



REPUBLIC OF KENYA



**Thuo & another v Gikera & another (Environment & Land Case  
72 of 2017) [2023] KEELC 20139 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20139 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 72 OF 2017  
LN GACHERU, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**MILKA NJERI THUO ..... 1<sup>ST</sup> PLAINTIFF**

**SIMION MAINA NG'ANG'A ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PAULINE WANGARI GIKERA ..... 1<sup>ST</sup> DEFENDANT**

**MWANGI GIKERA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Defendants/ Applicants moved this Court vide a Notice of Motion Application dated 21<sup>st</sup> March 2023, and filed on the 5<sup>th</sup> April 2023, seeking for the following orders; -
  1. That this Honourable Court be pleased to issue an order of eviction of the Plaintiffs/ Respondents from all that parcel of land known as LOC.2/ Kinyona/4192, (hereinafter called the suit property/ land) registered in the name of the 1<sup>st</sup> Defendant/Applicant, Pauline Wangari Gikera, and for vacant possession of the property to be delivered to her.
  2. That the Applicants be at liberty to instruct their preferred licenced Court Bailiff or auctioneers in execution of the eviction order.
  3. That the Officer Commanding Station (O.C.S), Kigumo Police Station do provide security during the execution of the eviction order.
  4. That the Honourable Court do order that the caution lodged by the Plaintiffs/Respondents on the 15<sup>th</sup> August 2022, on the suit property be removed forthwith.
  5. That costs of this application be provided for.



2. The application is premised on the grounds set out therein and on the Supporting Affidavit sworn by the 1<sup>st</sup> Applicant, Pauline Wangari Gikera, on 16<sup>th</sup> March, 2023. It is the Applicants' case that the suit land is registered in the name of the 1<sup>st</sup> Applicant – Pauline Wangari Gikera, who has absolute and indefeasible rights over the said land. That the Respondents' suit having been dismissed vide the ruling of this Court of 28<sup>th</sup> November, 2018, then the Plaintiff/Respondents' have no legal and/ registerable interest over the suit land, and as such, their occupation is wrongful and/ or unlawful, thus infringing on the 1<sup>st</sup> Defendant/Applicant's Constitutional right to property.
3. The 1<sup>st</sup> Applicant further deponed that despite notice having been issued to the Plaintiffs/Respondents to move from the suit property, they have refused to move and have instead lodged a caution over the suit property.
4. The Plaintiffs/ Respondents opposed the Notice of Motion Application vide a Replying Affidavit sworn by the 1<sup>st</sup> Respondent – Milk Njeri Thuo on 25<sup>th</sup> May, 2023. The Respondents posit that the Applicants acquired title through unclear circumstances and maintained that they are entitled to a share of the land by virtue of being children of Wambui Mwangi, who was the original owner of the land.
5. The Respondents further deponed that they have been in occupation of the suit land for over 40 years wherein they planted tea bushes. She reiterated that she has legitimate claim over the suit land and it would be unfair to evict her. The 1<sup>st</sup> Respondent filed a Further Affidavit wherein she deponed that the 1<sup>st</sup> Applicant instituted eviction proceedings in Kigumo CMCC No. 11 of 2022, and which proceedings are subjudice to the proceedings herein and added that the proceedings in Kigumo Law Courts ought to be stayed.
6. The application was canvassed by way of written submissions as directed by the Court. The Applicants filed their submissions on 26<sup>th</sup> June 2023, through the Law Firm of Gori, Ombongi & Co. Advocates and maintained that the 1<sup>st</sup> Applicant is the lawful owner of the suit property, and that the Respondents have not availed any evidence to demonstrate that they acquired title by dint of adverse possession. In submitting that this Court has the power to order for eviction, the Applicants relied on the case of *Ringera vs Muhindi* {2022} (KEELC 2481 (KLR), where the Court expressed itself that it has power to grant an order for eviction for illegal occupation.
7. The Respondents on the other hand filed their written submissions on 7<sup>th</sup> July 2023, through the Law Firm of Chege Kibathi & Co. Advocates, and raised four issues for determination by this Court.
8. On the 1<sup>st</sup> issue of whether the suit property was lawfully and validly registered in the name of Kigera Mwangi, the Respondents maintained that the suit land ought to have been distributed as per Kikuyu Customary Laws as provided for under Section 2(1) of the *Law of Succession Act*, which would mean that the land devolves to all the sons of the deceased and not one. It is their further submissions that the registration of the suit land in the name of the 1<sup>st</sup> Applicant was fraudulent. That the land ought to have been shared equitably. The Respondent invited this Court to the findings in the case of *The Estate of Stanley Kori Kiongo Alias Kori Kiongo*(Succession cause No. 96 of 2013) where the Court opined that a practice that resulted to unequal distribution of property was repugnant to justice.
9. On the issue of adverse possession, the Respondents relied on the rationale for a claim for adverse possession set out in the case of *Adnam vs Earl of Sandwich* (1877)2QB 485, as quoted in *Chevron (k) Ltd vs Harrison Charo wa Shutu*(2016) eKLR. They submitted that they have been in occupation of the suit land for over 25 years, now and are thus entitled to the suit land by dint of adverse possession.



10. On the third issue of removal of caution, it was their submissions that the caution is meant to protect any transactions that could harm their rights and interest over the land. That removing the caution would undermine their rights and they would suffer prejudice. In the end, they urged this Court to dismiss the Applicants' application with costs.
11. This Court notes and appreciates from the pleadings that the parties herein have litigated against each other for some time now. It is thus relevant that this Court points out the suits that have been filed over the suit property
  - a. Nyeri High Court Civil Appeal No. 68B of 2009; Kigera Mwangi vs Milkah Njeri & Nganga Mwangi: Being an appeal against the decision of the Provincial Land Appeals Committee. The Appeals Committee upheld the decision of Maragua Land Disputes Tribunal that directed the Appellant to excise a portion of the suit land to the Respondent. The High Court in its judgment of 21<sup>st</sup> February 2014, allowed the appeal and found that the Appeals Committee as well as the Land Disputes Tribunal lacked the requisite jurisdiction to determine the matter and also that the claim was res judicata.
  - b. Thika CMCC No. 30 of 1990;- Kigera Mwangi vs Nganga Mwangi & Mwangi Nganga; the Plaintiff therein sought restraining orders against the Defendants. Vide a decree given on 31<sup>st</sup> August 2007, the Defendants were permanently restrained from entering or interfering with the suit property.
  - c. Murang'a SPM Civ No. 37 of 1997; Nganga Mwangi vs Kigera Mwangi: The Court vide its ruling of 30<sup>th</sup> June, 2006, found the suit to be res judicata.
  - d. From the scanty details, it appears to this Court that Kigera Mwangi had filed a suit against his brothers Mwangi Ng'ang'a and Ng'ang'a Mwangi vide Thika Civ' Case No. 182 of 1989. There was another suit between the brothers yet again in Murang'a Civ' suit No. 87 of 1989. These suits were consolidated vide Nairobi High Court Misc' Application No. 396 of 1989, and referred to Thika for determination giving rise to Thika Civ' Case No. 30 of 1990.
  - e. Kerugoya High Court ELC No. 93 of 2014; Milka Njeri Thuo & Grace Njoki Kimotho vs Kigera Mwangi. The current suit. Interestingly, the Plaintiffs herein made an application seeking leave to amend their Originating Summons. This Court vide its ruling of 28<sup>th</sup> November, 2018, found that the suit herein was res judicata and proceeded to dismiss the suit.
12. It is correct to conclude that the ruling of this Court of November 28, 2018, has not been appealed against and as it is, the suit herein stands dismissed. The effect of this reverts this Court to the judgment of the Court in Nyeri High Court Civil Appeal No. 68B of 2009, where the learned judge affirmed the judgment of the Court in Thika RMCC No. 30 of 1990. The Court in Thika RMCC No. 30 of 1990, had entered judgment in favour of the Applicants' husband and father against the Defendants therein. The Defendants therein were permanently restrained from entering or interfering with the suit property. This is a judgment that was never appealed against.
13. The Applicants now want this Court issue eviction orders against the Respondents. Having read through the pleadings by parties, and having considered the rival written submissions together with the authorities cited and perused through the Court file, the Court finds the issues for determination by this Court are:
  - i. Whether the application is merited
  - ii. Who should pay costs for the application



## I. Whether the application is merited

14. The Land Law (Amendments) Act of 2016, amended the Land Act 2012, and it made it unlawful for any person to unlawfully occupy the land of another. The Act provided for the procedure for eviction depending on whether the land is public, private or community land. In case of private land as is the case here section 152E provides

152E. Eviction Notice to unlawful occupiers of private land.

- (1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
- (2) The notice under subsection (1) shall –
  - (a) be in writing and in a national and official language;
  - (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
  - (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
  - (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

15. The foregoing contemplates that a notice must first be issued. Once issued with a notice, a party may seek reliefs as provided for under Section 152F of the Land Act. The Court in considering whether to allow the eviction or not, will be guided by the provisions of section 152F (2) of the Land Act that

- (2) The Court, after considering the matters set out in sections 152C, 152D and 152E may-
  - (a) confirm the notice and order the person to vacate;
  - (b) cancel, vary, alter or make additions to the notice on such terms as it deems equitable and just;
  - (c) suspend the operation of the notice for any period which the court shall determine; or
  - (d) order for compensation.

16. Presently, this Court has perused a copy of a Notice which was served on the Respondents by the Applicants counsel, Gori, Ombongi Co. Advocates dated 17<sup>th</sup> August, 2021. This Court is satisfied that the letter was in compliance with the requirements of Section 152E of the Land Act. It is not lost that the Respondents, despite service opted not to move this Court. Since the Court has the duty to confirm compliance with the above provision of law in the issuance of Notice, it is not inconsistent with any law that the Applicants being the ones who issued the notice opted to move the Court. The application is thus competently before this Court. The next question to answer is; - Are the Applicants thus entitled to the eviction orders?.



17. This Court has perused a copy of the title deed, issued in the name of Pauline Wangari Gikera, on the 9<sup>th</sup> August, 2016. What is interesting is that the suit property was from the onset referred to as Loc.2/ Kinyona/94. Attached to the proceedings is a copy of a Letter of Consent dated 10<sup>th</sup> December 2013, whereby the suit land was transferred to the Applicants jointly. This Court has not perused any copy of title deed over Loc.2/Kinyona/4192. All along parties were disputing over Loc.2/Kinyona/94, but it is interesting that the Respondents registered a caution over Loc.2/Kinyona/4192. This is evident from the attached copy of a Certificate of Official search where the Respondents registered a caution claiming beneficial interests. It is not clear to this Court whether Loc.2/Kinyona/94, was ever subdivided or not.
18. Even so, the Respondents have claimed beneficial interests over Loc.2/Kinyona/94. What is interesting is that the 1<sup>st</sup> Applicant filed a suit against the 1<sup>st</sup> Respondent in Kigumo SPM ELC No. 11 of 2022. However, in their submissions, the Applicants submitted that the 1<sup>st</sup> Applicant already withdrew the suit. This was not disputed to by the Respondents.
19. The Respondents' hinge their beneficial interest on the suit property on the premise that the suit property belonged to Wambui Mwangi, and which property should have devolved to her three sons Kigera Mwangi, Mwangi Ng'ang'a and Ng'ang'a Mwangi. They seek to challenge the process through which Kigera Mwangi acquired title. Respectfully, this issues were well determined and as this Court expressed itself in its ruling of 28<sup>th</sup> November 2018, that the suit is res judicata. Unless there was an appeal setting aside the orders of this Court, the same are still valid. This basis cannot issue. On the allegations of adverse possession, the Respondents ought to move the Court appropriately, and this was not done. A claim for adverse possession will require the production of evidence, and this application being limiting in nature will bar the Respondents. This ground cannot be the basis upon which this Court will find that the Respondents have beneficial interests, as the Court ought to have been moved accordingly.
20. Suffice to state, this Court has perused some OB extracts and which the Applicants deponed that they were in respect of the Respondents act of evicting her from her house. This is an unfortunate occurrence. The Respondents if dissatisfied with the judgment of the Court ought to have appealed to ventilate their claim, or if they consider appropriate move Court accordingly.
21. The Court appreciates that the Applicants have made out a good case warranting the grant of the orders sought. However, this Court appreciates the fact that the genesis of the application and as a matter of evidence attached to the application is the dismissed suit. Needless to state, the Applicants won against the Respondents and they are entitled to enjoy the fruits of their judgment which can only be enjoyed if eviction orders are granted.
22. But as mentioned elsewhere in this judgment the instant application is in respect of Loc.2/ Kinyona/4192, whereas all along the suit was in respect of Loc.2/ Kinyona/94. It is not clear to this Court whether there exists a distinction between these two parcels of land or not. None of the parties bothered to shade some light for this Court. Unless there is clarity in identification of property, this Court cannot issue any such orders, notwithstanding the fact that the Applicants have complied with the provisions of eviction. If they are distinct parcels of land, then the Applicants ought to move this Court appropriately. To this end, this Court finds and holds that the eviction orders cannot issue for want of clarity.

### **Who should pay costs for the application**

23. The parties herein are related and matters of costs being discretionary, this Court directs that each party shall bear their own costs.



24. Having now carefully considered the Notice of Motion Application dated 21<sup>st</sup> March 2023, and the annexures thereto, the Court finds it not merited and the same is dismissed entirely for want of clarity.

Each party to bear his/her own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**L. GACHERU**

**JUDGE**

Delivered online in the presence of: -

1<sup>st</sup> Plaintiff/Respondent Ms Nyaga H/B Mr Juma

2<sup>nd</sup> Plaintiff/Respondent

Defendant/Applicant Mr Gori

2<sup>nd</sup> Defendant/Applicant

Court Assistant – Joel Njonjo

**L. GACHERU**

**JUDGE**

28/9/2023

