



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 140 OF 2008**

**MOSES MUNENE KIRERA.....PLAINTIFF**

**VERSUS**

**PATRICK GIKUNDA KIMATHI.....DEFENDANT**

**JUDGMENT**

**Background**

1. The brief history of this matter is that the suit land ABOTHUGUCHI/KITHIRUNE/421 was originally owned by one M'Ikiugu Karichu who was a brother of M'Kirera Karichu (also known as M'Kirera Mukira) and Kinyua M'Mukiira also known as M'Itunga M'Mukiraa. M'Kirera Mukira was father of the plaintiff. When M'Ikiugu died the succession cause was filed by M'Itunga, who's family sold the land to the current defendant. However, this land had earlier on been bought by plaintiff's father who had then settled the family on the suit land.

2. By way of originating summons filed on 28.10.2008, plaintiff is seeking for the following orders:

(i) An order that the estate of M'Kirera M'Mukira represented by the applicant/plaintiff herein has become entitled by adverse possession to land parcel No. Abothuguchi/Kithirune/421 which measure about 1.291 hectares and registered in the name of the defendant/respondent.

(ii) An order that the plaintiff/applicant be registered as proprietor (as the legal representative of M'Kirera M'Mukira) over the said land parcel No. ABOTHUGUCHI/KITHIRUNE/421 which land the applicant together with other beneficiaries of the estate of M'Kirera M'Mukira have occupied for over 12 years.

(iii) Costs be provided for.

3. The suit is opposed by the defendant through his replying affidavit filed on 8.12.2008.

**Plaintiff's case**

4. Plaintiff testified and also adopted his statement of 6.2.2012 as his evidence. He also called two witnesses to support his case. PW 1's, (plaintiff) testimony is that his father was known as M'Kirera Karichu alias M'Kirera M'Mukiira who had two brothers, M'Ikiugu Karichu and Kinyua M'Mukiira who was also known as M'Mutunga M'Mukiira. Plaintiff's uncle, M'Ikiugu had no wife or children and was the registered owner of land parcel No. Abothuguchi/Kithirune/421, of which he sold 2 acres to plaintiff's now deceased father. Plaintiff states that M'Ikiugu didn't transfer the land to plaintiff's father and the latter sued him in **HCCC no. 82 of 1979** whereby judgment was entered in favour of plaintiff's father.

5. M'Ikiugu had also sold land to one David Mburugu and failed to transfer the said land thus being sued by David in SRMCC no 56/1980. Plaintiff's father apparently paid up Daniel Mburugu and retained the land which was 1 ½ acres and combined with his two acres to make 3 ½ acres.

6. The plaintiff avers that the year 2001 is when his uncle M'Itunga claimed that the land was his. Plaintiff learnt that M'Itunga had filed a succession cause secretly thus being registered as the owner of the suit land. M'itunga then sold the suit land to the defendant without consulting the plaintiff.

7. According to PW 1, the land is wholly fenced and his family (his father's family) is the one which has been in occupation of the suit land since 1979. PW 1 further stated that defendant has never occupied the suit land as he stays at Kibirichia with his family.

8. PW 2, one Daniel Mburugu M'Ikiugu adopted his statement dated 6.2.2012. He avers that he had bought 1 ½ acres from the plaintiff's

uncle M'Kiugu Karichu in 1979 and that M'Ikiugu Karichu was the original registered owner of the suit land. He further stated that the suit land was Abothuguchi/Kithirune/421 and that M'Ikiugu failed to transfer to him the land thus suing him in **SRMCC No. 56 of 1980** which judgment was ruled in his favour. He averred that the land was put up for sale but the plaintiff's father paid the decretal sum hence rescuing the land from being sold by public auction. It was then agreed that the plaintiff's father would take the land instead of it ending up with an outsider. PW2 further stated that plaintiff's deceased father's family have lived on the suit land to date.

9. When PW 2 bought the 1 ½ acres of the suit land, he had found M'Kirera (plaintiff's father) utilizing the rest of the land. PW 2 was certain that the people who utilizes the suit land are the sons of M'Kirera.

10. PW 3, one Magambo M'Mukira adopted his statement dated 5.12.2012 as his evidence. He is a relative of plaintiff, as he is a step-brother of M'Kirera (father of plaintiff), M'Ikiugu, (the original owner of the land) and M'Itunga, (the one who became administrator of estate of M'Ikiugu. PW3 has captured this relationship in a diagram format in his statement. He testified that M'Ikiugu did not have a wife or children. M'Ikiugu therefore leased his land which was family land. M'kirera would however indemnify the buyers by refunding the monies paid for the land. PW 3 further stated that M'Ikigu never utilized his land since he used to be employed and that the land was utilized by plaintiff's deceased father until his brother M'Itunga started claiming it. When this dispute arose, it was heard by the chief and the district officer. M'Itunga lost the case but still went ahead and secretly sold the land. He learnt that the suit land had been sold to defendant after M'Itunga's death.

11. In support of his case PW 1 produced as exhibits the documents in his list dated 2.2.2015 (P Exhibit 1 – 22).

### **Defence case**

12. Defendant testified and he also relied on his statement dated 26.5.2011. He also called two witnesses to support his case. His case is that in the year 2008, one M'Itunga M'Mukira (deceased), his son and wife approached him with an offer to sell him a piece of land approximately 2.19 acres to be excised from land parcel no. Abothuguchi/Kithirune/421 measuring approximately 1.291 Ha. DW 1 further states that M'Itunga was ailing and needed money to offset bills. He avers that M'Itunga was the one cultivating the suit land with his wife and children and only a small portion was being occupied by the plaintiff. After ascertaining that there were no encumbrances, he purchased the land vide an agreement dated 12.9.2008. The terms of the agreement were that defendant was to have the whole land transferred to him, but would later on transfer a portion to M'Itungas wife or children since what defendant was buying was 2.19 acres and not the whole land.

13. DW1 also stated that during the pendency of the suit, the plaintiff put up a permanent building on the suit land especially on DW 1's portion and therefore he cannot claim adverse possession on the defendant's portion since he has only utilized a small portion of land.

14. During cross examination, DW 1 stated that the portion of the land he bought was bare but there was a semi-permanent structure on the other portion.

15. DW 2, one Susan Kanini adopted her statement of 16.3.2011 as her evidence. She stated that she is the wife of the deceased M'Itunga M'Mukira who was the registered proprietor of land parcel no. Abothuguchi/Kithirune/421 measuring approximately 1.291 ha. She averred that it is her late husband who used to cultivate the suit land and that he had allowed the plaintiff to cultivate on a small portion of land. When M'Itunga started ailing, the family (of M'Itunga) decided to sell the suit land to DW 1 to enable them foot the hospital bills. DW 2 further stated that later on, the plaintiff claimed the land to be his since he had increased his portion during the time of her husband's ailment.

16. DW 2 in cross examination stated that she got married in 1980 and found her husband staying on the suit land (the one at Kithirune). However, herself she stayed on the land at Kibirichia but she gave the suit land to M'Kirera's children so that she could get it later on. She doesn't know the circumstances under which her husband came to be registered as the owner of the land.

17. DW 3 Gitonga M'Itunga is the son of M'Itunga M'Mukira and DW 2. His evidence is more or less like that of his mother. In cross examination, DW 3 stated that plaintiff is the one in occupation of the suit land. He also stated that his family has always stayed on the land at Kibirichia.

### **Determination**

18. I have considered the pleadings, the evidence and the rival pleadings. The issue for determination is "***Whether the estate of M'Kirera M'Mukira has become entitled by adverse possession to land parcel no. Abothuguchi/Kithirune/421***".

19. For one to succeed in a claim for adverse possession, one must prove that he has been in exclusive continuous occupation of the suit land for a period of at least 12 years, which occupation must be open and notorious and should be without permission of the owner; **nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)** ,See- **Nyeri Court of Appeal case No.22 of 2013, Peter Mbiri Michuki vs.Samuel Mugo Michuki.**

20. It appears that the person in occupation of the suit land is the plaintiff. His cousin DW 3 was rather candid about this issue when he stated that; "***As I stand here, the person occupying the land is Moses Munene. He farms on that land. He plants maize and beans and vegetables. He stays on that land. He had fenced the land .....***".

21. DW 3's mother Susan was less candid. She initially stated that the suit land was occupied by her husband (M'Itunga) but she changed tune and stated that she resides at Kibirichia and she gave the suit land to M'Kirera's sons.

22. The documentary evidence adduced by plaintiff's side clearly gives a glimpse of how the family of M'Kirera came to take over the suit land. It was through a court case filed by M'Kirera against his brother M'Kiugu in 1979. Apparently M'Ikiugu had also sold another portion

of land to Daniel Mburugu (PW 2) who also had to file a case no. 56 of 1980 to get the land. Daniel has given an account of how he sold his interest in this land to M'Kirera.

23. It follows that the initial occupation of the suit land was hostile to the owner, M'Ikiugu. 1979 can therefore be one of the dates when time started to run.

24. Defence side has averred that the tribunal case and the succession case both interrupted TIME.

#### **Tribunal case**

25. It is the defence side which has alluded to the existence of a tribunal case. However, have not seen any such a case or particulars thereof. What is there are proceedings before the chief of Kithirune and such proceedings cannot be termed as a tribunal case.

#### **Succession cause**

26. It is not disputed that M'Itunga M'Mukira filed a succession cause no. 202/2001 in respect of the estate of his brother (M'Ikiugu), that is how M'Itunga became the registered owner of the land.

27. In the case of **Gerald Muriithi Kamande (suing as legal Representative of the estate of Kamande Muriithi vs Wamugunda Muiruki & another H.C.C No. 41/2003 Nyeri**, it was held that;

*“The mere change of ownership of land which is occupied by another under adverse possession does not interrupt such persons adverse possession”.*

Also see – **Mary Muthoni Kathu vs Faith Wambui Ngari & 2 others Kerugoya ELC No. 386 of 2013**.

28. The change of ownership of the land via succession case cannot be termed as having interrupted adverse possession. **Section 16 of the limitation of Actions Act** provides that;

*“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”*

29. I am inclined to find that plaintiff has proved his case on a balance of probability. I have also taken cognizance that plaintiff has a limited grant of letters of administration in respect of his deceased's father's estate issued on 23.10.2008 (see P exhibit 5).

#### **Final orders;**

**(1) It is hereby declared that the estate of M'Kirera M'Mukira represented by the applicant/plaintiff herein has become entitled by adverse possession to land parcel No. Abothuguchi/Kithirune/421 which measures about 1.291 hectares and registered in the name of the defendant/respondent.**

**(2) An order is hereby issued for the plaintiff/applicant to be registered as a trustee for the estate of M'Kirera M'Mukira over the parcel No. ABOTHUGUCHI/KITHIRUNE/421.**

**(3) The Deputy Registrar of this court is hereby authorized to sign all requisite documents to facilitate the implementation of this judgment.**

**(4) Any orders of injunction/inhibition or caution that may be subsisting are hereby discharged in order to give effect to this judgment.**

**(5) Each party to bear their own costs of the suit.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 7<sup>TH</sup> JANUARY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Kithaka for plaintiff

Plaintiff

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**