



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**CHUKA ELC SUIT NO. 1 OF 2019 (OS)**

**VERSUS**

**ZIPPORAH KARIGU ALIAS KARIGU M'MUGAMBI NGITI.....1<sup>ST</sup> PLAINTIFF**

**JOHN MWATHI M'MUGAMBI.....2<sup>ND</sup> PLAINTIFF**

**JEREMIAH MURAUKO MUGAMBI.....3<sup>RD</sup> PLAINTIFF**

**BEATRICE GACUNKU.....4<sup>TH</sup> PLAINTIFF**

**DAVID MUTUGI KARIGU.....5<sup>TH</sup> PLAINTIFF**

**JOSPHAT NJERU KIAYA.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**SABERA GAKUNDI MWITHI..... 1<sup>ST</sup> DEFENDANT**

**BEATRICE KATHAMBI.....2<sup>ND</sup> DEFENDANT**

**CHARITY KAINDI.....3<sup>RD</sup> DEFENDANT**

**VIRGINIA MUTHONI.....4<sup>TH</sup> DEFENDANT**

**JOHN KIMATHI.....5<sup>TH</sup> DEFENDANT**

**ALICE KARIMI.....6<sup>TH</sup> DEFENDANT**

**JAMES MUTUGI MWITHI.....7<sup>TH</sup> DEFENDANT**

**GERALD MUGAMBI.....8<sup>TH</sup> DEFENDANT**

**JAMES MWENDA MWITHI alias JOHN KIMATHI.....9<sup>TH</sup> DEFENDANT**

**STANLEY MURITHI NYAMU.....10<sup>TH</sup> DEFENDANT**

**MARY WAMBUI MWOBI.....11<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This Judgment concerns a consolidation of 2 cases, **Chuka ELC 1 of 2019 (OS)** and **Chuka ELC. 20 of 2019 (OS)**. Chuka ELC 1 of 2019 (OS) is the lead file. On **28<sup>th</sup> September, 2020** the parties by consent agreed to have the 2 cases consolidated. This consent conclusively deals with the issue of if or if not the 2 suits are properly before this court. By agreeing to have the two suits consolidated, and

to be escalated to full hearing, the parties accepted that there were substantive issues that merited determination by this court. I, therefore, do not find it necessary to address issues touching on this issue as raised in their written submissions.

2. PW1, James Mutugi Mwathi, told the court that he had through ELC 1 of 2019 obtained a judgment which he understood had been set aside to allow the hearing of this suit. He said that he had given part of the land to John Mwathi Mugambi who is the 2<sup>nd</sup> plaintiff in ELC 20 of 2019 because he lived on the land with his mother Zipporah Karigu (1<sup>st</sup> Plaintiff in ELC. 20 of 2019).

3. PW1 told the court that the other defendants did not live on the suit land but only invaded it after they learnt that the land had been awarded to him and his family by court. In short, PW1 testified that the other defendants had their land elsewhere and the female ones lived with their husbands elsewhere.

4. PW1 told the court that when he got a judgment in his favour, the land was meant to be held in trust for himself, his sisters and his brothers. He told the court that he had not given a title to Zipporah Karigu, the 1<sup>st</sup> plaintiff in ELC. 20 of 2019 because she asked that the apposite land be given to John Mwathi, his son, who lived with her on the suit land.

5. PW1 told the court that he sold land to Stanley Muriithi Nyamu (the 10<sup>th</sup> defendant in ELC. 20 of 2019) and to Mary Wambui Mwobia (the 11<sup>th</sup> defendant in ELC. 20 of 2019) because he and his family told the court that, after being let down by their original advocate, Mary Wambui Mwobia came to the family's aid by financing the necessary court proceedings with the understanding that, if they won the case, she would get a portion of the suit land. He proffered that she had given him a sum of **Kshs.350,000/=**. For Stanley Muriithi, it was agreed that he would meet the expenses of the necessary subdivision and would get a portion of land commensurate to the amount of money he would have spent.

6. PW1 explained that John Mwathi (2<sup>nd</sup> plaintiff in ELC 20 of 2019) was given land in good faith and he had given his identity card to facilitate the transfer of the apposite portion of land to him. He wondered why he had sued him and his family.

7. PW2, Sabera Gakundi Mwithi, the 1<sup>st</sup> defendant in ELC 20 of 2019 asked the court to adopt her witness statement which she wrote on **19<sup>th</sup> December, 2019** as her evidence in this suit. She also asked the court to also consider her evidence in ELC 1 of 2019 as her evidence in this suit.

8. PW2 told the court that except for Zippora Karigu and her son, John Mwathi, the other defendants had never occupied the suit land. She told the court that Stanley Muriithi Nyamu had assisted them financially in ELC 1 of 2019 and this is why the family had given him a portion of the suit land. Mary Wambui Mwobia had also assisted them financially during the proceedings in ELC. 1 of 2019. She said that this is why the family gave her a portion of the suit land. She told the court that the family had given a portion of the land to John Mwathi (2<sup>nd</sup> plaintiff in ELC. 20 of 2019) because he and his mother lived on the suit land. She testified that Zipporah Karigu had asked that the land be registered in the name of her son, John Mwathi. She confirmed that her family had given John Mwathi Mugambi **0.61 hectares**.

9. PW2 was categorical that the defendants, other than Zipporah Karigu and her son, John Mwathi, had never occupied the suit land but only invaded the land after learning that the suit land had been awarded to her family by the court.

**10.** PW3, Jacob Kirema Njagi, told the court that he was the chief of the area where the suit land was situated. He told the court that before demarcation only 2 people occupied the suit land. These were Mwithi Ntonkura Ndatho Ntontubia and Mwithi Ntonkura. He testified that at one time Mwithi Ntonkura Ndatho Ntontubia left the suit land and left Mwathi Ntonkura and his family on the suit land. He was categorical that only two families occupied the suit land. This is the family of Mwathi who is deceased and whose wife Sabera Gakundi (1<sup>st</sup> defendant in ELC. 20 of 219) and her family lived on the suit land. The other occupant was Zipporah Gakundi (1<sup>st</sup> plaintiff ELC. 20 of 2019) who lived on a portion of the land with her son John Mwathi (2<sup>nd</sup> plaintiff in ELC 20 of 2019). PW3 testified that he had been the chief of the area for **22 years since 1989**.

11. PW3 told the court that the other defendants did not live on the suit land and particularized as follows:

- a) The third plaintiff in ELC. 20 of 2019, Jeremiah Murauko Mugambi, did not reside on the suit land and had his own land elsewhere in the location.
- b) Beatrice Gacunku (the 4<sup>th</sup> plaintiff) did not live on the suit land but lived at Chiakariga where she was married.
- c) David Mutugi Karigu (5<sup>th</sup> plaintiff in ELC. 20 of 2019) did not occupy any portion of the suit land but had his own land elsewhere in the location.
- d) Josphat Njeri Kiaya (6<sup>th</sup> plaintiff in ELC 20 of 2019) did not occupy any portion of the suit land and had his own land elsewhere in the location.

12. PW3 told the court that Stanley Muriithi Nyamu (10<sup>th</sup> defendant in ELC. 20 of 2019) was a resident of his location and he lived on the suit land following a relationship with the family of Sabera Gakundi (1<sup>st</sup> defendant in ELC. 20 of 2019). He told the court that he had witnessed a sale agreement between the family of Sabera Gakundi and Stanley Muriithi Nyamu to the effect that he would assist them financially during the apposite proceedings and in return he would be given a portion of the suit land.

13. PW3 was categorical that he was well versed with the status of the suit land as in addition to being the chief for the area where the land was situated, his land was only **100 metres** away from the suit land.

14. DW1, Zipporah Karigu (1<sup>st</sup> plaintiff in ELC. 20 of 2019) told the court that she had sued Sabera Gakundi and her children because they wanted to take away her land. She said that she lived on the suit land alone. She said that the defendants in ELC. 20 of 2019 had chased her away from her land in **2019**. She denied that the defendants in ELC. 20 of 2019 had given land to her son John Mwathi upon her concurrence. She went on to say that she lived on the suit land with her children John Mwathi, Jeremiah Murauko, Beatrice Gacunku, David Mutugi and Josephat Njeri. This is notwithstanding that she had earlier on said that she lived on the suit land alone. She denied that her children had been given land by their father.

15. DW1 told the court that she got the suit land after her husband died. She admitted that in her witness statement she had averred that she moved into the suit land in **1986** after she had been mistreated by her in-laws and saw land that had no owner which she moved into. She said that she had mistakenly, earlier on, said that the land belonged to her brother one Ndatho. The court noted that DW1's evidence had material contradictions.

16. DW1 told the court that she occupied **20 acres** of the suit land. She could not satisfactorily explain why in her witness statement she had averred that she occupied only **2 ½ acres**. She also claimed that she is the one who had allowed Sabera Gakundi to move into the suit land. DW1 told the court that she did not file a suit to claim the suit land before Sabera Gakundi did so because the land did not belong to her.

17. This court notes that DW1 generally gave garbled and contradictory evidence.

18. DW2, David Mutugi Karigu, told the court that Zipporah Karigu cultivates and lives on the land with the family of Sabera Gakundi. He told the court that his co-defendants (plaintiffs in ELC. 20 of 2019) except Zipporah Karigu (1<sup>st</sup> plaintiff in ELC. 20 of 2019) and John Mwathi (2<sup>nd</sup> plaintiff in ELC. 20 of 2019) only cultivated portions of the suit land but did not live there. He admitted that he had his own land LR. Tharaka/Ciakariga A/2352. He also said that Jeremiah Murauko Mugambi (3<sup>rd</sup> plaintiff in ELC. 20 of 2019) owned land LR. No. Tharaka/Ciakariga/627 where he and his family lived. He told the court that he and the other plaintiffs in ELC 20 of 2019 brought this suit to court after knowing that Sabera Gakundi and her family had been given the suit land by the court. He told the court that his sister Beatrice Gacunku (4<sup>th</sup> plaintiff in ELC. 20 of 2019,) was married and stayed at Chiakariga in her husband's land. DW2 told the court that he had cultivated 3 ½ acres of the suit land for over **15 years**. He was unequivocal that the land belonged to a Mugikuyu called Dedan Mwangi. He was also unequivocal that he did not know from when the suit land devolved to the plaintiffs in ELC. 20 of 2019. He also said that his mother cultivated **20 acres** out of the suit land. This notwithstanding his mother having said in her witness statement she only occupied **2 ½ acres** of the suit land.

19. DW3, John Ndatho Ntubia, told the court that his name was Muikamba but he was later on called John Ndathu. He asked the court to adopt his witness statement dated **15<sup>th</sup> January, 2020** as his evidence in this suit. A conspectus of his averments in his witness statement is that the suit land was his land and that he is the one who gave it to the 1<sup>st</sup> plaintiff in ELC. 20 of 2019 (Zipporah Karigu) and the 1<sup>st</sup> defendant in ELC. 20 of 2019 (Sabera Gakundi). His statement also avers that although he gave the land to the two women, he did not follow up to know how they were occupying the land on the ground. The statement avers that originally he had thought the land was registered in his name but he later on learnt that the land was registered in the name of one Kikuyu called Mugo. He did not say when this information came to his knowledge.

20. During cross-examination by the plaintiffs' advocate, Kaai Mugambi, the court noted that DW3 was being generally evasive. He said that he did not know the registration number of the suit land. He admitted that he had several sons but could not explain why he chose to give the suit land to the 1<sup>st</sup> plaintiff in ELC 20 of 2019 instead of to his sons. He denied that he had a son called Luka Muriithi Ndatho, although he had referred to him as his son in his witness statement sworn on **15<sup>th</sup> January, 2020**.

21. DW3 demolished the probative value of his evidence in favour of Zipporah Karigu (1<sup>st</sup> plaintiff in ELC. 20 of 2019) when he told the court that she did not live on the suit land.

22. The parties filed written submissions.

23. I have considered the oral evidence, all the pleadings and the submissions proffered by the parties to buttress their diametrically divergent submissions. I have also considered the authorities cited by the plaintiffs in ELC 20 of 2019 (OS). They are all good authorities in their facts and circumstances. The case of *Githu versus Ndeete [1984] KLR 776* as quoted in *Paul Kamande Gicheha versus Jacob Kinyua Kiragu [2018] eKLR* is good authority for the assertion that: "**The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.**" The case of *Titus Kigoro Munyi versus Peter Mburu Kimani [2015] eKLR* is also good authority that: "**any man who buys land without knowing who his title is in possession risks, just as he does, if he fails to inspect his land for twelve years after he acquired it.**" With due respect, this authority has no discernible relevance to the facts and circumstances of this case.

24. Although change of ownership does not preclude a finding that a litigant has obtained ownership of land by way of adverse possession as held in *Githu versus Ndeete (supra)*, adverse possession must be proved through cogent evidence. Where it is not proved, a finding cannot be made in favour of a litigant or litigants.

25. The evidence of PW1, PW2 and PW3 has evinced consistency and no contradictions. It is congruent to the plaintiffs' evidence in ELC 1 of 2019 in which this court entered judgment in favour of the plaintiffs. This evidence is buttressed by the evidence of PW3, a chief who evinced well founded knowledge of the facts and circumstances of this case. I find that PW3 was a reliable witness who testified that the 1<sup>st</sup> defendant in ELC. 20 of 2019 and the 1<sup>st</sup> plaintiff in ELC. 20 of 2019 occupied portions of the suit land but that the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs in ELC. 20 of 2019 never occupied the suit land.

26. DW1 by and large, gave inconsistent and garbled evidence. She was approbating and reprobating when she said that she moved into the suit land after disagreeing with her in laws only to also say that the land was given to her by DW3. She also denied that her son had been

given a portion of the suit land with her concurrence. I find that she was being economical with the truth. I find that the plaintiffs' evidence in this sphere was credible.

27. The doctrine of *"nemo dat quod non habet"* (the nemo date rule) is veritably appropriate here. DW3 could not give to the 1<sup>st</sup> plaintiff and by extension to all the plaintiffs in ELC. 20 of 2019 what clearly did not belong to him. He had not got ownership of the suit land through any known legal process including an adjudication process or a consolidation process.

28. DW2 told the court that only the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> plaintiff (in ELC. 20 of 2019 lived on the suit land but said that all the plaintiffs cultivated part of the suit land.

29. DW3 told the court that he is the one who gave the suit land to the 1<sup>st</sup> plaintiff (in ELC. 20 of 2019). Eventually, he destroyed the probative value of his evidence when he said that the 1<sup>st</sup> plaintiff in ELC. 20 of 2019 did not live on the land. Indeed the civil (continental system) Rule *"nemo plus Juris ad alium transferre potest quam ipse habet"* is veritably relevant here. One cannot transfer to another more rights than he has."

30. Having considered all the facts and circumstance of this case, I find that there is merit to dismiss ELC. 20 of 2019. I also find merit to uphold the judgment of this court in ELC. 1 of 2019. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants (all plaintiffs in ELC. 20 of 2019) have not proved that they are entitled to a declaration that they have acquired ownership of the suit land through the doctrine of adverse possession.

31. The above notwithstanding, I note that the defendants in ELC. 20 of 2019 and specifically Sabera Gakundi Mwithi and James Mutugi Mwithi, and their family, were willing to give Zipporah Karigu and her son John Mwathi Mugambi 0.61 hectares out of the suit land. This was restated in their evidence.

32. I opine that parties should be bound by their pleadings. I will order that the land they had claimed to have given to John Mwathi Mugambi with the concurrence of his mother, Zipporah Karigu, should go to them as per their evidence and pleadings.

33. I note that except for Sabera Gakundi Mwithi and James Mutugi Mwithi, the other defendants in ELC. 20 of 2019 did not have much participation in these proceedings. Although in normal circumstances, costs follow the event, I will not award costs to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants in ELC.20 of 2019.

34. I enter judgment for the defendants in ELC. 20 of 2019 in the following terms:

a) Zipporah Karigu alias Karigu M'Mugambi Ngiti and John Mwathi M'Mugambi (1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in ELC. 20 of 2019 (OS) are jointly awarded 0.61 hectares (approximately 1.5 acres) out of land Parcel No. South Tharaka/Tunyai "A"/390.

b) The balance of land parcel No. THARAKA/TUNYAI "A"/390 is awarded, in congruence with this court's judgment delivered on **30<sup>th</sup> July, 2019** to the family of Sabera Gakundi Mwithi, and all its members will hold it as equal proprietors in common, and for avoidance of doubt these members are:

a) Sabera Gakundi Mwithi

b) Beatrice Kathambi

c) Charity Kaindi

d) Virginia Muthoni

e) John Kimathi

f) Alice Karimi

g) James Mutugi

h) Gerald Mugambi

c) Mutatis Mutandis, order (a) above AND FOR AVOIDANCE OF DOUBT, this court's judgment in ELC. 1 of 2019, delivered on **30<sup>th</sup> July, 2019** is hereby reinstated and, therefore, upheld.

d) Costs are awarded to Sabera Gakundi Mwithi and James Mutugi Mwithi, 1<sup>st</sup> and 7<sup>th</sup> defendants in ELC. 20 of 2019 against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs in ELC. 20 of 2019 who are defendants in consolidated ELC. 1 of 2019 (this suit).

**DELIVERED IN OPEN COURT AT CHUKA THIS 25TH DAY OF MAY, 2021 IN THE PRESENCE OF:**

CA: Ndegwa

Kaai Mugambi for the Plaintiffs

Kamakia h/b M/s Kithaka for the defendants

**P. M. NJORGE,**

**JUDGE.**