



**Mugo v Kinyoe (Environment & Land Case 14 of 2019)
[2023] KEELC 16545 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16545 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 14 OF 2019
JO OLOLA, J
MARCH 28, 2023
(FORMERLY NYERI HCCC 252 OF 1982)**

BETWEEN

BONIFACE MURAGE MUGO APPLICANT

AND

LYDIA WAIRIMU KINYOE RESPONDENT

RULING

1. By the notice of motion dated June 28, 2022, Boniface Murage Mugo (the applicant) prays for orders listed as follows:
 1. That this honourable court first to declare that this case was fully heard and determined (and) only the decree issued on January 23, 1986 was not implemented and that the respondent herein and her entire family, servants and agents on this land are members of the defendant's family which was ordered by the court to vacate the land parcel No Kabaru/Block 1/Mureri/78 and if the decree was implemented at that time the Respondent was to be affected and vacate in accordance with the said decree;
 2. That this honourable court may be pleased to issue eviction order against the respondent, her family, servants, agents and anybody else under her authority from the land parcel No Kabaru/Block 1/Mureri/78 the eviction to be carried out by Hippo General Merchant of PO Box 2024, Nyeri with the assistance of the OCS Kiganjo Police Station;
 3. That the title of the above land in the name of defendant under his name Joseph King'ori Mwaniki be cancelled and the Land Registrar Nyeri be ordered to register the applicant's name Boniface Murage Mugo to hold (in) trust for himself and the other children of Mary Wanjiru Mugo (Deceased);



4. The question of representation of King'ori Mwaniki deceased should not arise because prior to his death he violated the court order and went on having the said land unlawfully, illegally and unjustifiably registered in his name before the decree could be implemented yet he was aware of this case; and
 5. That the costs of this application be provided for.
2. The application is supported by an affidavit sworn by the applicant and is premised on the grounds *inter alia*, that:
- (a) The Defendant King'ori Mwaniki lost this case in 1986 and was ordered to move from Plot No 78 to No 77 which belongs to him but he opted to violate the Court order issued on 23rd January 1986;
 - (b) That through corruption and impunity he went to the Lands Officer Nyeri and caused LR No Kabaru/Block 1/78 to be registered in his name on August 31, 1989 and a Title Deed was issued to him the same day;
 - (c) The Respondent herein was and is part and parcel of King'ori Mwaniki who was to be affected and was to move out of the said parcel of land;
 - (d) The Respondent and her entire family and/or servants are members of the family of the Defendant who was to be evicted from the above land and they should not bring the question of representation of King'ori Mwaniki in this matter because she was left on the land by her father and could have been affected by the implementation of the eviction exercise; and
 - (e) The Respondent has made the family of the Applicant and his deceased mother Mary Wanjiru Mugo who have no land on which to settle to suffer irreparable damages for many years since 1982 when this case was filed.
3. Lydia Wairimu Kinyoe (the Respondent) is opposed to the orders sought. In a Replying Affidavit sworn on July 25, 2022, the Respondent avers that she has been served with this application as the Respondent yet she has never applied to be a Party herein nor has she participated in the proceedings relating to this case.
4. The Respondent further avers that neither herself nor her husband the late Peter Kinyoe have applied for letters of representation so that they could represent the interests of her father-in-law King'ori Mwaniki. The Respondent further avers that her said father-in-law had two wives and many sons including her husband and it is not clear why the Applicant has chosen to sue her instead of the sons who are surviving.
5. The Respondent further avers that the orders sought cannot be issued against her as she is neither abregistered owner of the parcel of land nor the legal representative of the registered owner.
6. The Respondent avers further that she has made enquiries about the case and has come to discover that the decree that the Applicant is relying on was set aside by the Court on April 20, 1989 by the consent of the Parties after it was determined that the arbitrator who had earlier dealt with the matter had made findings affecting parties including the Respondent's father-in-law who was not a Party to the proceedings.
7. The Respondent further avers that after the decree was set aside the Court ordered that the matter be referred to a new arbitrator to be appointed by the Commissioner of Co-operatives. The new arbitrator filed his Judgment on July 3, 1989 stating *inter alia* that Plot Nos 77, 78 and 79 rightfully belonged



to Kibiri Wachira, King'ori Mwaniki and Many Wanjiru Mugo respectively and that the said King'ori Mwaniki should be allowed to obtain a Title Deed for Plot No 78.

8. The Respondent states that it was pursuant to that award that King'ori Mwaniki obtained his title deed on August 1, 1989. It is further his case that the Applicant had initially tried to sue her husband Peter Kinyoe but abandoned the application after the Respondent's husband pointed out that he was not the legal administrator of the estate of King'ori Mwaniki.
9. I have carefully perused and considered the application and the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Parties herein.
10. By his application before the Court the Applicant urges the Court to declare that the suit herein was fully heard and determined and that it was only the decree issued on January 23, 1986 that was not implemented. It is further his case that the Respondent herein – Lydia Wairimu Kinyoe being the daughter-in-law of the original Defendant together with her family should vacate the parcel of land known as Kabaru/Block 1/Mureri 78 (the suit property) as she was one of those that should have been affected by the implementation of the decree.
11. Unfortunately for the Applicant, his application must fail for a number of reasons. First and foremost, this suit was filed in the year 1982 by the Applicant's mother Mary Wanjiru Mugo who has since passed away, against, the Respondent's father-in-law one King'ori Mwaniki who also passed away in 1998.
12. While the Applicant sought orders of the Court to substitute his deceased mother in the year 2019, the Respondent sued herein has not been made the legal representative of the original Defendant. As it were, the Respondent is neither the registered proprietor of the suit property nor is she clothed with capacity to be sued on behalf of her father-in-law. There was evidence that the Applicant's mother had initially tried to sue the Respondent's husband but that application stalled because it was pointed out as herein that the Respondent's husband had no capacity. The Applicant therefore ought to have known better.
13. Secondly, it was clear from the Respondent's Replying Affidavit that the decree sought to be enforced was set aside by the consent of the Parties on April 20, 1989 after it was determined the arbitrator who had made the award had made an error by including Parties who were not involved. There was accordingly no decree that could be enforced against the Respondent or anyone else.
14. Thirdly even if the decree issued on January 23, 1986 was in existence it was difficult to see how the Applicant could enforce the same against the Respondent. Section 4(4) of the [Limitation of Actions Act](#) on matters of Judgment states as follows:

“An action may not be brought upon a Judgment after the end of twelve years from the date on which the Judgment was delivered, or (where the Judgment or a subsequent order directs any payment of money or the delivery of any property to be made a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a Judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”
15. In the matter herein, it was apparent that more than 30 years had elapsed since the Judgment sought to be enforced was delivered. No explanation has been provided why it took so long for the Applicant



to come to Court. As the Court of Appeal stated while commenting on Section 4 of the *Limitation of Actions Act* in *M'Ikiara M'Rinkanya & another -vs- Gilbert Kabeere M'Mbijiwe* (2007) eKLR.

“... it is logical from the scheme of the Act, that a Judgment for possession of land, in particular should be enforced before the expiration of 12 years because Section 7 of the Act Limitation of Actions Act bars the bringing of an action for recovery of land after the end of 12 years from the date on which the right of action accrued ...”

16. Arising from the foregoing, it was clear to me that the application dated June 22, 2022 is misconceived and untenable. The same is dismissed with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 28TH DAY OF MARCH, 2023.

In the presence of:

Mr. Boniface Murage – the Applicant present in person

No appearance for the Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

