



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 302 OF 2017

FORMERLY MERU ELC. 38 OF 2006

**ANDERSON NYAGA BUURI (SUING AS LEGAL REPRESENTATIVE OF
THE ESTATE OF M'ABURI M'RUGANE).....PLAINTIFF**

VERSUS

MUTHARA NYANGE.....DEFENDANT

JUDGMENT

1. In his plaint dated **13th April, 2006** and filed on **18th April, 2006**, the plaintiff prays for judgment against the defendant for:

(a) An eviction order against the defendant from the plaintiff's land parcel NO. KARINGANI/MUIRU/32 and an order of permanent injunction restraining the defendant, his servants, agents, employees and or anybody acting on his behalf be restrained from entering, and or interfering in any way with the plaintiff's actual possession and occupation of the plaintiff's land parcel No. KARINGANI/MUIRU/32.

(b) Costs of this suit and interests.

(c) Any other relief.

2. The defendant filed a Counter Claim vide his statement of defence and Counter Claim dated **12th February, 2007**. The Counter Claim seeks the following orders:

(i) A declaration that the defendant has acquired by adverse possession an absolute title to the portion of parcel KARINGANI/MUIRU/32 measuring 0.76 Ha which is in his possession and occupied by him.

(ii) A declaration that the defendant is entitled to an order under section 38 of the Laws of Limitation Act to be registered as proprietor of that portion in place of the plaintiff who shall execute a valid transfer or assignment in favour of the defendant free from encumbrances.

(iii) A declaration that the plaintiff holds a portion of the parcel KARINGANI/MUIRU/32 measuring 0.76 Ha in trust for himself and the defendant as tenants in common and the defendant's name shall be entered in the register accordingly.

(iv) The plaintiff's suit be dismissed with costs and the defendant's counter-claim be allowed with costs.

(v) Any other relief that this honourable court may deem fit and just to grant.

3. With leave of this court, the defendant filed an amended plaint dated **23rd June, 2017** in which the order for eviction of the defendant from parcel No. KARINGANI/MUIRU/32 has been dropped. In the amended plaint, the plaintiff prays for judgment against the defendant for:

(i) An order of permanent injunction restraining the defendant, his servants, employees, agents, assignees, and/or anybody else acting on his behalf from entering, trespassing, interfering and/or in whichever manner dealing with the plaintiff's actual possession and occupation of Land Parcel NO. KARINGANI/MUIRU/32.

(ii) Costs of this suit and interests.

(iii) Any other relief.

4. The suit was to be heard on **9th July, 2018**.

5. On **9th July, 2018**, Mr. Riungu, the defendant's advocate, told the court that he had lost touch with his client. He intimated that he intended to file an application to cease acting for the defendant. He, however, told the court that he wished to leave it to the discretion of the court regarding any other directions.

6. The plaintiff's advocate, Mr. Nyamu Nyaga asked the court, to dismiss the defendant's defence and counter claim and award costs to the plaintiff.

7. I regretfully note that this suit was filed in the year 2006, twelve years ago. This is a matter that should have been heard and determined many years ago.

8. I do note that the defendant's advocate admitted that he had been properly served. In the circumstances, the court ordered that the suit should proceed to hearing ex-parte in terms of Order 12 Rule 2 of the Civil Procedure Rules.

9. The plaintiff in his oral evidence asked the court to adopt his witness statement dated **23rd June, 2017** as his evidence in this suit. The statement states as follows:

STATEMENT OF ANDERSON NYAGA BUURI

I am the above named person an adult of sound mind.

I come from Kangutu in Chuka.

I am the son of the plaintiff herein M'Abuuri M'Rugane who is now deceased.

He died on 16th December, 2012.

My father the said M'Aburi M'Rugane died during the pendency of this case.

After my father died, I filed Meru High Court Succession Cause No. 129 of 2013 in which I obtained a Limited Grant of Letters of Administration Ad Litem to enable me be enjoined in this case as his legal representative.

After I obtained the said Limited Grant of Letters of Administration Ad Litem, I filed the application dated 11th day of November, 2013 and I was enjoined in this case as the legal representative of my father the plaintiff herein.

I am aware of the dispute in this case. It relates to a portion of my father's land parcel no. Karingani/Muiru/32 and land parcel No. Karingani/Muiru/794 belonging to the defendant.

I want to state that I am well versed with the facts of this case.

Am aware that during the time of gathering in Muiru in Kangutu my late father went through the process of gathering of his land at Kangutu. The land was subsequently demarcated and it was eight (8) acres.

When the process of adjudicated commenced, my said father had the land which he had gathered shifted to where the defendant had gathered his land and demarcated.

This meant that the defendant was shifted to where my late father had gathered his land.

Since the said shifting of the defendant's land affected late my father's coffee and home, he complained to the land committee one Mr Nyaga – Now deceased. The said Mr. Nyaga – deceased sent survey officers who came to my father's land and that of the defendant and placed boundaries so that the problem between my father and the defendant could be solved out.

After the surveyor placed the boundaries between my father's land and that of the defendant, the defendant uprooted it.

My father reported to the land officer the said Mr.Nyaga who advised him (my father) that he go and report the matter to the Chief Muiru Location one Kathuni.

The said Chief Kathuni called the defendant three times to his office so that the dispute between my father and the defendant over the uprooted boundaries could be solved but the defendant refused to attend the meeting.

Before Chief Kathuni could call them the fourth time he (Chief Kathuni) died.

One Chief Mwangi took over as the Chief Muiru Location in place of Chief Kathuni who as I have stated hereinabove had passed on.

Chief Mwangi called the defendant's for three times but again, the defendant refused to attend the meeting.

When the defendant refused to attend the chief's meeting completely, chief Mwangi sent a letter to the Registrar of Land Meru South.

After the registrar received the letter from Chief Mwangi of Muiru Location, he summoned the defendant and my father.

My father responded to the land registrar's summons but the defendant refused to respond to the land registrar's summons.

The land registrar and the surveyor subsequently visited my father's land parcel No. Karingani/Muuiru/32 and that of the defendant land parcel No. Karingani/Muiru/794 and placed the boundaries for the two parcels of land.

I would also want to state that when the Land Registrar and surveyor visited the two parcels of land they indicated the area of the portion belonging to my late father which the defendant was refusing to vacate.

The defendant again uprooted the boundaries placed by Land Registrar and the surveyor.

It is also within my knowledge that when the defendant was served with summons to enter appearance and plaint in this case, he (defendant) vacated the 0.76 acres of our late father's land parcel No. Karingani/Muuiru/32 which he was in occupation and my late father took possession, occupation and use of the said portion which the defendant had occupied and which is the subject of the dispute in this case.

I and my siblings are now in possession, occupation and utilizing the said portion of land.

For avoidance of doubt, I would request the honourable court to visit the disputed portion of land and it will verify indeed, the defendant vacated the said portion of land and I and my siblings are utilizing it after the death of our late father.

After some time, the defendant tried to re-enter into the portion which he had vacated. My late father resisted and that is when the defendant came to court and filed the Notice of Motion dated 30th August, 2011 which is still pending in court.

When the notice of motion dated 30.8.2011 came up for hearing, then my late father applied to the court to visit the disputed portion of the said land to verify that indeed the defendant had moved out and / or vacated the disputed portion and he (my late father) had taken possession of the same and had started developing it.

To date, the defendant has not come to our late father's land, which he was in occupation.

I would want the defendant to be permanently enjoined from entering, trespassing and / or dealing with my late father's said 0.76 acres of land.

It has been brought to my attention that in the notice of motion dated 30th day of August, 2011 the defendant is seeking leave to amend his defence and file an amended defence and counter-claim.

I want to state that the dispute between my late father and the defendant goes back to 1974 during the time of demarcation and adjudication. It went on even after the process of registration within Muiru Location.

The dispute was in respect of the 0.76 acres of land parcel No. Karingani/Muuiru/32 which the defendant had forcibly occupied and refused to vacate though he later vacated the said land.

It therefore follows that the defendant cannot claim to have acquired my late father's 0.76 acres of land and / or any part of land parcel No. Karingani/Muuiru/32 because there was a dispute all along until when my father filed this suit and the subsequent vacation and / or moving out of the said land by the defendant.

The defendant cannot claim to have quiet and actual possession of the said 0.76 acres of my late father's land parcel No. Karingani/Muuiru/32 when his occupation was all along resisted by my late father.

Indeed, there is clear evidence even from that of the defendant when he appeared before the Land Registrar for the hearing of the dispute that he (defendant) acknowledged that there was a long standing dispute between him and my late father over his occupation of my late father's land parcel No. Karingani/Muuiru/32.

I pray that the orders sought in the plaint be allowed with cost.

The defendant has no plausible claim against my late father's claim.

I so humbly pray.

Dated at Meru this 23rd day of June, 2017.

Signed.....

Anderson Nyaga Buuri

10. The plaintiff produced the following documents as exhibits:

1. Death certificate of the late M'Aburi M'Rugane
2. Limited Grant of Letters of Administration Ad litem
3. Ruling in Meru HCC Misc Appl. No. 176 of 2005
4. Court order dated 5th April, 2005 in Meru HC Misc. Appl. No. 176 of 2005
5. Notice of discontinuation of the suit in Meru CMCC No. 784 of 1999.
6. Copy of the register for land parcel No. Karingani/Muiru/32
7. Copy of the register for land parcel no. Karingani/Muiru/794
8. Land registrar's Tharaka/Nithi District proceedings dated 2.10.1997 between M'Aburi M'Rugane – deceased the plaintiff herein and Muthara Nyange the defendant herein together with the copies of the register for land parcel Nos. Karingani/Muiru/32 and 794.
9. Photographs of the properties and developments in the 0.76 Ha. Of land parcel No. Karingani/Muiru/32 by the plaintiff since the defendant vacated the said portion.

11. The documents were marked as the plaintiff's Exhibits Numbers 1 to 9.

12. The issue for determination in this matter is straight forward. It is if or if not the plaintiff is entitled to an order of permanent injunction against the defendant.

13. PW1, the plaintiff during hearing on 9th July, 2018 asked the court to adopt his witness statement dated 23rd June, 2017 as his evidence in this suit.

14. The plaintiff's advocate asked the court to find that the plaintiff had proved his case against the defendant. He also asked the court to dismiss the defendant's Counter Claim.

15. I do find that the plaintiff has proved his case against the defendant on a balance of probability. I also find that the defendant's Counter-Claim merits dismissal.

16. Accordingly, the defendant's Counter Claim is dismissed.

17. Judgment is entered for the plaintiff against the defendant in the following terms:

i) The defendant's Counter Claim is hereby dismissed.

ii) I hereby issue an order of permanent injunction restraining the defendant, his servants, employees, agents, assigns and / or anybody else acting on his behalf from entering, trespassing, interfering with and / or in whichever manner dealing with the plaintiff's actual possession and occupation of Land Parcel No. KARINGANI/MUIRU/32.

iii) Costs are awarded to the plaintiff.

18. It is so ordered.

Delivered in open Court at Chuka this 31st day of July, 2018 in the presence of:

CA: Ndegwa

Miss Kiome h/b Nyamu Nyaga for the plaintiff

Defendant and his advocate – absent

P.M. NJORGE,

JUDGE.