



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 118 OF 1985

JOSEPH MURORI M'NKANATA

(Legal Representative of the Estate of M'Nkanata M'Mwirichia....PLAINTIFF

VERSUS

STANLEY GAITI.....1ST DEFENDANT

GODFREY GIKUNDA ANJURI 2ND DEFENDANT

SIMON KIAMBI3RD DEFENDANT

CHARLES KIRUJA.....4TH DEFENDANT

MUTUMA M'INOTI5TH DEFENDANT

JOSPHAT KIOGORA6TH DEFENDANT

JUDGMENT

History

1. This case holds the dubious status of being one of the oldest matters in this court (perhaps even in the Republic) having been in the court's arena for the last 34 years or so. The checkered history of this case has seen the parties die, the file getting lost, and case being dismissed and reinstated but finally the hearing took off on 7.3.2018 when case was heard and closed.
2. The initial plaintiff was one **Nkanata M'Mwirichia** who filed the suit **Meru H.C.C no. 118 of 1985** against Stanley Gaiti and Jelina Kaimuri claiming entitlement to 4 acres of **parcel no. Gaitu/318** by way of Adverse possession.
3. This plaintiff had apparently bought the land from its owner, one **Nkacha Kaiyanthi, in 1973** but the latter refused to effect transfer. Both M'Nkanata and Nkacha died and in their place came **Joseph Murori M'Nkanata** (son of M'Nkanata) and **Stanley Gaiti** and **Jelina Kaimuri** (the legal administrators of the estate of Nkacha Kaiyanthi).
4. The suit land **parcel no. 318** is no longer intact as it was apparently sold to other parties who are the defendants in **Meru H.C.C no. 124 of 2012**. The land was subdivided and titles issued to the purchasers.
5. While this case was pending in court, one of the purchasers, Godfrey Gikundi Anjuri filed **Tigania SRM's case no/. 46/2012** against Joseph Murori (plaintiff in ELC No.118 of 1985) seeking a permanent injunction to restrain Joseph Murori from dealing in land no. **Abothuguchi/Gaitu/2200**. A temporary injunction to that effect was issued on 23.3.2012 (exparte), but was soon set aside vide the court's ruling of 13.7.2012. No other proceedings took place in this file save for the transfer of that case to the Meru High court where the matter was registered as **Meru H.C.C No. 57 of 2012**.
6. Perhaps after realizing that the suit land had been sold and upon being threatened with eviction, Joseph Murori filed another case **Meru H.C.C No. 124 of 2012** against the following persons;

- The initial 1st defendant in ELC 118/1985 one **Stanley Gaiti**

-**Godfrey Gikundi Anjuri** (plaintiff in the Tigania case) as 2nd defendant.

- **Simon Kiambi** as 3rd defendant
- **Charles Kiruja** as 4th defendant
- **Mutuma M’Inoti** as 5th defendant
- **Josphat Kiogora** as 6th defendant

7. An application was then filed by Joseph Murori to have the two suits (H.C.C 124/12 and 57/12) consolidated with the present suit. This application was allowed vide the court’s ruling of 13.4.2016.

8. However, in a strange twist, a consent was entered into on 7.3.2018 between Mr. Kioga, counsel for Joseph Murori (plaintiff) in 118/85 and Mrs. Kaume, counsel for 3rd -6th defendants in **H.C.C 124/12** to the effect that the order of consolidation of the three suits given on 13.4.2016 was to be vacated and the suits were to proceed as separate suits.

9. Mrs. Kaume had then expressed a desire to have the defendants in **H.C.C 124/12** enjoined in 118/85 as interested parties. She also stated that she wanted to seek more time to engage **Stanley Gaiti** so as to represent him. In a ruling delivered the same day (7.3.2018) the court declined to adjourn the case and the matter proceeded *ex parte*.

10. It appears that in the earlier decades, the plaintiff was rather sluggish in having the matter prosecuted speedily. In some instances, the matter would lay in limbo for even 3 years. For instance, nothing happened from **1988 – 1990**. In **1986**, the matter appears to have been in court only twice. (**20.10.1986 – 17.9.1986**). There was no activity in **1991-1993**. In **1994**, the matter was in court only once (**15.9.1994**) while nothing happened in **1995!!** Eventually the case was dismissed on 17.3.2014 but was reinstated on 17.3.2014.

11. It is not clear as to when the original file got lost but proceedings of **10.11.1999** do indicate that there was such an occurrence.

12. It is also not clear as to when Nkacha Kaiyanthi (the original owner of the land) died. The initial plaintiff died on 25.12.1997 and Joseph Murori obtained a grant in respect of his estate.

13. It has also emerged that the initial 2nd defendant in 118/85 (who was allegedly wife of Nkacha Kaiyanthi) died years ago (no one stated when). Mr. Kioga applied to have the case against her marked as abated on **7.3.2018**. The application was allowed.

14. On the issue of representation Mr. Koga was always there for **Jospeh Murori (plaintiff in 118/85)**. Mr. Elijah Ogoti was appearing for the plaintiff in Tigania **No. 46/12 (Godfrey Gikunda)** but he never filed any pleadings and he never appeared in **H.C.C 124/12** where Gikunda was sued as 2nd defendant. Likewise in ELC 118/1985, Mr. Ogoti and his client were missing in action and the court proceeded with the hearing after ascertaining service as per the affidavit of service filed on 7.3.2018.

15. Mrs. Kaume had filed a memorandum of appearance for all defendants in **H.C.C 124/12** on 27.11.2012, but no defence was filed. She also actively participated in the proceedings in **H.C.C 124/12** and in ELC 118/85 (as from year 2016).

16. However, in case ELC no. **118/85** Mrs. Kaume would sometimes state she was for defendants and other times 3rd-6th defendants and then other times she would say **“I am for some of the defendants –see proceedings of 20.2.2017”**.

17. When the court declined to adjourn the matter further on 7.3.2018, only plaintiff’s case was heard and concluded.

The Evidence

18. Plaintiff testified that in **1973**, his father **Nkanata M’Mwirichia** had entered into a land sale agreement with Nkacha Kaiyanthi, whereby the latter was to sell 4 acres out of his land **parcel no. Abothuguchi/Gaitu/318 (measuring 3.523 hactares)** at price of shs.4000. According to **PW1**, his father’s family immediately settled on the land where the family embarked on utilizing the land by building houses planting gravelia trees bananas and yams.

19. **PW 1** testified that **Nkacha Kaiyanthi** who died by drowning had refused to effect transfer of the 4 acre of land to **Nkanata** and so the latter had filed this suit. **PW 1** stated that their land was clearly demarcated and that his family has been on that land since 1973.

20. **PW 1** further stated that on 4.10.1999, he obtained an injunction against **Stanley Gaiti** and anyone else from entering that land. He also obtained a more or less similar order in **H.C.C No. 124/12**.

21. He also avers that his father was buried on the suit land while his elderly mother still stays on that land.

22. **PW 2** one **Stanley Iriga** testified that he knew both **Nkanata** and **Nkacha** and was there when the two made the land sale agreement. He participated in putting a hedge along the boundary of **Nkanata** and **Nkacha’s** land. He also observed that Nkanata had proceeded to put up a home there by building houses and planting trees. He also stated that the family of **Nkanata** still occupies the land.

23. In support of plaintiff’s case, the following documents were produced as exhibits;

- (i) Plaintiff Exhibit 1: green card showing that land No. **Abothuguchi/Gaitu/318 measuring 3.52 ha** is in the name of Nkacha Kaiyanthi.
- (ii) Plaintiff exhibit 2: the 1973 land sale agreement between Nkacha Kaiyanthi (seller) and M’Nkanata M’Mwirichia (buyer).
- (iii) Plaintiff exhibit 3: limited grant issued to Joseph Murori Nkanata on 23.9.1999 in respect of the estate of Nkanata M’Mwirichia.
- (iv) Plaintiff exhibit 4: order in succession cause no. **65/1991** confirming grant in respect of the estate of Nkanata Kaiyanthi.
- (v) Plaintiff exhibit 5: the order of injunction issued in case no. **118/85** on **4.10.1999**.
- (vi) Plaintiff exhibit 6: The order to maintain status quo issued in **H.C.C No. 124/12** on **29.8.2013**.

Determination

24. This being a claim for adverse possession, the plaintiff is required to prove that he has used the land as of right **nec vi, nec clam, nec precario** (no force, no secrecy, no permission) -see Court Of Appeal case no. **22/2013 Nyeri Peter Mbiru Michuki vs Samuel Mugo Michuki**: **“The possession must be continuous, it must not be broken for any temporary purposes or any endeavors.....”**

25. The land sale agreement of 22.8.1973 shows that the full price had been paid by the date of the agreement and hence purchaser was allowed to take over possession of the land immediately.

26. The occupation of the 4 acres of land can be said to have taken place in August 1973, but such occupation was certainly done with the consent of the owner of the land. Adverse possession could therefore not run during the validity of the contract. Clause five of the agreement stipulated that the consent to transfer the land was to be obtained from land control board within 3 months. No such consent was ever obtained. Thus after 3 months from August 1973 it cannot be said that M’Nkanata was occupying the land with permission of the owner of the land. Time can therefore be computed to run as from **November 1973**.

27. This suit was filed on 18.12.1985. There is nothing to indicate that the family of Nkanata had left this land. There was no interruption. The 4 acres of land were demarcated with a boundary running from the road to the river Gwatu.

28. Thus **from 1973 November to 1985 December**, the family of Nkanata had been in continuous occupation of 4 acres of the suit land for a period of 12 years and one month. (They were just on time in filing the suit).

29. However a problem now arises in that the land **Abothuguchi/Gaitu/318** no longer exists. It has since been subdivided into other parcels. A perusal of file no. **124/12** reveals that **Charles Kirunja Rwito, 4th defendant** owns title no. **Abothuguchi/Gaitu/2676** which is 1.62 ha, where title was issued on 14.2.2008. **Simon Kiambi, 3rd defendant** owns **Abothuguchi/Gaitu/2198** which is 0.81 ha, and title was issued on 9.2.2000, whereas **Celestino Mutuma Inoti, 5th defendant** owns **Abothuguchi/Gaitu/2197** which is 0.4 ha where title was issued on 8.12.2011. A perusal of file no. **46/12 (Tigania)** also shows that **Godfrey Gikunda (2nd defendant in 124/12)** owns parcel no. **Abothuguchi/Gaitu/2200** which is **1.62 ha**. Where title was issued on 7.2.2000. No green cards have been availed by plaintiff hence I cannot state with certainty that all these parcels of land emanated from parcel no. 318. What is however crystal clear is that land no. **Abothuguchi/Gaitu/318** was alienated in blatant disregard of court orders.

30. Way back on **5.11.1992**, the succession court in **case no. 65/91** had given directions that the suit land was not to be disposed off to new purchasers (see **P. exhibit 4**). The order of **4.10.1999** in **case no. 118/85** directed the 1st defendant (**Stanley Gaiti**) not to alienate the land-see **Plaintiff Exhibit 5**, while the order of **29.8.2013** in **H.C.C 124/12** directed parties to **maintain status quo**. These orders did not however stop the alienation of the suit land as from year 2000.

31. PW 1 had testified that; **“Someone has come to occupy the land I am occupying. He was chasing me away. It is Mutuma who was claiming that the land is his.....”**

32. It appears that some of these buyers have taken over some or perhaps all of the suit land. However such eviction or interruption does not affect plaintiff’s case as far as the relevant period is concerned (**November 1973 – December 1985**).

33. In the case of **Leonola Nerima Karani vs William Wanyama Ndege COA Kisumu Civil Appeal no. 142/2007**, it was held that **“The mere change of ownership of land which is occupied by another under adverse possession does not interrupt such adverse possession..... Where a person in possession has already begun and is in the course of acquiring rights under section 7 of the limitation of actions Act (cap 22) and by virtue of section 30 of the registered land Act (cap 300) those rights are overriding interests to which the new registered purchasers title will be subject to.”**

34. Thus in the present case, the purchasers of the land **parcel no. 318** in its subdivided form hold the said land in trust for the plaintiff to the extent of 4 acres.

35. The court does not know and has not been told as to which current titles are affected by plaintiff’s claim. This is not surprising since the subdivisions occurred during the pendency of this suit. Nevertheless, plaintiff knows that his claim is for 4 acres out of the original **parcel no 318** which was measuring **3.523 hectares (about 8.7 acres)**. In the circumstances titles falling on the 4 acres will have to be cancelled.

36. What is the fate of these two files? .In view of the consent order separating these two files from 118/85, I direct that the same be severed from this file (118 of 85) and they be listed for further directions or closure but a copy of this Judgment is to be placed in those other files.

37. **Final orders:**

(1) It is hereby declared that plaintiff Joseph Murori has become entitled by adverse possession to 4 acres out of the original land parcel no. Abothuguchi/Gaitu/318 (measuring 3.523 hectares).

(2) The District Surveyor is hereby authorized to demarcate and hive off the 4 acres falling on the former land parcel no. Abothuguchi/ Gaitu/318 and put beacons accordingly. This portion is to cover the dwelling place of Joseph Murori.

(3) The land registrar is hereby directed to cancel all titles falling on the four acres of land and to register the same in the name of Joseph Murori.

(4) The deputy registrar is hereby authorized to sign all requisite documents to facilitate the implementation of this judgment.

(5) Any orders of injunction or inhibition are hereby discharged in order to give effect to this judgment.

(6) The 1st defendant (Stanley Gaiti) is condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 13TH FEBRUARY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Kimaita holding brief for Kaumbi for plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE