



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 148 of 2010

PETER RUGU GIKANGA.....1ST PLAINTIFF

ELIZABETH WAKONYO MWANGI.....2ND PLAINTIFF

VERSUS

WESTON GITONGA.....1ST DEFENDANT

DAVID MWANGI.....2ND DEFENDANT

NJOROGE NDUNGI.....3RD DEFENDANT

WAINAINA KARIUKI.....4TH DEFENDANT

DAVID NJIHIA.....5TH DEFENDANT

JOHN WATAKI.....6TH DEFENDANT

SIMON GICHUHI NJOGU.....7TH DEFENDANT

DUNCAN NJENGA.....8TH DEFENDANT

MARY NYAMBURA MUTHAKA.....9TH DEFENDANT

MWANGI KARUME.....10TH DEFENDANT

NELIUS NYARUAI KANYANGA.....11TH DEFENDANT

JUDGMENT

By a Plaint dated 1st July 2010 and filed in court on 2nd July 2010, the Plaintiffs sought judgment against the Defendants jointly and severally for -

- (a) *a declaration that the Plaintiffs are the legal owners of Land Title Number NYANDARUA/OL JORO OROK SALIENT/2114 (the suitland) as administrators of the Estate of GIKANGA RUGU (the Deceased) and the Defendants have no right or interest therein;*
- (b) *an order of eviction and ejectment of the Defendants, members of their families, their proxies, servants, employees or agents from the suit land;*
- (c) *an order for demolition and removal of the Defendants' houses and/or structures from the suit land;*
- (d) *a permanent injunction restraining the Defendants by themselves, members of their families, their proxies, servants, employees or agents from entering, remaining on, cultivating, erecting structures or in any other manner interfering with the plaintiffs' quiet enjoyment and possession of the suitland;*
- (e) *costs of the suit and interest thereon;*
- (f) *any other and or better relief that this court may deem just to grant.*

(b) THE DEFENCE

On being served with the Summons to Enter Appearance, and the Plaint, the Defendants entered appearance and filed a joint Defence the material parts of which were -

- (a) *that the land under their occupation does not form part and parcel of the suit land;*
- (b) *that they purchased their respective occupied plots from one Hellen Muringe Kabutha without notice of the Plaintiffs' claim thereon;*
- (c) *that the issues raised herein were directly and substantially in issue in NYAHURURU P.M.C.C. NO. 189 OF 2004 between HELLEN MURINGE KABUTHA the 1st Plaintiff herein and one MILKA WACHEKE GIKANGA as Defendants rendering this suit RES JUDICATA by virtue of Section 7 of the Civil Procedure Act, (Cap. 21 Laws of Kenya),*
- (d) *that there is a pending appeal being Nakuru H.C. Civil Appeal No. 74 of 2007 by the 1st Plaintiff and the said MILKA WACHEKE GIKANGA against the Judgment in NYAHURURU PMCC NO. 189 of 2004,*
- (e) *that the Plaintiffs' claim is statute-barred by virtue of the LIMITATION OF ACTIONS ACT, (Cap 22, Laws of Kenya),*
- (f) *that the Plaintiff's have no or any reasonable cause of action known in law or fact and the suit is incompetent, bad in law and an abuse of the court process,*

(g) *that this court has no jurisdiction over the matter.*

C. THE EVIDENCE

In support of their claim, the 1st Plaintiff testified on his own and on behalf of the 2nd Plaintiff who he said was elder sister.

This Plaintiff testified that their father Gikangu Rugu, the deceased, died in the year 1996. He was the registered owner of the suit land. Following his death, they took out a Grant of Letters of Administration Intestate, in Nyahururu Succession Cause No. 59 of 2007. Thereafter they also obtained a Certificate of Confirmation of Grant dated respectively 4th September 2007 and 17th March 2009. The said Certificate Confirmation of Grant also indicates the distribution of the suit land.

PW1 testified that though he and several other members of the family live on parts of the suit land, they are unable to distribute other parcels of the land because the Defendants claim they bought part of the land from HELLEN MURINGE KABUTHA being parts of Title Number Ol Joro Orok Salient Block 1337 occupy other parts of the suit land, and that the Defendants settled on the land in the years 2002/2003.

PW1 testified that despite notice given to the Defendants in September 2010, to vacate the land and give possession to the Plaintiffs, the Defendants have refused to do so.

PW1 also testified that despite an Official Search from the Lands Office, Nyahururu showing the acreage of the suit land as being 2.3 (*Two decimal three hectares*) or approximately five decimal seven acres (*5.68 acres*), on the ground however there is no doubt that the Defendants are sitting on the plaintiffs' suit land.

The Plaintiffs also testified that the cases at Nyahururu concerned Plot No. 1337 and not the suit land, and that the problem was started when the said MURINGE, closed the road separating the two parcels of land, and followed by selling off parcels of what she claimed was her land but was in fact the suit land. Though PW1 claimed that Government officials in the persons of the Chief, Assistant Chief, the District Officer and the District Surveyor visited the land and were shown the separate parcels of land, no action has been taken by said officers.

When cross-examined by counsel for the Defendants PW1 admitted that their late father, had filed Nairobi HCCC No. 529 of 1993 (**Gikanga Rugu vs. Hellen Muringe Kabutha**), and that their father died before the case was heard and following his death the case abated.

PW1 also testified that they were prosecuted in Nyahururu Cr. Case No. 189 of 2004, where they were coerced to agree that they were sitting on Plot 2114, and that their houses were demolished, but they were reinstated when the issue was raised in Parliament. He further testified that application for stay in Nakuru HCCA No. 74 of 2007 was dismissed.

PW1 further testified that MURINGE sub-divided the land based upon a map which was later cancelled. They had not sued her because she was sitting on her Plot 1337. It is the Defendants who live on the suit land following her sub-division of that part of the suit land and selling them to the Defendants. PW1 also testified that there is a road separating the suit land and MURINGE's land, and that what is in dispute are the portions which she sold to the Defendants.

On the delay in filing this suit, PW1 testified that they made numerous trips to the Lands Office and realised late that they were not getting any help from that quarter.

For those reasons the Plaintiffs prayed for the orders first above set out, as well as costs, and closed their case.

D. THE DEFENCE EVIDENCE

None of the Defendants testified. Instead, HELLEN MURINGE KABUTHA testified on their behalf. This was MURINGE's evidence.

- ***The original land (plot 1337) was 8.9 hectares,***
- ***Later on she acquired an additional 2.207 Hectares, and her land became 11.107 Hectares. She explained that the area on the ground was larger than what was on the title, and that after demarcation the maps were amended to reflect the areas on the grounds but that the titles remained with the same areas. DW1 also explained that she was allocated Plot Number 1339 which was water-logged, and that the owner of that plot was compensated by another plot at Kiige opposite Busara – Centre,***
- ***The Plaintiffs came to the area in 1984. They were brought by the Settlement Officer and settled next to her, and that they were shown Plot 1340 but chose Plot 2114, and that she has lived with the plaintiffs for over 20 years,***
- ***The Plaintiffs have been feuding with her since 1993 starting with Nairobi HCCC No. 5229 of 1993 – between Gikanga Rugu vs. Hellen Muringe Kabutha, when she was sued for trespass. Gikanga Rugu the Plaintiff in that suit, died. He was the father of the Plaintiffs. Following the death of their father and in the absence of any follow up – that case abated.***
- ***DW1 testified further that she too sued Peter Rugu Gikanga in Nyahururu P.M.C.C. No. 189 of 2004, and that the case was heard, and the said Defendant and his mother were granted plots No. 14587 and 14570 both approximately 50 x 100 ft and 100 x 100 ft.***
- ***DW1 was successful in that suit, and the plaintiffs were evicted, but they appealed in Nakuru H.C. Civil Appeal No. 74 of 2007 and that the said appeal was still pending, and in the pendency of that suit the plaintiffs have brought this suit,***
- ***That following sub-divisions of the land she sold some of the sub-divisions to the Defendants or to relatives of the Defendants, but through the various suits, the 1st Plaintiff currently occupies Plot No. 14589, to which he has no title or right, and that the mother of the plaintiffs has built on the road reserve,***
- ***That all the sub-divisions are from original title 1337,***
- ***The Plaintiffs have no right to evict any of the Defendants to whom she has sold the sub-divisions.***

When cross-examined by counsel for the plaintiffs DW1 (Muringe) reiterated her testimony in-chief that she had sub-divided her land, and sold some of the sub-divisions to the Defendants to whom she had already transferred title upon payment in full. Some of the Defendants being victims of the clashes were paying for the plots in instalments.

DW1 also testified that the whole area was originally plot 1340 although this Plot No. does not appear on the map and in cross-examination testified that the original allotments were 5 acres, but she got title for 8.9 Hectares, and that Plot 2114 is shown next to her plot.

DW1 also complained that she does not know why the plaintiffs started problems with her because they have another parcel of land where their father is buried.

When re-examined by her counsel as to whether they had any boundary disputes with the plaintiffs DW1 testified that any such disputes were settled in 1992, and that there were no appeals thereafter, and that all these issues on boundaries were settled in the Nyahururu Case (No. 189 of 2004), where the testimony of the Land Officers concerned was received and considered.

Finally DW1 testified that the original title No. 1337 showed 11.107 Ha following amendments by

the Government. For those reasons, DW1 prayed on behalf of the Defendants that the plaintiffs' suit be dismissed with costs. Likewise with her evidence, the Defendants closed their case, and none of them testified.

E. THE ISSUES AND ANALYSIS OF EVIDENCE

At the end of the Plaintiffs' and the Defendants' evidence respective counsel filed written submissions along with authorities relevant to their submissions. The issues raised by respective counsel were similar, and I will set them in the order in which I will deal with each of them -

- (1) *whether this court has jurisdiction to hear and determine the plaintiff's suit,*
- (2) *whether the issues in this suit were directly and substantially in issue in Nyahururu PMCC No. 189 of 2004, and therefore res judicata in terms of Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya),*
- (3) *whether the claim by the plaintiffs is statute barred by virtue of the Limitations of Actions Act (Cap. 22, Laws of Kenya),*
- (4) *whether the Plaintiffs had any reasonable cause of action, or whether the suit is incompetent, bad in law and an abuse of the court process,*
- (5) *Whether the plaintiffs are the registered proprietors and legal owners of the suit land as administrators of the Estate of the late Gikanga Rugu (deceased),*
- (6) *Whether the land occupied by the Defendants forms part and parcel of the suit land, and*
- (7) *whether the Defendants are therefore trespassers on the suit land,*
- (8) *whether the Defendants are innocent purchasers, for value without notice of the plaintiffs occupied portions,*
- (9) *whether the plaintiffs are entitled to the reliefs sought,*
- (10) *who is liable to pay the costs of this suit.*

(1) OF WHETHER THE PLAINTIFFS ARE THE REGISTERED PROPRIETORS AND LEGAL OWNERS OF THE SUIT LAND AS ADMINISTRATORS OF THE ESTATE OF THE LATE GIKANGA RUGU (deceased)

The 1st Plaintiff testified and there was no challenge to his evidence that he and the second Plaintiffs (*the Plaintiffs*) are by virtue of the Certificate of Confirmation of a Grant issued on 17th March 2009 in Nyahururu PMC Succession Cause No. 59 of 2007, and the registration thereof on 20.05.2009 in the Proprietorship Section of the Register on 28.05.2009 are the legal owners, as Administrators of the Estate of the late Gikanga Rugu. They are therefore competent to bring the suit herein.

(2) OF WHETHER THIS COURT HAS JURISDICTION TO HEAR AND DETERMINE THE PLAINTIFF'S SUIT (ISSUE 1)

The basis of this issue is Issue No. 2 – whether the issues in this case were directly and substantially in issue in Nyahururu PMCCC No. 189 of 2004 and therefore res judicata in terms of Section 7 of the Civil Procedure Act (*Cap. 21, Laws of Kenya*) Section 7 of the said Act says -

“S. 7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a court competent, to

try any such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally determined by such court.”

Under Explanation (1), the expression “***former suit***” means “***a suit which has been decided before the suit in question whether or not it was instituted before it.***” And Explanation 6 – “***where persons litigate bona fide in respect of a public interest or a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this Section be deemed to claim under the persons so litigating.***”

The essence of the Defendants argument here is that the Plaintiff's having failed in their Defence and Counterclaim in Nyahururu PMCC No. 189 of 2004, and having sued the Defendants, persons claiming under the plaintiff HELLEN MURINGE KABUTHA (*in that suit*) and that court having been competent to determine that issues, (*notwithstanding the existence of an appeal still undetermined*), this suit does not lie.

It is correct that the Defendants in that suit included the 1st Plaintiff herein, plus his mother, the subject matter was however Plots Nos. 14570 and 14587 in respect of which the plaintiff (*not a party in this suit*), obtained orders for eviction of the plaintiffs in that suit.

I have looked at the Memorandum of Appeal against the decision in Nyahururu PMCC No. 189 of 2004 (*the Nyahururu Case*) and I have also looked at the decision of my brother the Hon. L. K. Kimaru dismissing the 1st Plaintiff's application for stay of execution in the decree of the lower court in that suit. If it were not for the successful political intervention, the Plaintiffs would have been evicted from these plots. So while the plaintiffs herein are still residing on the plots, the wider issue of the true and legal ownership of the Plot 2114 is live and cries for determination.

Further, I think the Nyahururu Case was used by the Plaintiff Hellen Muringe Kabutha to bury the question of ownership of Plot 2114 by having the Plaintiffs evicted from the two plots which may have been part and parcel of Plot 2114.

Though the decision of the Nyahururu case was nominally one of eviction, it substantially determined the ownership of Plot 2114 in favour of the said Plaintiff Hellen Muringe Kabutha. The question then becomes, and it was not raised, whether the Nyahururu court was competent to determine that question. My view of the matter, and I am not determining the appeal, that court did probably, not have the jurisdiction to determine the question of title to land as envisaged then under Section 159 of the Registered Land Act, (*Cap. 300, Laws of Kenya*). The question of the matters being res judicata within the provisions of Section 7 of the Civil Procedure Act, does not therefore arise. Consequently also, the question of this court not having jurisdiction to determine this suit does not arise.

I should perhaps add, as counsel for the Defendants cited the **MV Lilian Case**, that jurisdiction is everything, and it ought to have been raised at the earliest opportunity and not at the submissions stage the parties have tendered evidence, for that at stage, the no party can say the court has no jurisdiction having taken part in the proceedings. That question could then only be legitimately determined at the appeal stage, and not by submissions, I therefore find and hold that this court has jurisdiction to determine the matters raised in this suit.

(3) OF WHETHER THE CLAIM BY THE PLAINTIFFS IS STATUTE – BARRED BY VIRTUE OF THE LIMITATION OF ACTIONS ACT (CAP. 22, LAWS OF KENYA) AND IS THEREFORE INCOMPETENT, BAD IN LAW AND AN ABUSE OF THE PROCESS OF THE COURT

Whereas the Defendants Counsel's argument that this suit may be time-barred in terms of the entry and occupation by the Defendants on to the suit lands, the issue cannot however be determined merely on the superficiality of the Limitation of Actions provisions though technically correct.

I say so, though a stickler to the law, because of the evidence tendered in the Nyahururu Case by

one Thomas Morara Nyangau at pp 60 – 63 of the typed proceedings and tendered by Hellen Muringe Kabutha as part of the Defence evidence on *res judicata*.

At p. 60, DW3, Thomas Morara Nyangau testified that he was a Registrar of Titles working with the Settlement Fund Trustees and had come to shed light on ownership of Plots 1337, 2114 and 1341. The learned trial magistrate acted correctly by overruling the Plaintiff's Counsel's objections against DW3 detailed testimony on these plots. According to his records from what called (final list) the areas of the three plots were as follows -

- (1) Plot 1337 is 8.9 ha
- (2) Plot 2114 is 2.3 ha
- (3) Plot 1341 is 6.4 ha

DW3 also testified that the old Number of Plot 2114 was 2722. He testified further that the Hellen Muringe Kabutha applied for allocations of Plot 2722 on 1.02.1991 and she even received a letter of offer, and also paid for the plot. However upon realization by the Director of Lands and Settlement that there was misinformation from the Provincial Administration confirmed in writing that the plot belonged to Gikanga Rugu. Hellen was asked to surrender the receipt for payment of Plot 2114 (*former Plot 2722*) and despite being asked not to develop the plot, Hellen went ahead and had this plot and plot 1337 “*amalgamated*” or “*consolidated*” to become 11.107 Ha, and had the area maps changed to suit her area of possession and occupation.

It was the testimony of the 1st Plaintiff (*in this case*) and 1st Defendant in the Nyahururu case), that his father Gikanga Rugu was initially and quite erroneously shown Plot 1341 which belonged to Ruth Waithera Kiuna who also successfully had these plaintiffs evicted from her plot 1341, and Gikanga Rugu sued Hellen Muringe Kabutha in the Nairobi case which abated upon his death.

In the meantime the Plaintiffs held to plots which they moved upon eviction by Ruth Waithera Kiuna's land. These plots may very well be the sub-divisions of Plot 2114 or parts thereof.

Though the Defendants may be innocent purchasers for value without notice, and though Hellen Muringe Kabutha tendered evidence to that effect, as seller of the plots to the Defendants, she produced no evidence of Sale Agreements or evidence of any payments received by her and the Defendants. For the Defendants to benefit from the doctrine of innocent purchasers for value without notice, they needed to testify to that effect. Both value (*in terms of consideration*), and notice are questions of fact. I doubt very much whether the Defendants can claim ignorance and innocence of the long running dispute between the plaintiffs herein or Gikanga Rugu under whom the plaintiffs claim, and the said seller Hellen Muringe Kabutha. There is therefore no basis of law or fact for me to make a finding that the Defendants are innocent purchasers for value and without notice.

On the twin claim that the plaintiff's claim is statutorily time-barred and consequently bad in law and incompetent, I, with respect do not think or find so. These are the reasons.

Firstly according to the evidence of DW3 (*Thomas Morara Nyangau – a Registrar of Titles as aforesaid*) the plot 2114 was discharged on 11.09.1992. It had been allocated to Gikanga Rugu in 1984. However Gikanga was shown the Plot 1341 belonging to Ruth Waithera Kiuna. Through no fault of his own, Hellen Muringe Kabutha had through the Provincial Administration misinformed the Director of Settlement about Plot 2114. The said Hellen Muringe Kabutha, despite being advised of the error, continued to deny the plaintiffs entry to their portion of land. Even the evidence Ruth Waithera Kiuna in the Nyahururu Case also indicates that Plot 2114 belonged to the Plaintiffs, and their ownership could not be extinguished by sub-division and transfer of portions thereof to the Defendants. There was no time when limitation began to run against the plaintiffs or Gikanga Rugu under whom they claim.

If I am wrong in this holding, there is a further ground, why the said Hellen Muringe Kabutha could

not hold to Plot 2114 and defeat the interest of Gikanga Rugu, or of his successors in title. To do so would be inequitable. Equity deems done what ought to be done. The Plot (2114) had been allocated (1984) to, and discharged to Gikanga Rugu in 1992. Hellen Muringe Kabutha could not and cannot in equity destroy that right. To do so would amount to approving conduct which is inequitable. The Plaintiffs are entitled in equity to trace their right and interest, in the hands of these Defendants, and in addition to action against the said Hellen Muringe Kabutha and hence the pendency of Nakuru H.C. Civil Appeal No. 74 of 2007.

I do not therefore find the Plaintiff's action as either time-barred or incompetent and bad in law.

4. OF WHETHER THE PLAINTIFFS ARE ENTITLED TO THE RELIEFS THEY SEEK AND WHO IS LIABLE FOR COSTS

Though I have every sympathy for the Defendants, the Seller, Hellen Muringe Kabutha has put them in a most awkward and embarrassing state. They or their predecessors, may indeed have paid the Seller for the plots, but they may well be sitting on the plaintiffs Plot 2114, or parts thereof. The Seller to them had no right to that plot or any portion thereof. It was erroneous on the part of the Director of Lands and Settlement to offer the plot to her, but that error was realised and corrected and she was informed.

Although no direct evidence of fraud on the part of Hellen Muringe Kabutha was led in this or the Nyahururu Case, there appear to be serious discrepancies with regard to the Survey Maps she used in enlarging her plot 1337, and the Register Index Maps (RIM), produced by DW3 in the Nyahururu Case. In light of those discrepancies, the title of the Plaintiffs to Plot 2114 (*of which they hold Title*) cannot be defeated by the submerging of that title into Plot 1337 or the purported sub-divisions thereof.

The rule in the Sale of Goods, “**NEMO DAT QUOD NON HABET**” (*No one can give that he has not*) equally applies to title to land. A person cannot give a better title than what he has, except in rare cases such as, a sale in a market overt, a sale under an order of court, transfer of negotiable instrument to a holder in due course. None of these exceptions apply in this case.

By purporting to sub-divide the plaintiff's plot and purporting to sell the sub-divisions to the Defendants, the Seller conferred no better title to the purchasers. In law, no such title was conferred to the purported purchasers.

In the circumstances the plaintiffs are entitled to the prayers sought in the plaint and I grant them to the plaintiffs.

However, I stay the execution of the said orders for 120 days from the date hereof to enable the Director of Survey together with the District Land Registrar to establish the exact area and extent of Plot No. 2114, vis-a-vis plots No. 1337 and 1341 at OL JORO OROK SALIENT in Nyandarua District.

Being successful in this suit, the plaintiffs shall also have the costs herein.

There shall therefore be orders as aforesaid and an order to the Director of Surveys and the District Land Registrar, together to carry out within 120 days a survey as aforesaid and file their report in this court detailing the proper, boundaries of Plot 2114 formerly Plot 2722 and the extent (*if any*) of the encroachment by the Defendants, and Hellen Muringe Kabutha.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 29th day of November, 2012

M. J. ANYARA EMUKULE

JUDGE