



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 30 OF 2016

HUMPHREY MUGO KABUTE.....PLAINTIFF

VERSUS

SUSAN GATUNDO MURAGE.....1ST DEFENDANT

JONAH MUNENE MURAGE.....2ND DEFENDANT

JEMIMAH GITHIGA.....3RD DEFENDANT

REBECCA MUTHONI KIMUNYI...4TH DEFENDANT

ZIPPORAH WAMARWA.....5TH DEFENDANT

JUDGMENT

BACKGROUND

The plaintiff, Humphrey Mugo Kabute, vide an Originating Summons dated 3rd March 2016 and filed the same date sought to be registered as the owner of land parcel No. MUTIRA/KATHARE/273 having acquired title to the same by way of adverse possession. The suit was filed contemporaneously with a Notice of Motion under **Order 40 Rule 1, 2 and 3 Civil Procedure Rules**. The plaintiff/applicant was seeking injunction orders to restrain the respondents or anybody acting on their behest from selling, transferring, alienating and/or partitioning the suit property pending the hearing and determination of that application and the suit herein. When the Notice of Motion was placed before the duty Judge on 15th March 2016, the Court ordered the status quo to be maintained with respect to the suit land parcel number MUTIRA/KATHARE/273 pending the hearing and determination of that application.

On 19th April 2016, the 1st respondent filed a replying affidavit opposing the applicant's application dated 3rd March 2016. The 1st respondent also filed a Notice of Preliminary Objection dated 21st March 2016. On 30th July 2018, this matter came up for hearing where the plaintiff testified alone and closed his case. The defendants who are acting in person instructed the 1st defendant to testify on their behalf and closed their case too.

PLAINTIFF'S CASE

The plaintiff, Humphrey Mugo Kabute who was sworn stated on oath that the suit property L.R No. MUTIRA/KATHARE/273 measuring approximately 1.6 8 HA belong to Munene Kabute who died in 1976. He stated that his Estate is being administered by the 1st and 2nd defendants herein. The plaintiff stated that he entered into that land in 1964. In 1994, he was chased but he refused to leave. He said that he was on a portion of the suit land measuring $\frac{3}{4}$ of an acre. The whole land is measuring approximately 4.6 acres. The plaintiff further stated that he has done developments on the suit land including building a house and a toilet. His son has also built on the suit property. He said that he wants the Court to give him $\frac{3}{4}$ of an acre where he lives and has developed. The plaintiff also said that there was a Succession Cause No. 49/2012 but he was not a beneficiary in that case. He said that he was told to file a case in the Environment and Land Court.

DEFENDANT'S CASE

The defendants nominated the 1st defendant to testify on their behalf. In her evidence, the 1st defendant stated that the suit land L.R No. MUTIRA/KATHARE/273 belonged to Munene Kabute who died around 1976. The land is now registered in the name of Samuel Murage and Karani Kabute. The land was given to the two through a succession cause she filed in the High Court. The 1st defendant stated that she saw the plaintiff in the suit land in 1982. The plaintiff was living there with the mother who was also buried in the same land. She does not know how the plaintiff came into the suit property without permission and is still living in the land. The defendants want him out of the land.

PLAINTIFF'S SUBMISSIONS

The plaintiff through the firm of Maina Kagio & Company Advocates submitted both on points of fact and points of law. On points of law, the learned counsel submitted that the land in issue is number MUTIRA/KATHARE/273 measuring 1.86 hectares which is approximately 4.6 acres. He stated that the land was given to Munene Kabute by the clan and later demarcated to him during Land Adjudication and consolidation period sometime in 1976. On 28th September 1976, the said land was registered in favour of the said Munene Kabute (deceased) and on 24th July 2003, the proprietor of the suit land passed on. On 3rd April 2013, letters of Administration were issued to Susan Gatundu Murage and Jona Munene Murage jointly who are the 1st and 2nd defendants herein. The counsel submitted that from the evidence, the 1st defendant in her evidence, stated that she got married in 1982 and that in the same year, the proprietor Munene Kabute (deceased) attempted to chase the plaintiff from the suit land but he resisted. It is further submitted that the plaintiff's evidence is that he was allowed by the initial owner Munene Kabute (deceased) to get into the suit land in 1964 and that he occupies $\frac{3}{4}$ acre which is clearly demarcated and the perimeter marked by a live fence. It is also submitted that in 1984, Samuel Murage Kabute who by then was the registered proprietor attempted to evict the plaintiff but he has been resisting such attempts. It is also submitted that the plaintiff's mother and wife were buried in the suit property.

On the issue of law, the learned counsel submitted that for one to prove adverse possession, he has to show that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years. He cited the case of **KASUVE VS MWAANI INVESTMENTS AND 4 OTHERS (2004) 1 K.L.R. 184 and SAMUEL KIHAMBA VS MARY MBAISI CA No. 27 of 2013 (KISUMU)**. The learned counsel also cited **Sections 7, 13 & 17 of the Limitation of Actions Act Cap 22** Laws of Kenya which provides for the extinguishing of the title of the proprietor of land in favour of the adverse possessor at the expiry of 12 years of that possession. The learned counsel also confirmed that after the demise of Munene Kabute on 24th July 2003, the 1st and 2nd defendants were appointed as joint administrators of the Estate of the deceased. It is further submitted that the defendant registration as the owner of the land on 20th January 2016 did not by any way affect the plaintiff's right to claim the $\frac{3}{4}$ acre portion by way of adverse possession. On that ground, he cited the case of **GITHU VS NDEETE (1984) K.L.R 776**.

SUBMISSIONS BY THE DEFENDANTS

The defendants did not file submissions for obvious reasons that they act in person. However, they submitted a copy of judgment in the High Court Succession Cause No. 49/2012.

ANALYSIS AND DECISION

I have considered the viva voce evidence adduced by the plaintiff and the 1st defendant on behalf of all the defendants. I have as well considered the Notice of Preliminary Objection dated 21st March 2016 and the submissions by counsel for the plaintiff. In the Notice of Preliminary Objection dated 21st March 2016, the 1st defendant raised the following grounds:

- (1) That the issues raised in the plaintiff's case were concluded in the Succession Cause No. 49 of 2012 and this renders it res-judicata.***
- (2) That the Estate of the said deceased was distributed to the beneficiaries and each beneficiary was given his or her share in the said Estate and the plaintiff/applicant was not awarded any share or benefits in the late Samuel Kabute's Estate.***

The Superior Court has rendered itself on numerous decisions that where a Preliminary Objection has been raised, the Court usually downs its tools and make inquiry on the preliminary issue before taking any step in the proceedings. I am not therefore going to depart from the principles of law. Having said that, I now wish to address my mind to the judgment of the Superior Court delivered by Hon. Justice R.K. Limo on 28th October 2015 in the Succession Cause No. 49/2012 touching the suit properties:

***“The 2nd protestor's claim or rights if any in the Estate of the deceased herein should be taken to the right Court which is established under Article 162 (2) of the Constitution to deal and determine the same. He told this Court that the matter was decided in Court in his favour and even if that was the case certainly he cannot execute a decision from another Court in a succession process or proceedings as it would amount to an abuse of Court process. This Court in the evidence finds no merit in the 2nd protest by Humphrey Mugo Kabute. He should file separate civil proceedings in the right Court (Environment and Land Court) if he has any rights over the property forming the Estate herein.*”**

The above named 11 dependants or beneficiaries shall share equally the two parcels of land comprising the Estate which are:

- (1) MUTIRA/KATHARE/273 registered in the name of deceased***
- (2) MWERUA/KIBIRIRI/169 that measures approximately 7.6 acres.***

***In order to bring finality to this case, this Court was informed that National Irrigation Board has acquired part of MWERUA/KIBIRIRI/169 and what is remaining to be shared is the compensation money. This Court therefore directs that the proceeds from compensation shall be part of the plot and shall equally be shared by the eleven beneficiaries*”**

Whereas the Court observed that the 2nd protestor's claim or rights (plaintiff's) if any over the Estate of Samuel Murage Kabute (deceased) should be taken to the Court established under ***Article 162 (2) of the Constitution*** to deal and determine the same, the Court nevertheless went ahead and distributed the entire Estate before the 2nd protestor could file and ventilate his claim and/or rights before the appropriate

Court. It would therefore be a tall order to proceed and make a determination on the plaintiff's claim when the Estate of Samuel Murage Kabute (deceased) has been distributed. I therefore concur with the defendants' Preliminary Objection to the extent that it would be an exercise in futility to determine this suit on merits when the Estate of the deceased was distributed to the beneficiaries and that each beneficiary was given his/her share in the said Estate. In the upshot, I find the Preliminary Objection on ground No. 2 merited and the same is upheld. Consequently, the plaintiff's suit is hereby struck out with each party to bear their own costs.

READ, DELIVERED and SIGNED in the open Court at Kerugoya this 25th day of January, 2019.

E.C. CHERONO

ELC JUDGE

25TH JANUARY, 2019