



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO 257 OF 2017**

**FORMERLY MERU ELC CASE NO 56 OF 2013**

**FRANKLIN MUTUMA NKONGE.....1<sup>ST</sup> PLAINTIFF**

**JOSEPH NKONGE M'ARITHI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ANDREW MURITHI M'NDEGWA.....1<sup>ST</sup> DEFENDANT**

**CECILIA KINYA M'NDEGWA.....2<sup>ND</sup> DEFENDANT**

**GRACE KARWIRA M'NDEGWA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This suit is a consolidation by consent of two cases, the defendants HCCC No. 56 of 2013 and the plaintiffs HCCC No. 129 of 2013 (OS). Plaintiffs in HCCC No. 56 of 2013 became plaintiffs in the consolidated suit. Plaintiffs in HCCC No. 129 of 2013 (OS) became defendants in the consolidated case.

2. Pw1, Frankline Mutuma Nkonge, the 1<sup>st</sup> plaintiff gave evidence that the suit land was registered in his name. Before that the land was registered in his father's name. He told the court that his father had bought the land from the defendants' father. He produced a certified copy of the original green card which showed that he was the registered owner of L.R. No. NYAKI/KITHOKA-MWANIKA/45.

3. Being cross-examined by Mr. Gikunda Anampiu, the defendants' advocate, PW1 told the court that the original parcel of land was L.R. NO. NYAKI/KITHOKA-MWANIKA/41 which was subdivided to make L.R. NOS. NYAKI/KITHOKA-MWANIKA/44 and 45. He further told the court that the original parcel of land was owned by M'Ndegwa Kareria who was the father of the defendants in the Originating Summons which was consolidated in this suit. He also told the court that his father took possession of parcel No. 44 in 1976 when he was a small boy.

4. PW1 told the court that to the best of his knowledge his father never occupied parcel No. 45. He was unequivocal that parcel No. 45 had always been occupied by M'Ndegwa Kareria and his children. He also confirmed that the defendants had their houses on parcel No. 45 and that they were cultivating it before it was registered in his name. He told the court the defendants' occupation was open.

5. PW1 told the court that his father had an arrangement to purchase the suit land from the father of the defendants. He, however, did not have details. He told the court that there had been HCCC No. 208 of 1987 at Meru but it was never concluded.

6. PW2, Joseph Nkonge M'Arithi, the 2<sup>nd</sup> plaintiff, told the court that he acquired the suit land from M'Ndegwa Kareria and obtained a title in 1997. Earlier on, he averred, M'Ndegwa Kareria had in 1976 sold parcel No. 44 to him. He produced as an exhibit the apposite green card. He told the court that he had since 1977 been pursuing M'Ndegwa Kareria to vacate his land and had in 1987 filed HCCC No. 208 of 1987. He said that M'Ndegwa died and the suit abated in the year 2006. He also averred that the file relating to HCCC 208 of 1987 got lost and that the suit is still pending.

7. PW2 told the court that the 1<sup>st</sup> defendant's father sold L.R. Nyaki/Kithoka-Mwanika/40 to him. He, however, contradicted himself when he said that the land had been sold to him by one Anderson Irungu who had bought it from the defendants' father.

8. PW2 denied that he had only bought parcel No. 44 from the defendant's father. He, however, said that he did not have any documents to support the alleged sale agreement concerning parcel No. 45. He also said that the documents he had in support of his purchase of parcel NO. 45 were lost when the file for Meru HCCC 208 of 1987 got lost. He also said that the documents in his advocate's office also got lost.

9. PW2 told the court that he did not attempt to remove the plaintiffs from parcel No. 45 because there was a pending suit. He also said that he did not have the suit land registered in PW1's name to frustrate the defendants claim by way of adverse possession. He averred that he did so because he had grown old. The court notes that Meru HCCC 2008 was filed in 1987 while PW2 was registered as owner of the suit land in 1977. He is obviously being economical with the truth.

10. DW1, Andrew Murithi M'Ndegwa, the 1<sup>st</sup> defendant told the court that he had filed a suit in HCCC No. 129 of 2013 by way of originating summons seeking to be declared the proprietor of L.R. Nyaki/Kithoka-Mwanika/45 through the doctrine of adverse possession. He also told the court that his co-litigants had intimated that they would deem his evidence as their evidence in this suit.

11. DW1 gave evidence that he and his siblings were born in the suit land, grew there and still live there. He testified that they had never moved out of the suit land. He averred that they had houses, crops, trees and other developments in the suit land.

12. He told the court that he had sired his children while living in the suit land.

13. DW1 told the court that Frankline Mutuma Nkonge (DW2) was a neighbour who had bought 1 acre of land from his father. He told the court that DW2 was his teacher. He averred that he moved to parcel No. 44 in 1978 and constructed his houses on the land.

14. DW1 told the court that the plaintiffs had never encroached upon the suit land and that there was a clear fence separating parcel numbers 44 and 45. He told the court that his family had lived on parcel No. 45 all their lives and that their occupation of the land was open and without interruption. He testified that the family had buried his father in parcel No. 45. He was also unequivocal that the plaintiff had never tried to remove his family from the suit land.

15. DW1 told the court that his father who was an illiterate person trusted DW2, who was a teacher, and gave him his title for parcel No. 41 to be subdivided. It was subdivided into parcel Nos. 44 and 45 but avers that the 2<sup>nd</sup> defendant took advantage of his father's illiteracy and registered both parcels in his name. DW1 told the court that the defendants were entitled to own the suit land by way of adverse possession. He further added that he and his family did not own any land in this whole world.

16. DW1 denied any knowledge of any suit involving his father and the plaintiffs. In cross-examination he told the court that he only came to know that the land was registered in the name of the 2<sup>nd</sup> defendant after his father's death.

17. DW2, Stanley Gatobu, averred that he hailed from Kithoka and that he had lived there for over 45 years. He told the court that he knew the plaintiffs and the defendants and that they lived in their separate parcels of land. He went on to say that there was a fence separating the parcels of the land occupied by the parties. He averred that over time he had not heard of any quarrels involving the parties. He also testified that the defendants had no other land they would move to if they were evicted from the suit land.

18. During cross-examination, DW2 told the court that he did not know the registration number apposite to the suit land. He was, however, unequivocal that the defendants lived on the suit land and that the plaintiffs lived on a separate parcel of land.

19. As already mentioned, this suit is a consolidation of Meru HCCC 56 of 2013 and Meru HCCC 129 of 2013 (OS).

20. In his plaint filed in court on 21<sup>st</sup> February, 2013 the plaintiff prays for orders against the defendants jointly and severally for:

- a) An order do issue directing the defendants to vacate L.R. NYAKI/KITHOKA-MWANIKA/45 forthwith.
- b) An order of permanent injunction do issue restraining the defendants whether by themselves or through their employees, agents, servants or anyone else acting at their behest from entering into or engaging in any cultivation or construction works on L.R. NYAKI/KITHOKA-MWANIKA/45.

21. The Originating Summons filed by the plaintiffs, who are now defendants, on 24.5.2013 in Meru HCCC No. 129 of 2013 (OS) states as follows:

### **ORIGINATING SUMMONS**

(Under section 38 of the limitation of actions act cap 22 Laws of Kenya and order 37 rule 7 of the civil procedure rules and all other enabling provisions of the law)

LET FRANKLINE MUTUMA NKONGE AND JOSEPH NKONGE M'ARITHI the respondents herein of P. O. Box 76572 NAIROBI within (15) fifteen days after service of this summons, inclusive of the day of such service enter appearance to this summons which is issued on the application of ANDREW MURITHI M'NDEGWA, CICILIA KINYUA M'NDEGWA and GRACE KARWIRWA M'NDEGWA OF P. O. BOX 160 Meru residing within Meru county on parcel of land No. L.R. NYAKI/KITHOKA-MWANIKA/45 prays the honourable court for determination of the following questions and orders:-

1. Whether the 1<sup>st</sup> Respondent FRANKLINE MUTUMA NKONGE is the current registered proprietor of all that parcel of land known as L.R. NYAKI/KITHOKA-MWANIKA/45 having obtained such proprietor ship from the 2<sup>nd</sup> respondent his father on 27.7.2012 measuring approximately 1.85 Ha.
2. WHETHER applicants have been in quiet, peaceful and notorious possession and occupation of the said land openly and

continuously for over 12 years preceding the alleged transfer to the 1<sup>st</sup> respondent.

3. WHETHER the applicants said occupation was adverse to the 1<sup>st</sup> and 2<sup>nd</sup> respondents proprietorship prior to the transfer of the said parcel of land to the 1<sup>st</sup> respondent.
4. WHETHER the respondents title to L.R. NYAKI/KITHOKA-MWANIKA/45 has been extinguished by dint of section 38 of the limitation Actions Act Cap 22 Laws of Kenya prior to 27.7.2012
5. WHETHER the applicants acquired absolute ownership of land parcel NO. L.R. NYAKI/KITHOKA-MWANIKA/45 prior to 27.7.2012
6. WHETHER the applicants are now entitled to be registered as the proprietors of the land parcel No. L.R. NYAKI/KITHOKA-MWANIKA/45 having lived thereon for over 35 years openly and uninterrupted with all their developments.
7. An order that the applicants be registered as the proprietors of land parcel NO. NYAKI/KITHOKA-MWANIKA/45.
8. WHETHER the applicants are entitled to the costs of this suit.

WHICH APPLICATION is supported by the annexed affidavit of ANDREW MURITHI M'NDEGWA on his behalf and other Applicants herein, the nature of this case and other reasons to be adduced at the hearing thereof.

**DATED AT MERU THIS 24<sup>TH</sup> DAY OF MAY, 2013.**

**GIKUNDA ANAMPIU & CO. ADVOCATES FOR THE PLAINTIFFS/APPLICANTS**

22. The plaintiffs have asked the court to rely on the following authorities:

1. **EDWIN G. K. THIONG'O AND GICHURU KINUTHIA & OTHERS, NAIROBI CA 267 OF 2007.**
2. **SOPHIE WANJIKU JOHN VERSUS JANE MWIHAKI KIMANI – NAIROBI ELCC 490 OF 2010.**
3. **RAVINDRA NATH DAHYBHAI BAGHAT VERSUS HAMISI HAROD & OTHERS – MALINDI ELC NO. 124 OF 2010**

23. The defendants have asked the court to rely on the following authorities:

1. **MBIRA VERSUS GACHUHI, 2002 (1) EA**
2. **GICHU VERSUS NDETE, 1984, KLR**
3. **C.A. 27 OF 2002 (NBI) – MBUGUA NJUGUNA AND ELIJAH MBURU WANYOIKE & ANOTHER**
4. **C.A 142 OF 2007 (KISUMU) – LEONALA NELIMA KARANI AND WILLIAM WANYAMA NDEGE**
5. **HCCC 80 of 2002 (MERU) – MALIAMU NCHURUBI M'IBIRI VERSUS FRANCIS M'IMANYARA M'RINGERA alias IMANYARA RINGERA.**

24. I frame the issues for determination as follows:

1. Considering the totality of the evidence adduced by the parties do the plaintiffs on a balance of probabilities deserve orders for eviction and permanent injunction against the defendants with respect to L.R. NYAKI/KITHOKA-MWANIKA/45?
2. Considering the totality of the evidence adduced by the parties are the defendants entitled to be registered owners of L.R. NYAKI/KITHOKA-MWANIKA/45 by way of adverse possession?

25. I have considered the pleadings, the oral evidence, the submissions and the authorities proffered by the parties in support of their diametrically opposed assertions and propositions.

26. The plaintiff's case is that the 2<sup>nd</sup> plaintiff who is the father of the 1<sup>st</sup> plaintiff bought land parcel No. Nyaki/Kithoka-Mwanika/45 from the previous owner who was the father of the 1<sup>st</sup> defendant. On 27.7.2012, the suit land was registered in the name of the 1<sup>st</sup> plaintiff. By virtue of the suit land being registered in the name of the 1<sup>st</sup> plaintiff and previously in the name of the 2<sup>nd</sup> plaintiff, the defendants want the plaintiffs evicted from the suit land and that an order of permanent injunction be issued against the defendants.

27. The 2<sup>nd</sup> plaintiff averred that he bought both parcel NO. NYAKI/KITHOKA-MWANIKA/44 and NO. NYAKI/KITHOKA-MWANIKA/45 from M'Ndegwa M'Kareria, the 1<sup>st</sup> defendants' father. Copies of Green Cards show that he was registered as owner of parcel No. 44 ON 23.3.76. This parcel of land is 0.405 Hectares (approximately 1 acre) in size. He was registered owner of land parcel No.

45 on 28.12.77. This parcel of land is 1.85 Hectares (Approximately 4.5 acres) in size.

28. The defendants aver that the father of the 1<sup>st</sup> defendant sold 1 acre to the 2<sup>nd</sup> plaintiff. He trusted the 2<sup>nd</sup> plaintiff, who was a teacher, and he gave him the title for the original parcel No. NYAKI/KITHOKA-MWANIKI/41 for subdivision purposes. They aver that he secretly and fraudulently registered both resultant parcel numbers 44 and 45 in his name.

29. The defendants say that the 2<sup>nd</sup> plaintiff moved into parcel No. 44, the smaller one, which was one acre in size and established his home in it. It was only much later that the father of the 1<sup>st</sup> defendant discovered that he had been swindled. They say that their land is over 4 acres in size and that they have developed it and that it has been their home all the time. They say they do not own any other land in this world. They also say that a clear fence separates their parcel No. 45 from parcel NO. 44. They say that that is where they buried their father, M’Ndegwa M’Kareria, without any protestation from the defendants who are their neighbours.

30. The evidence of the defendants that they have lived on parcel No. 45 for many years and that their occupation has been open and without interruption has been supported by both plaintiffs and DW2, their witness. There is no contestation that the defendants have been in open uninterrupted use of the suit land from before 3<sup>rd</sup> December, 1975, when the green card shows PW1’s father was first registered as owner of the suit land and definitely before 28<sup>th</sup> December, 1977, when the second plaintiff became registered owner of the suit land.

31. When the issue of how the 2<sup>nd</sup> plaintiff became the registered owner of parcel No. 45 and why if he had indeed purchased parcel No. 45, he had opted to build his houses on parcel No. 44 and to develop it although it was 1 acre in size and not to move into and develop parcel No. 45 which was over 4 acres in size, the 2<sup>nd</sup> plaintiff was evasive. He told the court that although he had documents showing how he became the owner of parcel No. 44, all documents relating to parcel No. 45 got lost both in his advocates’ office and in the court file concerning Meru HCCC 208 of 2007 which got lost and could not be traced. He said that this suit is still pending.

32. In their submissions, the plaintiffs have proffered a plethora of cases which they assert that they support their case. Having gone through them all, the cases proffered by the plaintiffs are proper authorities in their circumstances. However, in every case not all facts and circumstances are congruent to those of other cases. In evidence, no one shoe size fits all.

33. I, however, disagree with the proposition by the plaintiffs that since the plaintiffs have never taken possession of the suit land for the entire period it was registered in their names, the plaintiffs’ claim of ownership by adverse possession is unsustainable. I need not reinvent the wheel. The case of Kasuve versus Mwaani Investment and 4 others offers erudite guidance in this area. At page 188, the court opined as follows:

***“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right, without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”***

This opinion was quoted with approval by the Court of Appeal at Nyeri in the case of Eunice Karimi Kibunja (Appellant AND Mwirigi M’Ringeria Kibunja (Respondent) – Nyeri Civil Appeal No. 89 of 2009.

34. I opine that where the registered owner of the land neighbouring where he stays has allowed the defendants to openly, exclusively and as of right without interruption for a period of over 12 years to occupy the suit land, his possession has constructively been discontinued on his own violation. A studious bystander would expect that registered owner to assert his rights on his neighbouring land where he even allowed the burial of the father of the 1<sup>st</sup> defendant on that land without any protestation.

35. I clarify that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are widows of M’Ndegwa M’Kareria the father of the 1<sup>st</sup> defendant. It cannot be contested that they were adults when the 2<sup>nd</sup> plaintiff became registered owner of the suit land. I opine that in their own right, time for adverse possession could run in their favour since 1977 when the suit land was registered in the name of the 2<sup>nd</sup> plaintiff. As the plaintiffs aver that since 1977, the defendants were living on the suit land without their consent, this position applies to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, independent of their husbands alleged occupation of the suit land without the consent of the plaintiffs.

36. I find that the facts of this case do not fit in with the facts in the authorities proffered by the plaintiffs. I, however, reiterate that those authorities are good authorities in their circumstances. The authorities proffered by the defendants are also good authorities in their circumstances.

37. Regarding the issue of alleged fraud, the plaintiffs have in their submissions referred the court to the case of Faith Wanjiru Kimeria versus Joseph N. Kinyunye Mutua & Another – Nyeri HCCC No. 43 of 2006 as having opined as follows:

***“Allegations of fraud are very serious indeed and must be proved beyond the bar of balance of probabilities although not beyond a reasonable doubt as in criminal cases. The evidence of fraud must therefore be convincing”.***

38. I find that the allegation of fraud against the 2<sup>nd</sup> defendant has not been proved or disproved. The 2<sup>nd</sup> plaintiff himself did not help his cause. He told the court that the documents which could show that he had properly obtained title to parcel No. 45 were lost both in his advocate’s office and in court when file for Meru HCCC No. 208 of 1987 got lost. This raises suspicions. For example was the loss of this file authored by any of the plaintiffs or by all of them or was it authored by any of the defendants including their deceased father, or by all of them? Or did the file get lost without involvement of the parties? This can only be left to conjecture.

39. In their submissions, the defendants’ advocates, Gikunda Anampiu and Co., have submitted that by dint of section 7 of the Limitation of

Actions act, an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims to that person. They submit that the plaintiffs' claim to try to evict the defendants from the suit land 39 years after the 2<sup>nd</sup> plaintiff was registered as owner of the suit land is clearly outside the limitation period of 12 years. I do agree that this is the position in this case.

40. The defendants also say that section 25(1) (b) of the Land Registration Act states as follows:

***“Section 25(1) (b): The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-***

***(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***

***(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”***

41. They also submit that section 28(h) of the Land Registration Act clarifies the matter further. It says:

***“unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without their being noted on the register.-***

***(a) spousal rights over matrimonial property;***

***(b) trusts including customary trusts;***

***(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;***

***(d) natural rights of light, air, water and support;***

***(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;***

***(f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;***

***(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;***

***(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”.***

42. The defendants therefore assert that the 1<sup>st</sup> plaintiff obtained transfer of the suit land with all liabilities and obligations as set out by the law.

43. In the circumstances, I find that the orders for eviction and permanent injunction sought by the plaintiff s are untenable and their claims are dismissed.

44. The case of Mbira versus Gachuhi, EALR [2002] IEA 132 gives erudite guidance when courts consider the doctrine of adverse possession. It opines that a plaintiff has to prove the following :

a) That there had been absence of possession by the true owner through abandonment.

b) That the adverse possessor had been in actual possession of the piece of land;

c) That the adverse possessor had no colour of right to be there other than his entry and occupation;

d) That the adverse possessor had 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;

e) That there was a sufficient animus to dispossess and an animus possidendi;

f) That the statutory period, in this case twelve years, had elapsed.

g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and

h) That the nature of the property was such that, in the light of the foregoing, adverse possession would result.

45. From the evidence adduced by the defendants who were plaintiffs in Meru HCCC No. 129 (OS) OF 2013 and now defendants in this consolidated suit, I find that the defendants proved all the elements envisaged by the case of Mbira (supra) as follows:

- a) There has been absence of possession by the registered owner through abandonment.
- b) The defendants have been in actual possession of the suit land.
- c) Other than their stay on the land, the defendants have no other colour of right.
- d) The defendants have openly and without the consent of the plaintiffs done acts which are inconsistent with the enjoyment of the plaintiffs for purposes for which they intended to use it. This includes the burial of the father of the 1<sup>st</sup> defendant, continued establishment of their homes, planting crops, trees and cultivating on the suit land.
- e) It is clear that from the beginning, the defendants intention was to permanently occupy the suit land.
- f) The statutory period of 12 years, and from 1977, when I deem that the period for counting the period for which adverse possession accrued started has elapsed. By 2013, when this suit was instituted, the defendants had lived in the suit land openly and uninterrupted for 36 years.
- g) The evidence adduced both by the plaintiffs and the defendants is that throughout the statutory period there was no interruption to the adverse possession.
- h) The nature of the property is that adverse position results. The plaintiffs and the defendants live on separate parcels of land whose boundaries are clearly demarcated.

46. This answers all the issues raised by the defendant's Originating Summons.

47. In the circumstances, I give judgment in the following terms:

1. The court hereby declares that the defendants have acquired title over land parcel NO. NYAKI/KITHOKA-MWANIKA/45 by way of adverse possession.
2. The Land Registrar, Tharaka Nithi County (Meru South District) do register the defendants as the proprietors of land parcel No. NYAKI/KITHOKA-MWANIKA/45.
3. Should it be necessary for any documents to be signed to effect the registration of the defendants as owners of the suit land, the Deputy Registrar of this court is authorized and ordered to sign any such documents.
4. The plaintiffs' claims for eviction of the defendants from the suit land and for permanent injunction against the defendants are hereby dismissed.
5. Costs are awarded to the defendants.

**Delivered in open court at Chuka this 13<sup>th</sup> day of November, 2017 in the presence of:**

CA: Ndegwa

Franklin Mutuma Nkonge – 1<sup>st</sup> Plaintiff

Joseph Nkonge M'Arithi – 2<sup>nd</sup> Plaintiff

Andrew Murithi M'Ndegwa – 1<sup>st</sup> Defendant

**P.M. NJOROGE**

**JUDGE**