



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ELC CASE NO. 89 OF 2017

FORMERLY MERU ELC CASE NO. 410 OF 1991

GILBERT KATHENYA MUKUNGI.....PLAINTIFF

VERSUS

EVANGELINE KANYUA MWIANDI

(As Legal Representative of the Estate of Mwiandi Kaimbiru).....DEFENDANT

JUDGMENT

1. This suit was filed on **24th September, 1991**, twenty seven (27) years ago. The apposite plaint states as follows:

PLAINT

1. The plaintiff is an adult male of sound mind. His address of contact for the purpose of service of this suit is care of S/Mugumango Sub/Loc. Kiera Location, P. O. Box 203, Chogoria.
2. The defendant is also an adult male of sound mind, whose address for service for the purposes of this (sic) similar to that one for the plaintiff.
3. The defendant is the uncle to the plaintiff and he is registered proprietor of both lands No. Mwimbi/N. Mugumango/516 measuring about 9.10 acres and No. Mwimbi/Mugumango/942 and 943 measuring 19.00 acres or thereabout.
4. The plaintiff (sic) father died sometime, in 1960, and left us in the hands of the defendant so as to take care of the entire family including the properties of deceased.
5. The defendant was left in-charge of the family and (sic) 1967 he agreed to sub-divide and transfer about 4.00 acres from (sic) said suit lands which he had held in trust for the plaintiff.
6. The defendant had also agreed that since the plaintiff was assisting him paying the school fees for his children he will give him three (3) acres from land No. Mwimbi/N. Mugumango/942 and 943 and Mwimbi/ N. Mugumango/516 making a total of 7.00 acres altogether.
7. Consequently the plaintiff took the actual possession and occupation of the said seven (7) acres of land in the year 1967 ad has extensively developed the same.
8. The plaintiff has been in continuous and uninterrupted occupation and use of the 7 acres of the said land since 1967 a period of 23 years and the land in question (sic) has become entitled (sic) a declaration that he owes (sic) 7 acres of land under the doctrine of adverse possession.
9. That the plaintiff has even discussed this matter before the clan elders who resolved that the defendant should give me the portion of land he hold (sic) in trust and the additional three (3) acres he promised to transfer to me.
10. The defendant has made various false promises that he will sub-divide and transfer 7 acres of land to the plaintiff but all has ended in vain.
11. Despite several demand (sic) or intention (sic) to take legal action the defendant has failed or ignored to fulfill his promises.

12. The cause of action arose at Chogoria within the jurisdiction of this honourable court.

REASONS WHEREFORE the plaintiff prays for judgment against the defendant as follows:-

- a) A declaration that defendant holds 7.00 acres of L.R. No. Mwimbi/N. Mugumango/516 and L.R. No. Mwimbi/ N. Mugumango/942 and 943 in trust for the plaintiff.
- b) Alternatively a declaration that the plaintiff has become entitled to 7 acres of L.R.Mwimbi/ N. Mugumango/516 and Mwimbi/ N. Mugumango/942 under the doctrine of adverse possession.
- c) An order that the defendant do transfer 7 acres to the plaintiff.
- d) Costs of this suit.
- e) Any other or better relief that this honourable court may deem fit to grant.

DATED AT MERU THIS 24TH DAY OF SEPTEMBER, 1991

2. Under a Certificate of Urgency, the plaintiff filed an application dated **20th August, 2016** under Sections 1A, 1B, AND 3A o the Civil Procedure Rules and Order 24 of the Civil Procedure Rules. The application sought the following orders:

1. This application be certified urgent and be heard on priority basis.
2. That the interested party herein Evangeline Kanyua Mwiandi be joined as legal representative of the deceased defendant (sic) continue with the suit which is almost finalized.
3. That the costs of this application be provided for.

3. It had the following grounds:

- a) That the interested party had refused to take up grant to represent her deceased husband the defendant.
- b) That the issue ended up with citations as per Chuka CM Succession Cause No. 184 of 2013, HCCC Succ Cause No. 280 of 2014 at Meru.
- c) That the interested party has now been issued with temporary letters of administration in HCC. Succession Cause No. 552 of 2014.
- d) That she should now of necessity be appointed to represent the deceased defendant so that this matter is finalized.

DATED AT MERU THIS 20TH DAY OF AUGUST, 2016

MAITAI RIMITA & CO.

ADVOCATES FOR THE APPLICANT

4. The application was supported by the affidavit of **GILBERT KATHENYA MUKUNGI** sworn on **20th August, 2016** which states:

I, GILBERT KATHENYA MUKUNGI of P. O. BOX 10 CHOGORIA make oath and state as follows:-

1. That I am the plaintiff/applicant herein and therefore competent to make and swear this affidavit.
2. That the case before the court was heard almost to the finish but the defendant died before its conclusion.
3. That I live on the disputed land and the defendant's widow Evangeline Kanyua Mwiandi who occupies other portion has been frustrating me by refusing to apply for letters of administration.
4. That she has also sold portions of the land to strangers although no transfers could be effected.
5. That this compelled me to go to Chuka to have her appointed as a legal representative but she resisted the move. (Annexed is a copy of proceedings form Chuka PM's Court "GKM 1")

6. That I was advised to file a citation before the high court at Meru and filed Misc. Succ. Case No. 280 of 2014 (annexed are copies of citation and supporting affidavit marked “GKM 2”, “GKM 3”).
7. That when she found my insistence was going on she filed High Court Succession Cause No. 552 of 2014 (annexed is a copy of the petition and affidavit in support marked “GKM 4” and “GKM 5”).
8. That the Interested Party has been issued with temporary letters of administration and is therefore competent to be appointed to represent the defendant herein.
9. That the contents of this affidavit are true to the best of my knowledge, information and belief.
5. This application was allowed on **5th September, 2016**. A perusal of this suit’s file shows that the same application was once again allowed on **15th November, 2017** in the presence of Mr. Mutura, the defendant’s advocate and Mr. Rimita, the plaintiff’s advocate. The defendant, therefore, had no reason to claim that she was not already enjoined in the suit.
6. From the record of the proceedings, it is clear that the defendant has all along used all sorts of contrivances to ensure that this suit is not heard and determined. And for twenty seven years, the defendant has succeeded. The defendant’s advocate has told the court that she is not ready for today’s hearing.
7. All advocates are aware of the judiciary’s policy that **all cases over 5 years** in age ought to be **disposed of by December, 2018**.
8. For the last few months, the defendant has used the pretext that she was following up letters of administration. And yet from 5th September, 2016, she has been the legal and proper representative of the original defendant. She had obtained temporary letters of administration through **Meru HCCC Succession Cause No. 552 of 2014**.
9. This excuse was given to the court on 9th October, 2018. This prompted Mr. Charles Muchiri to ask the court to grant the plaintiff the orders he seeks in his plaint on account of the serial attempts by the defendant to ensure that this case never comes to a close. It is also clear that after her husband died, the defendant’s legal representative did not want to obtain letters of administration. All along, the plaintiff has lived on the suit land which is ancestral land.
10. On 9th October, 2018, Mr. Muchiri asked the court to rely on the plaintiff’s pleadings and deem them to be enough evidence to justify the granting of the orders sought in the plaint.
11. Miss Hayata did not address the issues raised by Mr. Muchiri. She merely said that she needed time to substitute Evangeline Kanyua Mwiandi in place of Mwiandi Kaimbiru, the original defendant. I think the idea is that if the defendant is not substituted with another person, the hearing of the suit will never proceed. And yet Evangeline Kanyua Mwiandi became a legal representative of the original defendant on 5th September, 2016, over two years ago. I opine that the defendant’s representative was using a procedural technicality to subvert the cause of justice and to delay justice. Both are deprecated by Article 159 of the Constitution of Kenya. And yet this procedural technicality was a mere contrivance not based on facts as the legal representative of the original defendant became enjoined in the suit over 2 years ago.
12. I find that the submissions proffered by the plaintiff’s advocate have not been controverted. The only issue for determination is if or not the plaintiff has tendered sufficient evidence, on a balance of probability, to grant him the orders sought in his plaint.
13. At the outset, I opine that the prayer for a declaration that the plaintiff has become entitled to 7 acres of L.R. MWIMBI/ N. MUGUMANGO /516, 942 and 943 under the doctrine of adverse possession is not tenable in this suit. I am not saying that he may not be entitled to his claim under the doctrine of adverse possession. What I am saying is that a suit for adverse possession should be filed in the prescribed manner.
14. A court of law cannot pronounce itself helpless when parties contrive to use technicalities and lies to delay hearing and determination of cases for decades. This court has been shackled by technicalities brought about, firstly, by the refusal of Evangeline Kanyua Mwiandi, the legal representative of the original defendant, to take out letters of administration apposite to her husband’s estate. Secondly, it was shackled by her contrivances, after she came into the suit as a legal representative to continue to refuse to participate in the hearing of the suit by claiming that she had not obtained letters of administration. As I have already pointed out, through Meru HCC Succession Cause No. 552 of 2004 and this court’s decision made on 5th September, 2016, the legal representative of the original defendant was rightly enjoined in this suit.
15. I embrace the spirit of the constitution as enshrined in Article 159(2b) and 2(d) to deliver justice in this matter. I also invoke this court’s power as contained in section 3A of the Civil Procedure Act to give orders that this court finds necessary for the ends of justice and to prevent abuse of the court process. I further invoke the provisions of sections 1A of the Civil Procedure Act and Section 3(1) of the Environment and Land Court Act to embrace the overriding objective and the spirit of these provisions of the

law to facilitate the just, expeditious, proportionate and accessible resolution of disputes.

16. I note that the parties in this matter are relatives. I will, therefore, not award costs to any of them.

17. In the circumstances, judgment is entered for the plaintiff against the defendant in the following terms:

a) It is hereby declared that the defendant holds 7.00 acres of L.R. No. **MWIMBI/N. MUGUMANGO/516 and L.R. NUMBERS MWIMBI/N. MUGUMANGO/942 AND 943** in trust for the plaintiff.

b) The defendant is ordered to transfer 7 acres from the aforementioned parcels of land to the plaintiff and in default, the Executive Officer of this court is authorized to sign all documents necessary for the implementation of this order.

c) No costs are awarded to any of the parties.

Delivered in open Court at Chuka this 23rd day of October, 2018 in the presence of:

CA: Ndegwa

Charles Muchiri for the plaintiff

Mr. Majau h/b Miss Hayata for the defendant

P. M. NJOROGE,

JUDGE