



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 519 OF 2013

CONSOLIDATED WITH ELC CASE NO. 47 OF 2016

HEZEKIEL MURIITHI NJOKA.....PLAINTIFF

VERSUS

JOSEPH MURIUKI MURIITHI.....DEFENDANT

JUDGMENT

This judgment is in respect to **KERUGOYA ELC CASE No. 519 of 2013** and **KERUGOYA ELC CASE No. 47 of 2016** which were consolidated by consent of the parties on 25th October 2015. Directions were then taken that the plaint in this case be the plaint in the consolidated suit and the Originating Summons in **KERUGOYA ELC CASE No. 47 of 2016** be the counter claim.

A summary of the pleadings is that in **KERUGOYA ELC CASE No. 47 of 2016**, the defendant herein **JOSEPH MURIUKI MURIITHI** (as the Applicant) had filed an Originating Summons on 12th April 2016 seeking the following orders against the plaintiff herein **HEZEKIAH MURIITHI NJOKA** (as the Respondent):

- 1. That the Applicant be declared to have become entitled by adverse possession of over 12 years to all that parcel of land registered under the Land Act No. 6 of 2012, the Land Registration Act No. 5 of 2012 and the Registered Land Act Cap 300 (repealed) and comprised in the title No. INOI/MBETI/308.***
- 2. That the said Applicant be registered as the sole proprietor of all the said parcel of land namely INOI/MBETI/308.***
- 3. That the Land Registrar Kirinyaga do register the Applicant as proprietor of L.R No. INOI/MBETI/308.***
- 4. That the Respondent be ordered to pay the costs of this suit to the Applicant.***

The Originating Summons was supported by the affidavit of **JOSEPH MURIUKI MURIITHI** to which were annexed various correspondences, the Green Cards to land parcels No. INOI/MBETI/219 and INOI/MBETI/308 and a ruling delivered in **NYERI HIGH COURT CIVIL CASE No. 38 of 1990 (O.S)** by **M.S.A MAKHANDIA J.** (as he then was) between **JOSEPH MURIUKI MURIITHI** (as plaintiff) and **WAKERA KABUI** Alias **WAKERA WAKABARI** and **MURIITHI KARIUKI** as defendants – annexures **JMM 1 to JMM 5**).

In that affidavit, the defendant had deponed, inter alia, that he and his family including his brothers and their family have been in occupation of land parcel No. INOI/MBETI/308 (the suit land) since 1959 and have even buried both their parents thereon. That the suit land is a sub-division of land parcel No. INOI/MBETI/219 which had been registered in the names of one **KABUI MUGO** to hold in trust for the defendant's father **MURIITHI KARUNGA** who was then in detention and who was also a step brother to **KABUI MUGO**. That **KABUI MUGO** died in 1963 before the original land could be shared and his wife and mother instituted Succession Proceedings without the defendant's knowledge and shared out the land. When the defendant learnt about this, he lodged a complaint with the Chief (annexture **JMM1**) and it was decided that land parcel No. INOI/MBETI/219 be shared equally between **WAMBIA KARUNGA** (the mother of **MURIITHI KARUNGA**) and **WAINOE KARUNGA** (the mother of **KABUI MUGO**) – see annexture **JMM 2**. That whereas the family of **WAINOI KARUNGA** resides on land parcel No. INOI/MBETI/309 after selling the suit land which was meant for the defendant's father, the defendant has remained in adverse possession of the suit land since 14th July 1978 together with his brothers and their families. That the defendant filed **NYERI HCCC No. 38 of 1990 (OS)** against **WAKERA KABUI** and **MURIITHI KABUI** claiming the suit land by adverse possession but that suit was dismissed on a technicality issue. That **JOHN MURIITHI KARIUKI** sold the suit land to the plaintiff herein on 13th March 2001 but by that time, the defendant had already acquired it by prescription of the law and has been in continued and un-interrupted possession thereof since 1959 when it was originally land parcel No. INOI/MBETI/219 and apart from a crop of 2880 coffee stems and 200 tea bushes, there are also 6 semi-permanent houses, 4 chicken coops and a bore hole.

In response to that Originating Summons, the plaintiff herein filed a replying affidavit in which he deponed, inter alia, that he purchased the suit land from **JOHN MURIITHI KARIUKI** and obtained title after all the necessary requirements including consent had been granted and he then issued a letter dated 25th March 2001 asking the defendant to vacate (annexture **HMN 2 (a)**) and also issued a notice to that effect dated 24th April 2001 (annexture **HMN 2 (b)**). That the defendant's occupation of the suit land was interrupted by a letter dated 23rd May 1990 (annexture **HMN 3**). That the plaintiff is an innocent purchaser of the suit land and before he purchased it, an order of eviction had been issued against the defendant in **EMBU RMCC CASE No. 34 of 1984** which had been filed against him by **WAMBIA KARUNGA** (annexture **HMN 4**) and that infact the defendant had been evicted by the firm of **S.K. AUCTIONEERS** on 23rd May 1990. The defendant had then field **NYERI HGH COURT CIVIL CASE No. 38 of 1990 (O.S)** against **WAKERA WAKABARI** and **MURIITHI KARIUKI** which was however dismissed. He then tried to have this suit dismissed but that application was disallowed (annexture **HMN I**). The plaintiff obtained title to the suit land on 13th March 2001 and thereafter filed this suit to assert his right and, therefore, the defendant cannot claim to have acquired the suit land *nec vi, nec clam nec precario* as alleged. That the alleged adverse possession by the defendant since 14th July 1978 cannot therefore apply since the plaintiff was only registered as proprietor thereof in the year 2001 and that is when time started running and the Originating Summons is therefore frivolous, vexatious and an abuse of the Court process.

On the other hand, the plaintiff filed **KERUGOYA ELC CASE No. 519 of 2013** on 22nd January 2009 seeking the following orders against the defendant:

- (a) An order compelling the defendant by himself, his agents and/or servants from further trespassing on the suit land.*
- (b) General damages for trespass and the inconvenience caused to him by the continued illegal occupation of the suit land.*
- (c) An order for eviction of the defendant from the suit land.*
- (d) Costs of the suit.*
- (e) Any other relief that this Honourable Court may deem fit to grant in the best interest of the plaintiff.*

The plaintiff's claim was founded on the pleadings that he is the registered proprietor of the suit land having purchased it from **JOHN MURIITHI MURIUKI** and yet the defendant continues to occupy it in contravention of the plaintiff's rights despite demand and notice to vacate.

In a short defence however, the defendant averred that he has acquired the suit land by way of adverse possession and put the plaintiff to strict proof of his claim adding further that this Court has no jurisdiction to entertain a claim based on trespass.

The trial commenced on 20th July 2007 and the parties were the only witness to their respective cases.

The plaintiff told the Court that he is the owner of the suit land having purchased it in 2001 from **JOHN MURIUKI KARIUKI** and obtained the title deed but he has been un-able to take possession because the defendant chased him away alleging that he (defendant) had filed **NYERI HIGH COURT CIVIL CASE No. 38 of 1990** which was however dismissed in 2007 but the defendant has still refused to vacate thus necessitating the filing of the suit. And with regard to the defendant's Originating Summons, the plaintiff stated that the defendant was evicted from the suit land by Auctioneers and his house demolished but he and his family returned and have prevented the plaintiff from accessing it.

On his part, the defendant asked the Court to rely on his Originating Summons and documents filed in support thereof in support of his counter-claim and asked the Court to dismiss the plaintiff's suit.

Submissions have been filed both by the firms of **KELI MWAURA ADVOCATES** for the plaintiff and **MAGEE WA MAGEE ADVOCATES** for the defendant.

I have considered the parties evidence as contained in their respective statements and affidavits, the documentary evidence and the submissions by counsel.

In paragraph four (4) of his statement of defence, the defendant pleaded that this Court lacks the jurisdiction to entertain a claim based on trespass. Although no evidence was led on that pleading, a question of jurisdiction, once raised, must be determined straight away because without jurisdiction, the Court must down its tools – **OWNERS OF MOTOR VESSEL 'LILLIAN S' VS CALTEX OIL KENYA LTD 1989 K.L.R 1**. Does this Court lacks the requisite jurisdiction to determine this suit because one of the remedies sought by the plaintiff is general damages for trespass? Certainly not. The jurisdiction of this Court set out in **Section 13 of the Environment and Land Court Act Section 150 of the Land Act and Section 101 of the Land Registration Act** is wide enough to include the determination of a dispute alleging trespass to land. The pleading on this Court's lack of jurisdiction could not have been raised with any serious conviction. It is rejected.

What is clear from the onset is that whereas the plaintiff's claim to the suit land is premised on the fact that he is the registered proprietor thereof, the defendant's claim to the same land is based on the pleading that he and his family, including his brothers and their families, have been in occupation thereof since 1959. The following are not really in dispute:

- 1. That the plaintiff is the registered proprietor of the suit land since 13th March 2001 having purchased it from JOHN MURIITHI KARIUKI who became the registered proprietor thereon on 29th December 1983.***
- 2. That prior to that, the suit land which is a sub-division of land parcel No. INOI/MBETI/219 was registered in the name of WAKERA KABUI.***
- 3. That land parcel No. INOI/MBETI/219 was until 14th August 1982 registered in the names of WAKERA KABUI and WAINOI KARUNGA as proprietors in common in equal shares.***
- 4. That the defendant, his siblings and their families have been in occupation of the suit land since 1959.***

In my view, the determination of the following two main issues is key to the resolution of this dispute.

- (a) Whether or not the registration of the plaintiff as the proprietor of the suit land was in fact always subject to any prescriptive rights enjoyed by the plaintiff.
- (b) Whether the defendant has met the threshold of orders to have acquired the suit land by adverse possession.
- (c) Whether the defendant's occupation of the suit land was in fact interrupted by the various suits and eviction orders which are part of the record herein.

As the registered proprietor of the suit land, the plaintiff is no doubt entitled to the protection provided by **Section 26 (1) of the Land Registration Act 2012**. A similar provision is found in **Section 27 of the repealed Registered Land Act**. **Section 26 (1) of the Land Registration Act 2012** is in the following terms:

“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, un-procedurally or through a corrupt scheme”.

On the basis of being the registered proprietor of the suit land, the plaintiff is therefore within his right to seek the eviction of the plaintiff therefrom including the order for damages and the other reliefs sought in his plaint. Indeed, I have not heard the defendant allege any fraud on the part of the plaintiff in his acquisition of the suit land. On the other hand, however, **Section 25 (1) of the Land Registration Act** provides that the rights of a proprietor are subject to any rights and interests which do not require to be noted on the register. **Section 28 (h)** of the same Act recognizes some of those interests as:

“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”.

Section 7 of the Land Act 2012 also provides that:

“Title to land may be acquired through:

(a)

(b)

(c)

(d) Prescription”.

And **Section 38 of the Limitation of Actions Act** which the defendant has invoked in his counter-claim states that:

“Where a person claims to have become entitled by adverse possession to land registered under any of this Act cited in Section 37 of land comprised in a lease registered under any of these 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”.

In the case of **TITUS KASUVE VS MWAANI INVESTMENT LTD C.A CIVIL APPEAL No. 35 of 2002 (2004 1 K.L.R 184)**, the Court of Appeal laid down what a party claiming land by adverse possession has to prove and said:

“And in order to be entitled to the 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 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition”.

Adverse possession is proved by establishing that the registered proprietor of the land in dispute has been dispossessed of the land in dispute for the statutory period – **WAMBUGU VS NJUGUNA 1983 K.L.R 172**. It is the submissions by counsel for the plaintiff that since the plaintiff purchased the suit land in 2001, and filed a suit to evict the defendant in 2009, the statutory period of twelve years had not lapsed. Counsel for the plaintiff has submitted as follows:

“My lord, from the evidence on record, its clear that the plaintiff bought land parcel No. INOI/MBETI/308 from JOHN MURIITHI KARIUKI, had Land Control Board approval and was registered as absolute owner of the said land parcel on 13th March 2001, and filed a suit of eviction of the defendant on 29th January 2009, the period between 13th March 2001 when the plaintiff obtained the title and the filing of the suit on 29th January 2009 was purely due to the fact that there was a pending case being Nyeri Civil Case No. 38 of 1990 (O.S) between the defendant/Applicant herein JOSEPH MURIUKI MURIITHI and WAKERA KABURI alias WAKERA WAKABARI and MURIITHI MURIUKI which was dismissed on the 6th November 2008 by Hon. Justice M.S.A MAKHANDIA.

My lord, we submit that twelve years period were not over between obtainance of title by plaintiff and filing of the suit, moreover the filing of the suit for the recovery of land stopped time from running for the purposes of Section 38 of the Limitation Act under which a person may claim to have become entitled to land by adverse possession”

In response however, counsel for the defendant has submitted that the defendant has been in possession of the suit land since 14th July 1978 when it was family land known as INOI/MBETI/219 and continued to do so even after his aunt fraudulently filed a Succession Cause and sub-divided it to give rise to the suit land. Counsel adds further that although the defendant filed **NYERI HIGH COURT CIVIL CASE No. 38 of 1990 (O.S)** seeking orders of adverse possession against **WAKERA KABUI** and **MURIITHI KARIUKI** who had sold the suit land to the plaintiff, that case was not determined on its merits and was dismissed for non-attendance.

From the Green Cards produced as evidence in this case (annextures **JMM 3** and **JMM 4**), it is clear that the title to the original land parcel No. INOI/MBETI/219 was closed on 14th August 1982 upon sub-division and **WAKERA KABUI** became the registered proprietor of the suit land on the same day. The defendant however continued living on the suit land together with his siblings and their families. In paragraph three (3) of his affidavit in support of his Originating Summons, the defendant deponed as follows:

3:“That I and my entire family and my three brothers and their families live on the suit land. We have lived on the suit land since 1959 and that is where we have buried both our parents”

It is clear therefore that as far back as 1959 even before the suit land was registered in the names of **WAKERA KABUI**, the plaintiff, his siblings and their families were in possession and occupation of the suit land even when it was still part of the original parcel No. INOI/MBETI/219. The Green Card to the land parcel No. INOI/MBETI/219 shows that it was registered in the names of **KABERE MUGO (KABUI MUGO)** who, according to paragraph four (4) of the defendant’s supporting affidavit, was the step brother to **MURIITHI KARUNGA** the defendant’s father and held the said land in trust for the said **MURIITHI KARUNGA** who was in detention at that time. This has not really been rebutted and the

plaintiff in his replying affidavit in opposition to the defendant's Originating Summons was content in confining himself to how he acquired the suit land in 2001 and the various suits that had been filed against the defendant. I therefore make a finding of fact that the plaintiff, his siblings and their families have always been in exclusive possession and occupation of the suit land as far back as 1959 even when it was part of land parcel No. INOI/MBETI/219 and registered in the names of his uncle **KABERE MUGO (KABUI MUGO)** and later in the names of **WAKERA KABUI** (see annexure **JMM 3**). There is no evidence to suggest that the plaintiff's possession and occupation of the suit land was in any way with the consent of the then registered owners. If anything, copies of the letters produced as exhibits herein show that the area Chief had been engaged severally in arbitrating over the original land parcel No. INOI/MBETI/219 and the suit land (see defendant's Exhibit 2). It is my finding therefore that the plaintiff's registration as the proprietor of the suit land has always been subject to the defendant's overriding interest as a party in occupation thereof since 1959.

Has the defendant met the threshold of orders to have acquired the suit land by adverse possession or has his possession and occupation thereof been interrupted by the various suits as shown by the documents produced herein? Those are the issues that I now propose to interrogate.

As I have already found above, the defendant's averment that he, his siblings and families have always been in exclusive possession and occupation of the suit land since 1959 even when it was still part of the original land parcel No. INOI/MBETI/219 was never really rebutted. This occupation was clearly with the knowledge of the plaintiff who in fact in his plaint refers to it as "***continued illegal occupation of the suit plot***".

It is common ground however that there have been various cases filed with respect to the suit land. The first such case appears to have been **EMBU RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 34 of 1984** involving **WAMBIA KARUNGA** as plaintiff and **WAINOI KARUNGA, WAKERA KABERE** and **JOHN MURIITHI KARIUKI** as defendants. The Court ordered the eviction of the defendants in a ruling dated 4th April 1990. The defendant herein was not a party and neither was any of his siblings mentioned in paragraph eleven (11) of his supporting affidavit. In any case, by the time that suit was filed in 1984, the plaintiff, his siblings and their families had been in possession and occupation of the suit land for some twenty five (25) years well in excess of the statutory period of twelve (12) years. That case could therefore not have interrupted the defendant's possession and occupation of the suit land as it came too late.

Then there is **NYERI HIGH COURT CIVIL CASE No. 38 of 1990 (O.S)** in which the defendant herein was in fact the plaintiff while the defendants were **WAKERA KABUI** Alias **WAKERA WAKABARI** and **MURIITHI KARIUKI** as the defendants. The ruling by **MAKHANDIA J.** (as he then was) dated 6th November 2008 and in which he declined an application to reinstate a dismissed suit does not indicate what the claim was all about. However, a reading of the plaintiff's submissions suggests that the suit must have involved the same suit land subject of this case. That case does not aid the plaintiff at all because it was the defendant who was asserting his right to the suit land as against the defendants. Interruption only occurs when the registered proprietor of the land files a suit to assert his ownership thereof and not the other way round and as is now clear, the defendant has never been the registered proprietor of the suit land. Further, the plaintiff herein was not a party in **NYERI HIGH COURT CIVIL CASE No. 38 of 1990 (O.S)**.

The thrust of the plaintiff's defence to the defendant's Originating Summons (counter-claim) is that since he (plaintiff) was only registered as the proprietor of the suit land in 2001 and thereafter asserted his right to the suit land by filing this case in 2009, the twelve (12) years limitation period has not lapsed. It is of course true that the registered proprietor of the suit land in 1983 and who sold it to the plaintiff in 2001 was **JOHN MURIITHI KARIUKI**. However, as was held in **GITHU VS NDEETE 1984 K.L.R 776**, the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession. The plaintiff's claim is that having filed this suit in 2009 seeking inter alia, to evict the defendant, the defendant's occupation of the suit land has been interrupted and in any case, the twelve (12) years statutory period has not lapsed to entitle the defendant to orders of adverse possession. However, as is now clear following **GITHU VS NDEETE** (supra), the plaintiff's

registration as proprietor of the suit land in 2001 was always subject to the defendant's overriding interests since he was and remains in possession and occupation thereof. The change of ownership of the suit land from **JOHN MURIITHI KARIUKI** to the plaintiff did not interrupt the defendant's possession and occupation of the suit land which remained open, exclusive and with the knowledge of the plaintiff. Whether time for purposes of adverse possession is computed from 1959 (when the plaintiff says he started living on the original land parcel No. INOI/MBETI/219) or from 1978 (when it is alleged by the plaintiff that **WAKERA KABUI** fraudulently acquired through succession land parcel No. INOI/MBETI/219), it becomes clear that the defendant's occupation of the suit land is well in excess of the twelve (12) years period provided for in law. It must also be clear by now that by the time the plaintiff filed this suit originally in **EMBU HIGH COURT as CIIL CASE No. 1 of 2009**, the defendant's claim to the suit land by way of adverse possession had long crystallized and that is why in his defence, the defendant has pleaded in paragraph two (2) that he had already acquired the suit land by way of adverse possession by the time the plaintiff moved to this Court. That assertion, in my view, is correct. In ***MWANGI & ANOTHER VS MWANGI 1986 K.L.R 328***, the Court held that the interest of a registered proprietor of land is subject to the overriding interests of persons in possession and occupation thereof even without legal title and that such overriding interests are equitable rights which are binding on the land. The proposition in ***MWANGI's*** case (supra) was up-held by the Court of Appeal in ***MACHARIA MAINA & OTHERS VS DAVIDSON KAGIRI C.A CIVIL APPEAL No. 6 of 2011 NYERI (Consolidated with CIVIL APPEAL Nos 26 and 27 of 2011) (2014 e K.L.R)***. It is therefore clear to this Court that by the time the plaintiff was registered as the proprietor of the suit land in 2001, the land was subject to those equitable rights in favour of the defendant. The law is that a person who buys land even without knowing who is in possession of it risks his title just as he does if he fails to inspect it for twelve years after purchasing it - ***MAWEU VS LIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 K.L.R 430***. I have not heard the plaintiff deny knowing about the defendant's possession of the suit land. Indeed in his plaint, he confirms that knowledge – see paragraph five thereof.

Ultimately therefore and after considering all the evidence herein, I find that the plaintiff is not entitled to the orders sought in his plaint in which he seeks to evict the defendant from the suit land on the basis that he is a trespasser who should also pay him damages. I find instead that the plaintiff's registration as the proprietor of the suit land was always subject to the defendant's overriding interests as an adverse possessor thereof and that those interests have since crystallized. I must therefore dismiss the plaintiff's suit. On the other hand, I find that the defendant has proved his counter-claim as contained in his Originating Summons filed herein on 12th April 2016 and is entitled to orders to have become entitled to the suit land by way of adverse possession.

The up-shot of the above is that this Court makes the following orders:

- 1. The plaintiff's suit against the defendant is dismissed.***
- 2. The defendant's counter-claim is allowed and he is entitled to be registered as the proprietor of land parcel No. INOI/MBETI/308 having acquired it by way of adverse possession.***
- 3. The Land Registrar Kirinyaga do register the defendant as proprietor of the land parcel No. INOI/MBETI/308 in place of the plaintiff.***
- 4. The plaintiff shall meet the defendant's costs of the dismissed suit and the counter-claim.***

B.N. OLAO

JUDGE

26TH JANUARY, 2018

Judgment dated, delivered and signed in open Court at Kerugoya this 26th day of January 2018

Ms Kiragu for Defendant present

Mr. Ndegwa for Mr. Mwaura for Plaintiff present

Plaintiff present

Defendant present

Right of appeal explained.

B.N. OLAO

JUDGE

26TH JANUARY, 2018

MR. NDEGWA:I seek a stay for 30 days.

MS KIRAGU:No objection.

COURT:Stay for 30 days granted.

B.N. OLAO

JUDGE

26TH JANUARY, 2018