



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

MERU ELC CASE NO. 191 OF 2012

M'MARETE M'MUKUL.....PLAINTIFF

VERSUS

M'ARITHI M'KUGWIRIA.....DEFENDANT

JUDGMENT

1. In his plaint dated 2nd November, 2012, the plaintiff prays for judgment against the defendant for:

- a) A declaration that all that parcel of land parcel No. 318 Abogeta/Upper Chure measuring 7.28 acres or thereabout belongs to the plaintiff to the exclusion of all others.
- b) An order of permanent injunction do issue against the defendant, his assigns agents and / or servants or anybody acting on his behalf or behest from entering, encroaching and/ or residing, cultivating any food crops and / or interfering with the plaintiff's ownership of all that parcel of land known as land parcel No. 318 Abogeta / Upper Chure.
- c) Costs of this suit with interest at court's rates.

DATED AT MERU THIS 2ND DAY OF NOVEMBER, 2012

2. Vide a statement dated 11th December, 2012 the defendant denied the claims averred by the plaintiff and asserted as follows:

I M'ARITHI M'KUGWIRIA OF ID/NO. 4471146 and C/O P. O. Box 2387 – 60200, Meru being an adult male of sound mind state as follows:

That I do state that the plaintiff and I are cousins.

The father of the plaintiff was M'Mukui Kanyonju and my father M'Kugwiria were sons of Kathegeju.

Kathegeju was the owner of land parcel No. Abogeta / Upper – Chure / No. 318 measuring approximately 7.28 Acres.

That upon the death of M'Mukui and M'Kugwiria I and the plaintiff were left cultivating the suit land.

At one point the plaintiff wanted to sell the suit land including the parcel of land that was to be inherited by myself.

I informed the plaintiff that I did not want my parcel of land to be sold and we were to share the suit land so that the plaintiff can sell his parcel of land if he wished.

That the plaintiff on or about the early 70's instituted a case against me at Kinoru Land Board.

The board informed the plaintiff that the land was not in its jurisdiction and the same was to be referred to Nkubu.

The plaintiff instituted a suit at Nkubu Law Courts around 1970's in January 1971. The court ruled that we should share the land equally.

That a sub division was done and each party was issued with a title deed on 21.8.1970.

The plaintiff received Abogeta/U-Chure parcel No. 1443 measuring 1.456 HA and I received ABOGETA / U – CHURE 1444 measuring 1.456 Ha.

That we continued to occupy our respective parcels peacefully from 1978 until 2000 when my son Justus Gikunda went to occupy and develop the parcel of land when the plaintiff wanted to take the matter to the Meru Central District Tribunal Case No. 51 of 2011 which was referred to ABOGETA DIVISION however before the matter was never (sic) heard abolished by the environment and Land Court Act (sic).

I would wish to state that in regard to land parcel No. 373 ABOGETA/U-CHURE measuring 26.45 Acres I gathered the same personally and also bought various parcels of land and part of which I inherited from M'KUGWIRIA.

That during the process of consolidation my parcel of land was consolidated and I was registered as the first proprietor on 9.9.1963 and issued with a title deed of the said parcel of land.

That the land parcel ABOGETA/U-CHURE 373 has never been owned neither was owned by Kathegeju because it has never been registered in the names of Kathegeju when ABOGETA/U-CHURE/318 was registered in the names of Kathegeju in 1963.

I would wish to state that land parcel No. 318 of ABOGETA/UPPER CHURE was it (sic) never left in trust and the plaintiff has never raised this claim after court ordered that we divided the same in 1970's.

I have never and neither of my agent has interfered with the plaintiff's parcel of land because we have clear boundaries and each party has occupied his parcel of land for over four decades.

That I would pray that court do dismiss the plaintiffs case with costs as the same is meritless and a fishing expedition.

That is all I wish to state before this honourable court.

Signed by the said M'Arithi M'Kuwiria at meru this 11th day of December, 2012.

3. The defendant also filed a defence dated 11th December, 2012 which among other things avers that the issues concerning this matter had been determined in a suit by the plaintiff at Nkubu Law Courts around 1970 or 1971.
4. On 16th April, 2018, TITUS MURITHI ARITHI and TERAH KARIMI ARITHI, sons of M'MARETE M'MUKUI, the plaintiff (deceased) were substituted to participate in these proceedings instead of the original plaintiff.
5. The plaintiff did not file a witness statement as this matter, in view of the plaintiff's age, had been exempted from the requirements of order 11 CPR on 20th April, 2015. He gave oral evidence.
6. PW1, M'Marete M'Mukui, told the court that he wanted the court to give him his 3 ½ acres back which he claimed the defendant took away from him. He said that the defendant had his 26 acres and he did not see why he should take his 3 ½ acres. He claimed that the defendant's brother –in-law was the sub chief for the area where the land was situated and the sub-chief was used by the defendant to threaten and bamboozle him to allow the defendant to take his land.
7. The plaintiff produced the following documents in support of his case:
 - a) A copy of green card for title No. 373 Abogeta Upper Chure
 - b) A copy of green card for title No. 318 Abogeta Upper Chure
 - c) A copy of green card for title No. 1443 Abogeta Upper Chure
 - d) A copy of green card for title No. 1444 Abogeta Upper Chure
8. The defendant was categorical that he was claiming the whole of the original land parcel No. Abogeta Upper Chure 318 whose subdivision had spawned parcel Nos. 1443 ad 1444 Abogeta Upper Chure.
9. During cross-examination by Mr. Mutunga, the defendant's advocate, PW1 confirmed that the and the defendant were cousins as their fathers were the sons of Kathegenju Magiri (deceased). He also confirmed that land parcel No. 318 Abogeta Upper Chure was originally registered in the name of his grandfather. He denied that the land had been subdivided in 1970 whereupon he got half of the land and Arithi Kugwiria got the other half following a succession suit even after he was shown a copy of the apposite green card.
10. PW1 told the court that he could not explain why he had not filed a suit concerning the suit land since 1970. Although he told the court that he went to the Land Disputes Tribunal, he produced no evidence that the matter had been heard and determined by the Tribunal. He also told the court that the defendant had told him that he held the portion of the suit land that was in his name in trust for his children. He, however, told the court that he did not have evidence to support this assertion.
11. PW1, during cross-examination admitted that he occupied part of the suit land whereas the defendant's son occupied the other portion.

He also admitted that he had no evidence that parcel No. 373 had been given to the defendant by his grandfather. He was also categorical that he would not call any witness to give evidence in support of his case.

12. The defendant asked the court to adopt his statement dated **11th December, 2012** (op cit) as his evidence in this suit.

13. DW1, M'Arithi M'Kugwiria, the defendant told the court that the plaintiff was his cousin as his father one M'Mukui alias Kanyungu (deceased) and his father M'Kugwiria (deceased) were brothers. He adopted his witness (op.cit) as his evidence in this suit. He said that the suit land was left to him by his father. He said that the plaintiff's father also left him with his portion of the suit land, which the plaintiff occupied.

14. DW1 produced a green card showing that the suit land, parcel No. 318 Abogeta Upper Chure was subdivided in 1970 following a succession case and half of the land was registered in the names of the plaintiff whereas the other portion was registered in his name. He also told the court that he owned another parcel of land, parcel No. 373 Abogeta Upper Chure 373 which he claimed to have bought from individuals.

15. DW1 produced as his exhibits a copy of the green card for parcel No. 318 Abogeta Upper Chure showing that the land was divided into parcel Nos. Abogeta Upper Chure 1443 and 1444. He testified that the plaintiff got parcel No. 1443 and he got parcel No. 1444. He produced a copy of the title for parcel No. 1444 showing that it was registered in his name. DW1 asked the court to dismiss the plaintiff's suit and to also order the removal of an inhibition the plaintiff had caused to be registered against the suit land.

16. During cross-examination by the plaintiff, DW1 was categorical that he and the plaintiff had shared the suit land equally. I opine that the plaintiff, did not in any way impeach the veracity and integrity of DW1's evidence.

17. For the defendant, his advocates, the firm of Charles Kariuki & Kiome Associates proffered the following cases in support of their assertions:

a) Mumo versus Makau (2012) EALR pg 770

b) Moses Mbugua versus Mary Nyambura (2012) eKLR

The cases were however not annexed to the apposite submissions.

18. The defendant's advocate annexed the case of Joseph Chege (Appellant) versus Gikuri Heho, HCCA 29 OF 2008 [2009] eKLR which is an apposite authority for the principle that the issue of trust is a matter of law which ought to be proved through cogent evidence. The case of Mbugua Versus Nyambura (op.cit) supports the same principle

19. The parties filed written submissions.

20. The plaintiff's written submissions are reproduced herebelow:

PLAINTIFF'S SUBMISSIONS

Your Lordship,

The proceedings herein commenced by way of plaint dated 02.11.2012 and in which the plaintiff prays for:-

a. A declaration that all that parcel of land known as parcel No. 318 Abogeta / Upper Chure measuring 7.28 acres or thereabout belongs to the plaintiff to the exclusion of all others.

b. An order of a permanent injunction do issue against the defendant, his assigns agents and or

Servants or anybody acting on his behalf or behest from entering, encroaching and / or residing or cultivating any food crop and / or interfering with the plaintiff's ownership of all that parcel of land known as land parcel No.318 Abogeta/Upper Chure.

c. Cost of this suit with interest at court rates.

It is the plaintiff (sic) suit your lordship that the said land parcel is the sole property is (sic) the plaintiff and that the defendant held the same in trust for the plaintiff. The defendant filed his statement of defence dated 11.12.2012 in which he denies the plaintiff's claim in it's entirety.

Your lordship, the plaintiff stated in his plaint and in his testimony before court that he was the legitimate owner of the parcel NO. 318 ABOGETA/ UPPER CHURE measuring 7.28 acres and that he had inherited the said land parcel from his grandfather, one KATHEGEJU S/O MAGIRI who is long deceased.

The plaintiff further stated that said land parcel was held by the defendant in trust for the plaintiff and that in total abuse and / or breach of the said trust existing over the said land parcel, the defendant unlawfully and illegally proceeded to subdivide the said land parcel into two (2) portions and which he proceeded to register as follows:

i) L.R. NO. 1444 ABOGETA / UPPER CHURE – M'ARITHI M'KUGWIRIA

ii) L.R. NO. 1443 ABOGETA / UPPER CHURE – M'MARETE M'UKUI

The plaintiff states your lordship, that the said subdivision of land parcel No. 318 ABOGETA / UPPER CHURE was done fraudulently and without his (plaintiff's consent) and that the same was illegal and unlawful.

The plaintiff further states your lordship, that the registration (sic) one of the resultant portions into the defendant's name was illegal, fraudulent and outright theft of the plaintiff's land by the defendant.

The plaintiff has stated and testified that he and the defendant herein are cousins and that they are joined together by a common grandfather. He has further gone on to state that him and the defendant both inherited their respective ancestral land parcel from their common grandfather whereby the plaintiff inherited land parcel No. 318 ABOGETA / UPPER CHURE while the defendant on his part was given, or rather inherited land parcel No. 373 ABOGETA/UPPER CHURE. It was therefore not fair for the defendant to again take part of land parcel No. 318 ABOGETA/UPPER CHURE as he has done and his actions therefore are illegal and have deprived the plaintiff the full use of his said ancestral land.

Your lordship, it is evidently as (sic) clear that the said land parcel solely belonged to the plaintiff and the defendant had no right of entitlement to a portion thereof. The defendant does not deny having taken a portion of the plaintiff's said land parcel No. 318 ABOGETA/UPPER CHURE, but does justify his entitlement thereof.

Your lordship, the defendant's actions over the plaintiff's parcel aforesaid were illegal and unlawful and it will be fair and just for this honourable court to so find, and proceed to enter judgment in favour of the plaintiff as prayed for in the plaint.

The plaintiff so prays.

DATED AT MERU THIS 18TH DAY OF JANUARY, 2018

M'MARETE M'MUKUI

PLAINTIE

21. The defendant's written submissions are reproduced herebelow:

DEFENDANT'S SUBMISSIONS

Your honour, these are humble submissions on behalf of the defendant (sic) the main prayer (sic) sought by the plaintiff are as follows;

- a. Declaration that parcel of land No. 318 Abogeta/Upper Chure measuring 7.28 acres or there about belongs to the plaintiff to the exclusion of all others.
- b. An order of permanent injunction to issue against the defendant or anyone working on his behalf from entering or interfering with the plaintiff's ownership of all that parcel of land known as land parcel No. Abogeta/Upper Chure/318.
- c. Cost of suit at court interest rates.

BRIEF FACTS

The defendant vehemently opposed the prayers sought by the plaintiff and seeks the suit (sic) dismissed with cost.

The honourable court gave directions for the matter to be heard *vivavoce* and on 15th June, 2015 the plaintiff testified before the honourable court.

The plaintiff in his sworn statement averred that the honourable court to order the defendant to return 3 ½ acres that he took from their grandfather (sic) land, he claimed that the defendant has another land measuring 26 acres more so that the defendant had held that land in trust for him. He produced a tribunal claim he had filed at Meru Central District Land Dispute Tribunal, a copy of green card of land title No. 318 and the subsequent sub division of land parcel no. 318 into 1444 and 1443 all at ABOGETA/CHURE.

That he acknowledge that original land parcel No. ABOGETA/UPPER CHURE/318 originally belonged to Kathegeju Magiri (the grandfather) and the resultant subdivision of that land is ABOGETA/UPPER CHURE/1443 and 1444 and more so he was in possession and legal ownership of land NO. ABOGETA/UPPER CHURE/1443 (half of his late grandfather (sic) land parcel No. ABOGETA/UPPER CHURE/318. He acknowledged that the defendant is the first registered owner of land parcel No. 373 after the adjudication process was done ON ABOGETA/UPPER CHURE area.

He claimed since the defendant had land parcel No. ABOGETA/UPPER CHURE/373 he is justified to take land parcel No. ABOGETA/UPPER CHURE/318 exclusively, the plaintiff pleaded with the honourable court to order the defendant to give parcel No. ABOGETA/UPPER CHURE/1444 which is a subdivision of land parcel No. ABOGETA/UPPER CHURE/373.

The defendant testified on 19th October, 2015, he adopted his written statement and further stated that indeed they are cousins with the plaintiff since they are all grandchildren of the late KATHEGEJU.

That the late Kathegeju had the sons namely KANYUNGU M'MUKUI and M'KUGWIRUA plaintiff's father and defendant (sic) father respectively.

That their grandfather owned land parcel No. 318 ABOGETA/UPPER CHURE which ought to be shared equally between their fathers.

That their fathers never subdivided the land during their lifetime however each of them used his respective part of the land.

That he acknowledged their grandfather had several lands which he shared out during his lifetime and the plaintiff's father got his share and sold it to other people.

That he acknowledged the plaintiff got a share of his father (sic) estate but later sold it.

He averred that when he heard that the plaintiff was selling half of land parcel No. ABOGETA/UPPER CHURE/318 he filed succession in Nkubu Law Court in 1970 and the land was equally shared between them.

That the resultant subdivision of land parcel No. ABOGETA/UPPER CHURE 318 were 1444 (sic) owned by plaintiff and his became No. 1444.

He gave his land parcel No. ABOGETA/UPPER CHURE/1444 to his son who resides therein with his family.

The defendant denies holding any land in trust for the plaintiff and further stated that the only land that the plaintiff could lay claim on was land parcel No. ABOGETA/UPPER CHURE/318 and he had already given half a share to the plaintiff. He denies meeting (sic) any form of mistreatment or threats to the plaintiff or his estate.

He prayed to the honourable court to examine the green card of the land parcel NO. ABOGETA/UPPER CHURE/318 with a view of proving that the land was initially in names of KATHEGEJU son of MAGIRI their grandfather and this (sic) he could not be holding the same land in trust for the plaintiff and more so the plaintiff is in possession of half of the land.

He prayed to the honourable court to lift the orders of inhibition placed on his land by the plaintiff (sic) dismissal of suit at court interest rules.

We submit that the defendant (sic) constitutional right to property cannot be interfered with unless he holds such property in trust for someone else or it is obtained through fraud or misrepresentation.

The defendant is the first registered owner of land parcel NO. ABOGETA/CHURE/373 since he produced receipt dated 2nd July 1964 and 12th April, 1965 paid to the colony and protectorate of Kenya for Kshs.5 AND Kshs.25 respectively for the land.

The land parcel NO. ABOGETA/UPPER CHURE/318 was subdivided equally amongst the beneficiaries of the late KATHEGEJU facts not denied by plaintiff vide his sworn affidavit dated 22nd July, 2014.

The land parcel No.ABOGETA/UPPER CHURE/318 was subdivided on 21st August, 1970 and it has taken the plaintiff 25 years to lay a claim against the defendant.

APPLICABLE LAW

Your lordship, we do submit that the plaintiff has not proved his case against the defendant at the required standard. Section 25 of Land Registration Act No. 31 of 2012 do (sic) protect the rights of a proprietor subject to the overriding interest in section 28 of the same Act. It is our case averments that the guiding principal (sic) on trust is well grounded in the locus case of MUMO VS MAKAU (2002) E.A PAGE 170 where the Court of Appeal held that trust is a question of law.

Both the plaintiff and the defendant are beneficiaries of their late grandfather's land in equal shares. The defendant avers he has got some other lands from individuals and as such he is the 1st registered owner of the same with evidence of having paid for them or reversed (sic) date to the colony and protectorate colony under native land tenure rules.

The Kenyan Constitution provided for protections (sic) of individual property under Article 40 and the defendant's case is no exception. We thus pray the honourable court to dismiss the plaintiff's case with cost.

We rely on the following authorities

1. Mumo vs Makau (2012 EALR Pg 770)
2. Moses Mbugua vs Mary Nyambura (2012) eKLR

We so pray.

DATED AT MERU THIS 9TH DAY OF MARCH, 2016

For: CHARLES KARIUKI & KIOME ASSOCIATES

ADVOCATES FOR THE APPLICANT

22. I have considered the pleadings proffered by the parties in support of their respective assertions. I have also considered their oral evidence and the submissions they have filed. I have also taken into account the authorities proffered by the defendant.

23. The issues to be decided in this suit are straight forward. They are:

(a) Is the plaintiff entitled to a declaration that land parcel No. 318 Abogeta/Upper Chure measuring 7.28 acres or thereabouts belongs to the plaintiff to the exclusion of all others?

(b) Is the plaintiff entitled to an order of permanent injunction against the defendant, his assigns, agents and / or servants or anybody acting on his behalf or behest from entering, encroaching upon and / or residing, cultivating any food crops and / or interfering with the plaintiff's ownership of all that parcel of land known as land parcel No. Abogeta/Upper Chure/318?

(c) Who should be awarded costs?

24. In his evidence the plaintiff has admitted that land parcel No. 318 Abogeta/Upper Chure was registered in the name of his and the defendant's grandfather on **9th September, 1963, fifty five years ago**. He has feebly denied that on **21st August, 1970**, through a succession Cause he **got ½ share** of the suit land and the defendant got the other half. This happened 48 years ago. The plaintiff was unable to explain why it took him thirty two years from 1970 to file his claim against the defendant.

25. It is pellucid that parcel No. 318 Abogeta/Upper Chure ceased to exist on 21st August, 1970 when it was subdivided into parcel Nos. 1443 and 1444 Abogeta/Upper Chure. The plaintiff got parcel No. 1443 and the defendant got parcel No. 1444. He admitted that the original parcel of land NO. 318 belonged to the common grandfather of the defendant and himself. He did not dispute that he got an equal share with the defendant. The land having belonged to their common grandfather, he did not explain to the satisfaction of the court why he should have inherited the whole of it. His claim smacks of veritable greed. He did not prove that the defendant held land in trust for him and his successors.

26. The plaintiff did not controvert at all that land parcel No. Abogeta/Upper Chure/373 belonged to the defendant to the exclusion of any other person. He, himself, proffered a copy of a green card showing that the land was registered in the name of the defendant on 9th September, 1963, fifty five years ago. He proffered no evidence that the defendant had inherited this parcel of land as ancestral land even though he makes this claim in paragraph 5 of his plaint. It is instructive that although he claims that parcel No. 373, measured 26 acres, he was not staking any claim against it. This is suggestive of the fact that he was aware that this parcel of land belonged solely to the defendant and was not ancestral land. That is why he is claiming parcel No. 318 which does not exist as it was shared equally by the plaintiff and the defendant in 1970.

27. The plaintiff admits that the defendant's son occupies the portion of land which he inherited and got a title thereof in 1970. This means that granting him an order for permanent injunction against the defendant and his assigns or agents would amount to granting an order of eviction against the defendant's son through the backdoor. This court cannot countenance such a phasmagoric scenario. As no illegality or fraud has been proved, the defendant is entitled to proprietary protection of his rights as decreed by section 25 of the Land Registration Act.

28. I do opine that section 7 of the Limitation of Actions Act goes against the plaintiff's claim 48 year after the defendant was registered owner of the claimed portion of land. Section 7 of the Limitation of Actions Act states as follows:

Section 7: "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person"

Even if we take 2012 as the starting point, this suit was filed in the year 2012, 42 years after accrual of the right of action to the plaintiff.

29. In the circumstances, I find that this suit lacks merit.

30. This suit is dismissed.

31. Costs are awarded to the defendant.

32. Orders accordingly.

Delivered in open court at Chuka this **30th day of July, 2018** in the presence of:

CA: Ndegwa

Charles Muchiri h/b M/S Kiome for the Defendant

M'Marete M'Mukui – Plaintiff

P.M. NJORGE

JUDGE