



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

E.L.C NO. 47 OF 2018

ROLEX MICHAEL GITAU WAMBUGU.....1ST PLAINTIFF

EPHANTUS MBUGUA NJUGUNA.....2ND PLAINTIFF

SAMUEL KAMAU KIBUKA3RD PLAINTIFF

(suing as Chairman, Secretary & Treasurer

of KIRUWAGAGI UPENDO SOCIETY)

VERSUS

KANGORIAKI FARMERS COOPERATIVE

SOCIETY LIMITED.....DEFENDANT

MURANGA COUNTY GOVERNMENT.....THIRD PARTY

JUDGEMENT

1. The Plaintiff claims a proprietary interest over all that parcel of land known as LOC 1/KIUNYU/497 measuring approximately 2.63 ha situated in Murang'a County.

2. The Plaintiff's claim against the Defendant is on trespass and seeks the following reliefs;

a. A declaration that the Plaintiffs are the absolute legal proprietors to all that parcel of land known as LOC.1/KIUNYU/497 (suit land) measuring approximately 2.63 ha situated in Murang'a County.

b. A Permanent injunction against the Defendant by itself , its agents and / or representatives from utilizing, wasting, alienating and or dealing in any way with the suit land.

c. A mandatory injunction against the Defendant to compel it to give vacant possession to the Plaintiffs of the suit land.

d. General damages for wrongful occupation of the land from the year 1996.

e. The officer Commanding Kirwara Police station to assist in effecting the orders so granted by this Honourable Court.

f. Costs of the suit

3. The Plaintiffs aver that it is a registered society under the Societies Act Cap 108 of the Laws of Kenya. It is the Plaintiffs' claim that sometimes in the year 1963 a group of its 65 members donated 0.1acres of their land all totaling up to 6.5 acres and had the said land registered in the name of Kiunyu Coffee Growers Cooperative Society Limited on 12/08/1963 for purposes of constructing a coffee factory which they did.

4. That the coming together of the 65 members was necessitated by the fact that at the time there existed only one coffee factory named Kiama Factory serving a radius of over 8kms which was difficult to access due to poor transport facilities at the time. The contribution of 0.1

acres of the land was done in agreement with the land demarcation officer during the land demarcation whereby the 65 members agreed to release 0.1 of an acre out of their entitlement. That they chose the location of the suit land between the two rivers for purposes of availability of the water resources for the factory. That they contributed Ksh. 100/- each for fencing the land and used the stones from the land to construct the factory.

5. They aver that it later turned out the said Society was not properly registered. That its registration was rejected by the Commissioner for Cooperatives, therefore the land could not remain registered in the name of the society. In order to remedy that anomaly, the land was then registered in the name of Murang'a County Council now defunct under section 142(1) of the Land Registration Act.

6. That the factory was then handed over to the Defendant in the year 1996 by the liquidator of Gatanga Cooperative Society claiming to be part of the assets of the said society. That the Defendants have continued to remain in illegal occupation of the Plaintiff's land raking in enormous profits to great loss to the Plaintiffs and have committed acts of waste and destruction on the said land by felling trees and removing water pipes that connect water to tank erected thereon. That all this while they have barred the Plaintiffs from entering the said land.

7. The above developments forced the Plaintiff through its representative to lodge a complaint to the Chief Land Registrar Nairobi on 08/08/2008 with a view of reclaiming their land back. Investigations were lodged to ascertain the rightful owner of the land amidst various correspondence with various government offices.

8. That upon conclusion of the investigations it was established that the Plaintiffs were the rightful owners of the suit land thus the Plaintiff embarked on the process for recovery of the land from the Murang'a County Council by making an application to the defunct Murang'a County Council on 18/08/2010 requesting for transfer of the land. In response to the Permanent Secretary of the local government in a letter of 17/11/2011 addressed to the Commissioner of Lands Nairobi and the Minister approved the transfer in the name of the Plaintiff Society. That the necessary steps were undertaken to obtain the registry index map and the site report for purposes of the registration. That a caution lodged on the said land was lifted with instructions from Chief Land Registrar to the District Land Registrar Thika vide a letter dated 20/12/2012 in response to the Plaintiff's request in their letter of 20/12/2012.

9. That the transfer and registration was thereafter completed on 28/01/2016 albeit with some delay as the land file had gone missing at the Lands Office.

10. That the Defendant has adamantly refused to vacate the suit land despite several demands by the Plaintiff to do so.

11. That the Gatanga Coffee Growers Cooperative Society comprising of 21 factories being in existence since colonial days forcefully took over the factory in 1995. That the said society was later liquidated and divided into 4 societies which saw the Plaintiffs' factory given to the Defendant society herein.

12. The Plaintiffs submitted the following documents in support of claim; their incorporation documents, a title deed in the names of the 1st to 3rd Plaintiff's herein issued on 19/04/2016 together with copies of official search, the list of the initial 65 members together with list of representatives for those who have since died, letter dated 03/03/1980 from the Land Registrar Murang'a informing the substitution of Kiunyu Coffee Cooperative Society with the name of Murang'a County Council under Section 142(1) of the Registered Land Act(repealed) together with copies of search showing the change, various correspondence from the Land Registrar in Thika, the Chief Land Registrar in Nairobi, the office of the Prime Minister and the Land Registrar Murang'a acknowledging the entitlement of the Plaintiff to the suit land and authorizing the transfer and registration of the same to the Plaintiff, duly executed transfer forms by the County government of Murang'a in favour of the Plaintiffs.

13. The Defendant contends that the suit factory was built by the Gatanga Coffee Growers Society Limited which was later liquidated in 1996 after which it took over. It claims to have developed the land and allege fraud against the Plaintiffs in the acquisition and registration of the suit land and particularized the fraud to have been propagated by failing to involve the Defendant in the registration process, giving false information to the County Government of Murang'a and the Commissioner of Lands and conspiracy with the County Government of Murang'a on the transfer of the land to the Plaintiff. It also challenged the locus standi of the quoted representatives of the Plaintiff Society deceased members. It claimed occupation of the suit land for a period in excess of 30 years with the permission of the Murang'a County Council. That it queried the title at the National Land Commission (NLC) over the Kiunyu Coffee Land dispute on 15/08/2017 which queries it received no response.

14. The Defendant in its replying affidavit dated 06/7/2018 admitted that the 65 members indeed donated the 0.1 acres of their land and contends that other members bought shares from Gatanga Cooperative Coffee Growers which funds facilitated the construction of the Kiunyu Coffee Factory.

15. The Defendant thereafter amended its defence to include a counterclaim on adverse possession claiming to have been in continuous occupation of the suit land for a period in excess of 50 years with knowledge of the Plaintiff which extinguishes the Plaintiff's title to the said land and sought for transfer of the said title to itself.

16. That counterclaim for adverse possession was contested by the Plaintiff on grounds that the suit land had been registered in the name of Murang'a County Council until 02/12/2015 which is a government entity against whom the said claim would not lie, that time if any against the now registered owner would start running from the said date which time then does not add up to twelve years and lastly that the Defendant having alleged fraudulent acquisition of title against the Plaintiff it cannot then claim adverse possession against the said title.

17. The County Government of Murang'a was later enjoined as a third party to the suit upon application by the Defendant. The Chairman of the Plaintiff passed on hence the pleadings were amended accordingly to include the new Chairman.

18. In its further amendment to the defence and counterclaim the Defendant abandoned its claim of adverse possession and preferred a claim of irregular acquisition of title by the Plaintiffs accusing the third party of irregularly transferring the title to the Plaintiff without the Defendant's consent and failing to carry out proper investigations on the ownership of the land.

19. The third party filed its response acknowledging the dispute over the suit land, claiming that the suit land is the property of County Government of Murang'a which was earmarked for the public purpose of developing a coffee factory, and claimed to be in receipt of applications for transfer from both the Plaintiff and Defendant which has not been possible to effect and are of the view that the said land ought to be registered in its name in trust for the factory.

20. The matter proceeded viva voce with two witnesses testifying for the Plaintiffs and one for the defence and none for the third party despite being given time to do so.

21. PW- Samuel Kamau Kibuka, the treasurer of the Plaintiff narrated the history of the suit land. That it is the Plaintiff who contributed land and did construction of the factory and that the reason for the decline by the Commissioner to register Kiunyu was the existence of others societies among them the Gatanga Cooperative Society that thereafter took over the management of the Kiunyu Factory. That it did not sit well with the Plaintiff that after the takeover Gatanga Cooperative Society only paid them for their coffee deliveries but not the rent for the suit land nor their factory. He also explained the steps they thereafter took to acquire registration over the suit land; by lodging complaints with the Chief Land Registrar, who then directed the Land Registrar in Thika to conduct investigations on ownership of the land; which was done by convening a meeting of all members of the society including those who did not contribute land; and a report was made that the Plaintiff were rightful owners; which was then followed with an authorization for transfer of the land to the Plaintiff. That the Murang'a County Council executed the transfer forms in favour of the Plaintiff, transfer fees was then paid and the title was duly issued. That there was no lease for rent. He denied that some members of the Plaintiff Society contributed money for construction of the Factory.

22. PW – Geoffrey Ngugi Mukono – the vice chairman of the Plaintiff and one of those who donated their land stated that only five of the initial members are still alive and asserts that it is the 65 members who constructed the factory. He too took issue with failure by the Defendant to pay them any monies for the use of their land. That the Defendant earns income from processing coffee received from farmers in the area.

23. DW1- James Gathua the chairman of the Defendant testified that the suit land was public land which was occupied by the Defendant in 1966 and was previously occupied by Gatanga Cooperative Society who did the construction of the factory as per minutes produced. That Gatanga Cooperative Society nominated managers to manage the Kiunyu factory. That upon liquidation of Gatanga the management of Kiunyu fell in the hands of the Defendant. That he was aware the land was community land from oral history. That after learning of the Plaintiff's registration over the suit land in 2017 they wrote to the NLC complaining of the Plaintiff's acquisition of title without their consent and knowledge. He believed the Plaintiff's title was acquired fraudulently because at time of obtaining the consent Kiunyu/ Gatanga was part of Thika County Council and not Murang'a and that the same was done without their knowledge and consent. He had no substantial evidence to show the contributions done by the Defendants into the construction of the factory of ksh. 400/- as alleged and also he could not ascertain authenticity of the minutes relied upon as they were not signed. He was convinced that they were not tenants of the Plaintiff and thus had no duty to pay them any rent and that no rent had been paid against the demands raised by the Plaintiffs to date. That there existed a Kiunyu coffee growers Factory which was not a Society but just a factory.

24. The Plaintiff submits that it has demonstrated through its pleadings, witness statements, documentary evidence and oral testimonies that it is the rightful registered owner to the suit land as evidenced through its title deed produced as exhibit no. 2 duly issued on 19/04/2016. That the Plaintiff led evidence into the long and detailed history of its journey towards acquisition of the said title, starting from how the land was contributed by a group of 65 Members for the purpose of setting up a coffee factory who were part of the Kiunyu Coffee Factory Society which turned out to have not been registered hence the title to the suit land was registered in the name of the Murang'a County Council in trust for the group and later with follow up from the Plaintiff the Permanent Secretary to the Ministry of Local Government authorized the transfer of the title to the Plaintiff directing the Chief Land Registrar to process the necessary documents vide a letter dated 17/11/2011 (exhibit no. 19). That instructions were then issued to the Land Registrar Murang'a and the transfer process was completed in favour of the Plaintiff whose title was issued after payment of the requisite transfer fees.

25. That the Defendant participated in the process with some of their representatives attending meetings convened by the Chief Land Registrar to ascertain the ownership of the land.

26. That the Defendants save from vaguely alleging fraud against the Plaintiff in the acquisition of the said title failed to demonstrate the same through evidence in the manner prescribed under Section 26 of the Registration of Land Act. The Plaintiff thus maintains it holds an indefeasible title which has not been challenged and enjoins this Court to find it to be so.

27. In regard to the claim for mesne profits and general damages the Plaintiff posits that its title to the suit land having not been legally challenged by both the Defendant and the third party ought to be regarded as prima facie evidence of ownership to the land and the Defendant having failed to demonstrate any legal interest over the suit land entitles the Plaintiff to payment of mesne profits for trespass by the Defendant on its land. To this end the Plaintiff relied on the case of **Kenya Hotel properties Limited vs. Willesden Investments Ltd [2009] KLR 126** where the Court of Appeal held that

“in a claim for mesne profits, there has to be evidence that the Plaintiff is the owner of the property upon which the claim is based.”

28. Further the Plaintiff submits that DW1 admitted firstly that the Defendant came into occupation of the suit land in the year 1966, second that the Defendant Society carries on its business on the suit land that generates income to cater for all its overhead costs and thirdly that Defendant has paid no rent since its entry onto the suit land. That there was demand for rent on 04/03/1974 and 16/08/1995 of ksh. 520/- and 137,457.00/- respectively from the Defendant with no evidence of payment to date, cumulatively for over 25 years since the last demand and prays for an award of a consolidated sum of Ksh. 5,000,000/- for damages.

29. The Plaintiff is convinced that it has proved its case on a balance of probability and prays for award of costs.

30. *The Defendant in its submissions still admits that the 65 members of the Plaintiff did contribute the 0.1 acres of the land but disputes that the Factory was constructed by the Plaintiffs only and contends that there were other members of the Gatanga Coffee factory who participated in the construction of the Kiunyu Factory as per minutes in its exhibit no. 6. That the Defendant took over from the Gatanga Society upon its liquidation. That the Factory has been in use by both the Plaintiff and other members all totaling to 600 members since 1967 who ought to have been involved in the process of acquisition of title. That no objection was raised by the Plaintiff to their use and occupation of the land through the years and have never been evicted hence are entitled to ownership of the land.*

31. *In opposition to the claim for mesne profits the Defendant submits that there existed no lease and or rent agreement between the Defendant and the Plaintiff to support the claim for Kshs. 5,000,000/-. That the Defendant is not a profit earning entity but an administrative body for the factory thus cannot be held liable for payment of mesne profits. That the contribution of land made by the Plaintiffs was for community use thus trespass does not arise. And appear to suggest such claim would lie after the Plaintiff acquired registration over the suit land and not from 1996 as prayed.*

32. *The third party on its part submits that the suit land is public land earmarked for development of a coffee factory that was registered in the third parties' name in trust this being so the said land fell under the ambit of Section 6 of the Community Land Act, 2016 and also subject to the Land Act, 2012. That the Plaintiff has failed to demonstrate the conversion of the said land from public land to Private Land as prescribed under Section 8 to 19 thereof. In the absence of such the third party concludes that the registration in favour of the Plaintiff was illegal, fraudulent and irregular it ought to be cancelled and reverted back of the County Government of Murang'a.*

33. *The issues for determination are; whether the suit land was irregularly registered in the name of the Plaintiffs; whether the Defendants should be evicted from the land; whether the Plaintiff is entitled to mesne profits/general damages for trespass; who should meet the costs of the suit.*

34. *Article 40 of the Constitution of Kenya protects the right to property with respect to acquisition and ownership in any part of the country. The constitutional protection is however not available with respect to any property that has been found to have been unlawfully acquired.*

35. *Section 25 and 26 of the Land Registration Act provides that the rights of a proprietor of land whether acquired on first registration or subsequently for valuable consideration or by order of the Court shall not be defeated unless provided for under the law. The certificate of title shall be taken as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to such encumbrances conditions set out in the Act. The Act provides two ways in which a title may be impeached; on the ground of fraud or misrepresentation for which the person is proved to be a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

36. *The case of the Plaintiffs is that they are the validly registered owners of the suit land having contributed the same jointly as a group of 65 families for purposes of setting up a coffee factory. That the Defendant has trespassed onto the suit land without their consent and or permission and are bent on destruction of the property by felling trees and removing water piping system on the ground. That the Defendants have failed to pay for the use and occupation of the suit land, hence are trespassers.*

37. *The Defendant has denied the Plaintiffs claim and contends that the Plaintiffs acquired the suit land irregularly without their knowledge and or involvement. It accuses the 3rd party of irregularly transferring the title to the Plaintiffs behind their backs. In its counterclaim the Defendant sought a declaration that it be declared as the rightful owner of the land.*

38. *The third party contends that the land was earmarked for the development of a public utility purpose and that the same should be held by it in trust for a public coffee factory.*

39. *Pw1 and PW2 led uncontroverted evidence that in 1963 65 named families contributed 0.1 acres of their lands during demarcation for purposes of building a coffee factory (see list produced on record). That they incorporated themselves into Kiunyu Coffee Growers Cooperative Society (**Kiunyu**) and caused the said land measuring 6.5 acres to be registered in the new entity. I have perused the green card of the suit land and it is evident that the 1st registration was made in the name of Kiunyu Coffee Growers Limited on the 12/8/1963. The evidence of PW1 as supported by PW2 is consistent with the green card. The list of 65 members of the Plaintiff society was produced in Court. In addition, the Defendant admits that the suit land was contributed by the 65 families. Their borne of contention is that the factory was constructed by Gatanga Coffee Growers Limited, its predecessor and that the title was registered in the name of the Plaintiff irregularly and without their involvement.*

40. *The Plaintiffs' witnesses testified and informed the Court that after the land was registered in the name of Kiunyu, they commenced the establishment of the coffee factory under the said entity. Later the registration of Kiunyu Coffee Growers Limited was rejected by the commissioner of cooperatives. To remedy the anomaly the land was registered under the County Council of Murang'a. See the letter dated the 3/3/80 which stated that;*

“following the instructions of the Chief Land Registrar I have deleted the name of Kiunyu Coffee Growers Cooperative Society from the register and substituted that of Muranga County Council under Section 142(1) of the Registration Land Act.”

The Land Registrar called for the surrender of the original title from the Plaintiffs. On the 29/11/1990 a restriction was registered by the Chief Land Registrar pending the resolution of registration of the suit land. The said restriction was removed paving way for the registration of the land in the name of the Plaintiffs on the 19/4/16.

41. *Evidence was led by PW1 that in 1967/68 the management of the factory was taken over by Gatanga Farmers Cooperative Society Limited. The record shows that in 1974 the Plaintiffs through their lawyers on record demanded for rent from the said society. There is no*

evidence that the rent was ever paid. This shows that the land did not belong to Gatanga Farmers Cooperative Society. This position is further confirmed by the letter dated the 12/5/1997 by the liquidator of Gatanga Farmers Cooperative Society Limited when he informed the Defendant that;

“we discussed this issue in our meeting and inspected the documents of title of Kiunyu Factory. It transpired that the parcel of land on which the factory is constructed is held in the name of Murang’a County Council and not Gatanga Farmers Cooperative Society Limited. The society had only been using it with the consent of Murang’a County Council.”

42. To unravel the ownership row, the Land Registrar called for a meeting at the coffee factory on 27/8/2008 attended by members of the Plaintiff Company, the representatives of the management committee and the local administration and the outcome was that the Plaintiffs are the true owners of the suit land. With the confirmation, the County Council of Murang’a in its works, Town Planning Markets & Housing Committee meeting held on the 25/10/2010 and adopted in its full council meeting approved the transfer of the land to the Plaintiffs. Consequently, a transfer was registered on the 19/4/2016 and a title issued on even date.

43. Going by the evidence above there is no evidence placed before the Court by the Defendants that the title was irregularly issued to the Plaintiffs. He who alleges must prove. The Defendants argue that the factory was constructed by Gatanga Farmers’ cooperative society, its predecessor. However it failed to lead any evidence to support their claim. Even if it did, it could as well be that Gatanga Farmers’ cooperative society may have constructed some buildings but as a management agent of Kiunyu coffee factory and not owner of the land. Unchallenged evidence was led by the Plaintiffs that they commenced construction of the factory using the stones labour and materials contributed by its members. It is on record that upon the collapse of Gatanga the Defendant took over the management of 4 factories one of which is Kiunyu. It is not clear under what terms the Defendant is managing this factory.

44. The Third party informed the Court that the land was registered in its name for purposes of a public coffee factory. This in my view was an afterthought and totally untrue. Given the overwhelming evidence led by the Plaintiffs the claim of the 3rd Party is premised on quick sand. In any event it transferred the suit land to the Plaintiffs. This transaction was with the blessings of the then line Ministry of Local Government under which County Councils fell.

45. The finding of the Court is that the Plaintiffs are the valid owners of the suit land. The Court did not find any iota of irregularity in the manner that it acquired and was registered as owner of the title.

46. The Court has made a finding that the Plaintiffs are the rightful owners of the suit land. The Defendant has admitted occupying the suit land since 1996. The Defendant has not adduced any justifiable reason for the occupation of the Plaintiffs land. It can only be termed as an unauthorized entry and trespass. In the absence of any lawful reason the Court orders the eviction of the Defendants. I shall make the appropriate orders in the end.

47. It is trite that mesne profits must be pleaded and proved. Mesne profits are defined as the profit of an estate received by a tenant in wrongful possession between the dates. In the case **Peter Mwangi Msuitia & Another Vs Samow Edin Osman (2014) e KLR**, the Court of Appeal held as follows:

“As regards the payment of mesne profit, we think the Applicant has an arguable Appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

48. As to whether the Plaintiff is entitled to mesne profits for the use of the suit land by the Defendant since 1996/ 2016, it is the finding of the Court that the Plaintiffs failed to guide the Court in the quantum of mesne profits if any. This would have been in form of a rent valuation report and or a management fee chargeable by factory operators of similar coffee factories in the region. In the absence of evidence, I find the claim unsupported and hereby decline to grant the same.

49. It is trite law that trespass is actionable per se. In the circumstances of this case and given the length of time the Defendant has unlawfully occupied the suit land, the appropriate relief would be to grant general damages for trespass. The sum of Kshs 200,000/- in my view is reasonable in the circumstances of this case.

50. Final orders and disposal;

a. The Defendants counterclaim fails and is hereby dismissed.

b. The Plaintiff’s claim succeeds.

c. A declaration is hereby issued that the Plaintiffs are the absolute legal proprietors to all that parcel of land known as LOC.1/KIUNYU/497 measuring approximately 2.63 ha situated in Murang’a County.

d. A Permanent injunction is hereby issued against the Defendant by themselves, their agents and / or representatives from utilizing, wasting, alienating and or dealing in any way with the suit land

e. A mandatory injunction against the Defendant to compel them to give vacant possession to the Plaintiff of the suit land within a period of 90 days from the date of the judgement, in default eviction to issue. A court approved bailiff to carry out the eviction of the Defendant (if required).

f. General damages for wrongful occupation of the suit land in the sum of Kenya Shillings Two Hundred Thousand Only (Kshs 200,000/-).

g. The Officer Commanding Station Kirwara Police Station to maintain law and order and supervise the eviction and execution of the orders of this honourable Court.

h. Costs are payable by the Defendant in favour of the Plaintiffs.

51. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANGA THIS 29TH DAY OF OCTOBER 2020

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Rono for the 1st – 3rd Plaintiffs

Ms Wambui for the Defendant

Ms Macharia HB for Kimwere for the 3rd Party.

Njeri, Court Assistant