



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC NO. 45 OF 2015 (OS)**

**CATHERINE KIENDE M'ITONGA.....PLAINTIFF/APPLICANT**

**VERSUS**

**LAWRENCE MBITI RUTERE.....DEFENDANT/RESPONDENT**

**JUDGMENT**

1. Vide an originating summons dated 23.6.2015, the plaintiff has sued defendant claiming that she is entitled to the land parcel Abogeta-Kiungone measuring 0.63 acres by way of adverse possession. She contends that in 1995, her father M'Itonga Murwithania (deceased) gave her land but he died on 24.6.2005 before transferring the 0.63 acres of land to her.

2. The plaintiff continued to occupy the said portion of land. However in 1999, defendant illegally obtained title to parcel 2283 measuring 0.43 ha but he never occupied the said land. The plaintiff contends that she has been in continuous occupation and exclusive possession of the said land since 1995.

3. Defendant opposed the case vide his replying affidavit filed in court on 13.7.2015. He contends that he lawfully bought parcel 2283 from plaintiff's father which land was lawfully transferred to him in 1999. He then filed a suit to protect his interests in parcel 2283 in Meru HCCC 114 of 2000 against plaintiff and her father while M'Itonga M'Murwithania upon incitement by plaintiff filed a suit against him in Meru HCCC 22 of 2001. Both suits were apparently consolidated and dismissed. Defendant claims that the current suit is resjudicata to the two suits.

4. Defendant contends that he is in occupation of parcel 2283 and plaintiff has no rights over this land.

5. During the trial, plaintiff testified and called two witnesses. PW 1, the plaintiff adopted her statement dated 2.10.2018 as her evidence. There in, plaintiff is challenging the document termed as the amended agreement dated 30.3.1999 in which plaintiff's father sold parcel 2283 to the defendant. She avers that the transfer was fraudulent since in the transfer documents, her father has signed yet he always thumb printed in form of a signature. That the effect of transfer of parcel 2283 was to usurp other parcels including that of K.T.D.A Gaturere Tea buying centre and James Kioga's land and that defendant was only meant to get ¼ acre (0.10 ha).

6. Pw1 contends that she resides on parcel 2283 while she uses parcel 2282 as her path of access. That though parcel 2283 reflects it is 0.43 ha on the title, it is in essence 0.10 ha on the ground.

7. In cross examination PW 1 stated that she wants to be allowed to continue staying in parcel 2282 which on the map is 2283. She also avers that her father's original parcel was no. 141 and she admits that the first two agreements in which her father sold land to defendant are okay.

8. She also admits that there was a case no. Meru CMCC 114/2000 filed by defendant while her father had filed case no. 22 of 2001 and that the cases were consolidated and dismissed.

9. PW 1 contends that she utilizes parcel 2283, this is her place of residence, but avers that defendant farms ¼ of that land and has built houses there and has tea leaves too.

10. In support of her case PW 1 produced the documents in her list dated 2.10.2015 as exhibits 1-5. These are:

- Title deeds for parcel 2282, 2284 and 2281, land sale agreement of 18.1.1998 between plaintiff's father and defendant, acknowledgement receipt of 18.1.1996, 24.11.1997 and 5.12.1996 between the aforementioned parties, land sale agreement between the aforementioned parties of 5.12.1996, the further agreement between same parties of 30.3.1999, application for consent and the

*consent for parcel 2283 between same parties, transfer forms for the aforementioned land, photographs and a grant of letters of administration issued to plaintiff.*

11. Pw 2 one Joseph Kirimi Magambo adopted his statement dated 2.10.2015 as his evidence. He introduced himself as chairman of KTDA Gaturere tea buying centre which was built in 1985. He says that they have a title to parcel 2284 but he was appalled to learn that the defendant has a title over their parcel of land which is not logical. He wants the status quo to be maintained.
12. In cross examination he avers that indeed the tea buying centre had sued defendant in the case no. 22 of 2001 and it concerned parcel 2283. He avers that survey was done in which defendant got his land, so did the plaintiff and even the tea buying centre. They all got titles but their land is also where defendant is claiming to be his land.
13. PW 3 one James Murithi also adopted his statement recorded on 2.10.2013 as his evidence. He equally bought land in 1985 from plaintiff's father and got a title to parcel 2281, but defendant has threatened to evict him. He wants the status quo to be maintained.
14. In cross examination pw 3 states that he bought his land from plaintiff's father but so did the defendant and that defendant uses that land. He further states that plaintiff's father also transferred a portion of the land to plaintiff.
15. The case for defence was advanced by DW1, the defendant who adopted his statement filed on 6.11.2015. His evidence is that plaintiff's father was known as M'Itonga M'Murwithania (now deceased) who was the owner of the parcel of land L.R No. Abogeta/U-Kiungone/141 measuring 12  $\frac{3}{4}$  acres. The deceased later subdivided that parcel of land and transferred part of it to his 3 sons and his wife and remained with the parcel of land L.R No. Abogeta/U-Kiungone/2171.
16. Later M'Itonga M'Murwithania sub-divided L.R No. Abogeta/U-Kiungone/2171 into 6 resultant parcels numbers 2281- 2286. In the year 1996 M'Itonga M'Murwithania sold a plot measuring 40 x 80 feet to the defendant. They entered into an agreement for the same at an agreed consideration of Kshs.80,000/= and defendant paid the full consideration thereof to the vendor.
17. Later, they entered into an amending agreement with the said vendor who sold to him another plot measuring 40 by 160 feet and defendant paid the full consideration.
18. On 30.3.1999 the said vendor again sold to the defendant parcel L.R No. Abogeta, U-Kiungone/2283 of which they signed the further amending agreement. They then attended the land control board, transfer was effected and defendant was issued with the title deed for the same. Dw1 proceeded to develop his land.
19. Defendant then filed a civil case against the said vendor being Meru H.C.C.C no. 114 of 2000 and the same was consolidated with Meru HCCC no. 22 of 2001. Both cases were later dismissed by the court.
20. Dw1 is aware that James Murithi Kioga as well as Gaturere Tea buying centre did buy portions of land from the said M'Itonga M'Murwithania and they were issued with title deeds for the same.
21. Dw1 contends that M'Itonga M'Murwithania signed the transfer documents himself and he was also thumb printing the documents. The plaintiff has no properties on defendant's suit parcel but she is seeking to occupy the same by force.
22. Dw1 further states that plaintiff's case has no merits since similar cases were dismissed by the court and her case is therefore *res judicata*”.
23. In cross examination Dw 1 states that everyone has their own portions of the land with titles. He contends that plaintiff is not residing on parcel 2283 but on 2286 and 2282.
24. In support of his case, defendant produced the documents in his list dated 3.11.2015 as exhibits 1-6. These include:
  - (i) Agreement for sale of land dated 18.1.1996.
  - (ii) Amended agreement for sale of land dated 5.12.1996.
  - (iii) Further amended agreement for sale of land dated 30.1.1999.
  - (iv) Mutation form for L.R No. Abogeta/U-Kiungone/2171.
  - (v) Application for consent of Land control board and letter of consent for L.R No. Abogeta/Upper-Kiungone/2283.
  - (vi) Court orders in Meru HCCC 114 of 2000 and 22 of 2001.
25. I have not seen any submissions by plaintiff. It was submitted for defendant that the latter is an innocent purchaser of land from plaintiff's father and that the parcel 2283 was lawfully transferred to him.
26. It was also submitted that the claim of adverse possession cannot succeed because the plaintiff is not in occupation of the land 2283 and that plaintiff has admitted that defendant occupies the said land. Further, it was submitted that plaintiff was a party in the case Meru HCC

no. 22 of 2001 hence this suit is resjudicata. That in the suit HCCC 114 of 2000, the plaintiffs were acknowledging that defendant took possession of 0.43 ha and not 0.101 ha.

27. It is further submitted that plaintiff has not demonstrated any fraud on the part of the defendant. In support of his case, defendant has relied on the cases of **Masiaya Ole Oloije vs William Siwintei & others Ha. No. 235 of 2011**, **Edward Mugambi Kairanya vs Jason Mathiu Mwangera C.A no. 52 of 2017** and **Shah vs Padamshi C.A no. 5 of 1982**.

### **Determination**

28. The plaintiff's claim is anchored on the doctrine of adverse possession. There is no counter claim. That being the case the issue for determination is whether the plaintiff has met the criteria of an adverse possessor.

29. In the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi- COA MALINDI (2015) eKLR** it was held that:

***“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”***

30. The plaintiff has pleaded that though defendant acquired title to parcel 2283 in 1999, the said defendant never took possession of the land. That it is the plaintiff who has been in exclusive and peaceful possession of this parcel since 1995 to date. However plaintiff's evidence is not in tandem with her pleadings. In her evidence, she avers that defendant utilizes a portion of the land where he has even built houses and he has tea leaves too.

31. It has also emerged that her witnesses pw 2 and 3 also occupy the same land. The element of exclusive occupation and possession of the suit land by the plaintiff is therefore missing.

32. It has also emerged from the evidence of the plaintiff that she is actually challenging the title held by the defendant in relation to parcel 2283. A perusal of plaintiff's documents indicate that plaintiff is the registered owner of parcel 2282 issued on 6.8.1999 which is 0.01 ha, that the Tea buying centre (KTDA Gaturere) has a title no. 2284 measuring 0.10 ha issued on 30.7.1994 while PW 3 (James Kioga) owns parcel 2281 measuring 0.01 ha issued on 8.4.1999. The case of the plaintiff and her witnesses seems to suggest that their titles are juxtaposed in the title held by defendant for parcels 2283 which was issued on 9.4.1999. It means that all those titles were issued more or less at the same period (1999). Firstly the issue of fraud raised by plaintiff in her evidence is not anchored in her pleadings. Secondly though plaintiff has a grant she has not brought the claim on behalf of the estate of her father. Finally no evidence has been led to indicate how the mutation was done to give rise to the four titles and further there is no evidence to indicate where each title is referenced on the ground.

33. How can the court determine that the titles of pw1, 2 and 3 are inside the title of the defendant without the input of the expert evidence of the land registrar and surveyor?. It is trite law in evidence that he who asserts must prove his case. **Section 107 of evidence Act** succinctly states:

***“Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

34. Thus the onus was upon the plaintiff to prove her case anchored on the doctrine of adverse possession of which she failed to discharge the said burden. In the final analysis I find that plaintiff has not proved her case on a balance of probabilities. Her suit is hereby dismissed with costs to defendant.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties through a notice issued on 3.9.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**