



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MERU

ELC CASE NO. 246 OF 2017

GEOFFREY MWIRIGI M'MUTUNGA.....PLAINTIFF

VERSUS

HENRY KIOME MUTUNGA.....DEFENDANT

JUDGMENT

Background

1. The plaintiff and defendant are brothers, being sons of one Mutunga Ringine who is deceased. The defendant is the registered owner of the parcel of land known as NTIMA /NTAKIRA/5911 of which the plaintiff is claiming a portion thereof.
2. This suit was filed vide a plaint dated 17/8/2017 where the plaintiff sought orders for the defendant to be estopped from evicting him from a portion of land measuring 149 by 60 feet within land parcel No. **NTIMA/NTAKIRA/5911**. He also sought for orders directing the District surveyor and District Land registrar Meru central to excise the aforementioned portion of the land out of the main parcel and register the said portion in his name. A statement of defence and counterclaim was filed on 12.9.2017 where plaintiff's claim is denied. The defendant sought for an order declaring him to be the lawful and rightful owner of the parcel of land no. NTAKIRA/Ntima/5911.
3. During the trial, the defendant was abandoned by his advocate midstream. The court granted the defendant time to get another advocate but finally, defendant opted to prosecute the case personally.

Plaintiffs Case

4. The plaintiff gave evidence and he also adopted his statement dated 17.8.2017 as his evidence. He also produced the documents in his list dated 29.1.2019 items 1-4 as his exhibits 1-4 respectively. Plaintiff's case is that their deceased father owned several parcels of land and the arrangement before he died was that his brothers, Luka Kirema Mutunga and Julius Muriira Mutunga would get parcel no. NTIMA/NTAKIRA/305, Henry Kiome would get NTIMA/NTAKIRA/270 and finally Moses Mwiti, Jacob Mutwiri, Edward Muriungi and himself would get parcel no. RUIRI/RWARERA/2018. By then, plaintiff had rented a place in Gitimbine in the outskirts of Meru Town where he was living with his wife, children and his mother.
5. However, in the year 2002 the defendant decided to give plaintiff a portion of his land as appreciation for assisting him when defendant was admitted in Chuka District Hospital. In addition, defendant informed their father and the rest of the family of this arrangement and hence, plaintiff was shown where to settle. He consequently moved his family from the rental place at Gitimbine after he built a 9 roomed permanent home on the suit land where he has been living peacefully together with his family.
6. The plaintiff further claims that after the death of their father, he accompanied the defendant to court in 2010 when a succession cause was filed by his elder brother to distribute their father's estate and plaintiff did not raise an objection because he was living on the land and he had agreed with his brother (defendant) that he would get that particular portion of the land. However, on 2/8/2017, the plaintiff received a notice to vacate the said land and since then the defendant has deposited stones preparing to deny him access to his compound. The defendant has even begun to build at the door steps of the plaintiffs portion of the land. Plaintiff stated that he has lived on the suit land for a period of over 16 years.
7. **PW2** one, **ISIAH MWIRIGI** adopted his statement of 3.10.2017 as his evidence. He is a nephew to the parties herein. He averred that defendant fell ill and was hospitalized in Chuka District Hospital, the plaintiff helped him by ensuring that he got medical attention and duly paid his medical bills and other medical expenses. Thereafter, when the defendant got better as a sign of gratitude he gave the plaintiff the portion of his land to settle on and since this was an important decision he informed their father. **PW2** was in attendance when the negotiations took place and that his grandfather did not object to this arrangement even though he had given the plaintiff a parcel at Ruiru. The defendant then took them to the land together with **PW2'S** grandfather whereby, defendant pointed out the portion of the land for the

plaintiff and they clearly demarcated the area in question where he had given the plaintiff. The plaintiff has since built a permanent home and settled thereon with his family.

Defendants Case

8. Defendant testified and he also adopted his statement dated 31.1.2018 as his evidence. He avers that he is the rightful owner of Land Parcel No. Ntima/Ntakira/5911 which resulted from the subdivision of his father's parcel no 270 of which he inherited the land through Succession Cause No. 288 of 2010. By the year 1995 there was a coffee plantation on the parcel NTIMA/NTAKIRA/270 and the plaintiff was given a portion of the same to harvest for not more than 10 years. The plaintiff however built his house forcefully on the suit land and destroyed the coffee plantations and trees while doing so. The plaintiff has his own parcel of land which he inherited measuring one and a half acres out of RUIRI/RWARERA/ 2018. Defendant avers that he had been residing in chuka and was hoping to construct his home on the suit land where he has planted coffee on his portion.

9. During cross examination it came to light that defendant had sub divided the suit land into two portions , parcel no. 5911 and parcel no. 5910 of which he sold the latter parcel. He confirmed that plaintiff is the one in occupation of the parcel no. 5911.

10. In his submissions the plaintiff argued that under the doctrine of Proprietary Estoppel the courts can grant a discretionary remedy in the circumstances where the owner of the land has implicitly and explicitly led another to act detrimentally in belief that rights in or over land would be acquired. In support of this argument, the plaintiff relied on the case of **INWARDS AND OTHERS V. BAKER (1965) 1 ALL ER 446** and **PKA V. HAS & ANOTHER [2017] eKLR**.

11. The plaintiff additionally contended that section 120 of the Evidence Act gives effect to the doctrine of estoppel, where it is stipulated that;

“When one person by his declaration act or omission, intentionally caused or permitted another person to believe a thing to be true and act upon such belief, neither her or his representative shall be allowed, in any suit or proceedings between himself and such or his representative to deny the truth of that thing”

Therefore the defendant's intention was clear and the plaintiff wholly relied on the same.

12. Defendant submitted that he is the rightful owner of the suit land as he inherited the same and also divided the same with the knowledge and consent of the plaintiff. He relied on Section 26 (1) of the Land Registration Act which provides that

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

13. It was the defendant's case that at all material times he has been the registered owner of NTIMA/NTAKIRA/5911 and that the plaintiff herein settled on the defendant's piece of land knowing that he has his own piece of land that he inherited from their father. Defendant avers that there was no fraud in the manner in which he acquired the suit property.

Analysis and determination

14. Proprietary estoppel is a doctrine of equity. It is an equity created by estoppel. In the case of **Inwards and others vs. Baker (1965) 1 AllER 446**, Lord Denning MR stated as follows with regard to the equity;

“It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied.”

In that case it was held that;

“Since the defendant had been induced by his father to build the bungalow on his father's land and had expended money for that purpose in that expectation of being allowed to remain there, equity would not allow that expectation so created to be defeated, and accordingly the defendant was entitled to remain in occupation of the bungalow as against the trustees (of the will of his father).”

15. In **Kenya National Capital Corporation Ltd. vs. Albert Mario Cordeiro & Another (2014) eKLR** it was stated that proprietary estoppel is established by showing that:-

“(i) The person claiming the equity believed that he had or was going to have a right in or over the property of the person against whom the equity is claimed.

(ii) The person against whom the equity is claimed was aware of the mistaken belief or created the belief or encouraged the belief. (iii) The person claiming the equity acted in reliance on the belief.”

16. In the present case, defendant had this to say during cross examination;

“Geoffrey has built a house on that land. It is a stone house with iron sheets. It has rooms. He stays there with his children and his wife. He farms there on one side.....”

Defendant went on to state that;

“Mwirigi has been on that land since 2003.....”

Geoffrey was staying at Gitmbine when he was constructing his house on the suit land.....The place where Geoffrey stays is clearly designated as each of us had their portion....He has a small kiosk. He also does horticulture. He has cows there”

17. This evidence clearly shows that defendant has been aware of plaintiff’s occupation and use of the suit land, whereby plaintiff’s portion is clearly designated. This portion is certainly the place which plaintiff calls home and he must have settled thereon with permission of the defendant.

The plaintiff must have acted on the belief that he would own the suit land and went ahead to construct his home there.

18. In view of the above findings the balance of probabilities tips in favour of the plaintiff and consequently allow plaintiff’s claim and I dismiss defendant’s counterclaim. Accordingly, I proceed to give the following orders;

I. The defendant is hereby estopped from evicting the plaintiff from the portion of land measuring 149 by 60 feet out of land parcel No. NTIMA/NTAKIRA/5911.

II. Land Registrar and the Land Surveyor Meru central District are to move into the suit land and curve out the portion of the land measuring 149 by 60 feet out of NTIMA/NTAKIRA/5911 and register the said portion in the name of the plaintiff.

III. A permanent injunction is hereby issued against the defendant , his servants and or agents from evicting and or interfering with plaintiff’s peaceful and quiet occupation and user of the suit land.

IV. As the parties herein are brothers, then each party is to bear their own costs of the suit.

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

C/A: Kananu

M/S Njenga for plaintiff

Defendant

Plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE