



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 588 OF 2012

BETWEEN

MIRIAM WAIRIMU 1ST PETITIONER

ERASTUS NDUNG’U NJOROGE 2ND PETITIONER

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

JOSPHAT MBURU WAINAINA 2ND RESPONDENT

SIMON KIUNA KARANJA 3RD RESPONDENT

JUDGMENT

Introduction and background

1. The petition concerns certain property, GATAMAIYU /GACHOIRE/119 and GATAMAIYU/GACHOIRE/129 (referred to as “Plot 119” and “Plot 129” respectively) which have been subject of court disputes since the year 1977. The two plots are adjacent to each other. Plot 129 was later subdivided in Plot 1645 and Plot 1646. Plot 1646 was further subdivided into Plots 1660, 1661 and 1662.
2. Miriam Wairimu (“Wairimu”), the 1st petitioner, is the wife of Munji Karanja (deceased) while the 2nd petitioner, Erastus Ndungu Njoroge (“Njoroge”) is the son of Munji and Wairimu. They are both administrators of the estate of the deceased. The 2nd respondent is the son and administrator of the estate of Wainaina Karanja (deceased).
3. In 1977 Munji Karanja sued Wainaina Karanja (deceased) and Simon Kiuna Karanja (“Kiuna”) to declare the transfer of Plot 129 null and void on the ground that it was fraudulently obtained. The matter was heard by a Panel of Elders and the decision adopted by the court which issued a decree in *Nairobi HCCC No. 2555 of 1977 Munji Karanja v Wainaina Karanja and Simon Kiuna*

Karanja on the following terms;

- i. **Judgment be and is hereby entered in accordance with the elders award.**
 - ii. **That the plaintiff's application to set aside the award be and is hereby dismissed with costs to the defendant.**
 - iii. **That the Plaintiff Munji should remain on Parcel Number 119 (4.8 acres).**
 - iv. **That Kiuna and Wainaina should remain on parcel number 129, Kiuna to have 2 acres out of parcel 129.**
4. As beneficiaries of the judgment in and in order to enforce the decree in **HCCC No. 2555 of 1977**, Kiuna and Wainaina (personal representative of Wainaina Karanja) filed suit against Mariam and Njoroge being **Githunguri SRMCC No. 11 of 2006** and in the suit, they sought an order for, "**Eviction of the Defendant and their families from L R No. Gatamaiyu/Gachoire/129.**" The ground for the suit was that Munji never appealed against the decree and his children, the defendants had declined to vacate the suit property despite notice to do so.
 5. **Githunguri SRMCC No. 11 of 2006** was heard and by a judgment delivered on 5th March 2009, the learned magistrate held that the suit was an attempt to enforce a decree of the High Court. The court concluded that the decree could not be enforced as it was statute barred under the **Limitation of Actions Act (Chapter 22 of the Laws of Kenya)**. The court also held that the decree could only be enforced by the court that issued it and as a result it dismissed the suit.
 6. In the meantime, Wairimu filed a case at the Kiambu West Land Dispute Tribunal being **Case Number KW/LND/9/6/28/2008** against Wainaina and Kiuna. Wairimu asserted that Josephat and Kiuna had no claim to Plot 129. After hearing the matter, the Tribunal gave its decision on 14th August 2008. It ordered the District Land Registrar to "**revoke Title Deed for GATAMAIYU/GACHOIRE/1660, 1661, 1662 in the names of Josephat Mburu Wainaina and revert to the original number 1646.**" **The same to be registered under the claimant's name – Mariam Wairimu Munyi. The Tribunal Court also orders the District Land Surveyor to visit the suit land and excise two acres at the extreme end of Gatamaiyu/Gachoire/119 to be registered in the names of Josephat Mburu Wainaina. Simon Kiuna Karanja's boundaries should remain intact.**"
 7. After the award was issued in her favour, Wairimu filed the award in Limuru **SPMCC Land Case No. 12 of 2008, Miriam Wairimu Munyi v Joseph Mburu Wainaina and Simon Karanja**. The award was read on 9th October 2008 by the Court. It appears that no other step was taken in this regard.
 8. In the meantime, Wainaina and Kiuna appealed the decision of the Land Disputes Tribunal to the Provincial Appeal Committee (Central) and by an award dated 29th September 2011 in **Claim No. KIAMBU WEST 8 OF 2008** the Committee ruled as follows;
 - i. **Josephat Mburu Wainaina to remain on Plot No. 1660, 1661 and 1662.**
 - ii. **Mariam Wairimu Munyi to retain her 119 Gatamaiyu Gachoiri.**
 - iii. **Simon Kiuna Garanja to retain his title 1645 Gatamaiyu Gachoiri.**
- In effect the Committee set aside the Kiambu West Land District Tribunal decision in favour of Wairimu and determined the matter in accordance with the High Court decree in **HCCC 2555 of 1977**.
9. After the appeal was dealt with by the Provincial Committee, Wainaina and Kiuna went back to Limuru Magistrates Court and filed the Provincial Committee award. The award was read over to the parties on 30th August 2011.
 10. On or about 18th December 2012, after the Provincial Committee award was adopted, Wainaina

and Kiuna filed an application in the court seeking the following orders;

1. *The Honorable Court be pleased to order for reinstatement of the boundaries in LR Nos GATAMAIYU/GACHOIRE/1660, 1661, 1662 and 119 by a qualified surveyor.*
 2. *The claimant/respondent, her servants, agents and/or assignees be restrained by injunction from cultivating tilling or howsoever occupying and or dealing with LR Nos GATAMAIYU/GACHOIRE/1660, 16661 and 1662 and be evicted there from with immediate effect and the status be maintained in accordance with the Decree herein.*
 3. *Costs of the application be provided for.*
11. Wainaina, in the affidavit sworn in support of the application stated that Wairimu had persistently refused to stop cultivating Plots 1660, 1661 and 1662 which has been awarded to Wainaina. From the record, the learned magistrate granted the orders on 18th December 2012 as the application was not opposed. On 21st December 2012 the applicants returned to court with order seeking enforcement of the injunction orders and also seeking police assistance to enforce the orders. The magistrate duly obliged and granted the orders sought. It is these orders of injunction that precipitated the filing of the petition that is under consideration.

The Petitioner's Case

12. In order to forestall eviction, the petitioners filed the petition dated 21st December 2012 in which they sought the following orders;
- a. *That a declaration be issued to declare that the petitioners are the owners of LR Nos Gatamaiyu/Gachoire/ 1660, 1661 and 1662 within the meaning of Article 40 of the Constitution.*
 - b. *That a declaration be issued to declare that the Award dated 29th September 2010 by the Provincial Appeals Committee (Central) violate the petitioners right to protection of law under section 27, 47 and 48 of the Constitution.*
 - c. *That a declaration be issued to declare that the Provincial Appeals Committee's Award dated 29th September 2010 violates the petitioners' right to protection of right to property under Article 40 of the Constitution.*
 - d. *That a declaration be issued to declare that any Award of a Land disputes tribunal or the Provincial Appeals Committee made without or in excess of jurisdiction is ipso facto inconsistent with the Constitution of Kenya.*
 - e. *That the Provincial Appeals Committee Award dated 29th September 2010 be quashed and set aside.*
 - f. *That a declaration be issued to declare that the petitioner be paid damages for violation of his fundamental under Articles 27, 40, 47 and 48 of the Constitution.*
 - g. *That a declaration be issued to declare that the Senior Principal Magistrate's Court at Limuru does not have the jurisdiction to entertain any disputes regarding LR Nos GATAMAIYU/GACHOIRE/1660, 1661 and 1662 by virtue of HCCC 2555 of 1977.*
 - h. *That a declaration be issued to declare that the SPM's Court at Limuru had no jurisdiction to entertain Land Case No. 12 of 2008 and all consequential orders issued therein are therefore null and void.*
 - i. *That the respondents be ordered to bear the costs of this petition.*
13. The core of the petitioners' case is that they are the owners of Plots 1660, 1661 and 1662 by reason of the failure of the respondent to execute the judgment in **HCCC 2555 of 1977** which was issued in Wainaina's favour. In order to buttress their position they rely on **Githunguri SRMCC No. 11 of 2006** where the court ruled that enforcement of the decree was barred by limitation.
14. Mr Wanyaga, learned counsel for the petitioners, argued that the court dealing with **Limuru SRM Land Case No. 12 of 2008** lacked jurisdiction to make the orders of injunction. He drew the court attention to the affidavit sworn by Wainaina when he opposed the adoption of the Kiambu West Land Dispute Tribunal award in court that the court lacked jurisdiction to deal with the matter.

Counsel contended that the respondents could not turn around and invoke the court's jurisdiction to enforce the Provincial Committee decision. Further, Counsel submitted, that once the decree issued by the High Court was unenforceable, both the Land Disputes Tribunal and Appeals Committee lacked jurisdiction to deal with the suit properties.

15. The petitioner's case is that their property rights under **Article 40** have been violated and the court is entitled to grant relief in the circumstances under **Article 23**. The petitioners also attack the orders issued by the Limuru Magistrate's Court on the basis that the court lacked jurisdiction and therefore this Court ought to exercise its supervisory jurisdiction to quash its decision.

Respondents' Case

16. The respondents, Wainaina and Kiuna, denied that there had been any violation of fundamental rights and freedoms. The respondent's rely on a replying and further affidavit of Josephat Mburu Wainaina sworn on 14th February 2013 and 16th April 2013 respectively. Ms Fundi, learned counsel for the 2nd and 3rd respondents, submitted that the case in the Tribunal had been instigated by the petitioners and they could not be heard to complain about the result when the respondents appealed against the decision. According to counsel the decree issued in **HCCC 2555 of 1977** had never changed the status of the land and the titles issued were issued in accordance with the decree.

District Registrar's Report

17. During the hearing, and in order to attempt a resolution of the matter, I directed the Kiambu District Land Registrar to conduct and inquire into the status of Plot 129 which had been subdivided into Plots 1660, 1661 and 1662 and also Plot 119 and report on the occupation thereof.

18. The Kiambu District Land Registrar in his report dated 29th May 2013 stated as follows;

29th May 2013

The State law Office

Sheria House Harambee Avenue

P O Box 40112-00100,

NAIROBI

GROUND STATUS – GATAMAIYU/GACHOIRE/119 AND GATAMAIYU/GACHOIRE/129 SUBDIVIDED INTO 1645 AND 1646 AND FURTHER 1646 SUBDIVIDED INTO 1660, 1661 and 1662

GATAMAIYU/GACHOIRE/119

This is where the family of the late Ayub Munji resides. This includes the wife and son.

They have however encroached on parcels Gatamaiyu/Gachoire/1660, 1661 and 1662 which are resultant sub divisions of Gatamaiyu/Gachoire/129.

There are no clearly marked boundary features.

GATAMAIYU/GACHOIRE/129

Gatamaiyu/Gachoire/129 was subdivided into Gatamaiyu/Gachoire/1645 and 1646

Gatamaiyu/Gachoire/1645 is currently occupied by Simon Muiruri Kiuna.

Gatamaiyu/Gachoire/1646 was further subdivided into 1660, 1661 and 1662. They are currently occupied by Josephat Mburu Wainaina, Francis Muiruri Wainaina and Ruth Wangui Ngacha respectively.

(Signed)

DISTRICT LAND REGISTRAR

KIAMBU

CC

DEPUTY REGISTRAR

HIGH COURT OF KENYA

19. Learned counsel for the Attorney General, Ms Njagi, adopted this report and left the matter for consideration by the court in accordance with the findings therein.

Determination

20. As I have outlined above, the facts leading up to this decision are not really in dispute. What is in issue is the status of the land and I think the parties have been laboring under a misapprehension from the very beginning.

21. The decree issued in ***HCCC No. 2555 of 1977*** must be read in the context of a dispute between Munji, Wainaina and Kiuna. What Munji sought in the suit was to set aside a transaction where Munji had transferred Plot 129 to Wainaina and Kiuna. The attempt to set aside that transaction failed and the effect of the decree issued was to confirm the transaction that had already taken effect. It is for this reason that Plot 129 was subdivided into Plot 1645 belonging to Kiuna and Plot 1646 belonging to Wainaina.

22. Since there was no change in the status of the land there was no need to execute the decree as the judgment merely recognized the transaction between the parties that had already taken effect. The effect of the elders award and decree of the High Court was to recognize and confirm the transaction which Munji tried to disown. It follows that the Githunguri suit was not well founded in so far as it was conceived to execute the decree of the High Court when in fact what the plaintiffs' in that case sought was to evict Wairimu from the part of Plot 129 she was cultivating.

23. By filing her case before the Land Disputes Tribunal, Wairimu was laboring under a misapprehension that she could litigate a matter that was finalized by a decree of the High Court. In my view, that attempt fell within the definition of *res judicata* as the 1st petitioner, as an administrator of the estate of the deceased, was seeking relief against the same persons her deceased husband sued in respect of the same property for which relief was granted. The Tribunal, in my view could, not proceed to permit the re-litigation of a matter that was already settled by a court of competent jurisdiction.

24. I recall the sentiments echoed by Justice R. Kuloba in his book, ***Judicial Hints on Civil***

Procedure, 1984 (Vol 1) at page 46 in a paragraph headed, “**Guard against attempts to evade the doctrine [of res-judicata]**” where he states that, “*One of the greatest difficulties which face those courts which try land suits is the disposition of the disappointed litigant to dress up a suit which has failed in a new guise and to try his luck once more Once a man has had his say, has taken his case as far as the law permits him, and has failed, he must be stopped from re-litigating the same matter.*”

25. This case is one such attempt and more. It is a case wrought with misapprehensions on all sides and in order to stop the waste of the parties time and money and save judicial resources, I take the position the court is entitled to take a robust view of matter and pronounce itself with finality so that the parties leave court knowing the legal position concerning the subject land. I think this approach is supported by the principles and values set out in **Article 159** of the Constitution.
26. As regards the petitioners claim to Plots 1660, 1661 and 1662, I find and hold that same were carved out Plot 1646 which was part of the original Plot No. 129 which Wainaina became entitled to under the decree issued in **HCCC No. 2555 of 1977**. As such I am unable to grant prayer (a) of the petition.
27. Prayer (b), (c), (d) and (e) of the petition deals with the award of the Provincial Committee. The appeal was one which emanated from a decision that emanated from the Kiambu West Land Disputes Tribunal. The case lodged by Wairimu was, I have stated, *res-judicata* and the tribunal should not have entertained it. Furthermore, I doubt that the Tribunal had jurisdiction to direct the District Land Registrar to cancel titles.
28. In the circumstances that decision cannot lie and in exercise of my jurisdiction under **Article 165(6) and (7)** I hereby quash the decision of the Kiambu West Land Dispute Tribunal **Case Number KW/LND/9/6/28/2008**. The consequence of this order is that the Appeal Committee decision cannot stand and falls by the wayside.
29. As **Limuru SPM Land Case No. 12 of 2008** was predicated upon the enforcement of the decisions of the Kiambu Land Disputes Tribunal Case and the Appeal Committee decisions, its foundation has been destroyed. The proceedings are therefore quashed in exercise of my jurisdiction under **Article 165(7)** and the suit is struck out.
30. This leaves the decision in **Githunguri SRMCC No. 11 of 2006**. In light of what I have found, the learned magistrate misdirected himself when he concluded that the case was an attempt to execute the decree of the High Court. As I stated there was not need to enforce the decree as its effect was to re-affirm a transaction that had already taken place. This is confirmed by the Land Registrar’s report, the Green Card for Plot 129 annexed to Wainaina’s replying affidavit. It is also on the basis that the 1977 transaction the plot was subsequently subdivided as there was no impediment on the title. I therefore am constrained to exercise my jurisdiction under **Article 165(7)** to quash and set aside the judgment in **Githunguri SRMCC No. 11 of 2006**.
31. It is now apparent that the issue between the parties is in reality a case of trespass where Wairimu and her family continue to trespass by cultivating **Plot 129** which belongs to Kiuna and Wainana as confirmed by **HCCC No. 2555 of 1977**. This is confirmed by the District Land Registrar’s report.
32. In order to ensure that this matter is settled, I direct the Kiambu District Land Registrar within three (3) months of the date of this judgment to assist the parties to mark the boundaries of the **Gatamaiyu/Gachoire/119 and 129** and the resultant subdivisions. Thereafter and in the event Wairimu and Njoroge decline to vacate the Plot 129, Kiuna and Wainaina shall be at liberty to prosecute **Githunguri SRMCC No. 11 of 2006**.
33. In conclusion I make the following orders which are necessary to resolve this matter;

- a. The decision Kiambu West Land Dispute Tribunal **Case Number KW/LND/9/6/28/2008** be and is hereby quashed.
- b. The judgment in ***Githunguri SRMCC No. 11 of 2006*** be and is hereby set aside.
- c. The orders in ***Limuru SPM Land Case No. 12 of 2008*** be and is hereby quashed and the suit be and is hereby struck out.
- d. The Kiambu District Land Registrar is directed, within three (3) months of the date of this judgment, to assist the parties to mark the boundaries of the **Gatamaiyu/Gachoire/119** and **129** and the resultant subdivisions.
- e. Thereafter and in the event Wairimu and Njoroge decline to vacate the **Gatamaiyu/Gachoire/129** and its subdivisions, Simon Kiuna Karanja and Josphat Mburu Wainaina shall be at liberty to prosecute ***Githunguri SRMCC No. 11 of 2006***.
- f. There shall be no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 26th day of July 2013.

D.S. MAJANJA

JUDGE

Mr Wanyaga instructed by Kinoti and Kibe Advocates for the petitioners.

Ms Njagi, Litigation Counsel, instructed by the State Law Office for the 1st respondent.

Ms Fundi instructed by Beth Gathoni Mwangi and Company Advocates for the 2nd and 3rd respondents.