



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. 53 OF 2005**

**MARY NCHEKEI PAUL.....PLAINTIFF**

**VERSUS**

**FRANCIS MUNDIA RUGA.....DEFENDANT**

**JUDGMENT**

1. This suit was filed by way of an Originating Summons dated 18.6.2005 whereby the plaintiff is claiming the whole of land parcel no. L.R Nanyuki/Marura Block 8/1590 (Nturukuma) measuring 0.80 ha by way of adverse possession in place of the registered owner who is the defendant.

2. The suit is opposed through the Replying Affidavit of the defendant filed on 9.9.2005 where by Defendant avers that plaintiff has not satisfied the legal requirements to succeed in a claim for adverse possession.

3. Defendant contends that plaintiff has no letters of administration in respect of the estate of her husband, Paul Mugambi Rukaria and that it is not possible for her to claim ownership by way of adverse possession at the same time claim ownership by way of contract.

4. Defendant further claims that he became the registered owner of the land on 15.2.2005 and hence 12 years had not lapsed by the time the suit was filed. He also states that plaintiff's alleged occupation of the land has not been peaceful since even when her husband was alive he was notified that the land he is occupying does not belong to him.

**Plaintiffs case**

5. Plaintiff Mary Nchekei Rukaria testified and she also adopted her statement dated 6;12;2011 as her evidence.

6. Plaintiff's testimony is that the suit land was known as land Parcel no. 822 Mariara Farmers which is 2 acres. She availed a land sale agreement dated 1981 to show how she acquired this suit land. It is her husband, one Paul Mugambi M'Rukaria is the one who had bought the suit land from one Daniel Chabari Kirunja. The plaintiff and her husband proceeded to settle on the suit land from henceforth (1981). When her husband died on 22.1.2005, she wanted to bury him on the suit land but she was stopped by the chief and the defendant. Later she decided to take the matter to court. She averred that the body of her husband is still at the mortuary to date and that she had no other land to bury her husband.

7. Plaintiff further stated that the defendant acquired the title to the land after the death of her husband when the case was till in court. She also stated that before the husband died, no one had ever claimed the land.

8. Plaintiff also gave an account of how defendant acquired the suit land. Apparently, defendant bought the land from one Japheth Kimathi who was the son of Daniel Chebari Kiruja, (the one who had sold the land to her husband and was also a member of the society).

9. Plaintiff stated that she never went to the land buying company's office and that Mariara Society Cooperatives Ltd was the one selling the land. She also said that the suit land was not transferred to her husband by the time he died.

10. On cross examination, plaintiff stated that at the time of purchase of the suit land (in 1981), there were no title deeds. She further stated that defendant was issued with the title deed in February 2005. She said that she was not aware that the title deed to the suit land was issued on 10.4.2004 in the name of Nturukuma Society.

11. Plaintiff also stated that her husband was not a member of Nturukuma Society but the land was sold to him by a member of Nturukuma Society known as Daniel Chabari Kiruja. She further stated that her family was told by Mariara Farmers' Cooperative society to leave the

land and that is why she took the matter to court before the Senior Resident Magistrate Nanyuki case no. 15/2095. In that case, the court had ordered that she should not bury the body of her husband until the case was finalized.

12. PW 2, one Samwel Mugambi testified that he knew the plaintiff and her husband and that he was the surveyor who identified the land being sold by Chabari, and that he had been given a contract by the Society to subdivide the land. He showed them (Chabari and Mugambi) the land and the plaintiff's husband built on that land immediately and had been living there since 1981 to date.

13. PW2 further testified that he also bought a piece of land no. 1512 which is about 4-5 kilometers from plaintiff's land. Consequently, he was able to see that plaintiff and her husband were in occupation of the suit land and had developed the same.

14. On cross examination, PW 2 stated that he was not an official of Mariara society but a member who was involved in the subdivision of the land together with surveyors who were contracted to do so.

15. PW 2 averred that Mariara was the office but the land was known as Nturukuma. When one bought the land from Nturukuma, the transfer was to be effected by Mariara who then issued a clearance letter. PW2 confirmed that such a letter was written to defendant by Mariara where the plot is identified as plot no. 822 Nturukuma farmers as is evident from defence list item no. 9 (a letter dated 17.2.2005).

16. PW 2 further stated that when one was doing a transfer, that person was supposed to pay for the title and for the surveyors.

17. In support of her case, plaintiff produced the following documents as exhibits.

(i) Limited grant of letter of administration and Colligenda Bona (P-Exhibit 1)

(ii) Agreement dated 25<sup>th</sup> August 1981 between Daniel Chabari Kirunja and Paul Mugambi M'Rukari. (P-Exhibit 2).

(iii) A document in name of Daniel Safari from Chairman Maraira farmers (P- Exhibit 3).

(iv) Letter from Mariara Farmers Society Company Limited. (P-Exhibit 4).

(v) Letter from S. Mwirigi M'Inoti & Co. Advocates. (P-Exhibit 5).

(vi) Letter from the Assistant Chief Nturukuma location to confirm death of Paul Mugambi. (P-Exhibit 7).

(vii) Copy of register from Mariara Faremrs Society Company Limited. (P-Exhibit 8).

18. Plaintiff's prayer is for the suit land currently registered in defendants name to be registered in her name.

### **Defence case**

19. Defendant, Francis Mundia Ruga testified as (DW 1) and he also relied on his affidavit of 7.9.2005. He avers that he bought the suit land in the year 1995 from Japhet Kimathi Chabari who was the registered owner as per the society's records who then obtained the necessary consent to transfer the land and so defendant paid the transfer fee. He was later called together with the deceased (PW 1's husband) to appear before the management committee over the issue of ownership of the suit land whereby the deceased was told to vacate the land.

20. DW 1 stated that the plaintiff wanted to bury her husband on that land but the Nanyuki Magistrates court declined to grant orders to that effect. Plaintiff then withdrew that suit only to file the present one where she apparently sought similar orders but the court did not agree to the same vide a ruling of 19.3.2007 by Judge Ouko.

21. Defendant's testimony is that he bought the suit land from Japhet Kimathi Chabari through Mariara Cooperative society and he was given letters by the society to that effect. He later acquired the title for the suit land and he is therefore the lawful owner of the land.

22. On cross examination, defendant stated that he bought the land in 1995 and that no one was in possession of the land. He also said that he consulted the society and the society summoned the deceased (plaintiff's husband) to vacate the land. He also said that he had never taken the plaintiff to court nor to any land tribunal. He only dealt with the society since he knew the owner of the land as a member of the society.

23. Defendant further stated that he had never met the father of Japhet but he only knew the owner of the land no. 822 as Japhet Chabari though he did not know his membership number.

24. The defendant said that the land was registered for the first time in 2004 and a green card annexed as "MNP" showed that there was an entry of 10.4.2004 showing Nturukuma Cooperative Society. It indicated that the first registered owner of the land was Nturukuma Farmers and that he was issued with a title deed on 15.2.2005 as the owner of the land. He also stated that he went to Mariara Farmers board to get a consent and was issued with a receipt though the minutes of the board meeting were not availed.

25. The defendant in support of his case produced the following documents in the list dated 18.2.2014 as his exhibits;

(i) Sale agreement

- (ii) Confirmation letter dated 25<sup>th</sup> April 1995 from Mariara Farmers' Cooperative Society Ltd.
- (iii) Payment receipts for application of transfer and transfer fee
- (iv) Payment receipts for survey fee
- (v) Receipts for transfer fees
- (vi) Letter dated 8<sup>th</sup> May 1996 from secretary of Mariara farmers
- (vii) Letter dated 4<sup>th</sup> March 1998 from secretary Mariara farmers
- (viii) Receipt dated 8<sup>th</sup> October 2004
- (ix) Letter dated 17<sup>th</sup> February 2005
- (x) Complaint in Nanyuki SPMCC No. 15 of 2005
- (xi) Defence in Nanyuki SPMCC no. 15 of 2005
- (xii) Ruling in Nanyuki SPMCC 15 of 2005
- (xiii) Copy of title deed for parcel of land no. NANYUKI/MARURA BLOCK 8/1590 (NTURUKUMA) in the name of FRANCIS MUNDIA RUGA.

26. Defendant through his counter claim prays for the eviction of the plaintiff from the suit land.

#### **Determination**

27. I have considered all the arguments raised here in as well as the rival submissions of the parties. I find that the issues for determination are; **whether plaintiff's claim of adverse possession in respect of the suit land is merited and whether defendants claim for eviction of the plaintiff has merits.**

28. On the claim of adverse possession, I have no doubts that plaintiff is the one who is in occupation of the suit land. Going by the documents produced as D-exhibit 7, plaintiff's occupation of the suit land has been there long before 1998. Defence Exhibit 7 is a letter from Mariara farmers and was directed to plaintiff's husband informing him that the suit land belonged to Francis Mundia and so he should vacate the land.

29. **The Black's Law Dictionary 7<sup>th</sup> Edition by Garner** defines adverse possession as “ a method of acquiring title to real property by possession for a statutory period under certain conditions especially a non-permissive use of the land with a claim of right when that use is continuous , exclusive, hostile, open and notorious.”

30. A claim of adverse possession is hinged on the provisions of **section 38 of the limitation of actions act** where it is provided that “(i) **Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land**”. The Acts referred to under section 37 are the Government Lands Act, Registration of Titles Act, Land Titles Act and Registered Lands Act (all repealed).

31. The copy of title deed produced as D-exhibit 13 shows that the register for parcel no NANYUKI/MARURA BLOCK 8 (NTURUKUMA) 1590 was opened on 4.10.2004 under the registered Lands Act Cap 300, while a title deed was issued to defendant on 15.2.2005 under the aforementioned law. I am therefore in agreement with defence submissions that time begun to run as from 10.4.2004. It also follows that plaintiff had only adversely occupied the suit land for a period of one year two months by the time this suit was filed on 20.6.2005.

32. In the case of **Ann Itumbi Kiseli vs. James Muriuki Muriithi (2013) eKLR**, a case cited by defendant, it was held that “adverse possession could only run as from 23.8.2006 when the title deed was issued for the first time.

33. In **Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakswen & Another, Court of Appeal civil Appeal No. 11 of 2014 Malindi**, it was stated that “**the identification of the land in possession of an adverse possessor is an important and integral part of the process of proving Adverse Possession**”.

34. In the present suit, the suit land before registration in 2004 was only identified as plot no 822 without any indication as to what legal regime defined this land. It cannot therefore be said that plaintiff had dispossessed the owners of the suit land the title to that land, before year 2004.

35. It is also not lost to this court that plaintiff's occupation of the suitland doesn't appear to have been peaceful. The family of the plaintiff was issued with notices by the office of the land buying company (Mariara) to the effect that the land belonged to the defendant. The court in

SRM CC Nanyuki No. 15 of 2005 appears to have been alive to this fact and proceeded to dis allow plaintiffs prayer to intern her husband on the suit land.

36. The upshot of my findings are that the claim for adverse possession has not been proved by the plaintiff.

37. Having established that plaintiffs claim under section 38 of limitation of actions act is not sustainable, then the logical trend is for defendant to commence the enjoyment of his land as stipulated under section 25 of the Land registration act where it is stipulated that; **“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”**.

38. **Final orders;**

1) Plaintiff’s suit filed on 20.6.2005 is hereby dismissed with costs to defendant.

2) It is hereby declared that plaintiff in the counter claim, **Francis Mundia Ruga** is the lawful proprietor of land parcel no. L.R.NANYUKI/MARURA BLOCK 8/1590 (NTURUKUMA).

3) An order of eviction is hereby issued against Mary Nchekei Paul from the land parcel No. Nanyuki/Marura Block 8/1590 (Nturukuma), but she is given a grace period of two months to leave the land.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 11<sup>TH</sup> DAY OF JULY, 2018**

**IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Miss Mwiraria holding brief for Wanjohi for plaintiff

Mwanzia for defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**