



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

CIVIL CASE 14 OF 1995

GEOFFREY MUREITHI Alias

GITARI MURIITHI PLAINTIFF

VERSUS

GERISHON KARUARE KIMANGA 1ST DEFENDANT

NJERU KAGIRI 2ND DEFENDANT

KAKUYA NJARAIMWE 3RD DEFENDANT

J U D G M E N T

This case demonstrates poignantly and in no and uncertain terms the need to have cases heard and determined timeously. The suit pertains to land parcel number Mutira/Kaguyu/557 hereinafter referred to as “*the suit premises*”. The Plaintiff lodged this suit in this court on 18th January 1995, almost thirteen years ago. The suit was initially against three defendants, **Gerishon Karuare Kimanga, Njeru Kagiri** and **Kakuya Njaraimwe**. The latter soon thereafter on 7th September 1995 passed on. Following the death, his widow **Virginia Karuara** was substituted in his place. However on 18th March 2005, almost ten years after the institution of the suit, she also passed on. By an application dated 7th July 2005, the plaintiff sought and obtained an order substituting **Stephen Muriithi Gakuya** in the suit in place of his deceased mother **Virginia Karuara Gakuya**. As the case was pending hearing the first and 2nd defendants also passed on. However they were never substituted and accordingly the suit abated as against them. So that by the time the case came up for hearing the contest was now left between the Plaintiff and the 3rd defendant. Had this case been heard and disposed off expeditiously, perhaps the problem encountered by both the Plaintiff and Defendant in marshalling the necessary witnesses and or evidence in support of the respective claims could well have been avoided. As it is the 1st and 2nd Defendants went to their graves with the secrets intact regarding how they sold and transferred the suit premises to the 3rd defendant, which land according to the plaintiff belonged to him. The truth may never be told or known.

It is worthy knowing that this suit was preceded by the two earlier similar suits filed by the plaintiff against the same defendants in this court being Nyeri HCCC No. 14 of 1989 and Nyeri HCCC No. 89 of 1990. In those suits the plaintiff sought orders that:-

(a) The suit premises belongs to him

- (b) The 3rd Defendant be ordered to move and vacate**
- (c) The land Registrar be ordered to amend his records accordingly**
- (d) Costs of the suit**
- (e) Interest at court rates**

Unfortunately those suits never saw the light of day as the first suit HCCC 14 of 1989 was on a technicality struck out by Tunoi J. (as he then was). However the learned judge granted the plaintiff leave to file the second suit, which is HCCC No. 89 of 1990. On 21st October 1994, Justice Ang'awa struck it out too holding “..... **That this court has perused the plaint, it speaks of fraud, no particulars of fraud has been pleaded under order 6 rule 8 (1) (b). It thus means that the plaint is defective and should and is hereby struck off (sic)....**” The learned judge granted the plaintiff leave to yet bring another suit. That leave is the genesis of this suit. From the foregoing one could say that the plaintiff has been in the court corridors for a total of eighteen years seeking justice. This is not a record that the judiciary can be proud of.

Anyhow pursuant to that leave the Plaintiff instituted the instant suit. The suit seeks the same prayers as the previous suits aforesaid to wit;

“(a) That land parcel Mutira/Kaguyu/557

belongs to him.

(b) That the 3rd defendant is illegally occupying

this land and he should vacate in favour of

the plaintiff.

(c) That the land Registrar at Kerugoya be

ordered to amend his register to show the

Plaintiff as the registered owner of

Mutira/Kaguyu/557

(d) Costs of this suit

(e) Interest at court rates.

(f) Any other relief this honourable court may

deem fit to grant”

The plaintiffs claim was premised on the fact that he was the registered owner of the suit premises. That on 1st February 1967 the 1st and 2nd Defendants fraudulently made an application to the Ndia land control board for consent to transfer the suit premises which then belonged to the plaintiff, a minor to the 3rd defendant falsely claiming that they were his appointed guardians. The plaintiff claimed that the said

application though fraudulent was nonetheless granted on 14th February 1967 and the suit premises were thereafter transferred and registered in the names of the 3rd defendant. The Plaintiff went ahead to give the particulars of fraud perpetrated by the 1st and 2nd defendants.

The Defendants denied the Plaintiff's claim. Since the 1st and 2nd defendants have passed on and the suit having abated as against them, we shall only be concerned with the defence advanced by the surviving defendant, the 3rd defendant. His defence was that the suit was time barred, that the suit was misconceived in that there were already two similar suits pending in this court namely HCCC No. 14 of 1989 and HCCC No. 89 of 1990, that the Plaintiff had never been in the registered proprietor of the suit premises which suit premises were and had all along been registered in the name of **Gitari Mureithi** not a party to the suit. That he was a bonafide purchaser for value of the suit premises without notice whatsoever of the alleged fraud and finally that having purchased the suit premises he immediately took possession of the same with his family and has since made extensive developments thereon. The transaction was lawful and unchallengeable in law under section 143 of the registered land Act.

In support of his case, the Plaintiff alone testified. In summary, his evidence was in these terms; that the suit premises were allocated to him by his clan in 1959 during land demarcation and consolidation. It was then registered in his name. At the time of registration he was a young lad aged about 12 years and in school. Later on when he went to check on the same he discovered that it had been sold and transferred to the 3rd defendant by the 1st and 2nd defendants. Subsequently, the said defendants were arrested and charged with the offence of forgery contrary to section 349 of the penal code, tried, convicted and sentenced to 6 months probation in criminal case number 611 of 1986 in the resident magistrate's court at Kerugoya. The offence had a bearing on the forged documents of transfer in respect of the suit premises. The plaintiff conceded however that since the suit premises had been given to him as aforesaid he had never taken physical possession of the same. He also confirmed that the 3rd Defendant had planted tea bushes and put up a residential house thereon. It was his prayer that since the 3rd defendant was occupying his land illegally, he should be evicted therefrom and the suit premises re-transferred to him. He also asked for costs of this suit.

Under cross-examination by **Mr. Ntarangwi**, learned counsel for the defendant, the plaintiff stated that he also went by the name, **Gitari Muriithi** which is an alias. However he had no documents to verify that fact. That his father had a mental problem and that is why in the criminal case at Kerugoya aforesaid, he claimed that the plaintiff was also not known as **Gitari Muriithi**. He conceded that he knew that the defendant bought the suit premises in 1965 but did not know the circumstances under which he bought the suit premises. However he knew that the Defendant bought the suit premises from the two deceased defendants and one, **Macharia Gatitu** whom he could not sue as he was unable to trace him. It appeared to the Plaintiff that the two defendants went to court and misled the Ndia African court into appointing them as guardians of the plaintiff to hold the suit premises in trust for the plaintiff. Later on however they sold and transferred the suit premises to the surviving defendant. He exonerated the Defendant of any wrong doing however. He stated that the defendant was not guilty of fraud and that he did not know whether the defendant knew that the authority given to the two deceased Defendants was genuine. The plaintiff called no other witness.

On his part, the Defendant alone also testified. He stated thus; that he was the legal representative of the Estate of his father who is the registered proprietor of the suit premises. The said suit premises were bought by his father on 10th February 1967 and transfer to him duly effected. Thereafter he was issued with the title deed. Since then he and his family have been in occupation. They have extensively developed the same by planting coffee and tea bushes as well as family residences. That the Plaintiff had never claimed the suit premises until 1995. That the plaintiff had tried to stop the burial of their father on the suit premises by way of a court injunction but the same was dismissed by the court of appeal. That the person who sold the suit premises to his father was **Gitari Muriithi** who is not the plaintiff. He thus prayed for the dismissal of the suit with costs.

On cross-examination by **Mr. Mahan**, learned counsel for the Plaintiff, the defendant confirmed that **Geoffrey Muriithi** and **Gitari Muriithi** were not one and the same person. He admitted that he knew the

Plaintiff as they were schoolmates some time back. That the suit premises were bought by his father from a different person and not the plaintiff.

At the conclusion of the hearing, both **Mr. Mahan** and **Mr. Ntarangwi** agreed to file and exchange written submissions. They did so subsequently and I have had the benefit of carefully reading and considering them together with the authority cited by **Mr. Ntarangwi**.

Having considered very carefully the pleadings, the evidence tendered, the written submissions and the law, what are the issues that have emerged that call for determination by this court? To my mind, they are essentially six to wit;

- (i) **Whether the suit premises were ever registered in the names of the Plaintiff.**
- (ii) **Whether the suit premises were fraudulently sold and transferred to the 3rd Defendant.**
- (iii) **If yes, should the 3rd Defendant's title be extinguished and or cancelled so as to revert the suit premises to the plaintiff.**
- (iv) **Whether the 3rd Defendant was a purchaser for value without Notice of the alleged fraud and the effect of section 143 of the Registered Land Act to the transaction.**
- (v) **Whether the plaintiff's suit is time barred.**
- (vi) **Costs**

Dealing with the 1st issue, it is the evidence of the plaintiff that he was the registered owner of the suit premises. He said so in paragraph 3 of the plaint as well as in his evidence. Indeed in his evidence he claimed to have been so registered since 1959. In support of this claim he tendered in evidence an extract from the land register with the regard to the suit premises, otherwise known as the green card. From the said extract, it is indicated that as at 2nd November 1959 the suit premises were registered in the name of **Gitaari Muriithi**. The plaintiff is called **Geoffrey Mureithi**. At least that is the name in which he filed the previous suits although in the instant there is mention of him being alias **Gitari Muriithi**. However he testified as **Geoffrey Mureithi**. He never indicated in his evidence in chief that he was also known as **Gitaari Muriithi**. It was only after the differences in the names in the green card were pointed out to him in cross-examination that he indicated that he was also known as **Gitari Muriithi**. However he had no documents to back up his claim. He did not tender the National Identity card, birth certificate nor even a Baptismal card. Surely if the plaintiff has an alias **Gitaari Muriithi**, what would have been easier than to avail any of these documents failing which call any witness(es) who knew him as such. It is also noteworthy that in all the previous two suits that he had filed in this court with regard to the suit premises i.e. HCCC No. 14 of 1982 and 89 of 1990, the plaintiff always referred to himself as **Geoffrey Mureithi** and never at any single time indicated in the body of the said plaints that he was also known by the alias **Gitari Muriithi**. He only sprang up the alias in the instant suit. The plaintiff has submitted that by the 3rd Defendant admitting the descriptive parts of the plaint in paragraph 1 of the defence, he is taken to have admitted that the plaintiff is also known as **Gitaari Muriithi**. That may well be so but the name featuring on the green card is not strictly in tandem with the plaintiff's alleged other name. On the green card the name is **Gitaari Muriithi**. The Plaintiff's alias is **Gitari Muriithi**. **Gitaari** and **Gitari** are not one and the same. Further I would imagine that when the defendant admitted descriptive parts of the plaintiff, it would ordinarily mean averments in the paragraphs of the plaint and not in the intitlement. There is no paragraph in the plaint that the plaintiff has indicated that he is also known as **Gitaari Muriithi** to which the Defendant would have been called to deny and or admit. It is also instructive to note that when he testified in the criminal case he gave his names as **Geoffrey Muriithi Marithia**. He again indicated that he was also known as **Gitari Muriithi**. Under Cross-examination by **C.C. Patel** then acting for the accused, he further disclosed that he was also known as **Gitari Marithia**. He also indicated that the names on his national identity card were **Geoffrey Muriithi Marithia**. The plaintiff seems to have too many alias for reasons best known to himself perhaps. The plaintiff's own father testified in the

criminal case and stated that the plaintiff's name were **Muriithi Mariithia** alias **Gitari Mariithia**. He denied that his son (Plaintiff) also went by the names **Gitari Muriithi**. Having appreciated the impact of his father's evidence as aforesaid on this case, the plaintiff was at pains to explain this assertion by his father. Under cross-examination by **Mr. Ntarangwi**, the Plaintiff claimed "..... **My father had a mental problem and that is why in the proceedings he claimed that I was not also known as Gitari Muriithi**" He produced no documents to buttress this claim nor any witness(es) to that fact. In any event the trial court would not have failed to notice that fact during the taking of his father's evidence if indeed it was true.

As at 1959, the plaintiff was aged about 12 years. He was therefore a minor. The suit premises could thus have not been registered in his name perse. It could only have been registered in an adult person's name to hold it in trust for the plaintiff. After all his father was alive and kicking. Nothing could have stopped him from being so registered. This may lend credence to the defendant's assertion that the **Gitari Muriithi** who sold the land to his father is not the alias **Gitari Muriithi**, that the plaintiff proclaims to be but totally a different person.

For all the foregoing reasons I am not satisfied that the plaintiff was the registered proprietor of the suit premises in 1959. The suit premises were registered in the name of **Gitaari Muriithi** who is not the plaintiff. Much as the plaintiff claimed that that was his name as well, he has not been able to prove that contention.

On the 2nd, 3rd and 4th issues, it is the testimony of the plaintiff that the suit premises were fraudulently sold and transferred to the defendant. However he does not attribute any fraud to the defendant. In fact he exonerates him completely. Under cross-examination he stated thus "..... **The defendant is not guilty of fraud....**" Indeed even in his plaint there are no particulars of fraud attributed to the Defendant. It would appear from the pleadings and the evidence tendered that the fraud complained of was perpetrated by the 1st and 2nd Defendants who unfortunately have since passed on. These two defendants were on the complaint of the plaintiff herein, arrested and charged in the Resident Magistrate's Court at Kerugoya in criminal case number 611 of 1986 with the offence of forgery contrary to section 349 of the Penal Code. They were duly tried and convicted for the offence and sentenced to 6 months probation. The forgery was in relation to the documents that led to the transfer of the suit premises to the defendant. That conviction is perhaps sufficient proof that the two deceased defendants had committed a fraud and perhaps had no capacity to pass good title to the instant defendant. However the plaintiff did not implicate the 3rd defendant in the forgery or fraud. He did not in any way suggest that that the said defendant knew of any forgery when he bought the suit premises. Clearly therefore the defendant was a purchaser for value without notice of the alleged fraud. Can this title be impugned in those circumstances. The plaintiff thinks that because of the fraud perpetrated by the deceased defendants, they had no good title to pass to the 3rd defendant. Accordingly the suit premises should revert to him. That may well be so. However section 143(1) of the registered land Act stands in his way. That section provides interalia:-

"143 (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

A closer reading of this section leaves no one in doubt that for me to be able to grant prayer (iii) in the plaint which essentially amounts to rectification of the register, the plaintiff must demonstrate that the defendant had prior knowledge of the omission, fraud or mistake of which the rectification is sought. In the circumstances of this case, the plaintiff categorically exonerated the defendant from the fraudulent acts of the deceased defendants. He did not allege that the defendant by either omission, fraud or mistake

orchestrated the transfer of the suit premises to himself by the deceased defendants. Neither did he allege that the defendant despite his prior knowledge of the omission, fraud or mistake perpetrated in the transfer nonetheless went ahead to effect the transfer of the suit premises to himself. Much as the plaintiff has been able to demonstrate the deceased defendants' fraudulent conduct in the whole transaction it has no bearing on the defendant's title. Section 143(1) supra, has provided the defendant with a bold shield and ammunition against the plaintiff's claim. With this I believe I have exhausted 2nd and 3rd and 4th issues as framed.

That brings me to issue number five. According to the testimony of the plaintiff he knew that the Defendant had bought the suit premises way back in 1965. That is about 43 years ago yet he took no immediate steps to evict the defendant and reclaim or repossess the suit premises. Instead he left him to remain in occupation thereof. Accordingly the Defendant and the family went ahead to extensively develop the suit premises. The deceased family consisting of five brothers have resided on the suit premises and built their homesteads thereon since its purchase as

aforesaid. The remains of the defendant's father were buried in the suit premises. The plaintiff's cause of action is premised on fraud. Fraud is a tort. Under section 4 (2) of the Limitation of Actions, an action founded on tort cannot be mounted in court after the expiry of three years from the date on which such cause of action accrued. Clearly therefore the plaintiff's action is statute barred for it was filed in court on 18th January, 1995 a whole 30 years after the cause of action accrued. The plaintiff may argue that the suit was filed pursuant to the leave granted by Justice Ang'awa on 21st October 1994 in HCCC No. 89 of 1990. However that leave was not granted on application for extension of time. It was granted ex gratia following the striking out of an earlier suit. The leave so granted was therefore dependent on whether the plaintiff's subsequent suit if any, would still be in time when filed. I cannot accept

the argument that merely because leave was granted, it must override clear and specific provisions of the law. Yes, the Plaintiff from the record had other suits relating to the suit premises. However they were all time barred. The plaintiff may also argue that his action is to recover land, in which event the three years limitation period does not apply. Under the same statute, a claim to recover land must be instituted within 12 years. Again by the same analysis aforesaid, the plaintiff's claim will still be caught in the web of limitation.

I appreciate that this issue was not raised in the evidence and or respective submissions. However it is raised in the pleadings. It is a question of law that I must deal with.

For all the foregoing reasons, I am satisfied that the plaintiff's suit is bad in law. Accordingly it is dismissed. I would award costs of the suit to the 3rd defendant.

Dated and delivered at Nyeri this 9th day of October 2008

M. S. A. MAKHANDIA

JUDGE