



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 142 OF 2017 (OS)

JACOB MWANGI KAMAU.....PLAINTIFF/APPLICANT

VS

JOSEPH MWANGI KARIUKI.....1ST DEFENDANT/RESPONDENT

SALIVIA WANGECHI KARIUKI.....2ND DEFENDANT/RESPONDENT

FRACIA NJERI KARIUKI.....3RD DEFENDANT/RESPONDENT

JUDGMENT

1. The Plaintiff took out an originating summons on the 25/11/2003 against the Defendants. The originating summons are brought under Section 76 of the Law of succession Act, rule 44(1) of the Probate and administration Rules, Order 37 rule 1 & 3D & Order 39 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 37 of the Limitation of Actions Act and all other enabling provisions of the law. The said originating summons were amended with leave of the Court on 7/6/2004. He sought the orders interalia;

a. That the Defendants/Respondents or their servants or agents be restrained from entering alienating, selling removing disposing trespassing or otherwise interfering with the Plaintiff 's quiet possession of the portion of land LOC 13/KARUNGE/1470 which is part of the estate of the late Kariuki Magoto.

b. That the confirmation of grant issued to Joseph Mwangi Kariuki on the 8/5/2001 by Muranga Senior Principal Magistrate's Court be revoked.

c. That this honourable Court do make a declaration that the Plaintiff is entitled to 0.34 hectares out of land parcel Number LOC 13/KARUNGE/1470 as a Purchaser OR in the alternative that the said 0.34 ha out of the said land parcel LOC 13/KARUNGE/1470 be registered in his name by way of adverse possession.

d. Costs of the suit be granted to the Plaintiff.

2. The application is based on the grounds interalia that the Plaintiff purchased the suit premises jointly with the deceased Kariuki Magoto in 1964; it was mutually agreed between the two that the suit land be registered in the name Kariuki Magoto who was the Plaintiff s Uncle; they lived on the suit land together with their families; the said Kariuki Magoto confirmed in the presence of the elders that the suit premises is owned by both of them; the Defendants have obtained letters of grant of administration to the exclusion of the Plaintiff ; that the Plaintiff has lived on the land uninterrupted since 1964 and the Defendants have threatened him with eviction.

3. In support of the originating summons the Plaintiff filed an affidavit on the 25/11/2003. He also filed a witness statement dated 18/12/2017. It is the Plaintiff's case that he and Kariuki Magoto are related. Kariuki Magoto is his paternal uncle as well as the father of the 1st Defendant and the husband of the 2nd & 3rd Defendants. The Plaintiff and Kariuki Magoto jointly purchased two parcels of land, 1.0 acres from Muthurima Wa Kabora (deceased) and another from Mwangi wa Gacheru (0.8 acres). The land from Muthurima Kabora was Kshs 500/- which was paid by the Plaintiff and the one from Mwangi wa Gacheru was Kshs 400/- and paid jointly by both the Plaintiff and Kariuki Magoto. Both parcels were aggregated to 1.8 acres in total.

4. With the agreement of the parties, the two parcels of the lands were consolidated and registered in the name of Kariuki Magoto as LOC 13/KARUNGE/1470. Kariuki Magoto was the eldest in the family and was like a father to the Plaintiff . The Plaintiff was young and unmarried. The Plaintiff father having passed away earlier in 1952. The title was kept in the custody of Kariuki Magoto. There was no written agreement for the purchase of the land from the two land owners. That it was a verbal agreement. He also testified that he paid the money in cash. There was no written acknowledgement. It was also agreed by the parties that the land would be owned in equal halves and

the subdivision would be carried out later.

5. With that, they took possession of the land upon purchase and the parties lived together peacefully each on their portions of their land and raised their families until 1989 when the Plaintiff's son wanted to build a house on his father's side of the suit land and Kariuki Magoto stopped him. The Plaintiff reported the matter to the elders who determined that the lands were jointly purchased and owned and the same should be divided into two equal portions with both getting the side that they had built and settled. He annexed the decision of the elders dated 26/8/1989. The parties in the presence of the Assistant Chief Gitugi namely James Kabuki confirmed that they had no unresolved dispute in respect to the suit land and that they would each continue living on the land where they had built and settled. He produced in evidence an agreement dated the 21/4/1990 in support. The son of the late Kariuki Magoto called Bernard Maina Kariuki with another witnessed the said truce.

6. The Plaintiff stated that he has built 3 houses on the land and planted bananas thereon. Kariuki Magoto died in 1995 after a long illness before the land was subdivided. He stated that he was waiting for him to recover so that they could embark on the sub division of the suit land. In 1989 his wife died and was buried on his portion of the suit land.

7. In the meantime, and unknown to the Plaintiff the wives of the deceased Kariuki Magoto obtained letters of grant of administration for the estate to the exclusion of the Plaintiff. In June 2002 they threatened to evict him from the land. He reported that matter to the Chief Gitugi Location who summoned the Defendants to no avail. He filed a case at the Mathioya District Land Dispute but the same did not proceed after the Defendants refused to attend the proceedings. He stated that he instructed his then lawyers to demand the transfer of half of the suit land but the Defendants ignored forcing him to file this suit. The Plaintiff argued that he has been in possession of ½ of the suit land since 1964 by right as a purchaser and in the alternative has established title by way of adverse possession. He produced a copy of the certified title for the suit land registered in the names of the 2nd and 3rd Defendants on the 20/5/2002 as well as a certificate of the confirmation of grant issued to the 1st Defendant on the 8/5/2001.

8. PW2 – James Mwangi Kibochi testified that he knows both families since his childhood. That he witnessed the agreement at the Chief's office on the 21/4/1990. The Assistant Chief James Kabuki asked him to record the agreement. The other witnesses were Bernard Maina Kariuki, the son of Kariuki Magoto. That it was normal for the Assistant Chief to request him to assist him record the proceedings in his office. That in the said agreement the Plaintiff and Kariuki Magoto agreed that the dispute is resolved and that they will continue to live on the land as before. That the agreement was reconciliatory.

9. PW3 – Jesse Mwangi Kimani testified and adopted his written statement dated 11/11/2017. He stated that he worked with Kariuki Magoto in Milimani Nairobi in 1964. That he informed him that he and his nephew Jacob Mwangi Kamau were purchasing land in Gitugi Muranga. That he knew that both settled on the suit land. That in 1989 he was the chairman of the elders who arbitrated on the land dispute between Kariuki Magoto and the Plaintiff. Then Kariuki Magoto had stopped the Plaintiff's son from building a house on the side of the Plaintiff. It was the decision of the elders that both continue living on the land, each on his portion and that the suit land was owned jointly in equal shares. That the suit land was registered in the name of the Defendants father trust for the Plaintiff since he was the eldest in the family. He stated that none of the parties to the dispute produced any documents to show how the land was purchased. The elders relied on the oral testimonies of the witnesses on both sides.

10. The 1st Defendant testified on his behalf and on behalf of the 2nd and 3rd Defendants and adopted his witness statement filed on the 24/10/2017. He stated that his father Kariuki Magoto purchased the suit land alone. He invited the Plaintiff to live on his land since he had been living with him in Nairobi. He showed him a small portion on the corner of the suit land to built his house which he did. In 1989 his father stopped the Plaintiff's son from building a house on the suit land arguing that he should built on LOC 13/GITUGI/1198 which was the Plaintiff's family land. That his father had only accommodated the Plaintiff and not his children. When the matter was referred to the elders for resolution, the elders decided that the land be shared equally which angered his father who refused on the ground that he bought the land alone and could not share with the Plaintiff. That the Plaintiff subdivided the family land at Gitugi LOC 13/GITUGI/1198 measuring 2 acres into two portions LOC 13/GITUGI/1091 and 1902 and gave 1901 to the Plaintiff, the share of the Plaintiff's father and retained 1902. He argued that the Plaintiff has never cultivated the suit land and he buried one of his wives on the suit land by force without the consent of the Defendants. It is his case that the Plaintiff has no share of land in the suit land.

11. The parties through their learned counsel on record elected to file written submissions which I have read and considered.

12. On the issue of revocation of grant the Plaintiff submitted that the grant issued to Joseph Mwangi Kariuki dated the 8/5/2001 was obtained through concealment of material facts that is to say that Kariuki Magoto owned the suit land in equal shares with the Plaintiff. That the Defendants had knowledge of the fact and choose to conceal it. The son of Kariuki Magoto namely Bernard Maina Kariuki was a witness to the agreement of 21/4/1990. Relying on section 76 (b) of the Law of Succession Act he argued that the grant should be revoked on the ground of fraud. He relied on the case of **Jamleck Maina Njoroge Vs Mary Wanjiru Mwangi (2015) ECLR**

13. The Plaintiff submitted that he has been in occupation and possession since 1964. That his possession has been continuous, open uninterrupted for over 40 years and therefore has satisfied the requirements of adverse possession. That the Defendants cannot recover land after the end of 12 years and that they are caught up by limitation under section 7 of the Limitations of Actions Act. He further submitted that the Plaintiff has no other land other than the suit property and stands to suffer irreparable loss if the orders are granted in his favour.

14. The Defendants on the other hand submitted that the agreement alleged reached at the Assistant Chiefs office in 1990 stated that the Plaintiff is occupying a small portion where his house sits and not the half of the land. Further that the Plaintiff's prayer for revocation of letters of grant of administration is misplaced since the Court does not have jurisdiction to determine the issue. The Defendants further submitted that they have no problem in allowing the Plaintiff to continue occupying the portion where the homestead is situate but not half of the land.

Analysis and Determination

15. The issues for determination are: Whether the Plaintiff is entitled to an order of cancellation of representation issued to the 1st Defendant; Whether the Plaintiff is entitled for an order for adverse possession for ½ of the suit land.

(A) Whether the Plaintiff is entitled to an order of cancellation of letters of representation issued to the 1st Defendant.

16. This issue arises out of the registration of the estate of the land of the late Kariuki also referred to as Kariuki Magoto. The suit land was registered in the name of the said Kariuki Magoto. The Defendants are son, wife and daughter of the deceased registered owner. In their application for a grant of representation it appears that they did not disclose to the Court that issued the grant that the Plaintiff had an interest in the suit land. Consequently the Court issued a grant of representation and confirmed the same without considering the Plaintiff's interest as beneficiary in the suit land.

17. The Plaintiff contends that the land was held by the deceased following a purchase jointly by them and therefore the deceased held the title in trust for the Plaintiff on ½ share equally.

18. The jurisdiction in this Court is derived from Article 162 (2) (b) and Section 13(2) of the Environment and Land Court Act. It provides as follows;

“ In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes— (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.”

19. From the foregoing it is clear that this Court has no jurisdiction on matters relating to beneficial interest pursuant to Succession of estates of a deceased person. Consequently, the 1st issue is answered in the negative.

(B) Whether the Plaintiff is entitled for an order for adverse possession for ½ of the suit land.

20. A claim for adverse possession is supported by the following factors;

- i) Whether entry and continued occupation of the suit land is adverse to the person in respect of whom adverse possession is alleged.
- ii) Whether the occupation is open, continuous and uninterrupted.
- iii) Whether entry and or occupation has not been disrupted in at least 12 years. These 3 factors must all be present at the same time.

21. In the present case it is not disputed that the Plaintiff :

- a) Occupies a section of the suit land and such occupation was not authorized by the deceased who is registered owner.
- b) The occupation has been continuous since 1964 until the year 2002 when the Defendants threatened to evict the Plaintiff .
- c) Between the periods 1964 – 2002 the Plaintiff peaceably occupied a section of the suit land without any disruption by the deceased owner namely Kariuki Magoto in whose title the Defendants derive their claim.

22. The Defendants in their submissions have stated that the Plaintiff may continue to occupy the part of the suit land where he has resided and built a family house.

23. On the part of the Plaintiff he asserts entitlement and claims possession and/or occupation of ½ share of the suit land on the section that he resides. The Plaintiff's claim is based on the following factors;

- a) The suit land was jointly bought by him and the deceased Kariuki Magoto in 1964.
- b) The suit land was registered in the name of the deceased Kariuki Magoto to hold in trust ½ share for the Plaintiff because the deceased was the eldest person in their family and the Plaintiff was then young by age.

24. The Plaintiff has since purchased and registered the suit land in the name of the deceased from 1964 to date occupied part of the suit land uninterrupted as at the date of the death of the said Kariuki Magoto in 1995 until the year 2002 when the Defendant threatened his peaceful existence.

25. On 26/9/89 following a report to the elders by the Plaintiff that the late Kariuki Magoto had interfered with the Plaintiff's son constructing a house on the side occupied by the Plaintiff the elders settled the claim by a direction that both the Plaintiff and the said deceased Kariuki Magoto continue to occupy the suit land in ½ share of the section that they resided.

26. On 21/4/90 the Plaintiff reported the matter of the dispute in respect to the land to the Assistant Chief of Gitugi Location and the Chief directed that the parties live in accordance to the decision of the elders stated in the preceding paragraph.

27. As at the time the late Kariuki Magoto died in 1995 there was no dispute pending or anticipated in respect to the ownership in equal shares of the suit land though the land had not been subdivided into 2 equal shares. In 1998 the Plaintiff's wife died and was buried in the section of the suit land where the Plaintiff resides.

28. The peaceful co-existence and occupation by the Plaintiff of the suit land was in the year 2002 disrupted by the Defendants who threatened eviction of the Plaintiff. Notwithstanding the Defendants' threat of eviction of the Plaintiff, the Plaintiff has continued occupation of the suit land to the date this suit was filed on 25/11/03 and to date.

29. On the contrary the Defendants claim that the suit land belonged to the late Kariuki Magoto who allowed the Plaintiff to occupy a small portion of the suit land where he has resided over the years. And in such case as described in the preceding paragraph the Defendants do not admit to ½ share of the suit land but instead concede that the Plaintiff is entitled to a small share of the suit land measuring the total area where occupied by his residential home.

30. Both the Plaintiff and the 1st Defendant gave evidence orally in Court. The evidence of these parties crystallized in the factors set out above: on observation of the two witnesses giving evidence the Court finds that the evidence of the Plaintiff is consistent, verifiable and chronological so much so to be more believable than the evidence of the Defendants who had filed their witness statements.

31. The issue No 2(a) is therefore, answered in the affirmative. In the circumstances the Court makes the following orders;

a) The Plaintiff's claim for cancellation of grant in respect to the suit land is dismissed.

b) Declaration that Plaintiff is entitled to 0.34 Ha. of the suit land by way of adverse possession. The Defendant to subdivide the land within 90 days and transfer the ½ portion to the Plaintiff.

c) The suit land be subdivided at the Plaintiff's cost into ½ share and the part comprising the Plaintiff's home and residence measuring 0.34 Ha. be transferred and registered in his name.

d) If the Defendants default to comply with order No. b within the time prescribed therein the Deputy Registrar of this Court is ordered to execute any documents necessary to facilitate subdivision and transfer of all that part of the suit land measuring 0.34 Ha. on the side now occupied and resided by the Plaintiff to him.

e) Either party to bear their own costs of the suit.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 31ST DAY OF OCTOBER 2018.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff – Absent

Mbugua HB for Gacheru for the Defendants

Irene and Njeri, Court Assistants