



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 31 OF 2016

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF L.R NO. KABARE/NYANGATI/5767

BETWEEN

THE SEVENTH DAY ADVENTIST CHURCH (E.A) LTD

Being sued on behalf of KUTUS SDA CHURCH.....1ST PLAINTIFF

REGISTERED TRUSTEES THE PRESBYTERIAN

CHURCH OF EAST AFRICA (Suing on behalf of

PCEA CHURCH KUTUS.....2ND PLAINTIFF

VERSUS

SALOME WAMUTIRA MUKURIA (Being sued

as the Legal Administrator of the Estate of

ELUD MUKURIA KARUIRU Alias

MUKURIA KARUIRU.....1ST DEFENDANT

JAMES NDAMBIRI MUKURIA.....2ND DEFENDANT

SIMON GICHAGUA WACHIONGO.....3RD DEFENDANT

JUDGMENT

By an Originating Summons filed herein on 4th March 2016, the plaintiffs sought the following orders against the defendants:

(a) That the registration of the current owners of land parcel No. KABARE/NYANGATI/5767 be cancelled from the register and the said parcel be registered in the names of the plaintiffs as owners in common with equal shares.

(b) That the plaintiffs be awarded costs of this suit.

The Originating Summons was supported by the affidavits of **PAUL MUASYA** the 1st plaintiff's director and **REV. PETER KANIAH KARIUKI** a trustee of the 2nd plaintiff. In summary, it is the plaintiffs' case that in 1988, they were each shown a ½ acre portion of land on parcel No. KABARE/NYANGATI/42 by the then **MUNICIPAL COUNCIL OF KERUGOYA/KUTUS** who they believed were the owners thereof. That parcel of land was in fact registered in the names of one **MUKURIA KARUIRU** Alias **ELIUD MUKURIA KARUIRU** who died in 2003 and the 1st defendant was appointed as the administratrix of the Estate. The portions occupied by the plaintiffs

are well marked with a fence and are developed and used as a church and none of the defendants has even occupied those portions since 1988 and indeed, the plaintiffs have been in exclusive and un-interrupted occupation thereof. However, the 2nd defendant has acquired the land parcel No. KABARE/NYANGATI/5767 (the suit land) following the sub-division of the original land. He then transferred the suit land to the 3rd defendant which is the portion that is occupied by the plaintiffs.

The defendants separately filed replying affidavits to the Originating Summons.

The 1st defendant **SALOME WAMUTIRA MUKURIA** confirmed that she is the administratrix of the of the Estate of her late husband **ELIUD MUKURIA KARUIRU** (deceased) having been so appointed in **KERUGOYA SUCCESSION CAUSE No. 43 of 2006**. That the deceased was the registered proprietor of land parcel No. KABARE/NYANGATI/42 since 1958 and the 2nd defendant is their son. That in 1978, the then **KIRINYAGA COUNTY COUNCIL** attempted to take over the land and placed a caution thereon which was however removed on 8th June 1998. That at no time did the deceased, who was buried on the land in 2003 give the said land to the plaintiffs. That neither the plaintiffs nor the **KIRINYAGA COUNTY COUNCIL** challenged the **SUCCESSION CAUSE** and so the 1st defendant distributed the Estate. That the 1st defendant was sued by the 2nd defendant and others in **KERUGOYA MAGISTRATE'S COURT CIVIL CASE No. 353 of 2010** for trespass and the plaintiffs fully participated in the suit. That the plaintiffs are therefore trespassers who are using this Court to right an illegality.

The 2nd defendant **JAMES NDAMBIRI MUKURIA** filed a replying affidavit in which he fully endorsed the contents of the 1st defendant's replying affidavit.

The 3rd defendant **SIMON GACHAGUA WACHIONGO** in his replying affidavit deponed, inter alia, that in May 2012, he purchased land parcel No. KABARE/NYANGATI/5767 (the suit land) after conducting due diligence and obtained the title thereto. That all along, he knew the plaintiffs as trespassers on the suit land. Annexed to that affidavit is a copy of a sale agreement between him and the 2nd defendant (annexure **SGW 1**) and a copy of the title deed (annexure **SGW 3**).

The hearing commenced on 10th May 2017 when **CHARLES THEURI KINGATHA** (PW1) who is an elder of the 2nd plaintiff and **JOHN GITHINJI GITAU** (PW2) also an elder of the 1st plaintiff testified on behalf of their respective churches. They re-affirmed the contents of the supporting affidavits sworn by **PAUL MUASYA** and **REV. PETER KANIAH KARIUKI** the 1st and 2nd plaintiffs' director and trustee respectively contents of which I have already referred to at the beginning of this judgment. They also produced their respective documents as documentary exhibits.

SIMON GACHAGUA WACHIONGO (DW 1) and who is the 3rd defendant was the only witness for the defence. He testified that he bought the suit land after carrying out due diligence and obtaining the necessary consent.

Submissions were thereafter filed both by **MR. KAGIO ADVOCATES** for the plaintiffs and **MR. NDUKU ADVOCATES** for the defendants.

I have considered the evidence by both parties and the submissions by counsel.

The plaintiffs' claim to the suit land is based on adverse possession. It is their case that since 1988, each has occupied and used as a church ½ acre of the suit land which was a sub-division of land parcel No. KABARE/NYANGATI/42 and which was allocated to them by the then **MUNICIPAL COUNCIL OF KERUGOYA/KUTUS** although it was registered in the names of the deceased. The defendants' case is that land parcel No. KABARE/NYANGATI/42 was never transferred to the plaintiffs and was lawfully transferred to the 3rd defendant after due diligence.

The following are not really in dispute:

1. That the suit land was a sub-division of land parcel No. KABARE/NYANGATI/42 which was registered in the names of the deceased husband and father to the 1st and 2nd defendants respectively.
2. That the suit land is registered in the names of the 3rd defendant who purchased it from the 2nd defendant at a consideration of Ksh. 500,000 as per the agreement dated 10th May 2012.
3. That the plaintiffs have each been in possession and occupation of ½ acre of the suit land since 1988 which are clearly marked and fenced.
4. That none of the defendants has ever occupied, entered or used the portions occupied by the plaintiffs.

There is therefore only one simple issue to be determined by this Court and that is whether the plaintiffs' occupation of the suit land has been adverse to the 3rd defendant's title as the registered owner.

In order to be entitled to 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 twelve (12) years – **KASUVE VS MWAANI INVESTMENTS LTD & OTHERS 2004 1 K.L.R 184**. As indicated above, it is clear that since 1988, the plaintiffs have occupied their respective ½ acre portions of the suit land which was allocated to them by the then **MUNICIPAL COUNCIL OF KERUGOYA/KUTUS** who the plaintiffs assumed to be the owners thereof. Counsel for the defendants has submitted that the plaintiffs did not call a representative from the **MUNICIPAL COUNCIL OF**

KERUGOYA/KUTUS or the **KIRINYAGA COUNTY GOVERNMENT** to shed light on how they became possessed of the suit land to be able to allocate the same to the plaintiffs and that therefore the plaintiffs' occupation of the suit land is "**nothing other than an irritating act of trespass**". It is true that no representative of the **MUNICIPAL COUNCIL OF KERUGOYA/KUTUS** was called to testify as to how it allocated the suit land to the plaintiffs. However, that fact is not in dispute because the allocation letter is self explanatory. A party need not call a witness to testify on a fact that can be proved by other available evidence. In any case, that allocation is not really in contention and further, a claim on adverse possession is addressed against the registered proprietor of the land in dispute. The presence or otherwise of the **MUNICIPAL COUNCIL OF KERUGOYA/KUTUS** would therefore be of no consequences to the plaintiffs case. And as to the submission that the plaintiffs occupation of the suit land is "**nothing other than an irritating act of trespass**", that is really what the doctrine of adverse possession is all about i.e. the enjoyment of property belonging to another without his consent.

Counsel for the defendants has further submitted that the registration of the 3rd defendant as the proprietor of the suit land is protected by the provisions of **Section 24 and 26 of the Land Registration Act 2012**. That is of course correct. **Section 26 (1) of the Land Registration Act** provides that the certificate of title issued to a purchaser of land upon transfer or transmission is prima facie evidence that the person named therein is the absolute and indefeasible owner thereof. Such title can only be challenged on grounds of fraud or misrepresentation or if acquired illegally, un-procedurally or through a corrupt scheme. Similarly, **Section 25** of the same Act provides that the rights of a registered proprietor of land is subject to:

(a) to the leases, charges and other encumbrances and to the condition and restrictions if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared to Section 28 not to required nothing on the register unless the contrary is expressed in the register".

Counsel for the defendant has submitted, and rightly so, that no evidence has been adduced by the plaintiffs in this case to demonstrate that the 3rd defendant's title to the suit land was obtained through fraud, misrepresentation or other corrupt scheme. I shall revert to that later in this judgment. What is clear however is that even as the 3rd defendant was obtaining title to the suit land, the plaintiffs had been in exclusive, open and un-interrupted possession and occupation of their respective portions since 1988. All this was with the knowledge of the defendants. The plaintiffs interests to the suit land were therefore overriding interests which are recognized and protected by **Section 28 of the Land Registration Act** which provides as follows:

"Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without being noted on the register –

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h) 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 on the other hand provides as follows:

'Title to land may be acquired through:

(a)

(b)

(c)

(d) prescription"

And **Section 38 of the Limitation of Actions Act** upon which the plaintiffs' Originating Summons is premised states that:

"Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those 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"

It is clear from the evidence herein that by the time the 3rd defendant was obtaining the title to the suit land on 2nd August 2012, the plaintiffs

had been in exclusive, open and un-interrupted occupation and possession of their respective portions since 1988 i.e. a period of twenty four (24) years which is well in excess of the statutory period of twelve (12) years that entitles the adverse possessor to claim another person's land. The 3rd defendant's registration as proprietor of the suit land was therefore always subject to the plaintiffs overriding interests. That was the position taken in **MWANGI & ANOTHER VS MWANGI 1986 K.L.R 328** and confirmed by the Court of Appeal in **MACHARIA MAINA & OTHERS VS DAVIDSON NGIRI C.A CIVIL APPEAL No. 6 of 2011 NYERI** (consolidated with **CIVIL APPEAL No. 26 and 27 of 2011**) (2014 e K.L.R).

Counsel for the defendants has also submitted that time for the purposes of adverse possession should be computed from the time land parcel No. KABARE/NYANGATI/5767 came into existence. The law however is that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession. Where the person in possession has already begun and is in the course of acquiring rights under the law on prescription, those rights are overriding interests to which the new registered purchaser's title will be subject – **GITHU VS NDEETE 1984 K.L.R 776**. There is no evidence placed before this Court to demonstrate that the plaintiffs' occupation and possession of the suit land was ever interrupted by the deceased during his life time or by the defendants. There is therefore sufficient and cogent evidence to entitle the plaintiffs to the orders sought in their Originating Summons.

I can now re-visit the submission by counsel for the defendants that no evidence has been adduced by the plaintiffs to demonstrate that the 2nd defendant's title was obtained through fraud, mis-representation or other corrupt means and is therefore protected by the provisions of **Section 25 and 26 of the Land Registration Act**. In that regard, counsel has referred me to the following two cases:

1. **ELIJAH MAKERI NYANGWARA VS STEPHEN ELC CASE No. 609 (B) of 2012 ELDORET (2013 e K.L.R)**
2. **ESTHER NDEGI NJIRU & ANOTHER VS LEONARD GATEI ELC CASE No. 128 of 2011 (2014 e K.L.R)**

In **ELIJAH NYANGWARA** case (supra), the Court found that some of the defendants were not involved in the fraud and left them “***off the hook for want of direct evidence linking them to the fraud***”. In the **ESTHER NJIRU** case (supra) however, a title obtained through fraudulent means was cancelled.

Those two cases of course set out the law on how a title to land may be impeached. However, they do not aid the defendants in this case because of one important reason. At the end of this trial, counsel for the plaintiffs drew my attention to the existence of **KERUGOYA ELC CASE No. 24 of 2012** in which I had delivered a judgment on 28th July 2017. I have therefore taken the liberty to peruse that judgment which infact involved the same land parcel No. KABARE/NYANGATI/42 in which the plaintiff (also a church) filed a suit against some eight (8) defendants claiming, inter alia, that all titles issued pursuant to the sub-division of land parcel No. KABARE/NYANGATI/42 were of no legal consequences. It turned out in the course of the trial in **KERUGOYA ELC No. 24 of 2012** that the deceased had infact surrendered the suit land to the **KERUGOYA KUTUS MUNICIPAL COUNCIL** on 30th December 1976 in exchange for land parcel No. **KIRINYAGA/MARURUMO/161** and yet the administratrix of his Estate and who is the 1st defendant herein had fraudulently sub-divided it and transferred it to the defendants therein notwithstanding the fact that the said land was no longer part of the Estate of the deceased. In my judgment, I made the following finding:

“The suit land having been acquired by KERUGOYA KUTUS MUNICIPAL COUNCIL as far back as 30th December 1976 in exchange for parcel No. KIRINYAGA/MARURUMO/161, it was no longer part of the Estate of the deceased ELIUD MUKURIA KARUIRU and it could not therefore be part of the properties that could be distributed in KERUGOYA SUCCESSION CAUSE No. 43 of 2006”

I then proceeded to state as follows:

“That is clear evidence of fraud and illegality which, under Section 26 (1) of the Land Registration Act, entitles the Court to cancel the resultant sub-divisions and registration obtained by the defendants”

This Court has not been informed if any appeal was filed against that judgment and if so, with what results. Pursuant to the provisions of **Section 44 of the Evidence Act**, this Court is entitled to conclude that the said judgment is conclusive proof that the 2nd defendant could not legally transfer the suit land to the 3rd defendant as he purported to do since it was no longer part of the property of the deceased's Estate having been surrendered to the then **KERUGOYA KUTUS MUNICIPAL COUNCIL** on **30th December 1976**. The transfer of the suit land to the 3rd defendant on 10th May 2012 was, therefore, done illegally, un-procedurally or through a corrupt scheme and can be impeached on those grounds. The 3rd defendant did not, in the circumstances, obtain a legal title to the suit land as submitted by his counsel. The suit land measures 0.40 Ha i.e. one acre. Each plaintiff occupies ½ acre.

Upon consideration of all the evidence herein, I find that the plaintiffs have made out a claim to be registered as owners of the suit land by adverse possession. A claim for adverse possession is against the registered proprietor of the land in dispute and therefore, such an order can only be made against the 3rd defendant.

Ultimately therefore, there shall be judgment for the plaintiffs against the 3rd defendant in the following terms:

1. ***That the registration of the 3rd defendant as owner of land parcel No. KABARE/NYANGATI/5767 be cancelled from the register and the said parcel be registered in the names of the plaintiffs as owners in common with equal shares.***
2. ***The claim against the 1st and 2nd defendants is dismissed.***

3. Each party to meet their own costs.

B.N. OLAO

JUDGE

2ND FEBRUARY, 2018

Judgment delivered, dated and signed in open Court at Kerugoya this 2nd day of February 2018

Mr. Njage for Mr. Nduku for Defendants - present

Ms Kimotho for Mr. Kagio for Plaintiffs - present

1st Plaintiff - present

2nd Plaintiff - present

1st Defendant – absent

2nd Defendant – absent

3rd Defendant – present

Right of appeal explained.

B.N. OLAO

JUDGE

2ND FEBRUARY, 2018