



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 258 OF 2017

FORMERLY MERU ELC. CASE NO. 116 OF 2017

ALVIN MBAE.....1ST PLAINTIFF

A M (THRO' ALVIN MBAE AS NEXT FRIEND)....2ND PLAINTIFF

WILSON MBAABU.....3RD PLAINTIFF

VERSUS

KINYUA MUKATHA.....1ST DEFENDANT

MONICA K. MUGO.....2ND DEFENDANT

ANDERSON NKONGE MUGO.....3RD DEFENDANT

JUDGMENT

1. This is an old case filed way back in the **year 2003**. It has been in the hallowed judicial pipeline for the last **15 years**. This is a situation that veritably deserves deprecation. I put the blame on the litigants themselves: the plaintiffs and the defendants.
2. The suit was given a hearing date on **30th October, 2017** and was to be heard on **24th July, 2017** when the parties without any explanation refused or failed to come to court. The court ordered that the suit be heard on **30th October, 2017**.
3. On **30th October, 2017**, the plaintiff's advocate Mr. Mwiti was in court. Mr. Mark Muriithi, held brief for Mr. M. M. Kioga, the defendant's advocate. He told the court that Mr. Kioga sought an adjournment because he had an engagement at Meru. There was no other explanation.
4. The court ordered hearing of the suit to take place at **10.30am**
5. During the time stipulated for hearing the plaintiff's advocate and his witnesses were in court. **Kinyua Muketha**, the **1st defendant**, and **Monica K.Mugo**, the **2nd defendant** were in court. But as soon as **PW1, Alvin Mbae** was **sworn by Mr. Ndegwa**, the Court Assistant, they **walked out of court**.
6. PW1, the **1st defendant, Alvin Mbae**, adopted his witness statement dated **17th November, 2017** and asserted, that he was claiming Land Parcel Numbers **Mwimbi/Murugi/1715 and 1716**. His evidence was in consonance with his witness statement. PW2 and PW3 gave evidence in support of the plaintiffs which evidence was in congruence with their witness statements.
7. To put matters into perspective the Originating Summons in this suit states as follows:

ORIGINATING SUMMONS

(Under Order XXXV r3 (1 & 2) of the Civil Procedure Act Cap 21, and S. 38 of Cap 22 (limitations of actions Act Laws of Kenya)

Let **Kinyua Muketha, Monica K. Mugo, Anderson Nkonge Mugo** the registered proprietors of land parcel Nos. **Mwimbi/Murugi/1715** and **Mwimbi/Murugi/1716** within **Meru South District** enter appearance within **15 days** of service of these summons, issued upon the application of **Alvin Mbae, A M Thro' Alvin Mbae as next friend, Wilson Mbaabu** who claim to have acquired title under the Limitation

of Actions Act, by Adverse possession since 1973 being the whole of land parcel No. **Mwimbi/Murugi/1715 and Mwimbi/Murugi/1716** measuring **2.85 Ha** or thereabout which land is registered in the names of **Kinyua Muketha, Monica K. Mugo and Anderson Nkonge Mugo**.

FOR THE DETERMINATION OF THE FOLLOWING QUESTIONS

1. Is the said lands (2 portions) measuring 2.85 Hectares?
 2. Are the plaintiffs in possession of the same for over a period of 12 years?
 3. Have the plaintiffs developed the whole of it?
 4. Have the plaintiff thereby acquired title to the said land under the Limitation of Actions Act and the doctrine of Adverse possession?
 5. How can the ownership of this suit land be determined by this Hon. Court?
 6. That the plaintiff be awarded costs of this suit.
8. The Summons is supported by the affidavit of **Alvin Mbae**, the 1st plaintiff sworn on **16th April, 2003** which is in the following form:

I, **ALVIN MBAE of P. O. Box 196, CHOGORIA** do hereby make oath and state as follows:-

1. That I am the 1st applicant herein competent to swear this affidavit.
2. That I have authority to swear this affidavit on behalf of the other plaintiffs and on my own behalf.
3. That the **2nd plaintiff** is a person of unsound mind and she is 3rd plaintiff and myself's mother.
4. That she was born on the suit land in dispute – that is on Mwimbi/Murugi/1715 and **1716** formerly **Mwimbi/Murugi/8**.
5. That she bore us on the said land and we have grown there.
6. That we have been on the land for an uninterrupted period of over 12 years and we have thus acquired the title to the said two portions formerly one portion **Mwimbi/Murugi/8**.
7. That the respondents have never developed the said land nor have they even set foot upon the same.
8. That these two portion's title should be transferred to us by the defendants and the register at the land's office rectified to read our name.
9. That I pray that our originating motion be allowed.
10. That what is deponed herein above is true to the best of my knowledge, belief and understanding.

9. The reply to the Summons is contained in the affidavit of **Kinyua Muketha** sworn on **21st May, 2003** which is in the following form:

“I, Kinyua Muketha of Chogoria Meru, make this affidavit and state as follows:

1. That I am the 1st defendant here, and have authority from other defendants to make this replying affidavit on my own behalf and on behalf of the other defendants herein.
2. That this 1st plaintiff is a vexious litigant who has filed three cases following each other which all do not succeed.
3. The 1st plaintiff is the one who is always instigating others to file the suits, yet these others do not attend the court. He himself – Alvin Mbae does not attend the court.
4. That so far, he has filed two cases before this one being **HC.C.C No. 3 of 2001** and **HC. C.C. No. 204/01**. But they have all been dismissed. He has not yet paid any costs in both cases which might amount to over shs.**200,000/=**.
5. That the plaintiff has not at all state (sic) or indicate (sic) the he had other suits with the defendants before, so he is trying to mislead the court in this matter.
6. The plaintiff does not live on the land he is claiming, and therefore adverse possession cannot arise.

7. That it has been said before in those proceedings that the plaintiff is not known in the family of **Muketha** to be able to claim his land. He (the 1st. plaintiff) is the illegitimate son of one **Shadrack Mutegi**; who has also given him land.

8. That it is not true that the plaintiffs were born on this land or that they have made any development on this land at all.

9. That the claim for land has been proved to be totally bogus and further the cases have been found to be res-judicata and he cannot now file other cases basing on the different purported causes of action.

10. The above statement is true to the best of my knowledge and belief.

10. The plaintiff's advocate filed written submissions and asserted that the plaintiffs had proved their case against the defendants. He was unequivocal that as the defendants had not challenged the plaintiff's evidence, the suit should be decided in favour of the plaintiffs. I agree that that is the normal trajectory in events where defendants fail or refuse to give evidence in rebuttal of evidence given by plaintiffs. However, I find that this suit has elaborated exceptional circumstances.

11. When perusing the pleadings, I have come across two rulings given by the **Honourable Justice Kassanga Mulwa, J**, on **9th May, 2004** at **Meru** and by **Honourable Justice W. K. Tuiyot** on **6th November, 2001** at **Meru**.

12. The **Ruling by Justice Kasanga Mulwa, J**, is reproduced herebelow in full:

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 204 OF 2001

A M (PERSON OF UNSOUND MIND SUING THROUGH)

ALVIN MBAE SHADRACK.....PLAINTIFF

VERSUS

KINYUA MUKENTHA

MONICA K. MUGO

ANDERSON MUGO.....DEFENDANTS

RULING

In this notice of motion the applicant is praying for the suit to be struck out on the grounds that:

- a) The suit is res-judicata
- b) The plaintiff has no locus
- c) The affidavit of verification contains falsehoods
- d) The application is an abuse of the court process

In his affidavit in support the applicant in paragraph (4) depones that **M'Muketha Mburugu (deceased)** had four sons. The 2nd defendant **Monica Mugo** is the widow of his late brother **Gerald Mugo Muketha**. She the (2nd defendant) is the daughter in law of **Muketha Mburugu** and not a granddaughter as it is alleged. The 3rd defendant **Anderson Nkonge Mugo** is the son of **Gerald Mugo** and therefore a **grandson of Muketha Mburugu** and **not a great grandson**. He further explains in paragraph 10 of the affidavit that the parcel No. **Mwimbi/Murugi/8** originally belonged to **M'Mriria Muchena**. Through **Succession No. 2 of 1975** at the Magistrates Court at Chuka filed by **Mercy Nguru**, the land was eventually given to **Charles Muketha Mburugu** after several appeals to the Senior Resident Magistrate court at Meru and by the High Court at Meru in **Civil Appeal No. 106 of 1979**.

The present suit is filed by A M through **Alvin Mbae Shadrack** against **Kinyua Muketha** as the 1st defendant, **Monica Mugo** as the 2nd defendant and **Anderson Mugo** as the 3rd defendant.

The judgment of **Civil Appeal No. 106 of 1969** was annexed to the application. In this appeal this court allowed an **appeal by Charles Muketha** against, **A M** and ordered the rectification of the Register by **removing** the name of **A M** and substituted it with that of the appellant **CHARLES MUKETHA**. **A M** did not appeal against that decision to date. As explained in the affidavit of **Kinyua Muketha** two of the defendants the **third** and the **second** are **sons of Muketha** while the second is a **daughter in law of**

Muketha. These are therefore, persons who derive their right to the land **MWIMBI/MURUGI/8** through **Charles Muketha**. By suing them whether herself directly or through a next friend **amounts to suing Charles Muketha**. It is therefore, not true to say as it is stated in the plaint that **Charles Muketha** had fraudulently transferred the land. Equally it is not true to state as it is stated in paragraph 7 of the plaint that Charles Muketha fraudulently subdivided the land and secretly got the subdivided parcels transferred to the defendants. It looks to me that the plaintiff decided to **revive** the case against the descendants of Charles Muketha by filing a claim whose plaint is composed of untruths. The record of judgment in **High Court Appeal No. 106** is quite clear and leaves no room for doubts as to how the register was rectified. The untruths in the plaint and in the supporting affidavit are therefore, deliberate. Having found that in this suit the plaintiff is the **2nd respondent in HCCC Appeal No. 106 of 1979** and that in that appeal it was the same land in issue as the present suit and that the defendants derive their title to this land through Charles Muketha, I find that the **present suit is Res Judicata** as it had been heard and determined at the appeal stage. This finding is sufficient to dispose of the suit and therefore, I do not find it necessary to go into the other grounds advanced by the applicant.

The application is allowed (sic) the plaint is struck out with costs to the applicant.

Dated and delivered this **9th day of May, 2004 at Meru.**

KASANGA MULWA

JUDGE

13. The **Ruling by Justice W. K. Tuiyot** is also reproduced herebelow

IN THE HIGH COURT OF KENYA AT MERU

H.C.C.C. NO. 3 OF 2001

A M (A person of unsound mind through)

ALVIN MBAE SHADRACK.....PLAINTIFF

VERSUS

KINYUA MUKETHA

MONICA K. MUGO

ANDERSON MUGO.....DEFENDANTS

RULING

The applicant's notice of motion dated **4th March, 2001** is brought under Order L, Order VII r.2 of the Civil Procedure Rules, Section 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking for orders that the applicant be allowed to withdraw the affidavit dated 5th January, 2001 and substitute the same with another one, sworn by the plaintiff on the ground that the original affidavit was deponed by the counsel for the applicant.

The defendants/respondents opposed the applicant's application. The defendants/respondents filed the notice of preliminary objection on the 12th February, 2001 through their counsel Mr. Kioga asking that the plaintiff's entire suit and the application be dismissed on the grounds that the verifying affidavit was sworn by his counsel instead of the plaintiff himself as required by law and that the said affidavit is contrary to the provisions of Order VII r. 2 of the Civil Procedure Rules. I consider that what prompted the plaintiff/applicant to make the application dated 4th March, 2001 was the defendants'/respondents' notice of preliminary objection dated 12th February, 2001. The plaintiff/applicant ought to have made an application for the withdrawal of the entire suit so that he could start afresh. The provisions of Order VII r. 2 and 3 of the Civil Procedure Rules Cap 21 Laws of Kenya is (sic) mandatory and must be complied with by the parties. The plaintiff's/applicant's application dated 4th May, 2000 offends the said provisions of the law and must be struck out. And as provided for by order VII r. 3 of the Civil Procedure Rules Cap 21 Laws of Kenya, I hereby strike out the plaintiff's suit dated 5th January, 2001 with costs to the defendants.

Dated and delivered on this 6th day of November, 2001

W. K. TUIYOT,

JUDGE.

14. In his ruling (op. cit), Justice Kasanga Mulwa was unequivocal that the court in Civil Appeal NO. 106 of 1979, almost 40 years ago, made definitive findings. The Judge did not mince words and said: "Having found in this suit the plaintiff is the 2nd Respondent in **HCCC Appeal NO. 106 of 1979** and that in that appeal it was the same land in issue as the present suit and that the defendants derive their title to this land through Charles Muketha, I find that the present suit is res judicata as it had been heard and determined at the appeal stage. This

finding is sufficient to dispose of the suit and therefore, I do not find it necessary to go into other grounds advanced by the applicant.”

15. Litigation must come to a close at some point in time. I am now writing a judgment concerning a matter a judge of horizontal Jurisdiction decided that it was res judicata the judgment in **High Court Appeal No. 6 of 1979**, almost 40 years ago. The mere addition of another plaintiff does not impeach the finding **made by Justice Kasanga Mulwa, J, on 9th day of May, 2004.**

16. By merely framing a suit as Originating Summons, a litigant cannot be allowed through a circuitous contrivance to move a judge to make a decision which will impeach the decision of another judge who has similar jurisdiction with his. If such conduct is embraced, it would spawn total confusion in the administration of Justice. It would amount to a judge fighting another judge. That is why the appeal process is there. The plaintiffs should have filed an appeal concerning Justice Kasango Mulwa’s ruling that the issues they were raising **were res judicata Meru Civil Appeal No. 106 of 1979.**

17. I find that I have no authority to decide in favour of the plaintiff’s when another court which had horizontal jurisdiction similar to mine had found the issues concerning the suit land as having been heard and determined on their merits. Whether called a petition or an originating summons, I am not persuaded that I can impeach decisions made in **Meru Civil Appeal No. 106 of 1979** and in **Meru High Court Civil Suit No. 204 of 2001.**

18. A studious bystander watching the court doing so would surmise that he is beholding veritable judicial phantasmagoria. A decision made by a Judge seized of concurrent and/or horizontal jurisdiction with another Judge having his decision juxtaposed against that of another Judge of similar status! He would think that the judiciary is a house of babel. I think that this would spawn judicial anarchy and chaos. I opine that the plaintiffs have been involved in a forum shopping misadventure.

19. I hasten to add that the case proffered by the plaintiffs in support of their case, **Harrison Oyari & 588 others (Appellants) AND MERO ORIAMBO & 22 Others (Respondents)** is relevant in its facts and circumstances in as far as it lays down various issues germane to adverse position. Having found this suit unmeritorious, I do not find it necessary to address the issues raised by the Originating Summons.

20. In the circumstances, I issue the following orders:

1. This suit is dismissed.

2. No costs are awarded to the defendants as a sign of the courts deprecation of their conduct in willingly refusing or failing to participate in the hearing of this suit.

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

CA: Ndegwa

Mr. I.C. Mugo h/b Miss Kiome for the plaintiffs

Defendants or advocate absent

P. M. NJORGE,

JUDGE.