



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 235 OF 2017

SIMON RUTERE NYAGA & ANO.....PLAINTIFFS

VERSUS

PHARES MUTEGI NYAGA.....DEFENDANT

JUDGMENT

1. The plaintiffs in this suit, vide their plaint dated **19th April, 2017** seek judgment against the defendant for orders in the following terms:
 - i) An order of eviction against the defendant from LR. NO. **KARINGANI/MUGIRIRWA/3685** and **KARINGANI/MUGIRIRWA/3687**.
 - ii) A permanent order of injunction restraining the defendant by himself, his agents, employees, relatives and/or anybody else acting for I am (sic) his behalf from interfering (sic) the plaintiffs' occupation, possession, user and/or enjoyment of land parcels Nos. **KARINGANI/MUGIRIRWA/3685 and 3687**.
 - iii) Costs and interests.
 - iv) Any other relief this honourable court may deem fit and just to grant.
2. The defendant filed a defence and a counter-claim dated **19th September, 2017**. In his counter-claim the defendant seeks judgment against the plaintiffs for orders:
 - a) An order for cancellation of titles do issue cancelling titles No. **Karingani/Mugirirwa/3685**, No. **Karingani/Mugirirwa/3686** No. **Karingani/Mugirirwa/3687**.
 - b) An order for the fresh survey of parcel of land No. **Karingani/Mugirirwa/503** and the re-establishment of the beacons thereof.
 - c) A declaration that the plaintiffs are trespassers on parcel of land No. **Karingani/Mugirirwa/503** and that the purported titles No. **Karingani/Mugirirwa/3685**, No. **Karingani/Mugirirwa/3686**, No. **Karingani/Mugirirwa/3687** are unlawful, illegal and a nullity *ab initio*.
 - d) An order of permanent injunction barring the plaintiffs by themselves, their agents or anyone claiming under them, from in any way trespassing, encroaching or otherwise interfering with the defendant's quiet enjoyment of the portion of land he currently uses and or occupies measuring 2 Acres.
 - e) General damages for trespass.
 - f) Any other relief that this honourable court deems just.
3. When giving his evidence, PW1, Simon Rutere Nyaga, asked the court to adopt his witness statement dated **15th March, 2017** as his evidence in this suit. The said statement reads as follows:

STATEMENT OF SIMON RUTERE NYAGA ID NO. 4446884

I hail from Mugwe Location, Chuka, Tharaka Nithi County.

Emilio Nyaga Nguu filed a Succession Cause at Chuka Law Courts cause **NO. 194 of 2009** to divide the suit land No. **Karingani/Mugirirwa/503**, but the grant was revoked.

The court proposed the alternative way of subdividing the same suit land in which Phares Mutegi was to get 2 acres, Simon Rutere to get 2 acres and Emilio Nyaga to get 1 acre out of the land.

The grant was therefore finally confirmed and titles were given. Simon got Title No. **Karingani/Mugirirwa/3685** and Emilio got title No. **Karingani/Mugirirwa/3687**.

Surveyor came on the land and accompanied by the chief and two officers to put (sic) on beacons.

Phares Nyaga (sic) title deed is not out yet because he refused to pay up the surveyor's fees or give identification documents to enable the process from going on, though his part is still intact on the ground.

However after the subdivision was done, he was left behind and uprooted all the beacons saying that the land as a whole belonged to him and that the ruling of the court meant nothing to him. We went to the chief who accompanied us to put back the beacons which were uprooted again by Phares.

We reported to Police via OB NOS. 16/05022017 and 16/21/2017 on the two occasions. The O.C.S however referred us to our advocates office to help us solve the issue.

I pray that (sic) this court to direct one Phares Mutegi to give me back my land and pay me the damage caused by him upon me.

That is all I wish to state.

Dated this 15th day of March, 2017.

4. PW1 produced his exhibit 1, being a letter his advocate had written to the OCS Chuka Police Station complaining that the defendant had destroyed his boundaries and had maliciously caused damage to his property. The letter asked the OCS to take appropriate action. He also produced his title of land parcel No. **KARINGANI/MUGIRIRWA/3685** showing that it was registered in the name of Simon Rutere Nyaga, himself. He also produced as an exhibit a grant dated **11th April, 2016**.

5. During cross-examination by the defendant he admitted that he had obtained a grant which had been cancelled but added that a second grant issued by the High Court had ordered that the suit land be subdivided. He denied that the apposite succession proceedings were being conducted without the knowledge of the defendant.

6. PW2, Emilio Nyaga Nguu asked the court to adopt his witness statement filed on **27th April, 2017** as his evidence in this suit. The said statement reads as follows:

STATEMENT OF EMILIO NYAGA NGUU ID NO. 4323200

I hail from Mugwe Location, Chuka, Tharaka Nithi County.

Emilio Nyaga Nguu filed a Succession Cause at Chuka Law Courts Cause No. 194 of 2009 to divide the suit land No. **Karingani/Mugirirwa/503**, but the grant was revoked.

The court proposed the alternative way of subdividing the same suit land in which Phares Mutegi was to get 2 acres, Simon Rutere to get 2 acres and Emilio Nyaga to get 1 acre out of the land.

The grant was therefore finally confirmed and titles were given. Simon got Title No. **Karingani/Mugirirwa/3685** and Emilio got title No. **KARINGANI/MUGIRIRWA/3687**.

Surveyor came on the land and accompanied by the chief and two officers to put on beacons.

Phares Nyaga title deed is not yet because he refused to pay up the surveyor's fees or give identification documents to enable the process from going on, though his part is still intact on the ground.

However after the subdivision was done, he was left behind and uprooted all the beacons saying that the land as a whole belonged to him and that the ruling of the court meant nothing to him. We went to the chief who accompanied us to put back the beacons which were uprooted again by Phares.

We reported to Police on the two occasions and the O.C.S. however referred us to our advocates' office to help us solve the issue.

I pray that (sic) this court to direct one Phares Mutegi to give me back my land and pay me the damages caused by him upon me.

That is all I wish to state.

Dated this 15th day of March, 2017

7. During cross-examination by Mr. Mutuma, the defendant's advocate, PW2 told the court that he was the administrator of the estate of Runyenje Mbuchi (deceased), the original owner of the suit land which spawned this suit. He clarified that he was not the biological father of the 1st plaintiff and the defendant.

8. PW2 gave evidence which was rather garbled, at first saying that he did not know that Meru Succession Case No. 550 of 2011 had revoked the Original grant issued in the Chuka PM's Court. Later on he testified that the grant was indeed revoked and the apposite titles had been cancelled.

9. PW2 told the court that the Original title for land parcel Number **Karingani/Mugirirwa/503** was in the custody of the defendant who had refused to co-operate in order for the parties to implement the order of the court in Meru HCCC Succession **No. 550 of 2011**. He denied that he and PW1 had obtained their titles fraudulently. He also told the court that after his properties and PW1's properties were destroyed by the defendant, they reported to the Chief and to the police who said that they were not willing to give evidence in court.

10. PW2 told the court that he and PW1 had obtained titles when the defendant had the original title because the defendant had been uncooperative and had refused to surrender the original title.

11. DW1 told the court that Simon Rutere Nyaga (PW1) was his step brother and that Emilio Nyaga (PW2) was his nephew. He said that the original suit land parcel No. **Karingani/Mugirirwa/503** belonged to his grandfather who died in 1989. He testified that before he died, his grandfather had subdivided the land into 3 portions which he allocated to 3 people as follows:

Himself (DW3) - 1 Acre

Rutere (PW1) - 1 Acre

Emilio (PW2) - 1 Acre

12. DW1 told the court that when the plaintiffs filed a Succession Case No. 194 of 2010 at Chuka PM's Court, they never involved him. He testified that he went to court in Meru High Court Succession Case No. 550 which revoked the earlier grant and indicated how the suit land should be subdivided.

13. DW1 asked the court to adopt his witness statement dated 19th September, 2017 as his evidence in this suit. He produced as an exhibit the court order apposite Meru High Court Succession No. **550 of 2011**. He also told the court that he retained the original title of the suit land in the name of Runyenye Mbuchi which he produced as an exhibit.

14. DW1 produced a bundle of photos as exhibits showing that he had a house on the suit land and that he did cultivation on the land.

15. DW1 asked the court to cancel the titles procured by the plaintiffs so that the parties can obtain new titles. He also prayed for costs.

16. Cross examined by PW1, he denied that he had destroyed the plaintiff's Mikungugu trees. He also denied that he had refused to attend family meetings meant to resolve issues surrounding ownership of the suit land.

17. Cross examined by PW2, he denied that he was all along uncooperative with the plaintiffs whenever they sought a resolution to issues surrounding the suit land. He denied that he refused to attend meetings whenever invited to discuss sub-division of the suit land.

18. Upon re-examination by his advocate, DW1 told the court that he had never been prosecuted for destroying the plaintiffs' fences and properties.

19. DW1's witness statement, which had been adopted by the court as his evidence, reads as follows:

STATEMENT OF PHARES MUTEGINYAGA

I, **PHARES MUTEGI NYAGA** of Post Office Box Number 211 – Chuka in the Republic of Kenya state as follows:-

I am the Respondent herein well versed with the issues at hand surrounding this matter hence competent to make this statement. Indeed Succession cause No. 550 of 2011 was decided by the High Court in Meru and distribution of the deceased' estate was ordered per the certificate of confirmation as alluded to in paragraph 2 of the applicants' supporting affidavit. However the applicants are not telling this court that whatever happened thereafter was couched in a scheme of secrecy, knavery and fraud to selfishly fulfill their egos to my detriment.

At all times I was and I am still in possession of the deceased's original documents including but not limited to the original title deed to the land, parcel No. L.R. Karingani/Mugirirwa/503 bearing the names of the deceased and that by no means can such a parcel of land be subdivided into 3 while the original title deed is still in force bearing in mind that such subdivision was subject to a succession cause. The respondents in connivance with the surveyor secretly carried out the sub-division of the subject parcel of land

and I was only surprised with this suit where I am now being restrained from interfering with my own land (sic) further to add is that the land which the applicants seek injunctive orders is the same land that I have lived on for all my life, developed the same with 3 semi-permanent houses, cattle shed, planted coffee, exotic and natural trees, bananas, fruit trees suffice to note that I have raised my family on the same parcel of land.

The truth of the matter is that the applicants are out to frustrate me and evict me and my family from a land we have been in occupation since time immemorial, (sic) the applicants did not involve me in the whole process of subdivision and as such went ahead to award themselves a share of the land I currently leave (sic) on land (sic) thereafter obtain flawed titles to the same subject parcel of land.

It is only fair that even sub-division was to take place, then my quiet enjoyment of the portion I have been living on should not be disturbed, upon the court confirming the grant of representation, the applicants took advantage of the fact that the court did not stipulate how such parcel of land would be subdivided nor did the court take into consideration that I was on the ground and priority on subdivision would be only fair if my parcel of land was left intact as long as I got my 2 acres. The applicants behavior even prior to this suit can be traced back in the year 2010 when the 2nd applicant hoodwinked the court in succession cause no. 194 of 2010 and indeed got letters of administration fraudulently, I filed for revocation of the same grant in succession cause no. 550 of 2011 and the same was revoked and annulled. The applicants' come to this Honourable Court with unclean hands as they have concealed from this honourable court information material and relevant information to the determination of the said application.

As such, I state that, in the circumstances, and based on the foregoing reasons, the orders sought in the said application supported by the said affidavits annexed thereto ought, in the interests of justice and fairness, to be refused and the said application dismissed with costs.

I also pray that this court orders for cancellation of the new title deeds, a re-survey of the suit land and any subsequent orders the court deems fit for the interests of justice.

STATED BY THE SAID PHARES MUTEGI NYAGA

AT MERU THIS 19TH DAY OF SEPTEMBER, 2017.

20. A conspectus of the evidence of PW1 and PW2 as contained in both their oral rendition to court and in their witness statements was that:

(a) They were the registered owner of the suit lands.

(b) That in Chuka Succession Cause No. **194 of 2009**, the 2nd plaintiff had obtained a grant which at the instigation of the defendant had been revoked.

(c) That in Meru H.C. **Succession Case No. 550 of 2011**, the court had confirmed a grant which indicated how the original suit land, to wit, land parcel No. **Karingani/Mugirirwa/503** would be subdivided and allocated to the defendants and the plaintiff.

(d) That the defendant had refused to cooperate in the implementation of the court order apposite to the confirmed grant and as a result the parties used the court process to have the land subdivided and titles issued to them. They, however, said that the plaintiff refused to pay the relevant fees with the result that he remained without title documents although his portion remained intact on the ground.

(e) That upon subdivision of the suit land, the defendant twice removed beacons placed on the land to show respective boundaries, even though beaconing was done by the surveyor in the presence of the area chief.

(f) They moved the court to allow the prayers as tabulated in their plaint and to award them costs of this suit.

21. A conspectus of DW1's case (the defendants case) as rendered in his oral evidence and in his witness statement is as follows:-

(i) That the 2nd plaintiff had in **Succession Cause No. 194 of 2009** at Chuka Magistrates' Court obtained a grant regarding Land Parcel No. **Karingani/Mugirirwa/503** and that at his instigation, it had been revoked by the Meru High Court **Succession Cause No. 550 of 2011** which ordered subdivision of the suit land as per the court's order.

(ii) In his witness statement he averred that before the death of his grandfather, he (the deceased grandfather) had apportioned the suit land as follows:

a) 1 Acre for himself

b) 1 Acre for the 1st plaintiff

c) 1 Acre for the 2nd plaintiff

(iii) It is his evidence that the original suit land was sub divided secretly by the plaintiffs and that the title documents spawned by that subdivision are illegal *ab initio* as, according to him, they were obtained fraudulently and more so because he still retained the

original title deed apposite to the original suit land. For this reason he asked the court to cancel the title deeds which were issued pursuant to the impugned sub-division.

(iv) He denied the plaintiffs' claim that he had uprooted beacons and destroyed the plaintiffs' property.

(v) In addition to his prayer that titles issued pursuant to the impugned subdivision be cancelled, he prays for an order for resurvey of the original suit land. He also seeks costs.

22. I have carefully considered the pleadings proffered by the parties to buttress their diametrically incongruent propositions. I have also considered the oral evidence tendered by the parties and the written submissions filed by the parties' advocates.

23. One thing is not disputed by the parties. It is that on **11th April, 2016**, the High Court in Meru High Court Succession Cause No. **550 of 2011** issued a Certificate of confirmation of Grant apposite to the estate of **RUNYENJE MBUCHI alias RUNYENJE RUCHI** which certificate was issued to **EMILIO NYAGA NGUU**. The written grant of representation was granted on **29th October, 2011**.

The Certificate of Confirmation of Grant had a Schedule stating as follows:

SCHEDULE

GRANT IS CONFIRMED

| <u>Description of property</u> | <u>share of Heirs</u> | |
|--------------------------------|------------------------------|---------|
| Phares Mutegi Nyaga | L.R. KARINGANI/MUGIRIRWA/503 | 2 acres |
| Emilio Nyaga Nguu | LR. KARINGANI/MUGIRIRWA/503 | 1 acre |
| Simon Rutere | LR. KARINGANI/MUGIRIRWA/503 | 2 acres |

24. In his oral testimony, the plaintiff told the court that the original owner of the original suit land had had given the 2 plaintiffs and himself 1 acre each. He did not indicate the fate of the remaining 2 acres. In his counter-claim, at paragraph (d), the defendant is claiming 2 acres. This claim is also contained in his witness statement dated **19th September, 2017** and filed in court on **20th September, 2017**.

25. In his prayer number (c) in his counter-claim the defendant seeks a declaration that the plaintiffs are trespassers on land parcel No. **KARINGANI/MUGIRIRWA/503**. I have no problem in finding this prayer untenable. It is quite obvious that the confirmed grant (op.cit) is pellucid that the plaintiffs are entitled jointly to 3 acres at issue. He is entitled to 2 acres only.

26. I also find prayer (d) in the defendant's counter-claim that an injunction should be issued against the plaintiffs restraining them from trespassing and encroaching upon the 2 acres of land which he occupies AND interfering with his quiet enjoyment of the 2 acres of land unequivocally untenable. This is because the confirmed grant (op.cit) only entitles him to only 2 acres of land out of the 5 acres that form the total area of the suit land. He has not, to the satisfaction of this court, on a balance of probabilities, demonstrated that the plaintiffs are encroaching upon the 2 acres of land he is entitled to.

27. I opine that refusing to surrender the original title to the original suit land cannot derail implementation of a court order. I find that the subdivision of the suit land was done in accordance with a process allowed by a court order and in faithful obedience thereof. I find that the original title that the defendant has clung to has no legal consequence. It is only a piece of paper which has no longer any legal meaning with regard to the original parcel No. **KARINGANI/MUGIRIRWA/503**. The said title was cancelled by operation of law when the order issued in Meru High Court Cause No. **550 of 2011** was implemented. An order of cancellation of the said original title cannot be issued by this court. A court of law cannot issue orders in vain. It cannot issue unnecessary and, therefore, useless orders.

28. An order that the original suit land be resurveyed is not only untenable but also veritably pyrrhic.

29. I find that the defendant has not proved his counter-claim.

30. I find that, on a balance of probabilities, the plaintiffs have proved their case. The apposite grant supports their case. I also find that they did not obtain titles to parcel numbers **Karingani/Mugirirwa/3685 and 3687** fraudently. The titles were obtained in obedience to a court order. I find that the said titles were not issued secretly. The defendant has acknowledged in his evidence that the order that culminated in the issuance of the 2 titles to the plaintiffs was always within his knowledge.

31. Judgment is entered for the plaintiffs in the following terms:

1. The defendant's counter-claim dated **19th September, 2017** and filed in court on **20th September**, is hereby dismissed and costs regarding the counter-claim are awarded to the plaintiffs.

2. I hereby issue an order of eviction against the defendant from Land Parcel Number **KARINGANI/MUGIRIRWA/3685** and Land Parcel No. **KARINGANI/MUGIRIRWA/3687**.

3. The defendant is ordered to move out of the suit land within 30 days of delivery of this Judgment and if he does not do so, he will be evicted with the assistance of the Officer Commanding Station, Chuka Police Station, without further reference to this court.
4. I issue a permanent order of injunction restraining the defendant by himself, his agents, employees, relatives and / or anybody else acting for him or on his behalf from interfering with the plaintiffs' occupation, possession, user and / or enjoyment of Land Parcels Nos. **KARINGANI/MUGIRIRWA/3685 and KARINGANI/MUGIRIRWA/3687**.
5. Costs of the main suit as regards the prayers contained in the plaint are awarded to the plaintiffs.
6. The defendant will pay interest on costs at court rates with effect from the date of delivery of this judgment.

32. It is so ordered.

Delivered in open Court at Chuka this 27th day of June, 2018.

in the presence of:

CA: Ndegwa

Emilio Nyaga Nguu – 2nd Plaintiff

Simon Rutere Nyaga – 1st Plaintiff

Phares Mutegi Nyaga - Defendant

P. M. NJOROGE,

JUDGE.