



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

Civil Case 1319 of 2006

GLADWELL WAMBUI GITHUMBIPLAINTIFF

V E R S U S

JANE MUTHONI MUNGE1ST DEFENDANT

AGNES WAMBUI MUNGE2ND DEFENDANT

FAUSTIN KABAKI MUNGE3RD DEFENDANT

R U L I N G

On a preliminary objection

I: Background

1. Gladwell Wambui Githumbi is the widow to the late Githumbi Munge who passed away on 31st July 2004 age 64 years from cancer. She obtained letters of grant to his estate on 27th March, 2006. The deceased only asset was a parcel of land being Kiambu Title No.Gatamaiyu/Kamuchege/351 issued on 3rd December 1969.

2. This title deed had since been extinguished by an order of a court in Kiambu Land case 25/99. I do not have this file before me but from the bundle of documents availed from the parties the said case had been referred to a panel of elders. They made their findings and the trial magistrate adopted the award of elders as part of the judgment. The effect of the award was to transfer the land parcel Gatamaiyu/Kamuchege/351 to the three defendants herein being Jane Muthoni Munge, Agnes Wambui Munge and Faustin Kabaki Munge. Title deed were accordingly issued on sub-division of the land as land parcel Gatamaiyu 1293, 1294, 1295, 1296 to the Plaintiff late husband and defendants respectively.

3. There was no appeal against the said decision to either the Provincial Lands Disputes Tribunal, nor was there any judicial review to quash the decision of the lands dispute tribunal.

4. The plaintiff explains that the deceased had in 1974 allowed the defendants upon the land as his relatives. In 1984, 10 years later he asked that they vacate his land. They failed to do so. The deceased filed HCCC No. 2875/92 seeking to have them vacated. Instead 7 years later the defendants filed Kiambu SPM Land Case 25/99 that was referred to the elders despite there being the high court case. The high court case was dismissed on 20th June, 2001 (Kasanga Mulwa, J) on grounds that no steps had been taken for 8 years (Order XVI r 6CPR).

5. The deceased passed away in 2004 and by succession cause file 3362/05 at Nairobi High Court the plaintiff; his widow obtained a grant for letters of administration intestate. She all along presented the original title deed LR Gatamaiyu/Kamuchege/351 as the deceased assets. By 2004 the said title had extinguished and no longer existed.

6. Two years later she filed this present suit (14.12.06) against the three defendants Jane Muthoni Munge (holding title Gatamaiyu/Kamuchege 1294), Agnes Wambui Munge (holding title Gatamaiyu/Kamuchege 1295) and Faustin Kabaki Munge (holding title Gatamaiyu/Kamuchege 1296).

7. Her claim against them was the manner in which the Kiambu SPM (ld)25/99 case was conducted namely that it was “fraudulently and illegally conducted with the result that a court order was issued ... declaring that the land be divided between the deceased and the defendants ...”

8. The particulars of land being:-

8(a). Conducting the proceeding with a dispute over the same piece of land by a panel of elders and then at the magistrates court without reference to them by the high court.

8(b) Allowing elders to decide the issue of ownership of land they had no powers to do so and confirming ownership of portions of the deceased’s land when the deceased was the absolute proprietor thereto in accordance with section 30 of the Registered Land Act.

8(c) Proceeding with the said land case without the knowledge of the deceased.

8(d) Forging and swearing false affidavits that the deceased had been served with civil papers, processes, hearing notices and other relevant documents to the said case when in fact he had not.

8(e) Locking the deceased out of court where the said court was proceeding and at times conducting proceedings relating to the said land and court case at places other than the places designated for the said proceedings to take place.

9. The plaintiffs claim comes for a declaration that the said Proceedings in Kiambu SPM courts No.25/99 (read) was fraudulent null and void and an order that the defendants title to portions of land known as Gatamaiyu/Kamuchege 1294, 1295 and 1296 be cancelled.

II Preliminary Objection

10. The defendants raised a preliminary objection to this suit. The grounds showing that a decision had been made in the SPMCC 25/99 case at Kiambu. This was a finalized case against the deceased and judgment duly entered. The only option left for the plaintiff as the administrator of the deceased estate was to:-

i) File a judicial review to the High Court to quash the

decision of the three.

ii) To appeal against the decision of the tribunal to the Lands Dispute Tribunal.

iii) To appeal on a point of law.

11. As it stands the suit is time barred.

12. Further, the 1st defendant is deceased. (This court has no indication that the 1st defendant had passed away save from what has been stated from the bar).

ii) In reply

13. In reply to the preliminary objection the advocate for the plaintiff stated that the suit was not true ... as it was based on fraud. There is no time limit in TORT for a claim under fraud. Further he stated that the plaintiffs had no issues with the elders decision what they objected it was the decision at the trial magistrates courts. Indeed the particulars of fraud are actually admitted to the said trial magistrate's court and not the three defendants.

14. The advocate for the plaintiff asked that evidence in this matter be called.

III Opinion

15. The law is very clear in our jurisdiction. Once a decision by way of judgment or order has been made by a competent court it stands. Therefore the decision made in SPM 25/99 case was made by way of adopting the decision of the elders and making it part of the judgment of the court. That decision stands and can only be challenged if a higher court sets it aside on appeal or if the same court sets it aside.

16. I am disadvantaged by not hearing SPM 25/99 file before me but both parties admit that a decision had been made. It is as a result of that decision that land was such divided to the three defendants.

17. I believe that the plaintiff is not permitted to file this suit in the light of the magistrate's court case having been determined. If perchance, there had been no decision and only the High Court case 2875/92 that was dismissed the subject to the limitation of actions act, a new High Court suit would have been brought.

18. Because there exists the decree of the subordinate court the only access the plaintiff has to this court is by way of judicial review, appeal and or appeal to the provincial lands disputes tribunal.

19. The advocate for the plaintiff tells me he was unable to proceed on the above terms as his client is now time bound.

20. I would agree with this. The plaintiff claims her deceased husband may not have been aware of the subordinate court case. She refuses to go back to that same court case and make appropriate applications according to law.

21. The title has extinguish, the remedy sought by the plaintiff herein is not available due to the existence of the said decree of the subordinate court.

22. I accordingly refused the preliminary objection I would struck out this suit with costs to the respondents defence.

DATED THIS 14TH DAY OF FEBRUARY 2008 AT NAIROBI

M. A. ANG'AWA

J U D G E

S.M. Keyonzo of S.M. Keyonzo & Co. Advocates for the plaintiff/applicant – present

S. Mwaura fo Mwaura Shairi & Co. Advocates for the defendant/respondent - present