



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO 11 OF 2018

M'ARITHI JOEL.....PLAINTIFF

VERSUS

CHARITY NJIRU (as the administrator of the estate of M'MURITHI

MURUGU and on her own behalf).....1ST DEFENDANT

MARTHA RIARA M'MURITHI2ND DEFENDANT

JACKSON MBAABU RIUNGU3RD DEFENDANT

CECILIA UKIMA FRANKLINE.....4TH DEFENDANT

FELICITY NKUENE MUTHAMIA.....5TH DEFENDANT

EDITH GAKIIRU M'KAINI.....6TH DEFENDANT

ELIPHAS MIRITI KIARA.....7TH DEFENDANT

JUDGMENT

1. The plaintiff filed this suit on 28.3.2018 claiming entitlement to two acres out of the land No. IGOJI/KIANJOGU/476, (the suit land) now part of land no Igoji/Kianjogu/ 2720-2726 by way of adverse possession. The parcel of land No.476 was originally owned by one M'Murithi M'Murugu (deceased) but it has since been sub divided into several parcels running from No. 2720-2726. The 1st and 3rd respondents are children of M'Murithi M'Murugu while 2nd respondent is wife of the deceased. The 7th respondent has been identified during the trial as someone who purchased part of the suit land from the deceased.

2. The respondents opposed the suit via the replying affidavit of the 1st respondent (Charity), filed on 4.5.2018. For ease of reference I will sometime refer to plaintiff as Joel and the 7th respondent as Eliphias. During the trial the respondents were abandoned by their counsel but 1st and 3rd respondents went ahead to advance the defence case.

Plaintiff's Case

3. The plaintiff Joel testified and also adopted as his evidence his sworn affidavit in support of the originating summons as well as his statement dated 27.3.2018. He also relied on the list of documents dated 27.3.2018 items 1-8 which were produced as his exhibits 1-8 respectively. Plaintiff's case is that in the year 1970 or thereabout, he moved on to the land of M'Murithi M'Murugu's parcel No. IGOJI/KIANJOGU/476 (the suit land) and he put up a house there. He married his wife Catherine while on that land and they were blessed with five children who were raised on that land. On that land, he has put up a house, he keeps animals and grows trees, coffee, napier grass and bananas. He buried his mother Agnes Nkoroi on the suit land in 1985 and his wife too in 1998.

4. He contends that he has been in continuous occupation of a portion of the suit land to the tune of two acres for a period of over 12 years (since 1970).

5. He contends that "late last year", which means end of year 2017, a daughter of the deceased came with surveyors but he did not allow the

survey process to take place. He sent his children to find out what was happening. That is when he learnt that 1st respondent had filed a succession cause in respect of her father's estate and had distributed the land including the suit land.

6. He contends that the only other person who stays on that land is Eliphas (7th respondent) and that their respective portions have distinctive boundaries.

7. He has sued all the respondents as the registered owners of the parcels No. 2720-2726 which are subdivisions of the original parcel No.476.

8. PW2 one Simon Manjau Joseph adopted his statement of 27.3.2018 as his evidence. He appears to be a cousin of PW1. He confirmed that Joel stays on the suit land. He also averred that M'Murithi used to be a circumciser and he used to be assisted by the plaintiff.

9. PW3, Betty Kawira is a daughter of PW1. She adopted her statement dated 27.3.2018 as her evidence. She averred that she and her siblings were born and raised on the suit land. Her mother and grandmother are also buried there. She is the one who went to the court registry and found that 1st respondent had filed a succession cause without their knowledge. She also followed up the matter at the land's registry where she established that 1st respondent had caused the subdivision of the land No.476 to give rise to parcel Nos. 2720-2726.

Defense Case

10. Defense case was advanced by 1st and 3rd respondents. DW1 (1st respondent) testified on behalf of her mother, 2nd respondent, who is apparently very old and sick. She adopted the statement of Martha Riara filed on 20.5.2019 as her evidence. In that statement of Martha, it is admitted that M'Murithi is the one who had allowed Joel to build on the suit land and he married while on that land. Martha has stated that she was told to treat plaintiff as a son, but she (Martha) wanted to be paid a he-goat, cost of the suit and cost of survey before she could give plaintiff land like her other children.

11. In cross examination, DW1 averred that she is the one who filed the succession cause No. 89 of 2004 of which she had only included parcel no. Abogeta/Lower Kiungone/194 but in her affidavit of 2013 in the succession cause, she sought to add the suit property No. 476 as part of the estate of the deceased.

12. Further in cross examinations, DW1 stated that the suit land was being used by her mother, plaintiff and Eliphas. She has admitted that plaintiff has buried his mother and other family members on that land but on half an acre of land. She also said that her family stays on another piece of land at Kanyakine which is far from the suit land. She confirmed that the suit land has been subdivided into 7 portions of which Eliphas, a purchaser, was given 2 acres. She contended that the portion which was to go to the plaintiff is held by their mother and it is half an acre, and the family is not ready to cede more land to the plaintiff.

13. As at the time of the trial, DW1 confirmed that the people using the suit land are plaintiff and Eliphas. She also said that before this case was filed in April 2018, titles had been issued and the process of selling the land had commenced.

14. DW2 is one Jackson Mbaabu, the 3rd respondent. He is also a child of M'Murithi (deceased). He adopted the statement of Silas M'Runyiru M'Mbui as his evidence. Silas knew M'Murithi as a circumciser whose assistant was the plaintiff. The latter used to carry the implements of trade for M'Murithi.

15. The two became close such that M'Murithi allowed plaintiff to build on the suit land. He avers that no measurements were taken but plaintiff was given the portion due to him but because plaintiff did not avail his identity card his share was retained by the widow of M'Murithi.

Determination

16. The issue for determination is whether the plaintiff has acquired a portion of the suit land via the doctrine of adverse possession. During the trial, the parties through their respective advocates had intimated that they wanted to settle the matter. Thus the court referred the matter to the Assistant Commissioner East Igoji where Alternative Dispute Resolution (ADR) was explored but failed.

17. For one to succeed in a claim of adverse possession, he must prove the following;

- i. "That he has been in continuous and uninterrupted possession of the land for 12 years or more.**
- ii. Such possession must be open and notorious to the knowledge of the owner.**
- iii. Such possession must be without permission of the owner.**
- iv. The plaintiff must assert a hostile title to that of the owner."**

SEE - Richard Mugo Kiambo vs James Muriuki Kiambo Court of Appeal No. 46 of 2013.

18. From the evidence tendered herein, it is not disputed that plaintiff occupies a portion of the suit land. The lengthy period of occupation is also admitted. Both DW1 and DW2 admit that plaintiff has buried his kinsmen on the suit land. What appears to be an issue is the element of consent as well as extent of the size of the land that plaintiff is entitled to. Further, the defense through Dw1 has advanced a claim during the

trial that the land had been subdivided by the time the suit was filed.

19. On the issue of consent, the court has to examine the circumstances under which the plaintiff entered that land. He was apparently an aide of M'Murithi who was a circumciser and in the course of that relationship, the plaintiff entered and settled on land parcel No. 476. Thus plaintiff's entry into the land was with the consent of the owner.

20. The documents appertaining to the succession cause No. 89 of 2004 availed by plaintiff show that M'Murithi died on 5.10.1992. There is no evidence to show that such consent had been withdrawn by M'Murithi before his death. Thus up to and until 1992, I would say that plaintiff was occupying the land with the consent of the registered owner.

21. In year 2004 a succession cause was filed in respect of the estate of the deceased (M'Murithi) and it appears the plaintiff was not involved. On 10.4.2013, the 1st respondent herein swore an affidavit for the rectification of the grant in succession cause No.89 of 2004 so as to include the suit property No. 476. Again there is nothing to indicate that plaintiff was involved in these processes. The plaintiff came to know about the succession cause and the subdivision of the suit land in late 2017 when 1st respondent came to the land with surveyors. Even though PW1 says that survey was not done, the land was still subdivided and titles were issued on or about 5.3.2018. From the foregoing analysis, the logical conclusion to make is that the family of M'Murithi had not consented to the occupation and use of the land by the plaintiff. That is why the proceedings in the succession cause and the subdivision of the land appear to have been conducted stealthily.

22. During cross examination, DW2 had stated that he had planted coffee but the same was uprooted. This again shows that the element of consent did not continue after the death of M'Murithi. I therefore conclude that for purposes of the doctrine of adverse possession, time started running from the time M'Murithi died which was October 1992. 26 years had lapsed by the time the suit was filed hence plaintiff meets the criteria of an adverse possessor.

23. The other point to determine is the acreage. The suit land 476 was 5 acres (2.0 ha) going by the green card availed as plaintiff exhibit 1. Plaintiff is claiming 2 acres out of the suit land while respondents are only willing to concede half an acre. It has emerged that this land is only used by plaintiff and 7th respondent (Eliphas). Plaintiff has also stated that his portion which he has used since 1972 is clearly fenced and so is Eliphas' portion. Eliphas' entitlement has crystallized through registration as is evidenced from the green card where he now owns parcel 2723 measuring 0.81 ha equivalent to 2 acres. If Eliphas' portion is subtracted, the remaining portion is 3 acres or thereabout. Having established that only the plaintiff and Eliphas were utilizing the suit land, then I can only conclude that Joel's use of the land could not have been half an acre as suggested by the respondents. I am also inclined to find that plaintiff's claim to the suit land to the tune of 2 acres is reasonable in the circumstances.

24. On the issue of subdivision of the land, I find that plaintiff has in his pleadings mentioned the titles numbered 2720-2726 hence the resultant parcels are actually the subject of litigation herein. DW1 has stated that they have no land to give Joel because the land belonged to M'Murithi and she (DW1) became the administrator. Her brother added that they could not have included Joel in the succession cause as he (plaintiff) is not a beneficiary of the estate of the deceased. I take this to mean that M'Murithi's family viewed plaintiff's claim as an ex-gratia token, where Joel ought to accept whatever he is given by this family since he was not one of the beneficiaries of deceased estate. However, plaintiff's entitlement is anchored on a known doctrine of adverse possession whose rationale was explained in the case of **Kahindi Ngala Mwangandi vs. Mtana Lewa, ELC No.108 of 2011 Malindi** where it was held that;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principle that persons who have at some anterior time been rightfully entitled to land or other property or money, have by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.....”

25. In the case of **Phyllis Wanjiru Kamau vs. Wilson Gichuhi Gachangwe & 2 others, Thika ELC No. 169 of 2017**, I was dealing with a case where a plaintiff was claiming land of a deceased person. I made reference to the case of **Mate Gitabi vs. Jane Kaburu Muga & 3 others Nyeri Court of Appeal Civil Case No. 43 of 2015** where it was stated as follows in reference to a claim of an adverse possessor.

“He continued to occupy the land openly, without secrecy, without violence and without permission. He did so in a manner inconsistent with and wholly adverse to the right of the estate of the deceased, his heirs and all those claiming under him. In this regard, it little matters that the 1st respondent did not take out letters of administration until 2003, or that she did not get to be the registered owner until 2004, both events being more than 30 years since the appellant took adverse possession of the land or dispossessed the 1st respondent....”

26. The difference in this case and the quoted case is that in the present case, the 1st respondent did take out letters of administration. She has subdivided the land and ostensibly, the beneficiaries are now selling the land. However, such process do not in any way extinguish the plaintiff's claim which matured way back in year 2004, when 12 years lapsed from 1992.

27. In conclusion I find that plaintiff's claim is merited and I allow the same in the following terms;

1. It is hereby declared that plaintiff has become entitled to 2 acres out of the former suit land no. Igoji/Kianjogu 476 now being parcels Igoji/ Kianjogu/2720-2726 by way of adverse possession

2. An order is hereby issued for the excision of 2 acres out of land parcel no Igoji/Kianjogu/2720-2726 but excluding parcels no Igoji/Kianjogu/2723 belonging to the 7th respondent.

3. The titles affected by the excision are hereby cancelled to facilitate the registration of the two acres of land in the name of M'ARITHA JOEL.

4. Any orders of injunction or inhibition subsisting in respect of the aforementioned titles are hereby discharged in order to facilitate the implementation of this judgment.

5. The deputy registrar of this court is hereby authorized to sign any requisite documents to facilitate the transfer and registration of the 2 acres to the plaintiff.

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

7. I grant a stay of 30 days.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JULY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a notice. 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 Judgment 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