

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 16 OF 2019

(Consolidated with ELC (O.S.) No. 43 of 2015 - Kisii)

IKENGO MURIMI IKENGO.....

PLAINTIFF

VERSUS

1. PASKALIA MUGOSI BOTHEMI

2. KENNEDY CHACHA BOTEBI

3. MOHABE JOSEPH BOTEBI CHACHA

4. MONANKA LUCAS BOTEBI

5. JOSEPH BOTEBI CHACHA

6. NAFTALI MAYABA OTONDO

7. PETER TUGUCHA

8. DAVID TATIRO

DEFENDANTS

JUDGMENT

A. Introduction and Background

1. The Plaintiff, **Ikengo Murimi Ikengo**, instituted this suit by way of a plaint dated **28th February 2019** against the Defendants seeking, inter alia, a **permanent injunction** restraining the Defendants, their servants and/or agents from trespassing upon or interfering with **Land Parcel No. Bukira/Buhirimonono/933** measuring approximately 2.4 hectares, an **order for eviction**

and vacant possession against the Defendants and any persons claiming under them, and **costs of the suit with interest thereon.**

2. The Plaintiff's case as pleaded is that he is the **registered and lawful owner** of the suit property, having acquired it through **purchase from one Chacha Chacha Monanka on 14th June 1991**, and that he has been in **exclusive use, occupation, and possession** thereof since that date until around **December 2014 and early 2015**, when the Defendants allegedly **forcefully entered** the land, constructed structures, cultivated, and began selling portions thereof to third parties without his consent.
3. The Plaintiff avers that the Defendants' actions amounted to **illegal invasion and trespass**, prompting him to file the present suit. He denies ever granting the Defendants permission, licence, or consent to occupy or utilize the suit land in any manner, contending that their entry was **violent, unlawful, and recent**, hence incapable of ripening into any lawful claim such as adverse possession.
4. He further states that the Defendants' assertion of ownership through **Kisii ELC (O.S.) No. 43 of 2015** was misconceived and without legal foundation, since the statutory period required for adverse possession had **not elapsed** by the time the claim was instituted.

5. In their response, the **2nd, 3rd, 4th, and 5th Defendants**, who are sons of the late **Joseph Botebi Chacha** and grandsons of **Chacha Monanka**, filed their **statement of defence and counterclaim** (originally through O.S. 43 of 2015), contending that the entire land parcel **Bukira/Buhirimonono/933** was originally part of **Bukira/Buhirimonono/293**, the family land of their grandfather, **Chacha Monanka**, who passed away in 1989.
6. The Defendants pleaded that following the patriarch's death, the family land was **subdivided among his sons** in accordance with **Kuria customary law** and that the portion now known as parcel **No. 933** fell to the family of **Botebi Chacha**, their father. They claim to have been in **actual possession, use, and occupation** of the suit land for **well over 30 to 40 years**, long before the Plaintiff's alleged purchase and registration, and that such occupation has been **open, continuous, peaceful, and as of right**.
7. The Defendants further allege that the Plaintiff's registration as proprietor of the suit land in 1991 was **fraudulent, irregular, and unlawful**, having been effected without their knowledge, consent, or family resolution, and contrary to the rights of the beneficiaries of the estate of **Chacha Monanka**. Consequently, they aver that the Plaintiff holds title to the land **in trust** for them as the rightful family beneficiaries.
8. The Defendants thus assert that the Plaintiff's title, if any, has been **extinguished by operation of law** under **sections 7,**

13, and 17 of the Limitation of Actions Act, and that they have since acquired **title by adverse possession**. They pray that the Plaintiff's suit be dismissed with costs and that they be declared the **lawful owners** of the suit land.

9. The Plaintiff filed a **reply to defence and defence to counterclaim**, reiterating his ownership and denying the alleged long occupation or any customary entitlement by the Defendants. He maintains that the land was **lawfully transferred and registered**, that the Defendants have their own parcels, and that their alleged occupation commenced **only in 2014/2015** through unlawful encroachment.

10. Owing to the competing claims, the court, on **26th March 2019**, ordered the **consolidation** of this suit with **Kisii ELC (O.S.) No. 43 of 2015**, the present file being the **lead file**, and directed that the matter proceed to hearing on a priority basis.

B. HEARING

a) Plaintiff case

11. The hearing of the consolidated suit commenced before Hon. G. Ongondo, J, on **8th April 2021**, with the plaintiff, **Ikengo Murimi Ikengo**, testifying as **PW1**. He adopted his witness statements dated **28th February 2019** and **7th April 2021**, together with his replying affidavit sworn on **9th December 2016**. He testified that he is the registered proprietor of **LR No. Bukira/Buhirimonono/933** (the suit land), which he purchased

from **Chacha Minanga**.

12. He stated that he had been in peaceful occupation and use of the suit land since 1991 until the year 2015 when the defendants allegedly entered the land without his consent, constructed structures, and began cultivation. He produced six documents marked **P Exhibits 1-6** in support of his case and prayed for the reliefs sought in the plaint. In cross-examination, he maintained that the defendants invaded the land by force in 2015, denied that they had any legal right to occupy it, and stated that he had reported the trespass to the police, though he did not produce an OB number.

13. The plaintiff called one additional witness, **PW2, Julius Rioba Machugu**, who testified on **21st September 2022** before me. He adopted his witness statement dated **4th April 2021** as his evidence-in-chief. PW2 confirmed that he was familiar with the plaintiff and the suit land and that the plaintiff had been utilizing the land prior to the dispute with the defendants. He corroborated the plaintiff's account that the defendants entered the suit land around 2015 and began using it without the plaintiff's consent. His evidence supported the plaintiff's position that the land rightfully belonged to the plaintiff. Upon conclusion of PW2's testimony, the plaintiff closed his case.

b) Defence case

14. On the part of the defence, **DW1, Joseph Botedi Chacha**, testified on behalf of the 2nd to 5th defendants. He adopted his

statement dated 26th July 2023 together with defence documents marked as Exhibits 1-8. He stated that the suit land originally belonged to his grandfather, **Chacha Monanka**, and that the plaintiff was aware of this. He confirmed that the land was initially parcel number 293, later subdivided into four portions, one of which parcel 933 was transferred to the plaintiff.

15. He further testified that he currently resides on the suit land and that other defendants also occupy portions of it. On cross-examination, he admitted that the plaintiff's name appears on the green card as the registered owner since 1991 but insisted that the land was ancestral and no succession had been done. Upon re-examination, he reiterated that his family had merely been shown where to live and that his father was never formally registered as owner. The defence then closed its case.

C. SUBMISSIONS BY EACH PARTY

a) Plaintiff's Submissions

16. Counsel for the plaintiff submitted that the suit concerns land parcel **LR No. Bukira/Buhirimonono/933**, measuring 2.4 hectares and registered in the plaintiff's name since 14th June 1991. The plaintiff contends that the defendants unlawfully invaded the suit land in December 2014 and early 2015, erected illegal structures, and began cultivation. It was argued that the plaintiff's registration was lawfully derived from **Chacha Chacha Monanka**, who had obtained the land from the family patriarch **Chacha Monanka** following the subdivision of the original parcel

No. 293. The plaintiff maintained that his title is protected under sections 24, 25, and 26 of the **Land Registration Act, 2012**, and that the defendants' entry onto the land was trespass and without consent.

17. It was further submitted that the defendants' claim of long occupation and adverse possession is not supported by credible evidence. Counsel referred to **Samwel Kihamba v Mary Mbaisi (2015) eKLR**, emphasizing that for adverse possession to succeed, occupation must be open, peaceful, and without permission or force (*nec vi, nec clam, nec precario*). The plaintiff argued that the defendants' alleged occupation began only in 2014-2015, far short of the statutory twelve years required under sections 7, 13, 17, and 38 of the **Limitation of Actions Act**, and that their possession has been characterized by conflict and resistance, thereby failing to meet the test of adverse possession.

18. The plaintiff submitted that the defendants' reliance on family ancestry is misplaced, since the patriarch's subdivision of the original parcel allocated distinct shares to each son, and parcel 933 was validly transferred to the plaintiff. It was contended that the defendants' photographs purporting to show occupation were unsupported by survey evidence, and only one defendant testified without clarifying each occupant's portion. The plaintiff therefore urged the court to find that his title has not been extinguished, that the defendants' entry was unlawful, and to grant the reliefs sought in the plaint while dismissing the defendants' originating summons in Kisii ELC No. 43 of 2015.

b) Defendants' Submissions

19. Counsel for the 2nd to 5th defendants submitted that they are the sons of the late **Joseph Botebi Chacha**, who was himself a son of **Chacha Monanka**, the original owner of the entire ancestral land, including the suit parcel. They argued that the plaintiff's registration as proprietor of parcel No. Bukira/Buhirimono/933 was irregular and did not confer good title, as the plaintiff's predecessor had acquired it unlawfully. The defendants contended that they and their family have been in continuous, open, and uninterrupted possession of the suit land for over thirty years, and that the plaintiff's title has been extinguished by operation of law.
20. It was their submission that this suit is **statute-barred** under sections 7, 9, 13(1), and 17 of the **Limitation of Actions Act**, as the defendants have occupied the land as of right and adversely to the plaintiff's proprietorship. They urged the court to find that by reason of prolonged occupation, the plaintiff holds the title in trust for them, and consequently, the plaintiff's claim should be dismissed with costs.

D. Issues for Determination

21. Having carefully considered the pleadings, the oral and documentary evidence adduced by both parties, together with their respective written submissions and the authorities cited, the Court is of the view that the following issues arise for determination:

- a) Whether the Plaintiff is the lawful proprietor of the suit land or whether the Defendants have acquired title by adverse possession.
- b) Whether the Defendants' occupation and sale of portions of the suit land constituted trespass or created any lawful interest in favour of the 6th-8th Defendants.
- c) What reliefs, if any, should the court grant.

E. Analysis and Determination

Issue 1: Whether the Plaintiff is the lawful proprietor of the suit land or whether the Defendants have acquired title by adverse possession

22. The Plaintiff, produced documentary evidence showing that he is the registered proprietor of **Land Parcel No. Bukira/Buhirimonono/933**, measuring approximately **2.4 hectares**, having been registered as such on **14th June 1991**. He tendered a certified copy of the register, a title deed, and a certificate of official search in proof thereof (PEXh.1-3).

23. The Plaintiff testified that he lawfully purchased the land from one **Chacha Chacha Monanka**, who had obtained it from his father, the patriarch **Chacha Monanka**, following a subdivision of the original parcel **No. Bukira/Buhirimonono/293** into four portions among the patriarch's sons. He stated that he took possession in 1991 and used the land for cultivation and grazing

until **December 2014 or early 2015**, when the Defendants forcefully invaded and began constructing structures thereon.

24. It is not in dispute that the Defendants are descendants of the late **Botebi Chacha**, a brother to **Chacha Chacha Monanka**, and that they occupy land adjacent to the suit property, known as parcel **No. 932**. Their case, however, is that they have been in occupation of parcel 933 the suit land openly and continuously for over 30 years, and that the Plaintiff's registration is therefore extinguished by adverse possession.

25. The Defendants did not produce any documentary evidence showing allocation, transfer, or registration in their favour. Their case rests entirely on the alleged long occupation. They relied on the affidavit of the late **Paskalia Mugosi** filed in **Kisii ELC (O.S) No. 43 of 2015**, wherein she claimed that the family had occupied the land for over 40 years, and that the Plaintiff's registration was fraudulent.

26. The court observes, however, that in paragraph 6 of the said affidavit, the late Paskalia deponed that **in 1989**, the patriarch **Chacha Monanka** subdivided his land (No. 293) into four portions among his sons. That admission is significant: it indicates that the subdivision took place only in 1989 not forty years earlier and that each son took his distinct portion.

The Defendants' patriarch, **Botebi**, was allocated his own share (separate from parcel 933), while **Chacha Monanka** received

the land that was later sold to the Plaintiff.

27. From the foregoing, the court finds that the Plaintiff's registration as proprietor of parcel 933 on **14th June 1991** was based on a lawful transfer from **Chacha Monanka**, who held good title following the family subdivision. Under **sections 24, 25, and 26 of the Land Registration Act, 2012**, the registration of a person as proprietor vests in him absolute ownership together with all rights and privileges appurtenant thereto, subject only to encumbrances, restrictions, or overriding interests noted in the register. No evidence was adduced to suggest fraud, illegality, or procedural impropriety in the Plaintiff's acquisition.
28. **Section 38(1) of the Limitation of Actions Act** allows a person to move the Court for an order that he be registered as proprietor in place of the registered owner, where he has been in adverse possession for at least twelve years. In **Kasuve v Mwaani Investments Ltd & Others [2004] 1 KLR 184**, the Court of Appeal held that: "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 and without interruption for a period of twelve years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition."
29. It is now settled that the combined effect of **sections 6, 13, and 17 of the Limitation of Actions Act** is to extinguish the title of the registered proprietor in favour of an adverse possessor after

twelve years of continuous adverse possession. In **Kimani Ruchine & Another v Swift Rutherford & Co. Ltd [1980] KLR 10**, the Court stated that occupation must not be by force, secrecy, or permission—*nec vi, nec clam, nec precario*—and must be open, peaceful, continuous, and uninterrupted.

30. The doctrine was further clarified in **Mtana Lewa v Kahindi Ngala Mwagandi, Civil Appeal No. 56 of 2014 [2015 eKLR]**, where the Court of Appeal described adverse possession as: “A situation where a person takes possession of land and asserts rights over it, and the person having title omits or neglects to take action against such person in assertion of his title for a certain period. In Kenya, it is twelve (12) years. The essential prerequisites being that the possession is neither by force, stealth, nor under licence of the owner; it must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

31. Applying these principles, the Defendants’ claim must be examined against the **undisputed date of invasion of December 2014 to early 2015**, as stated by the Plaintiff and not effectively rebutted in cross-examination. Even assuming occupation commenced then, by the time *Kisii ELC (O.S.) No. 43 of 2015* was filed and later consolidated with this suit in 2019, **less than twelve years** had elapsed.

32. The Defendants did not demonstrate when their possession became adverse to the Plaintiff’s title. Their own witness, **Muhare Joseph** admitted in cross-examination that the Plaintiff

has consistently asserted ownership and even involved the area chief in resolving the dispute. Such consistent protestation and litigation negate the element of peaceful, uninterrupted possession. Accordingly, the court finds that the Defendants' occupation of the suit land, having commenced in or about 2014 to 2015, has not ripened into ownership by adverse possession and cannot extinguish the Plaintiff's registered title.

33. Accordingly, the Court finds that the Defendants' occupation of the suit land, having commenced in or about **2014 to 2015**, has not ripened into ownership by adverse possession and cannot extinguish the Plaintiff's registered title.

34. I therefore find and hold that the Plaintiff remains the lawful proprietor of **LR No. Bukira/Buhirimono/933**, and that his title has not been extinguished or defeated by the Defendants' claim.

Issue 2: Whether the Defendants' occupation and sale of portions of the suit land constituted trespass or created any lawful interest in favour of the 6th-8th Defendants

35. Having found that the Plaintiff is the lawful proprietor of **Land Parcel No. Bukira/Buhirimono/933**, it follows that any occupation, use, or interference with the said land by the Defendants can only be lawful if authorized by the Plaintiff, or if it falls within a legally recognized exception such as a registered lease, easement, or other overriding interest.

36. The Plaintiff testified that the Defendants **forcefully entered** the land in December 2014 and early 2015, built semi-permanent structures, and began cultivating portions of the land without his consent. He stated further that he made reports to the local administration and even sought interim injunctive orders to restrain the Defendants' continued interference.
37. The Defendants, in response, maintained that they have lived on the land "peacefully and continuously" for over thirty years and have even sold portions thereof to third parties the **6th, 7th and 8th Defendants** who are alleged to be bona fide purchasers. However, they did not produce **any sale agreements, receipts, or consent to transfer** from the Land Control Board to substantiate those transactions.
38. The law is clear that only the **registered proprietor** of agricultural land may lawfully transfer or convey an interest in it, and any transaction in contravention of **section 6(1) of the Land Control Act (Cap. 302)** is **void for all purposes**. In the instant case, the 2nd to 5th Defendants were not registered owners and thus lacked capacity to transfer any valid title or interest to the alleged purchasers.
39. The maxim **nemo dat quod non habet** no one can give what he does not have applies squarely. The 6th to 8th Defendants, being purported purchasers from persons without title, acquired no better interest than their vendors possessed. **(See *David Peterson Kiengo & 2 Others v Kariuki Thuo [2012] eKLR.*)**

Moreover, there is no evidence that the Plaintiff ever gave consent or permission to the Defendants to occupy, build on, or dispose of portions of the land. His unchallenged testimony is that he has consistently resisted their entry and sought legal redress promptly after the invasion.

40. For a claim of peaceful occupation or equitable interest to stand, the defendants must show that the owner acquiesced or granted an implied licence. In this case, the Plaintiff's persistent objection negates such inference. The Defendants' entry was therefore **without right or colour of title**. Trespass to land is any unjustifiable intrusion by one person upon land in the possession of another. (See *Clerk & Lindsell on Torts, 19th Edn, para 18-01.*) Once ownership has been established, any unauthorized entry amounts to trespass regardless of motive or duration.

41. The photographs and oral evidence adduced by the Defendants do not establish that their structures are on parcel 933 as opposed to their adjoining family land. No surveyor's report or expert evidence was produced to verify that the impugned developments lie within the boundaries of the suit property. Even if they did, the occupation remains **unlawful and constitutes continuing trespass**.

42. The court therefore finds that: the Defendants' occupation of the Plaintiff's land since 2014-2015 amounts to **trespass**; and the purported sale of portions thereof to the 6th-8th Defendants is **null and void** and confers no legal or equitable interest upon

them.

43. Consequently, the continued possession and sale activities by the Defendants are **illegal, unjustified, and an infringement of the Plaintiff's proprietary rights** under **Article 40 of the Constitution of Kenya** and **Sections 24 and 25 of the Land Registration Act**.

Issue 3: What reliefs, if any, should the court grant

44. The Plaintiff, in his Complaint, sought substantive reliefs against the Defendants. He prayed for a **permanent injunction** restraining the Defendants, their servants and/or agents from trespassing upon **Land Parcel No. Bukira/Buhirimono/933**. He further sought an **order of eviction** against the Defendants and any persons claiming under them, together with **costs of the suit and interest thereon**.

45. Having found under **Issue 1** that the Plaintiff is the lawful registered proprietor of the suit land, and under **Issue 2** that the Defendants' occupation amounts to trespass and that the 6th to 8th Defendants have acquired no lawful or equitable interest therein, the Plaintiff is entitled to the protection of his proprietary rights as envisaged under Sections 24, 25 and 26 of the *Land Registration Act*. Consequently, the Court finds that the reliefs sought are merited. The Defendants, having no lawful claim to the land, must vacate and deliver vacant possession to the

Plaintiff forthwith. The Plaintiff shall also have the costs of this suit and interest thereon as provided by law.

F. FINAL ORDERS

46. In view of the findings made under Issues 1, 2 and 3, and based on the reliefs sought in the Plaint, the Court hereby makes the following final orders:

- a) A **permanent injunction** is hereby issued restraining the Defendants, their servants and/or agents from trespassing upon, cultivating, constructing on, or in any manner interfering with the Plaintiff's quiet possession and use of **Land Parcel No. Bukira/Buhirimonono/933**.
- b) The Defendants and any persons claiming under them shall **vacate the suit land within ninety (90) days** from the date of this judgment, failing which an order of **eviction** shall issue without further reference to the Court.
- c) The **Plaintiff shall have the costs** of this suit and interest thereon at court rates.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **31st** day of **October, 2025**.

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MOHAMMED N. KULLOW

JUDGE

Judgement delivered in the presence of: -

N/A for the Applicant

N/A for the Respondent

Philomena W. Court Assistant

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