



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 366 OF 2017 Consolidated with Migori ELcc No 888 of 2017

(Formerly Kisii Elcc No. 60 of 2006)

**MOSES WAMBURA MUTURI (Suing as administrator of
the Estate of Wambura Muturi).....PLAINTIFF**

VERSUS

LUCAS CHACHA MOHERAI.....1ST DEFENDANT

PIUS BURURE.....2ND DEFENDANT

JUDGMENT

A Introduction

1. This judgment is in respect of two (2) consolidated suits namely Migori ELCC No. 888 of 2017 (Pius Burure and Lucas Chacha Moherai- vs- Moses Wambura Muturi-sued as administrator of the estate of Wambura Muturi (deceased)) and the instant suit, Migori ELCC No.366 of 2017 being the lead file herein. On 23rd July, 2018 pursuant to the consent of counsel for the respective parties, it was ordered, inter alia, that;

“This suit be and is hereby consolidated with Migori ELCC No 888 of 2017 and this file be the lead file thereof”

2. The instant suit had been ordered dismissed for want of prosecution on 29th November, 2010. However, by a notice of motion application dated 13th September, 2016, the dismissal orders were set aside and the suit reinstated on 17th October, 2016.

3. The property in dispute is land Reference Number Bugumbe/Masaba/312 measuring approximately 18.00 hectares in area (Hereinafter referred to as the suit land). It was registered in the name of the late Jackson Chacha Wambura Muturi alias Wambura Muturi (the original plaintiff) under **sections 27 and 28** of the repealed **Registered Land Act (Cap 300)** on 29th August, 1977.

4. The present plaintiff, Moses Maroa Wambura substituted the original plaintiff on 6th April, 2016 further to:-

(a) A limited grant of administration ad litem in Migori High Court succession cause No. 389 of 2015 issued to the plaintiff on 29th September 2015 (P Exhibit 6) and;

(b) An application by way of notice of motion dated 27th November, 2015 which was allowed in favour of the plaintiff on 4th April, 2015.

5. The original plaintiff and the defendants, Lucas Chacha Moherai and Pius Burure share the same mother, Bohembwe (deceased 1). The father of the original plaintiff was Muturi Wambura (deceased 2) while the father of the defendant was one Moherai (deceased3 who also sired their sister, Nyamohanga.

6. The instant suit was transferred from the Environment and Land Court at Kisii to this court on 29th March, 2017 for hearing and determination.

7. The 2nd defendant had sued the original plaintiff over the suit land in Kisii High Court Civil suit No. 17 of 1985. However, on 14th March, 2005, the court (Kaburu Bauni J) dismissed the suit for want of prosecution with orders that each party bear his own costs.

B. Representation

8. The plaintiff is represented by learned counsel, Mr. Olao instructed by B.K Mtange and company Advocates who took over from Bosire Gichana and company Advocaes. Initially, the original plaintiff was represented by Chacha Mwita ad company Advocates.

9. The defendants are represented by learned counsel, Mr. Kerario Marwa of Kerario Marwa and Company Advocates.

C. The Plaintiff's Case

10. By a plaint dated 16th May, 2006 and filed in court on 18th May, 2006, the plaintiff is seeking judgment against the defendant's jointly and severally for the following reliefs; -

i. An eviction order directing the defendants to move out of the plaintiff's land Bugumbe/Masaba/321.

ii. A permanent injunction restraining the defendants by themselves their agents, servants an or anyone claiming through them from trespassing onto, cultivating , tilling, reconstructing any structures permanent or otherwise and or in other way interfering with the plaintiff's parcel of land Bugumbe/Masaba/321.

iii. Costs.

11. Briefly, the plaintiff claims that he is the first absolute owner of the suit land since 1974. That the same is not ancestral land. That in 1977, the defendants unlawfully entered the suit land and erected structures thereon against the plaintiff's will. That inspite of spirited protests from the plaintiff, the defendants who claim trust and adverse possession over the suit land, have continued to occupy the land hence precipitating the instant suit.

12. In his reply to defence and defence to counter claim dated 8th August, 2006, the plaintiff denied the defendant's claim regarding trust and adverse possession over the suit land and reiterated the contents of his plaint. He stated that he is the sole and absolute proprietor of the suit land which is not ancestral land as he had purchased the same from one Ochola (deceased 4). That their ancestral land is at Nyagasati Village in Maberu Division, Migori County. That the defendants did not settle on the suit land in 1950's but the original plaintiff paid their (defendants) school fees.

13. In his replying affidavit sworn on 31st January, 2018 and filed on 15th February, 2018, the present plaintiff opposed the defendants' originating summons dated 13th December, 2017 and filed in court on 15th December, 2017 for adverse possession over the suit land. He deponed, interalia; that in the year 2015, the defendants voluntarily surrendered to him a huge junk of the suit land but continue to occupy a portion of less than one (1) acre each where they had constructed their houses. He annexed to the affidavit copies of statements, letters of protest against the defendants' forceful occupation of the suit land and pleadings herein marked as "MNM-1 to 4b"

14. The plaintiff (PW4) testified and relied on his statement dated 30th June, 2017 as part of his evidence. He further, relied on his list of documents dated 18th July, 2017 (P Exhibits 1 to 8) which include copies of land adjudication fee receipts, letters, suit land register and a certificate of official search with regard to the suit land.

15. PW4 called his elder brother namely Marwa Mwita Muturi (PW1) who relied on his statement dated 30th June, 2017 as part of his testimony. He also called Chacha Murimi (PW2) who relied on his statement dated 12th June, 2017 and Joseph Maroa Nyakwara (PW3) who relied on his statement of even date in their respective testimonies in support of the plaintiff's case.

16. In his 12 paged submissions dated 23rd July, 2019 which exceeded 10 pages against Practice direction number 33 of this Court's Practice Directions, 2014), but noted to meet the ends of substantive justice herein as provided under **Article 159 (2) (d) of the Constitution of Kenya, 2010**, learned counsel for the plaintiff, stated that the original plaintiff who was a Bishop born of great love, care, compassion and generosity welcomed the defendants into his home. Counsel cited the **Holy Bible in 1 John 3:17** in support of the same. That the defendants' claims are contradictory, based on greed and can't hold thus sought dismissal of the defendants' counterclaim and originating summons with costs to the plaintiff.

17. Counsel gave a brief background of this case and the evidence of the respective parties. He framed and analyzed three (3) issues for determination namely whether or not a trust and adverse possession claim fall in favour of defendants and whether the defendants are entitled to a share of the suit land. Counsel also cited and relied on the authorities, inter alia;-

(a) Esiroyo –vs- Esiroyo (1973) EA 388 and Esther Ndegi Njiru and another –vs- Leonard Gatei (2014) e KLR in respect of protection of title to land.

(b) Isack Kiebia M'Inanga-v-Isaaya Theuri M'Litari another (2018) eKLR, Peter Ndungu Njenga-vs-Sophia Watiri Ndungu (2000) eKLR Juletabi African Adventure Limited & another-vs-Christopher Michael Lockley (2017) eKLR and Peter Moturi Ogutu –vs- Elmelda Basweti Matonda and 3 others (2013) eKLR on a claim of trust.

(c) Rodgers Mwambonje-vs-Douglas Mwambonje(2014) eKLR, Mbui-vs-Maranya (1993) KLR 726, Virginia Wanjiku Mwangi-vs-David Mwangi Jotham Kamau Nyeri ELCC No 86 of 2011(2013) eKLR cited in Stella Nduru Ichunge & another-vs-Ezekiel Nkamani M'ichunge & another (2019) eKLR and Charles Kiplangat Bosuben-vs-Willy Kipkemoi Kigen & 2 others (2016) KLR as regards a claim for adverse possession.

D. The defendants case

18. The gist of the defendants' case is anchored on their statement of defiance and counter claim dated 10th June, 2006 and filed in court on 12th June, 2006. They are seeking the following orders:-

- i. A declaration that there is a resulting trust in the registration of the land parcel No. Bugumbe/Masaba/312 in favour of the defendants.***
- ii. A declaration that the plaintiff was registered as proprietor of land parcel No. Bugumbe/Masaba/312 to hold the same in trust for the defendant, his blood brothers.***
- iii. An order directing the plaintiff to subdivide land parcel no. Bugumbe/Masaba/312 into three equal portions of 15 acres each and transfer the two portions to each defendant respectively.***
- iv. That in the event that the plaintiff refused to act as per prayer iii above the Court Executive Officer to execute documents of transfer and subdivide.***
- v. In the alternative a declaration that the defendants have acquired title to their respective portions measuring 15 acres on land parcel No. Bugumbe/Masaba/312.***
- vi. Costs of the suit.***
- vii. Any other relief this Honourable court may deem fit to grant in the circumstances.***

19. The defendants' case is also anchored on the originating summons (supra) whereby they jointly and severally claim to have acquired title to the suit land by adverse possession. They are seeking determination of questions 1 to 5 on the face of the originating summons thus:-

- a) THAT whether the respondent's rights to recover the cumulative 20 acre of Bugumbe/Masaba/312 is barred under the provisions of Section 37 and 39 of the Limitation of Actions Act Cap 22 Laws of Kenya, and the title there to extinguished and or nonexistent on the ground that the plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid portion of Bugumbe/Masaba/312 for a period exceeding 12 years as at the time of filing of this originating summons.***
- b) THAT whether there be an order that the applicants be registered as proprietors of the portion of 20 acres of LR NO. Bugumbe/Masaba/3121 which they occupy.***
- c) THAT whether an order should issue restraining the defendants, either by themselves, agents, servants and or employees or whomsoever from interfering with the plaintiff peaceful possession and occupation of said portion of land, that is 20 acres of Bugumbe/Mabera/312 in any manner whatsoever or however.***
- d) THAT who pays the costs of this summons.***
- e) THAT such further orders be made as the court may deem fit and expedient to grant in circumstances.***

20. The defendants contend that the original plaintiff and themselves are the siblings born of the same mother and father, who died while they were infants. That the said plaintiff brought them up on the suit land since 1950s after their parents' death. That they built homesteads on the land to which each claim ownership of fifteen (15) acres by way of adverse possession.

21. The 1st defendant (DW1) testified and relied on his statement dated 21st November, 2017 and supporting affidavit sworn on 13th December, 2017 in support of their claim herein. His younger brother, the 2nd defendant (DW2) and elder brother, Nyamohanga Chacha Kitururo (DW3) relied on their respective statements dated 21st November, 2017 and filed in court on 23rd November, 2017 as part of their evidence in this matter.

22. Learned counsel for the defendant filed submissions dated 13th March, 2019 whereby he provided the background of the matter, the evidence of the respective parties and two (2) issues for determination namely whether the original plaintiff was registered as a trustee of the defendants in respect of the suit land and whether the defendants have acquired title to the land by way of adverse possession. He analyzed the issues in favour of the defendants. Counsel also relied on the following authorities;

- (a) Kiama -vs-Ndia Mathunya & others Court of Appeal No. 42 of 1978, Kanyi-vs- Muthiora (1984) KLR 712 , Gathiba -vs-Gathiba (2001) 2EA 342 and Mbui Mukangu -vs -Gerald Mwitiri Mbui Nyeri Court of Appeal No.281 of 2000 that it is settled law that a registered owner can hold title in trust for others even if that fact is not noted in the land register.***
- (b) Githu-vs-Ndeete (1984) KLR 776 and Njuguna Ndatho-vs-Masai Itumo & others (2002) 2 KLR 637 with regard to adverse possession.***

E. Issues for determination

23. I have anxiously considered the pleadings, the evidence and submissions of the respective parties herein. Being guided by the Court of Appeal decision in **Galaxy Paints Company Limited -vs-Falcon Grounds Limited (2000) 2EA 385** and the issues framed in the submissions, I am of the considered view that the issues for determination boil down to:-

- (a) Who is the registered proprietor of the suit land?
- (b) Whether any trust is created over the suit land in favour of the defendants
- (c) Have the defendants acquired title to the suit land by way of adverse possession?
- (d) Are the parties entitled to the orders sought in their respective pleadings?

F Analysis of evidence

24. It is common baseline that the original plaintiff is the registered proprietor of the suit land as disclosed in the evidence of PW4 including P Exhibits 1 to 5, 7 and 8 as well as the testimonies of PW1, PW2, PW3 and PW4 which support the fact of registration. According to DW1 and DW2, the suit land is registered in the name of the original plaintiff. In examination in chief, DW1 stated in part that;

“I know the suit land, LR No. Bugumbe/Mabera/312. It is registered in the name of the late Wambura Muturi, the original plaintiff in this matter. He was my blood brother”

25. This court is not un aware of **sections 27 and 28 of the repealed Cap 300** and **Esiroyo and Esther Njiru cases (supra)**. I also note the definition of the term **“proprietor”** under section 2 of the Land Registration Act, 2016 (2012) and sections 24,25 and 26 (1) of the same Act as regards interest conferred by registration, rights of a proprietor and certificate of title to be held as conducive evidence of proprietorship respectively. It is therefore pretty clear that the suit land is registered in the name of original plaintiff. Furthermore, his title is not challenged as envisaged under **sections 26 (1) (supra)**. Nonetheless, are there overriding interests with regard to the title?

26. Overriding interests may subsist and affect registered land without their being noted on the register as stipulated under **section 30 of the repealed Cap 300** and **sections 25 and 28 (h) of the Land Registration Act (supra)** which provides for trusts including customary trusts. Therefore, the rights of a proprietor are subject to trusts, among other interests, as provided thereunder.

27. The defendants assert that there is a resulting trust in the respect of the suit land in their favour. The **Halsbury’s Laws of England, 4th Edition Volume 48 at paragraph 594** underscores the meaning and nature of “resulting trusts” thus:

“ A resulting trust is a trust arising by operation of the law:

i. Where an intention to put property into trust is sufficiently expressed or indicated, but the actual trust either is not declared in whole or in part or fails in whole or part; or

ii. Where property is purchased in the name or placed in the possession of a person ostensibly for his own use, but really in order to effect a particular purpose which fails; or

iii. Where property is purchased in the name or placed in the possession of a person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by purchaser or disposer is presumed to have been intended.”

28. At paragraph 10 of the plaint, it is stated that the suit land is not ancestral property. The plaintiff disputed that the suit land is held in trust for the defendants. The plaintiff stated that he bought the land from deceased 4 and simply brought up the defendants on the suit land.

29. **Section 3(2) of the Judicature Act (Cap 8)** declares that this court shall be guided by African customary law in civil cases in which one or more of the parties is subject to or affected by it so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law. The same provision is truly aligned to **Article 159(3) (a) (b) and (c) of the Constitution of Kenya, 2010**.

30. In the case of **Ernest Kinyanjui Kimani–vs-Muiru Gikanga and another (1965) EA 735**, it was held that he who seeks to rely on any African customary law as the basis of his custom, must prove by evidence the existence of such custom; see also **sections 107 and 108 of the Evidence Act (Cap 80)** as wells as the case of **Mumo -vs- Makau (2002) I EA 170** that the claim of trust must be proved by way of evidence.

31. **Article 10 of the Constitution (supra)** provides for national values and principles of governance including equity. I am guided by the dicta of **Madam, JA (as he then was) in Chase International Investment Co-operation and another-vs-Laxman Keshra and others (1976-80) 1 KLR 891 to the effect that:-**

“if the circumstances are such as to raise equity in favour of the plaintiff and the extent of the equity is known, and in what way it should be satisfied, the plaintiff is entitled to succeed.....”

32. It is trite law that a constructive trust and equitable estoppel apply in favour of a purchaser who paid full purchase price and took 14 years possession of a parcel of agricultural land but failed to obtain land control board consent under **section 6 (1) of the Land Control Act (Cap**

302). That the agreement between the parties is valid and enforceable in such circumstances; see the **Court of Appeal decision in William Kipsoi Sigei-vs-Kipkoech Arusei and another (2019) eKLR.**

33. Moreover, it well settled law that some of the elements that would qualify a claimant as a trustee include that the land in question was before registration, family, clan or group and, that the claimant belonged to such family, clan or group and that the claim was directed against registered proprietor who is a member of that family, clan or group ; see **M’Inanga Kiebia** case (**supra**).

34. In the instant matter, the defendants and their witness have simply stated that the suit land is ancestral land and that the original plaintiff holds the same in trust for DW1 and DW2. Their claim is strongly controverted by PW1 to PW4 who relied on P Exhibits 1 to 8. A thorough examination of the plaintiff and defendants’ cases discern no iota of customary trust or at all over the plaintiff’s title to the suit land in favour of the defendants as espoused in **Mumo and M’Inanga Kiebia cases (supra)**.

35. As regards the claim of adverse possession, the defendants lay their claim over twenty (20) acres of the suit land as per grounds (a) and (b) of the originating summons and paragraphs 6 and 7 of the 1st defendant’s supporting affidavit. In their counterclaim at paragraphs 11 and 12 as well as prayers (c) and (d) therein, the defendants claim title to the land to the extent of fifteen (15) acres each. Interestingly, the statements of DW1 and DW2 point to a claim of ten (10) acres each of the suit land. In examination in chief, DW1 stated as follows;

“I live on and occupy 10 acres. The 2nd defendant occupies and lives on another portion of the same land. He also occupies ten (10) acres.....”

36. During cross examination, DW1 changed tune on the acreage and stated, interalia;

“I used to occupy 15 acres and left five (5) acres to the deceased original plaintiff.....I knew one Ochola who moved out of the land.....”

37. DW2 testified that he resides on the suit land where he built houses between 2013 and 2017. He stated that:-

“I occupy approximately half (1/2) an acre of the suit land. There is a fence around my homestead.....”

38. It is essential that adverse possession should be of the whole or a defined portion of the suit land (see **Muthuita-vs-Wanoe and 2 other (23008) I KLR (G & F) 1024** which applied the decision in **Gatimu Kinguru -vs- Muya Gathangi (1976-80) 1 KLR 317**). The definite area of the suit land has not been established in view of the contradictory statements of DW1 and DW2 herein.

39. PW1 and PW2 told the court that the original plaintiff obtained the suit land through lawful means as confirmed by PW3, who was a recording officer with Lands office during land adjudication in the area hence the original plaintiff became the proprietor of the suit land. Besides, the right and registration of land can be challenged on grounds including adverse possession as recognized in the case of **Jayebali Adamji Alibhai-vs-Abdulhussein Adamji Alibhai (1938) 5 EACA** which was applied by **Kneller J in Kimani Ruchine & another -vs- Swift Rutherford company Ltd and another (1976-80) I KLR 1500** and as stipulated under **sections 25 and 28 (h) of the Land Registration Act (supra)**.

40. Be that as it may, DW3 did confirm that the original plaintiff lived together with DW1 and DW2 on the suit land. It is undisputed that DW1 and DW2 occupied and still occupy a portion of the suit land with the permission of it’s owner, the original plaintiff thus adverse possession does not arise as noted in **Virginia Mwangi case (supra)**.

41. It is evident that the occupation and possession of the portion of the suit land by DW1 and DW2 has been open and continuous but consensual and not exclusive in the obtaining circumstances. In that regard, I endorse the position taken by Nyamweya J in **Ramco Investment Ltd -vs- Uni Drive Theatre Limited (2018) eKLR** where she held thus;

“ The appellants’ occupation of the disputed portion was open and continuous but it was not adverse to the respondent’s title and was also consensual.....”

G. Disposition

42. It is therefore the finding of this court that the defendants have failed to establish that they are entitled to the suit land by way of resulting trust and adverse possession. Admittedly, the plaintiff is entitled to secure protection of property under **Article 40(1) of the Constitution of Kenya, 2010**. The defendants are in unlawful occupation of a portion of the suit land as envisaged under **section 152A of the Land Act, 2016 (2012)**. Therefore, the orders sought in the plaint are available to the plaintiff bearing in mind **section 152A (ibid) and section 13(7) (a) of the Environment and Land Court Act, 2015 (2011)**.

43. The upshot is that the plaintiff has proved his claim against the defendants jointly and severally on a balance of probabilities. On the other hand, the defendants have failed to prove their case in the originating summons and counterclaim against the plaintiff on a balance of probabilities.

44. A fortiori, the two (2) consolidated suits are determined as follows:-

(a) The defendants originating summons dated 13th December, 2017 in Migori ELCC No 888 of 2017 consolidated with the instant suit (Migori ELCC 366 of 2017) be and is hereby dismissed with costs to the plaintiff.

(b) Judgment be and is hereby entered for the plaintiff against the defendants jointly and severally in terms of orders (a), (b) and (c) sought in the plaint dated 16th may, 2006 herein.

(c) The defendants' counterclaim dated 10th June, 2006 in the instant suit is hereby dismissed with costs to the plaintiff.

(d) The defendants shall move out of the suit land within the next 135 days from this date in default eviction orders to issue against them accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 9th Day of OCTOBER 2019.

G.M.A. ONGONDO

JUDGE

In presence of:-

Mr. Olao learned counsel instructed by P.K. Mtange and Company Advocates for the plaintiff

Mr. Nyang learned counsel holding brief for Mr. Kerario Marwa for the defendants.

Tom Maurice – Court Assistant