



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
CHUKA ELC CASE NO. 210 OF 2017
FORMERLY MERU ELC. 246 OF 2016

M'CHABARI KINORO.....PLAINTIFF

VERSUS

ISAIAH NKOROI MURIUNGI..... 1ST DEFENDANT

JEREMIAH NYAGA MURIUNGI.....2ND DEFENDANT

JACOB GITONGA MURIUNGI.....3RD DEFENDANT

ELIVASE MUTEGI KAJIETA.....4TH DEFENDANT

THE DISTRICT LAND REGISTRAR THARAKA SOUTH.....5TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

1. The plaintiff in his plaint dated **23rd November, 2016** and filed on **28th November, 2016** seeks judgment against the defendants jointly and severally for:

a. A declaration that the defendants invasion and alienation of the land comprised in title Nos. **Kamanyaki/Kamarandi/894 and 899**, from which the defendants have illegally carved out parcels Nos. **Kamanyaki/Kamarandi/1280, 1281, 1282, 1283 and 1284** is unlawful and that the same constitutes illegal trespass and therefore the plaintiff is entitled to damages for the same.

b. An order of eviction against the defendants jointly and severally directing them to vacate the land comprised in Title Nos. **Kamanyaki/Kamarandi/894 and 899**, from which the defendants have illegally carved out parcels Nos. **Kamanyaki/Kamarandi/1280, 1281, 1282, 1283 and 1284**.

c. An order of this honourable court cancelling any and all titles issued to the defendants or any other persons with respect to parcels Nos. **Kamanyaki/Kamarandi/1280, 1281, 1283 and 1284**.

d. An order of this honourable court directing the **District Land Registrar Tharaka South** to reconsolidate any and all titles issued with respect to parcels Nos. **Kamanyaki/Kamarandi/1280, 1281, 1282, 1283 and 1284** and issue a new title in favour of the plaintiff.

e. Costs and interest of this suit.

2. The plaintiff filed an application by way of Notice of Motion dated **23rd November, 2016** which sought orders:

1. That this matter be certified as extremely urgent and service therefrom be dispensed with at this stage owing to the danger likely to be borne herein.

2. That pending the hearing of this application, this honourable court be pleased to issue an order of temporary injunction against the defendants/respondents, their agents, family members, successors in title, assigns or anybody else however acting on their behalf or behest from entering, trespassing upon, encroaching upon, alienating, conveying title, digging, planting, farming, constructing, fencing or carrying out any other activity whatsoever on the plaintiffs/applicants land parcel Nos. **Kamanyaki/Kamarandi/894 and 899**, from which the defendants/respondents have illegally carved out parcels Nos. **Kamanyaki/Kamarandi/1280, 1281, 1282, 1283 and 1284**.

3. That pending the hearing of this suit this honourable court be pleased to issue a mandatory injunction against the defendants/respondents, their agents, family members, successors in title, assigns or anybody else however acting on their behalf or behest from entering, trespassing upon, encroaching upon, alienating, conveying title, digging, planting, farming, constructing, fencing or carrying out any other activity whatsoever on the plaintiffs/applicants land parcel Nos. **Kamanyaki/Kamarandi/894 and 899**, from which the defendants/respondents have illegally carved out parcels Nos. **Kamanyaki/Kamarandi/1280, 1281, 1282, 1283 and 1284**.

4. That the **O.C.S. Marimanti Police Station** and the **Area Chief, Kamanyaki Location** enforce the court order and ensure that peace prevails.

5. That the costs of this application be in the cause.

3. The application had the following grounds:

a. That the plaintiff/applicant is, and has always been, the sole registered and absolute proprietor of the land comprised in title Nos. **Kamanyaki/Kamarandi/894 and 899**, from which the defendants/respondents have illegally carved out parcels Nos. **Kamanyaki/Kamarandi/1280, 1281, 1282,1283 and 1284**.

b. That the defendants/respondents have illegally and without any colour of right trespassed upon, devolved, conveyed, alienated and cultivated the plaintiff/applicant's land.

c. That unless restrained by this honourable court, the defendants/respondents will further alienate and waste all the plaintiff/applicant's land.

4. Temporary orders were granted on **6th December, 2016** injuncting the defendants from engaging in specified conduct concerning parcel numbers **Kamanyaki/Kamarandi/894 and 899** from which parcel numbers **Kamanyaki/Kamarandi/1280, 1281, 1282, 1283 and 1284** were hived out. Parties were to be heard inter partes on **15.12.2016**.

5. On **15/12.2016**, interim orders were extended in terms of the provisions of section 63 of the Civil Procedure Act. The respondents were granted 45 days to respond to the application and all parties were granted liberal leave to further respond to issues raised by the other parties, as and if necessary. Parties were to take directions on **2nd March, 2017**.

6. On **2nd March, 2017**, the parties appeared before the Lady Justice Lucy Mbugua at Meru who transferred this suit to Chuka where an Environment and Land Court had been established. The parties were ordered to take directions before the ELC Judge at Chuka on **16th March, 2017**.

7. On **16th March, 2017**, advocate Murango Mwenda told the court that he had not filed a response to the application because his clients had not given him instructions. He intimated that he would file an application to cease acting for the defendants if they continued to not cooperate with him.

8. Later on the same day, the parties compromised the application and proffered a consent in the following terms:

1. An Inhibition be and is hereby entered against the suit properties, to wit land parcel Numbers **Kamanyaki/Kamarandi/1280, 1281, 1282,1283 and 1284.**

2. The defendants are to comply with order 11 within the next 7 days.

3. That today's costs be in the cause.

4. Mention for directions on 28.3.2017

9. The consent was adopted as an order of this court.

10. On **28th March, 2017**, the court was informed that the **1st to 4th defendants** had filed their defence and the apposite compliance documents. The court granted all the other defendants and the plaintiff seven days to reply to the 1st and 4th defendants statement and compliance documents within 7 days if they so wished. Parties were directed to come to court for directions on **5th April, 2017.**

11. On **5th April, 2017**, the court was informed that except for the **5th and 6th defendants**, all other parties had complied with order 11 of the Civil Procedure Rules. Miss Mbaikiata representing the Attorney general for the **5th and 6th defendants** asked the court to grant her 3 days to comply with order 11 of the Civil Procedures Rules. Her request was granted.

12. On **31st July, 2017**, Mr. Kiongo, for the **5th and 6th defendants** informed the court that he had filed his memorandum of appearance on the same day. He had, however, not complied with Order 11 of the Civil Procedure Rules contrary to his office's intimation on **5th April, 2017** that the **5th and 6th defendants** would comply with Order 11 of the Civil Procedure Rules within 30 days of **5th April, 2017.**

13. Mr. Kiongo also told the court that there was a pending appeal to the minister. I directed that parties to appear before the court on **31st October, 2017** to clarify the issue concerning an alleged pending appeal to the minister.

14. On **31st October, 2017**, only the plaintiff's advocate came to court. For whatever reason or reasons that they had, the advocates representing the defendants failed or refused to come to court. The plaintiff's **advocate, Mr. Guantai** clarified that there was no appeal pending before the minister. He asked the court to grant the matter a hearing date. Considering that the defendants were in their separate ways delaying the hearing and determination of this suit, I ordered that the **suit be heard on 27th November, 2017.** I also ordered the plaintiff's advocate to serve the hearing date upon the defendants.

15. There is evidence that the defendants were aware of the hearing fixed by this court. In accordance with order 12 Rule 2 (a) of the Civil Procedure Rules, I ordered the hearing of this suit to proceed exparte.

16. PW1, M'Chabari Kinoro, told the court that he was the plaintiff and that he hailed from Kamarandi Sub Location, Kamanyaki Location in Tharaka Nithi County. He asked the court to adopt his witness statement dated **23rd November, 2016** as his evidence in this suit. He also produced the documents contained in his list of documents dated 23rd November, 2016. These documents, as a bundle, were marked as PW1 Exhibit No. 1.

17. In his witness statement, PW1 avers that he inherited land parcel numbers

KAMANYAKI/KAMARANDI/529, 899, 903, 891 and 894 from his father, Kinoro Karigua, who had, in turn, inherited it from his father, PW1's grandfather. He says that the suit land is ancestral land. He explains that land parcel numbers **894, 988, 900 and 903** are adjoining parcels **totalling approximately 50 acres**.

18. PW1 avers that he lives on **land parcel No. 529** and although the various parcels of land form one block, he had, over time, donated several parcels of land to landless relatives, a primary school and a church. He avers that he has occupied the land and has used it **continuously since 1942** when it was **bequeathed to him by his deceased father**. He avers that no one had ever made **any claims on the land since 1942**. He continues to say that the suit land was **adjudicated upon in 2003** when it was subdivided and allocated to the current numbers.

19. PW1 goes onto aver that Isaiah Nkoroi Muriungi, the 1st defendant and 3 other people, by mischief and fraud were allocated some of his land when they colluded with the Ministry of Lands before the adjudication process was completed. As a result, the 1st defendant, Isaiah Nkoroi Murungi, **illegally trespassed/invaded and encroached on his land in 2004**. He, the plaintiff, caused the Assistant Chief for the area to write to him when he was attempting to **put up a house on the land**.

20. The plaintiff in his witness statement asks this court to have his land returned to him and to be awarded damages for the loss he has suffered.

21. Documents, marked as a bundle as **PW1 Exhibit Nos. are listed herebelow:**

1. Letters (sic) to the chief dated 12th March, 2015
2. Official receipt for sale of proceedings
3. Proceedings on Case No. 52/08, 50/08, 55/08
4. Official receipt for land appeal case to the minister dated 9th July, 2009
5. Certificate of official search Kamanyaki/Kamarandi/1280
6. Certificate of official search Kamanyaki/Kamarandi/1281
7. Certificate of official search Kamanyaki/Kamarandi/1282
8. Certificate of official search Kamanyaki/Kamarandi/1283
9. Certificate of official search Kamanyaki/Kamarandi/1284
10. Chief's letter dated 16.12.2004
11. Chief's letter dated 31.05.2010
12. Letter dated 27.04.2010
13. Letter dated 27.3.2015
14. Letter dated 23.04.2015
15. Letter dated 5.3.2015
16. Letter dated 12.03.2015

17. Copy of sketch maps

22. PW2, Peter Muturi Njagi asked the court to adopt his witness statement dated **23rd November, 2016** as his evidence in this suit. In his statement PW2 avers that the plaintiff is a member of the Ndathe sub clan of his Kamurige clan and that he was also his neighbour. He goes on to state that he was the chairman of Kamurige clan during demarcation of its land in **Kamanyaki/Kamarandi Section**. He says that the plaintiff has several large chunks of land and that he was present when the boundaries were being drawn by the clan. He is categorical in his statement that the plaintiff has always owned and utilized the suit land.

23. PW2 states that the defendants never laid any claims upon the suit land during the adjudication process and laconically states that it is only after the plaintiff was allocated his land that the defendants illegally invaded the plaintiff's land with a view to alienating it.

24. PW2, continues to aver in his witness statement that the defendants' father had been allocated land in another area which they left and instead laid claim to the plaintiff's land. He opines that if they had any claim, it should be over their father's land. He laconically and categorically **avers that the defendant had no valid claim over the suit land as it always belonged to the plaintiff.**

25. PW3, Japhet Mugambi Nyaga, asked the court to adopt his witness statement dated **23rd November, 2016** as his evidence in this suit. PW3 avers that he is Chairman of Mwirijia sub-clan of the Kamurige sub-clan and that he was present when the adjudication process took place and that the suit land was allocated to the plaintiff. He goes on to say that the clan and **Njuri-Ncheke** elders physically demarcated the boundaries of the various portions and planted beacons. He avers that the then the adjudication officer, James Njagi, went to the ground in the presence of the chief of the location Japhet Mungatia and confirmed the existence of the plaintiff's land. He states that the defendants never staked any claim to the suit land and never participated in the adjudication process. He was laconical and categorical that the suit land belonged to the plaintiff.

26. PW4, Makindi Kibari, asked the court to adopt his witness statement dated 23rd November, 2016 as his evidence. He avers that he is an **elder of the Kamurige clan** and also a **member of the Njuri Ncheke, the Ameru council of elders.** In his statement he supports the evidence of the other witnesses, PW1, PW2 and PW3 that the suit lands were properly allocated to the plaintiff during the adjudication process. He is categorical that the defendants or any other person did not lay claim upon the plaintiff's land during the adjudication process.

27. PW4 goes on to say that during the adjudication process the Njuri-Ncheke had asked anyone who had not been allocated land and ought to have benefitted from the sharing out of the clan land to present themselves and register them in the clan register by paying Kshs.4,000/= to the clan and give a rum and cooking water in accordance with the clan's culture. He states that the defendants did not take advantage of this window which was open to all claimants.

28. PW4 further goes on to state that during colonial times, there had been a dispute over clan lands which was **resolved by elders taking the "Muuma", a sacred oath** after which clan lands were demarcated and beacons were planted by the elders. He is categorical that the defendants' father or the defendants never made any claim when the "Muuma", oath was taken to protest against encroachment of their land. He takes this as concrete proof that the defendants never had any claim against the plaintiff's land.

29. After closure of the plaintiff's case, **his advocate, Mr. Guantai, told the court** that the **defendants had taken advantage of the plaintiff and colluded with land officers to deprive the plaintiff of his land.** He told the court that it was inconceivable that the parcels claimed by the defendants were all surrounded by the plaintiffs land. He submitted that the availed sketch map showed movements about the parcel numbers. He submitted that parcel No. 899, a small parcel at the top had never existed. **He said that the defendants and the District Lands and Settlement Officer (DLASO), and the District Land Registrar colluded to create fictitious land boundaries and allocated them numbers which had not**

existed previously. He states that the number for parcel No. 894 remained intact and then they **gave numbers 1280 to 1289.** He opined that this was a subdivision on the map and not on the ground. Hence, the existence of new land numbers all surrounded by the plaintiff's land.

30. Mr. Guantai pointed out that there were **inconsistencies between evidence** tendered at the **District Land Dispute Tribunal (LDT)** and what is contained in the **defendants' joint defence.** He pointed out that at the LDT the defendants claimed that parcel No. 894 had belonged to their grandmother whereas in their defence they say that the land was allocated to them after the proper process was followed. He stated that until recently, under Meru Customary Law, women were not supposed to own land as ownership to land had always moved patriachally. He opined that the defendants were being economical with the truth as in the 1930's the defendants' grandmother would not have owned land.

31. Mr. Guantai took issue with the defendants' refusal to accept the plaintiffs offer for all parties to **subject themselves to the "Thenge Oath"** which in **Meru culture is the ultimate arbiter which defines the truth.** He pointed out that this offer had been proffered by the plaintiff in this suit when this matter was being heard at Meru. According to him, this refusal by the defendants to subject themselves to the Thenge Oath, irresistibly led to one conclusion: That the defendants claim on the plaintiff's land had no merit and that the evidence in this suit tilted in favour of the plaintiff. Mr. Guantai also pointed out that the defendants had failed to defend their case.

32. I frame the issues for determination as follows:

1. Has the plaintiff proved or not proved his legitimate ownership of land title numbers **Kamanyaki/Kamarandi/1280, 1281, 1282, 1283 and 1283** and should the plaintiff's ownership be proved, should the District Land Registrar be ordered to take ameliorative action as prayed by the plaintiff in his plaint.

2. Who bears the costs of this suit

33. I have carefully considered the pleadings proffered by the parties in support of their respective assertions. I do note that the defendants, even after being aware of the date this suit was to be heard, refused and/or failed to participate in the hearing proceedings. I do note that earlier on, the defendants' advocate had threatened to cease representing the defendants for their non-cooperation with him. This was on **16th March, 2017.** I also note that the **5th and 6th** defendants never filed a defence.

34. As a result of the non-participation by the defendants during the hearing of this suit, the evidence proffered by the plaintiff and his four witnesses remains uncontroverted. I find that on a balance of probabilities, the plaintiff has proved his case.

35. I find it necessary to point out that the Constitution of Kenya in Article 159 embraces promotion of the principle of alternative forms of dispute resolution "including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms", subject to traditional dispute mechanisms not (a) contravening the Bill of Rights; (b) being repugnant to justice and morality or resulting in outcomes repugnant to justice or morality or; (c) being inconsistent with this constitution or any written law.

36. I opine that the **Meru Thenge oath is a cultural practice that is not inconsistent with the Constitution** or any written law. In the past parties have been allowed by this court to subject themselves to the jurisdiction of Njuri Ncheke elders, with results accepted by the litigants. A court of law can, however, not force parties to subject themselves to the jurisdiction of **Njuri – Ncheke elders.** I opine that it would have been a good move had the defendants subjected themselves to the jurisdiction of the Njuri – Ncheke elders who would have administered the "Thenge" oath. This, however, has not influenced the court in arriving at its decision that the plaintiff has, on a balance of probabilities, proved his case.

37. Judgment is entered for the plaintiff against the defendants jointly and severally in the following terms:

a. A declaration is hereby made that the defendant's invasion and alienation of the land comprised in Title Numbers **KAMANYAKI/KAMARANDI/894** and **899**, from which the defendants have illegally carved out parcel numbers **KAMANYAKI/KAMARANDI/1280, 1281, 1282, 1283 and 1284** is unlawful and the same constitutes trespass and therefore the plaintiff is entitled to damages for the same.

b. An order is hereby issued directing the defendants to jointly and severally vacate the land comprised in Title Numbers **KAMANYAKI/KAMARANDI/894** and **899**, from which the defendants have illegally carved out parcel Numbers **KAMANYAKI/KAMARANDI/1280, 1281, 1283 and 1284** failing which the defendants should be evicted from the said parcels of land.

c. An **order** is hereby issued to the **District Land Registrar, Tharaka South District, Tharaka Nithi County** directing him to **cancel all titles issued to the defendants or any other persons with respect to parcel Numbers KAMANYAKI/KAMARANDI/1280, 1281, 1282, 1283 and 1284.**

d. An **order** is hereby issued **directing the District Land Registrar, Tharaka South, Tharaka Nithi County, to reconsolidate any and all titles issued with respect to parcel Numbers KAMANYAKI/KAMARANDI/1280, 1281, 1283 and 1284 and issue a new title in favour of the plaintiff.**

e. As the plaintiff has not adequately addressed this court with regard to **damages, a nominal sum of Kshs.100,000/= is awarded to the plaintiff.**

f. Costs and interest at court rates are awarded to the plaintiff from the date of delivery of this judgment.

Delivered in open court at Chuka this 21st day of February, 2018 in the presence of:

CA: Ndegwa

Miss Muriithi h/b Guantai for the plaintiff

Elivase Mutegi Kajieta – 4th defendant

P.M. NJOROGE

JUDGE