



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 41 OF 2017

JOHN WAWERU KIARIRE PLAINTIFF

VS

MAINA NJUGUNA 1ST DEFENDANT

KIARIE NJUGUNA 2ND DEFENDANT

GITAU NJUGUNA 3RD DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendants on the 28/6/16 seeking the following orders;

- a. A permanent injunction do issue restraining the Defendants their agents servants workmen relatives or anyone claiming through them from trespassing entering cultivating or in any way interfering with the Plaintiff's land Parcel number LOC3/MUKURIA/667 and LOC 3/MUKURIA/668 (hereinafter called the suit lands).
- b. General damages for trespass.
- c. Costs of the suit.

2. It is the Plaintiff's case that he is the registered proprietor of the suit lands having acquired them from Dirithi Gitau and Wanyui Gitau. That the Court should stop the Defendants from entering the suit lands permanently.

3. On the 31/8/16, the 2nd Defendant denied the Plaintiff's claim through a statement of defense and Counterclaim in which he sought the following orders;

- a. Inhibitory orders to issue against the Plaintiff, his servants her agents assignees or any other person claiming through him inhibiting them from interfering and/or dealing in any way with land Reference Number LOC3/MUKURIA/667 and 668.
- b. Court be pleased to declare and issue a declaration that the 2nd Defendant through his late father is the legal owner entitled to adverse possession for over 31 years of all that parcel of land comprised in LOC MUKURIA /667 & 668.
- c. An order for cancelation of the Plaintiff's title deed in respect to parcel of land known as LOC 3/MUKURIA 667 & 668.
- d. An order for the cancellation of the Plaintiff's title deed in respect to parcel of land known as LOC3/MUKURIA 667 & 668 and the same be registered in the Defendant's name.
- e. Costs of the suit.

4. It is the 2nd Defendant's case that the suit land belonged to their father one Njuguna Macharia and the said Ndirithi Gitau and Wanyui Gitau did not own the suit lands and therefore could not have conveyed any interest in the suit lands to the Plaintiff.

5. On the 10/3/17 the Plaintiff filed a reply to defense and denied the 2nd Defendants statement of defence and Counterclaim and sought to put him on strict proof thereof.

6. On the 10/3/17 the Plaintiff applied for judgment in default against the 1st and 3rd Defendants who had failed to enter appearance and/or

file a defence. However, on the 13/2/18 the parties by consent agreed to allow the 1st and 3rd Defendants to adopt the defence and Counterclaim on record filed by the 2nd Defendant on the 31/8/16. It is on record that the 1st and 2nd Defendants on the 19/4/18 filed an authority to swear and act thereby mandating the 3rd Defendant to swear on their behalf each and every document in respect to the case. The defence on record shall henceforth be deemed as that of the 1st -3rd Defendants.

7. At the hearing of the suit the Plaintiff testified solely and adopted his witness statement dated the 6/5/16. In it, he stated that he acquired the LOC 3/MUKURIA 667 AND LOC3/MUKURIA 668 on 15/11/83 and 6/2/85 from Dirithi Gitau and Wanyui Gitau respectively. The two were brothers. That upon acquisition he took possession, fenced the suit lands with barbed wire and planted trees thereon. That upon his return to the suit lands he found the Defendants had trespassed and cut several trees and destroyed the barbed wire without his knowledge and consent. He fingered the 1st Defendant as the one who removed the fence and cut the trees. He reported the matter to the local chief who advised him to file suit. He urged the Court to restrain the Defendants jointly and severally from entering the suit lands and causing destruction in his properties.

8. At the hearing the Plaintiff informed the Court that before acquiring the suit lands, he carried out due diligence in form of searches which showed that the suit lands were owned by the two brothers aforesaid. He informed the Court that Njuguna Macharia and Njuguna Gitau is the same and one person for whom he knew as the father of the Defendants. Further he informed the Court that he has not built on the suit lands and that he found the 1st Defendant living on the suit lands. He did not have any dispute with the father of the Defendants, he informed the Court, nor was he aware of any disputes between the father of the Defendants and his two brothers who sold the suit lands to him. He stated that Njuguna Gitau was present at acquisition of the suit lands and did not raise any issues. Rather on a contradictory note he stated that though he does not live on the suit lands, he cultivates thereon and that the suit lands are unoccupied.

9. DW1 – Gerald Gitau Njuguna testified that he is the 3rd Defendant and a brother to the 1st and 2nd Defendants. That the Defendants are the sons of Njuguna Macharia alias Kagera Gitau. He stated that LOC3/MUKURIA/278 originally belonged to his father who bought it from one Kihonge Mwati in 1961 in the presence of witnesses most of whom are deceased. That the estate of his late father has not been administered in succession. The suit lands were occupied by his late father until his demise. After his death his children continued to occupy the suit land. He stated that his grandfather had directed that the parcel No 278 belongs to his father and that no other person was entitled to claim it. Further that the clan elders on 21/6/1986 after a process of arbitration concluded that the land belonged to his father Njuguna Macharia. Similarly, the District Commissioner Muranga District in a letter dated the 9/2/1988 to the Kandara District officer confirmed that the land belonged to the Defendant's father.

10. He informed the Court that his uncles namely Dirithi Gitau and Wanyui, with intent to defraud his father, fraudulently acquired the land and caused its subdivision into 4 parcels, some of which are land parcel No 667 and 668 in 1980s and thereafter sold the said parcels to the Plaintiff. That his father registered a caution on the suit lands to protest the fraudulent dealings. He accused the Plaintiff of illegally and fraudulently acquiring the suit lands from his uncles. He stated that though the Plaintiff claims to have acquired the two parcels in 1983 and 1985, it is only in 2004 that he claimed the suit lands, 19 years later and 1 year after the demise of his father. His father died in 2003. He confirmed that the 1st Defendant resides on the suit lands.

11. On cross examination he confirmed that he has not filed any letters of grant of representation in respect to his father estate. That all his 3 uncles are deceased. He further clarified that the Defendants have been sued as individuals and not as representatives of the estate of his late father.

12. DW2- Maina Njuguna testified and informed the Court that he lives on both suit lands from 1974 to date. That in 1983 he was 13 years when the Plaintiff claimed to have bought one of the suit lands. He informed the Court that both suit lands are not fenced. That upon attaining the age of 18 years he started Plaintiff tea and coffee. That he was made aware of the dispute in respect to the suit lands between his later father and his uncles as he accompanied his father to Muranga lands office to lodge a caution. He stated that the Plaintiff came on to the land in 2004 and on being confronted by the area chief as to how he acquired the land and the nature of his interest in the suit lands, he walked away only to return in 2016 claiming that he is the registered owner of the suit land. That despite a Court order inhibiting any dealings on the land issued by the Court, the Plaintiff has continued to commit wanton destruction and waste on the suit lands such as destroying tea, coffee, bananas trees in a bid to force him to leave the suit lands. He is not aware if the Plaintiff raised any claim on the suit lands while his father was alive. He stated that on plot 667 there are eucalyptus macadamia and avocados. That he never met Ndirithu nor did he know where he lived.

13. DW3 – Salome Nyambura Macharia adopted her witness statement dated the 18/4/18 as her evidence in chief and thereafter was cross examined by the Plaintiff's counsel, Ms Wamboi. She informed the Court that she is the wife of Macharia Gitau, deceased, who was the brother of Njuguna Macharia alias Kagera Gitau, Ndirithu Gitau and Wanyui Gitau. That Njuguna Gitau bought the original suit land LOC 3 /MUKURIA/278 from Kihonge Mwati and on acquisition planted coffee and settled on it with his family upto his demise. LOC 3 /MUKURIA/278 was subdivided by Ndirithu Gitau and Wanyui Gitau into 3 plots which were given to Wanyui Gitau LOC 3/MUKURIA /668, Ndirithu Gitau LOC 3/MUKURIA /667 and Macharia Gitau got LOC 3/MUKURIA /669 respectively. She was given LOC 3/MUKURIA/669. She stated that the land belonged to Njuguna Gitau and it was wrong for the brothers to subdivide Njuguna's land. That she was informed by her husband that their father did not own any land and indeed LOC 3/MUKURIA /278 belonged to Njuguna Gitau. That the land was not family land. He confirmed to the Court that the original land is in the possession and occupation of the 1st Defendant where he grows bananas, coffee tea and keeps livestock. She informed the Court that it is her wish that the portion LOC 3/MUKURIA /669 which was given to her be reverted back to the family of Njuguna Gitau and in fulfilment of her wish, she handed over the title to her step sons to effect the transfer to the family of Njuguna Macharia Gitau. That she has never taken possession of 669 even though she has a title in her name. She stated that she lives on her own land at Marira Village and finally that the parcel 669 is in possession and occupation of the 1st Defendant.

14. The Plaintiff submitted that the original land LOC 3/MUKURIA /278 may have been subdivided vide a Court order in PMCC No 2014 of 1977 and therefore allegations of fraud by the Defendants are baseless. He submitted that the Plaintiff bought the suit lands from the brothers of the Defendant's father who were registered proprietors of the suit lands who had acquired titles under the Court order and as a purchaser for value he cannot be said to have acquired a tainted title. He submitted that the Defendants have not pleaded, particularized nor

proved fraud on the part of the Plaintiff and under section 25(1) of the Land Registration Act the Plaintiff is the absolute owner of the suit lands and enjoys legal protection.

15. In respect to the claim of adverse possession, the Plaintiff submitted that the same has not been proved. The Plaintiff has been in possession of the suit lands since 1989. That he took possession after purchase and immediately fenced the same and planted trees. That the Plaintiff has been in possession of the suit lands until 2016 when the Defendants illegally entered the properties destroyed the boundaries and begun cutting down trees for which the Plaintiff wrote to the Defendants on the 13/4/16 to stop the interference. The Plaintiff placed reliance in the case of **African Inland Church Kenya Registered Trustees Vs Catherine Nduku & 12 others (2017) EKLK** in which Court upheld the right of the registered land owner against that of the trespassers.

16. The Defendants in urging the Court to dismiss the Plaintiff's suit and grant their prayers submitted that the legitimate owner of the 278 was Njuguna Macharia, their father. The said land was fraudulently subdivided into 4 parcels by Ndirithi Gitau and Wanyui Gitau out of which 667 and 668 was fraudulently sold to the Plaintiff. Though the Plaintiff claims to have purchased the properties in 1983 and 1985 respectively he testified that on his recent return he found the Defendants had trespassed onto the suit land. The Defendants submitted that the suit lands have been in possession of the Defendants, specifically the 1st Defendant, a fact that was confirmed by the Plaintiff as well as the hearing of the case. That the Defendant's father died in 2003 and the Defendants through the 1st Defendant continued to occupy the suit land and that the Plaintiff only came back in 2016, 13 years after the demise of their own father. That the entire land is being occupied by the Defendants through the 1st Defendant. That though the Plaintiff claims that the suit land was subdivided however on the ground the entire land 278 is in possession of the Defendants to the exclusion of the Plaintiff.

17. As to whether there was fraud in the acquisition of the Plaintiff of the suit lands, the Defendants submitted that the Plaintiff conspired with their uncles to defraud their father of their land. That the Plaintiff did not produce any mutations to support the subdivision of the suit land. That Ndirithi and Wanyui had no valid titles to convey to the Plaintiff. That the Plaintiff did not give proof of consideration which he paid for the suit land. They relied on the case of **Munyu Maina Vs Hiram Gathiha Maina CA 239 of 2009** where the Court held that where a title is challenged it is the duty of the claimant /owner to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any overriding interests. They submitted that according to section 26 of Land Registration Act the Plaintiff cannot be said to have an unimpeachable title on account of the claim of fraud and illegality.

18. Having reviewed the pleadings, the evidence of the parties, the submissions and all the materials placed before the Court, the issues for determination are;

- a. Whether the Plaintiff has a cause of action
- b. Whether the Plaintiff acquired the suit lands fraudulently.
- c. Whether the Defendants are entitled to the suit lands by way of adverse possession
- d. Whether the Defendants are trespassers on the land
- e. Who meets the costs of the suit?

19. As to whether the Plaintiff has a cause of action, the entry point is in Para 4 where the Plaintiff pleaded as follows;

“The Plaintiffs claim against the Defendants jointly and severally is for permanent injunction restraining the Defendants from entering or in any way interfering with the Plaintiffs parcels of land above mentioned.”

20. What is a cause of action? It is fact or combination of facts that gives a person the right to seek judicial redress or relief against another. It is the legal theory forming the basis of a lawsuit. The cause of action is the heart of the complaint, which is the Pleading that initiates a lawsuit. Without an adequately stated cause of action the Plaintiff's case can be dismissed at the outset. It is not sufficient merely to state that certain events occurred that entitle the Plaintiff to relief. All the elements of each cause of action must be detailed in the complaint. The claims must be supported by the facts, the law, and a conclusion that flows from the application of the law to those facts.

A cause of action can arise from an act, a failure to perform a legal obligation, a breach of duty, or a violation or invasion of right. The importance of the act, failure, breach, or violation lies in its legal effect or characterization and in how the facts and circumstances, considered as a whole, relate to applicable law.

21. Order 2 rule 1 states as follows;

“every pleading in civil proceedings shall contain information as to the circumstances in which it is alleged that the liability has arisen ...”

A plaintiff must set forth the relevant allegations of fact that give rise to one or more legal causes of action along with a prayer for relief.

The prayers sought by the Plaintiff are injunctive in nature seeking to restrain the Defendants from trespassing entering cultivating and or interfering in any way with the suit lands. My reading of para 4 of the Plaintiff stated above seeks to enjoin the Defendants from entering or interfering with the suit land. There seems to be no threat or evidence of threat to enter the suit land.

22. Section 13 (1) of the Environment and Land Act provides that the Court shall have original and appellate jurisdiction to hear and

determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land. The suit does not disclose a cause of action and likewise does not disclose a dispute for which the Court has jurisdiction to hear and determine.

23. This Court is of the view that though the Plaintiff did not disclose a cause of action, the evidence on record and the witness statement have indeed disclosed a cause of action based on trespass. It is noteworthy that the Defendants did not raise any objection to the Plaintiff and have indeed proceeded to present their defense against a cause of action founded on trespass. The Court is of the view that the Plaintiff has established a cause of action. The first issue is answered in the positive.

24. It is not in dispute that the Plaintiff is the registered owner of the suit properties according to the copies of titles and official searches tendered before this Court. He became registered owner of LOC 3/MUKURIA/ 667 on 15/11/83 and LOC 3/MUKURIA /668 on 6/2/85. It is also not in dispute that the suit lands were resultant subdivisions from LOC 3/MUKURIA /278. According to the green card of parcel 278, the first registered proprietor of this land was Kagera Gitau on 6/6/62. On the 5/5/77 the said land became registered in the name of Njuguna Macharia and a certificate of title issued thereafter on the 18/5/77. On the 28/5/1980 the title was closed on its subdivision into plot Nos LOC 3/MUKURIA /667,668 669 and 670. According to the evidence of the parties on record, it is not in dispute that Njuguna Macharia was also known as Kagera Gitau. Both entries therefore refer to the same person.

25. According to the green card of plot No 667, the land became registered in the name of Njuguna Macharia on 17/5/1980 and on 28/5/1980 was transferred to Ndirithu Gitau at a consideration of Kshs 14,000/-. On the 15/11/1983 was registered in the name of the Plaintiff at a disclosed consideration of Kshs 10,000/-. On the other hand, the green card for plot No 668 became registered in the name of Njuguna Macharia on 17/5/1980 and transferred to Wanyui Gitau on 6/12/84 vide PMCC No 214 of 1977. The Plaintiff became registered owner on the 10/1/1985 at a disclosed consideration of Kshs 13,000/- and a certificate of title duly issued on 6/2/85.

26. The Defendants have claimed that the land 278 belonged to their father Njuguna Macharia alias Kagera Gitau and that the same was fraudulently acquired and subdivided by their uncles Ndirithu and Wanyui and thereafter sold to the Plaintiff who did not acquire a clean title. From the preceding paragraphs it is true that the land 278 belonged to Njuguna Macharia and according to the green cards the same was subdivided and the suit lands LOC 3/MUKURIA 667 and 668 registered in his name and were transferred to Ndirithu at a consideration and to Wanyui vide a Court order in PMCC No 214 of 1977. The Defendants did not furnish the Court with the orders in this case for the Court to appreciate the full text. Neither Ndirithu nor Wanyui were called to testify before the Court to lend credence to the averments by the Defendants. It is on record that the two are deceased. The Plaintiff has averred that he bought the suit lands from the uncles of the Defendants and this evidence is consistent with the record of the green cards of the two suit lands.

27. The Defendants have claimed that their father lodged cautions on the suit lands on account that he was the registered owner of the suit lands on 23/3/95 , however there is no record on the green cards of LOC 3/MUKURIA/ 667 and 668 that such cautions were ever registered. There is no evidence either that the father of the Defendants challenged the said transfer of the suit lands to the Plaintiff in 1983 and 1985 or at any other time during his lifetime. The Defendants have led evidence that their father died in 2003.

28. It is trite law that allegations of fraud must be pleaded, particularized and proved to the standard required in law which is on a balance of probabilities. The Court holds and finds that the Defendants have not proved fraud against the Plaintiff in the acquisition of the suit lands.

29. The Court finds the 1st issue in the negative.

30. A claim for adverse possession is supported by the following factors;

- i. Whether entry and continued occupation of the suit land is adverse to the person in respect of whom adverse possession is alleged.
- ii. Whether the occupation is open, continuous, peaceful and uninterrupted.
- iii. Whether entry and or occupation has not been disrupted in at least 12 years.
- iv. Whether entry is permissive.

31. In the case of **Kasuve Vs Mwaani Investments Limited & 4 Others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for adverse possession has to prove in the following terms;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

32. The Plaintiff led evidence that upon acquisition of the suit lands he took possession, commenced cultivation and fenced the suit land. That recently (does not state the time) he returned to the suit lands and found the Defendants have trespassed onto the suit lands and destroyed the barbed wire. In his evidence he stated that the land had trees upon acquisition and that when he returned from Nairobi in 1989 he found the fence had been destroyed by the 1st Defendant whom he found living on the land. He informed the Court that he does not live on the suit lands as he lives elsewhere and that he has not built any house on it. That he cultivates both suit lands and that both suit lands are not occupied.

33. The Defendants led evidence that the original land LOC 3/MUKURIA /278 was always in the possession and occupation of their father and his family until his death in 2003. DW2 informed the Court that though the Plaintiff claims that the two suit parcels, there is no subdivision on the ground, neither a fence nor any partitioning of the original land. That he has lived on the suit land throughout his life first

with his father and siblings and now with his family. The fact of occupation was corroborated by the evidence of the Plaintiff, DW1 and DW3 as well. The Defendants have led evidence that the Plaintiff came onto the suit land in 1989 claiming that he was the registered owner and when the area chief challenged him to explain how he acquired the suit lands he took off and returned in 2016. That all along the suit lands have been in the exclusive open occupation of the Defendants through the 1st Defendant.

34. DW3 gave credible evidence that indeed the land LOC 3/MUKURIA /278 belonged to Njuguna Macharia and that it was wrong for his brothers to subdivide land that was not family land and sell it. She disclosed that she was allocated 669 which she has never taken possession and indeed had taken steps to have the said land retransferred to the family of Njuguna Macharia. That the 1st Defendant is in occupation of the said parcel of land which formed part of the original 278.

35. Section 7 of Limitations of Actions Act states that;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

The Plaintiff acquired the suit lands in 1983 and 1985 respectively and therefore his right to recover the suit lands lapsed in 1995 and 1997 respectively. His claim is therefore time barred after 12 years of the acquisition of the suit lands. There is cogent evidence led by the Defendants that the suit lands have always been in their possession and at no time did their father nor the 1st Defendant hand over possession to the Plaintiff. By the time the Plaintiff filed this suit adverse possession in favour of the Defendants had crystalized and accrued in 1995 and 1997 respectively. So much so that the Plaintiff being the registered owner of the suit land is holding it in trust for the Defendants.

36. The Court finds and holds that the Defendants have proved adverse possession and the Court finds in the positive in respect to issue No. 2.

37. Having determined adverse possession in the positive, the issue as to whether the Defendants are trespassers falls off. The Court determines issue No 3 in the negative on account that the Defendants have established title by way of adverse possession on account of open uninterrupted and exclusive possession of the suit lands. Their rights of adverse possession crystalized and accrued by 1995 and 1997. The Plaintiff's claim therefore stands dismissed.

38. Final orders;

a. The Plaintiff's claim is dismissed with costs to the Defendants.

b. The Defendants' Counterclaim succeeds.

c. It is hereby declared that the Defendants have established title of the suit lands by way of adverse possession.

d. The Plaintiff is hereby ordered to transfer the suit titles to the Plaintiff's within a period of 30 days in default the Deputy Registrar of this Court is mandated to execute all the documents to effect the transfer.

d. A permanent injunction to restrain the Plaintiff, his servants, agents assignees or any other person claiming through him from interfering and dealing in any way with the suit lands.

e. Costs of the suit shall be in favour of the Defendants.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 17TH DAY OF JANUARY 2019

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff – Present in person. Advocate absent.

Mboha HB for Kiarie for the 1st – 3rd Defendants.

Irene and Njeri, Court Assistants