



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ORIGINATING SUMMONS NO. 28 'B' OF 2019**

**JOHN MWENDA M'IBURI.....1<sup>ST</sup> PLAINTIFF**

**EUNICE MUKIRI MUTIGA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**AGNESS NAITORE MUTEA.....1<sup>ST</sup> DEFENDANT**

**ANN KARIMI MUTEA.....2<sup>ND</sup> DEFENDANT**

**TARASILANKATHA MUTEA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A. PLEADINGS**

1. The plaintiffs by way of an originating summons dated 16.6.2019 seeks the court to declare them entitled to 0.162 Ha from each of the defendants' **Parcel No. Ntima/Ogoki/8363** formerly part of **Parcel No. Ntima/Igoki/5949** then registered in the name of **Anthony Mutea M'Muga (deceased)** on account of adverse possession since 2005 and 2007 respectively.
2. Upon declaration of adverse possession the plaintiffs seek defendants to excise the portions, execute and transfer them into their names in default the executive officer of the court to do so.
3. The defendants through a replying affidavit of the 1<sup>st</sup> defendant sworn on 23/7/2019 averred the suit land was validly transmitted to them through a succession process, the plaintiffs were trespassers who fraudulently entered therein with no rights and duped their deceased father yet he was sickly, a drunkard and of unsound mind.
4. They claimed mere occupation obtained through fraud could not justify the plaintiffs to claim what lawfully belongs to them since 2018.
5. In response to the defence, the 1<sup>st</sup> plaintiff put in a further affidavit filed on 22.8.2019 denying the deceased was of unsound mind as alleged or at all in 2005 and 2007 respectively, the sale agreements were witnessed before a lawyer; no support of medical reports had been attached and lastly, alleged the plaintiffs had been in actual, open, public continuous and exclusive occupation and possession since the date of purchase as pleaded hence their rights over the land had crystallized.

**B. EVIDENCE**

6. PW1 adopted his witness statement dated 11.6.2016. He testified that he entered into a sale agreement with the defendants' late father on 27.5.2005 to purchase ½ acre of **Parcel No. Naima/Igoki/5949** for **Kshs. 60,000/=**, cleared the amount and took vacant possession. PW2 also purchased a portion from the deceased. he testified they went for a land control board consent meeting for the subdivisions with the deceased, who subdivided the land into three portions namely **Ntima/Igoki/8362, 8363, and 8664**. Later on the deceased subdivided **L.R No. Ntima/Igoki/8362** into two portions **L.R No. Ntima/Igoki/8573** measuring **0.118 Ha** into his favour; **L.R Ntima/Igoki/8574** in favour of PW2.
7. PW2 continued that while processing the land control board consents for transfer one Zipporah Kanana placed a caution on the land on 3.6.2013 hence stalling the process.

8. Further PW1 testified the deceased passed on 15.10.2015 before effecting the transfers but the defendants filed Meru Magistrate's Succession Cause No. 278 of 2016 to which the plaintiffs unsuccessfully objected but the court issued inhibition orders to preserve the properties though now registered in favor of the defendants until their rights could be determined.

9. PW1 told the court he has been in occupation uninterruptedly for over 14 years, where he has made immense developments. He produced copies of the sale agreements dated 17.2.2007, 27.5.2005, copy of green card for **Parcel No. Ntima/Igoki/5949**, mutation form for **Parcel No. Ntima/Igoki/5949**, application for consent from land control board dated 2013, letter of consent to subdivide dated 5.5.2013, order in the succession cause, replying affidavit by the 1<sup>st</sup> defendant in the succession cause, photographs showing developments in the land and a search certificate for **Parcel No. Ntima/Igoki/8362** as **P Exh No's 1 – 11**.

10. In cross examination, PW1 insisted he was only interested in the portion of **Parcel No. Ntima/Igoki/5449** which he had bought measuring approximately 30 by 200 ft. Further he stated Zipporah Kanana was a neighbor though the person who had sold her the land was the father to the defendants though they had gone with him through the land control board processes before his demise.

11. She confirmed however that the defendants were all married off elsewhere and were not occupying the land as the deceased had already sold all his land especially after his wife passed on.

12. PW2 adopted his witness statement dated 11.6.2016 claiming he bought  $\frac{1}{4}$  acre for **Kshs. 60,000/=**, from the deceased as per **P exh 1 – 12 in 2007**, took vacant possession though the rest of the balance was to be cleared after he was transferred the land. He admitted he nevertheless made payments of the balance to the seller before he passed on at his lawyer's office though the transfer was not effected.

13. PW3 adopted his witness statement dated 26.11.2016. As the area assistant chief of Lower Igoki sub location, he stated he knew both parties to the case as well as the deceased Anthony Mutea M'Muga. Regarding the sale agreements, PW3 stated he was a witness to PW1's sale agreement in 2005 before Kiautha Arithi advocates where after PW1 took vacant possession and started developing his portion.

14. As to issues raised in cross-examination that the defendants were objecting to the sale, PW3 stated he received such a complaint, summoned the deceased and his children who admitted he had sold his land to pursue an insurance claim after one of his sons had a train accident. In his view the issue was amicably resolved since the defendants were comfortable and that the deceased was also claiming ability to sustain himself even after disposing all his land.

15. Further PW3 confirmed PW1 and PW2 had been in peaceful and an uninterrupted occupation of the suit land since 2005 and 2007 respectively long before death of the seller with visible permanent buildings especially PW2.

16. DW1 testified on behalf of her sisters, adopted her witness statement made on 24.1.2020 and produced **D exh 1 – 2** being copies of a search certificate for **L.R Ntima/Igoki/8362** and a confirmation of grant for the estate of her late father. She stated though they used to live on the suit land, they no longer occupy it since getting married but insisted the plaintiffs moved in after the demise of their late father.

17. Further she testified that all her brothers and mother now deceased were buried on the suit land. Again she told the court efforts to seek the plaintiffs to vacate their land had been unsuccessful. She denied any adverse possession, insisted the plaintiffs were trespassers who took advantage of the defendants' absence and their late father's drunkardness and mental sickness to irregularly get into his land hence urged the court to order the plaintiffs to vacate her land.

18. As regards succession proceedings, DW1 testified the same was allowed despite objection from the plaintiffs subsequent to which an eviction order was issued. She was unable to produce any document to prove his late father was mentally unfit.

### **C. SUBMISSIONS**

19. At the close of evidence, parties sought leave to put in written submissions. By written submissions dated 22.6.2021, the plaintiffs urged the court to find they had proved adverse possession in line with **Sections 7 & 38** of the **Limitation of Actions Act** for over 12 years. They relied on **Titus Mutuku Kasuve –vs- Mwaani Investments Ltd & 4 Others [2004] eKLR**, quoted in **Wilson Njoroge Kamau –vs- Nganga Muceru Kamau [2020] eKLR**.

20. As regards change of ownership, from the deceased to the defendants in 2018, the plaintiffs submit mere change of ownership of land occupied by them did not interrupt their adverse possession as held in **Paul Kamande Gicheha –vs- Jacob Kinyua Kiragu [2018] eKLR**.

21. In any event the plaintiffs submit they continued asserting their rights even after the demise of the deceased hence the reason they were issued with an inhibition order (**P exh 8**).

22. On the issue of fraud or illegality, as alleged by the defendants' replying affidavit, the plaintiffs submit that fraud and illegality must not only be pleaded but also proved. They rely on **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR** as quoted in **Mellen Mbera –vs- James Theuri Wambuqu [2020] eKLR**.

23. Further the plaintiffs submit no medical documents were produced regarding incapacity of the deceased to dispose of his land as alleged. The plaintiffs relied on **John Patrick Machira –vs- Patrick Kahiaru Muturi [2002] eKLR** as quoted in **Florence Soila Ngossor –vs- Rikoyan Ole Kuku & 8 Others [2021] eKLR**

### **D. ANALYSIS AND FINDINGS**

24. The issue for determination is whether the plaintiffs' have proved adverse possession and trust.

25. In order to be entitled to adverse possession the plaintiffs have to prove the following key steps have to be pleaded and proved as held in *Titus Mutuku Kasuve –vs- Mwaani Investments Ltd & 4 Others [2004] eKLR*, exclusive possession, openly, as of right, uninterrupted for a period of 12 years either after dispossessing or through discontinuation of possession by the owner on his own volition.

26. The plaintiffs' claim to have bought their parcels in 2005 and 2007 respectively from the defendants' late father who put them into vacant possession to date. On the other hand, the defendants allege they moved out of the land upon marriage. The defendants did not clarify the dates of their marriage. Whereas the defendants state they sought to evict the plaintiffs from their land, which they allege they irregularly moved in due to their absence and the demise of their late father, no evidence was produced to that effect. Again no evidence was led by the defendants to indicate the plaintiffs were never in occupation before the demise of their father.

27. Further, the defendants failed to produce any evidence that they complained or objected to the plaintiffs' occupation and or possession prior to the demise of their father. The exhibits produced by the plaintiffs clearly confirm occupation or possession started as early as 2005 and 2007 respectively. The defendants did not object to the production of **P exh 1, 2, 3, 4 5, 6 and 7**. There were no questions or issues raised as the authenticity, veracity and or legality of those documents.

28. The defendants did not insist on the makers of the documents if at all the mental status of the deceased at the time was in doubt.

29. In my considered view therefore, the plaintiffs' evidence as to the date of entering the suit land has not been controverted. In absence of any counter-evidence my finding is that time began to run in 2005 and 2007 respectively after the deceased on his own volition discontinued possession and handed them over the parcels after purchase.

30. The next question is whether the possession was adverse to the defendants' rights. PW1 produced **P exh 1 – 11** and whose existence and legality were confirmed by both PW2 and PW3.

31. The plaintiffs' case is that the deceased passed on before he could transfer the land to them. The delay was also occasioned by a caution registered by one Zipporah Kanana. The defendants have not denied those facts at all. Strangely, the said Kanana did not feature anywhere in the succession proceedings if at all she had any interest over the land.

32. Further the defendants were also silent over their relationship with Zipporah Kanana and how they managed to remove the caution so as to have the land registered in their names.

33. Evidence tendered indicates there was no action by either the deceased or the defendants to assert ownership or take vacant possession from the plaintiffs. Even though DW1 testified she had eviction orders, none was produced before this court. In absence of any evidence to the contrary, my finding is that the occupation of the plaintiffs was adverse to the deceased during his lifetime and subsequently afterwards as against the defendants.

34. Concerning the defendants, **D Exh 2**, the certificate of confirmation of grant was issued on 19.10.2017. Thereafter the defendants got registered as owners of **Parcel No. Ntima/Igoki/8362** on 9.5.2018 as per **D Exh 1**. A title deed to that effect issued on 28.5.2018.

35. As at 28.5.2018 the plaintiffs had been in occupation of the suit land for 12 and 11 years respectively. They nevertheless moved the court on 12.6.2019. In my view and given the foregoing the change of title did not extinguish the rights of the plaintiffs at all.

36. Since the defendants have produced no evidence of retaking ownership and or interrupting the plaintiffs' occupation and possession since 2005 and 2007, the lodging and pendency of the succession cause did very little to shake the rights of the plaintiffs. If anything, the plaintiffs also sought and obtained inhibition orders as per **P exh 8** in furtherance of their rights. Consequently, as at the time the change of title occurred, the defendants could only have been holding the same in trust for the plaintiffs.

37. The plaintiffs testified they undertook immense developments over the suit land including PW2 putting up a permanent homestead on his land. There is no indication that the defendants ever sought to stop any such developments prior to and after the demise of their father.

38. All these facts, and circumstances taken into totality show the plaintiffs were in exclusive control of the suit land and demonstrated their rights openly, as of right and without interruption for over 12 years.

39. As regards the mental status of the deceased, DW1 testified her late father was of unsound mind and hence the plaintiffs took advantage of his condition to dispossess him of his land. DW1 however produced no supporting documents to substantiate those claims.

40. In *Florence Soila Ngossor –vs- Rikoyan Ole Kuku & 8 Others (Supra)*, the court held anyone raising issues of mental incapacity must follow stringent provisions as set out under the **Mental Health Act Cap 248 Laws of Kenya**. In absence of any mental certificate and orders declaring the deceased to have been mentally unsound, this court is unable to find anything to vitiate the sale agreements and subsequently the land control board consents produced as exhibits herein.

41. In sum, I find the plaintiffs to have proved their claim in terms of **prayers (a), (b), (c), (2) (e), (f) & (g)**.

Costs to the plaintiffs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2021**

**In presence of:**

Mutebi for plaintiffs

L. Kimathi advocate for defendants

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**