



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 506 OF 2014 (O.S)

(Formerly NYERI HCCC NO. 110 OF 2008)

IN THE MATTER OF L. R. NUMBERS CHINGA/KIAGUTHU/804/805

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS

CAP 22 LAWS OF KENYA

JOHN GACHERU MUGO PLAINTIFF

-VERSUS-

DANIEL MOTOKU KIRORI

FRANCIS KAMAU KIRORI

(Sued As Personal Representatives Of The Estate Of

**KIRORI MOTOKU KIAI ALIAS KIRORI MOTOKU (DECEASED)
DEFENDANTS**

JUDGMENT

1. The plaintiff herein, **John Gatheru Mugo**, took up the summons dated **20th August, 2008** for determination of the following questions:-

- 1) Whether he has acquired title to the whole of L.R Numbers Chinga/Kiaguthu/804 and 805 situate within Nyeri district by adverse possession?
- 2) If the answer to (1) above is in the affirmative, whether the said parcels of land should forthwith be registered in his name?
- 3) If the answer to (2) above is in the affirmative, whether the defendants should be ordered to transfer the said parcels of land to him and in default, the executive officer of this court ordered to sign all necessary documents?

4) Who should bear the costs of the suit.

2. The suit is supported by the affidavit of the plaintiff sworn on **1st of September, 2008**. In that affidavit, the plaintiff has, *inter alia*, deposed that he has been in exclusive occupation and possession of the parcels of land known as **L.R Numbers Chinga/Kiaguthu/804** and 805 (hereinafter referred as the suit properties) for a period of more than twenty five (25) years.

The plaintiff explains that he has effected developments in the suit property by erecting permanent structures thereon and planting trees and crops thereon.

3. The plaintiff's suit is opposed through the replying affidavit of **Francis Kamau Kirori** sworn on **8th day of October, 2008**. In that affidavit, the deponent has, *inter alia*, deposed that the suit is bad in law because the affidavit sworn in support of it was sworn after the suit was filed.

4. The deponent denies the plaintiff's contention that he has been in open and peaceful occupation of the suit properties and that he has effected developments thereon. He explains that the suit properties were subject of an agreement of sale between his late father and the plaintiff's late father executed in 1969 and contends that in 1989, the said agreement was mutually revoked by the parties and the land returned to his father.

5. The deponent contends that despite the sale agreement having been mutually revoked, in 1990 the plaintiff's father starting using the suit properties.

6. The deponent further contends that the plaintiff lives and occupies a different parcel of land adjacent to the suit properties and not the suit properties, which he has personally been overseeing.

7. The deponent also points out that there have been several cases between the parties to this suit or their predecessors in claim over the suit property.

EVIDENCE

The plaintiff's case

8. When the matter came up for hearing, the plaintiff who testified as P.W.1 informed the court that he has been in occupation of the suit properties since he was born (that is to say he was born and brought up in the suit property).

9. Terming his occupation peaceful and notorious, the plaintiff informed the court that he has developed the suit properties by constructing structures and growing crops thereon.

10. To prove that he has effected developments in the suit property, he produced growers and tea certificate as Pexbt 1 and 2 respectively and photographs as Pexbt 3. The plaintiff also produced an agricultural report made by C.M Mbau Kabea in respect of the activities on the suit properties.

11. The plaintiff further informed the court that the suit properties are clearly demarcated by boundaries erected by his father.

12. Upon being cross-examined by counsel for the defendants, the plaintiff maintained that he has been in use and occupation of the suit property since 1971, when he was born. Although in his plaint (paragraph 6 thereof) he has pleaded that he has been in use and occupation of the suit property since 1982, he urged the court go by his testimony that he has been in use and occupation of the suit property since he was born.

13. With regard to the report compiled by an agricultural officer regarding the activities being carried out in the suit property, he admitted that he did not invite the defendants when the report was being made.

14. **P.W.2, Meshack Njuguna Gichuki**, told the court that he is aware that the suit property was left to the plaintiff by his father. He further informed the court that it is the plaintiff who has been using the suit properties. Terming the plaintiff's occupation of the land open and peaceful, he informed the court that nobody has even attempted to evict the plaintiff therefrom.
15. He confirmed the plaintiff's testimony to the effect that his father used to live in the suit property.
16. He maintained that the developments effected in the suit property were effected by the plaintiff and/or his father.
17. **P.W.3, Charles Mbao Kabea**, who is an Agricultural Officer in Othaya informed the court that on request by the plaintiff, he visited the suit properties and compiled a report in respect thereof. He produced the report as Pexbt 4. He stated that by the time he visited the suit properties, some tea bushes were mature. Napier grass was also mature.
18. He admitted that although he was aware that there was a pending dispute in court, he did not ask the other parties to be present when he was making the report. He, however, stated that absence of the defendants did not affect his report because it is merely a reflection of what is on the ground.

The Defence Case

19. **Francis Kamau Njoroge** who testified as D.W.1 informed the court that the 1st defendant and he are the administrators of their father, Kirori Motoku, who passed on in 1980.
20. He informed the court that he knew the plaintiff's father (Mugo Wathingira (deceased) but contended that he only got to know the plaintiff when he filed this suit.
21. He reiterated his contention that the suit properties which had been sold to the plaintiff's father were returned to his father in 1989 following what he termed mutual revocation of the agreement of sale. That notwithstanding, he stated that the plaintiff's father had cited him in Nyeri High Court Succession Cause No.116 of 1995 and even reported him to the area chief concerning the suit properties.
22. He further explained that he had been visiting the suit properties and that he only found the plaintiff in occupation of the suit property sometime in 2011. He explains that he unsuccessfully tried to get the plaintiff out of the suit properties.
23. Explaining that he took photographs of the structures that the plaintiff had erected in the suit properties and the developments thereon, he contended that the photographs showed that the structures were freshly put up.
24. With regard to the contention that the sale agreement executed between his father and the plaintiff's father was revoked, he said he had no document capable of proving that fact.
25. Concerning the plaintiff use of the suit properties, he stated that he does not know whether or not the plaintiff picks tea from the suit properties.
26. He admitted that plaintiff has been in use and occupation of the suit properties without his permission and that he has never been removed therefrom.

SUBMISSIONS

Submissions for the plaintiff

27. On behalf of the plaintiff, it is submitted that through the supporting affidavit and evidence, the plaintiff has demonstrated that he has been in exclusive possession and occupation of the suitland for an interrupted period of in excess of 25 years. It is pointed out that the plaintiff has constructed a

permanent house, a cow shed and planted crops and trees on the suit land. The testimony of P.W.2 is said to have corroborated that of the plaintiff.

28. The report by P.W.3 on the status of the suit properties is said to have confirmed the usage of the suit properties.

29. Terming the plaintiff's occupation of the suit properties hostile to the title held by the defendants, counsel for the plaintiff refers to the authorities cited below in support of the contention that the plaintiff has made up a case for being granted the orders sought. These are:-

- i. Wakaria Mboi Njaramwe & another v. Loise Kaguu Munge (2013) e KLR;
- ii. Ng'ati Farmers Cooperative Society Ltd v. Ledidi & 15 others Nakuru Civil Appeal No.64 of 2004 (CoA unreported);
- iii. Gatimu Kinguru v. Muya Gathangi (1976-80) 1 KLR 317 and
- iv. Jane Njeri Richu v. Samuel Miki Waweru Nairobi HCCC No.139 of 1999.

Submissions for the defendant

30. In the submissions filed on behalf of the defendants, it is pointed out that before the current suit was filed, the defendants had sued the plaintiff vide Nyeri Chief Magistrates Court's Civil Suit No.307 of 2004. Vide that suit, the defendants claim was that the plaintiff had trespassed into the suit properties and caused damage thereon. In his statement of defence and counter-claim, the plaintiff herein denies all the allegations levelled against him and contended that he was in lawful occupation of the suit property, the same having been bought by his deceased father from the defendants' deceased father. The plaintiff also claimed to be entitled to the suit property by adverse possession.

31. It pointed out that that suit was consolidated with the current suit and this suit identified as the lead file. The court, is therefore urged to consider the pleadings in both cases and the entire evidence.

32. Besides these two cases, it is pointed out that there have been other proceedings in court between the parties herein and/or their predecessors in claim. These are:-

- a) Succession Cause No.125 of 2002;
- b) Succession Cause No.116 of 1995 (Citation);
- c) Nyeri CMCCC No. 307 of 2004
- d) Succession Cause No.1026 of 1992.

33. It is argued that in all the claims above, both the plaintiff and his father claim to be entitled to the suit property simultaneously and contends the two claims cannot exist side by side unless the plaintiff herein is advancing his fathers claim. In this regard, it is submitted that it is not clear when the plaintiff's occupation of the suit began, whether at birth, 1982 as pleaded or after his father passed on in 2003.

34. Counsel for the defendants points out that the title held by the plaintiffs' father was handed over to the defendants' father in 1989 allegedly for sub-division of the suit property and transfer to the plaintiff's father. Pointing out that the intended transfer did not materialise and terming the hand over of the title held by plaintiff's father interruption of possession, counsel for the defendants submits that time for purposes of adverse possession stopped running after the defendants' father caused the property to be sub-divided and two new titles issued in respect thereof. (It is noteworthy that the defendants have not led any evidence capable of showing that possession and occupation of the suit properties was interrupted. All what they have managed to show is that there was sub-division and issuance of new titles in respect of the suit property).

35. Terming the evidence led in support of the plaintiff's case unreliable, counsel for the defendant

submits that the evidence adduced in this case shows that the plaintiff and his deceased father lived in a different parcel of land adjacent to the suit property.

36. With regard to the developments allegedly effected by the plaintiff on the suit property, it is submitted that the structures appear to have been constructed during the pendency of this suit. The licence produced is said to be for planting tea in a different parcel of land, Chinga Kiaguthu/279 and not the suit premises (Chinga/Kiaguthu/279).

37. P.W.2 is said to have failed to clarify where the plaintiff was left by his father as he went to Nyandarua. P.W.2 is also said to have failed to clarify whether the plaintiff in addition to inheriting tea and coffee on the suit property, also inherited the land.

38. The testimony of P.W.3 is said to be strange in that he goes to the suit property without informing the registered owner. P.W.3's testimony is also challenged on the ground that he does not seem to have noticed the presence of the permanent building allegedly found in the suit property. He noticed a temporary cow-shed, instead.

39. Reference is made to the testimony of D.W.1 and submitted that there was change of possession of the suit properties in 1989 when the plaintiff's father surrendered title to the suit property to the defendants' father for purposes of transfer of the suit property to him.

40. On the law applicable to the plaintiff's case, it is submitted that the plaintiff must prove that he has been in occupation of the suit properties for uninterrupted period of over 12 years; the occupation must be open and peaceful; without the the owner's consent and the area of occupation must be clear.

41. On whether the plaintiff has satisfied the above requirements of the law, it is submitted that the plaintiff has not satisfied any of the cited requirements of the law.

42. Concerning the authorities cited in support of the plaintiff's case, it is submitted that the cases do not support the general principles relating to cases of adverse possession.

43. Maintaining that the defendants' father re-gained entry into the suit property in 1989, it is submitted that thereafter there was no more peaceful, uninterrupted occupation of the suit property by either the plaintiff or his late father.

44. The plaintiff is also said to have failed to clarify which of the two parcels of land he constructed the structures he claims to have erected in the suit properties.

45. The plaintiff is faulted for having failed to reveal to the court about the pendencies suits including No. 15 of 2007 with which the current suit is consolidated.

46. In view of the foregoing, the plaintiff is said to have failed to discharge the burden placed on him.

Reference is made to, among other cases, the case of **Abubakar Herezo Bwana v. Twahir mohamed Salim Said & 2 others (1991)2KAR**

Analysis and determination

47. I have read and considered the pleadings, evidence and the submissions made in respect of cases of the parties in this case.

48. With regard to the claim for adverse possession, I begin by pointing out that on the authority of **Swalehe v. Nassim R. Mohammed** (supra), the applicants' claim for adverse possession is unmaintainable on the ground that time for the purposes of the title held by the defendant began to run in 2014, after the defendant was issued with title to the suit property.

49. Concerning the alleged existence of a customary trust in favour of the applicants, the burden to prove existence of the alleged customary trust lay with the applicants. To discharge that burden, the applicants were, by law required, to adduce credible evidence concerning existence of the alleged trust. In this regard see the case of Salesio M'itonga v. M'ithara & 3 Others (2015)eKLR where the Court of Appeal stated:-

“It is trite law that trust is a question of fact and has to be proved by evidence. In Gichuki - vs- Gichuki – Civil Appeal No. 21 of 1981, this Court held that a party relying on the existence of a trust must prove through evidence the existence of a trust. See also Mumo -vs- Makau - Civil Appeal No. 56 of 2001. In this case the appellant claimed that the original parcel belonged to his late father and was ancestral land. He also claimed that the 1st respondent was registered as proprietor and held a portion of 3 acres in trust for him. On the other hand, the 1st respondent refuted the appellant's claim and maintained that the original parcel belonged to him. The trial court made the following findings on the issue of trust:-

“I am persuaded that the 1st defendant (1st respondent) was registered as the owner of the suit land as a trustee for the family. I say so for the following reasons. There is evidence on record to show that the plaintiff (appellant) had one of the parcels of land belonging to his father registered in his name. This means that there was a high possibility that the suit land belonged to the father of the plaintiff and the 1st defendant even though the same was registered in the name of the 1st defendant. Secondly, the plaintiff planted tea bushes on the land without any interference by the 1st defendant. This means that it was common knowledge that the suit land belonged to the family. Thirdly, the 1st defendant was not given any family land. That means it was understood by everybody that he had already benefited by way of the suit land”

Having perused the record and taking into account the evidence therein, we find that the trial court erred in finding that the appellant had proved the existence of a trust. This is because firstly, the burden was upon the appellant to prove the creation and existence of the alleged trust. The fact that the appellant had one of the parcels of land, Abogeta/U-Kithangari/219 which belonged to their father did not prove the allegation that the original parcel was family land. Secondly, the fact that the appellant had also planted tea bushes thereon did not by itself establish a trust. Thirdly, we are unable to find any justification on record for the trial court's finding that the 1st respondent was not given any family land because he had already benefited by way of the original parcel. The 1st respondent in his evidence clearly indicated that his late father bequeathed both the appellant and himself parcels of land which he owned. This fact was not disputed by the appellant.

18. The appellant testified that the original parcel belonged to his father and was ancestral land. He has lived on the said land from 1969 and his father gave him a portion of 3 acres from the said land in 1988. He also testified that both he and his father were present when the 1st respondent was registered as the proprietor of the original parcel. He further testified that he was the eldest son. Based on the foregoing, we are of the considered view that the appellant did not prove how the alleged trust was created. This is because as correctly pointed out by the 1st respondent in his evidence; the appellant did not give any explanation why the original parcel was registered in the 1st respondent's name yet both his father and himself were present during the registration. Further the appellant in his evidence testified that at the time of registration he had an identification card while the 1st respondent did not. The question that arises is why was the original parcel registered in the 1st respondents name if it was ancestral land? We believe it was imperative for the appellant to have given evidence in this respect in order to prove how the alleged trust was created.

19. PW2, Phantus Magiri, testified that the original parcel belonged to the appellant and 1st

respondent's late father and that it was family land. We find that his evidence did not prove the existence of the alleged trust. This is because he admitted in his evidence that he never discussed anything with appellant and 1st respondent's father regarding the parcel. So how did he know that the parcel belonged to the appellant's father and that it was family land? This brings into question the credibility of the said evidence.

The appellant also contended by virtue of the fact that he was in possession of a portion of the original parcel and by dint of *Section 116* of the *Evidence Act*, the burden shifted to the respondents to prove that there was no trust. *Section 116* provides:-

“When the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

20. In this case, the appellant filed suit claiming existence of a trust therefore, the burden of proof lay with him to prove the existence of the same. We find that *Section 116* of the *Evidence Act* is not applicable in this case.

21. We concur with the following findings by the High Court:-

“Trust must be proved by credible evidence adduced by the person claiming that a trust exists. See *Wambugu vs. Kimani supra*. In this case, the respondent had to adduce evidence to establish on a balance of probabilities that a trust exists in his favour over the suit property. I did consider the respondent's evidence at length. He did not explain on what basis he believes that a trust existed. All he said is that he did not know why the land was registered in the 1st appellant's name and not his father's name. In fact if one critically analyses the respondent's evidence, it becomes abundantly clear that why he believes that there was a trust in his favour is because in 1982 or 1988 their father gave him a portion of 1st appellant's suit land. Yet he says he has been in occupation since 1969 when he planted tea trees. The evidence that it was his father who gave to him the land needs substantiation. This is because he was utilizing the land anyway. So what unique thing happened in 1982 or 1988 to signify he was given the land by his father? In any event the respondent admits he knew that the land was registered in the 1st defendant/appellant's name. How could his father give him land which did not belong to him? The respondent's evidence was full of contradictions. It is however clear that he did not adduce any evidence to prove trust to the required standards. Mere utilization of the land is not proof of the existence of a trust. The only conclusion one can reach from this set of facts is that the land was not family land and the 1st appellant was not registered as proprietor on any fiduciary capacity.”

22. Having expressed ourselves as above, we find that the trial court properly exercised its jurisdiction as the first appellate court.” (Emphasis supplied).

50. In applying the principles enunciated in the above case to the circumstances of this case, I make the following observations:-

1. That it's not in dispute that the suit land was obtained by the defendant from SFT by way of loan;
2. That the 2nd plaintiff's father and the 1st plaintiff husband lived in and utilised the suit land for a long period of time.
3. That there is no evidence capable of proving that the debt that existed in respect of the suit property was paid by the 2nd plaintiff's father or what contribution if any, that the 2nd plaintiff's father and the 1st plaintiff's husband made in acquisition of the suit property.

4. That there is no evidence to prove that the defendant had promised to transfer the suit property to the 2nd plaintiff's father. The letter on which the allegation that the defendant had promised to transfer the suit property to the 2nd plaintiff's father, is unreliable as it was not signed by the 2nd plaintiff's father. It is also notable that the letter does not mention which parcel of land it relates to.

51. In **Salesio M' itonga v. M'ithara & 3 Others** (supra) the Court of Appeal quoted with approval the decision of the High court to the effect that :-

“Mere utilization of the land is not proof of the existence of a trust.”

52. In this case, there being evidence that the suit property was obtained by the defendant and there being no evidence that the defendant had agreed to transfer the whole or a portion of the suit property to the 2nd plaintiff's father and/or the 1st plaintiff's husband who had been utilising the suit property with the consent of the defendant for a long period of time, I find and hold that the plaintiffs' have failed to prove existence of any customary trust in their favour.

53. Having found the plaintiffs' claim to the suit property to be unsustainable for the reasons stated herein above, I dismiss it with costs to the defendants/respondents.

Dated, signed and delivered at Nyeri this 25th day of May, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Macharia holding brief for the defendants

Mr. Wahome for the plaintiffs

Court assistant - Lydia