



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 12 OF 2011 (O.S)

CHARLES MURIUKI M'MWARI.....PLAINTIFF

VERSUS

M'MBOGORI M'AMBTU.....DEFENDANT

JUDGMENT

BACKGROUND

1. Plaintiff Charles Muriuki M'Mwari is the son of Rebecca Gakii (PW3) who in turn was wife of M'Mwari Kabutu.
2. M'Mbogori M'Ambutu is a son of the brother of M'Mwari Kabutu. M'Mwari Kabutu died many years ago in 1970. He had owned parcel No. L.R. NTIMA / IGOKI / 1378.
3. After the death of M'Mwari Kabutu, a Succession Cause No. 47 of 1971 was filed by the present defendant who successfully managed to inherit the suit land in accordance with Kimeru Customary Law.
4. Plaintiff and his mother filed a case No. 3 of 1996 to have the grant in Succession Cause No. 47 of 1971 annulled but they were not successful.
5. Plaintiff also filed another case No. 110 of 1997 against the defendant. Meanwhile, the defendant became the registered owner of the suit land on 14.12.1973.
6. On 19.10.2010, the suit land parcel No.NTIMA/IGOKI/ 1378 was subdivided to give resultant parcels Nos. 7693, 7694 and 7695 (all of them named as NTIMA/IGOKI).
7. Plaintiff claims that he has always lived on the suit land with his mother and is therefore claiming the land by way of Adverse Possession.
8. The defendant on the other hand claims that he is the registered owner of the suit land, and hence he is the owner of this land.

PLAINTIFF'S CASE

9. The Originating Summons was filed on 9.2.11, where the plaintiff desires the Court to establish the following:-

- 1. Whether the plaintiff can be deprived of his developed land after a stay of more than 30 years up to date without interference from anybody.**

2. Whether the defendant has made any development on land title No. NTIMA / IGOKI / 1378 or at all.

3. Whether the plaintiff is occupying land title No. NTIMA / IGOKI/1378 by adverse possession for more than 30 years.

4. Whether the plaintiff is entitled or/and can be registered as the owner of land title No. NTIMA / IGOKI / 1378 by adverse possession by virtue of Limitation of Action Act, Cap 22 Laws of Kenya.

10. The plaintiff and his mother testified as PW1 and 3 respectively. PW3 told the Court that when her husband died, she was four months pregnant with the plaintiff. She did not know about the Succession Case that was filed.

11. Both plaintiff and his mother admit that they have had many cases including Misc. Application No.3 of 1996 which case they lost, then Case No. 110 of 1997 where the plaintiff again lost the case.

12. PW2 one Njue Mugambi testified that he is from the clan of the litigants. He says that the clan has tried to intervene on the dispute in vain and that the clan has been wondering as to how the defendant took the land of the plaintiff's father.

13. The plaintiff and his mother aver that they have never known any other land. That is where they have always lived. They also claim that the defendant doesn't occupy this land. PW2 agrees with these sentiments.

14. The document availed by the plaintiff in support of his case is a copy of the Green Card showing the historical registration of the suit land. The main features there in are that Mwari Kabutu became the registered owner of the land No. 1378 in 1970. Defendant herein became the registered owner of the land on 14:12:1973. This title was closed on 19:10:2010 upon subdivision of the Suitland with resultant titles being Nos. 7693-7695.

DEFENCE CASE

15. The defendant testified that he is the registered owner of Land Parcel No. NTIMA / IGOKI / 7694, 7695 and 7693 having acquired them lawfully as subdivisions of No. 1378.

16. He avers that he became the registered owner of the suit land after filing the Succession Cause No. 47 of 1971.

17. The defendant admits that the plaintiff is a son of the wife of his uncle M'Mwari Kabutu who was the original owner of the land. He avers that the plaintiff and his mother lived on the suit land but with his permission.

18. The defendant avers that the plaintiff was born in 1986, 16 years after the death of M'Mwari Kabutu. The defendant further states that they have been having many cases over this land for a long time.

DETERMINATION

19. This being a claim of adverse possession, the issues to determine are:-

1. Whether the plaintiff has been in exclusive possession of the suit property.

2. Whether the plaintiff's occupation of the suit land (if any) has been open and notorious.

3. Non permissive, hostile or adverse use of the property.

4. Continuous / uninterrupted use of the land for at least 12 years.

Exclusive use of the property

20. The plaintiff was born on this land. Him and his mother have never known any other land save the suit land. The plaintiff was emphatic that for 44 years, the defendant has never done anything on that land.

21. PW2 (Njue Mugambi) also confirms that it is the plaintiff and his mother who have always lived on the suit land.

22. The defendant also admits that: -**“the plaintiff lives on the said land with his mother REBECCA GAKII”**.

23. I have no doubts in my mind that the plaintiff and his mother are the ones who have been in exclusive use and possession of the suit land for many years.

Open and notorious occupation

24. The occupation of the suit land by the plaintiff and his mother has certainly been open and notorious as this is where they have put up their homes.

Non permissive / hostile or adverse use of the property

25. The defendant avers that the plaintiff and his mother reside on the suit property with his permission. Nothing can be further from the truth. The land belonged to PW3's husband, so PW3 could not have required permission from her husband's brother's son to occupy the suit land.

26. The fact that the plaintiff and his mother tried to even have the grant annulled is enough evidence to indicate that there was no permission to occupy the suit land from the defendant.

Continuous uninterrupted occupation for at least 12 years

27. It is not disputed that the plaintiff and his mother have always lived on this land. For PW3 she says she was 4 months pregnant when her husband died in 1970. PW1 says he was one year old when the Succession Cause was filed in 1971. The defendant on the other hand says that the plaintiff was born in 1986 (16 years after the death of M'Mwari Kabutu).

28. The evidence of the defendant regarding when PW1 was born is rather questionable. This is because in the Misc. Application Case No. 3 of 1996, the plaintiff was not suing as a minor. He was an adult.

29. I am inclined to believe that the plaintiff and his mother have always occupied the suit land since the 1970's.

30. The question is, has the occupation been interrupted by the many cases? I have analysed the suits that have been in the arena of litigation concerning the litigants herein. Only 3 suits have been identified.

31. The first one was No. 47 of 1971. This was a Succession Cause. It cannot be said that the defendant was asserting title to his land.

32. The second case was Misc. Application No. 3 of 1996. In this case, the plaintiff and his mother (PW3) were trying to have the grant issued to the defendant on 26.10.1972 revoked or annulled. They were not successful. Again, this was not a case of defendant asserting title to his land.

33. For the case No. 110 of 1997, it is the plaintiff herein who had sued defendant and not the other way round. The document availed by the defendant in respect of this case (110/97) is headed Ruling. It is

barely legible. I am not able to discern what the defence claim was all about.

34. It follows that despite the many Court cases, none of them can be termed as defendant's assertion of his title. Further, it is pertinent to note that this case was filed in 2011 and there is no evidence of any suit existing within the period of 12 years earlier on.

CONCLUSION.

35. In my conclusion, I find it necessary to make reference to the circumstances under which defendant became the registered proprietor of the land. The law applied in the Succession Cause No. 41 of 1971 was the Meru customary law.

36. In the Misc Application No. 3 of 1996, the court had relied on Eugene Cotran restatement of African law to the effect that **"there is no formal appointment under customary law of an administrator intestate known as MUKURU MWENE NJAA because the deceased's eldest son of his senior wife automatically became the head of the family. If the eldest son of the senior wife is still a minor, then the eldest married son or the deceased's eldest brother acts in this capacity.....In this case ,deceased died leaving his widow Rebecca and only daughters..."**.

37. It is clear that inheritance was intertwined with heading a family. It appears that PW3's family was left headless and their inheritance was taken away because defendant herein did not act like the head of deceased's (read Rebecca's) family.

38. I find that defendant's root of his title is now inconsistent with the provisions of the supreme law of the land which guarantees property rights as well as social economic rights.

39. Article 19(2) of the constitution provides that:-

"the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings".

40. Article 20 (4)(a) of the constitution further provides that: -

"in interpreting the bill of rights, a court, tribunal or other authority shall promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom".

41. Therefore it is no longer tenable for the defendant to claim ownership of the suit land as that land belongs to Rebecca and her family. The land should revert back to the right full owners.

42. The final orders are as follows:-

1) The plaintiff is hereby declared as having acquired title to the land by way of adverse possession.

2) The title to parcels No. NTIMA / IGOKI 7693, NTIMA / IGOKI 7694 and NTIMA / IGOKI 7695 are to be cancelled from the names of M'MBOGORI M'AMBUTU and to be registered in the name of CHARLES MURIUKI M'MWARI.

3) Defendant is condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED AT MERU THIS 6th DAY OF DECEMBER, 2017 IN THE PRESENCE OF:-

C:A Janet

Plaintiff in person

Kaimenyi for Defendant Present

Hon. L.N.MBUGUA

ELC JUDGE