



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC CASE NO. 400 OF 2008

JOHN MURUNYU HINGA.....PLAINTIFF

VERSUS

JOSEPH NJUGUNA KAGIA.....DEFENDANT

JUDGMENT

This suit was brought to court by way of originating summons. It is brought under Order XXXV Rule 3D of the Defunct Civil Procedure Rules and Section 38 of the Limitation of Actions Act, Cap 22, Laws of Kenya.

The Originating summons states:

“LET JOSEPH NJUGUNA KAGIA of P.O. Box Care of Kenya Polytechnic Nairobi, within 15 days after service of this summons on him enter an appearance to this summons which is issued on the application of JOHN MURUNYU HINGA who claims to be entitled to **L.R. No. NGENDA/KIMUNYU/T.64** measuring about Zero Decimal Two Three Acres (0.23 Acres) land registered under Cap 300 Laws of Kenya by adverse possession for the determination of the following questions: -

1. That the Plaintiff is entitled to **L.R. NGENDA/KIMUNYU/T.64** by way of adverse possession and that the Plaintiff be registered owner of the L.R. **NGENDA/KIMUNYU/T.64** in place of the Defendant.
2. That the costs of this Originating Summons and the entire suit be provided for.”

The Plaintiff’s case is that the suit land was gifted to him, his mother and his siblings by his grandfather. He told the court that his father abandoned his family and moved to Mombasa. He told the court that his grandfather decreed that the suit land, which he had given his family, should forever remain “**Motherland**” where every member of the family, including any unmarried daughters would be free to put up residential houses.

He told the court that he, his mother and his siblings grew up, got married, and still lived on the suit land. He further said that his father was brought back home from Mombasa by his eldest brother, the Defendant, and stayed with the family on the suit land until 1991 when he died and was buried in a different parcel of family land.

He told the court that he only learnt that the land was registered in the name of the Defendant in 2008 when he got a letter from his brother, through the area Chief, asking him to vacate the suit land. He told

the court that members of his family were not aware that the suit land had been transferred to the Defendant and suggested that the said transfer was fraudulent. He opined that in 1985 when the suit land was transferred to the Defendant, his grandfather was too old to know what he was doing. He told the court that he prayed for orders sought in his Originating Summons.

During cross-examination by Mr. Ondabu, the Defendant's advocate, he admitted that he had signed his affidavit dated 20/8/2008. He told the court that he searched the suit land and also obtained a copy of the green card which showed that the Defendant became registered owner of the suit land on 20/9/1985.

After being shown the search document he had filed in court, he admitted knowledge that when he filed this suit his brother, the Defendant, had the land charged in favour of the Barclays Bank of Kenya. He also told the court that he himself, his mother, Charity Mwiru and his children lived on the suit land. He stressed that no other person lived there.

Upon further cross-examination, the Plaintiff told the court that his first wife, Theresia Njoki lived on the suit land. He said that his second wife lived at Kiganjo. He said that his first wife had not filed any documents to support his claim because this suit belonged to himself solely. He told the court that his first wife had no business in this suit. The court notes that in his evidence in chief, the Plaintiff had told the court that only his mother and his children lived on the suit land.

Pressed further by the Defendant's advocate, the Plaintiff told the court that he moved from the suit land in 2004 when he had only one wife. He stressed that he did not know how the land had changed ownership from his grandfather. He said that although his grandfather had died 15 years earlier, he only came to know that the land was registered in the name of his brother in 2008. He reiterated that the whole family should have been involved, if at all, his grandfather sold the suit land to only one person.

When questioned by Mr. Ondabu regarding if he was claiming the suit land for the family, the Plaintiff laconically stated that he was claiming the suit land on behalf of his family. Upon being referred to his prayers in this suit which indicated that he wanted the land registered in his name, the Plaintiff disowned the pleadings which contained that position.

The Plaintiff said that his surviving brother, Michael Kimani was not interested in the suit land because he had bought his own land. He told the court that his other brother, Peter Michuki, was deceased. There he contradicts his averment in paragraph 18 of his supporting affidavit that the Defendant had chased away Michael Kimani from the suit land.

Told that his mother was not interested in the suit and was not supporting him, because she was aware that the Defendant had bought the suit land from his grandfather, the Plaintiff denied this proposition and also denied that his mother had told him that the Defendant had bought the land from their grandfather.

PW2 gave evidence that the suit land was "**Motherland**" given to the family by her grandfather. She told the court that members of her family were not aware how and when the suit land was transferred to the Defendant. She was of the view that the suit land and any other family land should be shared by all siblings. She complained that when her father's land was shared out among her brothers, she got nothing, although she had been brought up on the suit land.

She admitted knowledge of family land at Kahuguini which her grandfather shared out to his sons, including his father. She denied knowledge of the Plaintiff's prayer that the suit land be registered in his own name in place of the Defendant's name. She told the Court that she had not sued her family to prosecute her claim to her portion of the family land, because she was waiting for the conclusion of this suit.

PW2 told the court that she was not aware the suit land was registered in the Defendant's name way back in 1985. She denied knowledge of the fact that the Defendant had obtained a loan from Barclays Bank by the time this suit was filed and with apparent finality said. "**He should pay the money through another piece of land.**" She concluded her evidence by reiterating that she and all her siblings did not agree that

the suit land belonged to the Defendant.

The Defendant (DW1) told the court that he would mainly rely on his affidavit which he swore on 24/8/2008. He asked the court to adopt it as his evidence.

The Defendant gave evidence that the suit land belonged to his grandfather. He explained that before he bought the land, his grandfather summoned all his sons, including his father, and all of them agreed that he could buy the land. He claimed that all his relatives were aware that the suit land was sold to him. He stated that all the sons of his grandfather, including his father, attended the Land Control Board meeting that approved the transaction.

He told the court that he bought the suit land around 1985 and got his title in the same year. He said that his father died in 1991, 6 years after the suit land was registered in his name. He added that his grandfather died in 1993, eight years after he had transferred the suit land to him.

The Defendant denied that the Plaintiff and his family lived on the suit land. He told the court that it was only his mother who lived on the land. He told the court that the Plaintiff had separated with his wife many years ago and had moved to a place called Kiganjo with his second wife.

The Defendant told the court that when the Plaintiff filed this suit, he was aware that the suit land had been charged in favour of Barclays Bank of Kenya to secure a loan which the bank had advanced to him.

He told the court that no one else in the family, except the Plaintiff, was claiming the land, even though the children of the family were eight, including the Plaintiff. He said that one of them, Peter Michuki, was deceased. He stressed that his other living brother, Michael Kimani, was not claiming the suit land because he knew that it rightfully belonged to him after it was sold to him by his grandfather.

He told the court that after the death of his father in 1991, he assumed the responsibilities hitherto performed by his father as the head of the family, in accordance with Gikuyu customary law. Having assumed that responsibility, he told the court that he shared out his late father's land to himself, to the Plaintiff and to Michael Kimani. He said that the Plaintiff had contributed to the sum of money paid as survey fees. He said that everyone was satisfied.

I note that in his replying affidavit sworn on 23rd September, 2008 the Defendant had pointed out what he claimed were falsehoods contained in the Plaintiff's supporting affidavit sworn on 20th August, 2008. In his replying affidavit, the Defendant in paragraph 10 thereof said: ***"That the contents of paragraph 9 are false. That Plaintiff was educated up to form four at Uthiru Secondary School. Teresia Wanjiku (PW2) was educated at Mumbi Girls Secondary School- Muranga but dropped at form three when she got pregnant. Others dropped at primary level not because of lack of money. The late Peter Michuki undertook a vehicle mechanic course after K.C.P.E in Nairobi at Kaburi."***

Paragraph 9 of the Plaintiff's supporting affidavit which the Defendant seeks to controvert states: ***"THAT because our late father was not present and our mother was a peasant farmer with no income, she was not able to educate her other children save for JOSEPH NJUGUNA KAGIA, the Defendant herein who got education up to a graduate level and even went to overseas for further studies."***

Many other assertions contained in the Plaintiff's supporting affidavit have been denied including the assertion by the Defendant in his replying affidavit that paragraph 7 of the Plaintiff's supporting affidavit was false because their father migrated to Mombasa before 1952 when the Plaintiff was not born. As the Plaintiff claims that their father was only brought back from Mombasa by the Defendant around 1993 and 1992, the Defendant's assertion may be suggesting that the Plaintiff was not the Defendant's father's child. I will leave it at that. I will, however, note that in his oral evidence the Plaintiff said that his father died in 1991, and therefore could not have returned home around 1993 or 1994. The position that their father died in 1991 is supported by the Defendant.

DW2 Njuku Hinga gave evidence that he knew both the Plaintiff and the Defendant as they were sons of

his elder brother. He said that the family of Paul Hinga, his father, and the grandfather of the parties in this suit, was aware that the suit land was sold to the Defendant by his grandfather. He told the court that all the sons of Paul Hinga were summoned by him and asked to buy the land. He said that as all of them did not have enough money to purchase the land, they all agreed that the land should be sold to the Defendant.

DW2 denied the claim by the Plaintiff that he lived on the suit land. He said that the Plaintiff did not live on the suit land and that only the mother of the parties lived there.

DW2 said that the suit land belonged to Paul Hinga. As such it should have devolved to all the 5 sons of their deceased father, Hinga, and since it was too small to be shared out among the 5 sons, it made sense for it to be sold.

DW2 told the court that after they agreed that his father could sell the land to the Defendant, all the sons of Hinga, the registered owner of the land, including the father of the Plaintiff and the Defendant, accompanied the seller and the buyer to the Land Control Board Meeting where the transaction was approved.

In cross-examination, DW2 told the Plaintiff that it was not necessary for his grandfather to have consulted him before selling the land to the Defendant, because his father and mother knew about the transaction. He told the Plaintiff that he was **“under the wings of your mother and your father.”** DW2 also told the Plaintiff that although his Identity Card read John Murunyu Hinga, this did not mean that he was his grandfather’s son. He told him that his assumption of his grandfather’s name as if the grandfather was his father was strange and did not entitle him to any claim over the suit land.

He also wondered why the Plaintiff wanted the land to be registered in his sole name if it was family land as he claimed.

I have carefully considered the pleadings averments and the evidence adduced by the parties. I do find that the Plaintiff’s assertions were successfully controverted by the Defendant. After weighing the evidence, I find that the evidence of DW2 supported the Defendant’s case. I find that the Plaintiff or any person claiming under him does not live on the suit land, irrespective of if he once resided there. Overwhelmingly the evidence tendered in court supports the assertion that the defendant bought the land from his grandfather. His registration as the rightful owner has not been impeached by the Plaintiff.

PW2, the Plaintiff’s sister did not help his case. During her cross-examination, it came out clearly that she was not aware that the Plaintiff’s prayer was for the land to be registered in his sole name, instead of the Defendant’s name. Indeed, she thought that she could use this suit to claim not only part of the suit land but also part of the family land shared out to other members of her family. I find that she was not truthful when she claimed that the Plaintiff lived on the suit land.

During cross-examination, the Plaintiff disowned his pleadings. He told the court that he was claiming the suit land on behalf of all family members. He laconically stated: **“I never wrote the pleadings saying I wanted the land personally.”** On account of this statement, his claim for the land **L.R. NGENDA/KIMUNYI/T.64** to be registered in his name by way of adverse possession fails. He has already denied his prayer. He cannot be granted what he has disowned.

Having said, that, this is a claim predicated upon adverse possession. From the evidence tendered in this court, I find that the Plaintiff had lived on the Suitland initially under the licence of his grandfather Paul Hinga. Later on, if at all he lived on the suit land after it had been bought by the Defendant and registered in his name, his stay on the land would be under licence granted by the Defendant, his brother. A licensee’s claim for adverse possession would be far-fetched. Such a claim must fail. I find that the Plaintiff’s claim for entitlement to the suit land through doctrine of adverse possession fails.

For the above reasons, I dismiss this suit.

Although in cases where family members are involved, courts are inclined not to award costs, in this matter I am persuaded otherwise. It is clear in my mind that the Plaintiff did not come to court with clean hands. I will, therefore, allow costs to follow the event. I award costs to the Defendant.

It is so ordered.

P.M. NJORGE

JUDGE

Delivered and signed in open court at Nairobi this 4TH day of FEBRUARY 2016 in the presence of: -

P.M. NJORGE

JUDGE