



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELEC CASE NO. 113 OF 2007**

**MUTWIRI ARIMI ..... PLAINTIFF**

**VERSUS**

**DORIS MUKUBA MUTUMA**

**L/R OF JULIUS MUTUMA..... RESPONDENT**

**JUDGMENT**

**THE HISTORY**

1. Here is a classic example of how things can go wrong. The case has a tragic litigation history with a tragic ending. The transaction that allegedly triggered litigation herein occurred in 1979. Over the years defendant died while plaintiff became incapacitated.

2. On 3.12.1979, one (Isaiah M’Muraa apparently sold the suit parcel Nyaki/Giaki/815 to Duncan Nchebere M’Mukindia who in turn sold the land on 18.9.1980 to plaintiff who took possession immediately. Those averments are contained in the supporting affidavit of the plaintiff dated 16.10.2007. Applicant further contends that Julius Mutuma, defendant herein fraudulently registered the suit land as Nyaki/Giaki/872. The alleged acreage of the suit land is 8.15 acres. The land dispute manifested itself in form of litigation in various courts, of which I have found it necessary to give a sneak preview of the said litigation.

**Meru PMCC No. 398 of 1990**

3. The first salvo in the litigation history was fired by the defendant herein (**Julius Mutuma**) when he filed the case **Meru PMCC 398 of 1990** on **29.9.1990** against one **Stanley Mbogori** where he sought eviction of Stanley from the land parcel no. **Nyaki/Giaki/872 (the suit land)**. On **2.7.91**, Julius amended his plaint to bring on board **M’Twiri M’Arimi** as the 2<sup>nd</sup> defendant (who happens to be the plaintiff in **Meru OS 113/07**), where he sought to have both defendants (**Stanley Mbogori and M’Twiri M’Arimi**) evicted from the suit land. On **21.6.1993**, Julius obtained injunctive orders against the defendants where the latter were restrained from interfering with the suit land.

4. The Judgment in the above mentioned case was delivered on **15.10.1994** where the then plaintiff (Julius) succeeded and obtained the prayer for eviction of defendants. Thereafter, the defendants on **21.11.1994** obtained an order of stay of execution of the Judgment which Judgment was **“temporarily set aside .....”**.

5. It appears that the Judgment was never executed and the suit quietly fizzled away.

**Meru H.C.C No. 13 of 1997**

6. Somehow the dispute which was determined before the lower court in **Meru PMCC 398 of 1990** resurfaced as a High Court matter after an application had been made for the transfer of the lower court suit. It appears the case was determined all over again in the **High Court case no. 13 of 1997**, where **Julius Mutuma** remained as the plaintiff whereas **Stanley Mbogori and Mutwiri Arimi** were the defendants.

7. In a Judgment delivered on **19.4.2001**, plaintiff’s case was dismissed. The court had ruled that the then plaintiff (**Julius**) should not have obtained title deed while the 2<sup>nd</sup> defendant (**Mutwiri Arimi – current plaintiff**) had already taken possession of the suit land.

**Application dated 7.5.2001 in Meru H.C.C 13/1997**

8. On **8.5.2001**, the then 2<sup>nd</sup> defendant in the above mentioned High Court matter (**Mutwiri Arimi – current plaintiff**) sought to have the

review of the judgment averring that his counter claim in the suit was not considered by the court. The ruling on this application was delivered on 15.6.2007 whereby the application was dismissed.

9. The dispute was left in limbo, and that is why I term the litigation history as tragic.

#### Meru OS no. 113 of 2007

10. All was quiet until the current plaintiff filed this suit on **16.10.2007** claiming entitlement to parcel no. **Nyaki/Giaki/872** by way of adverse possession. The case was opposed via the replying affidavit of Julius Mutuma filed on **3.12.2007**

#### THE RECORD

11. Vide the directions given by this court on **4.6.2008** the file **Meru H.C.C no. 13 of 1997** was to be annexed to the present file and the same was to be kept under lock and key as apparently the file **“had been missing since 2001 but had been traced!”**. Considering that **Meru PMCC 398 of 1990** appears to be the one which became **Meru H.C.C 13 of 1997** (see application for transfer dated **13.11.1995**), then the two files were destined to be together. To date, these two files are snugly tucked in the present file and the history captured herein is largely derived from the records in these files.

#### Death of the defendant

12. On **24.11.2014**, the court was informed that defendant had died. I have seen a court order of **18.2.2014** issued in Meru **High Court Succession cause no. 303 of 2010** (to be found on the last page of plaintiff’s bundle of documents), where one **Doris Mutuma** was appointed as the legal administrator of the estate of **Julius Mutuma**.

#### Incapacitation of the plaintiff

13. The plaintiff became incapacitated and he was unable to proceed with the trial. One **Damaris Kairuthi Mutwiri** applied to be substituted in his place and the application for substitution was allowed on **24.4.2018**.

#### DETERMINATION

14. **Order 24, rule 4 of the Civil Procedure Rules** provides that:

**“(1) Where one of two or more defendant’s dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. (emphasize)**

**(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.**

**(3) where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant”.**  
**(emphasize)**

15. I have keenly perused the entire record herein and there is nothing to indicate that **Julius Mutuma** who apparently died before **24.11.2014** was ever substituted with **Doris Mukuba Mutuma** or anyone else. Though there is an order from the succession court where **Doris Mukuba** became the legal representative of **Julius Mutuma**, the law requires that such a legal representative ought to be substituted in place of the deceased. There being no substitution of the defendant in this matter, it follows that the proceedings herein conducted after the death of defendant are a nullity.

16. It is therefore a futile exercise to determine the dispute herein. This is hence the tragic end of the suit which I mark as **ABATED**. No orders as to costs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 2<sup>ND</sup> DAY OF OCTOBER, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Karanja holding brief for Ndegwa for plaintiff

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**