



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 19 OF 2018 (OS)

JOYCE KAUMBAU M'MWIRICHIA1ST APPLICANT/PLAINTIFF

STEPHEN MUGAMBI M'MWIRICHIA.....2ND APPLICANT/PLAINTIFF

PAUL GITONGA M'MWIRICHIA.....3RD APPLICANT/PLAINTIFF

VERSUS

NELSON K. MAGIRIRESPONDENT/DEFENDANT

JUDGMENT

1. This suit was filed by way of an Originating on 22.5.2018, whereby the plaintiffs are claiming entitlement to 0.745 ha. Out of parcel No. L.R Abothuguchi/Katheri/477 by way of adverse possession. Defendant duly opposed the suit vide his replying affidavit dated 10.6.2018.

2. During the trial, defendant who had been duly served did not turn up.

3. PW1, 2 and 3 are the 3rd, 1st and 2nd plaintiff's respectively. The 1st plaintiff is also the mother of the other plaintiffs. The 3 plaintiffs adopted their statements dated 18.5.2018 as their evidence. It was the testimony of the plaintiffs that when PW 2 got married to one M'Mwirichia M'Itonga during the period of emergency she was taken to the suit land and settled there. That is where her children including PW 1 and 3 were born and raised. The suit land was however registered in the name of one M'Magiri M'Murithi who was the elder son in trust for M'Mwirichia M'Itonga.

4. The plaintiffs learnt that M'Magiri M'Murithi had transferred the suit land to his son Nelson K. Magiri (the defendant) without their knowledge. Then in 1977, Nelson Magiri sued the father of 1st and 3rd plaintiffs in Meru SRM CC. No. 65 of 1977 seeking to have the latter's family evicted from the suit land but Nelson lost the case. He was not satisfied and he appealed to the High Court at Nyeri and again his appeal was dismissed.

5. It is averred that PW 2 was settled on the suit land in 1954 and Pw 1 was born in 1968 while PW 3 was born in 1967 thus all of them have been on the suit land for a period of over 30 years. Each of the plaintiffs has a home on the suit land where they cultivate food crops and coffee plus trees. They also keep domestic animals.

6. Pw 4 is a rather old man of 81 years as at the time he recorded his statement in 2018. He is Silas M'Rimberia M'Ikiara who stated that his grandfather one M'Murithi Sagwara was a brother to M'Itonga Sagwara who was 1st plaintiff's father in law and 2nd and 3rd plaintiff's grandfather. In order to grasp the history of the dispute, I have found it necessary to capture the verbatim statement of this witness as follows;

"I am a retired civil servant aged 81 years. I worked with Land Adjudication Department from 1960 to 1990 when I retired. I know the parties in this suit. My great grandfather Sagwara M'Mungunya with his two wives lived onto land parcel in question. However, later his son M'Murithi with his sons M'Magiri M'Murithi, M'Murungi M'Muirithi and M'Ikiara M'Murithi moved from the land in question and settled at our other land at Kionjo and left M'Itonga Sagwara with his 2 sons M'Mwirichia M'Itonga and M'Mbijiwe M'Itonga onto the land in questions. After the period of emergency in Kenya, M'Magiri M'Murithi with his family moved back to the land in question, where they had left M'Mwirichia M'Itonga and his brother M'Mbijiwe M'Itonga. When land consolidation started at Katheri, our family members met and decided that the land in question should be registered in the name of M'Magiri M'Murithi and in trust for his step brother M'Mwirichia M'Itonga. That was because at that time the land consolidation practice was not allowing subdivision of parcel of land to less than 2 acres. That since when L.R No. Abothuguchi/Katheri/477 was registered for M'Magiri M'Murithi, M'Mwirichia M'Itonga's family has been occupying half of that before and after it was registered. Nevertheless, when M'Magiri M'Murithi died, his son Nelson K. Magiri filed a case in court to evict M'Mwirichia and his family from the land, but he lost the case. Nelson Koome M'Magiri does not occupy his portion but he lets it to other people for for cultivation".

7. I note that defendant filed submissions on 21.2.2020, where he purports to challenge the case of the plaintiff. He cannot purport to adduce evidence through submissions. I have therefore disregarded the said submissions.

8. I have weighed all the evidence tendered herein. A claimant of land on the basis of adverse possession must show such possession was *nec vic, nec clam and nec precario* (possession by the claimant must be continued, uninterrupted and without force for a period of at least 12 years) – see **Peter Mbiri Michuki vs Samwel Mugo Michuki C.O.A CA No. 22 of 2013**. Further, such occupation must be without permission of the owner of the land.

9. The plaintiff's entry into the suit land was on the basis that it was family land. PW 4, an old relative of the litigants has given a detailed and rather plausible account of how both families of the litigants settled on the suit land at the time of adjudication and consolidation of land. Thus such occupation must have been with consent of family members.

10. However, the person who was the registered owner of the land, one M'Magiri Murithi transferred the land to defendant on 12.3.1975. Defendant then filed a case against the father of 2nd and 3rd plaintiffs allegedly in 1977. It follows that defendant was no longer consenting to the occupation of the suit land by plaintiffs. Defendant did not succeed in the suit for eviction even in High court. The High court judgment appears to have been delivered on 21.6.1982.

11. The plaintiff's family appears to have filed another suit Meru CMCC No. 288 of 1996 (Joseph M'Mwirichia Itunga & Japhet Kithinji M'Murungi vs Nelson Magiri which suit was dismissed for want of prosecution through the pleadings in that suit have not been availed. Nevertheless, defendant's attempts to assert his rights were in the earlier suit.

12. Thus, from 21.6.1982, plaintiffs have been occupying a half of the suit land continuously and without interruption and without the consent of the owner of the land to date. The plaintiffs therefore have met the criteria of adverse possessors. The suit land itself measures 1.49 ha. The plaintiffs' are entitled to a half thereof.

13. Plaintiff's claim is therefore allowed in the following terms:

(1) It is hereby declared that plaintiffs are entitled to 0.745 ha. Out of land parcel No. Abothuguchi/Katheri/477.

(2) An order is hereby issued for the excision of 0.745 ha out of land parcel no. Abothuguchi/Katheri/477 which portion is to be registered in the names of JOYCE KAUMBAU M'MIWRICHIA, STEPHEN MUGAMBI M'MWIRICHIA and PAUL GITONGA M'MWIRICHIA, while the balance shall be registered in the name of NELSON K. MAGIRI.

(3) The Deputy Registrar of this court is hereby authorized to sign all requisite documents to facilitate the excision and transfer of the aforementioned parcel of land.

(4) Any orders of inhibition or injunction that may be subsisting in respect of the suit land are hereby discharged to facilitate the implementation of this judgment.

(5) The consent of land control board is hereby dispensed in order to facilitate the implementation of this judgment.

(6) Each party to bear their own costs of the suit.

(7) I grant a stay of judgment for a period of 60 days.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF APRIL, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. 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 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling 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