



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 666 of 2007

1. Land and Environmental Law Division
2. Subject of main suit. Filed 2nd May, 2002.

Land

- a) LR. Gathunguri/Gathieko/412 original Gathugrui /Gathieko/179 11acres.
- b) Trespass
- c) Injunction restraining defendants from trespass and destruction to property
- d) Eviction
- e) General damages
- f) Any other relief by court.

3. Defence 1st December, 2003

- a) Denial that there was any invitation to land on 16th January, 2001
- b) Denial of any forgery
- c) Admission plaintiff arrested for malicious damage
- d) Suit be dismissed.

4. Trial

- a) Court visits suit premises on 3.11.08 – adjourned to 26.11.08.
- b) Hearing on 8.4.09 – court vacation adjourned taken out of list
- c) Deputy Registrar orders file placed for hearing at Kericho.
- d) Both parties take date for 27th and 28th May, 2009 by consent at Kericho before the deputy registrar

- e) Defendant fails to attend court. Court adjourns to 28.5.09 to await defendant absent.
- f) Hearing on 28.5.09 – Order Ixb r 3(a) civil procedure rules
- g) Plaintiff evidence

5. **Held**

5.1 Injunction orders to issue

5.2 1st and 2nd defendants be evicted

5.3. The orders in 899/04 suo motor set aside

6. **Case law** – related suits.

a) 1056/07(JR)

b) 179/04(JR)

c) 899/04

7. **Advocates**

F.W. Kimeria instructed by the firm of Wamahiu Kimeria & Co. advocates for the Plaintiff/Applicant

J.W. Wachira instructed by the firm of Waithaka Wachira & Co. advocates for the Defendant/Respondent

STEPHEN WANYOIKE KINUTHIA PLAINTIFF

VERSUS

KARIUKI MAREGA & ANOTHER DEFENDANT

JUDGMENT

I: Claim

1. LR. Githunguri/Giathieko /179 originally consisted of 11.6 acres that belonged to one Marega Kinuthia as the sole registered proprietor of the said land as of 27th May, 1958. This old Patricah had two houses. A law of Succession case concerning the said land was concluded being a sub-division of the property.

2. One of the beneficiary to the estate was awarded 1.00 acre of land. On the 2nd May, 2002 he filed this suit claiming that his portion of land LR. Gathugni.Gathieke/412 had been invaded by the two defendants being Kiriuki Marega and Peter Muigai (*defendants 1 and 2 respectively*).

3. Stephen Wanyoike Kinuthia sued in his capacity as the legal representative of John Kinuthia Marega on a claim of trespass. He prayed to this court for orders of :-

- i) Injunction to restrain the defendants from trespassing and destroying his property.

ii) Eviction

iii) General Damages

iv) and any other relief by the court.

4. The defendants filed their defence on 1st December, 2003 and denied that there was any invitation to the land on 16th January, 2001, they claimed that there was not any forgery. They did admit that the plaintiff was arrested and charged for malicious damage. They prayed that this suit be dismissed.

II: Procedure

5. When the Environmental Law and Land division was established this High Court of Kenya Case NO. 722/02 was re-numbered to read High Court case Cause NO. 666/07.

6. An application by the defendants to dismiss and strike out this suit on grounds that there was no cause of action considering HCCC. 899/04.

Kariuki Marega

Peter Mungai (aka) Gikuiyu Marega

versus

The Chief Land Registrar

Later enjoined interested parties being the plaintiffs and others was dismissed. This case in effect further sub-divided the land and there was nothing left in the current case before court (*Mutungu J*)

7. In this court's ruling of 30th July, 2008, it held that there were triable issues. The application was duly dismissed.

8. Parties undertook to visit the suit property to determine the status of the same and they did indeed take photographs.

9. All related suits were called up for perusal by this court. Parties undertook pre-trial under their own supervision. A date of 3rd November, 2008 was set aside for site visit. This was re-adjusted to the 26th November, 2008 due to other assignment given to this court.

10. The site visit inspected the land in the presence of both parties and their advocates. The land sloped down to the river with each party wanting the said share of a river frontage. It's therefore meant the land seizure was in long small strips.

11. It was agreed with parties that the hearing and trial of this case be heard on 8th April, 2009. Unfortunately that day was court's vacation. The parties appeared before the deputy registrar and had this matter placed before the deputy registrar Kericho where they took consent dates for hearing of the 27th and 28th May, 2009. On the 27th May, 2009, the defendant and their advocate failed to appear to court. This court waited for them the whole day then adjourned the case to 28th May, 2009. The other party still failed to attend court. The court proceeded to trial under **Order Ixb r 3(a)** Civil Procedure Rules being satisfied that consent dates had been taken. The plaintiff gave evidence and called witnesses.

III: Background

12. In his evidence the plaintiff relied on several past High Court cases to explain the genesis and background of this case. This court has perused these cases and would conclude that the correct

background facts of this case is as follows:-

13. Marega Kinuthia the original proprietor of LR. Githunguri/Githieka/179 consisting of 11.6 acres; left an oral will that he had made sometimes in the year 1965 when he passed away the defendant No. 1 filed suit HCCC. 1327/1978 challenging the said will. The deceased died in 1967.

14. The will had given the land apportionment to

a) Kinuthia Marega 1st born – 4 acres

b) Kimani Marega - 3 acres

c) Wairimu Marega

2nd wife/widow on behalf of now defendant No. 1 then Plaintiffs and son of deceased – 3.60acres

d) Ndungu Kinuthia

grandson (and Plaintiff in this case) - 1 acre

(666/07)

This was done in the presence of Njoroge Muororo,

Kariuki Merocha

Gathira Gekonga

15. The defendant No. 1 then proceeded to the law courts at Githunguri to challenge the said apportionment but his case was dismissed. The land was subsequently divided.

16. In the case 1327/1978 the Hon. Mr. Justice Masime (as he then was) referred the matter, as the custom of the court during that time was, to arbitration before a panel of African elders and the chief. This was ordered on the 1st October, 1981. The award was to be ready by 9th December, 1981. This award was ready on 9th December, 1981. It came before Gachuhi J who read the same before the parties in the absence of their advocates. They were given leave to apply to set aside the awards. The 1st defendant did appear on 8th March, 1982 before Gachuhi J in the presence of Kimani Marega the defendant in that case and did in deed apply to set the award aside. The Hon. Judge refused and dismissed the said application ordering that the decision of the elders remain. This in effect became the judgment of the High Court. All remained was the execution. In 1986 the parties again returned to court and Owour J on the 25th October, 1988 whereby she ordered that the apportionment of land be strictly carried out in accordance with the terms of the court order made by Hon. Mr. Justice Gachuhi on 9th December, 1981.

17. For ease of reference I wish to first record the elders award that made up the final orders of Gachuhi J (as he then was on 9th December, 1981). This was:-

RE: - Civil Suit 1327/1978

Kariuki Marega Plaintiff

v

Kimani Marega Defendant

“The elders heard the above succession cause and the following is their decision:-

The deceased Marega had a land of 11.60 acres which has to be shared among four people

- i) Kinuthia Marega**
- ii) Gikuiyu Marega (the 2nd defendant in 666/07)**
- iii) Kimani Marega**
- iv) Francis Ndungu Kinuthia (plaintiff in 666/07)**

Kariuki Marega who is a complainant is a brother to Gikuiyu (ii) and the share that will go to Gukuiyu will be his (Gikuyu) and his brother Kariuki.

Although Kariuki Marega wanted the land to be shared among the deceased’s wives, the elders, could not agree with him because Marega had made his will before his death. This Will was found fair to the family and therefore arbitrators confirmed the following:-

- i) Kinuthia Marega to share 4 acres**
- ii) Gikuiyu Marega (ii) to share 3.60**
- iii) Kimani Marega to share 3.00 acres**
- iv) Francis Ndungu to share 1 acres**

The fourth person herein (F. Ndungu Kinuthia) was given one acre by Marega before his death as a free gift because of his help he had given to Marega at his (Marega’s) old age and since Marega himself gave Ndungu this one acre then Ndungu has a right to share this. He has the right just as the rest (of the) three persons.

The following are the appointed elders and their signatures

- a) Kimani Marega appointed**
 - i) Mr. Mburu Njoroge – signed**
 - ii) Mr. Chuchu Murungaru – Signed.**
- b) Kariuki Marega appointed**
 - i) Mr. Kariuki Kuogothoka – signed**
 - ii) Mr. Kimani Mwathi – Signed**
- c) Francis Ndungu Kinuthia appointed**
 - i) Mr. Karanja Gekandi – signed**
 - ii) Mr. Kangere Muiruri– signed**
- d) Kinuthia Marega appointed**
 - i) Mr. Mararia Wanjugi – signed**

ii) **Mr. Waiharo Gituoria – signed**

e) **Gikuiyu Marega alias Mungai Marega appointed**

i) **Mr. Ng’ang’a Gathaita – signed.**

ii) **Mbai Mwathi – signed**

18. The land was accordingly apportioned to Githunguri/Gathieka /370,371,411,412 & 373. {*Land parcel 372 was further sub-divided to 411 and 412*}. The plaintiff in this case was awarded his one acre being Gathunguri/Gathieka 412 which is the subject matter of this suit.

19. For some unknown reasons but soon after the elections in Kenya after His Excellency President Arap Moi the second president to Kenya , the 1st defendant invaded the plaintiff portion of land being one acre. The plaintiff took the law into his hands and demolished the boundary placed illegally by the 1st defendant. He was arrested and charged with malicious damage to property. On appeal he and others were accordingly acquitted.

20. He filed HCCC.722/02 this court but which was later remembered as HCCC.666/07 when this original suit was transferred to this division.

21. Whilst this suit was pending the 1st defendant through his advocate filed a judicial review application to quash the titles of the suit land. Misc.1056/03 at Nairobi this matter came before the constitutional and judicial review court where Nyamu-J dismissed the same as having been filed irregular on 18th September, 2003.

22. The 1st defendant then filed a second judicial review application Misc.179/04 that came before Ransley –J (as he then was) seeking the same orders to cancel the titles. The said Hon. Judge in his judgment of 6th July, 2004 dismissed the judicial review application on grounds that no government body had exceeded its powers in coming to its decision. He further held that the orders of Owour-J was not to be challenged at that forum.

23. The 1st defendant and 2nd defendant then filed High Court case 899/04 and sued the Chief Land Registrar. Other parties were left out. Together with the state counsel representing the Chief Land Registrar the 1st and 2nd defendant entered into a consent namely:

“The defendant (the land Registrar) herein he and is hereby compelled to cancel titles No.Gathunguri /Gathieka/370.371,411,412,373 and in their place issue titles No. Githunguri/Gathieka 465, 466, 467 & 468 in accordance with High Court Order of 9th December, 1981 in HCCC.No.1327 1978”.

24. A decree was issued purporting to having been signed by Bhatt, a Deputy Registrar and execution was duly carried out. The 1st and 2nd defendant then purportedly took over the property on grounds that the said matter was legally decided.

25. From the above order, the state counsel signed on behalf of the attorney general is unknown. The orders of 9th December, 1981 did not in anyway state that the land be appointed to No. Gathunguri /Gathieko 465, 466,467, 468. There had never been any decree of court.

26. The plaintiff and others moved to court to be enjoined which they duly were. The defendants on being served with the application of 30th December, 2004 and 30 July, 2005 respectively. Seeking to set aside the decree applied for both to be dismissed for want of prosecution on 27th July, 2007. This was granted by Mutungi –J (as he then was). This meant that the orders of correcting and further sub-dividing the land remained.

27. It was therefore the application by the defendants 1 & 2 to strike out this suit of 2002 on grounds that their case of HCC.899/04 was in effect overtaken this case with the court's orders, which orders this court observed did not come about by a decision of any Judge but by a consent order of the 1st and 2nd defendant through their advocate with an unknown state counsel. Which order this court set aside *suo moto* in that file.

III: Findings

28. The correct position in this matter is that the 1st defendant who was aged 25 years old when his father gave an oral Will as to the sub-division of his land that included the plaintiff his grandson whom he awarded one acre, was not satisfied. The 1st defendant wanted an equal portion of land between the two houses which would mean that their portion would be slightly larger. To achieve this, the 1st defendant together with the 2nd defendant invaded the land of the plaintiff and forcefully took over it.

29. I hereby find that the conduct of the 1st defendant and 2nd defendant disturbing and contrary to a reasonable person. It therefore leaves this court with no other option but to grant the plaintiff his prayers for a permanent injunction.

30. The plaintiff sought mandatory orders of evicting the defendants 1 & 2 from his portion of land. I grant him this.

31. The court notes the order that there be any other relief. I use this prayer to order that the land parcel numbers remain 370,371,411,412 & 373 as was determined in 1982 and that it was originally so agreed and being so determined remained as such. I order further an award of Kshs.500, 000/= general damages to the plaintiff.

32. I further order that the attorney general and police investigate counsel who entered the consent in 899/04 and if found liable to be prosecuted.

33. A copy of this judgment be supplied to the Provincial Commissioner, the Attorney General and the advocates complaints commission for necessary action. I award costs to the plaintiff.

DATED this 8th day of June, 2009 at **KERICHO**

M.A.ANG'AWA

JUDGE

Advocates

F.W. Kimeria instructed by the firm of Wamahiu Kimeria & Co. advocates for the Plaintiff/Applicant J.W. Wachira instructed by the firm of Waitthaka Wachira & Co. advocates for the Defendant/Respondent