



**Michael Karuku Gatura v Stephen Ngugi Robert & Njoki Kageche (Environment & Land Case 735 of 2016) [2022] KEELC 1790 (KLR) (27 January 2022) (Judgment)**

*Michael Karuku Gatura v Stephen Ngugi Robert & another [2021] eKLR*

Neutral citation: [2022] KEELC 1790 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 735 OF 2016**

**MD MWANGI, J  
JANUARY 27, 2022**

**BETWEEN**

**MICHAEL KARUKU GATURA ..... PLAINTIFF**

**AND**

**STEPHEN NGUGI ROBERT ..... 1<sup>ST</sup> DEFENDANT**

**NJOKI KAGECHE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. The Plaintiff filed this suit by way of a Plaint dated 28<sup>th</sup> June 2016. The Plaintiff's claim against the Defendants is for:
  - a) An order of permanent injunction
  - b) An eviction order directing the Defendants to vacate L.R No. Dagoretti /Mutuini/T.115
  - c) Costs of the suit.
  - d) Any other relief that the Honourable Court may deem fit to grant.
2. The Plaintiff withdrew the suit against the 1<sup>st</sup> Defendant on the ground that he has since passed on. He proceeded as against the 1<sup>st</sup> Defendant only.
3. The 2<sup>nd</sup> Defendant Response to the Plaintiff's suit was by way of a statement of Defence dated 6<sup>th</sup> January 2019. In the statement of Defence, the 2<sup>nd</sup> Defendant raised a number of issues namely;
  - a) That the Plaintiff's title to the parcel of land Dagoretti/ Mutuini/T.115 was cancelled by a gazette notice pursuant to a Decree issued in High Court Civil Case No. 1664 of 1977 (O.S).



- b) That no appeal was preferred against the Judgement of the High Court in the above cited case.
  - c) That the Plaintiff's suit is time barred under the Limitation of Actions Act, Cap 22 in view of the fact that a title over the parcel of land Dagoretti/Mutuini/T.115 was issued in 1988.
  - d) That the Plaintiff's suit is res judicata.
  - e) That the Plaintiff is not the registered owner of parcel Dagoretti/ Mutuini/T.115.
  - f) That the 2<sup>nd</sup> Defendant has been in possession of the land since 1964 and the Plaintiff has no legal or factual basis to seek her eviction from the land.
  - g) That the Plaintiff's suit is bad in law.
4. The 2<sup>nd</sup> Defendant therefore prays for the Dismissal of the Plaintiff's suit against her with costs.
  5. The case proceeded to hearing on 25/10/2021 and each party testified in court.

### **The Plaintiff's Case**

6. The Plaintiff adopted his witness statements dated 28<sup>th</sup> June 2016, 16<sup>th</sup> June 2017 and the undated one on page 40 - 41 of his trial bundle as his evidence in-chief. He further produced the documents listed in his Plaintiff's list of documents dated 28<sup>th</sup> June 2016 as exhibits in his case. They were marked as exhibits in the order in which they are listed.
7. I must point out that PE3 (a) & (b) and PE7 (a)-(g) were produced on condition that the Plaintiff avails translated copies with certificates of translations in 7 days. The Plaintiff did not comply. The exhibits are therefore expunged from the record because they are not in the Court's language.
8. The Plaintiff's case was that he holds the original title to the suit property (Dagoretti/Mutuini/T.115). The search form that the Plaintiff produced (PE 2) in support of his claim was dated 20<sup>th</sup> February 1986. It was the Plaintiff's case that he continued paying rates to the City Council of Nairobi until sometime in 1988 when he found out that the suit property had been registered in the names of other persons. The Plaintiff confirmed that he has never lived on the suit property. He confirmed that the Defendants were the ones who had been residing on the land initially as tenants.
9. The Plaintiff testified that he sought help from many public offices to evict the Defendants from the suit property over the years but everywhere he went, he was advised to go to court. In the year 2014, he claimed that he went to the Ministry of Lands and that is where he discovered that the title to the land was actually in the names of the Defendants, after he was issued the green card. The green card is PE 11. When he sought further explanation, he was given a copy of a Kenya Gazette Notice of 6<sup>th</sup> April 1990 – Gazette notice 1472 (PE 12) that cancelled his title. The Gazette Notice was issued pursuant to a decree issued in High Court Civil Case 1664 of 1997 (O.S). He produced a copy of the Decree (PE 13) as an exhibit in his case.
10. In cross-examination, the Plaintiff admitted that as early as 1986, he was aware that the title had been transferred to the Defendants. In fact, the houses that were on the land were demolished in 1986. The Plaintiff however, denied being represented by an advocate in the High Court Case. He further agreed that through the Land Registrar told him he had transferred his title, he did not see the need to join him as a party in this case.



### **The 2<sup>nd</sup> Defendant's case**

11. On her part, the 2<sup>nd</sup> Defendant adopted her witness statement dated 6/1/2020 as her evidence in-chief. She further produced the documents on her list of documents being DE 1-13. Her case was that she has been on the suit property since 1964. She has the title to the suit property in her name and that of the 1<sup>st</sup> Defendant who is now deceased. She wondered why the Plaintiff had sued her again yet they had already done another case which had been determined in her favour. She was in that earlier case been represented by an advocate called Kamonde. The Plaintiff too had an Advocate by the name, Wamba, in that earlier case.

### **Directions.**

12. After the hearing, parties were directed by court to file written submissions. Both parties complied.

### **Submissions by the Parties**

#### **Plaintiff's submissions**

13. In his submissions, the Plaintiff reiterated his case that he is the registered owner of the suit property. He stated that he has been in occupation of the land.
14. The Plaintiff denies knowledge of the earlier case before the High Court.
15. The Plaintiff identified 2 issues for determination in this matter. The 1<sup>st</sup> issue is whether the court can order for a permanent injunction to restrain the Defendants from dealing and interfering with the suit land. The second issue is whether an eviction order should be issued against the Defendants to vacate the suit land.
16. In regard to the 1<sup>st</sup> issue, the Plaintiff submits that he has demonstrated that he lawfully owns the property and is still holding onto the original title given way back in 1977. His submission is that the Defendants have no valid claim of right over the suit property. He states that he has severally served the Defendant with eviction notices but they have not complied. They continue to occupy his land.
17. Although the Plaintiff did not identify it as one of the issues for determination, he has submitted on the issue whether his suit is res judicata. He cites the case of IEBC vs. Maina Kiai & 3 others (2017) eKLR where the Court of Appeal restated the conditions that a court must consider in deciding whether the principle is applicable in respect of a suit before it.
18. The Plaintiff's position is that he was a stranger to Civil Suit No. 1664/1997. He was not served with summons to attend that suit which makes it an illegality.

#### **The 2<sup>nd</sup> Defendant's submissions.**

19. The 2<sup>nd</sup> Defendant submits that the Plaintiff's suit is Res judicata. This therefore ousts the jurisdiction of this court in terms of the provisions of Section 7 of the Civil Procedure Act. The Decree produced in evidence by both the Plaintiff and the 2<sup>nd</sup> Defendant suffices.
20. It is the 2<sup>nd</sup> Defendant's case that the Decree has not been challenged in any way; neither by way of appeal nor by way of review. It was therefore wrong for the Plaintiff to file a fresh suit.
21. The 2<sup>nd</sup> Defendant is of the opinion that what the Plaintiff terms as the title to the suit property is a worthless piece of paper. It does not confer on him any interest or right over the suit property. The 2<sup>nd</sup> Defendant notes that the Plaintiff has not even sought to invalidate the Defendants' title to the



suit property yet he is aware that they are the registered owners of the land. This was clear from his testimony.

22. It is the 2<sup>nd</sup> Defendant's position that the Plaintiff's suit is also time barred. The Plaintiff did not seek any orders for extension of time before filing the suit.
23. Finally, the 2<sup>nd</sup> Defendant states that the authorities relied on by the Plaintiff in his submissions are irrelevant. The 2<sup>nd</sup> Defendant therefore prays for the dismissal of the Plaintiff's suit against her with costs.

#### **Issues for Determination.**

24. Having considered the pleadings by both parties in this matter, the evidence adduced and their respective submissions, this Court is of the opinion that the issues for determination in this case are as follows: -
  - a. Whether the suit is Res judicata
  - b. Whether the suit is time barred
  - c. whether the Plaintiff is entitled to the orders sought.
  - d. Who should bear the costs of the suit?

#### **Analysis and Determination**

##### **A. Whether the suit is Res Judicata.**

25. In the case of IEBC –vs- Maina Kiai & 5 Others (2017) eKLR, cited by the Plaintiff, the Court of Appeal held that the following elements must be satisfied for the bar of res judicata to be effectively raised: -
  - i. The suit or issue was directly and substantially in issue in the former suit;
  - ii. The former suit was between the same parties or parties under whom they or any of them claim;
  - iii. The parties were litigating under the same title;
  - iv. The issue was heard and finally determined in the former suit; and
  - v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
26. In William Koross vs Hezekiah Kiptoo Komen & 4 others (2015) eKLR, the court stated that the philosophy behind the principle of res judicata is that there has to be finality in litigation. Litigation must come to an end. "It is meant to provide rest and closure, because endless litigation does little more than vex and add to costs."
27. In Ngugi vs Kinyanjui & 3 others (1989) KLR, 146, the court held that Section 7 of the Civil Procedure Act is a mandatory bar, from any fresh trial of a concluded issue.
28. The Plaintiff in this case produced the Decree in the High Court Civil Case 1664/1977 (OS) as one of his exhibits. The Decree discloses that the parties in the case were Njoki d/o Kageche (Miss), Wambuku w/o Ngeche (miss) & Michael Karuku s/o George Gatura. These are the same parties in this case. The claim before the court was for adverse possession where the Plaintiffs were seeking for a declaration that they had acquired the title over the suit property Dagoretti/Mutuini/T.115, and that the Defendant's



title was extinguished under the limitation of Actions Act, Cap 22. The said orders were granted as prayed for after the suit was heard on 2<sup>nd</sup> March 1983 and judgement delivered on 9<sup>th</sup> March 1983, before Hon. Justice O’Kubasu (as he then was) and in the presence of Counsel for the Plaintiffs and Counsel for the Defendant. The Decree was issued on 15<sup>th</sup> August 1983.

29. Considering the information in the Decree, this court finds that;
- a) the matter substantially & directly in issue in the HCCC 1664 /1977 (O.S) was ownership of parcel No. Dagoretti/ Mutuini/T.115. That is the same issue substantially & directly in dispute in this case. The Plaintiff claims ownership of the suit property and seeks to evict and bar the Defendants from the suit property on the basis that he is the lawful owner of it.
  - b) The suit HCCC 1664/1977 (OS) was between the same parties as in this suit. That is not in dispute.
  - c) The Parties in HCCC 1664/1997 (OS) and the parties in this case are litigating under the same title. Again this is a fact that is not in dispute.
  - d) The issue /matter in dispute was heard and finally determined in HCCC 1664 /1977 (OS). A judgement was rendered, the issue of ownership having been finally determined. The Decree followed that determination.
  - e) It is not in dispute that the High Court then had jurisdiction to determine the matter in dispute. It was a competent court to determine the issue as it did. It would have been competent too to determine the current suit. This court is a court of equal status with the High Court.
30. The Plaintiff denies having participated in the said case. The 2<sup>nd</sup> Defendant in her evidence however, testified that the Plaintiff was represented by an advocate called Wamba, whereas she, was represented by Mr. Kamonde who has since passed on.
31. Going by the contents of the Decree which the Plaintiff exhibited in Court, it is clear that the Defendant too was represented by Counsel in the case.
32. The Plaintiff’s testimony was that he obtained the Decree from the Land Registrar when he went to conduct a search of the title to the suit property. It was in execution of that Decree that his title was cancelled and registered in the names of the Defendants. The Kenya Gazette Notice No. 1472, also makes reference to the Decree.
33. The Court’s finding therefore is that, indeed this suit is res judicata. This finding is enough to dispose of the case as this point. However, the court finds it prudent to express its opinion on the other identified issues.

#### **B. Whether the suit is time barred**

33. The 2<sup>nd</sup> Defendant raised this issue in her Statement of Defence. In his Pleint, the Plaintiff’s case is that the Defendants have been occupying the parcel of Land Reference Number Dagoretti/ Mutuini/ T.115 illegally and he has issued several demand notices to them to vacate but to no avail.
34. As the 2<sup>nd</sup> Defendant rightly pointed out in her submissions, the Plaintiff has not sought the cancellation of the title in the names of the Defendants. The Plaintiff’s claim as stated in his Pleint is one of illegal occupation otherwise known as trespass. That is why, in his prayers he seeks an eviction order and a permanent injunction to bar the Defendants (trespassers), from interfering with the suit property.



35. The Plaintiff does not state when the trespass on his Land commenced but the statement in paragraph 5 of his Plaint infers that the trespass is continuous. It cannot then be said that his suit is time bared. In this regard I am persuaded by the reasoning of my sister Judge J G Kemei, in Eliud Njoroge Gachiri Vs Stephen Kamau Nganga (2018) eKLR.

**C. Whether the plaintiff is entitled to the orders sought.**

36. The Plaintiff seeks an order of eviction to evict the 2<sup>nd</sup> Defendant from the suit property and a permanent injunction to prevent her from interfering with the suit property. The Plaintiff testified that he is aware and has been aware that the title to the suit property is in the name of the 2<sup>nd</sup> Defendant and another person. He is the one who produced the green card showing that the title was transferred from his name way back in 1988. So, the first hurdle he needed to have surmounted was to challenge the validity of that title.

37. Secondly, in HCCC 1664 /1977 (OS), as confirmed from the Decree discussed above, the Court held that the Plaintiff's title, his claim of ownership over the suit property was extinguished. He has never challenged that decision of the Court.

38. The court finds that the Plaintiff has not established that he has a valid claim over the suit property. For this reason, even if the court were to find that the suit was not res judicata, it would still have dismissed it for the reason that the Plaintiff has not established a legal or factual basis for the grant of an order of eviction against the 2<sup>nd</sup> Defendant from the suit property while the title is in her name.

39. The court's finding is that the Plaintiff has not proved his case on a balance of probabilities and is therefore not entitled to the orders sought.

**D. Who shall bear the costs of this suit?**

40. Costs follow the event. Accordingly, the Plaintiff will pay the costs of this suit to the 2<sup>nd</sup> Defendant.

**Conclusion**

41. Arising from the above findings, this court hereby dismisses the Plaintiff's suit in its entirety with costs to the 2<sup>nd</sup> Defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY 2022.**

**M.D. MWANGI**

**JUDGE**

In the Virtual Presence of:-

Ms. Muhuhu for the Defendant

Onsembe Ms. for the Plaintiff

None appearance for the Defendant

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**

