



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT CHUKA
CHUKA ELC CASE NO 230 OF 2017
FORMERLY MERU ELC CASE NO.74 OF 2012
LUKE MUNGANIA INEBU.....PLAINTIFF
VERSUS
JOHANA M'ITABARI.....DEFENDANT

JUDGMENT

1. The plaintiff in his plaint dated **6th September, 2016** prays for judgment against the defendant for:
 - a) An order of eviction against the defendant from L.R. NO. Nanyuki/South Timau/Block 1/91. AND the defendant do give vacant possession of the land to the plaintiff, in default, the defendant to be forcibly evicted from the suit land.
 - b) An order of permanent injunction, restraining the defendant, his successors, assigns in title, family members, employees, agents or acting at his behest and direction; from forever trespassing, entering or interfering with the plaintiff ownership, possession & user of L.R. No. Nanyuki/South Timau Block 1/91.
 - c) Costs of the suit.
2. The defendant has filed a defence and a counter-claim. The counter –claim states:
 - 11. The** defendant repeats the contents of paragraphs 1, 2, 3, 4, 5,6,7,8,9 and 10 of the defence.
 - 12. The** defendant states that he has been living on L.R. NO. NANYUKI/SOUTH TIMAU/BLOCK 1/91 to the exclusion of the previous owner and the plaintiff and has been living there openly and adversely to their rights and titles.
 - 13. The** cause of action arose within the jurisdiction of this court.
 - 14. The** defendant avers that there is no other suit pending, and that there have been no previous proceedings, in any court between the defendant and the plaintiff over the same subject matter and that the cause of action relates to the defendant named in the plaint.
3. For the reasons he has given, the Defendant prays this honourable court to dismiss the plaintiff's claim

with costs and give judgment for the defendant for the following:

- a) An order that the defendant has acquired land reference No. Nanyuki/South Timau/Block 1/91 by prescription or adverse possession and should be registered as the owner thereof.
- b) Costs and interest.

4. PW1, Luke Mungania Inebu testified that he was a businessman and that he was the registered owner of Land parcel No. Nanyuki/South Timau Block 1/91. He testified that he became the registered owner of the land on 30.1.2003 and that a title deed was issued on 5.2.2003. He told the court that he had inherited the land from his father through a succession cause. He produced a copy of the title deed as an exhibit and also a copy of the certificate of grant confirmed by the Hon. Justice Kasanga Mulwa on 27.1.2003.

5. PW1 told the court that his father acquired the land but was now deceased. He also testified that his father had established a home on the suit land and had fenced it and erected 3 semi-permanent houses there.

6. PW1 told the court that his father gave the land to him in the presence of all family members. He also told the court that when his sister, who later on became a friend of the defendant, divorced her husband his father asked him to allow her to stay on the suit land together with another sister.

7. PW1 testified that as the defendant had his own land near the suit land, he befriended his sister Penina Ndune and later moved into the suit land to live with her.

8. PW1 testified that his sister died in 1997 but he did not allow her body to be buried in the suit land as his father had given her land elsewhere. He told the court that the defendant buried his sister, Penina Ndune, in his own land which was in the neighbourhood of the suit land. He opined that had the suit land belonged to the defendant, he would have buried Penina therein and not in his own land.

9. PW1 produced a search certificate showing that the suit land was registered in his name. He asked the court to evict the defendant from the portion of his land which he was occupying. He also produced a Notice issued by the Firm of Ondieki & Co. Advocates dated 7.9.2009 demanding the vacation of the defendant from the suit land.

10. PW1 testified that the defendant had no property on the suit land. He also told the court that the defendant's claim that he had bought the land from his deceased father was untrue. He also denied that the defendant had occupied the land for more than 12 years. He also told the court that by not allowing the defendant to bury his sister, Penina Ndune, in the suit land he had blocked his chance to claim ownership over the land.

11. PW1 told the court that his father became the 1st registered owner of the suit land in 1985. He also told the court that his father died in 1992 after which he filed a succession case in 1993. He also testified that his late sister, whom the defendant had befriended, actually funded him during the succession case. He said that she signed documents in support of his inheritance of his father's properties. He said that she died in 1997.

12. PW1 admitted that he inherited all of his father's properties and asserted that no one objected to the apposite inheritance.

13. PW1 testified that he started asking the defendant to vacate the suit land after his sister died. He said that he would promise to move out but never did so. Eventually, he testified, he was forced to file this suit.

14. PW1 told the court that he was cultivating most of the suit land and that the defendant only used a small portion of the land where the houses put up by the plaintiff's father stood.

15. I opine that even during cross – examination the integrity of PW1’s evidence was not impeached.
16. PW2, Monica Koki M’Inebe testified that she was the plaintiff’s sister and that the plaintiff had inherited the suit land from his father. She told the court that the family had supported the plaintiff’s inheritance of this property.
17. PW2 testified that the suit land was bought by her husband when he was working as a farm manager. She told the court that she used to live on the suit land with her family and her children.
18. PW2 told the court that the family had allowed Penina Ndune, her daughter, to move into the land after she divorced her husband. She told the court that the defendant had befriended her daughter and he moved into the land to cohabit with her. Apparently, she did not consider the defendant her son in law as he had not paid any bride price.
19. PW2 told the court that her husband had built 3 houses on the suit land and the defendant was telling lies when he claimed that he had built the houses.
20. PW2 told the court that after her daughter Penina Ndune died in 1997, the family wanted the defendant to move out of the land but he kept giving them false promises. She said that the family resisted the plaintiff’s bid to bury her daughter, Penina Ndune, on the suit land as this would have reinforced the defendant’s claim over the suit land. She told the court that the defendant buried her in his land nearby.
21. PW3, Colleta Munjiru, testified that the plaintiff was his brother. She told the court that he had inherited the suit land from his father. She told the court that the whole family had supported his inheritance of the suit land.
22. PW3 told the court that after her sister, Penina Ndune, divorced her husband, she was allowed by her father to live on the suit land. She said that she had also lived on the suit land when her children were small. She said that she moved out of the suit land after her sister died in 1997. She was categorical that her father had built 3 houses on the suit land.
23. During cross-examination she said that she was born in 1962 and that she had lived on the suit land from around 1988 when her sister moved into the land after her divorce. She was emphatic that the defendant moved into the suit land in 1990 and could not have moved into the land in 1973 as her sister, whom she befriended had not been divorced then. She also said that the 1973 claim by the defendant was not tenable as her father was only registered as first owner of the land in 1985. She also said that before her sister moved into the suit land, the family occasionally lived there, although they had another home at Muthara.
24. DW1, Johana M’Itabari, the defendant testified that he had married the plaintiff’s sister and that he bought the land after his wife, Penina Ndune, the plaintiff’s sister, told him that her father wanted to sell the land. He said that this was in 1981. He testified that the plaintiff’s father, now deceased, asked him to buy him clothes so that he could sell the land to him. He told the court that he bought the apposite clothes and his claimed father in law told him that the land was henceforth his. He testified that he refunded him Kshs.1,300/=, the amount of money he had paid for shares which culminated in his being allocated the land. He told the court that he started cultivating the land in 1982. He further said that he had built 3 houses. He also said that he had napier grass on the land and had 5 cows, goats and chicken on the land.
25. During cross-examination, DW1 admitted that he had no documents to show that he had bought the suit land. He also admitted that he had moved into the land with the permission of the plaintiff’s father. He also said that when he bought the land in 1981, he was living in Naromoru whereas Penina Ndune, his wife, was living in Meru. DW1 also admitted that the plaintiff cultivated part of the suit land.
26. DW2, David M’Luruma, testified that he hailed from Tigania, Meru, but also lived at Ngenia, Lol Doiga, in Laikipia, near Nanyuki. He told the court that he did not know the plaintiff but he knew his father Andrea M’Inebu, deceased. He testified that he knew the defendant Johana M’Itabari. He told the

court that the defendant lived on the suit land and had cows and crops thereon.

27. DW2 when cross-examined by advocate Mwirigi Kaburu, for the plaintiff, told the court that he did not know the registration number of the suit land. He said that the defendant entered the suit land in 1973. He said that that is when he started working in the “shamba”. Almost immediately he changed his story and said that he started working in the shamba in 1998. He also contradicted DW1 by stating that the houses standing in the suit land may have been constructed by Andrea M’Inebu, the plaintiff’s father.

28. DW2 contradicted his earlier evidence by saying that the plaintiff may have moved into the suit land in 1973 and adding that he did not know. He admitted that at that time he did not live in the neighbourhood of the suit land. He also said that the plaintiff cultivated part of the suit land.

29. DW2 admitted that the defendant moved into the suit land after befriending the plaintiff’s sister. He also told the court that the plaintiff’s sister, Penina Ndune, who was living with the defendant on the suit land, may have moved into the suit land in 1990. He also said that the defendant had his own land near the suit land.

30. The defendant continued to tell the court that he did not know that the defendant was claiming the suit land. He also laconically stated that the defendant had moved into the suit land with the permission of the plaintiff’s father.

31. During re-examination by advocate Rimita, he told the court that he did not know what arrangement the plaintiff’s father and the defendant had. He said that most of the times he lived at Tigania and not within the vicinity of the suit land. I note that in his written submissions, the defendant’s advocate admits that his client, the defendant, and his witness had difficulties concerning issues apposite to this suit.

32. Advocates for the parties filed submissions in support of their diametrically opposed assertions. The plaintiff proffered the following authorities:

1. Mbira Versus Gachuhi, East Africa Law Reports [2002] IEA 132.
2. Sophia Thimu Wamucii and 6 others Versus Josphine Keru Gichangi [2009] eKLR.

33. The defendant proffered the following authorities:

- a) Section 4(2) of the Limitation of Actions Act.
- b) Mwangi & Another Versus Mwangi (1986) KLR 328.
- c) Public Trustee Versus Wanduru [1984] KLR 314
- d) Ngati Farmers Coop Society Ltd Versus Councillor Ledidi and Others, EALR [2010] IEA 286.

34. I frame the issues for determination as follows:

- a) Has the plaintiff adduced enough evidence to merit the issuance of orders of eviction and permanent injunction as prayed in his plaint.
- b) Has the defendant adduced enough evidence to merit the issuance of an order that the suit land be registered in his name through the doctrine of adverse possession.

35. I have carefully considered the pleadings proffered by the parties. I have also considered the oral evidence tendered by the parties and the submissions filed by their advocates in support of their propositions. Further to that, I have considered the authorities proffered by the parties.

36. I opine that though written submissions are veritably helpful to a court when it considers what

decisions it should arrive at, the primary determinant of how a case is decided is the evidence tendered by the parties.

37. Upon careful analysis, I find the evidence tendered by the plaintiff and his two witnesses profoundly consistent. It is not controverted that the plaintiff inherited the suit land from his father through a succession cause. The evidence that the houses on the suit land were constructed by his deceased father is not controverted. Indeed, DW2 contradicted DW1 and said that the houses standing on the suit land may have been constructed by the plaintiff's father. On the other hand the plaintiff and his witnesses were consistent that the suit land was the plaintiff's inheritance from his father.

38. DW1 told the court that he moved into the suit land in 1973. This assertion was supported by DW2 who later on contradicted himself and said that the defendant may have moved into the suit land in 1990. DW2 also owned up that he did not live in the neighbourhood of the suit land during the dates mentioned by DW1. Although DW1 claimed that he moved into the suit land in 1973, he later on told the court that he purchased the land in 1981. How then could he have moved into the suit land 8 years before he bought it?

39. I find the evidence tendered by the plaintiff and his two witnesses credible that their sister, Penina Ndune, moved into the suit land around 1988 after she divorced her husband. I am also inclined to believe that the defendant moved into the suit land around 1990 after he befriended her. I also agree with the plaintiff that the defendant wanted to bury his sister on the suit land in 1997 so that he could buttress a future claim on the suit land. I also agree that that resistance led him to bury her in his own land, not very far from the suit land.

40. I opine that the evidence of the defendant and his witness, DW2, constitutes a veritable litany of contradictions and contrivances.

41. I find that the suit land rightly belongs to the plaintiff.

42. With the contradictions contained in the evidence of the defendant and his one witness, no court can find that he has acquired the suit land by prescription or adverse possession as prayed for in his counter-claim.

43. The counter-claim is dismissed.

44. The following orders are issued.

1. An order of eviction is issued against the defendant, JOHANA M'ITABARI, to evict him from L.R. NO. Nanyuki/South Timau/Block 1/91 and that he, the defendant, gives vacant possession to the plaintiff and in default, he, the defendant, be forcibly evicted from the suit land.

2. An order of permanent injunction is issued restraining the defendant, his successors, assigns in title, family members, employees, agents or anyone acting at his behest and direction FROM forever trespassing, entering or interfering with the plaintiff's ownership, possession and user of L.R. NO. Nanyuki/South Timau Block 1/91.

3. Costs are awarded to the plaintiff.

Delivered in open court at Chuka this **17th day of October, 2017** in the presence of:

CA: Ndegwa

Luke Mungania Inebu – plaintiff

Defendant or advocate not in court

P. M. NJORGE

JUDGE.