



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO 8 OF 2017

FORMERLY MERU ELC CASE NO.18 OF 2015

PAUL NDUBI NKOROI.....PLAINTIFF

VERSUS

JUSTUS KIRIGIA M'IKIARA.....DEFENDANT

JUDGMENT

1. In his Originating Summons dated **15th March, 2015**, the plaintiff seeks a declaration that he is entitled to be registered as owner of **0.23 Hectares** out of original title No. **KIERA EAST MAGUTUNI/166** which is registered in the name of **JUSTUS KIRIGIA M'IKIARA** by way of adverse possession.
2. The suit was fixed to be heard on **17.7.2017**.
3. The plaintiff and his advocate were present. The defendant was absent. The suit was called on for hearing outside the court but only the plaintiff was in attendance.
4. This court is satisfied that the apposite Hearing Notice had been duly served. I elected to proceed *ex parte*.
5. PW1, the plaintiff, a double amputee, who had to be carried to court gave evidence that he was closely related to the defendant. He averred that both parties had agreed to exchange **0.5 acres** of land. The defendant occupied and had the portion given to him by the plaintiff. He continued to say that the defendant had, however, refused to transfer the **0.5 acres** which was intended to be registered in his name to him. The plaintiff asked the court to adopt his witness statement dated **13th March, 2015** as his evidence in this suit.
6. In his witness statement, the plaintiff states that he is the biological brother of the defendant, **Justus Kirigia M'Ikiara**, and that he and his brother agreed that he would give his brother the lower part of his land so that he could access the river and in return his brother would give him an equal portion of land measuring **0.23 Hectares**. His brother, the defendant, took his 0.23 Hectares but refused to transfer to the plaintiff 0.23 Hectares as they agreed.
7. The plaintiff states that this mutual agreement was made **in 1978** and he has been in occupation, uninterrupted and peacefully of the **0.23 Hectares** intended by the parties as the exchange consideration since 1976. He submits that he has been in occupation for over **12 years** and thus is entitled to be declared owner by way of adverse possession of **0.23 Hectares** out of parcel No. **KIERA EAST MAGUTUNI/2662** which is a sub-division of the original parcel **NO. KIERA EAST MAGUTUNI/166**.

8. In his statement the plaintiff asks the court to order the defendant to transfer **0.23 Hectares** to him and that in default he asks the court to issue an order that the deputy registrar of the court signs the requisite documents to facilitate the transfer of the suit land to his name.

9. PW2, Wilfred Nkonge, told the court that he was the son of the defendant. He averred that he was privy to the arrangement between the plaintiff and the defendant. He asked the court to adopt his witness statement signed on **13th March, 2015** as his evidence in this suit.

10. In his statement, PW2 generally supported the assertions proffered by the plaintiff. He states that the proposed exchange was done and **0.23 Hectares** of the plaintiff's land was incorporated into the defendant's land but the defendant had refused to honour his side of the bargain. He laments that: ***"It would be unfair if the respondent to refuse (sic) to transfer the suit land to the applicant who is ageing."*** He was unequivocal that the plaintiff has been in use of the suit land in excess of **12 years**.

11. There are a few inconsistencies in the pleadings. For example PW1 in his statement states that he has been in occupation of the land he claims from the defendant since **1978**. PW2 claims that PW1 has been in occupation of the suit land from 1983. However, whichever version is deemed correct, PW1 would still have been in occupation for well over **12 years**.

12. The other inconsistency pertains to the area of the land PW1 claims. In some of the pleadings, it is said to be **0.23 acres**. However, in their witness statements PW1 and PW2 alluded to the area of the land in dispute as being half an acre. Half of an acre is approximately **0.23 Hectares**.

13. I find that the intention of the plaintiff and the defendant was to exchange **0.23 Hectares** with each other. It is noted that the defendant subdivided the original parcel **NO KIERA EAST MAGUTUNI/166** and subdivided it into parcel **NOS KIERA EAST MAGUTUNI/2662** and **2663**. He sold parcel **No.2662** and remains the registered owner of parcel **No.2663**.

14. I find that the plaintiff is entitled by way of adverse possession to be registered as owner of **0.23 Hectares** to be excised from land parcel **NO. KIERA EAST MAGUTUNI/2663**.

15. It is ordered as follows:

1. The defendant is to transfer **0.23 Hectares** to be excised from parcel **NO.KIERA EAST/MAGUTUNI/2663** to the plaintiff.

2. Should the defendant refuse or fail to effect the transfer ordered in 1 above, the Deputy Registrar is ordered to sign all requisite documents including the application for the apposite land control board consent and the actual transfer document to transfer **0.23 Hectares** to be excised from parcel **NO. KIERA EAST MAGUTUNI/2663** to the plaintiff.

3. The transfer costs will be borne by the plaintiff.

4. Costs of this suit are awarded to the plaintiff.

Delivered in open court at Chuka this **31st day of July, 2017** in the presence of:

CA: Ndegwa

I.C Mugo for the plaintiff

Defendant not present

P.M. NJOROGÉ

JUDGE