



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO. 145 OF 2017

JOSEPH NDUNGU KIRERU.....PLAINTIFF

VERSUS

ELIJOHN CHEGE MUGO.....DEFENDANT

JUDGMENT

1. Vide an amended plaint filed on the 13/4/18 the Plaintiff filed suit against the Defendant seeking the following orders

- a. A permanent injunction restraining the Defendant from meddling building trespassing occupying cultivating and or interfering with the Plaintiffs quiet and peaceful enjoyment of LOC 16/NDUNYU CHEGE/2 belonging to the estate of Mwangi Muiru either by himself his agents servants and children wife and or employees
- b. An order that the Defendant be evicted from the parcel of the suit land and the OCS Ndakaini Police Station do ensure compliance of the said eviction
- c. Costs of the suit.

2. The Plaintiff avers that the Defendant has trespassed onto the suit land illegally without any colour of right and has commenced construction of houses on a portion of the suit land thus occasioning the estate of his father Mwangi Muiru loss and damage. He has filed the suit as the legal administrator of the estate of Mwangi Muiru.

3. The Defendant resisted the Plaintiffs claim and denied trespassing onto the land and or causing loss and or damage. He contends that he has a beneficial interest in the suit land. That the Plaintiff's father Mwangi Muiru held the suit land in trust for his brothers, the Defendants father included.

4. Further he contends that he was born and bred on the suit land and has lived there all his life. That he has been in possession of a portion of the land for a period in excess of 12 years and claims title by way of adverse possession.

5. The Defendant further contends that the Plaintiff in breach of trust and in total disregard of the Defendants right to the suit land obtained letters of grant of administration to the estate of Mwangi Muiru to his exclusion.

6. In his counterclaim he sought the following orders;

- a. A declaration that the Plaintiff is a trustee for the Defendant for the portion occupied by the Defendant which was his late father's share of the land.
- b. A declaration that the Defendant has acquired by adverse possession an absolute title to the portion of the suit land which is in his possession and occupied by him
- c. A declaration that the Defendant is entitled to an order under Section 38 of the Limitation of Actions Act to be registered as a proprietor of that portion in place of the Plaintiff and or Mwangi Muiru deceased and that the Plaintiff shall execute a valid transfer or assignment in favour of the Defendant free from encumbrances.

7. At the hearing the Plaintiff led evidence and called two witnesses in support of his case. He informed the Court that he has filed the suit as an administrator of the estate of his father Mwangi Muiru. He presented the confirmation of grant issued on the 10/5/2016 which shows the land has been distributed to the Plaintiff, Winnie Kireru, Naftali Charagu and Patrick Mugo in equal portions of 0.23 ha. The beneficiaries are his step mother and siblings.

8. He informed the Court that the Defendant has trespassed on to the land. That the Defendant has no interest in the suit land as he is not one of the children and beneficiaries of the estate of Mwangi Muiru. He stated that the land belonged to his grandfather who had 4 sons; Mwangi Muiru, Mugo Muiru, Muchiri Muiru and Kariuki Muiru. That Mugo Muiru was the father of the Defendant but settled in his farm in Nyandarua. He refuted the Defendants claim that his father held the suit land in trust. the title is still in the name of his late father.

9. He claimed that he was not aware of the suit to wit; SRMCC No 78 of 1973 Thika in which the Court determined that the suit land be shared equally among the 4 brothers. He retorted in evidence that if there were any Court orders why they (uncles) executed the same. He informed the Court that the Defendant entered the suit land 6 years ago and has lived there under extreme protest from himself and hence the suit to evict him. He opined that the Defendant should relocate to Nyandarua where his father has settled.

10. PW2 – Patrick Mugo testified and stated that he is the son of Mwangi Muriu and the brother of the Plaintiff. That he is one of the beneficiaries of the estate vide the confirmed grant issued on the 10/5/16. He confirmed that his father had 3 other brothers to wit; Mugo Muiru, Muchiri Muiru and Kariuki Muiru. He stated that the suit land belonged to his father and not clan land. He stated that the Defendant entered the suit land about 6 years ago and lives in the house that belonged to Mwangi Muiru, his father.

11. PW3- Susan Wambui Kireru introduced herself as the wife of Mwangi Muiru and the step mother of the Plaintiff and one of the 4 beneficiaries of the estate of her husband. That upon marrying into the home she found the Defendants father living on the suit land with his wife and children. He later relocated to Nyandarua with his family. That the Defendant's wife lives on the suit land. She confirmed that her husband had 3 other brothers in total but they did not live on the suit land.

12. DW1- Elijohn Chege Mugo testified and informed the Court that he is the son of Mugo Muiru. He lives on the land with his wife and daughter. He rears goats on the suit land. That his father was the brother of Mwangi Muiru. The Plaintiff is his cousin. That his father lived on the suit land from 1962 to 1983 when he relocated to Nyandarua leaving him behind. That he has lived on the suit land since todate, for close to 35 years. He explained that the suit land is marked with boundaries on the ground and he occupies about 0.5 acres out of the suit land. That he has built 4 houses, 2 stone houses and one 3 bedroomed house on the suit land.

13. It is his evidence that the suit and was held in trust by Mwangi Muiru on behalf of the 3 brothers. His father had 3 brothers and that the suit land was family land that was shared out among the 4 brothers in 1974 vide the SRMCC case No 78 of 1973. In this case Mugo Muiru sued his brother Mwangi Muiru and the Court determined that the land be shared amongst the 4 brothers in equal shares. He informed the Court that for some reason or another the said orders were not effected but he continued living on the respective portion of the suit land. He stated that his father left him on the land in 1983. His interest is the portion of about 0.5 acres which was his father's share and not the whole land.

14. With the exception of the Defendant, the Plaintiff filed written submissions which I have read and considered.

15. It is not in dispute that the title is registered in the name of the Plaintiff's father. It is also not in dispute that the Court in SRMCC No 78 of 1974 ordered that the suit land be shared between the 4 brothers. It is also not in dispute that the said orders were not executed and thus lapsed after the statutory period of 12 years.

16. It is clear from the evidence led in the case that the suit land is family land having being registered in the name of the Plaintiffs father. It is also not in dispute that the parties are related being cousins. Their fathers were brothers. Undisputed evidence was led that the father of the Defendant lived on the suit land from 1962 -1983 when he relocated to Nyandarua leaving the Defendant behind on the suit land. The site report presented by the parties showed clearly how the parties including the Defendant have settled on the land. The nature of the structures and houses and developments being carried by each occupant are captured in the report. Each of the 4 occupants have a separate entrance to their portions.

17. From the evidence adduced it is the view of the Court that the suit land is family land which was held by the Plaintiffs father under trust for the family. It is more evident from the decision of the Court in SRMCC 78 of 1974 that the land was to be shared equally between the 4 brothers, the Defendants father included. The Court is of the view that the suit land is held in trust for the family members and the Court finds that the claim of trust is well founded and is determined in the affirmative.

18. In respect to adverse possession, It is now settled and trite that for adverse possession to mature into title to land the following conditions must be fulfilled:

- a. The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;
- b. The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
- c. The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- d. The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of limitation to claim back the land.
- e. The possession has to be *exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.
- f. Possession must be without the permission of the owner.

19. 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.

20. The Defendant led evidence that he has lived on the suit land since his childhood to date, initially with his parents and later on his own. It was his evidence that his father relocated from the suit land in 1983 leaving him and his family on the suit land.

21. The site report dated the 17/6/19 revealed that the suit land is divided into 4 portions on the ground. The 1st is inhabited by the Plaintiff, followed by DW3- the step mother of the Plaintiff followed by Naftaly Karagu and the 4th portion is the Defendant. The report described the farming activities on the portion as cultivation of avocados, macadamia, bananas and goat rearing. There are 4 houses on the plot one of which is unfinished permanent house and a water tank. It was the evidence of the Defendant that the portion is where his father lived before, he relocated to Nyandarua.

22. The Plaintiff and his witnesses led evidence and denied that the Defendant lived on the suit land. According to the PW1 and PW2 the Defendant came on to the land about 6 years ago but they are all in agreement that the Defendant’s father lived on the portion of the land before he relocated his family to Nyandarua. PW3 put it aptly in evidence as thus;

“I cannot remember when I got married into the family. I knew Mugo Muiru. He was my husbands’ brother. I know the Defendant. He is the son of Mugo Muiru. I found his father residing on the land. He lived with his wife and his children.The Defendant does not live on the land. The Defendant’s wife lives on the land.”

23. The Plaintiffs unsuccessfully informed the Court that the Defendant does not live on the land. If his wife and daughter lives there it is not plausible to say the Defendant is not in occupation, possession and control of the portion that he claims. It is also clear that the Plaintiffs have knowledge of his possession and occupation of the portion of the land. It is also evident that the possession has been unbroken.

24. When did time start running for purposes of calculating adversity? Unchallenged evidence was led by the Defendant that he has occupied the suit land since childhood to mean that the possession was with the consent of the owner of the suit land, Mwangi Muiru. It is in evidence that Mugo Muiru sued his brother Mwangi Muiru and the Court ordered that the suit land be shared equally between the 4 brothers. The Plaintiffs feigned ignorance of these orders in order to mislead the Court. All without exception had a similar answer which was “I am not aware of such Court orders”. These orders were not executed and lapsed by effluxion of time in 1986. Time therefore started running for the first time in favour of the Defendant from 1986 upto 1998 when adverse possession accrued and vested in favour of the Defendant.

25. Mwangi Muiru who was then alive and the holder of the title became dispossessed of the portion of the suit land. There is no evidence that time was interrupted nor that he took any steps to retake the portion of the suit land from the Defendant. The period therefore is not broken and he has demonstrated that he has constructed houses on the land and used the land in a manner inconsistent with the owner when he was alive. The paper owner had knowledge as his occupation was open.

26. The Plaintiff and his witnesses admitted that the Defendant is in possession and occupation of the suit land. This is captured in the site report as well.

27. It is the finding of the Court that Mwangi Muiru and consequently the administrator of his estate held the portion of the suit land in trust in favour of the Defendant.

28. Trespass is the unauthorized entry of another’s land without their consent and authority. As to whether the Defendant is a trespasser, having arrived at the decision that the Defendant is entitled to the portion of the suit land he occupies by way of adverse possession, the claim of trespass fails. Adverse possession is an overriding interest that attaches to the land and runs with it. It need not be noted on the register.

29. It is the finding of the Court therefore that the estate of Mwangi Muiru held the title for the portion in which the Defendant occupies in trust for him.

30. In the upshot I make the following orders;

a. The Plaintiff’s case fails.

b. The Defendants counterclaim succeeds in both claims.

c. It is hereby declared that that the Defendant has acquired title by customary trust/ adverse possession an absolute title to the portion of the suit land which is in his possession and occupied by him(about 0.5 acres).

d. A declaration that the Defendant is entitled to an order under Section 38 of the Limitation of Actions Act to be registered as a proprietor of that portion in place of the Plaintiff and or Mwangi Muiru deceased and that the Plaintiff shall execute a valid transfer or assignment in favour of the Defendant free from encumbrances.

e. The subdivision on the ground shall be done in as much as is practicable in accordance with the portion of land occupied by the Defendant.

f. Each party to meet the costs of subdivision and registration of the titles for their portions.

g. Parties being related, each party to meet the costs of their suit.

31. **It is so ordered.**

DELIVERED, DATED & SIGNED AT MURANG'A THIS 11TH DAY OF DECEMBER 2019.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kuria HB for Mugo Moses for the Plaintiff

Plaintiff is present in person

Wainaina HB for Gatheru for the Defendant

Defendant is present in person.

Irene and Njeri, Court Assistants