



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 682 OF 2017

JANE MUCHUNU ADAMS

(Suing by herself and as the

Administrator of the Estate of

ROBERT MUCHUNU MUMBURA).....PLAINTIFF

=VERSUS=

JOYCE RUGURU CHEGE.....1ST DEFENDANT

FLORENCE WAMAITHA CHEGE.....2ND DEFENDANT

LEAH WAMBUI KURIA.....3RD DEFENDANT

ROBERT MUCHUNU KURIA,,,,,,,,,,,,,,,,,,,,,,,,,,,,,4TH DEFENDANT

LAND REGISTRAR KIAMBU.....5TH DEFENDANT

JUDGMENT

1. The plaintiff, **Jane Muchunu Adams**, initiated this suit through a plaint dated 26/7/2017. She sought the following reliefs against the defendants:

a) A declaration that the restrictions and cautions registered against title numbers Kiambaa/ Kihara/ 1023, 4727, 4728, 4729, 4730, 4731, 4732, 4733 and 4734 are without lawful basis.

b) An order do issue compelling the Land Registrar, Kiambu, to forthwith remove the restrictions and cautions registered against title numbers Kiambaa/ Kihara/ 1023, 4727, 4728, 4729, 4730, 4731, 4732, 4733 and 4734.

c) An order of injunction do issue permanently restraining the 1st, 2nd, 3rd and 4th defendants by themselves, their servants, agents or otherwise whomsoever from entering into, trespassing upon, cultivating on or in any other manner interfering with plaintiff's charge over or possession of the parcels of land comprised in title numbers Kiambaa/ Kihara/ 1023, 4727, 4728, 4729, 4730, 4731, 4732, 4733 and 4734.

2. The 1st and 2nd defendants filed a joint statement of defence and joint counterclaim. Through the counterclaim, they sought the

following reliefs against the plaintiff:

i. A declaration that Joyce Ruguru Chege and Florence Wamaita Chege are entitled to title number Kiambaa/ Kihara/ 1023, as beneficiaries.

ii. In the alternative, a declaration that Joyce Ruguru Chege and Florence Wamaita Chege are entitled to title numbers Kiambaa/ Kihara/ 1023 by way of adverse possession and that title numbers Kiambaa/ Kihara/ 1023 no longer belongs to Jane Muchunu Adams or any other beneficiaries claiming thereof.

iii. A declaration that the title deed issued to Jane Muchunu Adams in respect of title numbers Kiambaa/ Kihara/ 1023, be cancelled and be surrendered to the Land Registrar, Kiambu, and a new title deed be issued in favour of Joyce Ruguru Chege and Florence Wamaita Chege as the registered owners.

iv. An order that the Registrar of the court executes the relevant documents to effect the transfer should the plaintiff fail to do so.

v. An order that the District Registrar of Lands do effect the necessary registration.

vi. Costs of the suit and interest be borne by the plaintiff.

3. The 3rd and 4th defendants filed a joint statement of defence dated 8/11/2017 in which they stated that the late Robert Muchunu owned parcel numbers Kiambaa/Kihara/878, 1023 and T413. They added that whereas the late Robert Muchunu left a will, the will only covered parcel numbers Kiambaa/Kihara/T413. They further contended that transmission of parcel numbers 878 and 1023 to the plaintiff as executrix of the deceased's will was illegal because the two properties were not part of the deceased's estate bequeathed to the plaintiff. It was their case that the plaintiff lacked authority to subdivide parcel number 878 into 8 parcels and to purport to distribute them to certain members of the deceased's family. They added that distribution of the said parcels violated the order of the High Court issued in August 2010 maintaining the *status quo*. They termed the plaintiff's action relating to the two parcels as fraudulent. They urged the court to strike out or dismiss the plaintiff's suit. They did not, however, lead evidence. They similarly did not file written submissions.

Plaintiff's Case

4. The plaintiff's case is contained in the plaint dated 26/7/2017; the reply to the 1st and 2nd defendants' defence and defence to counterclaim dated 6/11/2017; the reply to the 3rd and 4th defendants' defence dated 29/11/2017; the witness statement dated 26/7/2017; the further witness statement dated 4/3/2020; the oral evidence tendered in court on 26/10/2020; and the written submissions dated 25/10/2021, filed through the firm of *Ndungu Githuka & Co Advocates*.

5. Her case is that she brought this suit for herself and also in her capacity as administrator (sic) of the estate of the **late Robert Muchunu** alias **Robert Muchunu Mumbura** who died on **2/3/2005**. She is daughter to the late Robert Muchunu Mumbura [the deceased]. At the time of his death, the deceased was the registered proprietor of Land Parcel numbers **Kiambaa/Kihara/878** and **1023**. The deceased left a will in which she was appointed as executrix. Pursuant to the said will, she obtained a grant of probate in **Nairobi High Court Succession Cause No 2974 of 2005**. The grant of probate was confirmed and the estate was distributed. Pursuant to the certificate of confirmation of probate, she was registered as proprietor of parcel numbers **Kiambaa/ Kihara/ 878** and **1023**. She subsequently caused parcel number **Kiambaa/Kihara/878** [hereinafter referred to as parcel number 878] to be subdivided into eight parcels; namely, **Kiambaa/Kihara 4727, 4728, 4729, 4730, 4731, 4732, 4733** and **4734**.

6. The plaintiff further contends that on 26/10/2011, the 1st and 2nd defendants registered a caution against parcel number **Kiambaa/ Kihara/ 1023** [hereinafter referred to as parcel number 1023] claiming an interest therein as licensees. On 28/6/2012, another caution was registered against parcel numbers 1023 by the 3rd and 4th defendants claiming an interest as beneficiaries. On 28/6/2012, the 3rd and 4th defendants also lodged cautions against all the eight subdivisions parceled out of parcel number 878, namely Kiambaa/Kihara 4727 – 4734, claiming interest as beneficiaries. In 2015, the defendants approached the Directorate of Criminal Investigations and repeated their fallacious claims, thereby prompting the Directorate of Criminal Investigations [the CID] to place a further caution on parcel number 1023.

7. The plaintiff contends that in 1994, the deceased [Robert Muchunu alias Robert Muchunu Mumbura] instituted **Nairobi High Court Civil Case No 1654 of 1994** in which, in May 1995, he obtained a judgment and decree for orders of adverse possession relating to **parcel number 1023** against **Peter Kamau Chege** – the then registered proprietor of the land. Pursuant to the said adverse possession orders, the deceased was registered as proprietor of parcel number 1023 in 2004. She adds that the said judgment and decree of the High Court have never been overturned. The plaintiff contends that the 1st and 2nd defendants are sisters of the late Peter Kamau Chege.

8. The plaintiff adds that on 30/7/2010, the 3rd and 4th defendants filed summons in **Nairobi High Court Succession Cause No 2974 of 2005**, seeking revocation of the grant issued to her in respect of the estate of her late father, on the ground that William Kuria Muchunu had a beneficial interest in the estate of her late father, the late Robert Muchunu. The summons was heard by the High Court and the High Court [Achode J] dismissed the application for lack of merit. An attempt by the 3rd and 4th defendants to file an appeal out of time were found to be without merit.

9. It is the plaintiff's case that in a bid to intimidate her, the 1st, 2nd, 3rd, and 4th defendants have from time to time entered upon the suit properties and removed beacons therefrom and purported to lease parts of the suit properties for cultivation and generally cause nuisance to her peaceful execution of her duties. She adds that the 5th defendant has continued to entertain the cautions without requiring proof of any interest and registered them without notifying her. She adds that despite requesting the 5th defendant to vacate the cautions, he has failed to do so.

10. In answer to the counterclaim by the 1st and 2nd defendants, the plaintiff reiterated her case as outlined above and added that the late Robert Muchunu was in adverse possession of parcel number 1023 from 1968, hence the late Peter Kamau Chege's title was extinguished in 1980. She adds that the 1st and 2nd defendants were all along aware of the suit between the late Robert Muchunu and the late Peter Kamau Chege, contending that their acts of trespass are intended to frustrate the full realization of the judgment of the High Court. She further contends that her late father was in possession of the suit properties up to the time of his death and that it was only in 2011 that the 1st and 2nd defendants lodged a caution against parcel number 1023 and started sending people to enter the land. She further contends that the 1st and 2nd defendants are not administrators of the estate of the late Peter Kamau Chege and have no capacity to challenge the validity of the late Robert Muchunu's title to parcel number 1023.

11. The plaintiff further contends that the 1st and 2nd defendants have not been in possession of any defined portion of parcel number 1023 nor the whole of it for a period of 14 years as alleged. She urges the court to dismiss the counterclaim.

Case of the 1st and 2nd defendants

12. The case of the 1st and 2nd defendants is contained in their defence and counterclaim dated 13/10/2017; the witness statement by Florence Wamaitha Chege dated 23/7/2018; the witness statement by David Kamau Karari dated 23/7/2018; the oral evidence of the two witnesses; and the written submissions dated 12/11/2021 filed through the firm of *E. Muigai & Company Advocates*.

13. In summary, their case is that the plaintiff is not entitled to be registered as proprietor of parcel number 1023 because title to the said parcel was wrongfully and illegally conveyed to her late father, Robert Muchunu Mumbura. They contend that the registration of the plaintiff as proprietor was invalid. It is their case that they placed a caution on parcel number 1023 to protect their interest as beneficiaries of the said property since the property was held in trust for them by their late brother, **Peter Kamau Chege**. They contend that they later became aware that the plaintiff's father, the late Robert Muchunu Mumbura, had sued their late brother, Peter Kamau Chege and had obtained title to the said land. It is their case that they were not privy to the said suit. They contend that they are entitled to parcel number 1023 as beneficiaries since their late brother held it in trust for them.

14. They further contend that they have been cultivating parcel number 1023 since 2003 without secrecy, with the full knowledge of the plaintiff and without any interruption, hence they have acquired title to the land by adverse possession.

15. Further, it is their case that the plaintiff sued them in Nairobi **HCCC No. 164 of 2005** over the suit property, hence the suit herein is *res judicata*. They add that lifting of the caution would occasion them prejudice.

Plaintiff's Evidence

16. The plaintiff testified as PW1. She adopted her witness statements dated 26/7/2017 and 4/3/2020 as part of her sworn evidence-in-chief. She produced the 20 documents contained in her bundle dated 26/7/2017 and the 10 documents contained in her bundle dated 4/3/2020. Her evidence in the two witness statements was as per the summary of her case as outlined above. She added that upon the death of her late father, she was substituted as the plaintiff in Nairobi HCCC No 164 of 2005 but the case did not proceed to hearing because the 1st and 2nd defendants stopped trespassing on parcel number 1023. It was her evidence that whenever she fences parcel number 1023, the fence is pulled down at night. Her crops are normally cut down when ready for harvesting. When she was undertaking subdivision of her late father's estate, she discovered cautions had been lodged on various parcels. It was her evidence that during the hearing before the Land Registrar, the 1st and 2nd defendants lied to the Land Registrar that they resided on parcel number 1023 yet they had never resided on the land. Neither the 1st defendant nor the 2nd defendant were in occupation of parcel number 1023 and there had never been any peaceful, quiet, continuous, open nor exclusive possession of parcel number 1023 by the 1st and 2nd defendants.

17. In cross examination by counsel for the 1st and 2nd defendants she stated that the 1st and 2nd defendants stopped trespassing on the land when they were reported to the District Officer (D.O) in 2010. She added that the 1st and 2nd defendants had been trespassing on the land "on and off". During cross examination by counsel for the 3rd and 4th defendants, she stated that most of the cautions had since been removed.

18. In re-examination, she stated that there were no developed structures on parcel number 1023 and added that the structures depicted in the photographs exhibited by the 1st and 2nd defendants were on the road reserve and not on parcel number 1023. She added that when her late father filed Nairobi HCCC No 164 of 2005, the impugned cautions had not been lodged.

Evidence of the 1st and 2nd Defendants

19. Florence Wamaitha Chege testified as DW1. She adopted her witness statement dated 23/7/2018 as part of her sworn evidence-in-chief. She produced the 18 documents in their bundle dated 18/6/2018. Her evidence reiterated their case as summarized above. She stated that they had been cultivating parcel number 1023 and planting crops on it. She added that they had built kiosks on the land. She further stated that the kiosks were "on the suit land but on the road."

20. In cross-examination by counsel for the plaintiff, she stated that her late brother, Peter Kamau Chege, was sued by Robert Muchunu over parcel number 1023. She never used to attend the hearing of the said case. She did not know the outcome of the case. She could not recall about the case which Robert Muchunu filed against them in the High Court. They had in the past attended dispute resolution meetings with the plaintiff relating to parcel number 1023 at the D.O office and at the Chief Office. The plaintiff reported them to the Kiharo Police station when they cut down trees on parcel number 1023. She added that she did not live on the land; she lived at Gachie. She had kiosks on the land.

21. David Kamau Karari testified as DW 2. He adopted his witness statement dated 23/7/2018. He stated that the 1st and 2nd defendants entered parcel number 1023 when their mother died. Their mother had told them not to let go the land since that was their only inheritance. In cross-examination by counsel for the plaintiff, he stated that the late Robert Muchunu sued the late Peter Chege in the High Court at Nairobi. He added that prior to her death, the mother of the 1st and 2nd defendants advised them to enter parcel number 1023. He was aware that the 1st and 2nd defendants had been arraigned in a criminal court for trespass in 2003. He was not aware the late Robert Muchunu sued the 1st and 2nd defendants over the land. He did not know the D.O directed the 1st and 2nd defendants to stop interfering with parcel number 1023. He was aware the late Robert Muchunu and the 1st and 2nd defendants had a land dispute at Kiambu Land Registry. None of the relatives of the 1st and 2nd defendants had been buried on the land.

22. In re-examination, he stated that he was aware Peter Kamau Chege was the 1st registered proprietor of parcel number 1023. He added that the land previously belonged to Peter Kamau Chege's father. He added that the 1st and 2nd defendants were aged about 70 years.

Plaintiff's Submissions

23. The plaintiff filed written submissions dated 25/10/2021, through the firm of *Ndungu Githuka & Company Advocates*. On the caution lodged on 26/10/2011 against parcel number 1023 by the 1st and 2nd defendants, counsel referred the court to the definition of "licence" under the repealed Registered Land Act and submitted that whereas the 1st and 2nd defendants had lodged the caveat to protect their interest as licencees, there was no evidence of any licence or permission granted to the 1st and 2nd defendants to use

the land. Counsel contended that the 5th defendant acted recklessly in registering the caution.

24. On the cautions registered by the 3rd and 4th defendants, counsel submitted that the term “beneficiaries” was amorphous and did not reflect any interest recognizable under **Section 28** of the Land Registration Act. Counsel added that the succession court had already pronounced itself on the claim by the 3rd and 4th defendants and had found them to be unmerited. Counsel faulted the Land Registrar for violating the law relating to cautions and restrictions.

25. On the counterclaim by the 1st and 2nd defendant, counsel for the plaintiffs submitted that when the late Peter Kamau Chege was registered as proprietor of the suit properties in 1975, the 1st defendant was 31 years old and the 2nd defendant was 22 years old but their alleged interest in parcel number 1023 was never recognized or registered. Counsel added that when the late Robert Muchunu filed Nairobi HCCC No 1654 of 1994 against Peter Kamau Chege, the issue of trust was raised and the High Court pronounced itself on it by rejecting it, hence the issue was *res judicata*. Counsel added that in any event, the claim by the 1st and 2nd defendants was based on trust and was statute-barred.

26. On the claim by the 1st and 2nd defendants for the title under the doctrine of adverse possession, counsel for the plaintiff cited the Court of Appeal decision in *Mtana Lewa v Kahindi Ngala Mwangandi [2015]eKLR* and submitted that the essential elements of adverse possession were missing. Counsel argued that having been registered as proprietor in 2004, the late Robert Muchunu instituted a suit in the High Court on 15/2/2005 against the 1st and 2nd defendants, seeking to injunct them against trespassing on parcel number 1023. Counsel added that the caution lodged by the 1st and 2nd defendants estopped them from claiming title as adverse possessors because they had claimed to be licencees. Counsel argued that for purposes of adverse possession, time could only have started running on 25/10/2004 when Robert Muchunu was registered as proprietor. Counsel added that time stopped running on 15/2/2005 when Robert Muchunu instituted Nairobi HCCC No 164 of 2005 and did not run until 8/2/2012 when the suit was dismissed. It was the position of counsel that the threshold of 12 years had not been satisfied.

27. Finally, counsel for the plaintiff submitted that the 1st and 2nd defendants having failed to prove beneficial ownership of the suit property nor acquisition of the title through adverse possession, all their other prayers in the counterclaim were without merit. Counsel urged the court to grant the plaintiff’s claim and dismiss the counterclaim by the 1st and 2nd defendants.

Submissions by the 1st and 2nd Defendants

28. The 1st and 2nd defendants filed written submissions dated 12/11/2021 through the firm of *E. Muigai & Company Advocates*. Counsel submitted that the plaintiff having filed Nairobi HCCC No 164 of 2005 which was dismissed for want of prosecution on 8/2/2012, she was, under the doctrine of *res judicata*, barred from instituting a fresh suit premised on the same cause of action. Counsel added that this suit is an abuse of the process of the court because it is a fresh claim over the same subject matter.

29. Counsel for the 1st and 2nd defendants further added that the plaintiff had failed to prove her case against the 1st and 2nd defendants, contending that the 1st and 2nd defendants were legally entitled to lodge a caution against parcel number 1023 since they had been in occupation of the land since 2003. Counsel added that the plaintiff had failed to discharge her burden of proof in relation to the plea for injunctive orders.

30. On the counterclaim by the 1st and 2nd defendants, counsel submitted that the 1st and 2nd defendants had proved that their late brother, Peter Kamau Chege held parcel number 1023 in trust for them, hence they were entitled to it. Counsel argued that it was on the basis of their beneficial interest in parcel number 1023 that the 1st and 2nd defendants entered the land in 2003. Citing, among others, the decision of the Supreme Court of Kenya in *Isack M’Inanga Kebia v Isaaya theuri M’Lintari & another [2018]eKLR*, counsel urged the court to find that the land was held in trust for the 1st and 2nd defendants.

31. On adverse possession, counsel submitted that the 1st and 2nd defendants had established all the essential elements of adverse possession, contending that they entered the suit land in 2003 and had remained there since then.

32. The 3rd and 4th defendants did not file written submissions.

Analysis and Determination

33. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a common statement of issues. From the pleadings, evidence and submissions of the parties, the following are, in the view of the court, the six key issues that fall for determination in the primary suit by the plaintiff and in the counterclaim by the 1st and 2nd defendants: (i) Whether the suit by the plaintiff and the counterclaim by the 1st and 2nd defendants are *res judicata*; (ii) Whether the 1st and 2nd defendants are beneficial owners of parcel number Kiambaa/Kihara/1023; (iii) Whether the 1st and 2nd defendants have acquired title to parcel number Kiambaa/Kihara/1023 through adverse possession; (iv) Whether the caution and/or restriction registered against parcel number Kiambaa/Kihara/1023 at the behest of the 1st and 2nd defendants are lawful; (v) Whether the cautions and/or restrictions registered on parcel numbers Kiambaa/Kihara/1023 and 4727 to 4734 at the behest of the 3rd and 4th defendants are lawful; and (vi) What orders should be made in relation to costs of the primary suit and the counterclaim. I will make brief sequential pronouncements on the seven issues. I will for ease of reference refer to the land by their parcel numbers only.

34. The first issue is whether the suit by the plaintiff and the counterclaim by the 1st and 2nd defendants are statute-barred. There is common ground that the late Robert Muchunu Mumbura sued the 1st and 2nd defendants in **Nairobi HCCC No 164 of 2005** seeking an injunctive order restraining them against entering, remaining on, continuing in occupation, cultivating or using parcel number 1023. There is also common ground that the suit was dismissed on 8/2/2012 for want of prosecution. At the time of dismissal, the plaintiff, Jane Muchunu, had been substituted in place of Robert Muchunu Mumbura who had passed on. The 1st and 2nd defendants rely on this fact and cite the Court of Appeal decision in ***Cooperative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR***. They contend that the plaintiff is barred by the doctrine of *res judicata* against bringing a fresh suit based on the same cause of action. On her part, the plaintiff contends that the trespass which occasioned the dismissed suit had ceased at the time the suit was dismissed and that the cautions and restrictions which are at the centre of the present dispute were not in place when the dismissed suit was initiated.

35. The doctrine of *res judicata* is expressly provided for in Section 7 of the Civil Procedure Act. The Court of Appeal summarized the rationale of the doctrine in the case of ***Cooperative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services [2019] eKLR***, as follows:

"14. Undeniably the doctrine of res judicata is founded on public policy, which is aimed at achieving two objectives, namely, that there must be a finality to litigation and that a party should not be vexed twice on account of the same litigation."

36. On the question as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit, the Court of Appeal rendered itself on the issue in the above case as follows:

"17. As stated hereinbefore, this court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata."

37. The above pronouncement by the Court of Appeal is indeed the law. It is, however, noted from the pleadings that a substantial portion of the reliefs sought in this suit relate to different causes of action which did not subsist at the time the dismissed suit was initiated or dismissed. They relate to cautions and restrictions which were registered against registers relating to the suit properties long after the previous suit had been initiated or dismissed. They relate to cautions and restrictions which were not the subject of litigation in the dismissed suit. Further, some of the causes of action involve parties who were not privy to Nairobi HCCC No 164 of 2005.

38. Consequently, my finding on the first issue in relation to the primary suit by the plaintiff is that the cause of action relating to prayer 3 which is a plea for injunctive relief is *res judicata* only as against the 1st and 2nd defendants. The cause of action relating to prayers 1 and 2 which relate to the legality of the cautions and restrictions registered on the land registers relating to the suit properties are not *res judicata*.

39. The plaintiff similarly contended that the claim by the 1st and 2nd defendants that the late Peter Kamau Chege held parcel number 1023 in trust for them was *res judicata* because the late Peter Kamau Chege had raised it in Nairobi HCCC No. 1654 of 1994 and the High Court [Hayanga J] had pronounced himself on it. The 1st and 2nd defendants were not parties to the suit in the High Court. The doctrine of *res judicata* cannot, in the circumstances, be invoked against them.

40. In summary, my finding on the first issue is that only the cause of action relating to prayer 3 of the primary suit is *res judicata* as against the 1st and 2nd defendants. It is not *res judicata* as against the 3rd and 4th defendants. The causes of action relating to prayers 1 and 2 are not *res judicata*. Further, the counter claim by the 1st and 2nd defendants is not *res judicata*.

41. The second issue is whether the 1st and 2nd defendants are beneficial owners of parcel number Kiambaa/Kihara/1023. Parcel number 1023 was registered in the name of the late Peter Kamau Chege in 1975. At that time, the 1st and 2nd defendants were adults. Nothing was noted in the land register to suggest that the late Peter Kamau Chege held the land as a trustee. The 1st and 2nd defendants did nothing to cause the land to be conveyed to them between 1975 and 1994. Further, they did nothing between 1994 and 2004. They were adults in 1975. They did nothing about the litigation that culminated in the registration of Robert Muchunu Mumbura as proprietor despite being aware of the proceedings. DW2 testified that the 1st and 2nd defendants were prompted by their late mother to move onto parcel number 1023 on the ground that the late Muchunu had not paid purchase price for the land. The decree which vested the land in Robert Muchunu Mumbura has not been vacated. Further, **Sections 24** and **25** of the Land Registration Act protects the title of a registered proprietor of land.

42. Given the above circumstances, the court is not satisfied that the 1st and 2nd defendants have put forth a case to justify a finding to the effect that they are the beneficial owners of parcel number 1023. My finding on the second issue is that the 1st and 2nd defendants are not beneficial owners of parcel number Kiambaa/Kihara/1023.

43. The third issue is whether the 1st and 2nd defendants have acquired title to parcel number Kiambaa/Kihara/1023 through the doctrine adverse possession. The evidence placed before the court indicates that the late Robert Muchunu Mumbura was declared to have acquired title to parcel number 1023 under the doctrine of adverse possession through a High Court judgment rendered on 17/5/1995.

44. The 1st and 2nd defendants subsequently entered onto the land in 2003. This attracted criminal charges against them in the Magistrate's Court. Subsequently, the late Robert Muchunu was registered as proprietor pursuant to the decree of the High Court in 2004. In 2005, the late Robert Muchunu initiated **Nairobi HCCC No 164 of 2005** against the 1st and 2nd defendants, seeking to restrain them against trespassing on parcel number 1023. The litigation went on until February 2012 when the suit was dismissed. The present suit was filed on 15/9/2017. The counterclaim was filed on 16/10/2017. The reply to defence and defence to counter claim was filed on 16/11/2017. Has the threshold of 12 years necessary for crystallization of title under the doctrine of adverse possession been met" My answer to the above question is in the negative. Regardless of whether time is computed from 2003 [when the 1st and 2nd defendants entered the land] or 2004 [when the late Robert Muchunu was registered as proprietor], it is clear from the evidence presented to the court that there could only have been one or two years prior to the initiation of HCCC No 164 of 2005 by the late Robert Muchunu. During the period of subsistence of the case, time did not run for the purpose of adverse possession. Time could only have started running again in February 2012 when the litigation ended. From February 2012 to November 2017 when the counter claim was brought is a period of six years. The total comes to eight years if time is reckoned from the year 2003. It would be 7 years if time is reckoned from the year 2004. Consequently, the threshold of 12 years had not been met at the time the 1st and 2nd defendants brought their counterclaim. The counterclaim was resisted.

45. Secondly, the evidence presented to the court indicates that the 1st and 2nd defendants do not and have never lived parcel number 1023. There have been resistance by the late Muchunu together with his estate. There have been several dispute resolution sessions occasions by activities of the 1st and 2nd defendants on the land. Their activities on the land cannot, in the circumstances, be said to have been without resistance from the late Robert Muchunu and his estate.

46. The view I make out of the totality of the evidence presented to the court is that the essential statutory and common law elements of adverse possession have not been established in the counterclaim by the 1st and 2nd defendants. Consequently, my finding on the third issue is that the 1st and 2nd defendants have not acquired title to parcel number Kiamba/Kihara/1023 through adverse possession.

47. The fourth issue is whether the caution registered against parcel number Kiambaa/Kihara/1023 at the behest of the 1st and 2nd defendants is lawful. A caution is registered as a temporary measure intended to preserve the land pending the finalization of some exercise. A caution is never intended to be a permanent fixture on a land register. The same principle applies to a restriction. That, however, does not appear to be the position regarding the impugned caution.

48. The plaintiff contends that the impugned caution was lodged and registered without regard to the mandatory requirements of the

law. The Land Registrar did not tender evidence to justify the existence of the impugned caution. Further, it is noted that while procuring the caution, the 1st and 2nd defendants held themselves as having the interest of licensees in the suit property. The evidence presented to the court does not support that position. On that ground alone, it is undeniably clear that the caution was procured by the 1st and 2nd defendants through misrepresentation, hence it is illegal. They lied that they were licensees. Consequently, my finding on the fourth issue is that the caution registered on the land register relating to parcel number Kiambaa/Kihara/1023 at the behest of the 1st and 2nd defendants is not lawful.

49. The fifth issue is whether the cautions and restriction registered against the land registers relating to parcel numbers Kiambaa/Kihara/1023, 4727, 4728, 4729, 4730, 4731, 4732, 4733 and 4734 at the behest of the 3rd and 4th defendants are lawful. I have explained the principle governing cautions and restrictions. Neither the Land Registrar nor the 3rd and 4th defendants tendered evidence to justify the impugned caution and restrictions. The plaintiff made reference to the statutory framework on cautions and restrictions and tendered uncontroverted evidence to the effect that the cautions and restrictions were registered and have been maintained in contravention of the law. Indeed, evidence was tendered demonstrating that the 3rd and 4th defendants ventilated their claims in the succession court and their claims were found unmerited. Consequently, it is my finding that the cautions and restrictions registered on the land registers relating to parcel numbers Kiambaa/Kihara/1023 and 4727 to 4734 at the behest of the 3rd and 4th defendants are unlawful.

50. The 3rd and 4th defendants did not lead evidence to challenge the plaintiff's claim. I will, in the circumstances, allow the plea for an injunctive order against them.

51. On costs, the plaintiff did not pray for costs of the primary suit. I will, in the circumstances, not make any award on costs relating to the primary suit. The 1st and 2nd defendants prayed for costs of the suit and counterclaim. Their counterclaim did not succeed. Under **Section 27** of the Civil Procedure Act, they are liable to bear the plaintiffs costs of the counterclaim. Those are my findings on the issue of costs.

Disposal Orders

52. In the end, the suit by the plaintiff and the counterclaim by the 1st and 2nd defendants are disposed as follows:

a) The counterclaim by the 1st and 2nd defendants is dismissed for lack of merit.

b) It is hereby declared that the restrictions and cautions registered against title numbers Kiambaa/ Kihara/ 1023, 4727, 4728, 4729, 4730, 4731, 4732, 4733 and 4734 are without lawful basis.

c) An order is hereby issued compelling the Land Registrar, Kiambu, to forthwith remove the restrictions and cautions registered against title numbers Kiambaa/ Kihara/ 1023, 4727, 4728, 4729, 4730, 4731, 4732, 4733 and 4734.

d) Prayer (c) in the plaint is allowed against the 3rd and 4th defendants.

e) The 1st and 2nd defendants shall bear the plaintiff's costs of the counterclaim.

DATED AND SIGNED AT THIKA ON THIS 28TH DAY OF MARCH 2022

B M EBOSO

JUDGE

DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF MARCH 2022

J G KEMEI

JUDGE

In the presence of: -

Ms Muigai for the Defendants

Court Assistant: Phyllis Mwangi



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