



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**CIVIL CASE NO. 152 OF 2009 (OS)**

**IN THE MATTER OF LAND TITLE NO. NYAKI/MULATHANKARI/635**

**BETWEEN**

**JULIUS KATHURIMA M'ITWAMWARI.....1<sup>ST</sup> PLAINTIFF**

**JUSTUS MANYARA M'IGWETA.....2<sup>ND</sup> PLAINTIFF**

**AND**

**CHARLES M.K GIKUNDI.....1<sup>ST</sup> DEFENDANT**

**BARCLAYS BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The two plaintiffs filed the originating summons on 20<sup>th</sup> November 2009 requesting the court to make a determination in respect of the following questions:

- i. Whether the plaintiff has solely occupied this land for over 35 years since 1973.
- ii. When the 1<sup>st</sup> defendant became registered proprietor of this land in 1988, why he did not occupy the same either by cultivation or by any kind of development whatsoever.
- iii. Whether the plaintiff has occupied this land openly and peacefully for all that period of time.
- iv. Whether the plaintiff has effected substantial development in this land and whether there were any objections or complaints from the defendants.
- v. Whether land parcel no. Nyaki/Mulathankari/612 overlaps the above mentioned land so that boundaries are indistinguishable.
- vi. Whether the 2<sup>nd</sup> defendant, the Bank should have inspected the land physically to discover the occupants of the land before proceeding to advance the substantial loan to the 1<sup>st</sup> defendant.
- vii. Whether the law of caveat-emptor was applicable with respect to the 2<sup>nd</sup> defendant's transaction with the 1<sup>st</sup> defendant.
- viii. Determination of all the questions arising from the occupancy and charges of the above land.

2. The first plaintiff Julius Kathurima M'Twamwari swore an affidavit on 20<sup>th</sup> November 2009 on his own behalf and on behalf of the 2<sup>nd</sup> plaintiff in support of the originating summons. He has deponed that the land parcel number Nyaki/Mulathankari/612 (here and after referred to as Parcel No. 612) is registered in the name of 2<sup>nd</sup> plaintiff but is occupied by the 1<sup>st</sup> plaintiff, whereby the 1<sup>st</sup> plaintiff has built a permanent house on that land.

3. The first plaintiff has also averred that the parcel of land Nyaki/Mulathankari/612 is directly adjacent to land parcel number Nyaki/Mulathankari/635 (here and after referred to as parcel No. 635). 1<sup>st</sup> plaintiff states that this parcel of land number 635 overlapped with

a portion of Parcel No. 612 and the portion which had been overlapped is where the 1<sup>st</sup> plaintiff has built a permanent house.

4. The parcel no. 635 was apparently owned by one Nicholas Mworira who used to cultivate his side of the land and he never crossed over to parcel no. 612.

5. The plaintiffs further claim that the 1<sup>st</sup> defendant had deceived the bank that the house had belonged to him and therefore took a loan from the 2<sup>nd</sup> defendant. The land no. 635 was charged to the 2<sup>nd</sup> defendant and this land was about to be sold as the loan was never paid.

6. The plaintiffs had also filed an application on 20<sup>th</sup> November 2009 under certificate of urgency seeking orders inter-alia to stop the sale of parcel no. 635 which sale was scheduled on 23<sup>rd</sup> November 2009. On 23<sup>rd</sup> November 2009 the court allowed interim orders of injunction stopping the sale of the property on condition that the applicants give written undertaking to pay auctioneers fees and an undertaking to pay damages to the defendants if the suit did not succeed in respect of the inter-parties hearing of that application.

7. For one reason or another this application of 20<sup>th</sup> November 2009 was never prosecuted. At some point on 15.2.2010 the court had observed that the 2<sup>nd</sup> defendant had never been served and on that basis the court had declined to hear that application of 20.11.2009. The court had directed that the defendants be served.

8. On 23<sup>rd</sup> September 2010, interlocutory judgment was entered against the 2<sup>nd</sup> defendant.

9. On 15.12.2011, first defendant through his advocate filed an application to have the suit dismissed for want of prosecution. A ruling thereof was delivered on 15.2.2012 dismissing the suit as against the 1<sup>st</sup> defendant for want of prosecution. The first defendant was also awarded the cost of the suit and the application.

10. On 2<sup>nd</sup> of October 2012 counsel for the plaintiffs applied to the court for a stay of any further proceedings in this case as applicants were appealing against the order of 15.2.2012. The court observed that a notice of appeal had been filed on 20.2.2012 and therefore granted the orders for a stay of any further proceedings in this case by the first defendant until the determination of the appeal.

11. The plaintiff was also allowed to proceed with a formal proof case as against the 2<sup>nd</sup> defendant.

12. This is hence the background against which the matter proceeded for formal proof in respect of 2<sup>nd</sup> defendant. PW 1, Justus Manyara M'Igweta who is the 2<sup>nd</sup> plaintiff, testified that he bought the parcel of land no. 612 in 1973 from one Charles Marete Nkoroi. The latter had shown him the boundaries of that land whereby the adjacent land to the right facing North was the land of M'Imanyara M'Ikamati which is parcel no. 635.

13. PW 2 identified himself as Geoffrey Kirugi Nkoroi and that he is the one who sold the land parcel no 612 to Justus M'Imanyara. He also told the court that the neighboring parcel of land was land parcel no. 635 owned by M'Imanyara M'Ikamati. Further, he told the court that he never had any boundary dispute with M'Ikamati 'M'Imanyara even when M'Imanyara M'Ikamati sold the land to one Nicholas Mworira in 1969.

14. PW 1 testified that there was a distinct boundary between his parcel of land and parcel no. 635, and that he never had any dispute with M'Ikamati M'Imanyara as well as with Nicholas Mworira who were peacefully cultivating on their peace of land.

15. In 1988 the land parcel no. 635 was apparently transferred to Charles Gikundi who is the 1<sup>st</sup> defendant. PW 1 claims that he never saw Charles cultivate that land and that he has never seen the first defendant.

16. PW 1 further told the court that he saw a Daily Nation Newspaper advertisement of 16<sup>th</sup> November 2009 whereby Garam Auctioneers were to sell the land parcel no.635 owned by Charles M. K Gikundi and the land was to be sold with the house that was on the land. However, the only house that was on the land was PW 1's house. That is why the plaintiffs rushed to court seeking orders of injunction to stop the sale, and hence the auction never took place.

17. PW 1 had then sought to get the registry index map (R.I.M) which revealed that the parcel of land 635 was bending inward into parcel no. 612 and therefore the boundary was not a straight line as was appearing on the ground. The portion extending into parcel no. 612 is where PW 1 had built a house.

18. In support of their case plaintiffs produced the following documents as exhibits;

(i) P exhibit 1, A green card for parcel no. 612 which shows that the land was registered in the name of Charles Marete Nkoroi on 25<sup>th</sup> October 1967 and was transferred to Justus Manyara M'Igweta (2<sup>nd</sup> plaintiff) on 24<sup>th</sup> April 1973.

(ii) P exhibit 2 a green card for parcel no 635 which shows that the original owner was M'Imanyara M'Ikamati registered as the owner on 25<sup>th</sup> September 1967. The land was then transferred to Nicholas Mworira on 13<sup>th</sup> February 1969, and it was then transferred to Charles M.K Gikundi (1<sup>st</sup> defendant) on 15<sup>th</sup> February 1988.

(iii) P exhibit 3 daily Nation newspaper cutting of 16.11.2009 showing that the land parcel no. 635 was to be sold with the developments thereon on 23<sup>rd</sup> November 2009. The developments mentioned are a three bedroomed single storied residential building.

(iv) P exhibit 4 another daily nation newspaper cutting of 8.12.2009 indicating that land parcel no. 635 was to be sold on 15.2.2010 with the developments thereon. The developments are a 3 bedroomed single storied residential building.

(v) Registry index map showing that parcel of land no. 612 is adjacent to parcel no 635 and that the boundary bends inwards into in land no. 612.

19. Plaintiffs also called one Gerald Nyamu Kambu as plaintiff witness no. 3, who introduced himself as a surveyor technician with the firm of Geomatics services limited. He testified that under instructions of the 2<sup>nd</sup> plaintiff he undertook the survey of the two parcels of land that is No. 635 and 612. He was to ascertain the extent of the encroachment between the two parcels. He carried out a background check with relevant authorities and he obtained the R.I.M. (Registry Index Map) from director of survey. He then compiled a report which was produced as plaintiff exhibit 6 (a).

20. The pertinent issues captured in the surveyors report are that there was a defined boundary between the two parcels, which contained a live fence of bourganvelia hedge with barbed wire on old parts which indicated very conspicuous land marks which constituted the boundaries of the two parcels of land. From the R.I.M, parcel no. 635 had encroached with an area of 0.17 hectares into land parcel 612. PW3 drew a sketch which is annexed to his report, and he shaded the area of encroachment as XYZW.

### **Determination**

21. The case against 1<sup>st</sup> defendant was dismissed vide the court's ruling of 15.2.2012. That ruling has never been set aside. That being the case, then the only issue for determination is whether plaintiffs have any case against 2<sup>nd</sup> defendant. Although Barclays Bank had advanced a loan to 1<sup>st</sup> defendant with parcel No. 635 being the security, there is no evidence to indicate that the Bank is now the registered proprietor of this land.

22. The land in question was set to be sold but it has not come out clearly if the sale ever took place. A question arises as to why plaintiffs did not avail to this court a recent search certificate to confirm the status of this parcel of land.

The claim for adverse possession cannot therefore succeed against the bank.

23. As for request to amend the registry index map to reflect what is on the ground, again this tends to be a claim against the registered owner of parcel No. 635 who is either 1<sup>st</sup> defendant or another person not known to the court. As stated earlier on no claim can be sustained against 1<sup>st</sup> defendant and hence no orders can be issued against him.

24. The claim against 2<sup>nd</sup> defendant is not sustainable as the bank did not own the land and did not become the registered owner of the land. I therefore proceed to dismiss the suit as against 2<sup>nd</sup> defendant with no orders as to costs. Vide the court's ruling of 15.2.2012, the case against 1<sup>st</sup> defendant still stands as dismissed with costs to 1<sup>st</sup> defendant. The stay orders given on 17.7.2012 are hereby discharged.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 23<sup>RD</sup> DAY OF MAY, 2018**

**IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Chacha holding brief for Kioga for plaintiff

1<sup>st</sup> plaintiff present

2<sup>nd</sup> plaintiff present

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**