



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NO. 2 of 1998 (OS)

JOHN KAMAU CHEGE & 4 OTHERS.....PLAINTIFFS

=VERSUS=

JULIA WANJIRU MUNGAI

HANNAH NJOKI MUNGAI (SUED AS PERSONAL

REPRESENTATIVE OF MUNGAI THUKU (DECEASED)....DEFENDANTS

JUDGEMENT.

1. The dispute herein relates to **LR No.Lari/Kirenga/388** (suit property) which is currently registered in the names of the defendants. Prior to the registration of the suit property in the defendants names, the same had been registered in the name of their late husband Mungai Githu alias Mungai Thuku (Deceased). The suit property was registered by way of transmission pursuant to a grant obtained in Nairobi HC .Succession cause No.1139 of 1997.

2. Prior to the demise of the deceased on 18th August 1985, one Evan Chege had filed Nairobi HCCC No.1535 of 1984 against the deceased in which the plaintiff was claiming that he had acquired five acres out of the suit property by way of adverse possession. The deceased was substituted by his two widows who are the defendants in ELC381 of 1998. The suit proceeded to full hearing. As at the time of writing judgement, Justice Bosire as he then was noticed that the suit against the deceased had abated and that there was no application to revive the same. He further noticed that though the widows of the deceased had been substituted in his place by consent of the advocates, they had not obtained letters of administration in respect of the estate of the deceased. The judge therefore found that there was no suit upon which he could write judgement on merits.

3. Evan Chege is the family patriarch of the plaintiffs in ELC 2 of 1998 and the defendants in ELC 381 of 1998. By a further amended originating summons dated 1st August 2016, the plaintiffs are seeking the following orders:-

a. That the plaintiffs have since the year 1958 been enjoying exclusive use and cultivation of portions in the land Reference Number Lari/Kirenga/338 as follows:- first plaintiff occupying 2 acres, 2nd plaintiff ¾ acres,3rd plaintiff ¾ acres and 4th and 5th plaintiffs jointly each occupying ¾ acres openly peacefully and as of right from 1958, that is to say for a period of over twelve years preceding presentation of this originating summons in court.

b. That the title of the late Mungai Thuku (deceased) in respect of the above occupied by the plaintiffs in the manner indicated in paragraph (a) above in the said piece of land parcel number Lari/Kirenga/338 is extinguished under the Limitation of the Actions Act Cap 22 Section 17.

c. That the plaintiffs are under section 38 of the Law of Limitation of the Actions Act Cap 22 entitled to be registered as the proprietors of their respective portions in the said parcel number Lari/Kirenga/ 388 as follows:-

(a)Monica wangari Kamau } 2 acres

(b) Jonathan karanja Kamau }

(c) Margaret Njeri Chege ¾ acres

(d) Mahia Chege ¾ acres

(e) Phyllis Muthoni Chege ¾ acres

(f) Isabella Njeri Njuguna ¾ acres

d. That this honourable court do declare the transfer in favour of the defendants entered on the 24th February 1999 as null and void the title to the deceased having been extinguished.

e. That, the costs of this suit be awarded to the plaintiffs.

4. Monicah Wangari Kamau and Jonathan Karanja Kamau are legal representatives of the estate of their late father John Kamau Chege who was the son of Evan Chege. Margaret Njeri Chege is the second wife of Evan Chege. Mahia Chege is the son of Evan Chege. Phyllis Muthoni Chege is daughter of Evan Chege while Isabella Njeri Chege is a daughter in-law of Evan Chege.

5. The plaintiffs in ELC No.381 of 1998 are seeking the following reliefs:

a. A declaration that the defendants are trespassers upon the land known as L.R Lari/Kirenga/388.

b. An order permanently restraining them from ever trespassing upon LR No.Lari/Kirenga/388 or cutting trees thereon;

c. General damages

d. Costs of this suit

e. Interest at court rates;

f. Any other or further relief or relief as this Honourable Court may deem fit to grant.

6. It is not clear when Evan Chege died. What is however clear is that the Plaintiffs are not seeking the orders in the originating summons on behalf of the estate of Evan Chege. Each of the Plaintiffs is claiming portions of the suit property in their own right. PW1 Margaret Njeri Chege is the wife of Evan Chege. She testified that she was married to Evan Chege in 1954. Evan Chege was a headman. In or around 1956, the deceased expressed his intention to sell 5 acres out of the suit property which was 9 acres. Her husband bought 5 acres which were then excised from the deceased's land and traditional boundaries were put in place. The 5 acres bordered their land. They took possession in 1958 after some traditional rituals were undertaken to bind the parties to the sale transaction.

7. They have since been cultivating on the portion which was purchased. They have planted trees and fruits and they graze their animals on the same. This plaintiff testified that she has buried her son and her two grandsons on the disputed portion. When the deceased was asked to give title to the five acres, he demanded more money and even wanted to sell the balance of his 4 acres to them. This prompted her husband to file cases in court against the deceased which cases were all regarding transfer of the 5 acres.

8. The plaintiffs in ELC 2 of 1998 called PW4 Ernest Ngugi Waithaka who testified that he was aware that Evan Chege had purchased five acres of the deceased's land. The 5 acres were clearly marked on the ground. The wives of the deceased used to cultivate their portion and the family of Evan Chege planted trees fruits and were grazing on the portion comprising of 5 acres.

9. The first defendant in ELC 2 of 1998 is also the first plaintiff in ELC 381 of 1998. She is one of the widows of the deceased. She testified that Evan Chege brought a suit against the deceased in Kiambu Court. He did not succeed. He came to Nairobi where he filed HCCC No.926 of 1980 which he withdrew. He then filed HCCC NO.1535 of 1984 against the deceased. This case was found to have abated. She denied that the plaintiffs in ELC 2 of 1998 and defendants in ELC 381 of 1998 have been in possession of the portion they are claiming. She testified that the plaintiffs have been trying to occupy the disputed portion and each time they do so they have always been repulsed. Whatever they did on the disputed property was done by force. The three burials which have occurred on the disputed property have occurred at night. She testified that they have since carried out the process of succession and the whole parcel which belonged to the deceased is now in her name and the name of her co-wife.

10. I have carefully considered the evidence adduced in these proceedings as well as the submissions filed by the respective parties. There is no doubt that the suit property was originally registered in the name of the deceased. There is also no doubt that the suit property is now registered in the name of Julia Wanjiru Mungai and Hannah Njoki Mungai through transmission. The issues for determination in respect of the two cases were agreed upon and filed in court on 11th October 2006. The issues are as follows:-

1. Did the defendants wrongfully and unlawfully trespass upon the suit land? Did the defendants fell any trees? If so have the plaintiffs suffered any loss?

2. Had the defendants been occupying the suit land since 1958 peacefully, openly and as of right?. If so is the plaintiffs' suit to recover the said land time barred under the Limitation of Actions Act 22?

3. It is the defendants' claim of adverse possession res judicata?

4. To whom does the trees on the suit land belong.

5. *Whether notice of intention to sue was communicated?*

6. *Are the plaintiffs entitled to general and special damages?*

7. *Who are entitled to costs?*

11. I will first deal with the issues which touch on the claim in ELC 2 of 1998.

Res Judicata.

It has been argued that the filing of this suit (ELC 2 of 1998) is res judicata. The principle of res judicata is predicated on section 7 of the Civil Procedure Act which states as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

This argument arises out of the fact that there was ELC 1535 of 1984 which was seeking similar prayers. This case (ELC 2 of 1998) is not res judicata. ELC No.1535 of 1994 was not determined on merits. Justice Bosire as he then was found that the suit had abated and that he could not write any judgement on merits from a suit which had abated. The issue of res judicata was again raised before Justice Aganyanya, as he then was. He overruled the objection on the ground that there was no decision reached on merit. I therefore find that this suit is not res-judicata.

Whether the plaintiffs in ELC 2 if 1998 have been occupying the portions they claim peacefully, openly and as of right since 1958.

12. As I said at the beginning of this judgement the plaintiffs are not claiming their respective portions on behalf of the estate of Evan Chege. They are claiming in their own right. There is evidence on record that Evan Chege first entered part of the suit property with the permission of the deceased. This evidence is contained in the typed proceedings in respect of Nairobi HCCC No.1535 of 1984 (OS). At page 17, while under cross-examination by the advocate for the defendants, Evan Chege stated that before he bought the land, he was utilizing it with permission of the deceased.

13. There is no evidence to show that Evan Chege ever bought the 5 acres which he claims to have bought. In the evidence which he adduced in ELC 1535 of 1984, he stated that he bought 5 acres at Kshs.5500/= in 1956. He claimed to have taken possession in 1956 and that in 1957, he asked that the deceased gives him title. He again renewed his quest for title in 1958. The deceased did not give him title forcing him to file a case in Kiambu court. This case was withdrawn. He came and filed another case in High Court in HCCC 926 of 1980. This case was again withdrawn.

14. Evan Chege was not being candid when he claimed that he asked for title in 1956. As at 1956 there was no title to the suit property. Demarcation was done in 1958 and the deceased obtained title on 23rd February 1979. As there is no evidence of purchase and no evidence of when his permission to be on land ceased, I find that there is no credible evidence upon which this court can make a finding as to the allegation of purchase.

15. There is evidence that Evan Chege started filing cases in court after he was asked to vacate or cease utilizing the land in issue. Prior to filing a case in Kiambu Court in 1979, there was a dispute in respect of the same property before the local chief. The late Evan Chege never built any house on the disputed property and none of the plaintiffs have built a house there. This clearly confirms the defendant's assertion that the three bodies which were interred on the disputed portion were interred at night.

16. The plaintiffs claim that their occupation on the suit property has been peaceful since 1958. They also claim that the only time there was commotion is in 2015 after the death of their former lawyer when the defendants went and cut trees on the disputed property. The plaintiffs claimed that the suits which were filed by Evan Chege were all in respect of title which he wanted to be given. This is not true because evidence has clearly shown that these case were filed after he was asked to move out of the land which he had been allowed to cultivate because he had a large family. One of the wives of Evan Chege testified that she has 18 children. Evan Chege had another wife who also had children. It is therefore possible and this is confirmed by evidence on record that he was permitted to cultivate on the disputed parcel to feed his large family.

17. The plaintiffs never adduced any evidence to show that they have ever been in peaceful and continuous possession of the disputed land. In **Wambugu Vs Njuguna (1983) KLR172** it was held that where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined. In the instant case, I have stated that there is no evidence when the license was determined for time to start running in favour of Evan Mwangi. There is also no evidence of purchase so that for purposes of computing time, it can be known when the license which he admitted was determined by purchase.

18. It was incumbent for the plaintiffs to prove that they have been in continuous and uninterrupted possession for the statutory period required. In **Kimani Ruchire Vs Swift Rutherfords & Co.Ltd (1980) KLR at page 16 Kneller J** held that;-

“ The plaintiffs have to prove that they have used this land which they claim as of right nec vi nec clam, nec precario (no force secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or

constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.

19. Evan Chege was not pursuing title as the plaintiffs would like the court to believe. He was pursuing a claim for adverse possession. This is after his license had been determined and was asked to move out. If he was pursuing title, he would have given evidence of the alleged purchase. A person who has been permitted to be on the land cannot seek adverse possession. It is clear that there have been disputes regarding the disputed property which disputes started long time ago. The plaintiffs do not reside on the land. It has been admitted that there have been occasional confrontations whenever the plaintiffs seek to occupy the disputed portion. I therefore find that the plaintiffs have failed to prove adverse possession to the claimed portions totalling to 5 acres. I therefore proceed to dismiss the plaintiffs claim in ELC 2 of 1998 with costs to the defendants.

20. As regards ELC 381 of 1998 there is evidence on record that the defendants came on to the suit property with permission of the husband of the plaintiffs. When the defendants were asked to move out, the deceased started filing cases in court. The deceased died before concluding the cases. As is clear from the analysis of evidence in ELC 2 of 1998, the defendants did not prove that the deceased purchased the five acres which they cultivate by force. As early as January 1998, the defendants trespassed on to the suit property and started felling trees. The plaintiffs came to court and were granted an injunction stopping the interference.

21. The defendants have no claim to the suit property. The defendants could not prove that there was purchase of the suit property as they allege. The defendants have never built any structures on the suit property. During the hearing of ELC 1535 of 1984, the deceased said that he had not constructed on the disputed property because he did not have title. The trees on the suit property belong to the plaintiffs. This is why they came to court in 1998 seeking to stop the defendants from cutting down the trees. I find that the plaintiffs have proved their case against the defendants on a balance of probabilities.

22. In summary thereof, I proceed to dismiss the plaintiff's suit in ELC 2 of 1998 with costs to the defendants. As for ELC 381 of 1998 I enter judgement for the plaintiffs against the defendants in the following terms:-

1) A declaration that the defendants are trespassers on LR No.Lari/Kirenga/388.

2) A permanent injunction is hereby given restraining the defendants from trespassing on to LR No Lari/Kirenga/388.

3) The defendants shall pay costs of this suit to the plaintiffs.

Dated, Signed and delivered at Nairobi on this 4th day of October 2018.

E.O.OBAGA

JUDGE

In the presence of:

Mr Maina for Mr Mwangi for Plaintiff

M/s Chichi for Mr Kiania Njau for Defendants

Court Assistant: Hilda

E.O.OBAGA

JUDGE