



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

LAND CASE NO. 145 OF 2010 (O.S)

CATHERINE WAMBUI MURIGU.....1ST PLAINTIFF
MOSES KINOTI MURIUNGI.....2ND PLAINTIFF
GEOFFREY MURIIRA.....3RD PLAINTIFF
NANCY MWARI.....4TH PLAINTIFF
ROBERT MUGAMBI.....5TH PLAINTIFF
SIMON BUNDI.....6TH PLAINTIFF
JEDIEL KIREMA.....7TH PLAINTIFF
PAUL MUTUA.....8TH PLAINTIFF
JOHN KIGUNDA.....9TH PLAINTIFF
EMILY NJAGI.....10TH PLAINTIFF
MARY WANJIKU.....11TH PLAINTIFF

VERSUS

JANET KATHURE M'KIRIGIA (*Sued as legal representative of*

M'RIMBERIA M'MURURU).....DEFENDANT

DORIS KANJA INOTI.....INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. By an Amended Originating Summons dated 12/5/2016 and filed in court on the same date the plaintiffs herein sought the following orders.

a) A declaration that the plaintiffs have acquired by adverse possession absolute title to the whole of LR. No. NTIMA/IGOKI/276, LR. Nos. NTIMA/IGOKI 8179-8198 and 8838-8841 and therefore they are entitled to be registered as the proprietors of the same.

b) Costs of this suit.

2. The Amended Originating Summons is supported by the sworn affidavit of Catherine Wambui Murigu dated 16/9/2015. In that affidavit it is averred that on various dated in 1996 the plaintiffs bought LR No. Ntima/Igoki.276 from one Francis M'Mboroki, subsequently subdivided into Nos. Ntima/Igoki 8197-8198 and 8838-8841; that they took possession of their respective portions immediately, fenced them and intensively and extensively developed them and built permanent houses; that they have lived on the suit land since 1996 to date

peacefully and interruptedly; that their occupation had been open and notorious and continuous. **Paragraph 9** of that affidavit contains a prayer that they be declared as owners of the suit land by a way of adverse possession.

3. In the Originating Summons the following questions are sought to be answered:-

- (1) Whether the suit land is registered in the name of the defendant;
- (2) Whether the defendant is the legal representative of the proprietor of the parent suit land;
- (3) Whether the parent suit land measured 1 acre
- (4) Whether the plaintiffs have obtained title to the suit land by **Limitation of Acts and the doctrines of adverse possession**;
- (5) How can be the proprietorship be determined by the court?
- (6) Whether the plaintiffs are entitled to the costs of the suit.

4. In the replying affidavit to the amended originating summonses dated **12/5/2016** the defendant states that the issue of the suit land was settled in **Meru High Court Succession Cause No. 121 of 1998**; that the land parcel was shared by Geremano Samaki M'Arithi, Janet Kathure M'Kirigia (the defendant) and Moses Muriungi as ordered by the court long before this case was filed. The land was subdivided into **Parcel Nos. 8838 and 8841**. The owners of which resultant subdivision have been enjoined to this suit. The deponent states that since the land was bought when **Succession Cause No. 121 of 1998** was pending in court they have no cause of action against her.

5. By an order made on **20/4/2017** following an application at her instant dated **2/12/2016** the interested party was enjoined in such capacity to the suit. She was allowed to file her pleadings, if any, within 21 days of that date.

6. The plaintiff filed the witness statements of Catherine Wambui Murigu and Nancy Mwari Douglas on **16/10/2016**. The interested party filed an affidavit on **10/10/2017** in which she stated that she acquired a subdivision of the suit land going by the **Number 8196** measuring **0.164** hectares.

THE EVIDENCE OF THE PARTIES

The Plaintiffs' Evidence

7. **PW1** who is the 4th plaintiff testified on **22/2/2018**. She adopted her statement dated **12/10/2017** as her evidence-in-chief. The sum of her evidence is that the suit land belonged to Francis Muriungi M'Mboroki who lived there for **40** year; that in **1996** they came to a mutual understanding; that she has lived on the suit land for **14 years** and built permanent buildings, plaintiff trees and bananas and fenced her portion; that problems arose in **2010** when Muriungi's son Moses Kinoti sold a portion of the land to another person and all the trees around the suit land were cut around the year **2016**; that she reported to the police and Moses was arrested and detained; that she was living on the land with the other plaintiffs; that the original plot was later subdivided into **4** portions of which **Plot No. 8841** belonged to her; that Moses sold the parcel to the interested party in **April, 2016**; that the defendant was also given a parcel by Moses yet Moses had said that he never knew them during the succession proceedings. Moses was taking the place of vendor; when his father died he changed tune because he got some of the parcels of land.

8. Under cross examination **PW1** said she never brought land from the defendant, admitted that in **1976** the land was registered under the name of Moses' grandfather one M'Rimberia. Janet Kathure (the defendant) is still residing on the land and she is an administrator. She was also given some of the land. She stated that she is claiming land from Moses and from the defendant. She averred that she did not buy the land but she was there on the basis of mutual understanding.

9. When cross-examined by Mr. Kaimba for the interested party she said that her portion was a quarter of an acre and that Moses had title to that portion. She testified that the interested party got a part of her land removed her fence and put up her own. The understanding she spoke about was expressed to have been between her and Francis Muriungi. She stated that the plaintiffs were not tenants; that the understanding was that she would help with food or money and it lasted until Moses Muriungi died. After the death of Muriungi his son called all the plaintiffs who gave **Kshs.30,000/=** to him. The witness insisted that by that payment, what she calls a "mutual understanding" was entered between the plaintiffs and Moses Kinoti. She testified that her share falls on the portion given to Moses and partly on the one given to Samaki. However she did not have survey record to confirm the same.

10. Upon re-examination by Mr. Otieno she stated that the disruption of her stay commenced in **2010** and that there was no intimation by Muriungi that he would terminate the agreement. She stated that Moses Kinoti who used to be the 2nd plaintiff in this suit defected and joined the defendant in sharing the land to the exclusion of the plaintiffs.

11. **PW2**, Catherine Wambui Murigu, the 1st plaintiff testified on **18/6/2018**. She adopted her statement dated **12/10/2017** in this case as her evidence-in-chief. She stated that between **1960** and **1963** during the demarcation Francis Muriungi Mboroki lived with his sons on the land; that Francis Muriungi was son to Jason Mboroki M'Kirima; that she, Francis and **11** other people came together and entered into a mutual agreement whereby they were allowed to build on the land and in return they used to help into paying school fees. The house Francis Muriungi was living in was built by the witness and her colleagues. Muriungi's children were also educated by the same people when they started living on the land between **1996** and **1997**. She testified that they have now built permanent houses connected the main power grid and water supply, planted trees and bananas. At about the year **2010** the dispute between them and Moses Kinoti began. Moses began to subdivide the land around the year **2015**, an injunction was issued restraining the sale of the land. He tried to enter the shamba

unsuccessfully. At first he was part of the suit against the defendant but later on he teamed up with the defendant and one Samaki to harass the plaintiffs and evict them. She averred that the plaintiffs have been in the land for more than **13 years** and that it is the only place they and their children know as home.

12. When cross examined by Mr. Kiogora for defendant she stated that she never bought the land. However when shown her statement dated **12/10/2017**, she denied it as not being her statement and maintained that she never bought the land. She stated that by the time she entered the land by **1997** she did not know there was a court dispute. After entering the land she came to know that the land was registered to the name of M'Ikirigia. She averred that the land had never been registered in the name of Muriungi; that Moses Muriungi did not sell her any land but rather it is Moses's father who allowed her to be on the land. She testified that she does not know who the registered owners of the resultant subdivisions are.

13. Upon cross examination by Mr. Kaumbi she stated that the land was **1 ½ acres** that she occupies a **½ acre**. According to her not all the portions occupied by the plaintiffs are equal. However Nancy Mwari the **4th** plaintiff occupies a **½ acre**. She stated that she came to know of the **Succession Cause No. 121 of 1998** after entry onto the land; that the plaintiffs enjoined themselves into the Cause when the land was being subdivided.

14. Under re-examination by Mr. Otieno she maintained that the plaintiffs never bought land; that the plaintiffs had an agreement with Francis Muriungi Mboroki to stay with him, pay school and build him a house; that Moses Kinoti only stepped on his father's shoe as the owner of the land and that Moses Kinoti was originally a plaintiff in this case among the plaintiffs but later on he joined the defendant. She testified that none of the plaintiffs had been disturbed except Nancy Mwari the **4th** plaintiff who was disturbed in **2015**. She averred that all the other plaintiffs are living on the land peacefully.

15. PW3 is the **6th** plaintiff, testified on the same date. He adopted the evidence given by **PW1** and **PW2**. On cross examination by Mr. Kiogora he stated he had not filed any statement in this matter.

16. PW4 John Gikunda is the **9th** plaintiff, also adopted the evidence by **PW1** and **PW2** and adopted his statement in the case.

17. PW5 Mary Wanjiku Mureithi, the **11th** plaintiff testified and adopted the evidence of **PW1** as her evidence-in-chief. She admitted that she did not file any statement in the matter.

18. During the proceedings Mr. Otieno closed the plaintiffs' case subject to an application that he made to the effect that the court do visit the locus in quo. However when that time came the court was not inclined to visit the site as it deemed the evidence sufficient to dispose of the suit.

The Defendant's Evidence

19. DW1, Doris Kanja Kinoti the interested party testified on **18/6/2018**. She referred to her affidavit in the matter dated **9/10/2017** and the documents annexed thereto and adopt it as her evidence-in-chief. She identified her plot as **No. 2840** which she stated she bought in **2011** from Moses Kinoti. She stated that she found that the land title had a caution registered against it. She averred that none of the plaintiffs occupies her portion of land. She prayed the court to order that the caution against her land be removed. Mr. Kaumbi applied for an amendment of her affidavit to read **L.R. No. Ntima/Igoki/8840** instead of **Ntima/Igoki/2840**, an application Mr. Otieno for the plaintiffs opposed and applied for the entire affidavit to be expunged from the record as the annexures were not marked and the affidavit is not signed and it is not commissioned. Mr. Kaumbi responded by stating that the affidavit is signed and commissioned. The court observed that save the fact that the exhibits were not serially numbered as required by **Order 19** of the Civil Procedure Rules, the affidavit was duly commissioned. The court admitted that affidavit in evidence and ruled that that was just a minor infraction of the rules. The court ordered the witness to testify as to which number refers to her plot instead of ordering an amendment to the affidavit whereupon she identified it as **Ntima/Igoki/8840**.

20. While under cross examination by Mr. Otieno, **DW2** stated that she did not have evidence to show that she had bought the land, that she did not have any dispute with the **4th** defendant; that she does not use the land; that the plaintiffs are not occupying the land and that Moses had told her that he was given the land by the court. She testified that she has subdivided her portion into two. She denies knowing the defendant.

21. Upon re-examination by Mr. Kaumbi she testified that her portion of land measures **0.05 hectares**; that there is a house on the land and that Moses Kinoti informed her that the house belongs to him.

22. DW2, Janet Kathure the defendant give sworn evidence on **18/6/2018**; she adopted her statements dated **9/10/2017** and **8/5/2017** as her evidence-in-chief. She stated that she does not know the plaintiff; that they cannot allow her to access the land; that they have prevented her from accessing for a long time; that even in the year **2000** they were still preventing her and that the court ruled that the land belongs to her. She adopted the documents attached to her affidavit as **P. Exhibit 1-5**. She prays for the plaintiffs' case to be dismissed with costs and one acre of land be given to her.

23. When cross examined by Mr. Otieno she averred that the land belonged to her husband whose name was M'Rimberia M'Kirigia; that she knows Francis Mboroki; that Samaki is her nephew; that Moses Kinoti was given the land by the court but she did not challenge the court decision because that is when she was sued by the plaintiffs. She stated that she normally goes to the land secretly; that the plaintiffs have built on the land but no one is cultivating on it. She stated that they built on the land when she was still in occupation of it and then they sued her. She averred that Moses Kinoti calls her grandmother but she does not know him. She stated that Moses' father was buried by the roadside near her land because she objected to him buried on the land. She further stated Moses' father had a parcel of land that borders hers; that she had filed to her late husband's estate; that Moses was not to get land therefrom as he was just her neighbour; that her father did not have any land inside her land. She averred that the plaintiffs were not involved in the **Succession Cause No. 121 Of 1998**; that Kinoti was

not given the land; that Muriungi is the one who sold her land and that the people who he sold the land to sued her when they lacked title deeds. She denied having met the plaintiffs.

24. When re-examined by Mr. Kiogora she admitted that she last went to the land a long time ago; that however that visit was after this suit had been filed; that Moses Kinoti was not given the entire land but only a portion; that the plaintiffs normally chase her from the land and that is why she does not go there.

SUBMISSIONS

25. The plaintiffs filed their written submissions on **6/8/2018**. The defendants had filed theirs earlier on **2/8/2018**. I have perused through the record and found no submissions filed on behalf of the interested party.

DETERMINATION

Issues for Determination

26. The issues that arise in this suit are as follows:

(a) Are the plaintiffs entitled to be declared owners of the suit land by virtue of adverse possession?

(b) What orders should issue?

(a) Are the plaintiffs entitled to be declared owners of the suit land by virtue of adverse possession?

27. I have considered the evidence given by **PW1, PW2 PW3, PW4** and **PW5** in this matter as well as evidence of **DW1** and **DW2**.

28. From inception the defence of the defendant and the interested party is adversely affected by only one issue: that Moses Kinoti, the person named as co-administrator in the estate of Francis Muriungi, was originally a plaintiff in this very suit, who defected and joined the defendants in sharing out the land by virtue of a grant obtained in **Meru High Court Succession Cause No. 121 of 1998**. In that succession cause whose facts are clearly captured in the judgment dated **22/10/2010** the petitioner was pitted against two other persons: **Geremano Samaki M'arithi** and **Moses Kinoti**, a former plaintiff in this suit.

29. The judgment in that petition shows that the defendant herein successfully petitioned for letters of administration to the estate of her husband **M'Kirigia M'Mururu** whom she also referred to as **Rimberia M'Mururu**. She listed the suit land as part of the estate of her deceased husband.

30. **Geremano Samaki M'Arithi** and **Moses Kinoti** (former 2nd plaintiff in this suit) objected to the grant.

31. **Geremano** averred that the land belonged not to Janet Kathure's husband but to his grandfather called **M'Mururu** who was also father to Janet Kathure's husband and called for the suit land to be shared equally between him and Janet.

32. **Moses Kinoti** stated that his father **Francis Muriungi Mboroki** (whom the plaintiffs in this suit allege gave them the land) lived on the suit land. Both **Geremano** and **Moses** denied that Janet had ever lived on the suit land, evidence that was not challenged in that petition. In fact Janet testified in that petition that it was her father-in-law **Rimberia M'Mururu** who had lived on the land with his wife.

33. In that petition evidence was also adduced that **Geremano** has built a house on that parcel of land. **Moses Kinoti's** evidence in the same petition was that his family had lived on that land for a long time and that upon death, his father was buried on the said land. The court found that he is entitled to a part of the suit land. The opinion of this court is that **Moses Kinoti's** family had lived on the suit land alongside the plaintiffs over a very long period of time, just as **Geremano** had.

34. In the succession cause mentioned above, the court revoked the grant that had been granted to Janet and ordered the issue of a fresh grant in the names of Janet and **Geremano**. The court also ordered that the new grant be confirmed in the following terms :

“That grant shall be confirmed in the following terms:

(a) Parcel Number Ntima Igoki /276 to be shared equally between Geremano Samaki M'Arithi, Moses Kinoti Muriungi and Janet Kathure M'Kirigia.”

35. No record is made in that petition of appearance by the plaintiffs.

36. What can be discerned from the evidence on the record is that **Geremano, Moses Kinoti, PW1, PW2 PW3, PW4** and **PW5** have lived on the land for many years. In the instant suit it was also the evidence of **PW1** that Janet Kathure has been living on the suit land. It was the evidence of **PW1** and **PW2** that all the plaintiffs had lived on the land for a long time.

37. The question in this suit is whether the plaintiff's claim for title by way of adverse possession has merit. The initial inclusion of **Moses Kinoti** in the instant suit was an acknowledgement that he considered that the claim of the other plaintiffs in this suit had merit. His spectacular tergiversation evidenced by filing a withdrawal notice dated **19th February 2014** in this matter and the fact that he was not

subsequently enjoined as a defendant does not matter. It strengthened the plaintiffs' claim the more. Had he been joined as a defendant, he could not have been in a position to oppose it. Yet now he is in the position of a person who has inherited the land alongside Janet Kathure. I find that the three: **Janet, Geremano and Moses** knew of the plaintiffs' occupation of the land and failed to disclose the plaintiff's interests to the succession court.

38. In my view, having in mind that Moses had by filing the claim alongside the plaintiffs admitted that a claim lay in adverse possession, I only need consider the defence of the defendant in order to conclude as to whether the plaintiff's claim can succeed against her.

39. I have noted that she has not demonstrated that there was interruption in possession by the plaintiffs who claim to have taken possession of the land in **1996** in their supporting affidavit annexed to the Originating Summons. Their evidence is not controverted.

40. Whether as the administrator to the estate of her late husband who had a share in the land or as administrator of the estate of M'Rimberia Mururu, the defendant was the administrator to the suit land as at the time the instant suit was filed. Her reconfirmation as an administrator alongside Geremano Samaki is evidence that the plaintiffs sued the right person who had inherited title. Even the inclusion of Geremano as her co-administrator can not negate the fact that the plaintiffs commenced action in the first instance against the right person.

41. I therefore find that the plaintiffs have been in uninterrupted and peaceful possession of the suit land for a period of more than 12 years and they have therefore proved their claim against the defendant. I also find that the extract of title to the land as it was before subdivision was brought to court by way of an affidavit dated **15/1/2014** in this matter and that the requirements of the law in that regard have been fulfilled.

42. I therefore find that the plaintiffs have established their claim against the defendant on a balance of probabilities. The interested party must be affected by the orders that will be made as to title to the defendant, Geremano Samaki and Moses Kinoti over the parcels occupied by the plaintiffs is deemed to have been extinguished by effluxion of time.

CONCLUSION

(b) What orders should issue?

43. I therefore issue the following orders:

(a) A declaration that the plaintiffs have acquired by way of adverse possession title to the portions of land they occupy in LR No. Ntima/Igoki/276 now purportedly subdivided into the portions of Land referred to by Title Nos. Ntima/Igoki 8197-8198 and 8838-8841 and that they are entitled to be registered as proprietors of those portions.

(b) That the subdivision of the suit land into parcel numbers nos. Ntima/Igoki 8197-8198 and 8838- 8841 and subsequent sale where applicable is irregular and null.

(c) That the Land Registrar shall rectify the land register by cancelling all the titles and registrations issued from the subdivision of LR No. Ntima/Igoki/276 and especially parcel numbers nos. Ntima/Igoki 8197-8198 and 8838- 8841 and reinstate the title to Ntima/Igoki/276 to its former status and registration particulars as an undivided whole.

(d) Moses Kinoti who erected the fence over the parcel occupied by the 4th plaintiff should remove it at his expense within 14 days from the date of delivery of this judgment failure to which the same shall be removed at the instance of the 4th plaintiff and the boundaries of that plot reinstated to those that existed as at the date of the filing of the suit.

(e) The County Surveyor, Meru, shall upon the appropriate payments being made by the plaintiffs survey excise their respective portions from the main title for registration in their own names.

(f) The Deputy Registrar of this court shall execute all necessary documents to effect the subdivision of the land and transfer into the plaintiffs' names.

(g) Each party shall bear their own costs of these proceedings.

It is so ordered.

Dated, signed at Kitale this day of , 2018

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE

Delivered at Meru on this 31st day of October, 2018

JUDGE

