



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CASE NO. 94 OF 2017**

**FORMERLY MERU ELC CSE NO. 61 OF 2008**

**LINUS RIUNGU M'KANGA.....PLAINTIFF**

**VERUSS**

**ERASTUS NJAGI KAMUNDI.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff in this matter was dated and was filed on 23/5/2008 seeking the following prayers:

- a) An order directing the defendant to remove the caution placed against the plaintiff's land parcel NO. MWIMBI/N.MUGUMANGO/1318 and in default, the Honourable Court do empower the Executive Officer, Meru Law Courts to sign all the requisite documents to facilitate the removal of caution placed by the defendant on the said plaintiff's land.
- b) An order of permanent injunction restraining the defendant, his agents, servants, assignees, employees and or anybody else acting on his behalf from trespassing, entering and or cultivating the plaintiff's land parcel No. MWIMBI/N.MUGUMANGO/1318.
- c) Costs of the suit.

2. The facts relied upon are that the plaintiff is the registered owner of the suit property which measures about 1.62Ha. In January 2008, he applied to the Meru South LCB for subdivision of the suit property and obtained the consent sought. He then divided the land into 3 portions but was not able to register the mutation as a caution had been placed on the property by the defendant which action was confirmed after the Plaintiff conducted a search on 25/2/2008. The plaintiff states that he never sold his land to the defendant and hence the defendant's action is unlawful and untenable.

3. Efforts by the plaintiff to get the defendant to remove the caution wielded no fruits as the defendant refused to do so. The parties engaged the Meru South Land Registrar on 24/4/2008 but could not agree on the same and were advised to approach the Court.

4. Additionally, on 10/3/2008, the defendant forcibly trespassed on the plaintiff's land and proceeded to do some cultivation in disregard of the plaintiff's protests.

5. The Plaintiff filed a list and bundle of documents on 17/2/2012.

6. The defendant filed a defence on 8/7/2008 and the same is dated 4/7/2008. The same is to the effect that though the Plaintiff is indeed the registered owner of the property, the defendant had purchased the suit land but the plaintiff used his position as administrator of the Estate of M'Kanga M'Rangata to take away the defendant's entitlement.

7. The defendant avers that if there is indeed a consent from the LCB, which the defendant doubts, then the same was obtained through lack of disclosure of material facts. It is admitted that the dispute went before the Land Registrar Meru South, who found in favour of the defendant and maintained the caution.

8. 3 witnesses testified for the Plaintiff's case.

9. PW1 was the Plaintiff Linus M'Kanga. He stated that:

- a) He knows the defendant. He adopted his witness statement of 17/2/2012.

b) He is registered owner of parcel 1318 and has the title deed. The land was to be subdivided to two people Eustace Kubai and Bernard M'Kwanga with each getting 2 acres but the whole land was given to Eustace Kubai as M'Kanga was residing in Tigania.

c) Eustace Kubai was the father of Sospeter Kimathi while M'Kanga was the plaintiff's father who did not get the land. When Kubai died, Sospeter agreed to give PW1 the land i.e. parcel 680 which he did.

d) PW1 subdivided the land with consent of the Land Control Board.

e) He denied using forgery to get the land. He then stated that he could not remember how the land was obtained.

f) He prayed for the court to grant his orders as prayed.

10. In cross-exam, PW1 stated that the defendant is his cousin. He also stated that Judge Ouko asked why the land was registered in his name but the same is family land. He then said he did not remember if the judge questioned anything. He said that he does not agree that his name was improperly inserted in place of M' Akanga M' Rangata. On being asked why there was no application to substitute his father on the grant, he stated that they went to the lands office and the clerks said his father did not have land and they cancelled his name. His father died in 2005 and had been living at the defendant's place. He does not agree that he sold any land in 2002. He does not know about the existence of two grants. His father's sister and her children live on the land and not the defendant.

11. In re-exam, PW1 said that the defendant has no building on the land. The changes in the confirmed grant was done by the court. His father's name was replaced because the family wanted to sell the land. He was a witness to the sale agreement but at the time, the land belonged to PW1's grandfather. No one has ever challenged his registration as owner of parcel 1318 except for the present defendant.

12. PW2 was Kimathi Eustace. He stated that:

a) The plaintiff is his cousin, a son to his uncle. The defendant is also his cousin, a son to this aunt.

b) He adopted his statement dated 30/12/2011.

c) Parcel 680 was registered under the name of PW2's father as family land. PW2 was the administrator in Chuka Succession Cause No 48 of 2001 and the changes in grant were done by the Court.

d) He is not aware of any agreement between the father of the plaintiff and the defendant. The land could not have been sold by the plaintiff's father as it was still in the name of PW2's father.

e) Parcel 680 was divided into 3 portions one of which was given to the plaintiff. The 3 beneficiaries of the subdivision all occupy their portions of land. The defendant is not occupying or using the land. Neither is his mother.

f) There was no fraud in the succession case and no complaints were made to the police.

13. In cross-exam, the witness stated that his father was Eustace Ruchiami M' Rangata. The plaintiff's father was M'Kanga M' Rangata. PW2 appeared unsure if the land was ancestral but stated it was registered in his father's name and originated from his grandfather. The plaintiff's father was to get 4 acres. Succession case 48 of 2001 ended in 2002 and PW2's father died in 2005. The grant was issued before PW1's father died and had been implemented.

14. PW2 stated that he doesn't know about the process of changing a grant. All sons of his father came to court and agreed that the land be registered to the 1<sup>st</sup> born in trust for them.

15. PW2 also stated that the defendant never entered the land in 2002 and PW2 does not know about any dealings between the defendant and the plaintiff's father.

16. He said that it is not true that the defendant was evicted from the property in 2015.

17. He also said that the defendant was aware of the succession cause but he never raised any issue. He did not know if the defendant assisted M' Rangata in claiming his 4 acres.

18. He added that the property was given to the plaintiff to share with his family. He averred that when subdivision was implemented, he gave the land to Linus Riungu, the defendant, in 2007.

19. PW3 was Anderson Kathanya. He stated that:

a) The plaintiff and the defendant are both his cousins. He said that his mother died on 21/8/2018 and was living on the suit land at the time. PW3 told the court that he lives on the suit land with his family.

b) He has never seen the defendant on the suit land. The defendant attempted to enter the land but they resisted.

c) He denied that the defendant was to get 2 acres from M'Kanga M' Rangata.

20. In re-exam, the witness stated that they were referred to the registry where they got the grant and new titles. He stated that no one has ever challenged the succession case. The witness adopted his statement of 30/12/2011 as his evidence in this suit.

21. The defence called 2 witnesses.

22. DW1 was the defendant Erastus Njagi Kamundi. He stated:

a) The plaintiff is his cousin.

b) His witness statement is dated 23/9/2014 and he adopts the same. He also adopts the documents as per his list of documents of 30/1/2013.

23. In cross-exam, the witness states that he was purchasing part of parcel 1318 from M’Kanga M’Rangata though the registered owner was the late Ruciamii M’Rangata, brother to M’Kanga. He said that he did not know if or if not M’Kanga did not have capacity to sell. He agreed that Judge Ouko J’s ruling questioned the sale. He also admitted that there was no measurement by a surveyor at the time. He also admitted that he and M’Kanga had not obtained a Land Control Board consent as they did not reach that point.

24. DW1 claimed that he took possession of the land in 2002 and was evicted in 2015. He reported the same at Ntue police station but did not have the OB number.

25. He DW1 added that as stated in the agreement, he was shown the boundaries and allowed to enter onto the land. The boundaries were shown to him approximately though there was no surveyor. DW1 said that he had paid 50,240/= at the time of the agreement and the agreement was witnessed by a magistrate in Chuka as well as by the Plaintiff.

26. DW1 claims that he paid an additional Kshs. 5,000/= but does not have proof of payment. He added that the balance was never paid as issues arose between family members and thereafter the deceased passed away. It is apparent that the plaintiff is not the administrator of the estate of M’Kanga as stated in the defence. DW1 told the court that he did not object to proceedings in the succession case as M’Kanga was alive and would have inherited and transferred 2 acres to him. He also admitted that he never reported any issue of fraud by the plaintiff to the police.

27. In re-exam, DW1 highlighted page 4 of Ouko J.’s ruling where the judge said the registration of the applicant as proprietor of 1318 may have been illegal and fraudulent. DW1 maintained that he had been on the suit property. DW1 also claimed that he initiated succession cause 48 of 2001 by funding M’Kanga but was not a party.

28. DW2 was Bundi Kigunda. He stated that:

a) He knows both parties.

b) He recorded a witness statement on 8/4/2017 and wanted the court to adopt it as his evidence in this suit.

29. In cross-exam, DW2 stated that his home and that of the defendant were 2 kilometers apart. He said that the defendant was not his immediate neighbour but he has known him to have cultivated the suit land for 12 years. He admitted that the defendant had told him to tell that to the court. He also told the court that he did not know the land numbers but he knew the original owner Ruciami. He did not know how much money the defendant gave to M’Kanga for the land as he was not present. He however said that he was present at a time when the defendant loaned M’Rangata 50,000/= but could not recall the date. DW2 was not sure when DW1 took the claimed possession of the suit land. He said the surveyor was there but then said there was no proper survey. He insisted that the defendant bought 4 acres. DW2 admitted that he was not sure what was in his statement though he signed it. DW2 also told the court that he was not aware of the apposite succession case.

30. In re-exam, DW2 said that the witness statement was not read to him, when he signed it. He was, however, insistent that the plaintiff had entered the suit land around 2001 or 2002 but was chased away in 2015.

31. The Plaintiff filed his submissions on 14/11/2018. It was submitted that the Plaintiff had proved ownership and the defendant never challenged that ownership in the Succession cause 48/2001 in the Chuka SRM court. It is also stated that the vendor who sold the suit property to the defendant had no capacity whatsoever to sell the property. It is also stated that even if the Plaintiff witnessed that sale agreement, the same was still illegal. The plaintiff also states that he cannot be ordered to refund the paid sums, if any, as they were not paid to him. Additionally it is submitted that the sale was invalid for lack of consent from the Land Control Board. The plaintiff also submits that the defendant did not prove that he had indeed been occupying the suit land and also that another party, Bundi Kigunda, claims to be in occupation of the land. The plaintiff submits that he is not an administrator of the Estate of M’Kanga M’Rangata as claimed and the defence that he used his position as administrator to benefit himself cannot hold water. It is also submitted that there can be no claim for adverse possession as the sale agreement was entered into in 2002 and the suit was filed in 2008.

32. The plaintiff prays that judgment be entered in favour of the Plaintiff as prayed.

33. The defendant filed his submissions on 12/11/2018. The submissions state that the Plaintiff was fraudulently registered as the owner of the suit land and that he did not have locus to prosecute the suit. It is also submitted that the plaintiff is the administrator of the estate of M’Kanga M’Rangata (but did not show a grant to that effect) and, therefore, should be liable to cater for any liabilities as a result of the actions of the deceased. The defendant says that he had also filed a case, Chuka OS 276 of 2017 seeking ownership by adverse possession which was dismissed by the Court but maintains that he owns part of the suit land which he claims.

34. I frame issues for determination in this suit as:

1. Does the Plaintiff have locus to file this suit?
2. Does the defendant have a valid claim to parcel No. 1318 as a purchaser?

35. It was obvious from the evidence given on the stand that there was confusion between the plaintiff's witnesses. The plaintiff himself did not know how the property was transferred to him. PW2 did not know when his father died. He could not explain how the grant was cancelled. It is argued that the Plaintiff has no locus to sue over this property as he was registered as the owner in a vague manner.

36. The defendant never made a counterclaim based on fraud and did not avail evidence of fraud or call any witness from the Lands office to that effect. The proceedings in the Succession Court were not placed before Court for this Court to infer any illegality on the part of the Plaintiff.

37. If indeed the change in the grant was perpetuated by fraud, the implication would be far reaching as to possibly involve an inquisition into Court staff. If there was anything to challenge the name of the Plaintiff being added onto the confirmed grant, then the same would have been brought up before the said court that issued the Grant or before the Court of Appeal. The ruling by Ouko J of 10/6/2009 similarly did not make a declaration as to any falsehood on the part of the Plaintiff but page 4 was a continuation of page 3 where the Judge stated that he was setting out the respective positions of the parties. In any event, even if the Court was to find fraud at the hands of the Plaintiff, the land in issue would be lost to the estate of the late Ruciamii M'Ratanga alias Eustace Kubai and not devolve to the defendant.

38. Given the limited information presently before the Court, this court should exercise caution in making any declarations on the issue of ownership of the plaintiff, fraudulent or otherwise as the Succession court was better seized of evidence and documentation with regards to the succession. I find that the evidence in this file is not sufficient to support the allegation of fraud. Therefore, the plaintiff's alleged fraud cannot be determined in order to oust his locus.

39. It is not in dispute that the Plaintiff is the registered owner of parcel 1318 which is in issue herein. There is a certificate of confirmation of grant to the Estate of Ruciami Rangata alias Eustace Kubai, dated 17/9/2002 which shows the Plaintiff as having been given by the estate 4 acres of land parcel known as MWIMBI/N.MUGUMANGO/680. The name of M'Kanga M'Rangata which was listed as well, appears to have been cancelled and the name of the plaintiff added. It is said in the plaintiff's witness statement that this was adopted by consent after the said M'Kanga M'Rangata passed away before the succession transfers were completed. As a result, the Plaintiff inherited parcel 680 directly from the Estate of Ruciami in place of the late M'Kanga M'Ranagata. There was a subdivision thereafter and parcel 1318 measuring 1.62Ha was created as a result along with two other parcels. Title Deed for 1318 in the Plaintiff's name is dated 25/5/2007.

40. The defendant, however, claims the property by virtue of being a purchaser. There is a sale agreement dated 22/4/2002 between M'Kanga M'Rangata (Vendor) and the defendant herein in which the defendant purchased 2 acres of parcel number 680 while the succession of Ruciami was ongoing. M'Kanga M'Rangata was selling 2 acres of his anticipated inheritance to the defendant. This inheritance that was being purchased is what was registered to the Plaintiff on death of the Vendor. The defendant claims to have already taken possession of the property by that time but the plaintiff refused to act in any way pursuant to the defendant's sale agreement with the deceased.

41. The issue for this Court to determine is whether the defendant has a proper claim on the suit property and if not, whether the Caution lodged by him ought to be lifted and a permanent injunction issue against him.

42. In this case, the defendant claims to have bought the land from a person who was not a registered owner and who did not have the right to sell it in the first place. The said M'Kangata M'Rangata in selling the land offended the provisions of section 45 and section 83 of the Law of Succession Act.

43. Section 45 of the Law of Succession Act reads as follows:

No intermeddling with property of deceased person.

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

44. Section 45 states:

No distribution of capital before confirmation of grant

(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in [section 71](#). 82. Powers of personal representatives  
Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased;

and

(ii) no immovable property shall be sold before confirmation of the grant;

With regard to all the above provisions, it is pellucid to see that the late M’Kanga M’Rungata was in violation of the law when he dealt with the property of Ruchami by selling it to the defendant while a succession cause was ongoing. The courts have in several instances voided similar sale agreements.

45. In CIVIL APPEAL 343 AND 345 OF 2002 AT THE COURT OF APPEAL AT NYERI, JANE GACHOKI GATHECHA V PRISCILLA NYAWIRA GITUNGU & ANOTHER [2008] EKLK, the Court dealt with a situation in which the land of a deceased person was unprocedurally transferred to a third party and the third party thereafter sold to a fourth party. The said fourth party thereafter claimed to be protected under section 93 of the LSA. The Court dismissed the claim and in doing so, stated

**“We think, with respect, that there is a fallacy in invoking and applying the provisions of section 93(1) of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “transfer of any interest in immovable or moveable property”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void *ab initio* and the property is traceable.**

46. At the High Court in CHUKA SUCCESSION CAUSE NO. 560 OF 2015 ESTATE OF M’MUTHAMIA MWENDWA (DECEASED) [2016] EKLK, the Court handled a matter in which the beneficiaries of the deceased’s estate also sold property while they were not administrators. Mabeya J stated;

**“.. of course both Speranza and Linus were neither the owners of the properties they were purporting to sell nor were they administrators of the estate. Even an administrator of the estate with a grant which has not been confirmed cannot pass any title to land by dint of section 82 of the Act. Accordingly, Francis Kithinji and John Mutembei are at best intermeddlers who together with Speranza Kaguri and Linus Mwiti have fallen foul of Section 45 of the Act. Of course under that section, intermeddling with an estate of a deceased person is criminal and it attracts criminal sanctions”.**

47. In MACHAKOS HCC 256 OF 2007 IN RE ESTATE OF JOHN GAKUNGA NJOROGE (DECEASED) [2015] EKLK, the court dealt with similar facts in which property was claimed by persons who had bought land from the deceased prior to his death and by persons who had bought land from beneficiaries to the estate of the deceased. Muriithi J stated:

**“15. For the transactions between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the Confirmed Grant, the contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators, the dealings with immovable property of the Estate is restricted by the provisions on the powers and duties of the personal representatives under section 82 (b) Proviso (ii), which provides that:**

**“(ii) no immovable property shall be sold before confirmation of the grant”**

**“7. Recovery of consideration**

***If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22.”***

48. As seen in the above cases, Courts have held that transactions for land conducted prior to confirmation of a grant were void *ab initio*. In this case, the sale is disputed and additionally, no LCB consent was placed on record for the transaction between the defendant and the late M’Kanga M’Rangata. This appears to leave the sole remedy as seeking a refund of purchase price or any monies paid.

49. In addition to the invalidity of the sale agreement, it is not clear why the defendant claims the specific subdivision of parcel No.1318 when there were 2 other resultant parcels. The defendant avers that he left the property in 2015. He did not state that he had any developments thereon save that he was cultivating. The court was not told if the cultivation was long term plants and therefore, it suffices to say that on a balance of probabilities, anything cultivated by the defendant, if at all, in 2015 is likely not on the property now.

I am of the opinion that the defendant can be refunded the price of Kshs. 50,240/= by the administrators of M’Kanga as that is the sum proven as per the sale agreement at paragraph 2(a). Seeing as the late M’Kanga took the money when he had no right of sale, the plaintiff who is the beneficiary of his estate will be ordered to refund the money.

Whichever is the case, the defendant cannot be heard to claim lien arising from an unlawful action. No such prayer was even put forth by way of counterclaim to consider. The admission that the defendant filed a suit for adverse possession while the present suit was in court was also an action in bad faith.

#### **Who should bear the costs of this suit?**

This matter resulted because the defendant took part in an unlawful sale which may have been concluded had the late M’Kanga M’Rangata

not passed away when he did. He may or may not have known that the sale was unlawful but ignorance of the law is no defence. He lodged a caution which necessitated the filing of this suit. However, the plaintiff and the defendants are cousins. To promote harmony in the family, I will order that they bear their own costs.

## **CONCLUSION**

Orders ought to be allowed as prayed for by the plaintiff except the order of costs.

50. It is clear that the plaintiff benefited from the land he inherited from his father who had attempted to illegally sell land to the defendant. There is an agreement showing that the plaintiff's father received a sum of Kshs.50,240/= from the defendant. There was no documentary evidence that the defendant had paid the plaintiff's father a further sum of Kshs.5,000/=. It is not controverted that the plaintiff was a witness to the agreement entered into between his father and the defendant. The court cannot close its eyes to this situation. Doing so would amount to allowing the plaintiff to eat his cake and still retain it. It would also amount to condoning unjust enrichment. This court is inclined to order the plaintiff to refund the sum of Kshs.50,240/= paid to his father with his knowledge to the plaintiff within 3 months after delivery of this judgment.

51. This court enters judgment in the following terms:

a) An order is issued directing the defendant to remove the caution placed against the plaintiff's land parcel No. Mwingi/N.Mugumango/1318 and in default this court empowers the Executive Officer, Chuka Law Courts to sign all the requisite documents to facilitate the removal of the caution placed by the defendant on the plaintiff's land BUT the Executive Officer can only do so after satisfying himself that the plaintiff has refunded the sum of Kshs.50,240/= to the defendant.

b) The plaintiff is hereby ordered to pay a sum of Kshs.50,240/= to the defendant within 3 months after delivery of this judgment and if he does not do so, the defendant is entitled to enforce execution of this order as if a judgment had been delivered by the court that he owes the defendant the said sum of money.

c) The said Kshs.50,240/= payable to the defendant by the plaintiff shall attract interest at court rates with effect from the date of this judgment.

d) Pending payment of the said sum of Kshs.50,240/= to him by the plaintiff, the defendant is entitled to register an inhibition against Land Parcel No. Mwimbi/N.Mugumango/1318 and the Land Registrar, Chuka is ordered to register the order of inhibition BUT the Executive Officer of this court is authorized to sign documents necessary to remove that inhibition upon satisfying himself that the plaintiff has paid the sum of Kshs.50,240/= to the plaintiff.

e) An order of permanent injunction is hereby issued restraining the defendant, his agents, servants, assignees, employees and or anybody else acting on his behalf from trespassing, entering and or cultivating the plaintiff's land parcel No. Mwimbi/N/Magumango/1218.

f) As the litigants are cousins, and to promote harmony in the family, it is ordered that parties do bear their own costs.

g) Orders accordingly.

**Delivered in open Court at Chuka this 19<sup>th</sup> day of December, 2018 in the presence of:**

CA: Ndegwa

Linus Ndungu h/b Nyamu Nyaga for the Plaintiff

Erastus Njagi Kamundi – Defendant present

**P. M. NJOROGE,**

**JUDGE.**