



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC SUIT NO. 32 OF 2017

JOYCE MUSYAWA KILUNGU.....PLAINTIFF

VERSUS

EVASTUS MBUVI KILUNGU..... DEFENDANT

JUDGEMENT

1. By her plaint dated 13th March, 2017 and filed in court on even date, the Plaintiff prays for judgement against the Defendant for;

(a) An order of eviction against the Defendant.

(b) Costs of this suit.

2. The Plaintiff amended her plaint on the 11th July, 2018 and filed the same on the 18th July, 2018 where she added two more prayers namely;

(c) A declaration that Land Parcel NO. Nzai/Nzi/265 belongs solely to the Plaintiff – Joyce Musyawa Kilungu.

(d) A permanent injunction restraining the Defendant by himself, his servants and/or agents from trespassing, cultivating, planting, cutting down trees or dealing in any way with Land Parcel No. NZAUI/NZIU/265

3. Her claim is denied by the Defendant in his statement of defence and counterclaim dated 28th May, 2018 and filed in court on 30th May, 2018.

4. On the 11th June, 2018, the Plaintiff filed her reply to the defence and counterclaim, the same being dated 11th June, 2018.

5. The Plaintiff's case was that she is the registered proprietor of all that parcel of land known as LR.Nzai/Nzi/265. That the land initially belonged to her deceased parents. She said that when her father died, her mother filed a succession cause in Machakos upon which she had the land parcel registered in her names. That when her mother later died, she filed for probate and administration in respect of her mother's estate and hence her being registered as the proprietor of the said parcel No.Nzai/Nzi/265.

6. The Plaintiff said that the Defendant has taken over her land and proceeded to cultivate on it.

7. It was also the Plaintiff's evidence that one Masika Itumange who had bought land from her father filed a suit against her mother. That her mother won the suit filed against her by Itumange.

8. Regarding the Defendant, the Plaintiff told the court that the Defendant was charged in a criminal case which she withdrew upon request by him. The Plaintiff produced the title deed No.Nzai/Nzi/265 as P.Exhibit No.1. She went on to produce documents numbers 2 to 6 in her list of documents as P.Exhibit Nos.1 to 6 respectively.

9. The Plaintiff's evidence in cross-examination was that the Defendant is her step brother. She went on to say that her father had two wives. The first wife was known as Nduku Kilungu while the second was Nzisiva Kilungu. Nduku is her mother while the Defendant's mother is Nzisiva. She said that her father owned land parcels No.Nzai/Nzi/208 and Nzai/Nzi/265. That she and the Defendant have built on land parcel No.Nzai/Nzi/208. She said that she was aware that Nzai/Nzi/265 was registered in her father's name in the year 1974. That her father's wives sub divided land parcel No.Nzai/Nzi/208 into two shares and that she herself was unwilling to subdivide Nzai/Nzi/265 with the Defendant. She said that she was the one who cultivates on the said land. That the Defendant trespassed into the land in 1989. She said that she does not know if the mango trees that the Defendant planted on the said land had been cut down. Regarding the criminal case, the Plaintiff told the court that she withdrew it after she fell sick and also due to the fact that she did not want the

Defendant to be found guilty. She said that it was not true to say that the Defendant was the one who filed the case to evict another person from the land. She reiterated that although the land belonged to her father, the latter bequeathed the land to her mother.

10. Her evidence in re-examination was that she acquired the land through the legal process. She said that she does not know the person who cut down mango trees said to belong to the Defendant.

11. The Defendants case was that land parcel Nos.Nzau/Nzi/208 and 265 were in his father's name at the time of his death. He too told the court that his late father had two wives. According to him, the Plaintiff's mother conspired to have land parcel No.Nzau/Nzi/265 registered in her name. He said that as a family, they resolved to subdivide his father's parcels of land. That land parcel No.Nzau/Nzi/208 was subdivided equally between his father's wife's Nduku and Nzisiva. He revealed that they could not subdivide Nzau/Nzi/265 since one Masika Itumange laid a claim that he had bought it. According to him, Itumange filed a suit against him, his mother as well as his brother, Musyoki Kilungu in Makueni Court. That Itumange lost the suit and they were ordered to refund Kshs. 5,000/= to Itumange. That in 1982, her step sister Joyce Musyiawa (the Plaintiff herein) filed a succession cause without notifying the rest of the family. His prayer is that the title deed issued to her be annulled as it was obtained illegally. According to him, he took possession of Nzau/Nzi/265 in 1998. That he planted mango and orange trees until when the Plaintiff had him charged for trespass. He produced a copy of green card for land parcel No.Nzau/Nzi/265, certified proceedings in Makueni Criminal case No.671 of 2016 and photographs showing the development done on the land as D.Exhibit Nos.1 to 3 respectively. The three exhibits are in his list of documents dated 02nd October, 2018 and filed in court on 08th October, 2018.

12. It was also the Defendant's evidence that Nduku's children and those of Nzisiva reside in land parcel No.Nzau/Nzi/265 while the Plaintiff's son-in-law resides in Nzau/Nzi/265.

13. The Defendant denied having ever trespassed into the suitland as it belonged to his father.

14. The Defendant's evidence in cross-examination was that the green card (D.Exhibit No.1) that he produced shows that Kilungu Nzingila was registered as the proprietor of land parcel No.Nzau/Nzi/265 on 31st August, 1974. He said that it is not true that the Plaintiff's mother tried to notify his mother so that they could jointly file for probate and administration in succession cause No.34/82. He admitted that his mother did not file his objection in the said succession cause. His reason for his mother's failure to file an objection was that she was not aware of the cause. He said that neither he nor his mother filed an application for revocation of the grant. He denied that the Plaintiff filed her succession cause in the year 2008. He further said that Joyce did not try to involve him. He said that he did not object to when the Plaintiff filed the succession cause. According to him although his father had two (2) parcels of land, namely Nzau/Nzi/208 and Nzau/Nzi/265, only the former was sub divided amongst the family while the latter was not. He reiterated that Itumange sued him, his mother and brother. He further said that there was no agreement between himself and the Plaintiff when the latter withdrew the charge in criminal case No.671/16 nor did he object to its withdrawal.

15. In his written submissions, the Plaintiff's Counsel framed three issues for determination. These were: -

- 1) Whether the Plaintiffs ownership of title was obtained fraudulently as alleged by the Defendant.**
- 2) Whether the Defendant has any claim under Adverse Possession as alleged in his Counter-claim.**
- 3) Which party has proved their case and what orders are they entitled to.**

16. On the other hand, the Defendant's Counsel framed five (5) issues for determination namely: -

- a) Whether the Plaintiff legally acquired Land Parcel Nzau/Nzi/265?**
- b) Whether the Defendant trespassed on the Plaintiffs Land?**
- c) Whether the Defendant is entitled to a share of Land Parcel Nzau/Nzi/265?**
- d) What remedies are available to the parties herein?**
- e) What orders are as to costs.**

17. In my judgement, I will address the issues as framed by the Counsel on record for the parties together.

18. On whether the Plaintiff's ownership of the title to the suit property was obtained fraudulently and/or legally acquired, the Plaintiff's Counsel submitted that it is not in dispute that land parcel No.Nzau/Nzi/265 was originally registered in the name of Kilungu Nzingila, the father of the Plaintiff and the Defendant herein. The Counsel submitted that the Plaintiff contends that their father bequeathed the suit land to her mother, Nduku Kilungu Muunga. That upon the demise of their father, Nduku Kilungu petitioned for letters of administration vide Machakos High Court Succession Cause No.34 of 1982 whereupon she was registered as its owner through transmission. That when Nduku Kilungu passed away, the Plaintiff equally petitioned for letters of administration intestate vide Machakos High Court Succession Cause No.819 of 2008 and she was registered as the owner of the suitland through a similar process to that of her mother.

19. The Counsel pointed out that Nduku Kilungu tried to persuade the Defendant and his mother to obtain letters of administration but they did not take heed. The Counsel submitted that in both instances, neither the Plaintiff nor his mother ever made any application for revocation of the respective grants or the cancellation of the title deeds. The Counsel added that the Defendant cannot be heard to say that he did not

object nor apply for revocation/annulment of the said grants since such matters are published in the Kenya Gazette and besides that, ignorance of the law is no defence.

20. It was also the Counsels submissions that the Defendant's particulars of fraud are bare and absolutely insufficient to support the allegation of fraud. The Counsel pointed out that in civil matters, allegations of fraud are treated more seriously than other allegations and cited **Section 107(1) and (2) of the Evidence Act** which requires who alleges to prove their allegations. The Counsel further cited the case of **Sophie Wanjiku John vs. Jane Mwhaki Kimani [2013] eKLR** where Ougo J. opined thus: -

“The Defendant has also failed to prove that the Plaintiff is holding an illegal title as claimed. Fraud must be pleaded and strictly proved, the burden being heavier than on a balance of Probabilities generally applied in civil matters. When it is pleaded it must be sufficiently proved by the party who does so. The Defendant has failed to prove that the ownership of title was procured through fraudulent means as stated in paragraph 11 of her emended Defence. There was no evidence of fraud adduced.”

21. On the other hand, the Counsel for the Defendant submitted that land parcel No.Nzau/Nziu/208 was shared equally between the two families of the late Kilungu Nzingila for he had two wives. The Counsel added that the Plaintiff and her family acquired land parcel No.Nzau/Nziu/265 without taking into consideration the second family of their father.

22. On whether Defendant has any claim under adverse possession as he has averred in his counterclaim and/or whether he is entitled to a share of land parcel No.Nzau/Nziu/265, the Plaintiff's Counsel submitted that even though the Defendant claims to have been in occupation of the suit property since 1998, the Plaintiff acquired ownership of the same in the year 2009 when she was registered as the owner. The Counsel correctly submitted that the period of adverse possession runs from the year 2009 and hence the 12 year time period has not accrued. The Counsel cited **Section 7 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya**. The aforementioned section provides as follows: -

Actions to recover land

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right accrued to him, or if it first accrued to some person through whom he claims to that person.”

It was also the Plaintiff's Counsel's submissions that the Defendant's counterclaim is not accompanied by a verifying affidavit which is a mandatory provision under **Order 7 Rule 5(a)** of the Civil Procedure Rules. The Counsel cited the case of **Mbira v Gachuhi [2002] 1 EA 138** where Kuloba J, held:

“Where there are two persons on a piece of land, one of whom was the registered proprietor, and even asserted that the land was theirs and did some act in assertion of that right, then the question was which of those two was in actual possession, the person with the title was in actual possession and the other was a trespasser.”

The Plaintiff's Counsel further cited the case of **Sophie Wanjiku John vs. Jane Mwhaki Kimani [2013] eKLR** where J. G Kemei J held thus:

“In my view, the defendant's claim against the Plaintiff Sophie Wanjiku John on adverse possession in law cannot be sustained. The Defendant has failed to prove that she has been on the suit land nec vi, nec clam, nec precario. She was on the said land on the permission of her mother. The Defendant's claim of adverse possession has not been proved. Her evidence that the land was held in trust for her by her mother too cannot stand as she failed to prove she was a beneficiary therefore her Counter-Claim fails and is dismissed with Costs.”

23. The Counsel for the Defendant submitted that even though the particulars of trespass have been pleaded in the plaint, the Plaintiff did not adduce any evidence to show that the Defendant is a trespasser. The Counsel opined that the Plaintiff had not discharged the burden of proof in as far as the averment of trespass is concerned.

24. It was also the Defendant's Counsel's submission that the Plaintiff holds the suit land in trust for the Defendant and other beneficiaries. The Counsel went on to cite the case of **Charles K. Kandie vs. Mary Kimoi Sang [2017] eKLR** where the Court of Appeal defined what constitutes a trust.

25. Regarding the issue of which party had proved their case and the orders they are entitled to, the Plaintiff's Counsel cited Sections 24 and 26 of the Land Registration Act which vests a person who has absolute ownership together with all rights and privileges belonging or appurtenant thereto. In addition, the Counsel cited **Article 40 of the Constitution** which protects the right to own property.

26. The Counsel urged the court to make a finding in favour of the Plaintiff. But according to the Defendant's Counsel, the sum total of the evidence on record is that the suitland is family property which ought to benefit all the family members.

27. From the evidence on record, my finding is that there is no doubt that land parcel No.Nzau/Nziu/265 is registered in the name of the Plaintiff through transmission. Both parties are agreed that initially the land was registered in the name of their father, Kilungu Nzungila before it was registered in the name of the Plaintiff's mother, Nduku through transmission. Upon the death of Nduku, the suitland was registered in the name of the Plaintiff through the same process. It is also clear that on both occasions of registration by transmission, neither the Defendant nor the other family members raised objections and/or applied for revocation of letters of administration intestate that were issued to the Plaintiff's mother as well as to the Plaintiff. In failing to challenge petitions by the Plaintiff's mother as well as the Plaintiff, the Defendant was indolent. If the Plaintiff obtained the grant without notifying other members of the family as the Defendant has averred in his defence and counterclaim, those would have been good grounds to raise in an application for revocation and/or annulment of the grant. I will

say no more on this issue suffice it to say that the Plaintiff's title cannot be challenged on this ground before this court.

28. Secondly, in the amended plaint, the Plaintiff has averred that the Defendant has trespassed onto land parcel Nzai/Nzi/265. As was correctly submitted by the Defendant's Counsel, the Plaintiff did not lead any evidence to show when this occurred save for her evidence in cross-examination where she admitted that the Defendant's crops were destroyed even though she feigned ignorance as to the person(s) who caused the destruction. I will, therefore, hold that the Defendant has been in occupation of the suitland since 1998 as he told the court. The Defendant produced photographs (D.Exhibit No.3) which show mature mango trees. Even though he has pleaded that he be declared to own 2 acres by virtue of adverse possession, time began running from 15th December, 2009 when the Plaintiff was registered as the proprietor. It stopped running on the 29th November, 2017 when this suit was filed in court. The difference between 2017 and 2009 is 8 years. 12 years have not accrued in terms of Section 7 of the Limitation of Actions Act chapter, 22 of the Laws of Kenya.

29. As for the counterclaim, it is clear that the same is not accompanied by a verifying affidavit as is required under Order 7 Rule 5 of the Civil Procedures. Though Rule 5 is couched in mandatory terms and in my view the rule is procedural and not statutory. It also my view that the procedural lapse can be cured as is provided under Article 159(2) (d) of the Constitution which requires that justice shall be administered without undue regard to procedural technicalities.

30. As observed earlier on in this judgement, land parcels Nos.Nzai/Nzi/208 and Nzai/Nzi/265 belonged to Kilungu Nzingila who is the father of the Plaintiff and the Defendant herein. The former parcel of land was subdivided amongst the two wives of Kilungu Nzingila leaving the latter unsubdivided. In my view both parcels of land are family land. The registration of the Plaintiff's mother as well as the Plaintiff as the proprietors of land parcel No.Nzai/Nzi/265 did not extinguish customary trust as equity would have demanded that it also be shared equally between all the family members of Kilungu Nzingila. Article 10(2)(b) of the Constitution provides for equity and in my view, it is safe to hold that Nzai/Nzi/265 being family land, it ought to be shared equally amongst the two households of Kilungu Nzingila just like Nzai/Nzi/208. To that extent, the Defendant's defence partially succeeds. The title deed that was issued to the Plaintiff in respect of Nzai/Nzi/265 ought to be cancelled. The upshot of the foregoing is that the Plaintiff has not satisfied this court that she has a cause of action against the Defendant. I hereby proceed to dismiss it with costs to the Defendant. And in the same vein, I hereby proceed to enter judgment for the Defendant and against the Plaintiff in terms of prayers (i), (iii) and (iv) of the counterclaim.

Signed, dated and delivered at Makeni this 10th day of July, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Kisongo for the Plaintiff

Mr. Muthiani for the Defendant

Ms. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

10/07/2019.