



**REPUBLIC OF KENYA**

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

**ELC NO. 135 OF 2009**

**JOSEPH MUTHURI IKUNYUA.....PLAINTIFF**

**VERSUS**

**JAMES MUTHURI KINYUA .....1<sup>ST</sup> DEFENDANT**

**CHARLES KOOME IKINYUA.....2<sup>ND</sup> DEFENDANT**

**MARITHA MWARINJARU.....3<sup>RD</sup> DEFENDANT**

**HARRIET MAKENA M'IKUNYUA .....4<sup>TH</sup> DEFENDANT**

**J U D G M E N T**

**I N T R O D U C T I O N**

1. The Parties herein are close family members. 3<sup>rd</sup> Defendant Maritha Mwarinjaru is the mother of the rest of the defendants as well as the Plaintiff. The land in dispute is Parcel No. NTIMA/IGOKI/5219 registered in the name of 3<sup>rd</sup> and 4<sup>th</sup> defendant.

2. Plaintiff's claim over the Suitland is pegged on the Principle of adverse possession. Defendants on the other hand aver that parcel No. 5219 was registered jointly in the name of Maritha Mwarinjaru and Harriet Makena through transmission pursuant to the confirmed grant in High Court Succession case No. 339 of 2005.

**THE RECORD AND THE PLEADINGS**

3. The Suit herein was filed by Plaintiff Joseph Muthuri on 09:10:07 where he was claiming the Suitland by way of Adverse Possession. Plaintiff averred that he had occupied the Suit land for a period of 20 years, in the suit, Plaintiff identified his two brothers James Mwitari and Charles Koome as the defendant. A response was filed thereafter on 18:1:10.by Charles Koome with consent of James Muthuri.

4. It is contended by 1<sup>st</sup> defendant that there was a Succession Cause No. 339 of 2005 which was concluded and the Suitland 5219 was given to Maritha Mwarinjaru and Harriet Makena the mother and sister of the litigants.

5. 1<sup>st</sup> Defendant also contends that Plaintiff occupies a very negligible part of the land.

6. On 07:05:13, Plaintiff filed an application seeking the cancellation of title deed No. 5219 from the

names of 3<sup>rd</sup> and 4<sup>th</sup> Defendants and instead, for him to be the registered owner. The Court declined to allow the application and instead directed the Plaintiff to have the matter fixed for the main hearing. The ruling to that effect was delivered on 12:03:14.

7. Thereafter matter was fixed for hearing on 24:09:14. Plaintiff informed the Court that service had been effected upon his brothers. The Court had proceeded to give a date for Judgment on 08:10:14. In that Judgment Plaintiff's claim was allowed.

8. An application for stay of the Judgment was then filed on 29:10:14 by defendants' Advocates Basilio Gitonga, Murithi & Associates. A temporary stay was granted Ex parte on 30:10:14. On 8:12:14, after inter parties hearing of that application, the Court set aside the Judgment of 08:10:14.

9. On 17:04:15, defendant filed a preliminary Objection seeking to have the suit dismissed on the basis that the same is Res Judicata to Meru H.C.C Succession Cause No. 339 of 2005. The Preliminary Objection was withdrawn on 07:02:16.

10. On 01:02:16 Plaintiff filed an application to have all pending applications dismissed. This application was dismissed vide the Court's ruling of 17:02:16 where by the Court directed that the matter be heard in a full trial.

11. It is against this back ground that the court proceeded to hear the matter.

### **PLAINTIFF'S CASE**

12. Plaintiff adopted his statements and his documents dated 20:12:16 as his evidence.

13. Plaintiff's claim is that he is the occupant of the Suit land No. NTIMA/IGOKI/ 5219 and that he occupied this land even when his father was alive.

14. Plaintiff also avers that the 3<sup>rd</sup> and 4<sup>th</sup> defendants colluded with 1<sup>st</sup> and 2<sup>nd</sup> defendants to deprive him of this Suitland. Plaintiff does admit that there was a Succession Cause No. 339 of 2005 but he avers that the suit was registered in the names of 3<sup>rd</sup> and 4<sup>th</sup> defendants when there was already a stay in the Succession Cause.

15. Plaintiff states that he had been given the suit land by his father.

In support of his case, he produced the following documents as his exhibits: -

- 1) Judgment of Civil Case No. 135 of 2009 OS delivered on 8:10:2014.
- 2) Court Order dated 28:5:2009 directing defendants to file further of which defendants failed vide HC Succession Case No. 339 of 2005.
- 3) Affidavit of service of Civil Case No. 135 of 2009 to prove defendants were duly served personally apparent in Court file.
- 4) Withdraw of preliminary objection from Civil Case No. 135 O.S if 2009.
- 5) Extract of minute of Meru Municipal defencit for approval to construct a Kiosk in L.R No. NTIMA/IGOKI/205 original title to land to prove occupation and development before sub-divisions.
- 6) Agreement to occupy L.R No. NTIMA/IGOKI/5219 dated 15/4/2002 in the life time of deceased father to prove developments and occupation by plaintiff.

7) Photograph to prove development of permanent commercial building erected in L.R No NTIMA /IGOKI/5219.

8) Court Notice of Stay for execution of all orders to petitioners L.R NO. NTIMA/IGOKI/5219 was registered M'Ikunyua to claim life interest after his demise the land be consolidated with L.R No. NTIMA/IGOKI/4069.

### **DEFENCE CASE**

16. Harriet Makena 4<sup>th</sup> Defendant is the one who testified on the side of defence. She adopted her statement of 29:11:16 as her evidence. She testified that her brother, the Plaintiff was involved in the Succession cause and he never lodged an appeal. She avers that her and her mother are the registered owners of the Suitland.

17. DW1 further told the Court that Plaintiff and his family occupy land parcel No. 4069 and that Plaintiff only has a semi-permanent structure on land No. 5219 (Suitland).

18. In support of defence claim, DW1 produced the following documents as Exhibits:-

1) Green Card to L.R. NO. NTIMA/IGOKI/5219.

2) Green Card to L.R. NO. NTIMA/IGOKI/4069.

3) Certificate of confirmation of Grant vide MERU HC SUCC. CAUSE NO. 339 OF 2005.

4) Judgment on distribution dated 30/01/2017 delivered vide MERU HC SUCC. CAUSE NO. 339 OF 2005.

### **DETERMINATION**

19. I frame the issues for determination as follows:-

**1) Whether the 3<sup>rd</sup> and 4<sup>th</sup> defendants are properly sued.**

**2) Whether the suit is Res judicata to Meru H.C.C Succession 339 of 2005.**

**3) Whether the claim of Adverse Possession has been proved.**

**Whether 3<sup>rd</sup> and 4<sup>th</sup> defendants are properly sued.**

20. I find that the original Originating Summons filed on 09:10:09 was against James Mwiteri Ikunyua and Charles Koome Ikunyua. It is on the basis of this document that Charles Koome Ikunyua was able to file a response on 18:01:10. I have perused the file and I have not seen any amended Originating Summons. None of the parties and particularly the Plaintiff have indicated how Harriet and Martha were brought on board.

21. During the proceedings of 24:09:14 when the case had initially proceeded Ex parte, Plaintiff had told the Court that:-

**“My brothers were served. They have only come to Court once”.**

This is a clear indication that plaintiff had not brought his mother and sister (3<sup>rd</sup> and 4<sup>th</sup> defendants) respectively on board this suit, yet these are the registered owners of the land. I conclude that Harriet and Martha are not Parties to the suit.

22. Considering that the suit land 5219 is registered in the name of Martha and Harriet and not James and Charles, then Plaintiff has no cause of action against the latter two. As such, Plaintiff's claim has already failed. Nevertheless, I will still proceed to determine the other issues.

**Whether the suit is Res Judicata to Meru Succession 339/05?**

23. I find that both Plaintiff and defendants have availed a copy of the Judgment in the succession cause. The Plaintiff was the objector in the Succession cause. He was claiming the suit land on the basis that he had been allowed to occupy the suit land by his father and he had produced an agreement to that effect.

24. The Courts orders given on 30:01:07 in the succession cause were as follows:-

**“I shall order that title No. NTIMA/IGOKI/5219 be inherited jointly by Maritha M’Ikunyua and Harriet Makena save that Martha shall have a life interest and upon her demise, Harriet Makena shall be registered as the Sole and absolute Proprietor of the land . The protest by Joseph Muthuri is dismissed.....”**

25. I find that the issues raised by the Plaintiff in the present suit, particularly on who is the rightful owner of the land were dealt with in the Succession Cause. If Plaintiff was not satisfied with that decision, he ought to have appealed instead of filing another suit.

26. The Notice of stay of execution dated December 2007 produced by Plaintiff is neither here or there. He confirms that he never filed an appeal. So, what was the stay for if indeed such a stay existed?.

27. My conclusion on this issue is that this suit is Res judicata to the succession cause.

**Is Plaintiff entitled to the suit land by way of adverse possession?**

28. The basis of a claim of adverse possession is the claimant's possession of the land openly, and continuously without interruption for a period of at least 12 years. Such occupation must be notorious and without, permission of the owner. Plaintiff has stated that he was given the land as a gift by his father. It follows that his occupation of the land was with permission of the original owner.

29. The occupation by a claimant by way of adverse possession must be with the clear intention of excluding the owner from the property. In **Malindi ELC No. 106 of 2007, Haro Yonda vs. Sadaka Dzengo Mbauro and Kenya Commercial Bank Ltd**, it was stated that **“One must therefore have the animus possidendi to succeed in a claim for adverse possession. One must show that he either dispossessed the owner the land or the owner of the land discontinued his possession. Dispossession is where a person comes in and drives another out of the land, while discontinuance of possession is where a person in possession goes out and another person takes possession”**.

30. This is not the scenario in the instant case. Plaintiff did not drive out any one from the suit land, nor was there any discontinuance by the owner of the land.

31. I therefore find that the following cases cited for defence are relevant to this case.

**1. NAIROBI ELC SUIT NO. 490 OF 2010 – SOPHIE WANJIKU JOHN V JANE MWIHAKI KIMANI.**

**2. NYERI C.C NO. 28 OF 2014 - TITUS KIGORO MUNYI V PETER MBURU KIMANI**

**3. NAIROBI C.C NO. 267 OF 2007 – EDWIN G.K. THIONGO & ANOR V GICHURU KINUTHIA & 2 OTHERS.**

32. Finally, I find that Martha and Harriet became the registered owners of the land on 26.9.07. Two years had hardly lapsed when this suit was filed. The 12 years period is yet to be achieved for the claim of

adverse possession to mature.

33. The Suit must fail as far as the claim of adverse possession is concerned.

**CONCLUSION**

34. I find that Plaintiff has not proved his case of ownership by adverse possession. This suit is hereby dismissed with costs to defendants.

**DATED, SIGNED AND DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF NOVEMBER 2017 IN THE PRESENCE OF:-**

**CA:** Janet

Mutunga H/B for Muriithi for Plaintiff – present

Plaintiff in person present

**Hon. L. N. MBUGUA**

**ELC JUDGE**