



**Kimaru v Kaguyu (Environment & Land Case 81 of 2014)  
[2018] KEELC 4912 (KLR) (4 October 2018) (Judgment)**

*Charles Mukoma Kimaru v Johnstone Muchomba Kaguyu [2018] eKLR*

Neutral citation: [2018] KEELC 4912 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 81 OF 2014  
L WAITHAKA, J  
OCTOBER 4, 2018  
(FORMERLY NYERI CMCC NO. 422 OF 2013)**

**BETWEEN**

**CHARLES MUKOMA KIMARU ..... PLAINTIFF**

**AND**

**JOHNSTONE MUCHOMBA KAGUYU ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a plaint dated 13<sup>th</sup> November, 2013 and filed on the same day, the plaintiff instituted this suit seeking judgment against the defendant for an order of vacant possession of the parcel of land known as L.R No.Kirimukuyu/Kiria/251 (hereinafter referred to as “the suit property”) and in default an order of forceful eviction.
2. The plaintiff who is the registered proprietor of the suit property has pleaded that the defendant has been his licensee and that on or about 11<sup>th</sup> September, 2013 he terminated the license and required the defendant to forthwith give him vacant possession of the suit property but the defendant refused, failed and/or ignored to heed the demand rendering this suit necessary.
3. In response, the defendant filed the statement of defence and counter-claim dated 11<sup>th</sup> December, 2013 in which he denies the allegation that he holds the suit property in trust as a licensee of the plaintiff and avers that the plaintiff holds the suit property in trust for his family.
4. Explaining that there have been previous proceedings over the suit property between the parties to this suit, the defendant avers that he has obtained title to the suit property by way of adverse possession.



5. In his reply to defence and counter-claim, dated 3<sup>rd</sup> January, 2014, the plaintiff denied the defendant's contention that he has become entitled to the suit property by adverse possession and maintained that the defendant's use and occupation of the suit property has been through the pleaded license which license he has since terminated.
6. With regard to the defendant's counter-claim, he contends that this court lacks jurisdiction to hear and determine this suit.

## **Evidence**

### **The plaintiff's case**

7. When the matter came up for hearing, the plaintiff departed from his pleadings to the effect that the defendant's occupation has been pursuant to his pleaded trust and explained that the defendant has been a trespasser to his land.
8. The plaintiff informed the court that he inherited the suit property from his father who had inherited it from his grandfather. In 1950, he requested his uncle, Wambugu Mukoma, to take care of the suit property and relocated to Nyahururu. His uncle took care of the land until his death. When his uncle died, he left the suit property in the care of his wife who, before she died, told the plaintiff to take it over.
9. Explaining that his uncle's wife did not, at any time, inform him that she had allowed the defendant into the suit property, the plaintiff informed the court that in 2010, he learnt that the defendant was occupying his land yet he is not related to him in any way. On 11<sup>th</sup> September, 2013, through his advocate, C.M. Kingori, the plaintiff wrote a demand letter to the defendant requiring him to vacate the suit property but the defendant refused to heed the demand.
10. Concerning the defendant's contention that he holds the suit property in trust for him and that the defendant is his cousin, the plaintiff stated that those allegations are not true.
11. With regard the defendant's contention that there have been previous proceedings before the Land Disputes Tribunal over the suit property, he stated that he is not aware of such proceedings. However, he recalled that in 2011, he discovered that the defendant had lodged a caution to restrain dealings with the suit property which caution was later removed by the Land Registrar.
12. In cross examination, the plaintiff admitted that he has never lived in the suit property. Concerning his registration as the proprietor of the suit property in 2013, he stated that it is his uncle who caused it to be registered in his name.
13. The court heard that the plaintiff has only visited the suit property on two occasions, after demarcation when the same was shown to him by his uncle and after he was issued with a title deed in respect thereof.
14. When the plaintiff visited the suit property after he was issued with a title deed, he found coffee plants and other trees grown thereon which he believed were planted by his uncle as he had given him authority to utilize the land as he wished. He stated that he did not know the defendant or his father.
15. Concerning the letter from the chief dated 28<sup>th</sup> December, 2010 to the effect that his registration as the proprietor of the suit property is subject to a trust in favour of the defendant's family he termed the contents of the aforesaid letter incorrect.
16. Concerning the allegation that there were proceedings before the defunct Land Disputes Tribunal over the suit property, he recalled that he was invited to attend a hearing before the Tribunal but when they went there, they found that the Tribunal had been disbanded.



17. According to the plaintiff, all what is in the suit property belongs to him because he left the suit property in the care of his uncle.
18. Concerning the averments in his pleadings and the documents filed in court to the effect that the defendant was his licensee in the suit property, he stated that this is not the information he gave his advocate.
19. In re-examination, he stated that there has been no one in occupation of the suit property since the time his Aunt died. He maintained that contrary to what he recorded in his statement, he did not allow the defendant into the suit property as his licensee. He further stated that there was no fraud or corruption in the removal of the caution that had been lodged by the defendant to restrain dealings with the suit property. He stated that he has never obtained title to the suit property. He produced a copy of the letter dated 11<sup>th</sup> September, 2013 (demand letter) and a copy of an official search dated 31<sup>st</sup> October, 2013 as Pexbt 1 and 2.
20. Concerning the contents of the demand letter to the effect that the defendant was his licensee, he explained that his advocate did not word the letter in the manner he had instructed him.

### **The defence case**

21. The defendant informed the court that his father, Kagayu S/O Mwathi had two parcels of land namely, Kirimukuyu/Kiria/151 and 364. He explained that the suit property was registered in the name of the plaintiff because during that time, a person could not be registered as a proprietor of two parcels of land in one administrative area.
22. He informed the court that he came to know the defendant in 1986 when his father died. It was his evidence that his father's children and he have been utilizing the land-they have planted coffee, trees and fenced the same using barbed wire.
23. The court heard that the plaintiff has neither lived in the suit property nor effected any developments thereon and that there have been attempt to resolve the dispute through the local administration (office of the chief) and the Land Dispute Tribunal which have yielded no fruit.
24. The court heard that the plaintiff never consulted the defendant or his family members when he was changing the title to the suit property from his father's name to his name.
25. In cross examination, the defendant informed the court that the plaintiff is his distant cousin and that the plaintiff's father is the defendant's uncle.
26. According to the defendant, it is his father who paid the land consolidation fees in respect of the suit property and planted the coffee in the suit property.
27. In re-examination, the defendant stated that the plaintiff's grandfather and his grandmother are siblings.
28. Concerning lack of documents to prove that it is his father who paid fees for land consolidation in respect of the suit property, the defendant stated that at that time, it was not common for people to enter into written agreements or maintain documents to prove that they were in occupation.
29. He informed the court that although he had heard about the defendant, he met him for the first time in 1986.
30. D.W.2, Duncan Nderitu Nyaguto, a retired employee of the Ministry of Lands, informed the court that he was involved in land demarcation in Kiria area. He stated that the defendant's father was given



two parcels of land but because he could not be registered as proprietor of the two parcels of land, and neither his wife nor his children could be registered (women at that time could not be registered as proprietors of land and his children were minors), the defendant's father decided to register the suit property in his nephew's name.

31. According to D.W.2, it is the defendant's father who paid for land consolidation and he knew this because the suit property is near his own parcel of land. According to him there was no dispute concerning the suit property before plaintiff's father died.
32. He informed the court that he only met the defendant in a meeting in the chief's office after the plaintiff demanded that he vacates the suit property. He informed the court that in that meeting, it was decided that the land belonged to the defendant's family.
33. According to D.W.2, no coffee is planted in the suit property but there are trees which are harvested by the defendant's family.
34. In re-examination, D.W.2 stated that his testimony to the effect that the suit property belongs to the defendant's family is premised on his knowledge of the history of the suit property and his involvement in the demarcation process.
35. D.W.3, Mary Gathoni Wanjiri, the 1<sup>st</sup> child of Kagayu Mwathi, testified that it is the defendant's family that has been in use and occupation of the suit property since demarcation.
36. At close of hearing, parties to this dispute filed submissions which I have read and considered.
37. From the pleadings and the submissions filed, I find the issues for the court's determination to be:-
  - (a) Whether the registration of the plaintiff as the Proprietor of the suit property is subject to any trust in favour of the defendant and/or the defendant's family?
  - (b) Whether the plaintiff's title to the suit property has been extinguished by the defendant's occupation of the suit property?
  - (c) Whether any of the parties have made up a case to be granted the orders sought?
  - (d) What orders should the court make?
38. On whether the registration of the plaintiff as the proprietor of the suit property is subject to any trust in favour of the defendant and/or the defendant's family, on behalf of the defendant, reference is made to the pleadings filed in this suit and the evidence adduced in support thereof and submitted that unlike the plaintiff who pleaded that the defendant was his licensee in the suit property, the defendant had proved that the plaintiff was registered as a proprietor of the suit property in trust for the defendant's family.
39. Concerning that issue, having considered the evidence adduced in this case to the effect that it is the defendant and his family who have been in use of the suit property and there being no evidence that the use of the land by the defendant was subject to the pleaded license by the plaintiff and there being no evidence that it is the plaintiff's Uncle and Aunt who were in use and occupation of the suit property, I find the account offered by the defendant concerning the plaintiff's rights over the suit property to be more believable than the account offered by the plaintiff. Besides, the plaintiff unprocedurally departed from his own pleadings to the effect that the defendant was his licensee in the suit property and had since terminated the license. The plaintiff also, unlawfully sought to rely on evidence which did not form part of his pleadings to wit the contention that he had left the suit property in the care of his uncle who used it and upon his demise, left it with his Aunt. By dint of the provisions of Order 2 Rule 6 of



the Civil Procedure Rules, the plaintiff was estopped from departing from his own pleadings unless by way of amendment of the pleadings. In that regard, see the above cited section of the law which provides as follows:-

“6

- (1) no party may in any pleading make an allegation of fact or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit”.

40. On whether the plaintiff's title to the suit property has been extinguished by the defendant's occupation of the suit property, the evidence adduced in this suit shows that the plaintiff has never exercised control of the suit property ever since the same was registered in his name in 1959. For that reason, he lost his proprietary rights to the suit property to the defendant who has been in control of the suit property for more than 12 years without him exercising any proprietary control of the suit property.
41. The upshot of the foregoing is that the defendant has made up a case for dismissal of the plaintiff's suit against him and award of judgment in his favour in terms of the reliefs sought in prayers 1, 2 and 3 in his counter-claim and costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 4<sup>TH</sup> DAY OF OCTOBER 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. Waweru Macharia h/b for Mr. Ombongi for the plaintiff

Ms Wangechi h/b for Mr. Kebuka for the defendant

Court assistant - Esther

