



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

MERU ELC CASE NO.87 OF 2003 (OS)

KIRIGIA KIARUNY.....PLAINTIFF

VERSUS

DORIS CIOMBAKA IMATHIU.....1ST DEFENDANT

KABURU JAPHET IMATHIU.....2ND DEFENDANT

MWITI JAPHET IMATHIU.....3RD DEFENDANT

JUDGMENT

1. This suit was filed through Originating Summons dated 10th July 2003. It states as follows:

“LET DORIS CIOMBAKA IMATHIU, KABURU JAPHET IMATHIU and MWITI JAPHET IMATHIU all of Lare, Ntonyiri Meru North within 15 days after service of this summons on them enter appearance to this summons which is issued in this application of KIRIGIA KIARUNYI who claims:

(a) A declaration that the plaintiff has become entitled under section 38 of the Limitation of Actions Act (Cap 22 laws of Kenya) to be registered as proprietor by adverse possession of the whole of land Ref MITUNGUU/128 measuring 10.528 Ha in place of its present registered owner IMATHIU MARETE (now deceased).

(b) An order directed to the land registrar Meru ordering him to rectify the register to give effect to the declaration contained in paragraph (a) above.

(c) Costs of this suit and for determination of the following questions.

(1) Whether the plaintiff has been in continuous, open, exclusive and undisturbed possession of the whole of L.R.NO.MITUNGUU/128 measuring 10.528 Ha for over 12 years.

(2) Whether the period of adverse possession commenced in 1967 when JAPHET IMATHIU (deceased) was allegedly registered as the owner of the suit land.

(3) Whether on 31st January, 1997 when the deceased was registered owner of the land in dispute the plaintiff was in occupation of the whole land and whether the plaintiff continued occupying the land and whether the plaintiff is in that occupation to-date.

(4) Whether JAPHET IMATHIU is now deceased and whether the defendants are his legal

representatives.

(5) Whether the deceased's title is not subject to the plaintiff's overriding interests under S. 30 (f) of the registered land Act (Cap 300).

(6) Whether the plaintiff is not entitled to be registered as the proprietor of the suit land.

2. On 31st July, 2013, this suit was withdrawn against the 2nd and 3rd defendants.

3. PW1, the plaintiff, told the court that he had sued the defendant so that he could recover his land which was originally registered in his name but was later on secretly registered in the name of Japhet Imathiu Marete, the deceased husband of the defendant. He told the court that the suit land was registered in his name in 1966 but only realized in the year 2002 that the land was registered in the name of Japhet Imathiu Marete.

4. During examination in chief, the court noted that PW1 was being evasive. He stated that he had lived on the land since 1963 although he claimed that he only realized that the land was registered in the name of the deceased husband of the defendant only in the year 2002. He told the court that the deceased husband of the defendant was the son of his step father in that his father and his father were brothers. He claimed that the late Japhet Imathiu Marete and his family had never lived on the suit land. He also claimed that he did not know a Mr. Mbaabu who was caretaker of the farm on behalf of the family of Japhet.

5. During cross-examination by the defendant's advocate, the court recorded that he was giving conflicting evidence.

6. PW1 told the court that he had given the title to Japhet Imathiu Marete to keep for him. He told the court that he did not know when he had given the title to him but upon being prodded by the defendant's advocate he said that he could have given the title to him in 1964.

7. PW1 told the court that he did not take legal action when Japhet Imathiu Marete refused to give back his title. He told the court that after he demanded to get his title back, Japhet Imathiu Marete died 2 days later.

8. Being prodded further, PW1 told the court that he had asked Japhet Imathiu Marete to give back his title but he did not take any action to recover his title because he trusted Japhet Imathiu Marete. Asked why he waited until after Japhet Imathiu Marete died before he filed this suit, he told the court that he could not approach him as he was sick.

9. PW1 told the court that he did not know when Japhet moved to a place called Lare. Pressed to tell the court where he went to demand his title from Japhet, he told the court that he went to Lare.

10. PW1 told the court that he had children and a family who all lived at Mikumbuni. He told the court that he left them at Mikumbuni and alone moved to the suit land.

11. PW1 told the court that he did not have documentary evidence that the suit land was transferred to Japhet fraudulently. He denied that he had signed the requisite transfer documents to transfer the suit land to Japhet. He also told the court that he did not report the matter to police if he felt that the land had been fraudulently transferred to Japhet, because according to him police did not deal with land matters.

12. PW1 demurred to answer questions concerning photographs shown to him by the defendant's advocate meant to show that the suit land had not been developed or was being cultivated by him. The court had to order him to answer the apposite questions.

13. PW1 told the court that he could not answer questions concerning the photographs because he did not live on the land as he had been kicked out of it by the defendant's family.

14. PW2, Teresiah Wambui, told the court that she was a neighbour to the plaintiff and had known him since 1993. He told the court that between the year 2003 and the year 2010 she had rented the suit land from the plaintiff. She averred that the plaintiff had initially lived on the suit land with his family. This clearly contradicted the plaintiff's evidence that he had moved to the suit land alone.
15. PW2 went ahead to tell the court that the plaintiff's title had been eaten by ants. Then she said that the said title had been given to Japhet to keep it for the plaintiff.
16. PW2 was hard pressed to explain why she had said in her oral evidence that she had been a neighbour of the plaintiff since 1993 whereas in her statement she had said that she was a neighbour of the plaintiff since 2005.
17. In a suit claiming adverse possession one of the ingredients requiring proof is that the claimant had lived on the suit land for over 12 years. This suit was filed in 2003, two years before PW2 knew the plaintiff. I opine that her evidence has little evidential value. She has also contradicted the plaintiff who in his evidence told the court that he had moved into the suit land alone, leaving his family elsewhere whereas she was categorical that the plaintiff lived on the suit land with his family. During cross-examination, PW2 changed her story and told the court that the plaintiff's wife and children lived on another piece of land at Mikunguu.
18. PW3, John Mukasa Kagangi told the court that he had known the plaintiff since 1982 and that he was a neighbour. He told the court that he did not know the defendant but a grandson called Kinyua had lived on the land together with the plaintiff.
19. PW3 told the court that around 2010 he was the plaintiff's tenant but on 8th October, 2010, he and others were chased away from the land by invaders who told them that they owned the suit land.
20. PW3 told the court that he did not know if the plaintiff had another home elsewhere. He also told the court that the suit land had mangoes, peas, etc but they were no longer there since the plaintiff was evicted.
21. PW4, Tarasicio Mburugo told the court that he knew the plaintiff and had lived with him as neighbours for 30 years. He however told the court that he did not know the number of the plaintiff's land. He told the court that the defendant had moved into the suit land in August, 2012 and destroyed houses, including his, which were on the suit land.
22. PW4 admitted that his family lived at Ngonyi and not near the suit land. He also admitted that the plaintiff's family lived at Mikumbuni, not near the suit land.
23. DW1, the defendant told the court that she was the wife of her deceased husband Japhet Mathiu who died in 1997. She told the court that although this suit was filed in 2003, she only learnt about it in 2010. She told the court that the plaintiff had only moved into the suit land after he obtained injunctive orders in 2010. The defendant also told the court that she filed succession proceedings concerning her husband's estate in 2009 whereas this suit was filed in 2003, 6 years after her husband died in 1997. She was categorical that the plaintiff was not living on the suit land. She was also categorical that she had used the land from around 1966/1967 but said that she would use the land intermittently.
24. DW1 wondered why the plaintiff never sued her husband, his step-brother, before he died in 1997.
25. In her witness statement which DW1 asked the court to adopt as her evidence in this suit, she told the court that her husband had bought the suit land from the plaintiff and at the time the plaintiff sold the suit land to the defendant's deceased husband the plaintiff was living at Mikumbuni. After the land was purchased by her husband, he took possession, constructed a fence and put up a farm house. He allowed his sisters and his mother to cultivate the land. She also says that she also cultivated part of the land.
26. DW1 says that the plaintiff waited until her husband died and filed this suit in 2003 although she only

came to know about it in 2010. She avers that the suit was not served upon her. She further avers that the plaintiff moved into the suit land in October and November, 2010 after obtaining injunctive orders *ex parte*. She goes on to say that the plaintiff leased out the land to at least 14 people and had obtained a substantial sum of money. She also avers that the plaintiff has obtained money from 3rd parties to whom he had promised to sell the suit land. She opines that this is the reason the plaintiff has filed this suit for adverse possession.

27. DW1 avers that the plaintiff's allegation that he had only discovered recently that the suit land had been transferred to her deceased husband was a lie. She also said that it was a lie that the plaintiff had given the title to the suit land to her deceased husband to keep for him as her husband had bought the land for valuable consideration from the plaintiff. DW1 laconically avers that the plaintiff had not been in any continuous and exclusive occupation of the suit land.

28. Advocate G.M. Wanjohi was in court on 8th November, 2016 when one defence witness was to be heard. He told the court that the parties were ready to proceed with the scheduled hearing. Mr Kimathi Kiara, holding brief for Mrs Ntarangwi, for the defendant, told the court that Mrs Ntarangwi was also ready to proceed with hearing of the suit.

29. The suit was allocated time to be heard at 12.01 PM. Advocate G. M. Wanjohi was not in court. Having been given no explanation for Mr. G. M. Wanjohi's absence, the court ordered the hearing to proceed.

30. DW2, Gilbert Mbaabu asked the court to adopt his witness statement dated 1st December, 2011 as his evidence in this suit.

31. In his witness statement, DW2 avers that his mother was a sister to Japhet M'Imathiu, the deceased husband of the defendant.

32. DW2 avers that his parents, himself, his aunt and his brothers cultivated the suit land until 2010 when the plaintiff obtained an injunctive order and used it to move into the suit land. He states that he has always been a caretaker of the suit land parcel No. Mitunguu/128 as he lives on Parcel No. Mitunguu/161 which is also registered in the name of Japhet M'Imathiu, his uncle, who is the deceased husband of the defendant. He says that the two parcels of land are near to each other.

33. DW2 states that he knows the plaintiff as a distant relative. He says that the plaintiff never lived on the suit land until around November/December, 2010 when he obtained injunctive orders and moved into the suit land upon which he took possession of the crops planted thereof by the family of Japhet and himself and also destroyed the house that Japhet had constructed on the suit land.

34. DW2 states that the plaintiff has his farm at Mikumbune where he lived with his family. He also says that the plaintiff, prior to 2010, had never kept any animals on the suit land or constructed any houses thereon. He avers that in the year 2003, the plaintiff had attempted to lease out the suit land to some people but he chased them away when they attempted to enter his uncle's land.

35. I opine that although advocates for the parties filed written submissions, a court of law must rely on the evidence proffered by the parties and their witnesses when reaching its final decision.

36. In his submissions, the plaintiff's advocate says that the plaintiff has proved his claim for ownership of the suit land by adverse possession by demonstrating that he had occupied the suit land without force (*nec vi*), without secrecy (*nec clam*) and without permission (*nec precario*).

37. The plaintiff's advocate submits that the plaintiff had been in complete control of the suit land. He submits that the plaintiff's witnesses had testified that he had been in occupation of the suit land openly, peacefully and exclusively and that they had leased part of the land from the plaintiff. He also said that the witnesses had given evidence that they had never seen the plaintiff.

38. In support of his propositions, the plaintiff proffered the case of RAMCO INVESTMENTS LIMITED VERSUS UNI-DRIVE THEATRE LIMITED – NAIROBI HCCC NO.106 OF 2009.

39. The defendant's advocate submits that the defendant was not the legal representative of her deceased husband, the registered owner of the suit land when this suit was filed on 15th July, 2003 because the plaintiff obtained letters of administration to her husband's estate on 6th January, 2004. The advocate argues that the defendant was not the registered owner of the suit land when this suit was instituted in 2003 and further argues that she had not been sued as an administrator of the estate of Japhet M'Imathiu. In support of this proposition, the court is urged to be persuaded by the decision in the case of JAMES OBANDE WASUI VERSUS JEREMIAH OCHWANDA MUSUMBA – BUSIA HIGH COURT CIVIL CASE NUMBER 6 OF 2000.

40. It is submitted for the defendant that the ingredients that a party must prove to establish a claim for adverse possession are:

(i) That the adverse possessor has openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it.

(ii) That the statutory period of 12 years had lapsed.

(iii) That there had been no interruption to the adverse possession throughout the required statutory period.

(iv) That the nature of the property was such that, adverse possession would result.

(v) That the adverse possessor had no colour of right to be there other than his entry and occupation.

(vi) That the adverse possessor had been in actual possession of the suit land.

(vii) That there had been absence of possession by the true owner throughout abandonment.

41. It is submitted that the plaintiff ought to have reported the alleged fraud and sought cancellation of title on grounds of fraud. It is also submitted that the plaintiff should have availed documents such as transfer forms, application for Land Control Board consent to demonstrate that the land had been transferred to the deceased registered owner fraudulently.

42. It is also submitted that the plaintiff did not prove his allegation that he had given his title to the suit land to the deceased registered owner.

43. In the defendant's submissions, her advocate highlights inconsistencies in the evidence of the plaintiff and his witnesses. For example, PW2 told the court that the plaintiff lived on the suit land with his family while the plaintiff had testified that he had lived on the suit land alone. It was also submitted that had PW2 and PW3 been neighbours to the plaintiff in the area where the suit land is situated, they should have availed copies of titles to their parcels of land. It was also highlighted that PW4 had admitted that he comes from Ngonyi which is far from MITUNGUU where the suit land is situated thus showing that he did not live in the neighbourhood of the suit land.

44. It is submitted for the defendant that the plaintiff never raised any claim over the suit land during the lifetime of the deceased husband of the defendant. It is also highlighted in the submissions that since the time the land was purchased by the deceased husband of the defendant, she and her relatives continued using the land. It is submitted that the plaintiff's witnesses were untruthful and his evidence taken in totality has not proved a claim of adverse possession.

45. The defendant proffered the following cases in support of her propositions:

(i) JAMES OBANDE WASUI VERSUS JEREMIAH OCHWANDA MUSUMBA – HCCC NO. 6 OF 2009, BUSIA

(ii) RICHARD MUGO KIAMBO AND JAMES MURIUKI KIAMBO – COURT OF APPEAL C.A NO 46 OF 2013, NYERI

(iii) NJUKI RABUTA AND FRANCIS NJERU RABUTA – COURT OF APPEAL CA 143 OF 2008, NYERI

46. I have carefully considered the pleadings, the submissions and the authorities proffered by the parties in support of their disparate positions.

47. The evidence proffered by the plaintiff and his witnesses is riddled with veritable contradictions and inconsistencies. For example, PW1 testified that he moved in to the suit land alone and left his family in another place. PW2 told the court that the plaintiff had lived on the suit land with his family. PW2 later on changed her mind and told the court that the plaintiff's wife and children lived on another piece of land at Mitungune.

48. In her oral evidence PW2 told the court that she had known the plaintiff as a neighbour since 1993. In her witness statement she had stated that she knew the plaintiff as a neighbour since 2005. And yet this suit was filed in 2003. This has the effect that she knew the plaintiff two years after this suit was filed. I opine that her evidence has zilch evidential value in as far as proving that the plaintiff had acquired ownership of the suit property via adverse possession is concerned.

49. PW3 contradicted the plaintiff when he testified that in 2010 the suit land had mango trees, peas etc but those plants were no longer there since the plaintiff had been evicted from the suit land by the defendant. And yet the plaintiff testified that he was in occupation of the suit land.

50. PW4's evidence did not have much evidential value that supported the plaintiff's case. He admitted that although he had claimed to be a neighbour of the plaintiff near the suit land, he lived at Ngonyi far from the disputed land.

51. The court notes that none of the witnesses produced any documents such as titles, leases or agreements with owners of land around the suit land to demonstrate that they were neighbours of the plaintiff. Nor did they claim that they were squatters, workers or businessmen in the area where the disputed land is situated.

52. PW2 had a veritably supercaliflagisticexpialidociously contrived tale. She told the court that the title to the suit land had been eaten by ants. And yet, later on, without blinking an eye she told the court that the same title had been given to Japhet, the deceased husband of the defendant, by the plaintiff for safe keeping.

53. I opine that the evidence of DW1 and DW2 was consistent in asserting that the suit land belonged to the deceased husband of the defendant and that all along the family and the relatives of the defendant had been in occupation and use of the suit land. DW1 forcefully asserted that the suit land was bought by her deceased husband, who was the registered owner of the land and who was a stepbrother of the plaintiff.

54. PW1 pointed out that this suit was filed in 2003 and yet she was not served with the suit documents. After 7 years of the existence of the suit, the plaintiff obtained exparte injunctive orders and used those orders to invade the suit land.

55. I do note that the orders issued in the plaintiff's application dated 22nd October, 2010 and which orders the plaintiff used to move into the suit land had been set aside by the Hon. Justice J. A. Makau, J, on 7th October, 2010. Inter alia, the Hon Judge gave the following orders:

(i) That the injunctive orders issued in December, 2010, having expired, the plaintiff be and is

hereby given up to August, 2012 to vacate the suit land.

(ii) That the plaintiff should not continue to use the land until the hearing and determination of this case.

56. In demonstration of his tendency to be untruthful, through an application dated 8th October, 2012, the plaintiff sought orders, inter alia,

(i) That the honourable court be pleased to issue an order that the defendants, Doris Ciambaka Imathiu, Kaburu Japhet Imathiu and Mwit Japhet Imathiu be detained in prison for a term not exceeding six months for disobeying a court order.

(ii) That the order be served upon the OCS, Mitunguu Police Station for compliance.

57. It is pellucid that the plaintiff had contrived to deceptively obtain orders meant to punish the defendant for contempt when he knew that the orders he relied upon had been vacated. In this case he had come to court with dirty hands. He had sought to mislead the court in his scheme to perpetuate nefarious proclivities. However, the court came out on top and debunked the plaintiff's deceptive designs.

58. I am inclined to believe the defendant's assertion that the suit land parcel No. Mitunguu/128 was sold by the plaintiff to the deceased husband of the plaintiff and was registered in his name on 31st January, 1967. Had the land been registered fraudulently in the name of Japhet Imathiu Marete, the plaintiff had more than enough time between 1967 and when he filed this suit in 2003, a hiatus of 26 years. He would have pursued Criminal proceedings against the registered owner of the land. He would also have initiated legal proceedings for cancellation of the apposite title.

59. When this suit was filed in the year 2003, the defendant was not the registered owner of the suit land. The defendant also was not the personal representative of her deceased husband. In JAMES OBANDE WASUI VERSUS JEREMIA OCHWANDA MUSUMBA (SUPRA) THE court said:

“section 38 (1) of the Limitation of Actions Act provides that where a person claims to have become entitled to have become entitled by adverse possession to registered land, he may apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as proprietor of the land. And Order 36 Rule 3(1) of the Civil Procedure Rules provides that an application under section 18 of the Limitation of Actions Act shall be by originating summons which shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. These provisions, can, in my opinion, be construed in only one way; an order for relief by way of adverse possession can only be made in favour of an applicant against a respondent if the said respondent is the currently registered proprietor of the land which the applicant seeks to have registered in his name.”

60. It is pellucid that the defendant DORIS CIOMBAKA IMATHIU was not the registered proprietor of land parcel Number MITUNGUU/128. For this reason alone, this suit would merit dismissal.

61. Length of occupation of the suit land by a desessor, although an important ingredient towards proving ownership by way of adverse possession, is not conclusive evidence that a plaintiff had obtained title to land through adverse possession. A claimant must prove when time for the period, required for adverse possession to accrue started running. The adverse possession itself must be proved.

62. The plaintiff and his witnesses gave veritably inconsistent and contradictory evidence as pointed out elsewhere in this judgment. The upshot of the apposite inconsistencies and contradictions is that the plaintiff's evidence was unreliable and did not prove that he had been on the suit land for the period required for adverse possession. It did also not prove that he was in adverse possession of the suit land. This being the case, the plaintiff is not entitled to be declared owner through the doctrine of adverse possession of Land Parcel No. MITUNGUU/128.

63. It is clear to me that the plaintiff sold the land to the current registered owner in 1967. One wonders if a person who sells land for valuable consideration to another person can later on, even after very many years, move into that land and claim ownership by way of adverse possession. In my view such conduct would be against good public policy. It would amount to unjust enrichment. In the present case the decessor filed this suit not during the lifetime of the registered owner but six years after the registered owner had died. The registered owner was the plaintiff's step brother. I opine that good public policy would lean towards stopping such a person from reclaiming the land he had sold to another by way of adverse possession.

64. I answer the issues raised in the originating summons as follows:

(a) The plaintiff is not entitled to a declaration that he is the proprietor of Land Parcel No. MITUNGUU/128 by way of adverse possession.

(b) The prayer that the land registrar be ordered to rectify the register so that the plaintiff becomes registered as proprietor of the suit land is denied.

(c) It has not been proved that the plaintiff has been in continuous, open, exclusive and undisturbed possession of the whole of Land Parcel No. MITUNGUU/128 measuring 10.588 Hectares for over 12 years.

(d) It has not been proved that the period of adverse possession commenced in 1967 when Japhet Imathiu [deceased] was allegedly illegally registered as the owner of the suit land. I find from the evidence tendered that the defendant himself sold the suit land to the plaintiff and the registration of the land in the name of Japhet Imathiu [deceased] was not illegal or irregular.

(e) I find that the plaintiff was not in occupation of the suit land when the land was registered in the name of Japhet Imathiu. The plaintiff moved into the suit land after he deceptively, through concealing material information from the court, obtained exparte injunctive orders. I note that the said injunctive orders were vacated by the Hon. Justice Makau, J, on 8th October, 2012. Such occupation does not count in adverse possession proceedings. In any case, the plaintiff entered the suit land 7 years after he filed this suit in the year 2003.

(f) It is not controverted that Japheth Imathiu is deceased. The defendant was not his legal representative in 2003 when this suit was filed.

(g) The plaintiff has no overriding interests over the title under S 30(f) of defunct Registered Land Act (Cap 300).

(h) The plaintiff is not entitled to be registered as proprietor of the suit land.

65. In the circumstances, I find that this suit merits dismissal.

66. This suit is dismissed.

67. Costs are awarded to DORIS CIOMBAKA IMATHIU, the defendant.

68. The plaintiff, if he is still in occupation of the suit land, is ordered to vacate the suit land within 6 months of this Judgment and if he fails to do so, the OCS in charge of the area where the land is situated is ordered to assist in the implementation of this order.

69. It is so ordered.

Delivered in open court at Chuka this 12th day of April, 2017 in the presence of:

CA: Ndegwa

Carlpeters Mbaabu h/b Mrs Ntarangwi for the defendant

Plaintiff and his Advocate - absent

P. M. NJORGE,

JUDGE.