



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 81 OF 2014**

**JAMES MONGARE NYANARO ..... PLAINTIFF**

**VERSUS**

**KENNEDY MANGERA..... 1<sup>ST</sup> PLAINTIFF**

**MONGARE MANG'ERA.....2<sup>ND</sup> PLAINTIFF**

**J U D G M E N T**

1. The plaintiff instituted the present suit against the defendants vide a plaint dated 25<sup>th</sup> February 2014. The plaintiff alleged that the defendants unlawfully trespassed onto his land parcel **North Mugirango/Boisanga/3830** (“the suit property”) on or about 2000 and damaged his onions and pyrethrum and commenced cultivation thereon without the plaintiff’s consent. The plaintiff contended that the defendants have refused to yield vacant possession of the suit land to him and have consequently denied him the use of the land. The plaintiff seeks an order of permanent injunction against the defendants, general damages for trespass and mesne profits for the period the defendants have possessed and occupied the suit property.
2. The defendants filed a joint statement of defence on 19<sup>th</sup> March 2014 denying all the allegations set out in the plaint against them. The defendants averred that the plaintiff’s claim, if any, had become time barred. They specifically denied that they had trespassed onto the suit property and averred that they were legally in possession of land parcel **North Mugirango/Boisanga/356** which they were entitled to inherit from their deceased father.
3. The plaintiff and two witnesses testified in support of the plaintiff’s suit while the 1<sup>st</sup> defendant, Kennedy Mang’era testified on behalf of himself and the 2<sup>nd</sup> defendant and called the land registrar, Nyamira County as a witness for the defence case.
4. The plaintiff testified that he purchased the land that was subsequently registered in his name from one Silas Nyangau in 1998 pursuant to an agreement produced as “**PEx.1(a) and (b)**”. The plaintiff stated he was issued a title deed dated 7<sup>th</sup> January 1999 (“**PEx.2**”) though the copy of certificate of search dated 29<sup>th</sup> January 2014 indicated he was issued the title on 7<sup>th</sup> January 2000 (“**PEx.3**”). The plaintiff stated he purchased a portion from an original parcel of land the particulars whereof he could not remember but stated that his portion after subdivision became land parcel **North Mugirango/Boisanga/3830**. He explained that the defendants were the children of Silas Nyangau’s brother, Mangera Nyangau.
5. Under cross examination, the plaintiff conceded the alleged agreement of 1998 was not signed by Silas Nyangau but stated it had his identity card number. The particulars of the land the subject of sale were not also indicated. He stated he was registered as owner of the property on 18<sup>th</sup> December 1998. He further stated he had no document or evidence to show the said Silas Nyangau was the owner of the land before he purchased it. The plaintiff additionally acknowledged that the original land from which the land he claims was obtained was registered in the name of Kerubo Nyangau the grandmother of the defendants. The plaintiff claimed that Kerubo Nyangau had subdivided her land to her sons, Silas Nyangau and Mangera Nyangau and his contention was that he purchased the share belonging to Silas Nyangau.
6. The plaintiff admitted that he has never taken possession and/or occupied the suit property and stated that it is the defendants who have occupied the land since the year 2000.
7. The plaintiff’s other two witnesses, Joseph Mayaka Osogo (PW2) and Christopher Maguto (PW3) were witnesses to the alleged agreement of sale between the plaintiff and Silas Nyangau in 1998. The witnesses affirmed that the defendants’ grandmother, Kerubo Nyangau was alive when the agreement was entered into. The witnesses could not confirm the details of the land that was the subject of the sale.
8. The defendants evidence given through, Joash Kombo Mangera alia Kennedy Mangera, the 1<sup>st</sup> defendant herein was to the effect land parcel **North Mugirango/Boisanga/356** belonged to Kerubo Nyangau who was their grandmother. The defendants stated that they were in occupation and were residing on land parcel 356 which they have occupied all their life. The defendants stated that Kerubo Nyangau had two sons, Peter Mangera Nyangau who was their father (defendants) and Silas Nyangau Nyangau who are now both deceased. The witness

stated that their father died in 2011 while Silas Nyangau Nyangau (their uncle) died in 2014. The defendants stated that by the time of the death of their father and uncle they were residing on the suit land and that the plaintiff only instituted this suit after the death of their father and uncle.

9. It was the defendants' further evidence that the plaintiff has never occupied the suit land even though the title produced in evidence by the plaintiff indicates he was registered as owner in 1999. The witness stated that Kerubo Nyangau died in 2001 and that she was not the one who applied to subdivide her land **parcel North Mugirango/ Boisanga/356** as shown in the mutation form. The witness further stated the ID/Card No. 5816956 indicated in the mutation form as that of his grandmother did not belong to her and to support that he produced a letter dated 20<sup>th</sup> March 2017 from the registration officer Kisii Huduma Centre ("**PEX.1**") which confirmed the ID/Card belonged to a person named Penina Nyanchoka Mangera. The letter was referenced: **Re: Confirmation of Individual Identity Card No. 5816956 - Penina Nyanchoka Mangera.**

The letter read as follows:-

**"This is to confirm that according to database held by the Director, National Registration Bureau – the above individual number pending replacement is for PENINA NYACHOKA MANGERA."**

10. The witness explained that Penina Nyachoka Mangera was their mother and that she died in 1989. The witness stated that when they discovered that their grandmother's land had been unlawfully subdivided in the year 2000 to create land parcels **North Mugirango/ Boisanga/3829** and **3830**, their grandmother complained to the land registrar and the land registrar wrote to the plaintiff the letter dated 18<sup>th</sup> February 2000 ("**DEX.4**") inviting him to attend a meeting before him and to bring with him the subdivision titles but the plaintiff did not attend. The defendants denied that their grandmother sold any land to the plaintiff and further stated that Silas Nyangau did not have any land which he could have sold to the plaintiff. The defendants stated further that Silas Nyangau had no family but their father had 10 children and they were all residing on the land owned by Kerubo Nyangau as neither Silas Nyangau nor their father had land of their own.

11. The defendants further testified they reside and have their homes on the suit property and that they have planted blue gum trees, bananas, tea bushes, avocados and farm maize thereon. The defendants denied that land parcel **356** was subdivided into two portions by their grandmother. They further denied that there was any time the plaintiff took any possession of any portion of the suit land and they chased him away.

12. The land registrar, Nyamira, Mr. Kenneth Bosire, testified as DW2. He testified that land parcel **North Mugirango/Boisanga/356** was subdivided on 18<sup>th</sup> December 1998 into 3 portions **3828, 3829** and **3830**. As per green card the size of land parcel **3830** is 0.205Ha and on 17<sup>th</sup> February 2000 a restriction by the land registrar was registered but again is shown to have been removed on the same date. On 7<sup>th</sup> January 2000 the land as per green card is shown to have been transferred to James Mongare Nyanaro. The land registrar stated he did not find the instrument of transfer, application for land board consent or consent to transfer which are the documents which are usually used to effect transfer. He stated it was only the green card for parcels **3828, 3829, 3830** and **356** which were available which he produced as "**PEX.5(a)-(d)**". The witness stated the title issued to the plaintiff on 7<sup>th</sup> January 1999 does not correspond with the green card and the search which both show the title to have been issued on 7<sup>th</sup> January 2000.

13. Though the court directed the parties to file written submissions, the plaintiff who acted in person opted not to file any submissions. The firm of Sonye J. Ondari & Company Advocates filed submissions on behalf of the defendants on 26<sup>th</sup> April 2018. On the basis of the pleadings, the evidence and the submissions the following are the issues that arise for determination.

**1. Whether the plaintiff was validly registered as owner of land parcel North Mugirango/Boisanga/3830 on 7<sup>th</sup> January 1999 or any other date?**

**2. Whether the plaintiff's cause of action, if any, was statute barred as at the time he instituted the present suit?**

**3. Whether the plaintiff is entitled to the reliefs sought.**

14. The plaintiff's suit is predicated on the fact of being the registered owner of the suit property following purchase of the land from one Syrus Nyangau Nyangau in 1998. The plaintiff produced a memorandum of agreement "**PEX.1(a)**" that was not signed by the alleged seller. The evidence tendered by the parties also established that one, Kerubo Nyangau was the registered proprietor of land parcel **North Mugirango/Boisanga/356**, from which the suit property was hived from, and that she was not party to the agreement with the plaintiff. The said Silas Nyangau Nyangau could not sell land that he did not own. The abstract of title (Green Card) for land parcel **North Mugirango/Boisanga/356** produced by DW2 shows Kerubo Nyangau was registered as the owner of the land on 14<sup>th</sup> March 1973 and that the title of the same was closed on 18<sup>th</sup> December 1998 when it was subdivided into land parcels 3828, 3829 and 3830. The alleged agreement between the plaintiff and Silas Nyangau did not have any reference of the land that was the subject of the agreement.

15. The plaintiff produced in his evidence a copy of his title which indicates he was registered as owner of the suit property on 7<sup>th</sup> January 1999. The green card (abstract of title) and the certificate of search indicated he was registered on 7<sup>th</sup> January 2000. No copies of the application for consent for transfer, consent of transfer and signed transfer were produced to support the registration of the transfer. It is strange that the plaintiff has a title showing he was registered as owner on 7<sup>th</sup> January 1999 while the register at the lands office showed the registration to have been effected on 7<sup>th</sup> January 2000. There is further discrepancy in that the land register held by the lands office for the property shows that:-

- **Kerubo Nyangau was registered on 18<sup>th</sup> December 1998 as owner and on 17<sup>th</sup> February 2000 a restriction was**

- registered to restrict any dealings with the land without the consent of the District Land Registrar.**
- **The restriction was removed probably (it is not clear) on 7<sup>th</sup> January 2000 when the plaintiff is shown to have been registered.**

16. It is apparent that from the sequence of the registration as per the register that the registration of the restriction as entry No. 2 was earlier in time than the registration of the plaintiff on 7<sup>th</sup> January 2000. This is clearly an anomaly as the restriction having been registered on 17<sup>th</sup> February 2000 as entry No. 2 the registration of the plaintiff could only have been later after that date. There appears to have been a manipulation of the register. The green card does not have any registration of the plaintiff on 7<sup>th</sup> January 1999 as the title he holds shows. The title copy shows under the proprietorship section entry No. 2 that the plaintiff was registered on 18<sup>th</sup> December 1998 and issued a title deed on 7<sup>th</sup> January 1999 as per entry No. 3. This is totally at variance with the green card which shows on 18<sup>th</sup> December 1998 Kerubo Nyangau was registered as the owner while on 17<sup>th</sup> December 2000 a restriction was registered as entry No. 2 before it was removed and the plaintiff registered on 7<sup>th</sup> January 2000 and issued with a title. It could not have been possible for the restriction to have been registered on 17<sup>th</sup> February 2000 as entry No. 2 and the plaintiff to be registered retroactively on 7<sup>th</sup> January 2000 following the removal of the restriction. A scrutiny of the title abstract shows that the signature of the land registrar who registered the restriction is different from that of the registrar who registered the transfer in favour of the plaintiff. It is note worth that a restriction was placed against the title of land parcel **North Mugirango/Boisanga/3829** on the same day (17<sup>th</sup> February 2000) as the restriction placed on parcel **3830** apparently by the same land registrar.

17. DW2 the land registrar testified that there were no documents available to support the registration of the plaintiff as the owner of land parcel 3830. In the face of the anomalies pointed out above it was crucial for the supporting documents to be availed for the registration of the plaintiff to be validated. **Was there a transfer to the plaintiff and if so, who executed the same? Equally, was there a consent for the transfer to the plaintiff?** These are questions that have not been answered. The plaintiff claims he purchased the land from Silas Nyangau and the evidence availed does not show the said Silas Nyangau had any land that he could have sold to the plaintiff. The suit property belonged to Kerubo Nyangau and no evidence has been led to show that she sold any land to the plaintiff and/or executed a transfer in his favour. In the absence of any documents to support the registration of the plaintiff as the owner of the suit property in the form of land board application for consent and consent to transfer and a duly executed transfer, it is not possible to authenticate the title of the plaintiff. In the premises, it is my finding that the plaintiff has failed to prove that he was lawfully and validly registered as the owner of the suit property.

18. As regards the second issue whether or not the plaintiff's suit against the defendants is statute barred, the court on the basis of the evidence answers the issue in the affirmative. The defendants in their evidence stated that they have occupied and possessed the suit land all their lives since that is where they were born. The land belonged to their grandmother and their father was residing thereon before he died in 2011 and so was his brother Silas Nyangau before he also died in 2014. The defendants stated they have residential houses on the land and that they farm on the land where they have blue gum trees, tea bushes, avocados and bananas. Their evidence was not controverted in any manner.

19. The plaintiff for his part asserted that the defendants entered into possession in 2000 and they started cultivating thereon and have continued in possession and occupation up to date. He admitted he has never occupied the suit land owing to the defendants' activities on the land. According to the plaintiff he acquired the land in 1998 and was issued with a title deed on 7<sup>th</sup> January 1999. It was his evidence that the defendants entered into occupation in 2000 and have remained in possession ever since. The plaintiff filed the instant suit on 27<sup>th</sup> February 2014 seeking an order of permanent injunction and damages for trespass. The defendants denied they were in trespass and asserted they were occupying the land as the rightful heirs to their late grandmother's estate.

20. The evidence both from the plaintiff and the defendants is that the defendants have been in occupation and possession of the suit property at least as from 2000 and were in such possession as at the time the suit was filed in 2014. The plaintiff's cause of action therefore arose in 2000 when he admits the defendants occupied the property. The plaintiff's claim against the defendants is based on the tort of trespass. The plaintiff having discovered the defendants were trespassing on his land in 2000, he ought to have instituted the suit against the defendants before the expiry of three years from then to avoid the action being time barred.

21. Under Section 4(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya an action founded on tort becomes statute barred after three years from the date the cause of action arose. Section 4(2) provides:-

**(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.**

22. The plaintiff by his evidence accepts the defendants have been in occupation and possession of the suit property since the year 2000 and they have through their acts prevented the plaintiff from entering and/or taking possession of the suit property. Thus, even if it is found the plaintiff was the owner of the suit property, the plaintiff would have been time barred in bringing the suit for recovery of the land in February 2014 from the defendants by virtue of Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. Section 7 of the Act provides as follows:-

**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.**

23. In the present suit, the plaintiff found the defendants in the suit property in 2000 and they have remained thereon and were on the property as at 27<sup>th</sup> February 2014 when the plaintiff filed the present suit against them. The right of the plaintiff to recover the property from the defendants lapsed in 2012 so that by 2014 when the plaintiff filed the suit against the defendants the suit had been caught up by limitation and the same could not be sustained against the defendants. It is therefore the finding of the court that the plaintiff's suit against the defendants was statute barred under the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya.

24. On the basis of the foregoing analysis the court has come to the determination and conclusion that the plaintiff has failed to prove his case on a balance of probabilities, the plaintiff is not entitled to the prayers sought in the suit. The suit is hereby ordered dismissed with costs to the defendants.

25. Orders accordingly.

**JUDGMENT DATED, SIGNED and DELIVERED at KISII this 26<sup>TH</sup> DAY OF OCTOBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Plaintiff present in person

Nyang'acha for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**