



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 54 OF 2015

SOSPETER MURIMI KARITU.....PLAINTIFF

VERSUS

MARTIN MURIUKI MUGO.....DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff first filed this suit in the High Court at Nyeri being HCCC No. 49 of 1987 seeking the following orders:

- a. That the defendant do transfer land parcel No. MWERUA/KANYOKORA/144 to the plaintiff.*
- b. Without prejudice and alternatively to prayer (a) above, the plaintiff prays for a declaration that he has been in adverse possession of land in dispute and he is entitled to be registered.*
- c. Costs of this suit with interest thereon.*
- d. Interest on (b) above at Court rates.*
- e. Any other relief this Honourable Court may deem fit to grant.*

In a consent letter dated 22nd December 1988 addressed to the Deputy Registrar, the parties agreed to compromise this suit as follows:

- 1. That the defendant do transfer land parcel No. MWERUA/KANYOKORA/144 the subject matter in this case to the plaintiff herein.*
- 2. That the defendant to execute all the necessary documents to effect the transfer of land parcel No. MWERUA/KANYOKORA/144 to the plaintiff herein and in default, the Executive officer of this Honourable Court to execute the same.*
- 3. That the plaintiff to meet all the transfer fees payable to the necessary authorities.*
- 4. That no order as to costs in this case.*

On 24th February 1992, this matter was listed for mention before Hon. Mr. Justice Tunoi in the presence of counsel for the plaintiff and the defendant in person. The counsel for the plaintiff sought to have the consent letter filed in Court on 22nd December 1988 adopted as an order of the Court. The application was allowed. On 25th July 2013, the defendant through the firm of Waweru Macharia & Co. Advocates filed a Notice of Appointment of advocate, a statement of defence and an application under certificate of urgency seeking the following prayers:

- 1. Spent.*
- 2. That the consent judgment and decree entered against the defendant/Applicant on 24/2/1992 as well as all subsequent orders be and are hereby set aside.*
- 3. That the defendant be granted leave to file defence and defend the suit unconditionally.*

4. That the Court file be kept under lock and key to avoid any interference as there is clear evidence there is criminality involved in the transfer of the Applicant's property to the Respondent.

5. That a prohibitory order be and is hereby issued against any transaction in respect of L.R. No. MWERUA/KANYOKORA/144 and the same be served upon the Land Registrar, Kerugoya for registration against the said title in the Land Register.

6. That this order be served upon the OCS Baricho Police Station for compliance.

7. That the costs of this application be borne by the Respondent.

That application was placed before the duty Judge who upon perusal granted orders in terms of prayers 1, 4 and 5 pending the hearing and determination at the inter-parties hearing. On 30th September 2013, the said application was coming up for hearing when the counsels for the parties recorded a consent in the following terms:

1. That the Kerugoya DCIO to investigate the matter and determine whether the signatures on the consent dated 22/12/1988 was signed by the defendant, Martin Muriuki Mugo.

On 6th November 2014, Hon. Ombwayo J. (as he then was) rendered himself on the Notice of Motion application dated 25/7/2013 in the following terms:

1. That the application dated 25th July 2013 is allowed.

2. That the consent judgment on the 24th February 1992 as well as all subsequent orders are set aside.

3. That the defendant is granted leave to file defence within the next 14 days.

4. A prohibitory order is issued against any transaction in respect of L.R. No. MWERUA/KANYOKORA/144 and the same served upon the Land Registrar, Kirinyaga for registration against the said title in the Land Register.

5. The file herein to be kept in the strongroom at the registry.

6. Costs to the defendant/Applicant.

On 19th November 2014, the defendant filed his statement of defence and counterclaim. On 30th December 2014, the plaintiff filed a defence to the counterclaim and on 7th January 2015, the defendant filed a reply to defence to counterclaim.

On 22nd April 2015, Hon. Lady Justice L. Waithaka transferred the file to this Honourable Court for hearing and determination.

PLAINTIFF'S CASE AND EVIDENCE

PW1 was a Document Examiner No. 231662 CP Daniel Gutu who stated that he was a forensic document Examiner attached to the Directorate of Criminal Examination. He has been an Examiner for more than ten (10) years. He was trained and certified by Regional Forensic Laboratory and National Forensic Institute in Khartoum Sudan. He stated that he had two reports dated 4th September 2013 and 9th October 2013 respectively. On the first report, he stated that he received documents from ICI Kirinyaga Section under Escort of Samson Osamba accompanied by Exhibits marked as follows:

- Disputed documents
- A consent dated 22/12/1988 A1 and A2 specimen signatures of Martin Muriuki Mugo.

Request – To ascertain whether signature pointed with red arrow if the signature was made by the same person as document in A1 and A2.

The witness stated that in his opinion, the signatures were made by different authors. He also stated that he received documents on 9/10/2013 from DCI Kirinyaga under escort of Samson Osamba Document marked Q – Questioned documents –

Consent dated December 1988 and BI deed Poll – Containing known signatures of Mr. Muriuki Mugo – Pointed by Arrows.

B1 Kenya Armed Forces Identity dated 24/3/1988

Certified copy. The I/D belongs to Martin Mugo 13347. Rank Corporal.

B2 Certificate of Liability from Kenya Armed Forces belonging to Martin Mugo.

Same case applies to B3.

- To ascertain whether signature pointed by arrows on document marked Q, a consent, if the signature was made by the same author when compared by known signatures in B1 – B4.

He stated that he examined them and in his opinion, the signatures were made by the same author. He said that during his examination, he did subject questioned specimen and known signatures to image enhancement and magnification procedures on stereo microscopy, video spectral comparator for better visibility and inspection of the minute individual characteristics for absolute identification as follows:

- Signatures individualization
- Signature construction and alignment
- Pen movement
- Natural variation and natural penstine
- Baseline alignment.

He produced the two reports as Plaintiff's Exhibits 1 & 2 respectively.

PW2 was the plaintiff Sospeter Murimi Karitu who stated that the defendant, Martin Muriuki Mugo is the son of one Mugo Karioi (deceased) and that Mugo Kario was his uncle. He stated that in 1960, Mugo Kario approached him and informed him that he needed money for school fee. He stated that the said Mugo Kario had several children in school at the time and was unable to raise fees. The said Mugo Kario also told the plaintiff that he wanted to raise money to develop his land as there was a threat of the land being taken away by the Government if he did not develop it. He stated that Mugo Kario further told him that he had been given another parcel of land by the clan but that he had registered it in the name of one of his sons namely Martin Muriuki Mugo (defendant). He stated that the said Mugo Kario was willing to sell to the plaintiff land parcel No. MWERUA/KANYOKORA/144 which was in the name of his son Martin Muriuki Mugo (defendant). They then entered into a sale agreement of the said parcel of land measuring 5 acres for a consideration of Ksh. 2,500/= dated 23/12/1960. He stated that he paid the seller Mugo Kario the consideration by instalments until the same was paid in full. The said Mugo Kario then allowed the plaintiff to take possession of the suit land and to start developing it. In 1967, the plaintiff entered upon and took possession of the suit land. He cleared the bushes and planted tea and was later given a licence by the K.T.D.A. He planted coffee on half of the suit land but later uprooted and planted tea on the whole land. He stated that the seller Mugo Kario died in 1984 before he could transfer the land to him. He further stated that before his demise, the said Mugo Kario gave the defendant a portion of land that is adjacent to the suit land. The plaintiff stated that before Mugo Kario passed on, he warned the defendant against interfering with the plaintiff's quiet possession and use of the suit land as he had sold it to him and had paid him in full. He stated that sometime in the year 1986 or thereabouts, he approached the defendant so that the defendant could transfer the land to him but the defendant refused. He was therefore prompted to put a caution on the suit land and later filed this case.

PW3 was Peterson Maina Karitu. He stated that he knows the plaintiff as his elder brother. He also knows the defendant as the son of one Mugo Kario. He stated that his brother Sospeter Murimi Karitu bought the suit land from Mugo Kario (deceased). After he bought the suit land, his brother took possession in 1967. Since the land was a thick forest, he engaged labourers including himself to clear the bushes and thereafter, they planted coffee on half of the land while the remaining half was planted with tea. He used to work on the land as well as taking care of the crops whenever the plaintiff was away. He stated that the defendant has never occupied the suit land. The witness further stated that the defendant has a home on his father's land which is separated from the plaintiff's land by a seasonal stream. He further stated that he is the one who used to deliver the plaintiff's tea leaves to Kiaragana Tea Buying Centre.

PW4 was Joseph Gichangi Wagachau. He stated that in 1967, he was in secondary school and used to be engaged by the plaintiff, Sospeter Murimi Karitu to work on his land in Kanyokora Village. He used to work on the said land with other people who were engaged by the said Sospeter Murimi Karitu. After they cleared the bushes and trees, the plaintiff planted coffee on half of the land and tea on the other half. Later, the owner uprooted the coffee and planted tea on the whole land. He stated that the plaintiff has been in occupation of the suit land since 1967.

DEFENDANT'S CASE

The defendant testified and stated that he is a resident of Kiarakana and works for a private entity dealing with cottages. Previously, he used to work with Kenya Defence Forces (K.D.F). He stated that he was born in 1957 and that he is the registered owner of land parcel No. MWERUA/KANYOKORA/144 which is now registered in the name of Sospeter Murimi Karitu, the plaintiff herein. He stated that the plaintiff committed forgery by changing his title deed into his name. When he

realized the fraud, he instructed his lawyers who advised him to report the matter to the C.I.D. He also filed an application before this Honourable Court to reverse a judgment/decreed which had been issued. He stated that the suit land was given to him by the clan and did not belong to his father. He said that he was not holding the land in trust and that he did not give instructions to his father to deal with the land in any manner including selling the same. He referred to his list of documents dated 19th November 2014 containing 7 items which he produced in evidence as Defence Exhibits 1, 2, 3, 4, 5, 6 & 7 respectively. He also adopted the contents of his statement dated the same date.

ISSUES FOR DETERMINATION

The issues that emerge for determination from the pleadings and the evidence are as follows:

1. ***Whether land parcel No. MWERUA/KANYOKORA/144 was registered in the name of Martin Muriuki Mugo in trust for his father Mugo Kario?***

2. *Whether there was any privity of contract between the plaintiff and the defendant?*

3. *Whether the plaintiff has acquired title to the suit land parcel No. MWERUA/KANYOKORA/144 by adverse possession?*

4. *Whether the plaintiff's registration and issuance of title in respect of the suit property L.R. No. MWERUA/KANYOKORA/144 was regular, lawful and procedural?*

5. *If the answer to (4) above is in the negative, whether the register should be cancelled and rectified to restore title to the defendant?*

6. *Who will bear the costs of this suit?*

1. Whether land parcel No. MWERUA/KANYOKORA/144 was registered in the name of Martin Murimi Mugo to hold in trust for his father Mugo Kario?

The suit property L.R. No. MWERUA/KANYOKORA/144 is currently registered in the name of Sospeter Murimi Karitu pursuant to an impugned consent order issued by the Nyeri High Court before being transferred to this Honourable Court. The said Court order was subsequently set aside vide another Court order issued on 6th November 2014 upon an application by the defendant dated 25th July 2013. The allegations that the defendant Martin Muriuki Mugo held the suit property in trust for his father Mugo Kario (deceased) was not proved by the plaintiff. He made no effort to adduce evidence of the existence of any trust in favour of the late Mugo Kario. It is trite law that prove of a trust is through evidence which the plaintiff has failed to adduce.

2. Whether there was any privity of contract between the plaintiff and the defendant?

Evidence has been adduced that the defendant was the registered proprietor of the suit property before the impugned consent letter which purported that the plaintiff and the defendant agreed to transfer the suit property to the plaintiff. The defendant has come out stating that he never allowed his father or any other person to sell the suit land. There was no written consent by the defendant authorizing Mugo Kario (deceased) his father to sell the suit land. The sale agreement entered between the plaintiff Sospeter Murimi Karitu and the defendant's father Mugo Kario (deceased) has no binding force capable of being enforced in law. In any event, the purported sale agreement was entered into in the year 1967. The defendant who was born in 1957 was hardly ten (10) years and therefore was not having capacity to give consent to the sale of the land. **Section 114 of the Registered Land Act** (repealed) required that anybody purporting to act on behalf of a minor **must** have express authority to do so by way of a Power of Attorney. No such evidence has been availed by the plaintiff to prove that the defendant's father Mugo Kario (deceased) had the authority or capacity to deal with the property of a minor. In the absence of authority and/or capacity to enter into a contract on the part of the defendant's father Mugo Kario (deceased), I find and hold that there was no privity of contract capable of binding the defendant who by then was a minor and the plaintiff herein. In the case of **Samuel Wafunafu Wachilonga Vs John Makokha Sakwa (2018) e K.L.R.**, the Court held that in the absence of privity of a contract, the contract cannot be enforced against a person who was not party to it.

(3) Whether the plaintiff has acquired title to land parcel No. MWERUA/KANYOKORA/144 by adverse possession?

It is trite law that for adverse possession to crystallize, the claimant has to prove that he has been in occupation of the suit land openly, freely and quietly and un-interrupted for a period not less than 12 years. The circumstances obtained in the instant case is different. The plaintiff in this case bought the suit land from one Mugo Kario (deceased) who is the defendant's father. I have already pronounced myself on the veracity of that sale agreement which I reiterate here that it was illegal and unlawful. That therefore leaves the plaintiff as an illegal occupier and trespasser in the defendant's land. His occupation on the defendant's land is trespass. When the plaintiff filed this suit, he was enforcing his right based on the sale agreement which has been declared as null and void. As such, he cannot therefore advance a claim for adverse possession.

(4) Whether the plaintiff's registration and subsequent issuance of title in respect of land parcel No. MWERUA/KANYOKORA/144 was procedural, regular and lawful?

The plaintiff obtained title pursuant to a consent letter dated 22nd December 1988 and adopted by this Court on 24th February 1992. This Court in a Notice of Motion dated 25th July 2013 filed by the defendant herein pronounced itself in a ruling delivered on 6th November 2014 and ordered the alleged consent judgment entered on 24th February 1992 as well as all consequential orders to be null and void and therefore set it aside. The Court also issued a prohibitory order against any transactions in respect of the suit land parcel No. MWERUA/KANYOKORA/144 which was also ordered to be served upon the Land Registrar Kerugoya for registration against the suit title. Though the plaintiff expressed dissatisfaction with the said decision and even filed a Notice of Appeal, the same was not taken beyond there. Following the setting aside of the consent judgment entered on 24th February 1992, the transfer and issuance of title in respect of the suit land parcel No. MWERUA/KANYOKORA/144 to the plaintiff Sospeter Murimi Karitu is a nullity and of no legal effect. While setting aside the said judgment, the learned Judge observed at Page 18 as follows:

"..... Moreover this Court finds that the consent order entered on the 24/2/1992 was not regular as there was no appearance filed by the defendant. No evidence has been shown that the defendant was served with summons to Enter Appearance. No return of service or affidavit of service has been shown by the plaintiff to demonstrate that the defendant was served in accordance with the Civil Procedure Rules".

In view of my finding that the consent judgment of this Court entered on 24/2/1992 was set aside together with all consequential orders, the transfer and issuance of the title deed in favour of the plaintiff is therefore liable for cancellation and the register rectified to restore the title in favour of the original owner who is the defendant herein under **Section 80 of the Land Registration Act No. 3 of 2012**. The cumulative

effect of my finding is that the plaintiff has not proved his case against the defendant on the required standard. This suit therefore fails and the same is hereby dismissed. As regards the defendants counterclaim, I find that the defendant has demonstrated that he is the absolute proprietor of the suit land title No. MWERUA/KANYOKORA/144 which he was given by the clan in accordance with the Kikuyu Customary Law. The defendant has also shown that he did not give his late father Mugo Kario authority to deal with the land in any way whatever and howsoever. I am therefore satisfied that the defendant's defence and counterclaim meets the grant of the orders sought therein. Consequently, I enter judgment as follows:

1. ***The plaintiff's suit as against the defendant be and is hereby dismissed with costs.***
2. ***The register to land parcel No. MWERUA/KANYOKORA/144 be and is hereby rectified by cancelling the registration of the plaintiff as the proprietor and replacing with the name of the defendant, MARTIN MURIUKI MUGO.***
3. ***An order be and is hereby issued evicting the plaintiff from the suit land parcel No. MWERUA/KANYOKORA/144.***
4. ***The Officer Commanding Police Division (O.C.P.D), Kirinyaga do supervise the eviction of the plaintiff from the said property parcel No. MWERUA/KANYOKORA/144 and ensure order and security is maintained.***
5. ***A permanent injunction be and is hereby issued restraining the plaintiff, his family, agents, servants or in any other way howsoever from interfering with the suit land after eviction.***
6. ***The plaintiff to pay damages for trespass at the sum of Ksh. 100,600/=.***
7. ***The costs of this suit and the counterclaim shall be borne by the plaintiff.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 21st day of February, 2020.

.....

E.C. CHERONO

ELC JUDGE, KERUGOYA

21ST FEBRUARY, 2020

In the presence of:

1. Son to the Plaintiff – present
2. Mr. Waweru Macharia for Defendant
3. Martin Muriuki Mugo, Defendant – present
4. Okacth, Court clerk – present
5. Mr. Asiiimwe holding brief for Mr. Okwaro for Plaintiff