



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 1159 OF 2000

1. MICHAEL MUOHI GATUNE
2. FRANCIS MUCHAI KARERA
3. KARAMBA WAINAINA
4. DAVID NJOROGE CHEGE
5. JOHN MUHINDI
6. LIVINGSTONE NDUTIRE
7. NELSON GICHUHI NJOROGE
8. ALEXANDER KARUGO
9. SAMSON CHEGE GICHUNGI
10. EZEKIEL KURIA KIGATHI & OTHERS.....PLAINTIFFS

VERSUS

1. LUKA KIMEU MUTEVU
2. JOSEPHAT MULEI MUTUNGI
3. BERNARD MULWA MULI
4. RICHARD MUTHINI KASYOKA
5. JOHN MBITHI MUTEVU
6. JOSHUA NGOVU
7. WAYUA NGANDA.....DEFENDANTS

AND

ROYAL CAPITAL LIMITED.....INTERESTED PARTY

JUDGMENT

On 26th August, 1983, the Government of the Republic of Kenya issued a grant No. I.R 37951 in favour of Muthanga Farm Company Limited in respect of all that freehold parcel of land known as L.R No. 9447/2 measuring 422.1 hectares. L.R No. 9447/2 was described in the said grant as situated within Thika Municipality, Kiambu District. The grant was registered on 1st September, 1983. In 1988 or thereabouts, Muthanga Farm Company Limited sub-divided L.R No. 9447/2 into several portions namely, Makuyu/Kambiti/Block 1/1-54, 61 and 62 which it allocated to its members. The titles for the said subdivisions of L.R No. 9447/2 were issued under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Some of the plaintiffs are members of Muthanga Farm Company Limited who benefited from

the allotment of the said portions of L.R No. 9447/2 while others purchased portions of the said parcel of land from the allottees.

The plaintiffs brought this suit against the defendants on 21st July, 2000 through a plaint dated 19th July, 2000. The plaintiffs amended the plaint on 25th August, 2000. In the amended plaint, the plaintiffs described themselves as the registered owners and representatives of the registered owners of the said parcels of land known as Makuyu/Kambiti/Block 1/1-54, 61 and 62 which resulted from the subdivision of L.R No. 9447/2(hereinafter referred to as "the suit properties"). The defendants were described as representatives of all the unlawful occupants of the suit properties. The plaintiffs averred that about 3 to 4 years prior to the filing of the suit, the defendants without lawful authority or excuse invaded the suit properties and had since then continued in unlawful occupation thereof. The plaintiffs averred that the defendants in addition to occupying the suit properties had also commenced cultivation, sand harvesting, charcoal burning and cattle grazing thereon thereby causing loss and damage to the plaintiffs. The plaintiffs averred that demand had been made and notice of intention to sue given but the defendants had failed to vacate the suit properties thereby making the filing of the suit necessary. The plaintiffs sought judgment against the defendants jointly and severally for;

1. An order that the plaintiffs be allowed to sue in a representative capacity on behalf of all the registered owners of the suit properties against the defendants in their representative capacity.
2. Eviction of the defendants from the suit properties and an order restraining them from re-entering the said properties.
3. Mesne profits.
4. Costs and interest.

The defendants filed a joint statement of defence and counter-claim on 20th May, 2003. The defendants admitted that the plaintiffs were the registered proprietors of the suit properties. They denied however that they were occupying the suit properties unlawfully. The defendants denied further that they entered the suit properties 3 to 4 years prior to the filing of the suit. The defendants averred that at all material times, they were and still were occupying the suit properties without the permission, consent, leave or license from the plaintiffs and their predecessors in title and that they had been cultivating and using the suit properties for uninterrupted period of over 12 years. The defendants averred that they occupied the suit properties before the plaintiffs acquired the same and that the plaintiffs were always aware of their occupation and interest in the suit properties.

The defendants averred that they had also carried out developments on the suit properties and that they had by virtue of adverse possession become entitled to be registered as the proprietors of the suit properties. The defendants denied that the plaintiffs were entitled to the reliefs sought in the amended plaint. The defendants averred that their rights over the suit properties by virtue of adverse possession accrued before the plaintiffs acquired the said properties and as such the registration of the plaintiffs as the owners of the suit properties did not affect their interests in the properties. The defendants averred further that the plaintiffs' suit was incompetent and bad in law for non-compliance with the provisions of Order 1 rule 8 of the Civil Procedure Rules and other related provisions of the law. In their counter-claim, the defendants reiterated the contents of their defence and prayed for judgment against the plaintiffs for;

1. A declaration that the defendants have acquired absolute titles to the suit properties by adverse possession.
2. A declaration that the defendants are entitled to be registered as the proprietors of the suit properties in place of the plaintiffs and that the plaintiffs should execute valid transfers or assignments in favour of the defendants free from encumbrances.

The plaintiffs filed a reply to defence and defence to counter-claim on 3rd July, 2007. The plaintiffs reiterated the contents of their plaint and averred that the defendants had no right to occupy the suit properties. The plaintiffs denied that the defendants had occupied the suit properties for over 12 years and that they had acquired the same by adverse possession. In their defence to the defendants' counter-claim, the plaintiffs reiterated the contents of their reply to defence and amended plaint. The plaintiffs denied the defendant's counter-claim in total and urged the court to dismiss the same with costs.

The hearing of the suit commenced on 11th December, 2017. On 5th April, 2018, ROYAL CAPITAL LIMITED was granted leave to join the suit as an interested party. In its application for joinder dated 28th March, 2018, the interested party averred that it was the registered proprietor of all those parcels of land known as Makuyu/Kambiti/Block 1/ 7, 8, 9, 11, 12 and 61 which were some of the properties whose ownership were in dispute in this suit between the plaintiffs and the defendants. The interested party averred that it was opposed to the defendants' counter-claim because Makuyu/Kambiti/Block 1/ 7, 8, 9, 11, 12 and 61 were not occupied by the defendants.

The 2nd, 6th and 8th plaintiffs gave evidence for the plaintiffs at the trial. The 6th plaintiff (PW1) who was the first to give evidence narrated to the court the history of the suit properties and how the plaintiffs acquired the same. The 6th plaintiff produced the plaintiffs' bundle of documents filed in court on 2nd April, 2015 as an exhibit. He stated that after the plaintiffs had been issued with title deeds and had taken possession of the suit properties, the defendants invaded the suit properties and threw the plaintiffs out. The 6th plaintiff stated that that is what prompted the filing of this suit. He stated that the defendants were in occupation of the suit properties and as such the plaintiffs were unable to use the same. He stated that the plaintiffs' claim concerned 49 parcels of land particulars of which were set out at pages 11 to 13 of plaintiffs' bundle of documents. The 6th plaintiff stated that the plaintiffs had suffered heavy losses as a result of the defendants' occupation of the suit properties. He urged the court to grant the plaintiffs compensation for the loss of use of the said properties and an order for the eviction of the defendants from the suit properties.

The 2nd plaintiff(PW2) was the next to give evidence. PW2 adopted his witness statement dated 24th March, 2015 as his evidence in chief. He corroborated the evidence of PW1 on how the plaintiffs acquired the suit properties. He urged the court to grant the prayers sought in the plaint against the defendants. The plaintiffs' last witness was the 8th plaintiff (PW3). PW3 adopted his witness statement as his evidence in

chief. He agreed with the evidence of PW1 and PW2. He told the court that his parcel of land was Makuyu/Kambiti/ Block -1/15. He stated that the plaintiffs had not used their parcels of land for a very long time. He urged the court to grant damages to the plaintiffs as against the defendants.

The interested party's acting company secretary, Stephen Nganga Muigai (IPW1) gave evidence on behalf of the interested party. IPW1 adopted his affidavit filed on 5th November, 2018 as his evidence in chief and the annexures thereto as IPW1's exhibits. IPW1 stated that the interested party purchased the parcels of land known as Makuyu/Kambiti/Block 1/7,8,9, 11, 12 and 61(hereinafter referred to as "the interested party's properties") through a loan from Equity Bank. He stated that after acquiring the properties, they found that they could not take possession of the same because the same were occupied by squatters. IPW1 stated that initially, only one parcel of land was occupied by squatters a fact that was not disclosed by the sellers. He stated that when the interested party tried to take possession of the interested party's properties, it was repulsed by the squatters. He stated that only a small portion of Makuyu/Kambiti/Block 1/12 was occupied by the squatters. He stated that the other parcels of land were vacant. He urged the court to order the squatters out of the interested party's properties. He also prayed for loss of use of the said parcels of land.

The 1st and 2nd defendants gave evidence for the defendants. The 1st defendant (DW1) told the court that he was the leader of those who were residing on the suit properties. He stated that he was born on the suit properties. He stated that the parcel of land that gave rise to the suit properties was owned by a European who vacated the same in 1964. He stated that his parents were working for the European and that when the European vacated the suit properties, they remained in possession. He stated that the land they were occupying did not belong to the plaintiffs. He stated that the people who were residing on the suit properties were 1900 excluding children. He stated that the residents chased away the interested party when it attempted to fence some of the suit properties that it claimed to have purchased. He stated that he knew no other home a part from the suit properties and that he would have nowhere to go in the event that he was asked to vacate the suit properties.

The 2nd defendant (DW2) also told the court that he was born on the original parcel of land which gave rise to the suit properties. He stated that his parents were residing on the said parcel of land. He stated that he was residing on the suit properties and that no one had asked him to vacate the same. He stated that there were about 2000 families residing on the suit properties.

After the conclusion of the defendants' case, the parties made closing submissions in writing. The plaintiffs filed their submissions on 8th May, 2019. The interested party filed its submissions on 21st June, 2019 while the defendants filed their submissions on 22nd November, 2019. I have considered the evidence tendered by the parties in support of their respective cases. I have also considered the submissions of counsels appearing for the parties together with the authorities cited in support thereof. From the pleadings, the following in my view are the issues arising for determination in the suit and the counter-claim before the court;

1. Whether the plaintiffs' suit is competent or properly before the court.
2. Whether the defendants have trespassed on the suit properties.
3. Whether the plaintiffs are entitled to the reliefs sought against the defendants.
4. Whether the defendants are entitled to the reliefs sought against the plaintiffs.
5. Whether the interested party is entitled to any relief.
6. Who is liable for the costs of the suit?

Whether the plaintiffs' suit is competent or properly before the court.

As I have stated earlier in this judgment, the defendants had contended in their defence that the plaintiffs' suit is incompetent and bad in law for non-compliance with Order I rule 8 of the repealed Civil Procedure Rules. Order I rule 8 of the repealed Civil Procedure Rules that was in force when the suit was filed provided as follows:

- 8. (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.**
- (2) The court shall in such case direct the plaintiff to give notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.**
- (3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.**

In their submissions, the defendants contended that although the plaintiffs had brought this suit on their own behalf and on behalf of others, the plaintiffs had failed to seek the court's directions under Order I rule 8 of the Civil Procedure Rules. The defendants submitted that the plaintiffs' failure to comply with Order I rule 8 of the Civil Procedure Rules denied the persons on whose behalf the plaintiffs had brought the suit an opportunity to apply to court to be made parties to the suit under Order I rule 8 of the Civil Procedure Rules. The defendants averred that this omission was fatal to the plaintiffs' suit. The defendants submitted further that the plaintiffs sued the defendants in their own right and as representatives of other unnamed persons. The defendants contended that the plaintiffs ought to have sought leave of the court for the named defendants to defend the suit on behalf of the others who were not named as parties to the suit. This omission according to the

defendants also rendered the suit incompetent. The plaintiffs did not respond to this issue in their reply to defence and submissions.

It is common ground that the plaintiffs brought this suit on their own behalf and on behalf of other persons not named in the amended plaint. It is also common ground that the plaintiffs sued the defendants on their own account and as representatives of other unnamed persons occupying the suit properties. I am in agreement with the defendants that in the circumstances, the plaintiffs had an obligation to comply with the requirements of Order I rule 8 of the repealed Civil Procedure Rules. The plaintiffs were required to apply to court for directions on how to notify the persons on whose behalf they had brought the suit and those on behalf of whom the defendants had been sued so that those who wished to apply to join the suit could do so.

I am of the view that the purpose of the notice under Order I rule 8(2) of the repealed Civil Procedure Rules was to give those persons on whose behalf a suit was instituted or was being defended an opportunity to join the suit in case they wished to do so and in the event that they did not apply to join the suit, for them to be bound by the outcome of the suit. What then is the effect of failure to comply with Order I rule 8 of the repealed Civil Procedure Rules? I am not in agreement with the defendants that such omission renders a suit incompetent and bad in law. In my view, the omission merely denies a plaintiff the benefit of a representative suit. In the present suit, the plaintiffs who are referred to in the amended plaint as "others", on whose behalf the plaintiffs brought this suit and the unnamed defendants on whose behalf the defendants were sued having not been given notice of the institution of this suit and an opportunity to join the suit, cannot be bound by the outcome of the suit. The plaintiffs having failed to comply with Order I rule 8 of the Civil Procedure Rules, their suit ceases to be a representative suit. I have noted that one of the reliefs sought by the plaintiffs in the amended plaint is for the plaintiffs to be allowed to bring this suit as a representative suit. Under Order I rule 8 of the repealed Civil Procedure Rules, the plaintiffs did not require leave of the court to file a representative suit. What was required of the plaintiffs was to move the court for appropriate directions under Order I rule 8(2) of the said Civil Procedure Rules. Even if such leave was required, it could not be sought as a relief in the plaint.

The upshot of the foregoing is that the plaintiffs' suit is not incompetent and bad in law as claimed by the defendants. The suit is however not a representative suit and the same shall be determined only as between the parties before the court.

Whether the defendants have trespassed on the suit properties.

I am satisfied that the plaintiffs are the registered proprietors of all those parcels of land known as Makuyu/Kambiti/Block I/ 17, 44, 6, 27, 48, 83, 20, 15, 32 and 43 respectively. The plaintiffs produced copies of title deeds for these parcels of land in evidence as exhibits. The registration of these parcels of land in the names of the plaintiffs was admitted by the defendants in paragraph 3 of their defence and counter-claim. The other parcels of land in respect of which the suit was brought namely, Makuyu/Kambiti/Block I/1-5,7-14,16,18,19,21-26,28-31,33-42,45-54,61 and 62 are not owned by the plaintiffs. The same are owned by the other persons on whose behalf the plaintiffs purported to bring this suit. As I have held above, this is not a representative suit. The plaintiffs have therefore not laid any basis for their claims in respect of Makuyu/Kambiti/Block I/1-5,7-14,16,18,19,21-26,28-31,33-42,45-54,61 and 62. From the evidence on record, the parcels of land known as Makuyu/Kambiti/Block I/ 7, 8, 9,11 and 12 are registered in the name of the interested party. The interested party joined the suit to support the plaintiffs' claim against the defendants and to oppose the defendants' counter-claim. The interested party did not make any independent claim in respect of its said parcels of land. It chose to ride on the back on the plaintiffs' claim in the belief that the plaintiffs had a valid representative suit. For the foregoing reasons, it is my finding that the plaintiffs have only established proprietary interest in the parcels of land known as Makuyu/Kambiti/Block I/ 17, 44, 6, 27, 48, 83, 20, 15, 32 and 43(hereinafter referred to as "the disputed properties.")

The plaintiffs' claim against the defendants is based on trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01. In the case of Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. I have already made a finding that the plaintiffs are the registered owners of Makuyu/Kambiti/Block I/ 17, 44, 6, 27, 48, 83, 20, 15, 32 and 43 ("the disputed properties"). As the registered owners of the disputed properties, the plaintiffs are entitled to possession thereof. The question that the court needs to answer is whether the defendants have any justifiable cause for being in possession of the said properties. From the evidence on record, the only justification put forward by the defendants for their occupation of the disputed properties is that they have acquired the same by adverse possession. In Salim v Boyd and Another [1971] E.A. 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows:

"The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpccario (no force, no secrecy, no evasion)The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration."

In Wambugu v Njuguna [1983] KLR 172 the court stated as follows:

"First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years."

In Githu v Ndeete [1984] KLR 776 it was held that:

"Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into

land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”

It is on the foregoing principles that the defendants’ claim over the disputed properties falls for consideration. The following facts are not in dispute. The plaintiffs acquired the disputed properties from Muthanga Farm Company Limited. Muthanga Farm Company Limited acquired L.R. No. 9447/2, Grant No. I.R. 37951 which was subdivided to give rise to the disputed properties from the Government of the Republic of Kenya. Muthanga Farm Company Limited acquired the said parcel of land from the Government of the Republic of Kenya on 26th August, 1983 through Grant No. I.R. 37951 that was registered on 1st September, 1983. This means that up to 1st September, 1983, L.R. No. 9447/2 that gave rise to the disputed properties was owned by the Government of the Republic of Kenya. Under section 41 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, a person cannot acquire title to government land by adverse possession. The defendants could not therefore have acquired any title to the disputed properties prior to 1st September, 1983 assuming that they were in possession of the said properties prior to that date. It is also not disputed that after Muthanga Farm Company Limited acquired L.R. No. 9447/2, it subdivided the same which subdivision gave rise to among others the disputed properties. The process of subdivision of L.R. No. 9447/2 ended in 1988. The registers for the subdivisions of L.R. No. 9447/2 were opened on 1st August, 1988 under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). The plaintiffs were registered as proprietors of the disputed properties as from 1st August, 1988. From the time Muthanga Farm Company Limited acquired L.R. No. 9447/2 and the time it completed its subdivision that gave rise to the disputed properties, 12 years had not elapsed. The defendants had therefore not acquired any interest in L.R. No. 9447/2 as at the time it was subdivided and portions thereof transferred to the plaintiffs and other persons. The plaintiffs brought this suit against the defendants seeking their eviction from the disputed properties on 21st July, 2000. If time is reckoned from 1st August, 1988 when the plaintiffs acquired the disputed properties from Muthanga Farm Company Limited, 12 years had not lapsed as at the time the plaintiffs brought this suit against the defendants for possession. In the circumstances, the defendants had not acquired title to the disputed properties by adverse possession as at the time this suit was brought against them by the plaintiffs. The defendants did not therefore have lawful justification for occupying the disputed properties which validly belonged to the plaintiffs. For the foregoing reasons, it is my finding that the defendants are trespassers on the disputed properties.

Whether the plaintiffs are entitled to the reliefs sought against the defendants.

The plaintiffs have proved that they are the registered proprietors of the disputed properties and that the defendants are trespassers on the said properties. The plaintiffs are entitled in the circumstances to an order for possession of the disputed properties and an injunction restraining the defendants from re-entering the said properties once they vacate. The plaintiffs having established that the defendants are trespassers on the disputed properties and that they have been unable to use the same, the plaintiffs are entitled to mesne profits that they have claimed. The plaintiffs did not however place any evidence or material before the court on the basis of which the court can assess the mesne profits payable. In the circumstances, I am unable to make any award to the plaintiffs under this head of claim.

Whether the defendants are entitled to the reliefs sought against the plaintiffs.

The defendants’ counter-claim can only lie in respect of Makuyu/Kambiti/Block I/ 17, 44, 6, 27, 48, 83, 20, 15, 32 and 43 (“the disputed properties”) which are owned by the plaintiffs. The other parcels of land are owned by persons who are not parties to the counter-claim. If the defendants wished to extend the counter-claim to the other persons whom the plaintiffs purported to represent, they were also required to comply with Order 1 rule 8 of the repealed Civil Procedure Rules which they did not.

I have made a finding that the defendants have not established their adverse possession claim against the plaintiffs in respect of the disputed properties. In the circumstances, the defendants have not proved their claim against the plaintiffs. They are therefore not entitled to the reliefs sought in their counter-claim.

Whether the interested party is entitled to any relief.

As I have mentioned earlier in this judgement, the interested party joined this suit on 5th April, 2018. The interested party did not make any claim against the defendants on which the court can pronounce itself. In the circumstances, I am unable to grant any relief in favour of the interested party against any of the parties to the suit.

Who is liable for the costs of the suit and the counter-claim?

Costs is at the discretion of the court. As a general rule, costs follow the event unless the court for good reason orders otherwise. See, Supermarine Handling Services Ltd. v Kenya Revenue Authority [2010]eKLR that was cited by the plaintiffs in their submissions. The plaintiffs have succeeded in their claim against the defendants. In the absence of any reason to warrant a departure from the general rule on costs, the plaintiffs shall have the costs of the suit and the counter-claim.

Conclusion.

In conclusion, I hereby make the following orders;

1. The defendants shall vacate and handover to the plaintiffs all those parcels of land known as Makuyu/Kambiti/Block I/ 17, 44, 6, 27, 48, 83, 20, 15, 32 and 43 respectively within ninety (90) days from the date hereof in default of which the plaintiffs shall be at liberty to apply for their forceful eviction from the said properties.
2. A permanent injunction is issued restraining the defendants by themselves or through their agents, servants or representatives from re-entering Makuyu/Kambiti/Block I/ 17, 44, 6, 27, 48, 83, 20, 15, 32 and 43 once they vacate or are evicted therefrom.

3. The defendants' counter-claim is dismissed.

4. The plaintiffs shall have the costs of the suit and the counter-claim.

Delivered and Dated at Nairobi this 12th Day of June 2020

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

Ms. Wangoko for the Plaintiffs

Mr. Etole for the Defendants

Mr. Kimani for the Interested Party

Ms. C. Nyokabi-Court Assistant