



**Gatigi & another v Kinyua & 2 others; Land Registrar & another (Third party) (Environment & Land Case 231 of 2014) [2023] KEELC 17206 (KLR) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17206 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 231 OF 2014  
JO OLOLA, J  
MAY 8, 2023  
FORMERLY NYERI HCCC NO. 216 OF 2000**

**BETWEEN**

**PENELOPHY WAMBUI GATIGI ..... 1<sup>ST</sup> PLAINTIFF  
ISAAC MWANGI KANJA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**WATETU KINYUA ..... 1<sup>ST</sup> DEFENDANT  
JOHN MWANGI KINYUA ..... 2<sup>ND</sup> DEFENDANT  
EUSTACE KANURA KINYUA ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**THE LAND REGISTRAR ..... THIRD PARTY  
THE HON. ATTORNEY GENERAL ..... THIRD PARTY**

**JUDGMENT**

**Background**

1. By their Plaint dated 25<sup>th</sup> dated 25<sup>th</sup> April, 2000 as filed herein on 13<sup>th</sup> November 2000, Penelophy Wambui Gatigi and Isaac Mwangi Kanja pray for Judgment against the three (3) Defendants for:
  - (a) An order of declaration by this Honourable Court that the Defendants herein are unlawfully occupying and trespassing on a portion of land parcel Iriaini/Kiaguthu/8 belonging to the Plaintiff and hence the Defendants are liable to pay the Plaintiff's general damages for trespass from June, 1998 and an order of eviction against the Defendants to give vacant possession (to) the Plaintiffs in relation to their portion of land trespassed by the Defendants;



- (b) An order of permanent injunction restraining the Defendants by themselves and/or their agents (or) servants from cultivating, utilizing the portion (or) in any way continuing to trespass the same;
  - (c) Any other or further or better orders or relief as this Honourable Court may deem fit and just to make; and
  - (d) Costs of this suit and interest thereon at Court rates.
2. Those prayers arise from the Plaintiffs' contention that at all times material, they were the registered proprietors of all that parcel of land known as Iriaini/Kiaguthu/8 measuring 7.7 acres (the suit property) wherein the 1<sup>st</sup> Plaintiff resides with her family.
  3. The Plaintiffs aver that upon acquiring the parcel of land in July, 1998, they requested the Land Registrar to ascertain the boundaries thereof to enable them fence the same. When the Land Registrar and other officials from the Nyeri District Land Survey office visited the land, they established that the Defendants had encroached thereon and were illegally occupying a portion thereof. In spite of several demands made to the Defendants to vacate the land, they have refused and/or ignored to do so thereby rendering this suit necessary.
  4. But in their joint Statement of Defence dated and filed herein on 27<sup>th</sup> December 2000, Watetu Kinyua, John Mwangi Kinyua and Eustace Kanuri Kinyua (the defendants) deny the Plaintiffs' claim and assert that they are the wife and sons of one Kinyua Gachara (now deceased) who was the registered proprietor of land parcel No. Iriaini/Kiaguthu/7 comprising some 15.5 acres.
  5. The Defendants aver that they settled on the said parcel of land in 1957 and have since developed the same by erecting permanent buildings and growing coffee thereon. The Defendants further aver that after the death of the said Kinyua Gachara on 9<sup>th</sup> February 1999, the Plaintiffs herein went to the Land Registrar Nyeri and complained that the Defendants had encroached on their land.
  6. The Defendants assert that prior to the filing of this suit on a date unknown to them, someone had purported to cancel the Green Card for their parcel of land by changing the measurement from 15.5 acres to 11.8 acres. The same person also changed LR No. Iriaini/Kiaguthu/8 belonging to the Plaintiffs' father from 3.5 acres to 7.7 acres. It is those illegal cancellations that the Plaintiffs rely on to claim a portion of 3.7 acres.
  7. The Defendants further assert that in any case, they have been in a continuous and uninterrupted occupation over the disputed portion of land and that they have acquired the same by adverse possession and have now acquired a good title to the same.
  8. The Defendants further aver that the suit is misconceived and that it ought to be struck out as no personal representative of the Estate of Kinyua s/o Gachara has been appointed and any suit against his wife and children in regard to his parcel of land is misconceived and ought to be dismissed with costs.
  9. Following an application by the Defendants dated 30<sup>th</sup> July 2014, the Land Registrar Nyeri as well as the Honourable the Attorney General were joined as Third Parties to the suit for purposes of bringing them on board to shed light on the changes said to have been made on the two Green Cards for the two adjacent properties.
  10. By their written Statement of Defence dated and filed herein on 23<sup>rd</sup> March 2015, the Third Parties denied that there were any illegal cancellations and/or alterations made on the Register. It is their case that if any action was taken, it was regular, reasonable and procedural and the same was done in furtherance of their statutory duties.



### **The Plaintiffs' Case**

11. The Plaintiffs called one witness who testified in the trial that commenced before Lady Justice L. N. Waithaka on 24<sup>th</sup> June, 2015.
12. PW1 – Isaac Mwangi Kanja is the second Plaintiff herein. He told the Court that LR No. Iriaini/Kiaguthu/8 was jointly owned by himself and his sister. Their father had been issued with a title deed for the land before the same was transferred to themselves.
13. PW1 testified that their parcel of land is about 7 acres as confirmed by the certificate of official search they had been issued with. He told the Court the Defendants own an adjacent parcel of land and that they had had a boundary dispute since 1998. PW1 testified that on 28<sup>th</sup> February 1998, the Land Registrar visited the site but could not determine the dispute as the Defendants were absent.
14. PW1 told the Court the Defendants had encroached on a portion measuring about 3.4 acres. Before the Land Registrar's visit, the Plaintiffs were unaware of the extent of the encroachment. The Defendants graze on the land and have planted trees and built structures on that portion of land. PW1 denied that they had altered the Land Register as stated by the Defendants.
15. On cross examination, PW1 testified that the land initially belonged to their father who passed away in the year 2008. He conceded that according to the Green Cards contained in the Defendants' List of Documents, the Plaintiffs' parcel of land was measuring 3.5 acres but the same was cancelled to read 7.7 acres while the Defendants land parcel No. Iriaini/Kiaguthu/7 initially measuring 15.5 acres had been reduced by a similar cancelation to 4.77 Ha.

### **The Defence Case**

16. The three (3) Defendants equally called one witness who testified on their behalf at the trial.
17. DW1 – Eustace Kanuri Kinyua is the 3<sup>rd</sup> Defendant and a businessman. He told the Court the 1<sup>st</sup> Defendant is his mother while the 2<sup>nd</sup> Defendant is his brother. Relying on his recorded Statement dated 28<sup>th</sup> November, 2014 as filed herein on 1<sup>st</sup> December 2014, DW1 told the Court he was born in 1965 and had been raised up on LR No. Iriaini/Kiaguthu/7.
18. DW1 testified that their father Kinyua Gachara died on 9<sup>th</sup> February, 1999. Shortly thereafter, the 2<sup>nd</sup> Defendant was served with summons to appear in Court. Later on, DW1 came to learn that the Plaintiffs had sued them over an alleged encroachment to their land parcel No. Iriaini/Kiaguthu/8. DW1 told the Court the Plaintiffs had gone to the extent of tampering with documents in the Land Registry whereby they had changed the acreage of the two adjacent parcels of land.
19. DW1 told the Court that while their LR No. Iriaini/Kiaguthu/7 was originally measuring 15.5 acres, someone had tried to change it to show 11.8 acres and later 4.77 Ha. without their knowledge or consent. The Plaintiff's parcel No. Iriaini/Kiaguthu/8 previously reading 3.5 acres had been altered to read 7.7 acres.
20. DW1 told the Court the Plaintiffs had on various occasions taken the Land Registrar to the parcels of land to put beacons but the Land Registrar had declined claiming that there was a land dispute. DW1 testified that they had planted coffee bushes and put up semi-permanent building on the disputed portion of the land.



## Analysis and Determination

21. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the learned Counsels representing the Parties herein. The Land Registrar Nyeri and the Honourable the Attorney General who were enjoined as Third Parties in these Proceedings did not call any evidence. The two original Plaintiffs have since both passed away and were substituted by Christopher Karanja Mwangi and Ceaser Kanja Mwangi.
22. By their Complaint dated 25<sup>th</sup> April 2000, the two original Plaintiffs had sought a declaration by this Court that the Defendants herein are unlawfully occupying and trespassing on a portion of their land parcel No. Iriaini/Kiaguthu/8 and that hence the Defendants are liable to pay to the Plaintiffs general damages and mesne profits from June, 1998. The Plaintiffs also urged the Court to issue an eviction order against the Defendants from the portion they are said to have encroached. In addition, the Plaintiffs have sought an order of a permanent injunction restraining the Defendants from cultivating or utilizing the said portion of land.
23. It was the Plaintiff's case that the said parcel of land originally belonged to their father Solomon Kanja Ngahu from whom they acquired the same in June, 1998. At Paragraph 5 of the Complaint, the Plaintiffs aver that prior to the said transfer of the suit property to themselves, they had extracted a Green Card and also carried out a search both of which depicted that LR No. Iriaini/Kiaguthu/8 measured some 7.7 acres.
24. The Plaintiffs told the Court that subsequent to the said acquisition of title, they proceeded to the District Land Registrar's Office with a view to having the boundaries of their said parcel of land ascertained to enable them fence off their land. It was then that the Plaintiffs established that the Defendants had encroached on a portion of their land.
25. On their part, the three (3) Defendants deny any encroachment on the Plaintiffs' said parcel of land. It is the Defendants case that they have since the year 1957 been in occupation and possession of LR No. Iriaini/Kiaguthu/7 which parcel of land has ever since its registration been in the name of one Kinyua Gachara. The said Kinyua Gachara who passed away on 9<sup>th</sup> February 1999 was the husband to the 1<sup>st</sup> Defendant and the father to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein.
26. The Defendants assert that prior to the filing of this suit and on a date unknown to them, someone unknown to them had purported to cancel and alter the sizes of the two adjacent parcels of land by decreasing the measurement for their land and increasing that of the Plaintiffs.
27. It is their case that despite the said alterations, they have at all times been in a continuous and uninterrupted occupation over the disputed portion of land and that at any rate they had acquired possession thereof by adverse possession owing to the period they had occupied the same.
28. From the material placed before me, it was apparent that the two adjacent properties were acquired by the Plaintiffs' and Defendants' families more or less at the same time. From the Green Cards produced by the Defendants herein, it was evident that LR No. Iriaini/Kiaguthu/7 was registered in the name of Kinyua s/o Gachara as a first registration on 23<sup>rd</sup> December, 1957. That was the same day on which LR Iriaini/Kiaguthu/8 was registered in the name of Kanja s/o Ngahu.
29. A perusal of the two Green Cards further reveals that as at the said time of registration, LR No. Iriaini/Kiaguthu/7 belonging to the Defendants was shown to be approximately measuring some 15.5 acres while LR No. Iriaini/Kiaguthu/8 belonging to the Plaintiffs was measuring approximately 3.5 acres.



30. It was also apparent that sometime after the two Green Cards were printed, someone cancelled the printed acreage on both by pen. The cancellations which are not countersigned are followed in LR No. Iriaini/Kiaguthu/7 with the markings 11.8 acres which is also cancelled and then in what appears to be a second alteration a figure of 4.77 Ha. has been inserted. A similar cancellation equally undated and unsigned appears on the Plaintiffs' parcel No. Iriaini/Kiaguthu/8 wherein the numbers 3.5 acres has been cancelled and the number 7.7 acres inserted by pen.
31. As it were, it was these cancellations and alterations which led to the accusation that the Defendants had encroached upon the Plaintiffs' parcel of land and it was important that a basis be provided for the same and an explanation be provided when they were made. None was given, more so by the Plaintiffs who had initiated this action.
32. While the Plaintiff contend that they realized that their land had been encroached on in 1998 after the land was gifted to them, it was apparent that the boundaries had remained as they were from the time of land registration and that that was why they had not utilized the portion of land they now claim.
33. From the 2<sup>nd</sup> Plaintiff's recorded Statement dated 24<sup>th</sup> March 2014, it was apparent that in 1986, some 12 years before the two Plaintiffs were registered as the owners of the land they claim to be measuring 7.7 acres, they had had a dispute over the size of the land. There is no evidence that their father Kanja s/o Ngahu who was the registered owner of the land at the time made any claim against the Defendants predecessor in title. Indeed, according to the Plaintiffs, their father passed away in 2008, some eight (8) years after this suit was filed. There was neither evidence that his previous title had shown the approximate area of his parcel of land as 7.7 acres and/or that he had any interest in helping the Plaintiffs to recover the portion of land they now claim to be theirs.
34. I have looked at the Report filed herein on 13<sup>th</sup> April, 2022 by one S. M. Mwanzane, the Land Registrar Nyeri dated 31<sup>st</sup> March, 2021. The same assumes the measurements inserted by pen to the two properties without giving any explanation as to when or how they were inserted and the reason for the cancellation. That Report is worthless and of no use in this dispute. The Land Registrar did not appear in Court to explain the basis of those cancellations and I therefore found no basis upon which to rely on the Report.
35. It follows that I was not persuaded that there was any merit in the Plaintiffs case. The same is dismissed with costs to the Defendants.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 8<sup>TH</sup> DAY OF MAY, 2023.**

In the presence of:

Ms Wangui Mwai for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

No appearance for the Defendants

No appearance for the 3<sup>rd</sup> Partie

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**

