



Thumbi & another (Suing as the Personal Representatives of the Estate of the Late Mugo Thumbi) & 8 others v Gicheru & 4 others (Environment & Land Case E144 of 2021) [2023] KEELC 316 (KLR) (16 January 2023) (Judgment)

Neutral citation: [2023] KEELC 316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E144 OF 2021
BM EBOSO, J
JANUARY 16, 2023**

BETWEEN

PETER MUTHONDU THUMBI & ESTHER NJOKI WAINAINA (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE MUGO THUMBI) 1ST PLAINTIFF
PETER MUTHONDU THUMBI 2ND PLAINTIFF
ESTHER NJOKI WAINAINA 3RD PLAINTIFF
DAVID MUKUNDI THUMBI 4TH PLAINTIFF
STEPHEN MUGO THUMBI 5TH PLAINTIFF
HENRY NDEGWA THUMBI 6TH PLAINTIFF
KEZIAH WAMBUI THUMBI 7TH PLAINTIFF
ELIZABETH WANGUI THUMBI 8TH PLAINTIFF
DANCAN NJOGU KAMAU 9TH PLAINTIFF

AND

JAMES MBATIA GICHERU 1ST DEFENDANT
MOSES NAROK 2ND DEFENDANT
JOHN NJOROGE MAHINDA 3RD DEFENDANT
SAMMY MUKINYO KASIMIRU 4TH DEFENDANT
LAND REGISTRAR, KIAMBU 5TH DEFENDANT



JUDGMENT

1. The plaintiffs initiated this suit through a plaint dated December 7, 2021. Their case is that Peter Muthondu Thumbi and Esther Njoki Wainaina [the 1st plaintiff] are the joint legal representatives of the estate of the late Mugo Thumbi [the deceased] who was at all material times the lawful allottee of Land Parcel Number Dagoretti/Settlement Scheme/21, previously designated as Plot No 17 Dagoretti Scheme, measuring approximately 1.4 hectares. The deceased made all the requisite payments towards acquisition of the suit property between 1966 and 1980. The deceased together with the ten plaintiffs have at all material times been in possession of the suit property. The deceased died on May 3, 2005 [sic] and his remains were interred on the suit property.
2. The plaintiffs contend that a search conducted on or around April 20, 2021 revealed that the 1st – 4th defendants were registered as proprietors of the suit property. They contend that the said registration was and is fraudulent. They add that the 2nd – 9th plaintiffs are beneficiaries of the estate of the late Mugo Thumbi and they, together with their children, live on the suit property and cultivate it.
3. The plaintiffs seek, inter alia, a declaration that the title issued in the names of the defendants was processed and obtained fraudulently and a declaration that the deceased is the lawful owner of the suit property.
4. As an alternative plea, the 2nd – 9th plaintiffs contend that they have been in continuous actual, physical, open and uninterrupted occupation of the suit property for over 12 years, hence they have acquired title to the suit property under the doctrine of adverse possession. They seek, among other reliefs, an order directing the Land Registrar to register them as proprietors of the suit property.
5. On January 27, 2022, the plaintiffs obtained leave to effect service of summonses to enter appearance through a notice in the newspaper. They subsequently filed an affidavit sworn by Nancy Waruguru Mwangi, indicating that the defendants were served through a notice published in the Daily Nation Newspaper on March 28, 2022. The 1st – 4th defendants did not enter appearance.
6. On or about October 14, 2022, the 5th defendant filed a memorandum of appearance dated October 3, 2022 and a statement of defence of even date. The 5th defendant contended that he was a stranger to the plaintiffs' contention that the deceased was the lawful allottee of the suit property and to the contention that the 1st – 4th defendants had obtained a title to the suit property fraudulently. He denied the particulars of fraud as set out in paragraph 25 of the plaint. He admitted that the suit property was no longer a government forest. He contended that he did not have knowledge of the 2nd – 9th plaintiffs' adverse possession of the suit property and crystallization of their title as adverse possessors. He denied being issued with a demand notice prior to the institution of this suit. He admitted this court's jurisdiction over this dispute. He urged the court to dismiss the plaintiffs' suit.
7. At the hearing, the plaintiffs called one witness, Esther Njoki Wainaina (one of the two persons who are designated as the 1st plaintiff in this suit). She adopted their witness statement dated December 7, 2021, in which she restated the plaintiffs' case as summarized above. She produced the 14 documents contained in the plaintiffs' bundle of documents dated December 7, 2021.
8. The plaintiffs filed written submissions dated November 22, 2022 through M/s S M Muhia & Co Advocates. None of the defendants filed written submissions.
9. I have considered the plaintiffs' pleadings, evidence and submissions. Further, I have considered the 5th defendant's pleadings, the relevant law and the relevant jurisprudential principles. The claim against



the 1st – 4th defendants is undefended. Secondly, although the 5th defendant filed a statement of defence, he did not lead evidence in support of the defence. Similarly, he did not challenge the plaintiffs' evidence through cross-examination or submissions. In the circumstances, three key issues fall for determination in this suit. The first issue is whether all or any of the plaintiffs have/has proved their primary claim or the alternative claim against all or any of the defendants. The second issue is whether all or any of the plaintiffs are/is entitled to all or any of the reliefs sought in the plaint. The third issue relates to costs of the suit. I will dispose the three issues sequentially in the above order.

10. The first issue is whether all or any of the plaintiffs have/has proved their claim against all or any of the defendants. Peter Muthondu Thumbi and Esther Njoki Wainaina are jointly designated as 1st plaintiff. They exhibited a joint grant of letters of administration *ad litem* relating to the estate of the one Thumbi Mugo Thumbi. They, however, brought the primary claim on behalf of the estate of Mugo Thumbi [not Thumbi Mugo Thumbi]. Other than bringing the primary claim on behalf of the estate of Mugo Thumbi, they are also named as 2nd and 3rd plaintiffs respectively. Together with the 4th – 9th plaintiffs, they brought the alternative plea claiming title to the suit property under the doctrine of adverse possession.
11. It does emerge from the letter from the Assistant Chief of Gitiba Sub Location dated February 21, 2002; the letter from the area chief dated February 22, 2002; the letter dated July 17, 2002 from the Area District Officer and the list of allottees that the suit property was allocated to Mugo Thumbi [also known as Mugo wa Thumbi] in the 1960s. It does also emerge from the letters dated February 21, 2002 and February 22, 2002 that as at 2002, Mugo Thumbi had died.
12. Whereas the 1st plaintiff brought this suit in their joint capacity as personal representatives of the late Mugo Thumbi, they produced and relied on a grant of letters of administration *ad Litem* issued on August 7, 2022 relating to the estate of Thumbi Mugo Thumbi, who died on May 3, 2005. They also produced and relied on a Death Certificate relating to Thumbi Mugo Thumbi showing that the said Thumbi Mugo Thumbi died on May 3, 2005. They did not produce any evidence of a grant relating to their appointment as administrators of the estate of Mugo Thumbi, the alleged allottee and beneficial proprietor of the suit property who had already died by the year 2002.
13. In the absence of evidence of the 1st plaintiff's legal status as personal representatives of the late Mugo Thumbi, they cannot sustain a suit on behalf of the estate of the late Mugo Thumbi. They cannot therefore be said to have proved the primary claim. The result is that the primary claim by the 1st plaintiff is struck out without venturing into its merits. The duly appointed personal representatives of the late Mugo Thumbi will be at liberty to ventilate any claim they may have over the suit property.
14. On the alternative claim, it does emerge from paragraphs 15, 16, 17 and 27 of the plaint that the 2nd-9th plaintiffs acknowledge that they are beneficiaries of the estate of the late Mugo Thumbi who is the beneficial owner of the suit property. Their claim of acquisition of title to the suit property under the doctrine of adverse possession cannot be determined conclusively without a conclusive pronouncement on the interest of the estate of the late Mugo Thumbi. Their claim for title under the doctrine of adverse possession would have been determined conclusively if the duly appointed representatives of the estate of the late Mugo Thumbi were made parties to the suit. I take this view because the personal representatives of the late Mugo Thumbi represent all the beneficiaries to the estate and they ought to be heard on the claim by the 2nd – 9th plaintiffs. Consequently, in the absence of the duly appointed personal representatives of the estate of Mugo Thumbi, the alternative claim of adverse possession by the 2nd – 9th plaintiffs similarly stands to be struck out.
15. In view of the court's finding on the primary claim and the alternative plea, it follows that the reliefs sought are not available.



16. The result is that the plaintiffs' primary claim and the alternative claim for title under the doctrine of adverse possession are struck out. The estate of the late Mugo Thumbi [also known as Mugo wa Thumbi] shall be at liberty to initiate appropriate proceedings to ventilate any claim it may have over the impugned title. Because the 1st – 4th defendants did not enter appearance and the 5th defendant did not participate in the trial, parties shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF JANUARY, 2023.

B M EBOSO

JUDGE

Mr Mwangi for the plaintiffs

Court Assistant: Ms Osodo

