



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 131 OF 2014

JOSEPH KIMARI MUCHERU.....PLAINTIFF

VERSUS

SAMMY KIYO MACHARIA.....1ST DEFENDANT

**PATRICK MAGUTA MACHARIA (SUING AS THE ADMINISTRATOR OF
THE ESTATE OF FRANKLIN MUNYORO MACHARIA)..2ND DEFENDANT**

CONSOLIDATED WITH

NAKURU ELC 133 OF 2014

ESTHER NJOKI MUCHERU.....PLAINTIFF

VERSUS

BENSON NJOROGE MACHARIA.....1ST DEFENDANT

**PATRICK MAGUTA MACHARIA (SUED AS THE ADMINISTRATOR OF THE
FRANKLIN MUNYORO MACHARIA.....2ND DEFENDANT**

AND

NAKURU ELC 134 OF 2014

ELIJA NJOROGE MUCHERUPLAINTIFF

VERSUS

ALICE MURINGI MACHARIA.....1ST DEFENDANT

**PATRICK MAGUTA MACHARIA (SUED AS THE ADMINISTRATOR OF
FRANKLIN MUNYORO MACHARIA.....2ND DEFENDANT**

AND

NAKURU ELC 132 OF 2014

BETH WANGARI NJUGUNAPLAINTIFF

VERSUS

RHODA WAITHIRA MACHARIA.....1ST DEFENDANT

PATRICK MAGUTA MACHARIA (SUED AS THE ADMINISTRATOR OF

FRANKLIN MUNYORO MACHARIA.....2ND DEFENDANT

JUDGMENT

(Four consolidated suits claiming adverse possession; allegation that suit is res judicata as plaintiffs' father had litigation with the defendants' father; previous suit being on a different property and not the subject property; suit not res judicata; plaintiffs having been in possession and having utilized the land in excess of 12 years; suits succeed; counterclaim of defendants dismissed with costs).

PART A. INTRODUCTION AND PLEADINGS

1. This is a consolidated judgment for four suits all claiming certain lands by way of adverse possession. The matters have been consolidated for they raise similar issues of fact and law.
2. The first suit, of Joseph Kimari Mucheru, the applicant in the suit Nakuru HCCC No. 131 of 2014 (O.S), is a claim to be declared owner by way of adverse possession to the land parcel Londiani/ Londiani Block 3 Kamuingi/236 , measuring 3.15 Hectares, which land is currently registered in the name of Sammy Kiyochi Macharia, the 1st respondent in the said suit.
3. The second suit is the case, Nakuru HCCC No. 132 of 2014 (O.S). The claimant is Beth Wangari Njuguna. She claims the land parcel Kericho / Londiani Block 3 (Kamuingi) / 240, which land is registered in the name of Rhoda Waithira Macharia, the 1st respondent in the said case.
4. The third suit is Nakuru HCCC No. 133 of 2014 (O.S). The claimant is Esther Njoki Mucheru. She wants to be declared owner of the land parcel No. Kericho/Londiani Block 3 (Kamuingi)/237 measuring 2.35 Hectares, which land is registered in the name of Benson Njoroge Macharia, the 1st respondent in the said suit.
5. The final suit is the case Nakuru HCCC No. 134 of 2014. The claimant is Elijah Njoroge Mucheru. He wants to be declared owner of the land parcel Kericho/Londiani Block 3 (Kamuingi) /239. The said land is registered in the name of Alice Muringi Macharia, who is the 1st respondent in the suit.
6. All these suit properties were previously comprised in the land parcel Londiani/Londiani Block 3/ 60. This land was registered in the name of Franklin Munyoro Macharia (Munyoro) (deceased), who seems to have obtained title on 27 November 1987. Upon his demise, succession proceedings, being Nairobi High Court Succession Cause No. 1888 of 2002, were undertaken, with Patrick Maguta Macharia, the 2nd respondent in all the cases herein, being the administrator. The grant of letters of administration was confirmed, with the properties of the deceased, one of which was the land parcel Londiani/Londiani Block 3/60, being distributed to the beneficiaries of the estate of the late Franklin Munyoro Macharia. Among the beneficiaries are the respondents herein who were allocated the suit properties. That is how the land parcel Londiani/Londiani Block 3/60 came to be subdivided, and that is how all the 1st respondents in the cases herein, obtained titles to the suit properties. They all became registered as proprietors on 6 July 2004.

7. The case of the applicants is that they have been in possession of the claimed properties since the year 1988; that they have built their houses on the properties; that they have farmed and raised children on the properties; that they have buried some of their relatives on the land; that they have been in continuous occupation for a period now in excess of 26 years; and that they have acquired title to the respective properties that they claim by way of adverse possession.

8. Esther Njoki Mucheru (Njoki) , the claimant in the suit No. 133, is wife to Samuel Mucheru Wamoni (Wamoni) (deceased). Wamoni died on 27 June 2009 and it is said that he was buried on the land that Njoki claims. The other three claimants are the children of Wamoni and Njoki. I appreciate that Njoki is wife to Wamoni, but in these proceedings, I will refer to Wamoni as the plaintiffs' father only for ease of reference.

9. The respondents have resisted the suits by filing a replying affidavit. They have also raised a counterclaim seeking to have the applicants (whom I will henceforth refer to as plaintiffs) evicted from the suit properties. They have stated that one Kimari Mucheru, had filed a case, being Nairobi HCCC No. 1855 of 1983 in the High Court at Nairobi, against their father, claiming ownership of the land parcel Londiani/Londiani Block 3 (Kamuingi)/ 60 (parcel No. 60). Kimari Mucheru died and was substituted by Wamoni, in the said suit (it will be noted that Wamoni is father to the plaintiffs herein). The said case was dismissed. Wamoni had also filed objection proceedings in the succession matter of the late Munyoro (father of the defendants), claiming an interest in the land parcel No. 60, which objection was dismissed on 4 October 2013. Following the determinations, the respondents allege that the applicants, in writing, pleaded with the family of Munyoro, to allow them to give them up to 31 December 2014 to vacate the properties. It is denied that the plaintiffs have been on the suit properties for 28 years as claimed and it is pointed out that in any event, their parents had a suit pending in court. It is the position of the defendants that the cases herein are res judicata and an abuse of the process of court.

10. To their replying affidavit, the respondents (whom I will henceforth refer to as the defendants) have annexed copies of the Certificate of Confirmation of Grant issued in Nairobi Succession Cause No. 1888 of 2002; copies of a ruling delivered on 22 November 2012 in respect of the suits Nairobi HCCC No. 1854 and 1855 of 1983; a Notice of Appeal dated 4 November 2012 in respect of the ruling of 22 November 2012; and a ruling dated 4 October 2013 in respect of objection proceedings in Nairobi Succession Cause No. 1888 of 2002.

11. In a further supporting affidavit, the plaintiffs averred that the cases before court are completely different from the issues in the case Nairobi HCCC No. 1854 of 1983 and in the objection proceedings in the succession matter. They have denied having begged the defendants to allow them time to be on the land and have denied promising to vacate the said properties. They have stated that they were threatened by the Chief to sign an agreement to vacate.

Since the facts were not largely in dispute, I directed that the matter be heard by way of affidavit evidence supported with submissions of counsel.

PART B : SUBMISSIONS OF COUNSEL

12. In her submissions, Ms. Nancy Njoroge for the plaintiffs, pointed out that the plaintiffs have been on the land in excess of 26 years; have buried their relatives on the land; have farmed and utilized it continuously; and that they have had built their homes on the suit properties. On the claim that the suit is res judicata, she submitted that in the case Nairobi HCCC No. 1854 of 1983, the court, in its ruling of 22 November 2012, observed that the land which was being litigated, ought to have been Londiani/Londiani Block 3/ Kamuinge/60 and that the plaintiffs' father was not litigating on the correct parcel Kericho/Londiani/Block 3/Kamuingi/60. She submitted that res judicata cannot apply since the parcels being litigated upon in the said suit were incorrect and completely different from the current parcels in issue. She submitted that the plaintiffs have never litigated with the defendants in any other court regarding the parcels of land that they claim herein and that the defendants have also never been parties in the previous suits. She submitted that the claim for adverse possession has been proved. She relied on the cases of *Kanda Kimet vs Chepkuyeng Kimamet (Kimamet) Chebobei, Eldoret HCCC No. 218 of 2000*;

and *Lelei A Tuei alias Joseph Lelein Kemei & Another vs Kipsuge A. Lelei alias Suk A. Lile, Kericho HCCC No. 48 of 2004 (OS)*.

13. On his part, Mr. Mwangi Kigotho for the defendants, submitted that this suit is res judicata. He submitted that in the succession case of the late Munyoro (father of the defendants), the court ordered status quo to be maintained till determination of the objection filed Wamoni (father of the plaintiffs and wife to Njoki). He submitted that Wamoni had applied for an injunction against the beneficiaries of the estate of Munyoro, which application was dismissed by the court on 22 September 2004. He submitted that an application to have the titles of the defendants cancelled was dismissed by Kimaru J, on 4 October 2013. He submitted that the earlier claim over the suit property was dismissed by Kimondo J on 22 November 2012. He submitted that the plaintiffs failed to disclose the existence of these previous suits. It was his view that the issues herein have been determined in the previous two suits. He submitted that the matters in issue in the two suits related to ownership and occupation of the land parcel No. 60. He submitted that the subdivision of that land did not in itself create a separate and distinct cause of action by way of adverse possession. In his view, the remedy was to pursue an appeal.

14. He further submitted that the legal requirements for adverse possession have not been met. That the title deeds have not been in place for 12 years prior to the filing of these suit. He submitted that for the period that the plaintiffs have been in occupation, this has been with the permission of the defendants. He relied on the cases of *Abdulkarim vs Member of Lands (1958) EA 436*; *Kimani Ruchine & Another vs Swift, Rutherford Co Ltd & Another (1976-1980) KLR 1500*; and *Murugami Gichembe vs Gunda Gichembe, Nairobi HCCC No. 1258 of 1996 (2000) eKLR*.

PART C : ANALYSIS AND DETERMINATION

15. I have considered the matter. I first need to determine whether this suit is res judicata. The core reasons for this argument is that there were two previous suits, being Nairobi HCCC No. 1855 of 1983 and Nairobi Succession Cause No. 1888 of 2002. It is the position of the defendants that the decisions in these two suits, determined the matters herein.

16. As in every litigation, I must decide the case based on the pleadings and evidence that the parties thought fit to tender. At the outset, I must say that I am in a bit of a handicap, for none of the parties annexed the pleadings in the two suits. The plaintiffs in fact did not even mention these two suits in their Originating Summons or supporting affidavit. What the defendants annexed are, in respect of the suit Nairobi HCCC No. 1855 of 1983, a ruling of Kimondo J, dated 22 November 2012, and in respect of Nairobi Succession Cause No. 1888 of 2002, a Certificate of Confirmation of Grant dated 21 May 2003 and a ruling of Kimaru J, dated 4 October 2013.

17. My perusal of these documents informs me that the ruling of Kimondo J, was made in respect of an application for review for two consolidated suits, the suit No. 1854 and 1855. The plaintiff in the suit No. 1854 was one Nahashon Kahara and in the suit No. 1855 the plaintiff was Samwel Mucheru (Wamoni, father of the plaintiffs). The defendants were Kamuingi Farmers Company Ltd and Ashford Macharia (who is Munyoro, the father of the defendants) . What was sought to be reviewed were the decrees issued on 21 January 1992 and 23 October 1989. The review was sought so as to enable the plaintiffs excise 13 acres each (in total 26 acres for there were two plaintiffs, Nahashon Kahara and Samwel Mucheru Wamoni), from the land parcel No. 60 which had by then been subdivided into the parcels No. 234, 235, 236, 237, 238, 239 and 240. There was also a prayer that these subdivisions be nullified or cancelled. The application was considered and dismissed on various grounds. The ruling did replicate the decrees issued in the said suits and in respect of the suit by the plaintiffs' father, the following was the decree :-

"1. That the 1st and second defendants to vacate and give 13 acres plot known as Londiani Plot No. 16 to the plaintiff who should be registered as its proprietor.

2. That if the first and second defendants fail to comply then the registrar of the High Court to sign the necessary documents to constitute the plaintiff as the owner of the 13 acres.

3. That the defendants do pay to the plaintiff the costs of this suit to be taxed and certified by the taxing officer of this court."

18. Although the defendants alleged in this suit that the plaintiffs' father lost the litigation, it will be seen from the above, that the father of the plaintiffs (Wamoni) did not actually lose the litigation; a decree was issued in his favour for the plot No. 16. I am not too sure why the plaintiffs sought a review of that decree, but I think, that there may have been a confusion as to whether the land in issue was plot No. 16 or Plot No. 60. The learned judge dismissed the application for review on two fundamental grounds. One was that the application for review was coming too late in the day, it having been filed about 20 years to the date of judgment. The other reason was that there was no reference in the decree in respect of the land parcel No. 60, the decree having been issued in favour of the plaintiff, for the land parcel No. 16. It emerged in the course of that application, and I have seen it for myself in the extract of title to the parcel No. 60, that the father of the defendants obtained title on 27 November 1987.

19. From the ruling annexed, I can only assume that the court, in the litigation between the father of the plaintiffs and father of the defendants, dealt with the land described as land parcel No. 16 and not the land parcel No. 60. The attempt to supplant the land parcel No. 60 in place of the land parcel No. 16 were rebuffed in the application for review. Indeed the defendants herein successfully opposed the application to supplant the parcel No. 16 with the parcel No. 60. I do not now see why the defendants want to now change tune, and say that the litigation in the case No. 1855 of 1983, was over the parcel No. 60, while in the application for review, they argued that the decree was for parcel No. 16, meaning that the litigation was over the parcel No. 16 and not parcel No. 60, and that parcel No. 60 was not affected. They are clearly wavering; when it suits them, they say that the litigation in the case No. 1855 of 1983, was over the parcel No. 60. When it doesn't, they say that the litigation was over the parcel No. 16. It did suit them, to state that the claim in the case No. 1855, was not over the land parcel No. 60, when dealing with the objection proceedings in Succession Cause No. 1888 of 2002, where they did state, and it is contained in the ruling of Kimaru J, that the land parcel No. 60 has never been the subject of any dispute between the plaintiffs and defendants. Now, of course it does suit them to say that the previous litigation was over parcel No. 60, so that the doctrine of res judicata may be invoked.

20. On my part, I opt to follow the decree as issued, which was over the plot No. 16. It is the same position that was taken by Kimaru J, when dealing with the application by the plaintiffs in Succession Case No. 1888 of 2002. Given this position, I cannot therefore say that there has been previous litigation over the parcel No. 60 which is the parent title to the subdivisions in issue in this case.

21. But even assuming that I am wrong on this, and if I am to assume that the litigation was over the parcel No. 60, I cannot hold that this suit is res judicata. The case No. 1855 was not a case for adverse possession. Neither did it consider any claim for adverse possession by the plaintiffs herein, who have filed this suit, on their own behalf, they, not claiming the land for the benefit of the estate of their deceased father. Their claim is independent, and they base their claim on the strength of their possession of the suit property, which has not been denied, since the year 1988. Neither can it be said that the proceedings in Succession Cause No. 1888 of 2002 were a claim for adverse possession. They were not. The claim therein was that part of the land parcel No. 60 does not form the estate of the father of the defendants, because of the decree in Nairobi HCCC No. 1885 of 1983. The issue of adverse possession was never canvassed in the earlier proceedings.

22. On my above reasoning, I am unable to state that this suit is res judicata. The objection that this case is res judicata is therefore defeated.

23. I will now go to the substance of the suit. This is a case for adverse possession. It is trite law that for one to succeed in a claim for adverse possession, he must demonstrate that he has been in quiet and uninterrupted possession of the claimed land for a period in excess of 12 years. Such possession must be possession which is without force, without secrecy and without permission. This is captured in the latin maxim *nec vi, nec clam, nec precario*.

24. The first thing for me to determine is whether the plaintiffs have been in quiet uninterrupted

possession for a period of at least 12 years. The case of the plaintiffs is that they have been in possession since the year 1988. This is actually not denied by the defendants. It was however stated in the submissions of Mr. Kigotho, that the plaintiffs were in possession because of a stay/status quo order issued in the Succession matter. I have no proof of such order, and I have no proof that the possession of the plaintiffs was ever interrupted at any point in time. The facts can only point one to the conclusion that the possession was quiet and uninterrupted. The plaintiffs farmed the land and built their houses on it. They raised their families on this land. Njoki buried her husband, and the other plaintiffs buried their father, in the said land. This was in 2009. There is nothing to show that the defendants attempted to stop this burial. Joseph Kimari Mucheru, buried his son in the land in the year 2013. Again, there is no evidence of any attempt to stop the burial on the land. There is nothing to show that the father of the defendants, nor even the defendants themselves, attempted to dispossess the plaintiffs from the land that they claim.

25. It was argued by the defendants that they have only held their titles since the year 2004, and therefore, the claim for adverse possession, having been filed in the year 2014 is premature, as 12 years had not lapsed since they took their titles. There is no substance in this argument, which was considered and dismissed, in the case of *Githu v Ndeete (1984) KLR 776*, wherein it was held that a change in proprietorship does not affect the running of time. It therefore does not matter that the land parcel No. 60 was subdivided, or that the defendants obtained their titles in the year 2004, or that the parcel number changed description. That subdivision, change of description, and the change in proprietorship, did not constitute any interruption on the possession of the land by the plaintiffs.

26. It is therefore apparent to me that the possession of the land by the plaintiffs has been in excess of a period of 12 years. Such possession was quiet and uninterrupted. The possession was open for all to see, and neither was it forceful. It was possession that was not in secret and it was exclusive in nature. Neither was it with the permission of the defendants. It was in fact clearly adverse to the title of the defendants and/or their predecessors.

27. The defendants in their replying affidavit stated that the plaintiffs had agreed to move out of the land, and their continued stay on the land was therefore with their permission. This was of course refuted by the plaintiffs. The basis for this contention, raised by the defendants, is a document dated 8 May 2014. It is from the Office of the Chief, Sorget Location. It is titled "*Agreement between Ashford's family and Mucheru's family (Elijah Njoroje Mucheru & Samwel Mucheru Muchiri)*". In brief, it states that the family of Samwel Mucheru have pleaded with the family of Ashford Malaria to have them occupy the land up to 31 December 2014. I have serious problems with this document. First, it does not state what land is in issue. Secondly, I cannot say that the two signatories, Elijah and Samwel, represented all the claimants herein. But most importantly, the plaintiffs in their further affidavit, stated that they were threatened by the Chief, which allegation, has not been controverted by the defendants. That document is no authority to state that the occupation of the land was with the permission of the defendants.

28. From the foregoing, I am convinced that the plaintiffs' possession of the properties that they claim, was possession of such a nature as to entitle them to be registered as proprietors of the suit properties by way of adverse possession. In short, the plaintiffs succeed in their suit. I now make the following final orders.

(1) *That is hereby ordered and decreed, that Joseph Kimari Mucheru, the plaintiff in the suit Nakuru ELC No. 131 of 2014, is entitled, by way of adverse possession, to the land parcel Londiani/Londiani Block 3 (Kamuingi) / 236.*

(2) *It is hereby ordered and decreed, that Beth Wangari Njuguna, the plaintiff in the suit Nakuru ELC No. 132 of 2014, is entitled, by way of adverse possession, to the land parcel Kericho/Londiani Block 3 (Kamuingi) / 240.*

(3) *It is hereby ordered and decreed, that Esther Njoki Mucheru, the plaintiff in the suit Nakuru ELC No. 133 of 2014, is entitled, by way of adverse possession, to the land parcel Kericho/Londiani Block 3 (Kamuingi) / 237.*

(4) *It is hereby ordered and decreed, that Elijah Njoroge Mucheru, the plaintiff in the suit Nakuru ELC No. 134 of 2014, is entitled, by way of adverse possession, to the land parcel Kericho/Londiani Block 3 (Kamuingi) / 239.*

(5) *The respective defendants are hereby ordered to execute all requisite documents to transfer the said properties to the plaintiffs, within the next 30 days, and if they fail to do so, the Deputy Registrar of this court, is hereby directed to execute the same and have the subject properties transferred to the successful plaintiffs.*

(6) *The counterclaim of the defendants is hereby dismissed.*

(7) *The plaintiffs shall have the costs of their respective suits together with the costs of the counterclaim.*

Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 24th day of September 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Ms.Nancy Njoroge for plaintiff

Mr. Mwangi Kigotho for defendants

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU