



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 23 OF 2019

RUFUS MUNYA MUCHIRI.....PLAINTIFF/APPLICANT

VERSUS

JOHN MURITHI NJAGI

(SUED AS THE NEXT OF KIN OF JOHN NJAGI NKANYA).....DEFENDANT/RESPONDENT

JUDGMENT

1. This suit was brought to court by way of Originating summons which is in the following manner:

IN THE MATTER OF LAND REFERENCE NUMBER MWIMBI/N.MUGUMANGO/670

ORIGINATING SUMMONS

(Under Sections 28 (h) of Land Registration Act 3 of 2012; Order 37 Rule 7 (a) (b) (c) of Civil Procedure Rules cap 21, Sections 7, 17, 18, 37 and 38 Limitation of Actions Act Cap 22)

LET JOHN MURITHI NJAGI (Legal Representative of JOHN NJAGI NKANYA) who is the Registered owner of land parcels NO.MWIMBI/N.MUGUMANGO/1595, 1596, 1597,1598, and 1599 all of which were subdivided from land parcel no. MWIMBI/N.MIGUMANGO/670 within MARIMA, THARAKA NITHI COUNTY enter appearance within 15 days of service of these summons, issued upon the application of RUFUS MUNYUA MUCHIRI who claims to be entitled the following relief;-

- a) An Order cancelling land titles numbers MWIMBI/N.MUGUMANGO/1595, 1596, 1597, 1598 and 1599 and consolidating them back into the original land title no. MWIMBI/N.MUGUMANGO/670 measuring 2.43Ha
- b) A declaration that the Applicants and has been occupying three (3) acres out of original land parcel NO. MWIMBI/N.MUGUMANGO/670 measuring approximately 2.43 Ha since 1997
- c) A declaration that the plaintiff has acquired by way of adverse possession ownership of three (3) acres out of original land parcel NO.MWIMBI/N.MUGUMANGO/670 situated in North Mugumango location of Tharaka Nithi County.
- d) Alternatively and without prejudice to the foregoing, that the Estate of JOHN NJAGI NKANYA is holding three (3) acres out of original ~~the whole~~ land parcel NO.MWIMBI/N.MUGUMANGO/670 in trust for the Plaintiff.
- e) An order that the defendants do execute a valid transfer instrument for three (3) acres out of land parcel NO.MWIMBI/N.MUGUMANGO/670 after the consolidation of land parcels no. NO.MWIMBI/N.MUGUMANGO/1595, 1596, 1597,1598, and 1599 in favor of the plaintiff and in default the Executive Officer of this Hon court be empowered to execute such transfer instrument.
- f) Costs of this suit and any other relief that the court may deem fit and expedient.

WHICH SUMMONS IS TAKEN OUT FOR the determination of the following questions:-

1. Whether the Plaintiffs have now acquired adverse possession of three (3) acres the suit land being land parcel NO. MWIMBI/N.MUGUMANGO/670 having been in occupation and possession for more than 12 years since 1997.

2. Whether the Deceased JOHN NJAGI NKANYA-Deceased is the registered proprietor of land title NOS.MWIMBI/N.MUGUMANGO/670:1595, 1596, 1597,1598, and 1599.
3. Whether land parcels numbers MWIMBI/N.MUGUMANGO/1595, 1596, 1597,1598, and 1599 are a subdivision of land parcel no. MWIMBI/N/MUGUMANGO/670
4. Whether the subdivision of land titles numbers MWIMBI/N.MUGUMANGO 1595, 1596, 1597,1598, and 1599 was done in 2012.
5. Whether by the time land parcel number MWIMBI/N/MUGUMANGO/670 was subdivided into the new titles numbers MWIMBI/N.MUGUMANGO 1595, 1596, 1597,1598, and 1599 the Plaintiff had acquired adverse possession of three (3) acres out of the whole land.
6. Whether the Deceased JOHN NJAGI NKANYA had acquired the said land from his father M'RINKANYA BAIKIARA (Deceased).
7. Whether the Applicant had entered and taken possession of three (3) acres out of land parcel no. MWIMBI/N.MUGUMANGO/670 under the belief that he had a right to claim it since it belonged to his family through his father MUCHIRI M'IKIARA (Deceased).
8. Whether the plaintiff has been in open, public, exclusive, continuous and notorious occupation and possession of three (3) acres out of land parcel NO. MWIMBI/N.MUGUMANGO/670 since the year 1997.
9. Whether the Plaintiff's such open, public, exclusive, continuous and notorious occupation has given rise to adverse possession within the meaning of Limitation of Action's Act (Cap 22 of the Laws of Kenya) and other laws.
10. Whether the Plaintiff's occupation and possession of three (3) acres out of land parcel no. MWIMBI/N.MUGUMANGO/670 took place with the full knowledge the M'RINKANYA BAIKIARA (Deceased); JOHN NJAGI NKANYA (deceased) and the Defendant and other beneficiaries of the estate of M'RINKANYA BAIKIARA (Deceased) and JOHN NJAGI NKANYA (Deceased)
11. Whether the plaintiff has been in total and effective control of the soil of three (3) acres out of land parcel no. MWIMBI/N.MUGUMANGO/670 including utilizing the said portion for his own economic use and other livelihood necessities.
12. Whether the Plaintiff is now vested with overriding interests against three (3) acres out of land parcel no MWIMBI/N.MUGUMANGO/670 as envisioned in section 28 (h) of the Land Registration Act Cap 3 of 2012.
13. Is the plaintiff therefore entitled to a transfer of three (3) acres out of land parcel no. MWIMBI/N.MUGUMANGO/670? Who is to bear the costs of this suit?

THIS SUMMONS is supported by the annexed affidavit of the plaintiff RUFUS MUNYUA MUCHIRI herein and other reasons to be adduced at the hearing hereof.

DATED at MERU this 9th day of December, 2019

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NJIRU KITHAKA & CO ADVOCATES

FOR PLAINTIFFS

2. The summons is supported by the affidavit of **RUFUS MUNYUA MUCHIRI**, the plaintiff/applicant which states:

SUPPORTING AFFIDAVIT

I RUFUS MUNYUA MUCHIRI of PO BOX 13 MARIMA in the REPUBLIC OF KENYA do hereby make oath and state as follows:-

1. That I am the Applicant herein and that I am competent to swear this affidavit
2. That the Defendant/Respondent is the legal representative of the Estate of the said JOHN NJAGI NKANYA (Annexed and marked as RMM '1' is a copy of the Limited Grant ad litem dated 18th April 2018)
3. That land parcels no. MWIMBI/N.MUGUMANGO/1595; MWIMBI/N.MUGUMANGO/1596 measuring approximately 0.405 Ha; MWIMBI/N.MUGUMANGO/1597 measuring approximately 0.413Ha MWIMBI/N.MUGUMANGO/1598 measuring approximately 0.413Ha MWIMBI/N.MUGUMANGO/1599 measuring approximately 0/802Ha are currently registered in the names of the Deceased JOHN NJAGI NKANYA (Annexed and marked as RMM '2' 'a' 'b' 'c' 'd' and 'e' are copies of official search for the five land parcels.

4. That the five land parcels are a subdivision of land parcel no. MWIMBI/MUGUMANGO/670 which was registered in the names of one M'RINKANYA BAIKIARA who is now deceased. (Annexed and marked as RMM '3' is a copy of the green card for the land.
5. That the said M'RINKANYA BAIKIARA was the father of the said JOHN NJAGI NKANYA and the said land parcel passed to him through succession cause no. 108 OF 2009 in Meru.
6. That the said JOHN NJAGI NKANYA died on 18th January 2018 and the Defendant/Respondent was appointed as the legal representative for purposes of being sued in respect of Plaintiff/Applicants claim for a portion of land parcel no. MWIMBI/MUGUMANGO/670.
7. That the said M'RINKANYA BAIKIARA is my maternal uncle having been a brother to my own father MUCHIRI M'IKIARA who died in 1997.
8. That at the time of his death my father MUCHIR M'IKIARA was entitled through a court decree to three (3) acres out of the suit land (annexed hereto and marked as 'RMM '4' is a copy of the said decree issued in MERU HCCC NO 372 of 1989)
9. That in that suit my father MUCHIRI M'IKIARA (Deceased) had sued his brother M'RINKANYA BAIKIARA (Deceased) for a share of their ancestral land which is land parcel no. MWIMBI/N.MUGUMANGO/670. (Annexed and marked as 'RMM '5' are copies of the said proceedings.)
10. That before my father died he had shown to me three (3) acres out of the suit land which he told me belonged to our side of family and which he said I should take over and which I did.
11. That in 1999 believing that the land belonged to my father I entered and took possession of the said land which measures three (3) acres out of the suit land parcel no. MWIMBI/N.MUGUMANGO/670.
12. That I have continued in occupation of the suit land since 1999 to present and I have total and exclusive control of the soil of the said land and I have been cultivating and leasing parts of the said land for financial gain.
13. That I have been in occupation and possession with the full knowledge of the Defendant's father JOHN NJAGI NKANYA and he has never done anything to remove me from the said land.
14. That the Defendant's father JOHN NJAGI NKANYA on several times ordered me to leave the suit land but I refused to do so because the land belongs to me.
15. That in the year 2014 the said JOHN NJAGI NKANYA had me summoned to the office of the area sub chief whereby he told the chief that I had refused to leave his land which had devolved to him by reason of a succession suit.
16. That I refused to vacate the said land and up-to and until now I am in occupation and possession of the three (3) acres my father left to me.
17. That after entering the land in 1999, I took effective and exclusive control of the suit land; I have carried out various developments therein and I also lease it to other farmers who pay me for it. (Annexed hereto are photos marked as 'RMM '6' showing farming activities on the land).
18. That it is my assertion that I have acquired overriding right over the suit land by my own right and that I should now be registered as the rightful owner of three (3) acres out of land parcel no. MWIMBI/MUGUMANGO/670
19. That what is stated herein is true to the best of my knowledge, understanding and belief

Sworn by the said **RUFUS MUNYUA MUCHIRI** at MERU this 9th day of December, 2019

3. When the matter came up for directions on **21.10.2020**, it was pointed out that the defendant had been properly served, had refused to append his signature in acknowledgment of the service and had told the process server that he would never come to court. This court directed that he properly be served again with the date this court fixed for the hearing of the suit.
4. During the date fixed for hearing of the suit, the defendant was not in court. There was an affidavit of service by a process server deponing that the defendant had been served. The process server also depones in the same affidavit that the defendant refuse to acknowledge receipt of service and also told him that he (the defendant) had no interest in this suit.
5. In terms of the provisions of Order 12 Rule 2 of the Civil Provisions, the suit was called on for hearing outside the court. The defendant was nowhere to be seen. Having satisfied myself that the notice of hearing had been duly served, I directed the hearing of the suit to proceed ex parte.
6. PW1, Rufus Munyua Muchiri, asked the court to adopt his witness statement dated 9th December, 2019 as his evidence in this suit. The said statement reads as follows:

PLAINTIFF'S STATEMENT- RUFUS MUNYUA MUCHIRI

My names are Rufus Munyua Muchiri. I am the Plaintiff in this suit. The Defendant is my nephew because me and his father JOHN NJAGI NKANYA are cousins. The father of JOHN NJAGI NKANYA was called M'RINKANYA BAIKIARA and was the brother of my father MUCHIRI M'IKIARA. Both M'RINKANYA and my father are now deceased. Both had a land dispute in respect of land parcel NO. MWIMBI/N-MUGUMANGO/670 in which the court directed that my father's side get half of the land. At that time I and other family members were living in our fathers other land. However our father used to farm and control half a portion out of the suit land even when the dispute was going. The decision by the court was made in 1989. On or around the year 1997 and because my father was sick he called me and he advised me to start utilizing his portion and I entered the land in that year in 1997 and began farming on it. When I entered the land I began carrying out subsistence farming on it including cultivating maize and beans; planting indigenous trees; cashew nuts. I also began to lease some parts of the said land to other farmers and they pay me rent for utilizing my side of the land. I have been utilizing this portion of the land that belongs to my side of family from 1997 upto now. I have been utilizing it publicly and to the exclusion of all other people. I do remember that sometimes in 2014 the Deceased JOHN NJAGI NKANYA used to come to my land and start disturbing the people whom I have leased the land to but they used to tell him that the land belongs to me and they have my full authority to utilize the said land.

I do remember that in the year 2014 the said JOHN NJAGI NKANYA summoned me at the Chief's office where he proceeded to inform that he had become the owner of the suit land after the succession case for his father was finalized. I told the said John Njagi Nkanya and the Chief that I was the owner of the portion that I was utilizing because it belonged to me and my family. The said Chief asked the said JOHN NJAGI NKANYA to bring a court order to evict me from the suit land but upto now the said JOHN NJAGI NKANYA has never done so. Later I carried out a search at the Lands Office and I discovered that the said JOHN NJAGI NKANYA before his death had subdivide the suit land into five portions and that each portion has a new title number as indicated in my pleadings. Since there has been no subdivision on the ground I would like the court to cancel the new title deeds and to have these portions consolidated back into the old title number.

This is because I am the owner of the portion measuring 3 acres out of the suit land; I have been utilizing these three acres since 1997 and even the old man M'Rinkanya has never asked me about it. He died in 1999. The son of M'Rinkanya who is JOHN NJAGI NKANYA is the only one who has been giving me problems but even by the time he died in 2018 he had not succeeded despite all the efforts he put in trying to remove me from the land. He used to come and threaten to throw out the people I have leased the land to but he has never managed to do so. I have therefore been in continuous, exclusive, open, and public possession of three acres out of land parcel NO. MWIMBI/N-MUGUMANGO/670 from 1997 to date and I pray that the court registers me as the proprietor of the three acres.

DATED at MERU this 09th day of December, 2019

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RUFUS MUNYUA MUCHIRI

7. PW2, produced the following documents as exhibits:

- a) Limited Grant of Letters of Administration Ad Litem in favour of John Muriithi Njagi only for purpose of litigation in the Estate of his father John Njagi Nkanya.
- b) Official search for 5 land parcels.
- c) A copy of Green Card for Land Parcel No. Mwimbi/N.Mugumango/670.
- d) Judgment in Meru HCCC No. 159 of 1989.
- e) Decree in HCCC No. 372 of 1989.
- f) Photographs of developments and activities on the portion he claims to be owner of

8. PW2 asked the court to grant the orders he was seeking in this suit.

9. PW2, Wilfred Nkonge Mwambia, asked the court to adopt his witness statement dated 9th December, 2019 as his evidence in this suit. The statement reads as follows:

PLAINTIFF WITNESS STATEMENT WILFRED NKONGE MWAMBIA

Am from Ikumbo sub-location. We are neighbours with Rufus the plaintiff. He has been occupying the suit land since 1997 after his father died. His father was called Muchiri and he had another son called ERNEST NJAGI MUCHIRI who used to cultivate the suit land prior to his death.

In February 1997 after Ernest Njagi Muchiri died in February 1997, his father also died in the same year. This is when the plaintiff came to the land and he took over and began utilizing it. He has been cultivating it since 1997 but from 2000 he leased portions of it to other people who pay him money. One of them is Thomas Kinyaki who is utilizing one acre. Another person who has leased the land from the plaintiff is Japheth Riungu.

I have been contracted severally by Rufus to oversee his farming activities including hiring people to provide farm labour for him. I am therefore familiar with his farming activities and occupation of the portion belonging to his side of family.

The other portion of land is for now nobody farms it including the family of M'Rinkanya. The children of M'Rinkanya son don't bother with the land. I remember in 2014 one John Njagi a son of M'Rinkanya who is father of defendant came and told the plaintiffs people to stop farming the land because he wants to sell it. These people informed me and I alerted the plaintiff who went and reported to the chief. The issue was resolved by the chief and we continued with our activities on the land without further problem. So it is true that the plaintiff is the owner of half of this land since 1997 to present.

DATED at MERU this 09th day of December, 2019

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WILFRED NKONGE MWAMBIA

10. PW3, Thomas Kinyaki Johana, asked the court to adopt his witness statement dated 9th December, 2019 as his evidence in this suit. The statement reads as follows:

PLAINTIFF WITNESS STATEMENT THOMAS KINYAKI JOHANA

I come from Ukuruni village Ikumbo sub-location in Tharaka Nithi , I know Rufus Munyua Muchiri. He is the son of my neighbor and friend. Muchiri was the father of the plaintiff and one Ernest Njagi Muchiri who is also deceased. I remember that this Njagi used to cultivate a portion of the suit land because it belonged to his father, the other portion used to be cultivated by one M'Rinkanya who is the brother of the plaintiffs father Muchiri.

I remember that the father of the plaintiff died in 1997 and he left his portion to his son Rufus the plaintiff. Rufus has been farming /utilizing the land from 1997 to toady. He is cultivating the land by planting beans, maize cashew nuts and other trees. In 2000 he leased to me one acre out of his portion for the sum of Kshs.3000/= per year every August. I pay him in cash on my one acre portion. I do subsistence farming, maize and bean crop.

In 2014 some people came to disturb me claiming that the land belonged to them but I told them that I don't know them and that they should deal with his directly.

I have been cultivating my portion from 2000 upto now and I have never had any problem. There are other people also leasing the land from Rufus including Japheth Riungu.

That is all to say.

DATED at MERU this 09th day of December, 2019

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THOMAS KINYAKI JOHANA

11. Having perused all the pleadings proffered in this case and having considered the oral evidence given by the plaintiff and his two witness, I find that the plaintiff has proved his case against the defendant. In view of the fact that the defendant has not defended this case at all, I am inclined not to award costs to the plaintiff as against the defendant.

12. Judgment is hereby entered for the Plaintiff against the defendant in the following terms:

- a) An order is issued to the Registrar of Land in charge of the registers for land title numbers Mwimbi/N.Mugumango/1595, 1596, 1597, 1598 and 1599 to cancel the titles and consolidate them back to the original land title No. MWIMBI/N. MUGUMANGO/670.
- b) It is hereby declared that the plaintiff Rufus Munyua Muchiri, has acquired by way of adverse possession ownership of three (3) acres out of original land parcel No. MWIMBI/N. MUGUMANGO/670 situated in North Mugumango Location of Tharaka Nithi County.
- c) An order is hereby issued for the defendant John Muriithi Njagi, to excute all documents necessary to transfer three (3) acres of land out of land parcel No. MWIMBI/N.MUGUMANGO/670 after consolidation of land parcels NO. MWIMBI/N. MUGUMANGO/1595, 1596, 1598 and 1599 in favour of the plaintiff, Rufus Munyua Muchiri AND IN DEFAULT the Executive Officer of this court is hereby empowered to execute all documents necessary to have the subject land transferred to the plaintiff.
- d) No costs are awarded.

Delivered in open Court at Chuka this 4th day of November, 2020 in the presence of:

CA: Ndegwa

Nyamu Nyaga h/b M/s Kithaka for plaintiff

Defendant absent

P. M. NJORGE,

JUDGE.