



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC SUIT NO. 8 OF 2020

MAJANI ESTATES LIMITED.....PLAINTIFF

VERSUS

MUTHONI NKONGE.....1ST DEFENDANT

MURIUKI NDUBI.....2ND DEFENDANT

SAULU NDIGA.....3RD DEFENDANT

KARIBA KANAMPIU.....4TH DEFENDANT

MWIRIGI MIRITU.....5TH DEFENDANT

MUGENDI KAINYATU.....6TH DEFENDANT

PAUL KINYUA RIUNGU.....7TH DEFENDANT

MWITI RIUNGU.....8TH DEFENDANT

BENEDICTINE NJIRU RIUNGU.....9TH DEFENDANT

JUDGEMENT

INTRODUCTION

1. In this case, I am required to write a judgement based on the evidence taken by P.M Njoroge J, who was seized of this matter but has since been transferred to ELC Isiolo. When the matter came up before me on 20th September ,2021 and 18th October 2021 to confirm filing of written submissions, the advocates for both the parties asked this court to proceed and write judgement in the case.

2. Order 18 rule 8 (1) of the Civil Procedure Rules provides as follows:

Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit or the hearing of an application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it.

3. In this instance, the trial judge has been transferred to ELC Isiolo and is therefore prevented from concluding this matter. This court notes that the parties herein are in agreement that the court may proceed to write the judgement based on the evidence taken by my predecessor.

PLAINTIFF' S CASE

4. The plaintiff instituted this suit vide a plaint dated 5th August 2020 seeking the following reliefs;

- a) An order of permanent injunction be issued restraining the defendants and or their servants from entering or carrying out any dealings in land parcels no. MWIMBI/CHOGORIA/5951,5952 AND 5953

b) An order of eviction against the Defendants if any of them are in occupation of land parcels No. MWIMBI/CHOGORIA/5951,5952 AND 5953 with the assistance of the O.C.S Chogoria police station.

c) Costs and interests of the suit.

d) Any other relief this court deems necessary.

5. The plaintiff avers that it is the registered owner and is in possession and occupation and has always had possession and use of the land since the year 2014. The plaintiff states that the defendants have without any color of right on the 22nd July, 2020 interfered with the plaintiff's quiet possession and use of the suit land by chasing away the plaintiff's workers/employees/ agents from the three parcels of land claiming that the same belong to them, thus denying the plaintiff free and peaceful enjoyment of the same.

6. Ronald Mutuma Mutai testified on behalf of the plaintiff as PW1. He stated that he is the manager with Majani Estates Limited, the plaintiff herein. He relied on and adopted his witness statement dated 5th August 2020 as his evidence -in -chief. He also produced documents numbers 1,3,4 and 5 in the plaintiff's list of documents dated 5th August 2020 as plaintiff Exhibit 1. These documents are official searches for L.R Nos. MWIMBI/CHOGORIA/5951,5952 and 5953; Board minutes extract and demand letter. He urged the court to grant the plaintiff the prayers sought in the plaint.

7. PW1 was also cross-examined and re-examined. He testified that the plaintiff bought the land in 2014 from one Peter Gitonga M'mwari and his brothers, Joseph Murungi Gitonga and Bernard Njeru Kariuki who got the lands through succession. That the land parcels are subdivisions of parcel No.1086. That the Green card showed that the land was first registered in the name of Kaligani Kairana on 20th August 1974, then it went to M 'Ndaka Kangangi on 9th May 1997 through succession cause No.246 of 1995. Thereafter it went to Joseph Mwangi Gitonga on 7th February, 2014 vide succession cause No.251 of 2012. He was categorical that the plaintiff was the registered owner of the land parcels. He stated that he did not know that in 2018, the people who sold the land to the plaintiff got another grant. He also stated that he was not aware of a pending succession cause at Chuka High Court, being Succession Cause No.2 of 2020 (Previously Meru HCC No. 246 of 1995 consolidated with No.251 of 2012).

8. He contended that he did not know if orders for inhibition had been issued at Meru for LR.5951,5952 and 5953 and also that he did not know M'Ndaka Kangagi. He stated that he did not know that M'Ndaka Kangagi had any land from his father's land through succession. He acknowledges M,Ndaka Kangagi had his own 9 acres. He denied knowing that the defendants fraudulently filed another Succession cause and got the land which they sold to the plaintiff when there was another Succession Cause in court.

9. PW1 was asked whether he knew the defendants and he stated that that he did not know any of them except Muthoni Nkonge. He stated that the defendants have been disturbing them. He stated that when they bought the land, it was vacant and even now, only Muthoni stays there. He also did not know if the defendants all have title deeds to their land. He further stated that the plaintiff has titles and when shown a copy of a title issued to Jadiel Mwiriki Ndubi for title No. Mwimbi Chogoria/5057 he stated that the same was different from their land.

10. He was further questioned if he knew that the people who sold the plaintiff land fraudulently filed succession cause and got the land which they sold to the plaintiff and his answer was that he did not know.

11. Pw1 stated that he did not know about the underlying succession issues. He also did not know that the defendants had the title documents. When asked if he knew that the grant issued in Meru succession 251 at Meru to Joseph Mwangi Gitonga was revoked vide application dated 1/7/2014, his answer was in the negative and that he did not know whether the grant and the resultant titles were revoked.

12. When re -examined PW1 contended that the orders of inhibition were never registered in the Green card. He stated that he was in occupation and use of land and he had the titles.

DEFENDANTS' CASE.

13. The defendants entered appearance and filed a joint statement of defence and counterclaim dated 2nd December, 2020. The defendants deny that they have in any way interfered with the Plaintiff's possession of the suit parcels of land. The defendants state that the plaintiff has never occupied the suit parcels of land and accused the plaintiff of interfering with the defendants peaceful and quiet possession of the suit lands. The defendants contend that they have lived in the suit parcels of land for a period in excess of 12 years. In their counter claim, the defendants are seeking a declaration that the plaintiff's claim of ownership of the suit properties have been extinguished by law and that the defendants have acquired the same under the doctrine of adverse possession. In their counter claim, the defendants claim for judgement against the plaintiff for:

a) A declaration that the defendants in the counterclaim ownership to title to parcels L. R No. MWIMBI/CHOGORIA/5951,5952 and 5953 has extinguished by Law.

b) That the plaintiffs in the counterclaim have acquired occupation of the suit lands under the doctrine of adverse possession.

c) Costs of the suit and counterclaim.

14. The matter was slated for the hearing of the defence case on 17th May, 2021. On that day, Mwirigi Miriti (5th defendant), Mugendi Kainyati (6th defendant) and Mwititi Riungu (8th defendant) were not present in court. Mr. Muthomi advocate for the defendants was also not in court at the time of hearing. Mr. Mutegi, the plaintiff's advocate applied to the court to enter judgement against the said absent defendants. The court found that the case against the 5th, 6th and 8th defendants had been proved in terms of the provisions of Order 12 Rule 5 of the Civil

Procedure Rules, and consequently entered judgement for the plaintiff against the said defendants together with costs.

15. Paul Kinyua Riungu, the 7th defendant testified as DW1. He asked the court to adopt his statement dated 3rd March 2021 as evidence. He also produced the list of documents dated 2nd December 2020 as defendants exhibit numbers 1,2 and 3 respectively. These documents are official searches for LR MWIMBI/CHOGORIA/5951,5952 &5953, Green cards and Title Deeds for the same parcels of land. DW1 denied being illegally on the suit land and testified that they have been living on the suit land since around 1999 to 2000 and have never been evicted.

16. The evidence of DW1 was that around the year 1999, his late father, ELIPHAS RIUNGU (deceased) purchased land parcel LR MWIMBI/CHOGORIA/2357 measuring approximately 2.0 Ha from HAMPALY KARANI M'NDAKA, L.R MWIMBI/CHOGORIA/2358 Measuring 1.21 Ha from EUGENIO MURUNGI HENRY; L.R MWIMBI/CHOGORIA/2359 measuring approximately 2.43 Ha from MWITI M'NDAKA;LR MWIMBI/CHOGORIA/2360 measuring approximately 2.03 Ha from TERESIO NJABANI M'NDAKA and LR MWIMBI/CHOGORIA/2361 measuring approximately 3.36 Ha from one M'NDAKA KANGAGI. That the said parcels were registered in the name of ELIPHAS RIUNGU (deceased) and a title deed issued.

17. It was further the evidence of DW1 that when his deceased father died his mother BENEDICTINE NJIRU RIUNGU and his brother MWITI RIUNGU became the administrators of the deceased's estate. That they have planted 5000 tea bushes, a wide range of indigenous trees, nappier grass and beehives save that in or around July 2020, he was shocked after receiving information that some goons numbering about 60 had invaded the suit parcels of land, uprooted the tea bushes, nappier grass and cut down trees. DW1 stated that they reported the matter at Mbogori police post. His evidence was that there was no time that the plaintiff's agents visited the land and informed them that they were utilizing the plaintiff's land. He contended that the plaintiff had no right whatsoever to interfere with the defendant's peaceful occupation and urged the court to dismiss the plaintiffs' suit with costs.

18. When DW1 was cross-examined by Mr Mutegi advocate for the plaintiff, he stated that the land was purchased from M'Ndaka (deceased) and was aware that M'Ndaka had a succession cause pitting his cousins JOSEPH MURINGI GITONGA, PETER GITONGA and BERNARD NJERU KARIUKI. He stated that they got titles for land parcels MWIMBI/CHOGORIA/2357, 2358 and 2359 in the year 2000. He also confirmed that he was aware that the titles were revoked in Meru succession cause 246 of 1995. DW2 stated that he was not aware that the original land parcels were divided into three portions. The subdivisions are MWIMBI/CHOGORIA /5951, 5952 and 5953. DW1 stated that he did not know the original number of the land off-head. He was also not aware that succession case No. 246 of 1995 in Meru has been concluded. According to them, the same is not concluded.

19. When he was asked about adverse possession, he said that he did not know the meaning of adverse possession. He stated that he was claiming the land because they bought it truthfully and honestly. He claimed that his mother Benedicta Njiru Riungu and his brother Mwiti Riungu are the administrators of his father's estate. DW1 stated that they have not sued M'Ndaka for refund. He confirmed that his brother MWITI and his mother Benedicta do not live in any land in MWIMBI/CHOGORIA. DW1 contends that only some of the defendants live on the land but could not say who live there.

20. When DW1 was asked if they cultivate the land as stated in their statements his response was that he could not answer. He also acknowledged that he did not know what is in their statements. When asked if he knew whether the agents of Majani estates had a dispute before the OCS Chogoria Police station, DW1 responded that he did not know about the dispute, adding that they only encroached on the land. He stated that the OCS did not refer them to the ELC or any other court.

21. DW1 was re-examined by Advocate Gitari where he stated that Meru Succession Cause No. 246 of 1995 has never been completed, but was transferred to Chuka High Court and became Chuka Succession Case No. 2 of 2020. That the parties in the Meru and Chuka case are the same. He stated that there exists a valid court order in Chuka ELC Case 2 of 2020 for status quo to be maintained until the matter is determined. He stated that the plaintiff came to the court after the said order was issued. It was noted by court that at re-examination DW1 was going beyond the issues raised in the cross examination. DW1 stated he understood that the plaintiff's title was issued in 2014. He stated that the grant was issued in 2018, adding that none of the parties hold titles after the grant was issued in 2018.

22. DW2 was Muthoni Nkonge, and she is the 1st defendant in the suit. She said she was a peasant farmer and lives in Mbogori where the suit land is.

23. She stated that on 3/3/2021 that she did not visit any advocates office or make any statement. She stated that she did not know why she was coming to court.

ISSUES FOR DETERMINATION

24. I have reviewed and considered the pleadings, the evidence tendered and the submissions made. The court identifies the following issues for determination:

- i. Whether the Plaintiff has proved ownership of the suit properties.
- ii. Whether the defendants have acquired the said parcels of land by virtue of adverse possession.
- iii. Whether the plaintiff is entitled to the reliefs sought in the plaint.
- iv. Whether the defendants are entitled to the reliefs sought in the counter claim.

Whether the Plaintiff has proved ownership of the suit properties.

25. The plaintiff has adduced evidence showing that it is the registered owner of the suit properties. The certificates of official search which were produced as exhibits indicated that the plaintiff was registered as proprietor of the suit properties on 20th May, 2014 and Title Deeds were issued on the same date in the name of Majani Gardens Limited, the plaintiff herein.

26. On their part, the defendants produced as exhibits copies of Green cards that indicate that the plaintiff was registered as proprietor of the suit parcels of land on 20th May, 2014 and Title Deeds issued in its name on the same date. This evidence by the defendants no doubt corroborated and supported the evidence by the plaintiff.

27. As already stated, the court on 17th May 2021 entered judgement for the plaintiff against the 5th, 6th and the 8th defendants. That said judgement has not been set aside and therefore remains in force.

28. From the evidence adduced, I do find that the plaintiff is registered as proprietor of the suit properties. Section 24 and 25 of the Land Registration Act apply and the titles that were produced are prima facie evidence that the plaintiff has proved that it has proprietary rights in the suit parcels of Land.

Whether the defendants have acquired the suit properties by virtue of the doctrine of adverse possession.

29. This court has also analyzed and reviewed the evidence given by DW1 and DW2. I find that the same does not support the defendants' case to the required standard. For instance DW1 even confirmed that the 8th and 9th defendants were not living on the suit properties. DW2 even disowned her own witness statement.

30. Further, the defendants claim is for adverse possession. In the case of **Kasuve Vs. Mwaani Investments Limited & 4 others 1KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for Adverse possession has to prove and held as follows;

“In order to be entitled to land by Adverse possession, the claimant must prove that he has been in exclusive possession of the Land openly and as of right without interruption for a period of 12 years either dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

31. The threshold for adverse possession has also been set out in the case of **Mbira -v- Gachuhi (2002) IEALR 137** in which the court held that:

“...a person who seeks to acquire title to land by the method of Adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruptions...”

32. Based on the evidence of DW1, the claim of adverse possession cannot succeed since the defendants have not been in peaceful possession of the suit parcels of land for the statutory period of 12 years. From the evidence adduced it is clear that the defendants claim they entered the land as purchasers and are also claiming the same through succession. In this case, the plaintiff acquired title of the suit parcels in May 2014 and the defendants filed their counterclaim on 2nd December, 2020, a period of about 6 years. Therefore, the defendants could not have met the required threshold of 12 years.

33. The period of adverse possession could only have started to run in 2014 when the plaintiff was issued with title deed to the suit properties. In the Case of **Titus Kigoro Munyi v Peter Mburu Kimani (2015) eKLR** it was held thus:

“...computation of time for purposes of adverse possession could only start when there is actual or constructive knowledge by the registered proprietor that a third party claiming adverse possession is in possession of the suit property.”

34. In this instant case, from the evidence on record, the defendants did not adduce evidence to support their claim of adverse possession. Their possession on the suit properties, if at all was not open, non-consensual and adverse as there were existing litigation on ownership over the suit properties in the succession court. Moreover, the defendants had not even met the required threshold of 12 years. It is therefore my findings that the defendants claim of adverse possession is without merit and the same must fail.

Whether the plaintiff is entitled to the reliefs sought in the plaint.

35. Section 24 of the Land Registration Act No.3 of 2012 provides:

- a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

36. Section 25 of the same Act provides as follows:

“1)The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of

court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

37. In addition, Section 26 of the same Act Provides:

1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

a) On ground of fraud or misrepresentation to which the person is proved to be a party: or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

38. From the above, it is clear that section 26 excludes from protection of law titles to property obtained fraudulently or through misrepresentation, to which a person is proved to be a party and where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme. In the instant case, no fraud or misrepresentation has been proved against the plaintiff in the manner it acquired title to the suit properties. It has also not been proved that the plaintiff's title was acquired illegally, unprocedurally or through a corrupt scheme. Having found that the plaintiff is the lawful owner of the suit properties, having acquired titles to the same lawfully and procedurally, it is also my finding that the plaintiff has proved its case on a balance of probabilities and is entitled to the reliefs sought against all the defendants. Judgement is therefore entered for the plaintiff against the defendants.

39. It is also the finding of this court that the defendants have totally failed to prove their counterclaim. The defendants' claim is without merit and is dismissed.

40. Final orders:

a) An order of eviction be and is hereby issued against the defendants if any of them are in occupation of land parcels no. MWIMBI/CHOGORIA/5951, 5952 and 5953 with the assistance of the O.C.S Chogoria Police Station.

b) An order of permanent injunction be and is hereby issued restraining the defendants and or their servants or agents from entering or carrying out any dealings in land parcel No. MWIMBI/CHOGORIA/5951,5952 AND 5953.

c) The defendants' counterclaim is hereby dismissed.

d) The cost of the suit shall be in favour of the plaintiff against the defendants jointly and severally.

41. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF NOVEMBER, 2021 IN THE PRESENCE OF:

CA: Ndegwa

Muthomi for the Defendants

N/A for Plaintiff

C. K. YANO,

JUDGE.