



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO 14 OF 2017 (OS)

FORMERLY MERU ELC CASE NO.18 OF 2016(OS)

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 6 OF 2012

AND

IN THE MATTER OF LAND ACT NO. 3 OF 2012

AND

IN THE MATTER OF THE LIMITATION OF ACTION ACT CAP 22

LAWS OF KENYA SECTION 7 AND 38

AND

IN THE MATTER OF AN APPLICATION BY NJOKA KATHUNI, ROSE KAGENDO

AND AILEEN MARUTA THAT THEY BE DECLARED THE PROPRIETORS OF

LAND PARCELS MAGUMONI/MWONGE/1909, MAGUMONI/MWONGE/1910 AND

MAGUMONI/MWONGE/1911 BY VIRTUAL OF OPERATION OF LAW (ADVERSE POSSESSION)

AND IN THE MATTER OF ORDER 37 RULE 7(1, 2, 3)

AND IN THE MATTER OF AN APPLICATION BY NJOKA KATHUNI, ROSE KEGENDO AND

**AILEEN MARUTA THAT THEY BE REGISTERED AS PROPRIETORS OF LAND PARCELS MAGUMONI/MWONGE/1909,
MAGUMONI/MWONGE/1910 AND LR. MAGUMONI/MWONGE/1911**

BETWEEN

NJOKA KATHUNI.....1ST APPLICANT

ROSE KAGENDO.....2ND APPLICANT

AILEEN MARUTA.....3RD APPLICANT

VERSUS

MBAKA KATHUNI.....1ST RESPONDENT

JUSTINE M. MUTINDWA.....2ND RESPONDENT

CASTY KANYUA JOSEPH.....3RD RESPONDENT

JUDGMENT

1. This suit was filed in court on **12th April, 2016** by way of Originating Summons in the following terms:

ORIGINATING SUMMONS

Let MBACKA KATHUNI, JUSTINE M. MUTINDWA AND CASTY KANYUA JOSEPH OF MWONGE LOCATION OF MERU SOUTH SUB COUNTY IN THARAKA NITHI COUNTY within 15 days of service of this summons upon them enter an appearance to this summons of NJOKA KATHUNI, ROSE KAGENDO AND AILEEN MARUTA the applicants herein who claim to be and have been in actual possession and occupation of all that which is contained in LR. MAGUMONI/MWONGE/1909, MAGUMONI/MWONGE/1910 AND MAGUMONI/MWONGE/1911 (sub divisions of LR. MAGUMONI/MWONGE/194) from 1967 and have an overriding interest thereon and for the determination of the following question.

1. Whether Mbaka Kathuni the 1st respondent was the original registered proprietor of LR. MAGUMONI/MWONGE/194 (as it was then) since 1967.
2. Whether the 1st respondent is currently the registered proprietor of LR. MAGUMONI/MWONGE/1911 A SUB DIVISION OF LR. MAGUMONI/MWONGE/194?
3. Whether the 2nd respondent is currently the registered proprietor of LR. MAGUMONI/MWONGE/1909 a subdivision of LR. MAGUMONI/MWONGE/194?
4. Whether the 3rd respondent is currently the registered proprietor of LR. MAGUMONI/MWONGE/1910 a sub division of LR. MAGUMONI/MWONGE/194?
5. Whether the 1st respondent has ever lived, occupied or made use of LR. MAGUMONI/MWONGE/1909, LR. MAGUMONI/MWONGE/1910 and LR. MAGUMONI/MWONGE/1911 a subdivision of LR. MAGUMONI/MWONGE/194?
6. Whether the applicants have been in actual possession, occupation and in use of LR. MAGUMONI/MWONGE/1909, MAGUMONI/MWONGE/1910 and MAGUMONI/MWONGE/1911 subdivision of MAGUMONI/MWONGE/194 since 1967?
7. Whether the 1st respondent was aware of the applicants occupation, possession and use of LR. MAGUMONI/MWONGE/1909, MAGUMONI/MWONGE/1910 and MAGUMONI/MWONGE/1911 without the 1st respondent leave, permission or authority since 1967.
8. Whether the applicants have extensively developed LR. MAGUMONI/MWONGE/1909, MAGUMONI/MWONGE/1910 and MAGUMONI/MWONGE/1911 subdivision of MAGUMONI/MWONGE/194 and have therein 3000 tea bushes, 100 banana plants, 10 ovacado trees, 3 macadamia trees, 4 mango trees, 100 yams plants, 35 graverrier trees, nappier grass and 3 residential houses.
9. Whether the 1st respondent subdivided secretly LR. MAGUMONI/MWONGE/194 into LR. MAGUMONI/MWONGE/1909, 1910 and 1911 and transferred LR. MAGUMONI/MWONGE/1910 to the 2nd respondent and LR. MAGUMONI/MWONGE/1911 to the 3rd respondent and whether this act by the 1st applicant defeated the applicants overriding interest over LR. MAGUMONI/MWONGE/1909, MAGUMONI/MWONGE/1910 and 1911 the subdivision of MAGUMONI/MWONGE/194.
10. Whether the 1st respondent has ever given notice to the applicants to vacate or give vacant possession in any manner of LR. MAGUMONI/MWONGE/1909, 1910 and 1911 a subdivision of LR. MAGUMONI/MWONGE/194 as it was then.
11. Whether the 2nd and 3rd respondents were aware and inquired when purchasing land from the 1st respondent the status of the applicants on the land given that the 1st respondent was not occupying the land and the applicants were in full occupation of LR. MAGUMONI/MWONGE/1909 and MAGUMONI/MWONGE/1910 subdivision of LR. MAGUMONI/MWONGE/194.
12. Whether the applicants have acquired an overriding interest over and against the respondents interest on all (sic) which is contained in LR.MAGUMONI/MWONGE/1909, 1910 and 1911 subdivisions of MAGUMONI/MWONGE/194.
13. Whether the applicants have acquired absolute title to 2.74 acres comprised in LR. MAGUMONI/MWONGE/1909, 1910 and 1911 subdivisions of LR. MAGUMONI/MWONGE/194.
14. Whether the applicants are entitled to be registered as the absolute proprietors of approximately 2.74 acres comprised in LR. MAGUMONI/MWONGE/1909, 1910 and 1911 a subdivisions of LR. MAGUMONI/MWONGE/194.
15. Whether the applicants should be registered as absolute proprietors of approximately 2.74 acres of LR. MAGUMONI/MWONGE/1909, 1910 and 1911 subdivision of LR. MAGUMONI/MWONGE/194.
16. Whether the respondents should be ordered to execute all the necessary documents to effect transfer including necessary application for consent and transfer of approximately 2.74 acres comprised of LR. MAGUMONI/MWONGE/1909, 1910 and 1911 subdivisions of LR. MAGUMONI/MWONGE/194.

17. Whether the respondents are now threatening to evict the applicants from approximately 2.74 acres comprised of MAGUMONI/MWONGE/1909, MAGUMONI/MWONGE/1910 and 1911, subdivision of LR. MAGUMONI/MWONGE/194.

18. Whether the applicants are entitled to the costs of this suit.

This summons is supported by the annexed affidavit of NJOKA KATHUNI and other reasons and grounds and evidence to be offered at the hearing hereof and the annexed certified copies of copy of registers of LR. MAGUMONI/MWONGE/1909, MAGUMONI/MWONGE/1910, MAGUMONI/MWONGE/1911 and MAGUMONI/MWONGE/194.

DATED AT CHUKA THIS 7TH DAY OF APRIL, 2017

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IC MUGO & CO. ADVOCATES FOR THE APPLICANTS

2. The suit was heard orally on 26th February, 2018.

3. PW1, told the court that he prayed that the 1st respondent be ordered to transfer Land Parcel No. MAGUMONI/MWONGE/1911 to him. He claimed that the suit land was part of ancestral land. He feared that if this parcel of land was not transferred to him, the 1st respondent would sell it as he had sold other parcels arising out of the subdivision of the original parcel NO. MAGUMONI/MWONGE/194.

4. PW1 told the court he relied on the facts averred in the Originating Summons and on his supporting affidavit sworn on 7th April, 2016.

5. PW2, Rose Kagendo, told the court that she supported PW1's claim. She said that PW1 and the 1st respondent were biological brothers and that she and the 3rd applicant were their sisters.

6. PW3 told the court that she wanted the 1st respondent to transfer parcel No. MAGUMONI/MWONGE/1911 to the 1st applicant.

7. DW1 told the court that he was willing to transfer parcel No. MAGUMONI/MWONGE/1911 TO Njoka Kathuni, the 1st applicant. He said that he was his younger brother and that in Meru custom, he considered him a son. BUT he wanted him to recognize his cultural status as the head of their family by slaughtering a small goat worth Kshs.3,000/= which they would eat together to cement their cultural bonds.

8. PW1, told the court that he would pay obeisance to his brother's wishes and that he would either arrange for a goat to be slaughtered in accordance with his brother's wishes or he would give him the sum of Kshs. Three thousand shillings (Kshs.3,000/=) before the 13th of March, 2018.

9. I find that this suit has been compromised. Consequently, I do not find it necessary to answer the questions framed by the Originating Summons.

10. Article 159 of the Constitution allows this court to embrace traditional dispute resolution mechanisms which do not:

- a. contravene the Bill of Rights;
- b. amount to being repugnant to justice and morality or whose results spawn outcomes that are repugnant to justice or morality; or
- c. amount to being inconsistent with the Constitution or any written law.

11. The spirit envisaged by Article 159 (2) (C) of the Constitution is embraced by Section 20 of the Environment and Land Court Act.

12. I find that giving a goat or a monetary equivalent to DW1 is in consonance with the provisions of Article 159 of the Constitution. It is not repugnant to justice and morality and is not inconsistent with the Constitution or any written law.

13. Subject to the 1st applicant slaughtering a goat in honour of the 1st respondent, his elder brother, OR paying him a sum of Kshs.3,000/= on or before the 13th day of March, 2018, Judgment is entered for the 1st applicant in the following terms:

a. The 1st Respondent, MBAKA KATHUNI, will transfer land parcel No. MAGUMONI/MWONGE/1911 to NJOKA KATHUNI, the 1st Applicant failing which the Executive Officer of this court is directed to execute all documents necessary to effectuate implementation of this order.

b. Inhibition orders issued by this court against Land parcel numbers MAGUMONI/MWONGE/1909, MAGUMONI/MWONGE/1910 and MAGUMONI/MWONGE/1911 are hereby set aside to ease implementation of the orders issued herein.

c. As the Applicants and the Respondents are siblings, and to promote harmony in their family, parties shall bear their own costs.

d. It is so ordered.

Delivered in open court at Chuka this 13th day of March, 2018 in the presence of:

CA: Ndegwa

Njoka Kathuni – 1st Applicant

Mbaka Kathuni – 1st Respondent

P.M. NJORGE

JUDGE