



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 483 OF 2017**

**JACOB MWANGI MUIRURI.....1<sup>ST</sup> PLAINTIFF**

**ELIZABETH WAMBUI MUIRURI.....2<sup>ND</sup> PLAINTIFF**

**VS**

**BENSON MUIGAI HIRAM.....DEFENDANT**

**JUDGMENT**

1. The Plaintiffs aver that at all material times to the suit they are the registered owner of LOC 3/MUNG'ARIA/1288. LOC 3/MUNG'ARIA/181 which was owned by Muiruri Kagiri deceased. It was subdivided into 3 plots: LOC 3/MUNG'ARIA/1287, 1289 & 1288 (suit property).

2. The Plaintiffs' claim is that the Defendant has encroached on the suit land without their consent and authority thus occasioning them loss of user and damages. The Plaintiffs have sought the orders, *inter-alia*;

a) A declaration that the Defendant has unlawfully trespassed onto Plot known as LOC 3/MUNG'ARIA/1288 situated at MUNG'ARIA the property of the Plaintiffs.

b) Eviction orders against the Defendant by himself, his servants, agents, employees and/or anyone claiming ownership through him to vacate the land known as LOC 3/MUNG'ARIA/1288.

c) The Defendant be restrained by himself, his servants, agents, employees and/or anyone claiming ownership through or under him by permanent injunction from trespassing onto or interfering in any manner howsoever with the Plaintiffs' quiet user and enjoyment of the Land known as LOC 3/MUNG'ARIA/1288.

d) Orders that the Defendant do demolish the structures that the Defendant has erected on the Land Known as LOC 3/MUNG'ARIA/1288 at his own costs.

e) Costs of this suit and any other or further relief this Honourable Court may deem fit to grant.

3. In denying the Plaintiffs' claims the Defendant averred in his Defence and Counter-Claim filed on 8/11/2017 that the Plaintiffs obtained the registration of the suit land in July 2017 by, *inter-alia* fraud, misrepresentation, collusion, illegality and irregularity. As a result, he pleaded that the Plaintiffs suit is fatally defective, time barred and an abuse of the Court process.

4. In his Counter-claim he pleaded that he is the son of Hiram Nganga Njoroge and Co-administrator of the estate Hiram Nganga Njoroge deceased. It is his case that the said deceased purchased 1.0 acres out of parcel No. LOC 3/MUNG'ARIA/181 from Francis Maina Muiruri the registered owner, in 16/5/91. On the 14/12/91 he purchased an additional 0.5 acres, took possession of the 1.5 acres, commenced developments, and built his Matrimonial home. The Defendant is still in occupation and possession to-date. He added that the 1<sup>st</sup> Plaintiff witnessed the agreement. On the 29/6/96 Hiram Nganga Njoroge died after an illness and before the land transfer was concluded.

5. He avers that in 2000 the 1<sup>st</sup> Plaintiff filed a complaint at Kigumo Land Dispute Tribunal against Francis Maina Muiruri and the 2<sup>nd</sup> Plaintiff. As the hearing of the tribunal case was underway, Francis Maina Muiruri fell ill and passed away in 2004. By then the land LOC 3/MUNG'ARIA/181 had been subdivided into 3 parcels LOC 3/MUNG'ARIA/1287, 1288 & 1289 all registered in the name of Francis Maina Muiruri. The Defendant has been in occupation of LOC 3/MUNG'ARIA/1288 since 1991.

6. On 14/5/14 Virginia Njeri Nganga, the wife of Hiram Nganga Njoroge was issued with letters of administration intestate for the estate of Francis Maina Muiruri – vide HCCC No 1741 of 2011. Before the confirmation of the said grant, the said Virginia Njeri Nganga passed away from a terminal ailment. On the 25/7/17 the Plaintiffs sent a demand letter to the Defendant which on receipt carried out a search whereupon

he realized the suit land had been transferred to the Plaintiffs fraudulently. The particulars of illegality, fraud and irregularity are pleaded.

7. The Defendant further averred that he has lived and cultivated the suit land for over 22 years and has acquired title by adverse possession.

8. The Defendant prays for orders as follows;

a) A declaration that the Plaintiffs registration of title deed No. LOC.3/MUNG'ARIA/1288 is null and void and the same is hereby cancelled.

b) In the alternative and without prejudice to prayer (i) herein above a declaration that the Plaintiffs and or Francis Maina Muiruri's (deceased) right and/or interest over LOC.3/MUNG'ARIA/1288 was extinguished under the Limitation of Actions Act Cap 22 Laws of Kenya on the ground that the Defendant has been openly and without interruption occupied land parcel NO. LOC.3/MUNG'ARIA/1288 for a period of over 12 years preceding the filing of this suit.

c) That the District Land Registrar Murang'a is hereby ordered to cancel the Plaintiff's registration of title deed No. LOC.3/MUNG'ARIA/1288 and do register the Defendant, Benson Muigai Hiram, as the proprietor of Land Parcel LOC.3/MUNG'ARIA/1288.

d) The Deputy Registrar and or the Executive Officer of this Court do sign all the necessary documents/forms to facilitate transfer and registration of land parcel LOC.3/MUNG'ARIA/1288 into the name of Benson Muigai Hiram, the Defendant herein.

e) Costs of this suit and Counter claim be borne by the Plaintiffs.

f) Any other and or such further relief as the Court may deem fit and just to grant.

9. In reply to the defence and defence to Counter claim the Plaintiffs aver that the subdivision of LOC 3/MUNG'ARIA/181 into 3 parcels LOC 3/MUNG'ARIA/1287, 1288 & 1289 was pursuant to the decision in D.O. Case No. 70 of 2000. They reiterate that the Defendant is a trespasser on the suit land. They averred that the purported sale of the land to Hiram Nganga Njoroge by Francis Maina Muiruri was challenged in D.O. No. 70 of 2000. They denied occupation for a period over 12 years and sought to put the Defendant to strict proof.

10. Further, the Plaintiffs stated that the sale of the land to the Defendant's father became null and void by operation of law and was further nullified by an order of the Court. That the award of Kigumo LDT was adopted by Chief Magistrates Court at Thika on 5/5/01. They denied the contents of the Counter claim in its entirety.

11. At the hearing the 1<sup>st</sup> Plaintiff testified on his own behalf and that of the Co-Plaintiff and relied on his statement filed on 16/10/17. He produced the documents listed as below;

a) Abstract of Title LOC.3/MUNG'ARIA/181

b) Copy of Title LOC 3/MUNG'ARIA/1288

c) Copy of search dated 10th October 2017

d) Copy of order dated 5th May 2001

e) Copy of order dated 3rd April 2017

f) Demand letter dated

12. In brief, he stated that he is the Co-owner of LOC 3/MUNG'ARIA/1288, a sub-division of the main plot LOC 3/MUNG'ARIA/181 originally registered in the name of Kagiri Muiruri, his father. Kagiri Muiruri had 3 wives. He is the son of Waithira Muiruri 1<sup>st</sup> wife while the 2<sup>nd</sup> Plaintiff is the 3<sup>rd</sup> wife. The land LOC 3/MUNG'ARIA/181 was transferred to Francis Maina to hold in trust for the family. That in 1991 Francis Maina Muiruri who was his stepbrother attempted to sell the land to the Defendant's father, now deceased. In objecting to the sale, he filed a dispute at Kandara Land Dispute Tribunal, which nullified the sale and directed that the original land be subdivided into 3 equal portions to be shared between Francis Maina Muiruri, Elizabeth Wambui Muiruri and the 1<sup>st</sup> Plaintiff. The land was subdivided in 2003. Francis Maina died in 2004. He further testified that in 2017 the orders of the Court in LDT 70 of 2001 was reviewed and the 3 parcels of land were ordered registered in the names of;

a) LOC 3/MUNG'ARIA/1287 - Jacob Mwangi Muiruri

b) LOC 3/MUNG'ARIA/1288 - Jacob Mwangi Muiruri & Elizabeth Wambui Muiruri

c) LOC 3/MUNG'ARIA/1289 - Jacob Mwangi Muiruri

13. Further, he stated that Francis Muiruri is his younger step brother and the 2<sup>nd</sup> Plaintiff is his step mother. That his parents were buried on the suit land. In Cross-examination, the 1<sup>st</sup> Plaintiff stated that the Defendant entered the land in 1991-93. He refuted the claim in his

statement that the Defendant entered the suit land in 2017. He reiterated that the Defendant was put in possession of the land by Francis Maina Muiruri who was the rightful owner.

14. In respect to the sale agreement dated 16/5/91 he informed the Court that the same was to secure the loan of Kshs. 80,000/= owed by his father to the Defendant's father. The suit land (1.0 acre) was security for the debt. He however could not confirm if the loan was ever paid. He informed the Court that he was a witness to the said agreement. He further added that the Defendant lives on the land and that he (1<sup>st</sup> Plaintiff) does not cultivate the land. That he was not responsible for repaying the loan of Kshs. 80,000/=.

15. He stated in re-examination that the loan owed by Kagiri Muiruri to the Defendant's father referred to the security as LOC 3/MUNG'ARIA/181 and not LOC 3/MUNG'ARIA/1288. He refuted claims by the Defendant that the Agreement was signed in 1991. He claimed that it was actually signed in 1994 and backdated to 1991. That he signed it through duress applied to him by Francis Muiruri Maina. That he challenged the agreement at LDT 70 of 2000.

### **Defence evidence**

16. The Defendant testified that he is the son of Hiram Nganga Njoroge & Co-administrator of the estate of his estate (deceased). That his father bought 2 pieces of land totaling 1.5 acres from Francis Maina Muiruri out of LOC 3/MUNG'ARIA/181 vide agreement dated 16/5/91 and 14/12/91. Immediately he was put into possession of the suit land by his father in 1991 whereupon he developed the land and built a matrimonial home where he resides to-date. The 1<sup>st</sup> Plaintiff was a witness to the 1<sup>st</sup> Agreement. His father passed away in 29/6/96 before the formal transfer was effected.

17. In 2000, the 1<sup>st</sup> Plaintiff filed a dispute with Kigumo Land Dispute Tribunal challenging the ownership of the land by Francis Muiruri Maina. The Plaintiffs did not disclose that the land LOC 3/MUNG'ARIA/1288 had been sold. Francis Muiruri Maina did not attend the hearing as he was sick and passed away in 2004. That by the time Francis Muiruri died he had subdivided the land into 3 portions and were all registered in his name of Francis Maina Muiruri.

18. Vide HCC NO 1741 of 2011 the widow of Hiram Nganga Njoroge petitioned for succession of the estate and was granted letters of administration in order to secure the interest of the deceased Hiram Nganga Njoroge. Virginia Njeri Nganga passed on 6/8/17 before the confirmation of grant of letters of administration in the estate of Francis Maina Muiruri.

19. At the close of hearing on 25/5/18 the parties elected to file written submission which I have read and considered.

20. The Plaintiffs submitted that the agreement dated 16/5/91 was not a proper agreement because it was security for a debt owed by Kagiri Muiruri to the Defendant's father. The son of Kagiri Muiruri executed the agreement while he was alive then. The 1<sup>st</sup> Plaintiff alleged that the agreement was signed under duress in 1994 but was backdated to 1991.

21. In respect to the 2<sup>nd</sup> Agreement dated 14/12/91 he submitted that this was nullified by operation of law because no Land Control Board consent was obtained for the transfer from Francis Maina Muiruri to Hiram Nganga Njoroge. Further, that it is unclear how the said Francis Maina Muiruri got registered as the original title had been deposited in Court in Criminal case No. 67 of 1990.

22. The Plaintiff further submitted that the Kandara Land Dispute Tribunal No. 101 of 2000 nullified the sale of the disputed land and directed subdivision of the lands into 3 portions amongst the 3 houses of Kagiri Muiruri. In respect to the decision of District Officer case No 70 of 2000 the Plaintiffs submitted that the Defendant albeit obtaining leave to file certiorari and prohibition as well as stay of execution, they did not prosecute their case leading to dismissal for want of prosecution on 12/3/2010. This was in the case of 1227 of 2001 Misc application HCCC. Following the lapse of stay orders, the Plaintiffs reverted the orders in D.O. 1227 of 2001 on 3/4/17 amending the sharing of the land and effectively excluding the name of Francis Maina Muiruri. He contends that the orders issued in D O 70 of 2001 have not been contested in any Court of law thus are valid.

23. In respect to the Defendant's claim for adverse possession, the Plaintiffs submitted that the claim fails because the land was only registered under the name of the Plaintiffs on 4/7/17, which does not qualify for the 12 year statutory period. Inter-alia, they submitted that they acquired the property lawfully and are therefore indefeasible owners pursuant to section 26 (1) of the Land Registration Act, 2012.

24. That Plaintiffs added that the Defendants claim for adverse possession to the title of Francis Maina Muiruri was extinguished when the registered title LOC 3/MUNG'ARIA/181 was cancelled. That the claim is time barred as it was lodged 13 years after the demise of Francis Maina Muiruri contrary to section 7 of the Limitation of Actions Act.

They have listed the following cases to support their claim;

a) Justice O.A. Angote in the case of Haro Yonda Juaje –vs- Sadaka Dzengo Mbauro & Anor (ELC suit No. 106 of 2007(OS).

b) Justice R.E. Ougo in the matter of Sophie Wanjiku John –vs- Jane Mwihaki Kimani (ELC Suit No. 490 of 2010).

c) Haro Yonda Juaje –vs- Sadaka Dzengo Mbauro & Anor (ELC Suit No. 106 of 2007 (OS) and Sophie Wanjiku John –vs- Jane Mwihaki Kimani (ELC Suit No. 490 of 2010).

25. The Defendant submitted that his father acquired the parcel of land 1.5 acres in 1991 and the Defendant was put in possession. That he has been in possession from 1991 to-date. He submitted that the land acquired by his father and occupied by him is identifiable and in 2003 it was formally surveyed and registered as 1288. From 1991-2004 the original owner did not assert any title.

26. In respect to the transfer of the land to the Defendant, the Defendant faulted the Plaintiffs who purported to transfer the land to themselves pursuant to letters of grant of administration *ad litem*. That such actions amount to intermeddling of the deceased assets.

27. Having reviewed the pleadings, evidence, the written submissions, the key issues for determination are;

- a) Who owns the suit land?
- b) Whether there is a valid agreement for sale?
- c) Whether the Defendant has established title by way of adverse possession?
- d) What orders should the Court grant?

28. The background of the suit land is as follows; the original land LOC 3/MUNG'ARIA/181 was registered in the name of Kagiri Muiruri on 12/2/61. On 11/9/90 the said land became registered in the name of Francis Maina Muiruri. Kagiri Muiruri was the father of the late Francis Maina Muiruri and the 1<sup>st</sup> Plaintiff and the husband of the 2<sup>nd</sup> Plaintiff. It is on record that he had 2 other wives. The late Francis Maina Muiruri and the 1<sup>st</sup> Plaintiff therefore were step brothers. According to the green card in respect to LR No LOC 3/MUNG'ARIA/181, the said land became registered in the name of Francis Maina Muiruri pursuant to HCCC No. 4582/1989. No evidence has been produced for the Court to appreciate the nature and details of this order.

29. Hiram Nganga Njoroge was the father of the Defendant. On various dates to wit: 16/5/91 Hiram Nganga Njoroge acquired 1.0 acres of land out of LOC 3/MUNG'ARIA/181. The agreement was executed by the parties and witnessed by the 1<sup>st</sup> Plaintiff. The agreement was in respect of repayment of monies owed by Hiram Nganga Njoroge to Kagiri Muiruri. The son Francis Maina Muiruri guaranteed the Kshs. 80,000/= borrowing and gave an undertaking that should the money not be repaid; 1.0 acres of land shall be transferred to the Defendant's father.

In addition, on 14/12/91 the parties entered into the second agreement for the sale of 0.5 acres out of LR No. LOC 3/MUNG'ARIA/181 in the sum of Kshs. 40,000/=.

30. According to the evidence of the Defendant, which evidence is not controverted, his father immediately put the Defendant in possession whereupon he commenced development thereon including constructing a Matrimonial home and resides there to-date.

31. Hiram Nganga Njoroge died on 29/6/96 before the formal transfer of the land was done. Earlier on 24/9/94 the father of the 1<sup>st</sup> Plaintiff Kagiri Muiruri died.

32. In 2000, LOC 3/MUNG'ARIA/181 was subdivided into in the following 3 portions;

LOC 3/MUNG'ARIA/1287

LOC 3/MUNG'ARIA/1288

LOC 3/MUNG'ARIA/1289

The 3 portions were all registered in the name of Francis Maina Muiruri. In 2017 LOC 3/MUNG'ARIA/1288 which is the subject of this suit became registered in the names of the Plaintiffs

33. Was there a valid agreement of sale?. Section 3 (3) of the Law of contract provides as follows;

“ No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded— (i) is in writing; (ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”.

34. I have perused the agreements which are in writing, signed by both parties and was witnessed by the 1<sup>st</sup> Plaintiff (the 1<sup>st</sup> agreement). The 1<sup>st</sup> Plaintiff has disowned the agreement by claiming that it was signed in 1994 and backdated to 1991. He also claimed that he signed the agreement under duress. He did not place any evidence before the Court to support these allegations. The Court finds them to be unfounded. This Court holds and finds that there were valid agreements for sale.

35. Has adverse possession been proved? The Plaintiffs have admitted in evidence that the Defendant has lived on the land since 1991 to-date. It is not disputed that the initial entry was in pursuance of a purchasers right by the Defendants father who put him in possession upon acquiring the land. According to Madan J in the case of **Public Trustee Vs Wanduru (1984) KLR 314**

“adverse possession should be calculated from the date of the payment of the purchase price to the full span of the twelve years if the purchaser takes possession of the property because from this date the true owner is disposed of possession.”

36. From the above passage, having held that there was a valid agreement for sale the Defendant who had paid full purchase price and taken possession of the land acquired equitable rights on the land. The Plaintiffs therefore held the suit land in trust for the Defendant. The subsequent registration of the suit land in the name of Plaintiffs as proprietors became subject to the overriding interest and they merely held the title in trust for the Defendant. The purported review of the LDT decree to facilitate the variation of registration of the suit land in the names of the Plaintiffs was an action done late in the day because prescriptive rights had accrued even when the late Francis Maina Muiruri was still the registered owner.

37. When did time start running for purposes of adverse possession? Time started running from 1992 – 2004. By the time the Francis Maina Muiruri died in 2004 the rights of adverse possession had crystallized in favour of the Defendant.

38. The Defendant has shown that he has been in continuous and uninterrupted possession of the land from 1994- to date, in excess of the mandatory 12 years period. There is no evidence that he ever was dispossessed or handed over possession to the registered owner. His possession has been open continuous and notorious to the knowledge of the owner (Francis Maina). Indeed, the right to title under adverse accrued and vested during the lifetime of the then registered owner of the land. There is no evidence that the said Francis Maina took any steps to stop time from running in favour of the Defendant. His possession was without the permission of the owner as it was as of a right accrued from a purchase from the registered owner. Lastly that the Defendant has successfully asserted a hostile title to the owner of the property. I associate myself with the decision in **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for adverse possession has to prove in the following terms;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

39. The Plaintiff has argued that the land is not identifiable. The Defendant in his evidence has stated that the land is 1.5. acres and it is the land which he is in occupation on the ground. According to him it is the land demarcated as LOC 3/MUNG’ARIA/1288 on the ground and is currently registered in the names of the Plaintiffs.

40. In the end the Court finds that the Defendant has proved a claim under adverse possession over 1.5 acres of land out of LOC 3/MUNG’ARIA/181 which now stands as LOC 3/MUNG’ARIA/1288.

**41. Final orders.**

a) Plaintiffs claim is dismissed.

b) A declaration is hereby issued that the Plaintiffs’ and or Francis Maina Muiruri’s (deceased) right and or interest over LOC 3/MUNG’ARIA/1288 was extinguished under the Limitation of Actions Act Cap 22 Laws of Kenya on the ground that the Defendant has been openly and without interruption occupied land parcel No. LOC 3/MUNG’ARIA/1288 for a period of over 12 years preceding the filing of this suit.

c) That the District Land registrar Murang’a is hereby ordered to cancel the Plaintiffs’ registration of title deed No. LOC 3/MUNG’ARIA/1288 and do register the Defendant, Benson Muigai Hiram, as the proprietor of land parcel LOC 3/MUNG’ARIA/1288.

d) Costs of the suit payable by the Defendants.

Orders accordingly

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 31<sup>ST</sup> DAY OF OCTOBER 2018**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mbugua HB for Kiongera for the Plaintiffs.

Kigwa HB for Muthoni for the Defendant.

Irene and Njeri, Court Assistants