



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MILIMANI**

**ELC NO. 884 of 2013**

**WANYIRI KIHORO & ANOTHER** *Suing as Administrators of estate of*

**Dr Wanjiru Kihoro).....PLAINTIFFS**

**=VERSUS=**

**HON. ATTORNEY GENERAL & 3 OTHERS.....DEFENDANTS**

**JUDGEMENT.**

1. The plaintiffs are the administrators of the estate of the late Dr Wanjiru Kihoro (deceased) who was the registered owner of LR.No Dagoretti/Uthiru/T.382 (suit property). The suit property was bought from one Ndibo Nthenge on 22<sup>nd</sup> January 1982. The vendor was registered as owner of the suit property on 9<sup>th</sup> October 1981 and was issued with title on 22<sup>nd</sup> October 1981. The suit property was transferred to the deceased on 31<sup>st</sup> March 1983.

2. The Plaintiffs brought this suit against the defendants claiming the following reliefs:-

***a. Judgement against the defendants jointly and severally and requisite orders for eviction and removal of the trespassers' goods and property.***

***b. Orders for the removal of the restriction and caution placed on the property by the second and third defendants respectively and allow the transmission of the property.***

***c. Orders for payment of general compensation to the plaintiffs, in respect of loss of use, rents and mesne profits from the property and apportionment thereof among the defendants.***

***d. An award of exemplary damages against the first, second and third defendants for cynical non-observance of clear statute and case law.***

***e. Interest on any award until payment in full.***

***f. Costs of this suit.***

3. The third and fourth defendants filed a defence and raised a counter claim in which they contend that the third defendant has acquired title to the suit property through adverse possession and that the title in respect of the suit property should be registered in the name of the third defendant.

4. The sale agreement for the purchase of the suit property was signed by the first plaintiff who did so on his own behalf and on behalf of the deceased who was in the United Kingdom. The first Plaintiff later joined the deceased in UK. In 1983, the deceased came back to Kenya whereby she completed the sale. As the first plaintiff was away in UK, the deceased made a statutory declaration that she was being registered as owner of the suit property which she was holding in trust for her husband the first plaintiff. The suit property was then registered in the name of the deceased who then returned back to the UK after she left someone to take care of the suit property.

5. The deceased came back to Kenya in 1986 and went back to UK in 1987. The first plaintiff came back to Kenya in 1986. He was put in detention where he remained until 1989. When he came out of detention, he instructed the firm of Murimi & Co Advocates to follow up the issue of the suit property. In 1990, a demand letter was addressed to the third defendant in respect of the suit property on behalf of the deceased.

6. On 4<sup>th</sup> January 2006 a restriction was placed on the title to the suit property at the instance of the second defendant. On 3<sup>rd</sup> March 2006 the third defendant cautioned the suit property. After the demise of the deceased, the process of succession was undertaken. After confirmation of grant, the suit property was given to the first plaintiff. The first plaintiff has made numerous attempts to have the restriction and caution removed in vain. This is what prompted the plaintiffs to file this suit against the defendants.

7. Though the first defendant filed a defence to the plaintiffs claim, they did not call any evidence in support of their case.

8. The second defendant called Stephen Ng'ang'a Kiiru the sub-county administrator as its witness. This witness narrated the procedure used to allocate land to an individual or institution. He stated that according to the records, the suit property was allocated to Ndibo Nthenge by way of rectification which was un-procedural. The suit property had been allocated to the third defendant in 1974 and there was compliance with the procedure which was required then. He stated that as at the time the suit property was being transferred to the deceased, there were temporary structures on the ground which had been put up by the third defendant. A permanent church was thereafter constructed on the suit property.

9. The third and fourth defendants called Beatrice Wanjiku Mugo as their witness. Beatrice Wanjiku Mugo is an ordained church elder of the third defendant. She has been a church member since the 70's. In 1974, the church approached the then area councillor to assist them look for a plot. She was then attending Kinoo Church. The councillor advised them to write a letter. They wrote a letter to Kiambu County Council. The necessary meeting of the relevant committee of the council was convened whereby they were allocated the suit property in 1974.

10. The church moved to the suit property where they put up temporary structures. Arrangements were made to raise funds through harambees. In one such harambee, the then Attorney General Charles Njonjo attended. There was ground breaking ceremony where a permanent church was put up. The first time the third defendant became aware of the deceased's claim to the suit property was in 1990, when the third defendant received a demand letter from her advocates. As at the time of this demand, the church had been in the suit property for 16 years.

11. The third and fourth defendants contend that neither the first plaintiff nor the deceased had ever taken possession of the suit property and that the deceased never visited the suit property before she purchased the same.

12. I have considered the evidence adduced by the plaintiff as well as that of the second, third and fourth defendants. I have also considered the submissions by the plaintiffs as well as those of the third and fourth defendants. The plaintiffs and the third and fourth defendants filed their separate list of issues. I have looked at the separate lists and the following issues can be singled out for determination.

***1. Whether there is misjoinder of parties.***

***2. Whether the deceased had actual or constructive notice that the third defendant was in occupation of the suit property.***

***3. Whether the deceased was a bonafide purchaser of the suit property and if so whether Ndibo Nthenge had a good title capable of being passed to the deceased.***

***4. Whether the third defendant was the lawful allottee of the suit property.***

***5. Was there basis for registration of restriction and caution against the title to the suit property?.***

***6. Is the third defendant entitled to registration of the suit property through adverse possession?.***

***7. Are the plaintiffs and third and fourth defendants entitled to the prayers in the plaint and counter-claim respectively?.***

***8. Who is to bear the costs of the suit and counterclaim?.***

**Whether there is misjoinder of parties.**

13. The third and fourth defendants are contenting that they should not have been sued in those capacities and that the third defendant has no capacity to be sued and that there is no cause of action against the fourth defendant. To this extent, they argue that there is misjoinder of parties. The plaintiffs in response have argued in their submissions that if there was an issue of misjoinder, then the defendant should not have mounted a counter claim because if there is no capacity to sue, it follows that there is also no capacity to be sued. The plaintiffs also argue that they sued the fourth defendant in order to be safe in case of execution of any judgement in their favour.

14. The third defendant was given what they call a letter of allotment in that capacity. They have also raised a counter claim in that capacity. If there is any misjoinder, then that does not matter as it will not defeat the plaintiff's suit. Order 1 Rule 9 of the Civil Procedure Rules provides as follows:-

***“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”***

15. The parties before me are the ones who have come seeking determination of the issues placed before me. I will therefore not be bogged down by the issue of misjoinder or non-joinder of parties.

**Whether the deceased had actual or constructive notice that the third defendant was in occupation of the suit property.**

16. The evidence on record shows that the deceased and the first plaintiff who was her husband had intended to purchase the suit property jointly. As at the time of signing the sale agreement, it happened that the deceased had gone to the UK. The first plaintiff had to sign the agreement on his own behalf and on behalf of the deceased. Though the third defendant had been offered the suit property by the then County council of Kiambu in 1974, evidence on record shows that as later as November 1976, they had not been shown the boundaries of the suit property. This is clear from letter dated 23<sup>rd</sup> November 1976 from PCEA general assembly offices which was referring to the letter of 27<sup>th</sup> December 1974 which the third defendant refers to as the letter of allotment.

17. There is no evidence whether the third defendant responded to the letter from their head office. It is therefore not true when the third defendant claims that the church took possession of the suit property in 1974. The plaintiffs evidence is that when the property was purchased there was no one in possession and it is not possible that the first plaintiff and the deceased who were learned would have risked purchasing a property which was occupied.

18. It is apparent that when the third defendant was allocated the suit property, they merely forwarded the letter to their headquarters and never bothered to make a follow up so that they could be issued with a letter of allotment to enable them to process title documents. This letter was found in the file at the headquarters prompting the letter of 23<sup>rd</sup> November 1976. There is no evidence at all that there was a temporary church on the suit property. There is no doubt that harambees were conducted for the construction of the church. The church was constructed later on and was opened in 2000. If the photographs annexed to the third and fourth defendant's documents are anything to go by, a harambee for construction of the church was conducted by Charles Njonjo on 1<sup>st</sup> November 1981. By this time the suit property was in the name Ndibo Nthenge. In 1983 when the church was under construction, the deceased had already had the title registered in her name. The third and fourth defendants initially availed documents which had been falsified. They obtained a green card showing that the title to the property had been issued on 21<sup>st</sup> March 1983 which was not the case. There was even another falsified document showing that the suit property had been registered in the name of the Presbyterian Foundation something which was not true. If this could happen, I do not see what could prevent the same person from lying as they did that there was a temporary church structure on the suit property from 1974. I therefore find that there was no temporary structure of a church when the suit property was purchased.

**Whether the deceased was a bonafide purchaser of the suit property and if so whether Ndibo Nthenge had good title capable of being passed to the deceased.**

19. The suit property was registered under the Registered Land Act Cap 300 (now repealed). Section 39(1) of the repealed Act provided as follows:-

***“ No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned-***

***a. to inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor was registered; or***

***b. to see to the application of any consideration or any part thereof”***

20. Section 39(1) protected the deceased from making any inquiries as to how Mr Ndibo Nthenge acquired his title. The deceased and the first plaintiff had been satisfied that the suit property was vacant when they purchased it. The same had been registered in the name of the vendor Mr Ndibo Nthenge. The deceased having become the registered owner, her proprietary rights were protected by Section 27 of the repealed Act while 28 of the same Act provided that those rights could not be challenged except in accordance with the Act. This then calls into play the provisions of section 143(1) which states as follows:-

***“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.***

***(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”.***

21. The second, third and fourth defendant have made generalized allegations of fraud against Ndibo Nthenge. They claim that Ndibo Nthenge could not have been registered as proprietor of the suit land by way of rectification of the register. They therefore argue that Mr Ndibo Nthenge obtained his title fraudulently and therefore had no good title to pass to the deceased. I have already pointed out that the deceased bought the suit property from Ndibo Nthenge who was a registered proprietor. She was not under any obligation to know how Ndibo Nthenge obtained the title. If there was any reason to believe that Ndibo Nthenge acquired his title fraudulently, nothing would have prevented the second, third or even fourth defendants from moving to court accordingly and have his title annulled. There is no evidence that the deceased was involved in whatever fraud which the second, third and fourth are attributing to Ndibo Nthenge.

22. It cannot therefore be said without evidence that Ndibo Nthenge's title was not good capable to being passed to the deceased. The third and fourth defendants have cited the case of **Josephat Muthui Mwangi Vs Chief Land Registrar & 2 Others (2015) eKLR** in which Justice Munyao held that even though the second defendant who had purchased land from the third defendant was innocent purchaser, it could not be allowed to keep titles which had been obtained illegally. In that case fraud on the part of the third defendant had been established. The third defendant had obtained a grant of letters of administration on the pretext that the plaintiff had died when it was not the case. The plaintiff was all along alive. When the properties were transferred to the third defendant, she sold the same to the second defendant. The facts in the instant case are quite different in that there is no fraud which has been established as against Mr Ndibo Nthenge. What we

have are mere allegations which are not substantiated.

23. The second, third and fourth defendants argue that as the register shows that Mr Ndibo Nthenge was registered by rectification of register, then that was fraudulent as section 142 of the repealed Act provided for instances where rectification of register can be done. Section 142 (1) provided as follows:-

***“The Registrar may rectify the register or any instrument presented for registration in the following cases - (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor; (b) in any case and at any time with the consent of all persons interested;***

24. The plaintiff testified that Ndibo Nthenge had exchanged the suit property with a portion of his land in Ndumbu-ine where the county council of Kiambu put up a cattle dip. This evidence was not challenged. The witness who testified on behalf of the second defendant stated that he came to office in particular the section dealing with land records in 1981; that he did not have any records relating to the transaction touching on the suit property. This being the case, there is no evidence to show that rectification was not done with the consent of the parties concerned. The Attorney General who was sued on behalf of the registrar did not call any evidence from the lands office to shed light on how rectification was done. In the absence of such crucial evidence there is no basis upon which the court can hold otherwise than the due process was followed. The parties affected by the transaction were the county council of Kiambu who were the successors of Native Land Trust Board. The third defendant's interests had not reached a level where they would have been consulted by the Registrar as they did not even have a letter of allotment. To this extent, the decision of Justice Okong'o in **County Government of Migori Vs The Registered Trustees of catholic Diocese of Homabay & 2 others (2015) eKLR** is distinguishable. This is the case with **Republic Vs The Land Registrar Kisii & another Ex-parte Alloys Mataya Mosei (2014)eKLR** where Justice Okong'o declined to issue orders of mandamus compelling the Land Registrar Kisii to rectify the register as that would have affected the interest of the interested party which was also claiming title to the same property and there was a pending litigation as to who was the owner of the disputed property which had two titles. I therefore find that the deceased was a bonafide purchaser who obtained a good title from Ndibo Nthenge.

***Whether the third defendant was the lawful allottee of the property.***

25. The third defendant had just been allocated the suit property. The process was never followed through as required by the repealed Local Government Act. The allocation of the suit property was supposed to be communicated to the minister concerned with Local authorities who would have then moved the process forward to the commissioner of lands who would have issued an allotment letter which then would have enabled the third defendant to be registered as owner of the suit property. As this process was not followed, the third defendant cannot be said to have been the lawful allottee of the suit property.

***Was there basis for registration of restriction and caution gainst the title to the suit property?***

26. The restriction was registered against the suit property following a letter from the second defendant dated 29<sup>th</sup> December 2005. The caution was registered on 4<sup>th</sup> January 2006 by the third defendant which was claiming interest in the suit property as beneficiary. The second defendant was suspecting fraud in the manner in which the suit property was registered in the name of Ndibo Nthenge. There is no evidence that the second defendant ever bothered to carry out investigations of the alleged fraud. There is also no credible evidence which will sustain the caution which the third defendant registered against the title. I have demonstrated hereinabove that the third defendant did not move beyond the mere letter advising them that they had been allocated the suit property. In absence of this evidence I do not think that they have any basis to sustain the caution. The Land Registrar issued notice to parties to show cause why the restriction should not be removed. There is however no evidence to show what became of the intended proceedings. However be that as it may I do not see the basis of the restriction.

***Is the third defendant entitled to registration of the suit property by way of adverse possession?.***

27. The third and fourth defendants have premised their case on their long occupation of the suit property. As at 1990 when the plaintiff wrote a demand letter asking the third defendant to move out of the suit property, the third and fourth defendants contend that they had been on the suit property for 16 years and as such had become entitled to be registered as owners by virtue of adverse possession. The suit property was registered in the name of Native Land Trust Board on 31<sup>st</sup> March 1959. It was registered in the name of Ndibo Nthenge on 9<sup>th</sup> October 1981. The law is clear that limitation period does not run against a local authority or government. As the suit property was registered in the Native Land Trust Board which was the predecessor of County Council of Kiambu, the period of limitation could not start running.

28. The period for purposes of limitation could start running when Ndibo Nthenge became the registered owner on 9<sup>th</sup> October 1981. Before I start analyzing whether the fourth defendant has proved that it is entitled to be registered as owner of the suit property by way of adverse possession, I have to address the issue of whether a claim for adverse possession can be raised by way of counter claim. Order 37 Rule 7 provides that an application under Section 38 of the Limitation of Actions shall be made by originating summons. The plaintiffs argue that the third and fourth defendants should not have raised a claim of adverse possession through a counter claim. In support of their contention, they cited the court of Appeal decision in Kisumu Civil Appeal No. 262 of 1998 between **Patrick A Odako & another Vs William N Kirew** where the Court of Appeal held that it is settled law that a claim for adverse possession must be brought by way of origination summons. The plaintiffs also cited my decision in **Patrick Kimeli Chepngok Vs John Kirwa Rotich (2016) eKLR** in which the defendant had raised the issue of adverse possession in his defence. In my judgement, I said that though the defendant had stated in his defence that he had acquired the suit property by way of adverse possession, he never gave evidence touching on the issue and in any case the proper way for him was to raise his claim of adverse possession by way of originating summons.

29. The counsel for the third and fourth defendants submitted that a claim for adverse possession can even be raised in a defence or counter claim. In support of their contention, they cited the court of appeal decision in **Sammy Likuyu Adiema Vs Charles Shamwati Shiskani (2014) eKLR** where the court of appeal overturned the High Court decision which had dismissed the appellants counter claim for adverse possession. The judges of Appeal held that given the provisions of Article 159 (d) and (e) of the Constitution, the respondent need not to have filed a separate suit (originating summons) claiming the subject parcel by way of adverse possession. The third and fourth defendants

further relied on **Gulam Noordin Vs Julius Charo karisa (2015) eKLR** where the judges of Appeal held that where a claim of adverse possession is raised in a defence or even by way a plaintiff, the same can be allowed.

30. The decisions of **Sammy Likuyi Adiema and Gullam Noordin (supra)** were mainly made on the basis of Article 159 of the constitution which encourages the courts to do substantive justice rather than technical justice. These two decisions were made post the 2010 Constitution. I agree with these decisions which are binding on me. I therefore find that there is nothing wrong in a party raising a claim of adverse possession through a counter claim or even through a plaintiff.

31. A claim of adverse possession is also not against the constitution as was held in **Mtana Lewa Vs Kahindi Mwangandhi (2015) eKLR** . Having disposed of the issue of procedure for bringing claims of adverse possession and the issue of the constitutionality of the same, I now move to analyze whether the third defendant has proved that it has acquired the suit property by way of adverse possession. In **Harrison Mbaria Mbogo & another Vs Mbutu Mutungi (1997) eKLR** the Judges of Appeal held as follows:-

***“ It is the owner of the land who is obliged to take reasonable steps to re-enter his land. This he can do by use of peaceful means or by instituting action to exert his rights over the land”.***

32. If any period for purposes of adverse possession can be computed, it has to start from 9<sup>th</sup> October 1981 when the suit property was registered in the name of Ndibo Nthenge who later transferred it to the deceased. The question which then arises is whether the running of time was ever interrupted before the expiry of 12 years. There is evidence that on 14<sup>th</sup> December 1990 the deceased through the firm of Murimi & Co. Advocates wrote a letter addressed to the moderator of Presbyterian Church of East Africa (PCEA) asking that the third defendant moves out of the suit property. There was a response to this letter written on 1<sup>st</sup> February 1991 in which the third defendant through its lawyers contended that they could not move out of the suit property which they had occupied for 16 years and in any case were entitled to it through prescription.

33. I have pointed out that time would not have started running in favour of the third respondent in 1974 even if they were found to have entered the suit property at the time. Time started running in third defendants favour in 1981. In 1990, a demand was made by the deceased who wanted the third defendant to move out of the suit property. This action was one way of peacefully trying to re-enter the suit property. This demand therefore interrupted time from running. Thereafter the plaintiffs particularly the first plaintiff made sustained efforts to have the third defendant relinquish possession of the suit property.

34. When the deceased was immobilized in hospital due to the Busia plane crash, the first plaintiff was sustaining pressure on the third defendant. The first plaintiff even attempted to have an amicable settlement of the matter since the church had built a permanent building on the suit property. Due to the efforts by the first plaintiff to claim the suit property on behalf of his wife, the second defendant caused a restriction to be registered against the title. The third defendant also registered a caution against the title. The restriction and caution were registered in 2006. After the demise of the deceased the plaintiffs carried out succession process in which the suit property was given to the first plaintiff.

35. The first plaintiff tried to have the suit property registered in his name through transmission but this was not possible due to the restriction and caution. He was forced to file this suit in 2013. It is therefore clear that the third and fourth defendants have not enjoyed the suit property *openly, peacefully and without interruption*. The third defendant cannot therefore claim the suit property through adverse possession.

**Whether the plaintiffs or third and fourth defendants are entitled to the prayers in the plaint and counter-claim respectively.**

36. The third and fourth defendants having failed to demonstrate that they have met the statutory threshold for the claim of adverse possession it follows that their claim fails and is hereby dismissed with costs to the plaintiffs. The third and fourth defendants have no basis for remaining on the suit property. The restriction which was registered at the instance of the second defendant was without basis. Equally, the caution which the third defendant registered had no basis. The restriction and caution have unnecessarily put the plaintiff to anxiety and expense. The restriction and caution were put in place when the deceased was immobilized in hospital. The third defendant was even running around during this period trying to have the Land Registrar carry out proceedings in respect of ownership of the suit property. The third defendant as well as the second defendant were aware of the condition of the deceased as the registered owner of the suit property. The actions of the second, third and fourth defendants call for not only an award of general compensatory damages but also exemplary damages. I will therefore assess general compensatory damages in the sum of Kshs.5,000,000/= and exemplary damages of Ksh.2,000,000/=.

37. I enter judgement in favour of the plaintiffs against the defendants as follows:-

***a. An order of eviction directed at the third and fourth defendants from LR No.Dagoretti/Uthiru/T 382 and removal of structures thereon within 90 days from the date of this judgement.***

***b. An order directing the removal of the restriction and caution placed on LR No.Dagoretti/Uthiru/T 382 forthwith.***

***c. Compensatory damages of Kshs.5,000,000/= to be apportioned as follows:-***

***i. Kshs.2,000,000/= to be paid by the second defendant.***

***ii. Kshs.3,000,000/= to be paid jointly and severally by the third and fourth defendants.***

***d. Exemplary damages of Kshs.2,000,000/= to be apportioned as follows:-***

*i. Kshs.500,000/= to be paid by the second defendant.*

*ii. Kshs.1,500,000/= to be paid by the third and fourth defendants jointly and severally.*

*e. Interest on (c) and (d) to be apportioned in the manner stipulated therein.*

*f. Costs of the suit to be apportioned in the respective ratio.*

**Dated, Signed and Delivered at Nairobi this 9<sup>th</sup> day of April 2018.**

**E.O .OBAGA**

**JUDGE**

In the presence of ;-

Mr Wanyiri Kihoro acting in person who acts for 2<sup>nd</sup> Plaintiff

Mr Kamau for 1<sup>st</sup> Defendant

Mr Kamau for 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Court Assistant: Hilda

**E.O .OBAGA**

**JUDGE**