



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

LAND CASE NO. 6 OF 2012 (O.S)

JULIUS GATOBU MAGIRI.....1ST PLAINTIFF

GERRARD MBAABU MATIRI2ND PLAINTIFF

STANLEY MBAE M'MWONGO (*on behalf of*

KITHIMENE S.H.G).....3RD PLAINTIFF

GRACE KARAMBU (*Administratrix of the Estate of*

M'RINGERA M'ABURI (deceased).....4TH PLAINTIFF

GLADYS GAUKU MBWIRIA (*on behalf of*

NTUKIA CENTRE WOMEN GROUP).....5TH PLAINTIFF

VERSUS

PATRICK MURIGU.....1ST DEFENDANT

KENNETH MAWIRA.....2ND DEFENDANT

EVANGELINE KITHIRA.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. By an Amended Originating Summons dated 23/7/2012 and filed in court on the same date the plaintiffs herein sought the following orders:-

a) That the plaintiffs are and have been in occupation of various portions of land comprised in land parcel LR No. NKUENE/U-MIKUMBUNE/84 now subdivided into parcels LR. No. NKUENE/U-MIKUMBUNE/1724 to 1728 in the previous names of one GAKIE W/O MBUTURA deceased and currently in the name of the defendant over a period in excess of 12 years with full knowledge of the deceased, the defendant herein and his mother and relatives. The plaintiffs occupy various portions respectively as follows:-

(i) 1st plaintiff - 80 feets by 80 feets

(ii) 2nd plaintiff -40 feets by 80 feets

(iii) 3rd plaintiff - 20 feets by 80 feets

(iv) 4th plaintiff - 40 feets by 80 feets

(v) 5th plaintiff - 20 feet by 80 feet

b) A declaration that the plaintiffs have acquired entitlement and ownership of the said portions of land which are comprised in the said parcel of land LR. No. NKUENE/U-MIKUMBUNE/84 currently subdivided into parcels LR. No. NKUENE/U-MIKUMBUNE/1724 to 1728.

c) That the plaintiffs are now entitled to the said portions of land respectively being part of the aforesaid parcel of land.

d) Alternatively and without prejudice to the foregoing the plaintiffs seek orders to the effect that the defendants hold the various portions enumerated above in trust for the plaintiffs after the plaintiffs acquisition by operation of the law by way of adverse possession.

e) An order that the various portions comprised in LR. No. NKUENE/U-MIKUMBUNE/84 currently subdivided into parcels LR. No. NKUENE/U-MIKUMBUNE/1724 to 1728 has already vested in the plaintiffs by way of adverse possession or prescription.

f) An order that the defendant do forthwith execute a valid transfer instruments to transfer the various portions comprised of LR. No. NKUENE/U-MIKUMBUNE/84 currently subdivided into parcels LR. No. NKUENE/U-MIKUMBUNE/1724 to 1728 to the plaintiffs and in default the Executive Officer of the honourable court be empowered to execute the said transfer instruments.

2. The Originating Summons is supported by the sworn affidavit of **Gerrard Mbaabu Matiri** dated **17/1/2011**. In that affidavit it is averred that the plaintiffs have been in open and notorious possession of their respective portions of land for a period exceeding 12 years; that those portions were sold to the plaintiffs by the defendant's father; that the defendant's mother at one time filed a succession cause and named the plaintiffs as beneficiaries and then failed to implement the resultant confirmed grant; that later the 1st defendant filed a succession cause vide which he managed to have the land registered in his name and that the plaintiffs' claim did not abate by virtue of the registration of the suit land in the defendant's name as they had already acquired title by way of adverse possession.

3. In the affidavit dated **12/3/2012** filed in reply to the originating summons the 1st defendant states that he is the grandson to the original owner of the land one Gakie Mbutura; that the plaintiffs are not related to the deceased or her estate and they never had any transaction with her; that the doctrine of adverse possession does not apply to his ownership of the land as the 1st defendant has been an owner for only 6 years; that the defendant's father never sold the plaintiffs land; that the land that the defendant's father owned was **Abogeta/U-Mikumbune 662** and not **Abogeta/U-Mikumbune/84** hence he could not sell the latter plot to the plaintiffs; that the plaintiffs never objected to the 1st defendant application for a grant over his mother's estate; that the inclusion of **Parcel No 84** in the **Succession Cause No 197 Of 1998** was unprocedural as the succession cause was in relation to the estate of **Gilbert Justice Murithi** and the grant issued therein was null; that the defendant never consented to the plaintiff's occupation of the land which he learnt of recently; that the plaintiffs have not been in continuous occupation of the land and he has tried to evict them unsuccessfully and that the originating summons is overtaken by events as Parcel No 84 no longer exists as it was subdivided and new persons registered as owners pursuant to the grant.

4. In a supporting affidavit of **Gerrard Mbaabu Matiri** annexed to an amendment application dated **4/4/2012**, he responded to the replying affidavit stating that the original green card for the suit land was filed with the originating summons and it showed that the land was one undivided whole at the time of filing the originating summons.

THE EVIDENCE OF THE PARTIES

The Plaintiffs' Evidence

5. **PW1 Julius Gatobu Magiri** who is the 1st plaintiff testified on **21/6/2018**. He adopted his statement dated **17/1/2011** as his evidence-in-chief. The gist of his evidence is that the 1st defendant was young while the plaintiffs were dealing with his parents; that he bought the suit land measuring 80 feet by 80 feet in 1991, paid consideration, and entered into possession and developed it; that he has never been evicted from the plot; that the 1st defendant's father passed on and was survived by his widow; that she has never transferred the land to the plaintiffs; that the recent transfer of the land was effected secretly and after the plaintiffs asked for transfer of the land to them the defendants began removing the fence while demolishing plaintiffs developments; he produced an agreement dated **12/1/1991** between him and the 1st defendant's father for sale of 80 feet by 80 feet for ksh. 50,000/= (Plaintiff Exhibit 1). On cross examination he averred that the land had been bequeathed to the 1st defendant's father by Gakie who had died in the 1960s. He also admitted that only a portion of 50 feet by 80 feet remains in his possession and is occupied by a church to which he has leased the land beginning the year 2004. The rest of his plot was taken away from him in 2011 before the filing of this suit and has been cultivated by the defendants.

6. **PW2, Stanley Mbae Mwongo**, is the 3rd plaintiff and testified on **21/6/2018**. He adopted his statement in this case as his evidence-in-chief. His evidence is that he bought the plot measuring **50 feet by 80 feet** from one **Gerrard Mbaabu** on **25/10/1992** and paid the consideration and took possession; that the building materials he deposited on the land were sold by the 1st defendant while this suit was still pending; that he stopped using the land when the suit was filed and awaited orders; that though the self-help group he represents did not carry on any activities at the plot, they had fenced it upon purchase; that the defendants interfered with the plot after the suit was filed.

7. **PW3 Gladys Gauku Mbwiria**, the 5th plaintiff, testified on the same date on behalf of the **Ntukia Women's Self-Help Group**. She adopted the contents of her statement filed in this suit as well as of **Gerrard Mbaabu's** supporting affidavit to the originating summons as her evidence-in-chief. She averred that the group bought a plot measuring **20 feet by 80 feet** from the 1st defendant's father in **1984** and took possession thereof and have never ceased being in possession thereof since; on cross examination she stated that the plot she claims falls

under the parcel registered in the name of the 1st defendant.

8. PW4 Grace Karambu Ngeera is the 4th plaintiff, testified as the administrator of the estate of M'Ringer M'Aburi who she stated purchased land from the 1st defendant's father. She adopted her statement filed in this suit as her evidence-in-chief and averred that she still lives on her portion of land to date. She averred that she still cultivates on the land.

The Defendants' Evidence

9. DW1, Patrick Murigu the 1st defendant testified on **28/6/2018**. He adopted his statement made in this case as his evidence-in-chief. His evidence is that he is the caretaker of the suit land; that the land has been subdivided in accordance with a confirmation of grant dated 13/12/2005 in Succession Cause 102 of 2004 and the titles have been registered in the names of new owners upon cross examination he admitted being the grandson of Gakie who was the mother of Gilbert J Murithi, his father; stated that his father owned only one parcel no 662; that Gakie died before he was born; that his grandmother held the suit land in trust for him and his brothers and sisters; that his mother is alive; that he does not know the reason the plaintiffs are named by his mother in the **Succession Cause Number 197 Of 1998** which she filed; that he filed succession **Cause No 102 of 2004** in respect of Gakie's estate and after confirmation of grant distributed the suit land to the beneficiaries, showed them their portions and they took possession thereof; that that from the year 2006 the land was registered in his names; that the plaintiffs were not in occupation of the suit land in 2006 when the land was transferred into his name and they are not in occupation now; that the posho mill was removed; that **parcels number 1724, 1727, 1728** are in his name while parcel **number 1725** belongs to the 2nd defendant and **parcel number 1726** to the 3rd defendant; that the land was never sold to the plaintiffs; that the plaintiffs fraudulently filed **Succession Cause Number 197 of 1998** without his knowledge or the knowledge of his mother and that he has applied for a revocation of the grant therein and that the defendants entered into possession before the suit was filed. Upon further cross examination he acknowledged the contents of his affidavit dated 12/3/2012 which shows that the plaintiffs are in possession of the land (which contradicts his earlier evidence) and which expresses his desire that the plaintiffs be evicted therefrom. He admitted that the plaintiff's structures were built between **1988** and **2000**. He acknowledged that his mother was part of the *posho* mill business that was being run on part of the land by the women's group; he however denied knowledge of the agreements presented by the plaintiffs. He averred that the original parcel number 84 does not exist.

10. DW2, Kenneth Mawira the 2nd defendant gave sworn evidence on **28/6/2018**; he adopted his statement dated **14/2/2018** as his evidence-in-chief. His evidence is that Gakie was his paternal grandmother; that the land parcel she owned was **Abogeta/U-Mikumbune/NO 84** and it was subdivided to give rise to several plots of which his is number 1725. He denies that the plaintiffs have ever occupied or utilized the suit land either before or after the death of Gakie. He denied that the claim against his father was proper as in his opinion his father was never the owner of the suit land at any time.

11. When cross examined by Mr. Gikunda he averred that Gakie died before he was born; that his family lived on the suit land while he was young and he never knew that the land had been sold; that the plaintiffs have structures on the suit land but they do not live on the land. He did not know how they came to be on the land.

12. When re-examined by Ms. Kithaka he admitted that there is a church and that there are some people who reside on the land. he stated that the current occupants rent the houses on the land but he does not know who receives the rent.

SUBMISSIONS

13. The plaintiffs filed their written submissions on **15/8/2018**. The defendants filed theirs on **24/9/2018**.

DETERMINATION

Issues for Determination

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

(1) Whether the defendants are currently the registered proprietors of LR No. NKUENE/U- MIKUMBUNE/84 currently subdivided into parcels LR. No. NKUENE/U- MIKUMBUNE/1724 to 1728;

(2) Whether the plaintiffs have had open, exclusive, continuous and notorious occupation and possession of the various possession comprising of LR. No. NKUENE/U-MIKUMBUNE/84 currently subdivided into parcels LR. No. NKUENE/U- MIKUMBUNE/1724 to 1728 respectively and if so, they have been in such uninterrupted possession for a period in excess of 12 years.

(4) Whether the plaintiffs' such open, quiet enjoyment and exclusive uninterrupted, notorious user and occupation has given rise to adverse possession?

(5) Whether the transfer of the subject matter land to the defendant herein is irregular or invalid in law the interest over the subject matter having vested in the plaintiffs by adverse possession and or prescription prior to the defendant's action of transferring the subject matter to his names.

15. As to the question whether the defendants are the registered owners of the suit land, now subdivided into several plots, the answer is in the affirmative. The plaintiff is registered as proprietor of parcels number **1724, 1727, 1728**; the 2nd defendant is the registered proprietor of **Parcel Number 1725** while the 3rd defendant is the registered proprietor of **Parcel Number 1726**. All those parcels of land were

subdivisions of the original **Parcel Number 84**.

16. On the issue of whether the plaintiffs have had open, exclusive, continuous and notorious occupation and possession of various parcels comprising LR. No. NKUENE/U-MIKUMBUNE/84 (currently formally subdivided into parcels LR. No. NKUENE/U-MIKUMBUNE/1724 to 1728) for a period in excess of 12 years the evidence is that they bought parcels of land from the defendant's father and took possession thereof. No dispute is recorded as having existed between them and the defendants' father during his lifetime. It would appear that there were no other heirs to the estate of Gakie, so the defendant's father who was her son appears to have taken possession of the suit land and sold it to the plaintiffs without demur from any quarters. The agreements produced by the plaintiff as well photographic evidence of the structures on the land which the defendants admit were built by the plaintiffs are sufficient evidence that the plaintiffs took possession of the land after the sale transactions were complete.

17. As for the period that the plaintiffs were in possession of the land, it appears that there is no sufficient evidence from the defendants to controvert the evidence of the plaintiffs. Evidence of the **1st plaintiff** is that he entered into possession of his parcel of land measuring 80 by 80 feet in **1991**. Evidence of the **3rd plaintiff** shows that he bought a plot measuring 20 by 80 feet from the **2nd plaintiff** in **1992** and took possession thereof and stayed thereon until this suit began whereupon he developed a wait-and-see attitude. The **4th plaintiff's** evidence is that her late husband purchased the land in **1986**, took possession and left her in possession thereof. The **5th plaintiff** averred that her group bought land measuring 20 feet by 80 feet from the defendants' father in **1984**, took possession and operated a posho mill thereon. However the posho mill ground to a halt but the assets of the group are still on the suit land.

18. In their pursuit of this case the defendants have contradicted themselves on the issue of occupation of the land by the plaintiffs. in the replying affidavit of the **1st defendant** dated **12/3/2012** and filed on **16/3/12** he states as follows:

In paragraph 5: ***"That the plaintiffs are strangers to me and they are unlawful and illegal occupiers of our land..."***

In paragraph 6: ***"That I became the legal owner of (the suit land) in 2006, and have been the owner of this land only for 6 years hence the doctrine of adverse possession does not apply in favour of the plaintiffs."***

In paragraph 11: ***"that I have never given consent to the plaintiff's occupation of the subject matter and I only became aware of their claim and occupation recently, neither have they been in continuous occupation of the land in issue as alleged and I have been trying to evict them unsuccessfully."***

In paragraph 14: ***" that I believe that to ensure justice and fairness is done the plaintiff's application should be dismissed with costs and orders of eviction be granted to the defendant and the plaintiffs be prohibited from trespassing..."***

19. In summary, in the light of the above confessions filed on the unguarded spur of the moment at the inception of the suit, it is not proper to believe the **1st defendant's** evidence in his written statement adopted at the hearing that:

"...these people were not on the land by 2006 when I got it transferred in my names. They had already left and abandoned some of their structures..."

20. Besides the defendant's mother, who was not called by the defendants as a witness in this suit, appeared to have acknowledged the plaintiff's claim by including the plaintiffs in the confirmation of grant in **HC Succession Cause No 197 of 1998** as beneficiaries of some parcels of various sizes in parcel no 84.

21. Failure to call her evidence in the matter can only lead to the presumption that if it had been given it would have been adverse to the defendants' defence.

22. The defendants' allegations attributing fraud and secrecy to the plaintiffs regarding that succession cause are not credible. It can only be the case that they were already in occupation of that land as at the time the succession cause was filed and it would appear that the defendant's mother recognized that fact.

23. Since it has not been shown by the defendants that there was any other beneficiary to the estate of the late Gakie other than their father, it therefore follows that he was the sole beneficiary for the purposes of the instant suit. There may have been a slip when the defendant's mother applied for a grant in respect of her husband's estate while naming Parcel No 84 as his asset instead of applying for a grant in respect of Gakie's estate. However, that was but a procedural lapse, for nothing changes the fact that upon Gakie's demise the suit land devolved to the defendant's father's estate before devolving to his wife or his children and that he took actual possession of the same and resided thereon before selling it to the plaintiffs.

24. From the foregoing it is therefore the conclusion of this court that the taking of possession of the suit land was with the consent of the defendants' father following the finalization of purchase transactions. Their occupation of the land was therefore without force or secrecy.

25. The denial by the defendants of these sale transactions now, which it is doubtful that they could have had knowledge of at the time of execution as the defendants were toddlers or of tender age, does not detract from the fact that the plaintiff's entry led to continuous possession until after the suit was filed.

26. The admission by the **2nd defendant** that the structures on the suit land are still being rented out to tenants bespeaks of lack of control of the premises by the defendants.

27. The activities that the defendants undertook on the suit land after the suit was commenced were futile in the face of the plaintiff's claim for adverse possession as the plaintiffs had already secured their claim by filing suit.
28. The admission in the replying affidavit that the 1st defendant had not by the time of that deposition succeeded in evicting the plaintiffs is sufficient to fix the time the plaintiffs have been on the land.
29. Going by the dates of taking possession given by the plaintiffs which were not controverted, and considering that they were in possession as at date of institution of the originating summons, I find that the 1st plaintiff has been in possession continuously since 1991, the 3rd plaintiff since 1992, the 4th plaintiff since 1986 and the 5th plaintiff since 1984.
30. All the plaintiffs have therefore been in open and continuous uninterrupted possession of the suit land for a period in excess of 12 years.
31. The defendant's averment that the subdivision of the original land parcel puts the land out of reach of this court's orders is as mischievous as it is misadvised, for this court presumes that all citizens are aware of the doctrine of *lis pendens*.
32. Besides, all that is of consequence is that the plaintiffs filed a copy of the green card showing that the land was not subdivided as at the time of filing the originating summons. The subdivisions conducted while the suit was pending are therefore at the mercy of this court's orders; they can be revoked.

CONCLUSION

33. In the final analysis I find that the plaintiffs have proved their claim against the defendants on a balance of probabilities. I therefore issue the following orders against the defendants jointly and severally:

a) A declaration that the subdivision of the land LR. No. NKUENE/U-MIKUMBUNE/84 currently subdivided into parcels LR. No. NKUENE/U-MIKUMBUNE/1724 to 1728 is null and void and is hereby cancelled and the original title to parcel number LR. No. NKUENE/U-MIKUMBUNE/84 is restored to its former position as an undivided whole.

b) A declaration that the plaintiffs have been in occupation of various portions of land comprised in land parcel LR No. NKUENE/U-MIKUMBUNE/84 for a period in excess of 12 years with full knowledge of the estate of Gilbert Justus Murithi, the defendants herein and their mother.

c) A declaration that the plaintiffs occupy various portions respectively as follows:-

(i) 1st plaintiff - 80 feet by 80 feet

(ii) 3rd plaintiff - 50 feet by 80 feet

(iii) 4th plaintiff - 40 feet by 80 feet

(iv) 5th plaintiff - 20 feet by 80 feet

d) A declaration that the various portions comprised in LR. No. NKUENE/U-MIKUMBUNE/84 as occupied by the plaintiffs have already vested in the plaintiffs by way of adverse possession or prescription.

e) An order that the 1st defendant will hold the title to the land comprised in LR. No. NKUENE/U-MIKUMBUNE/84, in so far as the various portions enumerated above occupied by the plaintiffs are concerned, in trust for the plaintiffs.

f) An order that the defendant do forthwith execute valid subdivision and transfer instruments to transfer the various portions comprised of LR. No. NKUENE/U-MIKUMBUNE/84 to the plaintiffs and in default the Deputy Registrar of the honourable court be empowered to execute the said subdivision and transfer instruments.

It is so ordered.

Dated, signed and Delivered at Meru this 20th day of December, 2018

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT.