defence in that suit on 2.11.82 He pleads in para 4 thus:

“In the further alternative and without prejudice to the foregoing the defendant states that the property in question has not been sub divided and the eleven registered owners have not been issued with individual titles to a portion of the property. The defendant will therefore aver that he was a right of undivided property together with the other registered owners and a suit for trespass against him in respect of the said property or a section of it is not sustainable.”

On 23.8.82, Defendant made an application in that suit for striking out of the suit. That application was supported by the affidavit of defendants advocate Mr. Henry Mukilua Muli deposed in para 7 of that affidavit thus: “That so long as the property remains undivided none of the joint registered owners has the exclusive possession and /or ownership of any part thereof as to entitle to sue one or more of others for trespass”

The application to strike out the suit was dismissed by Simpson C.J. on 28.10.82 The plaint in that suit was subsequently amended. The defendant filed a Defence to Amended plaint and a counter claim. By the counter-claim, defendant claimed to have bought the suit properties from Peterson Munuhe Kariithi in 1974 and 1976. Defendant further averred that he was immediately put into possession and had been exclusive possession of the suit lands since date of the agreement. The reliefs sought by way of counterclaim included order that the administrator of the estate of Peterson Munuhe Kareithi do sign the necessary documents for transfer once the relevant deed plans are issued. On 12.8.83 Platt J (as he then was ) issued an order of injunction in that suit in the following terms:

“Order: On the evidence I will grant the injunction asked for because the land was said to be purchased without Land Control Board consent and because it was said to be purchased after a caveat had been entered on the title. It appears at present that the probabilities are that the deceased was still the owner of the land and that the defendant will probably succeed on the issue of title; the defendant is restrained from trespassing grazing erecting structures cultivating or otherwise interfering with the identifiable portion of

the land LR No. 5842 situated at Karen until the final disposal of the suit or until further orders of the court. The plaintiff will give undertaking as to damages. Damages to be considered later. The present cultivation if any is to be allowed to continue to harvest after which no further cultivation will continue”

It is clear that that suit has not been disposed of. The record shows that plaintiff in that suit wanted a hearing dates on priority basis but defendants advocates said that defendant wanted to appeal against the order of injunction and asked for a hearing date long way off. This surprised Platt J who referred matter to CJ to decide whether or not an early hearing date should be given (see proceedings of 1.9.83).

Although by Defence and counter claim filed on 13.4.82 Mr. F. T. Nyamo was claiming the suit lands as a purchaser he claims the suit lands in HCCC NO. 1664/96 (O.S) through adverse possession.

Dr. Mruth Wanjiru Nduati deposes in the supplementary affidavit filed on 25.10.2002 inter alia as follows Paras:

“16 That the plaintiff claim against the defendants is that he purchased the suit land from the late Peterson Munuhe Kariithi He has however been unable to prove such purchase by way of a valid Land control Board consent authorizing such purchase as was ruled by the court in the No. 1226/82 above mentioned

17 That further plaintiff has claimed for adverse possession of the suit land alleging that he has been enjoying quite possession of the land for over 12 years. That is not so. There is no single day that the plaintiff ever enjoyed a quite possession of the land in dispute.

18 That it is on record before the Hon. Court that by 1982 there has been lodged to this Hon. Court a suit by our late mother challenging the plaintiff herein of any claim he had on the suit lands which suit culminated to the injunction order mentioned here above and by which the plaintiff ceased all developments in the suit land

19 That further as administrators of the late Peterson Munuhe Kareithi we have actively pursued our claim on the suit land as can be testified by the court record here in to this very date

20 That accordingly I am advised by counsel on record which advise I truly believe that the claim by plaintiff that he has adverse possession of the suit land is misplaced because for the entire time, that he claims to have had possession there has been in court active prosecution by ourselves claiming and asserting our ownership of the suit land. There is therefore no room for adverse possession of the suit premises

21 That since the year 1970 we have been utilizing the suit land for purposes of grazing but many a times plaintiff has severally reigned violence on us as a family and the only peaceful way to assert our claim on the suit land is through the court process however long it may take. Hence the proceedings herein.

Mr. F. T. Nyamu did not file a reply to the supplementary affidavit of Dr. Ruth Wanjiru Nduati sworn on 25.10.2002. So the facts stated therein have not been challenged.

I have considered the above factors, Mr Njanja’s submissions and the authorities cited. Mr. Nyamo deposes that he purchased the two parcels of land. In para 5 he deposes that he paid the full consideration and was put in possession in 1976 and that he has been in exclusive possession since then. In para 7 he deposes that the defendants has refused to sign the necessary conveyances.

In para 8 he deposes that he sincerely believes that having been in exclusive possession for over 20 years he is the absolute owner by virtue of adverse possession.

Although plaintiff in HCCC NO. 1664/96(O.S) refers to the fact of sale of the land, he has filed that suit to recover the two parcels of land not because he purchased them but because he is entitled to them by adverse possession That is to say that HCCC NO. 1664/96(O.S) is not a suit for specific performances of the Agreements of sale but a suit to recover the land as an adverse possession Yet it is only in para 8 of

the supporting affidavit that plaintiff refers to claim to the land by adverse possession That one paragraph does not state sufficient facts to support the claim for adverse possession. As plaintiff states in para 5 of that affidavit, he has been in possession by virtue of the sale of the two parcels of land since 1976.

Mr. F. T. Nyamo by his counterclaim in filed on 15.4.83 in HCCC NO. 1226/82 implicitly shows that he was claiming possession of the land as a purchaser. Possession does not become adverse before the end of the period for which permission to occupy has been given. Clearly Mr. F. T. Nyamo was in possession of the two parcels of land since 1976 with permission of the owner Peterson Munuhe Kariuki as a purchaser. He was a purchaser in possession awaiting completion of the agreement of sale with the consent of the owner.

The consent of the owner ceased on a bout 22.9.77 when the owner died. Thereafter Mr. Nyamo could only have occupied the land either as an adverse possessor or as a purchaser. That he filed a counter claim in HCCC NO. 1226/82 on 13/4/83 to recover the land from the administrator of the estate of Peterson Munuhe Kareithi shows that, at least up to 1983, Mr. Nyamo was occupying the land as a purchaser and not as an adverse possessor Mr. Nyamo does not show when he ceased to occupy the two pieces of land as a purchaser and when he started occupying the two parcels of land as an adverse possessor. But by 10.7.82 when the administrator of the estate of Peterson Munuhe Kareithi filed HCCC NO. 1226/82 to recover possession of land Mr. F. T. Nyamo has been in possession for 6-8 years And even by 12/8/83 when the order of injunction was issued against Mr. Nyamo, he had not occupied the land for 12 years from 1976. So, Mr Nyamo had not by 10.7.82 or by 12/8/83 occupied the land for the required 12 years whether time is computed from 1974 or from 1976. Secondly he has not shown that he in any case in possession as an adverse possessor as opposed to a purchaser in possession pending completion of the sale.

Moreover an order of injunction was granted against Mr. Nyamo on 12/8/83. Any occupation of the land from that date would be in contravention of the law as the order of injunction legally terminated any claim for possession that he had.

From the foregoing it is apparent that Mr. Nyamo has not had adverse possession of the two pieces of land either by 10.7.82 when suit to recover possession was filed or by 12.8.83 when the order of injunction terminated his possession.

Lastly, Mr. Nyamo's claim to the land by adverse possession is inconsistent with para 4 of his Defence filed on 2.11.82 in HCCC NO. 1226/82 and also inconsistency with para 7 of the affidavit of his advocate Mr. Muli sworn on 7.10.82 because Mr. Nyamo was asserting that because he owned the land with 14 others as tenants in common in equal shares and since the land was not partitioned, any co-proprietor had a right of ownership of any portion of undivided property and that none of co-owners had the exclusive possession of any part of that property. That is a statement of the legal characteristic of a co-proprietorship as tenant in common in equal shares.

It shows that Nyamo had a right to occupy the two parcels as of right arising from co-proprietorship and therefore the question of adverse possession did not arise.

I am satisfied from the foregoing that Dr. Ruth Wanjiru Nduati has proved on balance of probability that the claim to land by adverse possession by Mr. Nyamo is without merit and is frivolous.

I am further satisfied that she has proved on a balance of probabilities that two pieces of land still belong to the estate of her deceased father. Consequently, I dismiss Mr. Nyamo's suit HCCC NO. 1664/96 with costs.

I allow the Administrators suit HCCC No. 1574/98 (O.S) against Francis Thombe Nyamo and grant prayer 2 of the originating summons with costs.

**E. M. Githinji**

**JUDGE**

**18.3.2003**

**Mr. Njanja present**

**Mr. Mungai for F. T. Nyamu present**

**Mr. Mungai**

**I apply for stay of orders to enable me make formal application for stay – order 41 Rule 4(5) Civil Procedure Rules.**

**Mr. Njanja**

**I strongly oppose the application**

**E. M. Githinji**

**JUDGE**

**Order: I grant stay of execution for 7 days to enable plaintiff to file a formal application for stay of execution.**

**E. M. Githinji**

**JUDGE**

**Mr. Njanja**

**I want to apply informally for some consequential orders.**

**E. M. Githinji**

**JUDGE**

**Order: As it is 4p.m. and as I have dealt with applications listed for hearing this afternoon, matter stood over to 27.3.2003 for making of the application. Consequential orders.**

**E. M. Githinji**

**JUDGE**