



**Mutiga v Mwilaria & another (Environmental and Land Originating Summons  
E010 of 2021) [2024] KEELC 6440 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6440 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E010 OF 2021  
CK YANO, J  
OCTOBER 3, 2024**

**BETWEEN**

**SALESIO MURIUKI MUTIGA ..... PLAINTIFF**

**AND**

**JOSEPHAT DAVID MWILARIA ..... 1<sup>ST</sup> RESPONDENT**

**STEPHEN MUNGATHIA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By an Originating Summons dated 18<sup>th</sup> January, 2021, the plaintiff herein claimed to have become entitled to the whole of those parcels of land known as LR No. URINGU II/2373 and 49 by way of adverse possession.
2. In response to the originating summons, the 1<sup>st</sup> defendant filed a replying affidavit dated 12<sup>th</sup> July, 2022 and a counterclaim of even date wherein he denied the plaintiff's claim and prayed for its dismissal. The 1<sup>st</sup> defendant (plaintiff in the counterclaim) prayed for judgment against the plaintiff (defendant) in the counterclaim) for orderS of eviction from the suit land, permanent injunction, costs and interest.
3. Pursuant to the provisions of Order 25 Rule 1 of the *Civil Procedure Rules*, the plaintiff filed a notice of withdrawal of suit dated 30<sup>th</sup> August 2023 seeking to withdraw the suit against the defendants wholly with no order as to costs. On 26<sup>th</sup> October, 2023 the plaintiff's claim was marked as withdrawn with costs to the defendants. Thereafter, the 1<sup>st</sup> defendant proceeded and prosecuted his counterclaim. This judgment is therefore in respect to the 1<sup>st</sup> defendant's counterclaim.



## The 1<sup>st</sup> Defendant's Case

4. The 1<sup>st</sup> defendant (plaintiff in the counterclaim) averred that he is the registered owner of LR. No. Tigania/west/uringu II/2373 and that the plaintiff (defendant in the counter claim) has no legal interest or right over the same.
5. At the hearing, the 1<sup>st</sup> defendant testified as D.W 1 and adopted his statement dated 12<sup>th</sup> July, 2022 as his evidence in chief. He produced the following documents as Exhibits 1-14; A certificate of death for the 2<sup>nd</sup> defendant, Copy of title deed for LR. NO. TIGANIA WEST/URINGU II/2373, judgment in Land Committee case of 9<sup>th</sup> December, 1976, proceedings in Arbitration Board case No. 5 of 1980 dated 26<sup>th</sup> February, 1981, proceedings dated 25<sup>th</sup> June 1991, investigation proceedings dated 5<sup>th</sup> May, 1992, Proceedings and decree in MERU CMCC NO. 400 of 1994, an order issued in MERU J.R APPL. NO. 70 of 2010, a letter from Land Adjudication and Settlement Department dated 16<sup>th</sup> September, 2020, an order issued in MERU ELC NO. 203 of 2012, an application dated 20<sup>th</sup> September, 2017, an amended defence in MERU ELC NO. 203 of 2012 and an order dismissing Tigania ELC NO. 33 /18 (Formerly Meru ELC no. 203 OF 2012). He was then cross examined and re-examined.
6. Josphat David Mwilaria testified that he is the first registered owner of the suit land which had clearly delineated boundaries. That he got registered on 29<sup>th</sup> February, 2016. He stated that he was gifted the land in 1982 by his father, Zakayo M'Marimba (now deceased), who obtained it from their Bothanja clan in the 1920's. The 1<sup>st</sup> defendant further stated that his father, and later himself cultivated the said land and are the ones who planted trees, fruits, miraa and bananas which the plaintiff alleged to be his.
7. The 1<sup>st</sup> defendant stated that their clan has had several disputes with clan-mates and relatives of the plaintiff over the parent parcel of land of the said Bothanja clan out of which the suit land was hived. That in those several disputes, the plaintiff and his clan-mates lost. These include Nthenge oath (he-goat) of 2<sup>nd</sup> September, 1959, land committee case of 9<sup>th</sup> December, 1976, Arbitration Board case no 5 of 1980, investigations ordered by the Director of Land and Settlement in 1991 and 1992, Meru CMCC No. 400 of 1994, Tigania PMC ELC no. 33 OF 2018 (formerly Meru ELC case No. 203 of 2012) and A/R objections of 18<sup>th</sup> August, 2020. That the decision in favour of the 1<sup>st</sup> defendant stands to date.
8. The 1<sup>st</sup> defendant stated that the plaintiff's father and kin sued the 1<sup>st</sup> defendant and his kin vide Meru ELC case No. 203 of 2012 in which the 1<sup>st</sup> defendant and his kin filed an application and obtained an injunction which restrained the plaintiff from burying his late father in the said land parcel No. 2373 and another parcel of land. That the plaintiff and his kin started occupying the 1<sup>st</sup> defendant's land No. 2373 in September, 2017 with the assistance of his sister by the name Joyce Mwarocia Mutiga and other relatives who were the plaintiffs in Meru ELC case no. 203 of 2012. That they brought an old timber house thereon and began constructing a permanent house. That on 2<sup>nd</sup> November 2017, the court ordered maintenance of status quo by not building any other or further houses on the said parcels of land. That the said Meru ELC case No. 203 of 2012 was transferred to Tigania Law courts where it was registered as Tigania PMC ELC NO. 33 of 2018 where after the 1<sup>st</sup> defendant and others moved the trial court and the case was dismissed with costs.
9. The 1<sup>st</sup> defendant was cross examined by Ms. Mugo, learned counsel for the plaintiff. He stated that he was born in 1948 and is the registered owner of the suit property. That he got registered in the year 2016.



10. The 1<sup>st</sup> defendant stated that he was given the suit land by his father in 1982 and before he was given, his father was cultivating it and he continued using it up to date. That the plaintiff entered part of the land in 2017.
11. The 1<sup>st</sup> defendant pointed out that his father got the land from the clan around the year 1920. He stated that he had documents such as the Nthenge oath taken in 1959. That during adjudication, his father gave the land to the adjudication in his name. He denied that the land was given to the plaintiff's father. The 1<sup>st</sup> defendant further testified that there are fruit trees, gravellia trees and arrow roots in the swampy area of the land.
12. The 1<sup>st</sup> defendant stated that he is in occupation and denied that the plaintiff was using the land. That in all the objections, his father won. The 1<sup>st</sup> defendant further stated that after all the objections were concluded, he was registered as the owner of the land.
13. The 1<sup>st</sup> defendant stated that there were documents given after the objection and which he had. The 1<sup>st</sup> defendant further stated that he has tried to evict the plaintiff severally, even through the chief, although he did not have the documents in court to support that.
14. The 1<sup>st</sup> defendant was also re-examined by Mr. Carpleters Mbaabu, learned counsel for the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant stated that the plaintiff entered the land in September, 2017.
15. The 1<sup>st</sup> defendant stated that from 1982, his father and him were utilizing the land. He further reiterated that he had shown that he has trees, fruits, miraa and bananas on the land. That exhibits 3 onwards are proceedings of 1976 and were in favour of his father and that there is no case pending to challenge those proceedings.
16. The 1<sup>st</sup> defendant stated that the last case is the instant one wherein the plaintiff withdrew his claim and has not filed any other case. It was the evidence of the 1<sup>st</sup> defendant that he obtained his title in February, 2016 which is marked D exh. 2. That the process of objections and appeals to the Minister were concluded in 1990's and nothing stopped him from obtaining his title.
17. The 1<sup>st</sup> defendant filed submissions dated 23<sup>rd</sup> April 2024 through the firm of M/S Carlpeters Mbaabu & Co. Advocates wherein they gave a background of the case and identified three issues for determination. The first issue is whether or not the 1<sup>st</sup> defendant (plaintiff in the counterclaim) is the registered owner of the suit land to wit L.R No. Tigania West/Uringu II/2373.
18. The 1<sup>st</sup> defendant submitted that he produced in evidence a copy of his title deed for the suit land dated 29<sup>th</sup> February, 2016 as D Exh. 2, a judgment, proceedings, a decree, orders and other documents in several cases wherein the suit land was the subject matter and which were determined in favour of the 1<sup>st</sup> defendant's kin as against the plaintiff's kin as D Exh 3-14 and a letter dated 16<sup>th</sup> September, 2020 marked D Exh. 10 confirming the 1<sup>st</sup> defendant's ownership of the suit land at the adjudication stage.
19. The 1<sup>st</sup> defendant further submitted that he is the first registered owner of suit land measuring about 8.19 acres having been gifted the same by his late father one Zakayo M'Marimba in 1982 and who had obtained it from their Bothanja clan in the 1920's and where they have been cultivating and had planted trees, fruits, miraa and bananas thereon.
20. It was submitted on behalf of the 1<sup>st</sup> defendant that the evidence on record confirms the 1<sup>st</sup> defendant and his kin have been litigating with the plaintiff over the suit land since the year 1959 and that the 1<sup>st</sup> defendant and his kin always emerged the successful litigants.



21. It is the 1<sup>st</sup> defendant's submissions that in his cross examination, his evidence of acquisition and ownership of the suit land was not shaken at all. The 1<sup>st</sup> defendant implored the court to find on a balance of probabilities that he had proved that he is the registered owner/proprietor of the suit land in view of his title deed dated 29<sup>th</sup> December, 2016 marked D Exh 2 and the letter dated 16<sup>th</sup> September 2020 marked D.Exh 10 which have never been challenged to date. The 1<sup>st</sup> defendant's counsel relied on Section 24, 25 and 26 of the [Land Registration Act](#) No. 3 of 2012.
22. The 1<sup>st</sup> defendant further submitted that the plaintiff had not challenged the 1<sup>st</sup> defendant's title deed over the suit land on any of the afore mentioned grounds or any other whatsoever. The 1<sup>st</sup> defendant's counsel relied on the case of [Josephine Chepkurgat Ruto & another v William K. Meli](#) (2013) eKLR and [John Monyancha Ngong'e v Marcela Kerubo Kebabe](#) (2019) eKLR.
23. On the 2<sup>nd</sup> issue on whether or not he is entitled to orders of eviction and a permanent injunction sought in the counterclaim dated 12<sup>th</sup> July, 2022, the 1<sup>st</sup> defendant relied on Section 24, 25 and 26 of the [Land Registration Act](#).
24. The 1<sup>st</sup> defendant further submitted that the plaintiff and his family illegally entered into and started occupying the suit land sometime in September, 2017.
25. It is the 1<sup>st</sup> defendant's submission that the unchallenged evidence in the counterclaim demonstrate and establish a balance of probabilities. That the 1<sup>st</sup> defendant is the registered owner of the suit land and therefore the plaintiff is a trespasser and squatter thereon without any legal justification.
26. The 1<sup>st</sup> defendant urged the court to grant him the prayers sought in the counter claim with costs and interest thereon. The 1<sup>st</sup> defendant's counsel cited Section 26 and 27 of the [Civil Procedure Act](#).

### **Analysis And Determination**

27. This court has carefully considered the pleadings, the evidence adduced and the submissions filed by the 1<sup>st</sup> defendant to buttress his assertions. I have also considered the legal authorities proffered by learned counsel for the 1<sup>st</sup> defendant. I do note that the plaintiff withdrew his suit against the defendants wholly. What proceeded for hearing was the 1<sup>st</sup> defendant's counterclaim which was undefended since the plaintiff's defence to the counterclaim was struck out. The court identifies the following issues for determination;-
  - i. Whether the 1<sup>st</sup> defendant is entitled to the reliefs sought in the counterclaim.
  - ii. Who bears the costs.
28. In the counterclaim, the 1<sup>st</sup> defendant's claim against the plaintiff herein is for orders of eviction, permanent injunction as well as costs and interest. Whereas the 1<sup>st</sup> defendant's counterclaim is not defended, it is still incumbent upon the 1<sup>st</sup> defendant to prove his claim to the required standards, that is on a balance of probabilities.
29. In this case, the 1<sup>st</sup> defendant testified that he is the first registered owner of the suit land which has clearly delineated boundary. He stated that he got registered on 29<sup>th</sup> February, 2016, but was gifted the land by his father, Zakayo M'Marimba (deceased) in 1982. That his father obtained the land from their Bothanja clan in the 1920's. The 1<sup>st</sup> defendant testified that they have been cultivating the said land and had planted a variety of crops and trees which the plaintiff wrongly claimed to be his.
30. I have considered the evidence on record. From the documentary evidence, and specifically the copy of the title deed for land parcel No. Tigania West/Uringu II/2373 which was produced as exhibit 10, it



is not in dispute that the 1<sup>st</sup> defendant is the registered owner of the said land having been registered as proprietor of the land on 29<sup>th</sup> February, 2016. The material on record also confirm that previously, there were several disputes between the parties and/or their relatives and all the said disputes were decided in favour of the 1<sup>st</sup> defendant herein. There was no evidence adduced to indicate that those decisions were set aside, and therefore the same are still in force.

31. The law is very clear on the position of a holder of a title to land. Section 24 (a) of the [Land Registration Act](#) provides for the interest conferred by registration and states as follows-;

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto.”

32. Section 25 of the said Act provides inter alia, that the rights of a proprietor shall not be liable to be defeated, except as provided in the Act and shall be held by the proprietor free from all other interests and claims whatsoever.

33. Further, Section 26(1) of the same Act provides as follows-;

“The certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer shall be taken by all courts as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except-;

- a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

34. In this case, the 1<sup>st</sup> defendant has proved that he is indeed the registered owner of the suit land and therefore the rightful owner having been gifted by his late father. The 1<sup>st</sup> defendant’s evidence is that the plaintiff herein had trespassed onto the suit land and had refused to vacate therefrom. The only way that the plaintiff could challenge the 1<sup>st</sup> defendant’s title is as provided under Section 26 (1) of the [Land Registration Act](#). In this case, the 1<sup>st</sup> defendant’s title has not been challenged by the plaintiff. Indeed, the plaintiff withdrew his claim for adverse possession over the suit land. Having withdrawn his claim for adverse possession, it is my opinion that the plaintiff is a trespasser on the 1<sup>st</sup> defendant’s land and has no business remaining on the land that legally belongs to the 1<sup>st</sup> defendant. It is my finding that the 1<sup>st</sup> defendant has proved his counterclaim on a balance of probabilities, and as the registered owner of the land, he is entitled to all the rights, interests and privileges that pertain to the land. The 1<sup>st</sup> defendant is therefore entitled to the prayers sought in the counterclaim.

35. Consequently, this court enters judgment for the 1<sup>st</sup> defendant against the plaintiff as follows-;

- a. The plaintiff is ordered to vacate from the 1<sup>st</sup> defendant’s parcel of land LR No. Tigania West/ Uringu II/2373 within sixty (60) days from the date hereof, failure to which the 1<sup>st</sup> defendant be at liberty to evict him therefrom.
- b. A permanent injunction be and is hereby issued restraining the plaintiff, his family members, relatives, representatives, employees, servants, agents and anybody else acting at his behest from entering into, trespassing into, cultivating, farming or in any other way whatsoever utilizing L.R No. Tigania West/Uringu II /2373.



- c. The Officer Commanding Tigania Police station (O.C.S) be and is hereby ordered to offer security and supervision in carrying out the exercise and to maintain law and order
- d. The 1<sup>st</sup> defendant is awarded costs of the counterclaim.

36. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 3<sup>RD</sup> DAY OF OCTOBER, 2024**

In the presence of;

Court Assistant – Tupet

Mawira holding brief for Carlpeters for 1<sup>st</sup> defendant

C.K YANO

ELC JUDGE

