



REPUBLIC OF KENYA

IN The ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 119 OF 2017

FORMERLY MERU ELC. 48 OF 2010 (OS)

M'RAMA MITAMBO.....PLAINTIFF

VERSUS

NKONGE RUBARA.....DEFENDANT

JUDGMENT

1. This suit was brought to court by way of Originating Summons which is in the following form:

ORIGINATING SUMMONS

ORDER XXXVI RULE 3D & 3F OF THE CIVIL PROCEDURE RULES

LET NKONGE RUBARA OF C/O KIIRUA LOCATION OF MERU CENTRAL DISTRICT within 15 days after the services (sic) of this summons upon him enter an appearance to this summons of **M'RARAMA MITAMBO** the applicant herein who claim to be and has been in actual possession of **2 Acres** in **LR:MWIMBI/S. MUGUMANGO 565** since **1968** to date by actual occupation and possession and has an overriding interest for determination of the following questions:

1. Whether the applicant has acquired absolute title of approximately **2 acres** out of **LR: MWIMBI/S. MUGUMANGO/565** measuring **approximately 4 acres**.
2. Whether the applicant is entitled to be registered as the absolute proprietor of **LR:MWIMBI/S.MUGUMANGO/565** measuring approximately 4 acres and which (sic) has been in actual possession and occupation **since 1968**.
3. Whether the applicant is entitled to be registered as the proprietor of approximately **2 acres** out of **LR: MWIMBI/S. MUGUMANGO/565 measuring 4 acres**.
4. Whether the respondent had the actual knowledge of the applicant (sic) actual possession and occupation of approximately **2 acres** out of **MWIMBI/S. MUGUMANGO/565 since 1968**.
5. Whether the applicant has an overriding interest of approximately 2 acres out of land parcel **LR: MWIMBI/S. MUGUMANGO/565** measuring approximately **4 acres**.
6. Whether the applicant has acquired absolute ownership of approximately **2 acres** out of land parcel **LR:MWIMBI/S.MUGUMANGO/565** measuring approximately **4 acres**.
7. Whether the respondent is now threatening to forcibly evict the applicant from **LR: MWIMBI/S. MUGUMANGO/565** measuring approximately **4 acres**.
8. Whether the respondent should be ordered to execute all the necessary documents including the application for consent, and transfer forms to effect the transfer of approximately **2 acres** to the applicant from the respondent (sic) parcel of land **LR:MWIMBI/S. MUGUMANGO/565** which is approximately **4 acres**.
9. Whether the applicants are entitled to the cost of this suit.

This summons is supported by the annexed affidavit of **M'RAMA MITAMBO** and other reasons and grounds and evidence to the

(sic) offered at the hearing and the annexed certified copy of the register to parcel of land **LR:MWIMBI/S. MUGUMANGO/565**.

DATED AT CHUKA THIS 6TH DAY OF APRIL, 2010

I.C. MUGO & CO.

ADVOCATES FOR THE APPLICANT.

2. The Originating Summons is supported by the affidavit of the applicant sworn on **6th April, 2010** which states”

“I M’RAMA MITAMBO OF P. O. BOX 463 CHOGORIA in the Republic of Kenya makes oath and states as follows:

1. That I am the applicant herein and hence competent to make and swear this oath.
2. That the parcel of land known as **LR:MWIMBI/S.MUGUMANGO/565** is registered in the name and style of the respondent one **NKONGE RUBARA**. (Annexed and **marked M. M. I** is a certified copy of register.)
3. That I have been in actual occupation and in possession of approximately **2 acres** out of parcel of land **LR: MWIMBI/S. MUGUMANGO/565 since 1968**.
4. That my occupation and or use of the land for all that period has been open and continuous without interruption and force or authority of the respondent.
5. That for the entire period of over 40 years now I have been in actual possession and occupation of the suit land which period is in excess of **12 years** and the respondent has taken no steps to have me evicted from the suit land.
6. That all my neighbours regard me as the owner of approximately **2 acres** out of the suit land **LR: MWIMBI/S.MUGUMANGO/565**.
7. That in view of the foregoing I do claim title of the said approximately **2 acres** out of the aforesaid parcel of land by way of adverse possession.
8. That now the respondent is threatening to evict me from the suit land **LR: MWIMBI/S. MUGUMANGO/565**.
9. That I have extensively developed **2 acres** out of **LR: MWIMBI/S. MUGUMANGO/565** under my occupation and possession and I have therein 20 banana plants, 35 gravelia trees, 3 macadamia trees, 3 avocado trees, several exotic and indigenous trees and terraces with big portions of napier grass and I have been cultivating subsistence crops since 1968 when I occupied and took possession of the suit land.
10. That all which is deponed herein is true to the best of my knowledge, belief and information.

3. The respondent sought to rebut the applicant’s supporting affidavit through his affidavit sworn on **23rd February, 2011**. It states:

“I, Nkonge Rubara of P. O. Box 87, Chogoria hereby make oath and say as follows:-

1. That I am the defendant/respondent herein.
2. That my advocate on record has read and explained to me the contents of the application dated **8th February, 2011** and it is in reply thereto that I swear this affidavit.
3. That it is not true that the plaintiff has been in possession of my land **since 1968**.
4. That the plaintiff is not in possession of the suit land and I have planted maize and bananas thereon which fact can be verified by a visit to the land.
5. That the plaintiff voluntarily vacated the small portion of my land that he was utilizing on **16th September, 2010**.
6. That as I explained in the replying affidavit filed in court on **26th April, 2010** this suit was improperly brought as there is a pending case between us over the same subject matter.
7. That the only person that I had allowed to enter my land was one **MICHAEL NJAGI** who later sued me in **HCCC No. 39 of 1983**.
8. That the said suit was settled and I refunded the entire consideration paid to me by the plaintiff therein and he vacated my land-annexed and marked **“NR1”** is a copy of the consent.

9. That I believe that the application has no merit and ought to be dismissed with costs.

10. That the contents of this affidavit are true to the best of my knowledge, information and belief.

4. PW1 told the court that she was Judith Kangai Nyaga and that she had been substituted for the deceased plaintiff who was her husband. She testified that she and her husband entered the suit land in 1964 and had stayed on the suit land for 48 years until the year 2010 when her occupation had been interrupted after the plaintiff sold the land to someone else.

5. During cross-examination, PW1 told the court that the suit land was bought by her and her husband. She testified that they were buying 2 acres but the defendant had sold some of the land and, therefore, she was only claiming 2 acres. She told the court that each acre was costing Kshs.400/=. She said that she did not know when the suit land was registered in the name of the defendant. She gave conflicting testimony, at one time saying that the suit land was bought in 1964 and at another time saying that it was bought in 1966.

6. The plaintiff gave veritably garbled evidence as she also told the court that the suit land was, after she was evicted, sold to one Michael, who later died: She also told the court that Michael, whom she said bought the suit land, moved into the land in 1977. If she and her husband had moved into the land in 1966 as she had testified then the said Michael had interrupted her occupation of the suit land after she and her husband had been in occupation for only 11 years short of the period for a claim for adverse possession to accrue or to mature. And yet in her pleadings, she was categorical that the defendant had evicted her from the suit land on 17th September, 2010! PW1 was not re-examined by the plaintiff's advocate.

7. **PW2, Celia Muthoni** told the court that she was the daughter of PW1 and the deceased plaintiff. She asked the court to adopt her witness statement filed on **12th April, 2016** as her evidence in this suit.

8. During cross-examination by advocate Kiogora Arithi, the defendant's advocate, she testified that her family used to cultivate the suit land in the 1960's when she was a small child. She told the court that her family did not have a house on the suit land and that they only used to cultivate the land. She further proffered that they lived on another piece of land where the family buried her father, the plaintiff.

9. Contrary to PW1's evidence that she and her husband were buying 4 acres, PW2 told the court that they were buying 5 acres. She, however, clarified that the evidence she was giving relied on what she had heard from her parents. She also told the court, during cross-examination, that she did not know when her parents were evicted from the suit land. She was unequivocal that she stayed in the suit land from 1968 to 1980 when she got married. And then curiously, she changed tack and said that she left the suit land in 1978. The plaintiff's advocate did not re-examine her.

10. **PW3, Elias Muriuki Muchiri**, told the court that he wrote a witness statement in the advocates office and he asked the court to adopt this statement as his evidence in this suit. The statement was undated.

11. During cross-examination by the defendant's advocate, he told the court that he did not know the number of the suit land. He further told the court that he did not know when he was last on the suit land. This assertion notwithstanding, he told the court that the plaintiff was still in occupation of the land.

12. Any probative value that could have been gleaned from PW3's evidence was fatally debunked by his evidence that he did not know the contents of his witness which he had signed in the office of the plaintiff's advocate. Once again, Mr. Kibiti, the plaintiff's advocate opted not to cross examine this witness.

13. **DW1, Nkonge Rubara**, the defendant, told the court that he wished to rely on his witness statement dated **10th January, 2017** as his evidence in this suit. He was categorical that he never sold any land to the plaintiff. He testified that the only person he had allowed to enter the suit land was one Michael Njagi. He produced a decree showing that he had **refunded Kshs. 13,000/=** to Michael Njagi to whom he had agreed to sell 3 acres of land, out of the suit land, **in 1969**.

14. In his witness statement he is unequivocal that the plaintiff was never in occupation of the suit land although he had, at one time around 1978 attempted to trespass on the suit land by starting to cultivate a small portion thereof but nevertheless he chased him out of the land. The cross-examination by the plaintiff's advocate did not ruffle DW1's evidence.

15. **DW2, Boniface Murithi**, asked the court to adopt his witness statement dated **10th January, 2017** as his evidence in this suit. In his witness statement he tells the court that the plaintiff was his uncle and that up to the year 2007, when his father, the defendants brother died, his family cultivated the suit land. He avers that after his father **Ephantus M'Rarama Mitambo** died the plaintiff, for a second time tried to trespass upon the land, and as had happened in 1978 when he was first chased away, he was thrown out of the suit land. DW2 was categorical that he was unaware of any sale of land by the defendant to the plaintiff, **Ephantus M'Rarama Mitambo**. He told the court in his witness statement that the plaintiff's land was parcel **NO. SOUTH MUGUMANGO/926** where he was buried.

16. I find that DW2's evidence is congruent to DW1's evidence. I opine that the integrity of DW2's evidence was not impeached by the cross-examination conducted by the plaintiff's advocate.

17. **DW3, M'Arimi M'Athara** asked the court to adopt his witness statement dated **10th January, 2017**. By and large his averments support DW1's evidence. He avers that the defendant was registered as owner of his land in 1970 and that a title deed was issued in 1973. He goes on to say that the defendant in the 1970's after he was registered as the owner of the suit land went to work at **Ngushishi in the then Timau Division**. It was then that the plaintiff in the company of 7 people attempted to trespass upon the suit land but he was chased away. He avers that he was the chairman of his clan when the suit land was adjudicated. I opine that cross-examination by the plaintiff's advocate did not ruffle DW3's evidence.

18. I frame the only issue for determination to be if or if not the plaintiff has proved that he is entitled to be declared owner of 2 acres of land out of the suit land.
19. I have carefully considered the pleadings filed by the parties, their oral evidence, their submissions and the authorities proffered in support of their diametrically incongruent assertions.
20. The case of *Peter Mbiri Michuki (Appellant) Versus Samuel Mugo Michuki (Respondent – Nyeri Civil Appeal No. 22 of 2013* is good law and binding to this court in the correct circumstances. I however find that the circumstances of this case bear no similarity to the facts of that case in that, by and large, the plaintiff and her witnesses have proffered contradictory and garbled evidence.
21. The case of *Masiaya Ole Oloije (Appellant) and William Simintei & 2 others (Respondents)* [Nairobi C.A. No. 235 of 2011] is good law and binds this court in proper circumstances. The plaintiff's evidence clearly indicates that, if there was an agreement for sale of land between the plaintiff and the defendant, that dispute should have been canvassed in another forum. I also agree that contrary to what should be canvassed through Originating Summons, the issues raised in this suit were not simple. The *Court of Appeal in Kenya commercial Bank versus Oisebe [1982] KLR 296 at page 63 opined as follows:*
- “It is well established that the Originating Summons procedure is available only in a limited number of cases specially provided and the procedure is designed to deal with simple matters which may be decided by the court without the expense of bringing an action and was not intended for determination of matters which involved a serious question on contested facts.”**
22. Nevertheless, I find that the plaintiff has not proved her case against the defendant. She contradicted herself regarding when she and her husband entered the suit land. Her claim that she and her husband had bought the suit land was not proved as she gave different dates. Her attempt to produce evidence in the form of an illegible handwritten copy of a document written in Kimeru language was veritably unsuccessful. In any case, the purchase would only have been relevant to prove that the time from which adverse possession accrued, started from the date such an agreement for sale was unilaterally abrogated by the defendant.
23. Whereas PW1 was unequivocal that her family had a house on the suit land, PW2, her daughter, was categorical that they only cultivated the suit land. In any case, PW2, owned up that the evidence she was giving was based on what she had been told by her parents. In cross-examination, she agreed that her family lived on the land where her father had been buried.
24. PW3's evidence had no probative value. He told the court that he was only given a document by the plaintiff's advocate which he merely signed without knowing its contents.
25. Perhaps some of the issues which inimically convoluted the evidence proffered by the plaintiff and his witnesses would have been clarified had the plaintiff's advocate not opted not to re-examine PW1, PW2 and PW3.
26. I find that the evidence proffered by the defendant and his witnesses was credible.
27. Adverse possession must be proved through cogent evidence. I find that the plaintiff has not proved her claim to ownership, through the doctrine of adverse possession, of 2 acres out of the suit land, namely, **L.R. NO. MWIMBI/S. MUGUMANGO/565.**
28. In the circumstances, this suit is dismissed.
29. Costs shall follow the event and are awarded to the defendant.

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

CA: Ndegwa

Miss Wanjohi present for the defendant

Plaintiff or advocate absent

P.M. NJOROGE

JUDGE