



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 516 OF 2017 (OS)

IN THE MATTER OF TITLE NO.S LOC6/GIATHAINI/511, LOC6/GIATHAINI1031 & LOC 6/GIATHAINI/992

AND

IN THE MATTER OF SECTION 37 & 38 OF THE LIMITATION OF ACTIONS ACT, CAP 225 LAWS OF KENYA.

PERIS NJERI MUIRURI.....1ST PLAINTIFF

MAXWELL MUIRURI GATETE.....2ND PLAINTIFF

HARRISON GICHUIRI MUIRURI.....3RD PLAINTIFF

EVANSON NGUGI.....4TH PLAINTIFF

CHARLES GICHARU MUIRURI.....5TH PLAINTIFF

SAMUEL RURII MUIRURI.....6TH PLAINTIFF

ANNIE WANJIKU KAMANDE.....7TH PLAINTIFF

KENNEDY MICHAEL EVANSON NGUGI 8TH PLAINTIFF

STEPHEN MUIRURI NGUGI9TH PLAINTIFF

MARY WANJIKU WAHOMBA.....10TH PLAINTIFF

EDWARD KAMAU IHOMBA.....11TH PLAINTIFF

JOHN MUIRURI IHOMBA.....12TH PLAINTIFF

PETER MUNGA IHOMBA.....13TH PLAINTIFF

VS

MUIRURI GATETE.....1ST DEFENDANT

KAMANDE NJUGUNA..... 2ND DEFENDANT

MWEA NJUGUNA..... 3RD DEFENDANT

JUDGMENT

1. The originating summons are brought under sections 37 & 38 of the Limitations of Actions Act and Order 37 Rule 7(1) and (2) of the Civil procedure Rules and section S. 3A of the Civil procedure Act and all the enabling provisions of the law.

2. The Plaintiffs sought the following orders;

- a. A declaration that the Plaintiffs are entitled to be registered as the owners of LOC 6/GIATHAINI/511, LOC6/GIATHAINI1031 and LOC6/GIATHAINI 992 (suit lands) which the Plaintiffs have been in possession since 1993 to date being more than 12 years occupation preceding the presentation of this suit and on which they have used openly and continuously as of right and in Adverse Possession and without any interruption from the Defendants and the Defendants title in the suit land have been extinguished in favour of the Plaintiffs under section 37 & 38 of the Limitations of Actions Act.
- b. An order that the Defendants do transfer the suit lands to the Plaintiffs and in default the Deputy Registrar be authorized to sign.
- c. A permanent injunction do issue restraining the Defendants, their servants representatives agents and or anyone claiming under them from alienating, transferring, charging or in any manner whatsoever from interfering with the suit land.
- d. An order for costs and interest thereon of this application.

3. The Originating Summons is supported by the Affidavit of the 1st Plaintiff filed on the 20/12/2017.

4. The Defendants opposed the Plaintiffs' claim through a Replying Affidavit sworn by the 1st Defendant on the 17/9/18 on his behalf and that of the other Defendants. In it, he deponed that the originating summons as filed were incompetent in that it does not disclose a prima facie case. He added that it has not been disclosed in the Originating Summons that the Plaintiffs have been in continuous and uninterrupted occupation in view of their admission that there have been many lawsuits between the parties. He cited the suits; Misc. Application HCCC No 625 of 2002, 348 of 2003, LDT No18 of 1990. It is his opinion that the dispute between the parties was resolved by Succession Cause CMCC No. 164 of 1986 and as such, litigation must come to an end. He contended that the Plaintiffs remedy laid in the revocation of the confirmed grant issued in the succession cause but not to file a new suit. That this suit is equivalent to asking the Court to sit on appeal on the succession cause aforesaid, a position they posit is untenable in law. That Adverse Possession cannot be founded in the presence of eviction orders issued by the Court in CMCC No 164 of 1986 on the 26/5/98, which orders have not been appealed, set aside or vacated.

5. PW1 – Charles Gicharu Muiruri testified that he resides in Kamugu, Gakuyu sub location, Kahumbu location in Thika. That the 1st Plaintiff is his mother in a family of ten children all raised and brought up on the suit lands and in specifically parcel 511. That all the Plaintiffs live on the portion registered in the name of 1st Plaintiff (6.2 acres). That the family cultivate on parcels LOC6/GIATHAINI /1031 and 992. He stated that the suit lands are ancestral having been owned by Gatete Gatumuta, their grandfather who had three wives; Waithera, Njoki and Tetu. His father was the son of Njoki. He testified that his grandfather distributed his lands to the house of Waithera and Tetu during his lifetime. Waithera's share went to Ihomba Gatete and her two daughters while that of Tetu was registered in the name of Njuguna, her son. The old man lived with Njoki on her portion of the land but had not transferred the land in her name.

6. The witness stated that upon his death Ihomba Gatete filed a dispute with the clan elders (Muhiriga) claiming a share of the land that was registered in the name of his late father. In the meeting Njoki protested the claim on account that she had already benefited from his mother's share. According to him the clan elders advised them to take the dispute to Kigumo Court. Ihomba unfaced proceeded to secretly file a succession cause in CMCC No 64 of 1986. He stated that having been aggrieved by the decision in the succession Court, they instructed an Advocate Messrs. Muhoro Advocate to appeal but he failed to do so. Upon the death of Ihomba, the 1st Defendant took over the suit in Thika.

7. He testified that the 1st Plaintiff lives on the land. Njoki has sired 5 children, his late father Muiruri Gatete included. That the 1st Defendant obtained orders to evict the Plaintiffs but they were never enforced and therefore did not vacate the land. Further attempts in 2018 to seek execution of the eviction orders issued in 1998 were thwarted by the Court on account that the said orders had expired.

8. In cross-examination, he stated that the estate of Gatete Gatumuta was succeeded as follows; that the parcels of land are registered in the 1st Plaintiff and the 1st Defendant (LOC6/GIATHAINI /511), the 1st Defendant (LOC6/GIATHAINI /1031) and the Njuguna Gatete deceased (LOC6/GIATHAINI/992). Njuguna Gatete was the father of the 2nd – 4th Defendants. He informed the Court that the 2nd – 4th Defendants are not registered owners of the suit land and was unaware if they were legal representatives of the estate of Njuguna Gatete. As to whether he had any document to evidence the distribution of land to the house of Njoki by Gatete Gatumuta, he responded in the negative.

9. The 2nd Plaintiff testified and stated that the 1st Plaintiff is his mother and they live on parcel 511 and cultivate on LOC6/GIATHAINI /1031 & 992. He informed the Court that he lives in Kiambu since 2003. He reiterated the evidence of PW1 that his grandfather gave titles to his two wives but died before transferring the suit lands to Njoki, his grandmother whereupon the family of the 1st and 3rd wives filed succession without involving them. He clarified that he is claiming the portion of 1.6 acres in the name of the 1st Defendant.

10. The 1st Plaintiff stated that she is the wife of Muiruri Gatete who was the son of Njoki and Gatete Gatumuta. The family patriarch had 3 wives; Waithera, Njoki and Tetu in that order. During his lifetime he did share and distribute land to his two wives, Waithera and Tetu. The titles were registered in the names of sons of Ihomba Gatete and Njuguna Gatete on behalf of the 1st and 3rd house respectively. She averred that Gatete Gatumuta lived with Njoki and at the time of his death, he was yet to transfer the land to Njoki, his 2nd wife. According to her evidence the said Gatumuta shared his properties amongst his 3 wives as follows; 1st house; LOC 6/GIATHAINI/506, 962 and 214. The 2nd House; LOC 6/GIATHAINI/511, 1031 & 992. The 3rd house; LOC6/GIATHAINI/524. She avers that the 1st and 3rd houses received their share of the land each house took possession of their allocated pieces and farmed thereto.

11. It was her evidence that after the death of Gatete Gatumuta the children of the 1st and 3rd houses filed succ cause NO 164 of 1986 without involving those of the 2nd house. She contends that they did not disclose to the Court that the 2nd house had not been provided for. By the

time they learnt about the succession cause the 1/3 share of the 2nd house had been shared into 3 parts. That this amounted to unjust enrichment of the 1st and 3rd house as they had been provided for during the lifetime of their father. That they concealed some properties of the estate that were in their possession already. That though the 2nd house protested they were late in appealing due to unsound legal advice that they had received from their then legal counsel. The grant was confirmed in 1992.

12. She testified that the Defendants attempted to evict the Plaintiffs from the suit lands in vain. That she has lived on the land (LOC6/GIATHAINI /511) since she got married to the family to date. That she and the Plaintiffs developed the suit land over the years and have been in open uninterrupted possession since 1993. She informed the Court that though she knows the 2nd and 3rd Defendants, she was not sure if they are registered owners of some of the suit lands.

13. PW4 -Joseph Murege stated that he knows the parties to the suit well as he is the secretary of the clan and the Plaintiffs are his neighbours. He knew all the lands that Gatete Gatumuta had as he was present during land demarcation. He reiterated the evidence of PW1-3 and added that upon the death of Gatete Gatumuta the children of the 1st and 3rd house took all the land that belonged to their father including the parcels that were the entitlement of the 2nd house.

14. He informed the Court that the 1st Plaintiff and her family have lived on the lands since the 1990s. He added that there are trees, crops and houses on the land for the Plaintiffs.

15. Muriruri Gatete testified for the Defendants and relied on his replying affidavit dated the 17/9/18 and in it reiterated the contents stated in para 4 of this judgment. He stated that he is the registered owner of parcels LOC6/GIATHAINI /511(1.6 acres), 1031, 219. That the 1st Plaintiff is co – owner of 6.2 acres in parcel LOC6/GIATHAINI /511. He stated that Njuguna Gatete was his brother and the 2-4th Defendants are his nephews being the sons of Njuguna Gatete. That he transferred parcel LOC6/GIATHAINI /992 to Njuguna Gatete. That the Plaintiffs have never vacated the suit lands despite the orders of eviction. That the 2nd – 4th Defendants are beneficiaries of the estate of the late Njuguna Gatete and none of the lands are registered in their names.

16. He stated that he has never occupied the suit lands and concurred with the Plaintiffs that they have indeed lived on the suit lands since 1993.

17. In respect to the succession of his father's estate he averred that the same was concluded through succession cause No 164 of 1986, Thika where all the beneficiaries of the estate were provided for. He stated that he obtained orders of eviction of the Plaintiffs however, he did not execute the orders. In 2018 he sought orders to be reissued and the Court disallowed his application because the earlier orders were statutory barred.

18. Parties have filed written submissions which I have read and considered.

19. It is not in dispute that the parties are all related being the descendants of the late Gatete Gatumuta who had 3 wives. The Plaintiffs are wife and children of Muiruri Gatete and Ihomba Gatete from the 2nd house of Njoki. The 1st Defendant is the brother in law of 1st Plaintiff and the brother of Muiruri Gatete. The 2nd -4th Defendants are the sons of Njuguna Gatete, from the 3rd house.

20. It is claimed by the Plaintiffs that Gatete Gatumuta was a wealthy man by their standards and owned a number of fragments, which upon consolidation and registration shared out with his 1st and 3rd wives through their sons. They were issued with titles. The 2nd house of Njoki was not given land during the lifetime of Gatete Gatumuta though Gatete lived with her. The 1st Plaintiff averred that the remaining land in the names of Gatete Gatumuta was the entitlement of the house of Njoki. As fate would have it Gatete Gatumuta died in 1974 and the glamour for his land amongst his kin and kindred begun in earnest.

21. It is in evidence that the estate of Gatete Gatumuta was succeeded vide succession cause no 164 of 1986. The grant of administration was issued on the 21/2/1992 and according to the evidence of the 1st Plaintiff the estate was shared into 3 parts according to the 2nd house without considering the earlier provisions made by Gatete Gatumuta to the benefit of the 1st and 3rd houses. That a third of the estate that was to be the entitlement of the 2nd houses was being succeeded by the three houses. That the Defendants did not disclose to the Court that the Plaintiffs were disinherited during the distribution of the land. They aver that due to ill advice by their lawyer they were late in appealing or revoking the grant issued in 1992.

22. The evidence of the 1st Defendant is that the parcels of land were shared amongst all the beneficiaries of the estate, the 1st Plaintiff included on behalf of the 2nd house. This evidence is corroborated by the confirmed grant dated the 21/2/92 which shows that parcel LOC6/GIATHAINI /511 was allocated to the 1st Plaintiff (6.2 acres) and the 1st Defendant (1.7 acres). The green card shows that the two became registered as owners of 511 on the 16/2/93 by way of transmission.

23. The Plaintiff in her evidence stated that she is claiming Adverse Possession on part of parcel LOC6/GIATHAINI/ 511, which is the share of the 1st Defendant.

24. It is agreed by the Plaintiffs and the 1st Defendant that the 2nd -4th Defendants are simply beneficiaries of the estate of Njuguna Gatete. Parcel LOC6/GIATHAINI /992 is registered in the name of Njuguna Gatete. The green card in respect to parcel LOC6/GIATHAINI /992 shows that Njuguna Gatete became registered as owner of LOC6/GIATHAINI /992 on the 17/4/2003. The 1st Defendant led evidence that Njuguna Gatete is deceased. Nevertheless, the Court did not receive any documentary evidence in respect to the death of Njuguna Gatete but it is common ground amongst the parties that Njuguna is deceased. Conversely, the 2nd -4th Defendants were sued as the beneficiaries of the estate of the late Njuguna Gatete, however the Plaintiffs failed to place any evidence before the Court to show that they had obtained letters of representations in respect to the estate of Njuguna Gatete. It is trite that a person who is being sued on behalf of the estate of a deceased

other must be clothed with the legal mandate to so represent the said estate. In this case, it is doubtful that the 2nd -4th Defendants are legal representatives of the estate of Njuguna Gatete so much so that they are unable to create the necessary nexus to parcel No LOC 6/GIATHAINI 992.

25. The Court finds that the 2nd -4th Defendants are non-suited in this suit and I proceed to struck out the claim in respect to parcel LOC6/GIATHAINI /992 and the 2nd -4th Defendants.

26. According to the green card in respect to LOC6/GIATHAINI /511, the land LOC6/GIATHAINI /511 measuring 7.9 acres is owned by the 1st Plaintiff and the 1st Defendant in the proportions of 6.2 acres and 1.7 acres respectively. They succeeded the land pursuant to the confirmed grant issued on the 21/2/1992. The official search dated the 30/11/17 in respect to parcel LOC6/GIATHAINI /511 confirms the position of ownership as 6.2 acres for the 1st Plaintiff and 1.7 acres for the 1st Defendant. The Plaintiff cannot seek Adverse Possession on her own land; it is untenable. I understand the Plaintiffs claim to be on 1.7 acres of the 1st Defendant's land.

27. The parcel LOC6/GIATHAINI /1031 is registered in the name of 1st Defendant solely in accordance to the copy of the official search dated the 30/11/17, the title having been issued as such on the 10/6/94 following the confirmation of grant issued on the 21/2/92.

28. Having struck out the claim against parcel LOC6/GIATHAINI /992 in para 25 above, what is left of the claim of the Plaintiffs is against the parcels Nos. LOC6/GIATHAINI /511 (part) and LOC6/GIATHAINI /1031.

29. The issues for determination are;

- a. Whether the Plaintiffs occupation and possession of the suit lands (1.6 acres in LOC6/GIATHAINI /511 and 1031) has been continuous open and uninterrupted therefore adverse.
- b. Whether by virtue of the said occupation the Plaintiff is entitled to the suit lands by way of Adverse Possession.
- c. What orders should the Court issue

30. Under Section 28 of the Land Registration Act, all registered land is subject to overriding interests without being noted on the register specified therein which includes trusts, including customary trusts, rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription and any other rights provided under any written law.

31. Section 7 of the Limitation of Actions Act cap 22 states that;

“Actions to recover land 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.”

32. Section 38 of the Limitation of Actions Act, Cap 22;

“Registration of title to land or easement acquired under Act (1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

33. Finally, in the case of **Kimani Ruchine vs Swift Rutherford & Co. Ltd (1980) KLR 10** as per Kneller J. stating:

‘...The Plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, Nec Clam, Nec Precario (no force, secrecy or persuasion) ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.

34. The Plaintiffs have led evidence that they have occupied the suit land way before 1993 to date. That the Defendants attempted to evict them in 1998 but failed. That their occupation has been open, exclusive uninterrupted and continuous. The 1st Defendant testified that;

“the Plaintiffs have lived on the land since 1993 to date. They have refused to vacate the suit land. I do not live or cultivate the lands”.

35. It is the finding of the Court that the Plaintiffs have been in occupation of the suit lands even before 1992. I say so because in the Land Dispute Tribunal, the 1st Plaintiff was said to be in occupation of the suit land. The 1st Defendant also sought and obtained eviction in 1998 against the Plaintiffs, meaning they have been in occupation long before the confirmation of grant in 1992.

36. When did time start running for purposes of calculating Adverse Possession? It is commonly agreed that the suit lands belonged to the family patriarch Gatete Gatumuta. After his death and succession of his estate the land was succeeded as set out in the confirmed grant. The 1st Defendant obtained eviction orders in Succession cause No 164 of 1986 against the 1st Plaintiff on the 26/5/98. It is not clear how the 1st Plaintiff intended to execute the eviction orders in view of the fact that the 1st Plaintiff was heir to 6.2 acres of the land that they own jointly. In this case, the eviction was a step by the Defendants to dispossess the Plaintiffs of the suit lands. The 1st Defendant could effectively evict

the Plaintiffs from 1.7 acres out of parcel LOC6/GIATHAINI /511 and not more as the 1st Plaintiff owned 6.2 acres pursuant to succession.

37. From the evidence on record, it can be argued that prior to this period (1992) the Plaintiffs occupied the land with the permission of the late Gatete Gatumuta and consequently his son Muiruri Gatete. The occupation of the Plaintiffs of parcel LOC6/GIATHAINI /511(part) and LOC6/GIATHAINI /1031 became adverse from 1992 when the grant was confirmed and the suit lands were distributed to the 1st Defendant. 12 years therefore would expire in 2004. However, the period was interrupted in 1998 when the 1st Defendant obtained eviction orders against the Plaintiffs in PMCC No 164 of 1986. Given that the life span of Court orders are 12 years, then the orders expired in 2010. Time stopped running from 1998 to 2010. It started running again in 2010 for purposes of Adverse Possession and the period of 12 years would be 2022.

38. It is the finding of this Court that this suit has been brought prematurely against the Defendants.

39. The suit is dismissed.

40. Parties are related, I order that each to bear their costs of the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 24TH DAY OF JUNE 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Kiama for the 1st to 13th Plaintiffs

T M Njoroge for the 1st to 4th Defendants

Njeri and Kuiyaki, Court Assistants