



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 51 OF 2014

(FORMERLY KERUGOYA ELC 771 OF 2013)

PETER MBURU KIMANI.....1ST PLAINTIFF
 LUCY WAITHERERO MWANGI.....2ND PLAINTIFF
 ALICE NJERI MBURU.....3RD PLAINTIFF
 JAMES KARANJA MWANGI.....4TH PLAINTIFF
 BONIFACE KIMANI MWANGI.....5TH PLAINTIFF
 CHARLES NGUNYA MWANGI.....6TH PLAINTIFF
 JANE WAITHIRA NNAMBI.....7TH PLAINTIFF
 ESTHER WAMBUI KIARIE.....8TH PLAINTIFF
 NELSON KIBE MWANGI.....9TH PLAINTIFF
 PETER MACHARIA MWANGI.....10TH PLAINTIFF

VERSUS

TITUS KIGORO MUNYI.....DEFENDANT

(BY ORIGINAL ACTION)

TITUS KIGORO MUNYI.....1ST PLAINTIFF
 KARIAMBURI THIGARI.....2ND PLAINTIFF

VERSUS

PETER MBURU KIMANI.....1ST DEFENDANT
 LUCY WAITHERERO MWANGI.....2ND DEFENDANT
 ALICE NJERI MBURU.....3RD DEFENDANT
 JAMES KARANJA MWANGI.....4TH DEFENDANT
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ESTHER WAMBUI KIARIE.....8TH DEFENDANT

NELSON KIBE MWANGI.....9TH DEFENDANT

PETER MACHARIA MWANGI.....10TH DEFENDANT

(BY WAY OF COUNTERCLAIM)

JUDGEMENT

1. By a plaint dated and filed on 17th October 2013 the Plaintiffs sought the following reliefs against the Defendant;
 - a. This honourable court be pleased to grant and/or issue an order of eviction from land parcel Mbeti/Gachoka/473 against the Defendant, his servants, employees, agents and/or any other person claiming under or through him.
 - b. The Officer Commanding Station (O.C.S) Kiritiri Police Station do oversee and ensure the enforcement of the eviction orders herein by providing such security as may be necessary.
 - c. The costs of the suit be against the Defendant.
 - d. Any other relief that this honourable court may deem just and expedient.
2. The basis of the Plaintiffs' suit was quite straightforward. It was pleaded that they were the registered proprietors of *Title No. Mbeti/Gachoka/473* (hereinafter *the suit property*) and that the Defendant had without the Plaintiffs' consent or authority continued to occupy and utilize the suit property. The 2nd – 9th Plaintiffs had acquired beneficial interest in half of the suit property through succession proceedings as beneficiaries of the estate of their late mother, Tabitha Muthoni.
3. The Plaintiffs further pleaded that the Defendant had filed an originating summons claiming adverse possession of the suit property vide *Kerugoya ELC Case No. 63 of 2013 (O.S) Titus Kigoro Munyi Vs Peter Mburu Kimani* which was dismissed with costs upon a full hearing. It later turned out the Defendant's appeal to the Court of Appeal was also dismissed with costs in *Nyeri Civil Appeal No. 28 of 2014*.
4. The Defendant filed a defence dated 20th November 2013 denying the Plaintiff's claim in its entirety. It was pleaded that the Defendant was in occupation prior to the Plaintiff's registration. It was further pleaded that the Plaintiffs had illegally, irregularly and fraudulently obtained registration of the suit property hence they did not acquire a valid title thereto. The Defendant also asserted that he had purchased the suit property from the leader of Kamuvea clan of the Mbeere tribe for valuable consideration.
5. With leave of court granted on 22nd February 2017, the Defendant amended his defence to include a counterclaim. By his counterclaim, the Defendant reiterated the contents of his defence and pleaded that the suit property was originally part of a larger parcel of land belonging to Kamuvea clan which had passed through 6 generations. It was further stated that during the land adjudication process, the suit property was awarded to Kamuvea clan through objection No. 20 of 1973 and that it was from the said clan that the Defendant bought in 1973 at a consideration of Kshs 56,000/-.
6. The Defendant further pleaded that upon conclusion of the land adjudication process, he was unable to obtain registration as proprietor of the suit property because one Kangangi Kivinda (hereinafter *Kivinda*) had illegally and fraudulently sold it to the Plaintiffs. The Defendant pleaded several general particulars of fraud against Kivinda and the Plaintiffs. The only specific allegation of fraud stated that the Plaintiffs had *falsified* the records for the suit property so as to deprive the Defendant of the suit property.
7. The Defendant, therefore, sought the following reliefs in the counterclaim;
 - a. A declaration that the registration of Peter Mburu Kimani and Tabitha Muthoni as proprietors of land parcel number Mbeti/Gachoka/473 on first registration and/or as the first proprietors upon completion of the process of land adjudication and demarcation was unlawful, fraudulent and irregular and the said registration did not therefore confer any proper or legal title or proprietary interest in the said land to Peter Mburu Kimani and Tabitha Muthoni, capable of being dealt with, transferred or transmitted and therefore the 2nd to 10th Defendants in the counterclaim as successors of Tabitha Muthoni do not have any claim, legal title or proprietary interest in lane parcel number Mbeti/Gachoka/473 or it's sub-divisions and they are specifically not entitled to half share of the said land.
 - b. A declaration that the 1st Plaintiff in the counterclaim has an equitable right to land parcel number Mbeti/Gachoka/473 by virtue of long open and exclusive occupation and use of the same even prior to the time of land adjudication, demarcation and registration and he is therefore entitled to and should be registered as the proprietor of the said land.
 - c. That the names of Peter Kimani Mburu and Tabitha Muthoni and/or Lucy Waitherero Mwangi, Alice Njeru Mburu, James Karanja Mwangi, Boniface Kimani Mwangi, Charles Ngunya Mwangi, Jane Waithira Mnamdi, Esther Wambui Kiarie, Nelson Kibe Mwangi and Nelson Macharia Mwangi be cancelled from the proprietorship section of the register for land parcel number Mbeti/Gachoka/473 and/or it's sub-divisions and the Plaintiffs titles to the said land and/or parcels of land be cancelled and the 1st

Plaintiff in the counterclaim Titus Kigoro Munyi's name be entered in the proprietorship section of the register for land parcel number Mbeti/Gachoka/473 and/or its sub-divisions and a title or title deeds in respect of the said land or parcels of land be issued to him by the District Land Registrar.

d. That costs of the original suit and the counterclaim be to the Defendant in the original suit and Plaintiffs in the counterclaim.

8. The Plaintiffs filed a reply to the amended defence and defence to counterclaim dated 24th March 2017. The Plaintiffs stated that the Defendant's appeal on his earlier suit for adverse possession was dismissed by the Court of Appeal. It was further pleaded that part of the counterclaim amounted to a re-litigation of the earlier claim for adverse possession hence *res judicata*. The Plaintiffs further pleaded that the entire counterclaim was statute-barred under the law.

9. The Plaintiffs denied that they had acquired the suit property fraudulently, illegally or irregularly and denied all the particulars of such impropriety pleaded in the counterclaim. They further contended that the joinder of the 2nd Plaintiff (hereinafter *Kiriamburi*) in the counterclaim was an afterthought of no legal consequence since he was not seeking any relief in his favour.

10. At the trial of the suit, the Plaintiffs called two (2) witnesses one of whom was the 1st Plaintiff. They also called the Land Adjudication Officer for the area in dispute to testify on their behalf and produce copies of some official documents whose production was objected to by the Defendant. Their evidence basically followed the script of their pleadings. They laid down the legal basis for their registration during the land adjudication process which was concluded with an appeal to the Minister under **section 29 of the Land Adjudication Act (Cap 284)**.

11. The Defendant and Kiriamburi (the Plaintiffs by counterclaim) on the other hand testified on their own behalf at the trial. They also intended to call 3 additional witnesses in their favour. However, the advocates for the parties agreed to dispense with their personal appearance and to admit their witness statements in evidence. Those three witnesses had testified in the Defendant's earlier suit for adverse possession and they were maintaining the same evidence.

12. The 1st Defendant's evidence was geared towards establishing his counterclaim since it was alleged that the Plaintiffs had acquired the suit property through illegal, irregular and fraudulent means. Apart from impeaching the Plaintiffs' title to the suit property, the Defendant also sought to demonstrate that he had bought it for valuable consideration and that he had been in open, exclusive and uninterrupted possession thereof since 1970 hence had acquired some legal or equitable rights over it.

13. Upon conclusion of the trial on 22nd October 2018 the Plaintiffs in the suit were given 30 days to file and serve their submissions whereas the Defendant and Kiriamburi were granted 30 days upon service to file and serve their submissions. The record shows that the Plaintiffs filed theirs on 27th November 2018 but the Defendant and Kiriamburi did not file theirs until 22nd March 2019.

14. The court has considered the pleadings, evidence and documents on record. The court notes that the parties did not file any agreed statement of issues. Whereas the Plaintiffs filed their version of issues for determination, the Defendant and Kiriamburi did not file any. The court shall, therefore, frame the issues for determination.

15. Under the provisions of **Order 15 Rule 2 of the Civil Procedure Rules**, the court may frame issues for determination from any of the pleadings, documents produced by the parties, and any sworn statements tendered at the trial. The court is of the view that the following issues arise for determination in this suit;

- a. Whether the Plaintiffs in the suit obtained registration of the suit property illegally, irregularly or fraudulently.
- b. Whether the Plaintiffs in the counterclaim are the legitimate or lawful owners of the suit property.
- c. Whether the Defendant has acquired any legal or equitable rights over the suit property on account of lengthy open, continuous and exclusive possession.
- d. Whether the counterclaim is statute-barred under the law.
- e. Whether the Plaintiffs are entitled to the reliefs sought in the plaint.
- f. Whether the Plaintiff's in the counterclaim are entitled to the reliefs sought in the counterclaim.
- g. Who shall bear the costs of the suit and counterclaim.

16. The court has considered the material on record on the 1st issue. The court has noted that even though the Defendant pleaded in paragraph 22A of his counterclaim that it was Kivinda who had "illegally, fraudulently and irregularly" sold the suit property to the Plaintiffs, the said Kivinda was not made a party to the proceedings. And surprisingly, the Defendant attributed particulars of the alleged illegality, fraud and irregularity to the Plaintiffs in paragraph 23A of the counterclaim. It is well settled in law that a court of law cannot make a finding on such serious allegations against a person who is not a party to such proceedings where such allegations are pleaded. There was no explanation given as to why the said Kivinda or his personal representative was not joined in the suit.

17. In those circumstances the court will only consider whether on the evidence on record the Defendant and Kiriamburi proved any of the said allegations and particulars of fraud, illegality and irregularity against the Plaintiffs. It is well settled that such allegations must be strictly proved and to a degree higher than a balance of probabilities but not as high as beyond reasonable doubt.

18. In the case of **Evans Otieno Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR** Majanja J held, *inter alia*, that;

“In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd Vs Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary civil case”.

19. The court is far from satisfied that any of those allegations were proved against the Plaintiffs. On the contrary, the documentary evidence on record shows that they were registered after following due procedure during land adjudication process. A restriction was duly entered against the suit property when an appeal was lodged to the Minister and the same was only discharged upon conclusion of the appeal. The records which were produced by the Land Adjudication Officer did not show anything illegal, fraudulent or irregular about the Plaintiffs’ registration. In the opinion of the court, the entries in the land register were adequately supported by the records held by the Land Adjudication Officer. The 1st issue is accordingly answered in the negative.

20. The 2nd issue is, of course, interconnected with the 1st issue. The court has considered the entire evidence on record and this issue. The claim of ownership is not fully supported by the adjudication records kept by the Land Adjudication Officer. The mere fact that at some point Kiriamburi lodged an objection with respect to the suit property is not sufficient to confer ownership. An objection is only one of the steps to be taken during the adjudication process. In this instance, there is evidence to demonstrate that the claims and counterclaims over the suit property progressed all the way to the Minister who upheld the Plaintiffs’ ownership.

21. It is pertinent to point that during cross-examination of the Defendant, he admitted that the proceedings of objection No. 20 on which he relied did not mention the suit property (i.e. parcel 473) as one of the properties the subject matter of the objection. He also conceded that the parcel number appearing on the face of the proceedings was added by hand. He informed the court that the handwritten addition was made by Kiriamburi. The court, therefore, finds no basis whatsoever for the ownership claim by the Defendant and Kiriamburi.

22. Apart from the Defendant’s failure to prove his claim to the suit property on the basis of the evidence on record, it is doubtful if, as a matter of law, the Defendant should be allowed to prove such a claim. It is on record that the Defendant had filed a claim for adverse possession of the suit property against the 1st Plaintiff in previous proceedings. The claim failed before both the Environment and Land Court and the Court of Appeal. It must be remembered that a claim for adverse possession is not a challenge to the validity or legality of the proprietor’s title. It is, in fact, an admission that the registered proprietor is the owner of the suit property coupled with a plea that his title thereto has been extinguished by operation of law on account of adverse possession.

23. So, if the Defendant acknowledged the Plaintiff’s title in the previous proceedings how, then, can he be allowed in subsequent proceedings to challenge that title on account of alleged fraud and illegality? And why should he be allowed to plead and swear that he was, in fact, the legitimate owner of the suit property all along? The court is of the view that the two claims by the Defendant are totally inconsistent with each other. Whereas, a litigant who has unsuccessfully claimed ownership may subsequently seek adverse possession thereof, a claimant who has lost his claim for adverse possession cannot, in my view, subsequently mount a claim for ownership on the same state of facts.

24. The 3rd issue is whether the counterclaim is statute-barred under the **Limitation of Actions Act (Cap 22)**. This issue was raised by the Plaintiffs in their defence to counterclaim. The court has noted that the parties did not submit on this issue. The court has noted that the Defendant’s counterclaim was introduced in 2017 upon leave to amend the defence being granted. The court is aware that under **section 7 of the Limitation of Actions Act (Cap 22)** any claim for recovery of land must be instituted within 12 years.

25. The said section stipulates as follows;

“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.”

26. The court does not consider that the granting of leave to amend a pleading affects the application of the law on limitation of actions. The leave to amend a pleading is quite distinct from leave to file a claim or counterclaim out of time. There is evidence on record that all along the Defendant was aware that the Plaintiffs had obtained registration of the suit property. The Defendant’s evidence at the trial confirmed that he was aware of the Plaintiffs’ registration as from 1976. The court is therefore of the view that the Defendant’s counterclaim is clearly statute-barred under **section 7 of the Limitation of Actions Act (Cap 22)**.

27. The 4th issue is whether the Defendant has acquired any legal or equitable rights by virtue of his open, continuous, and exclusive possession of the suit property. Although it would appear that the Defendant has been in possession of the suit property for a relatively long period of time, his claim for adverse possession was adjudicated upon in previous proceedings and rejected by both the Environment and Land Court and the Court of Appeal. It cannot be subject of re-litigation in the counterclaim.

28. The Defendant, however, appears to have changed tact in his written submissions. It was submitted that the Defendant had acquired an overriding interest over the suit property which did not require to be noted in the land register. The court finds this to be a very curious submission for the following reasons. First, it was never pleaded in the counterclaim that the Defendant had an overriding interest over the suit property. Second, there was no prayer in the counterclaim claiming any declaration to the effect that the Defendant had a vested

overriding interest over the suit property. What the Defendant sought in the counterclaim was very clear and straightforward. It was to be registered as proprietor of the suit property by virtue of equitable rights arising from his open, exclusive and continuous occupation.

29. In any event, the court is not satisfied that an overriding interest is capable of being established in the circumstances of this case. The Defendant relied on **section 30 (g) of the Registered Land Act** (now repealed) which provided that an overriding interest included;

“(g) The rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed.”

30. The court is aware that the nature of the rights described in the aforesaid paragraph have since been clarified to mean customary law rights. In the case of **Isack M’Inanga Kiebia Vs Isaaya Theuri M’Lintari & Another Petition No. 10 of 2015 [2018] eKLR** the Supreme Court of Kenya held that an entitlement in right only of possession and occupation refer to rights arising under customary law. It was held by the court that;

“[49] Be that as it may, it is undeniable that such rights of a person that subsisted at the time of first registration, as evidenced by his being in possession or actual occupation, are rooted in customary law. They arise under African customary law. They derive their validity from African customary law. They are “rights to which one is entitled in right only of such possession or occupation”. They have no equivalent either at common law or in equity. They do not arise through adverse possession, neither do they arise through prescription. For if they did arise through these processes, they would be overriding interests, not under Section 30(g), but under Section 30(f) of the Registered Land Act, which recognizes:

“rights acquired or in the process of being acquired, by virtue of any written law relating to the limitation of actions or by prescription.”

[50] It is customary law and practice that clothes the rights of a person in possession or actual occupation, with legal validity. If customary law and practice, does not recognize such possession or actual occupation, then it cannot be a right to which a person is entitled...”

31. In the said case the court ultimately made the following emphatic declaration;

[53] We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in *Obiero v. Opiyo* and *Esiroyo v. Esiroyo*. Once it is concluded, that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.

32. The Defendant’s pleadings and evidence really betray his claim to an overriding interest. All through, the Defendant’s case was that he was a purchaser for value of the suit property from members of a clan known as Kamuvia. He claimed to have bought the suit property to be his absolutely. It was an outright purchase and not just an acquisition of rights of possession or occupation only. The court, therefore, answers this issue in the negative.

33. The 5th issue is whether the Plaintiffs are entitled to the reliefs sought in the plaint. The court has already found that the Plaintiffs lawfully acquired the suit property. The court has also found that the Defendant and Kiriamburi have failed to prove the particulars of fraud, illegality or irregularity pleaded in their counterclaim. It would, therefore, follow that the Plaintiffs are entitled to the reliefs sought in the plaint.

34. The 6th issue is whether the Plaintiffs in the counterclaim are entitled to the reliefs sought in the counterclaim. The court has found that the Defendant and Kiriamburi have failed to demonstrate their ownership of the suit property. The court has also held that the Defendant has failed to demonstrate any other legal interest in the suit property to warrant his registration as proprietor. Accordingly, the counterclaim must fail in its entirety.

35. The 7th and final issue is on costs of the suit and the counterclaim. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigants should not be awarded costs of the suit and the counterclaim.

36. The upshot of the foregoing is that the court finds that the Plaintiffs have proved their claim to the required standard whereas the Defendant and Kiriamburi have failed to prove their counterclaim to the required standard. Consequently, the court makes the following orders;

- a. Judgement be and is hereby entered for the Plaintiffs against the Defendant as prayed for in plaint.
- b. The counterclaim is hereby dismissed in its entirety.
- c. The Defendant shall bear costs of the suit whereas the Plaintiffs in the counterclaim shall bear costs of the counterclaim.

37. It is so ordered.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **28TH** day of **MARCH, 2019**.

In the presence of Mr. Gathoga for the Plaintiff and Ms Nzekele holding brief for Mr. Okwaro for the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

28.03.19