



**Nginyinyi v Kangangi & another (Environment & Land Case  
17 of 2013) [2022] KEELC 15676 (KLR) (1 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 15676 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 17 OF 2013**

**EC CHERONO, J**

**JULY 1, 2022**

**BETWEEN**

**FRANCIS NYAGA NGINYINYI ..... PLAINTIFF**

**AND**

**KABABI KANGANGI ..... 1<sup>ST</sup> DEFENDANT**

**KABARE FARMERS COOPERATIVE SOCIETY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff vide a plaint dated June 14, 2010 and Further Amended on November 27, 2013, is seeking the following orders;-
  - a. That the 2nd Defendant be ordered to specifically perform the Agreement dated December 22, 1982 or in the alternative the Kirinyaga Land District Registrar be ordered to cancel the title deed for L R No Kabare/Kiritine/317 which is in the name of the 2nd Defendant and the same be registered in the name of the late Kinyinyi Nyaga's Estate.
  - b. A declaration that the Plaintiff is an adverse possessor of L.R Kabare/Kiritine/317 and the 2nd Defendant's Title be cancelled and the said land be registered in the Plaintiff's name.
  - c. That cost and interest of the suit be granted to the Plaintiff.
2. The 1<sup>st</sup> defendant through the firm of M/S Ngigi Gichoya & Co. Advocates denied the plaintiff's claim and sought to have the suit dismissed with costs. The 2<sup>nd</sup> defendant through the firm of Kamau Kuria & Co Advocates, filed an Amended defence and counterclaim on December 11, 2013. After complying with Order 11 [CPR](#), this Court certified the case as ripe for hearing and the same was fixed for hearing on July 30, 2018.



## **Plaintiff's Summary Of Facts**

3. The plaintiff referred to his witness statement dated November 27, 2013 and asked the Court to adopt in his testimony. He stated that the suit land parcel No Kabare/Kiritine/317 belonged to his paternal uncle who was brother to his father, one Karani Wambu. He stated that the said land was sold to Kabare Farmers by the 1<sup>st</sup> defendant. When his father heard, he lodged a complaint with Kabare Farmers where the committee wrote a statement to the effect that his father was to be paid money by Kabare Farmers and the suit land would also be transferred to him. However, the land was not transferred to his father. He instructed A.P Kariithi Advocate to write a demand letter to Kabare Farmers to return the land on July 31, 2008. He produced the letter as p-Exhibit no.2 The plaintiff also referred to a green card for the suit land which he produced as p-Exhibit No.3. He further referred to a certificate of a limited grant in succession Cause No 10 of 2009 which he produced as P-Exhibit No 4. The plaintiff testified that he has been utilizing the suit land since 1970 to date and has planted horticultural crops such maize, beans, fresh beans, water melon etc. and that the defendants have never used the suit land. He produced photographs showing that he is the one using the land as p-Exhibit No.5. The plaintiff also produced a letter from the area chief dated April 8, 2008 calling for a meeting with the management of the 2<sup>nd</sup> defendant on the suit land and to bring any supporting documents but failed to do so. He stated that in the year 1992, the committee of Kabare Farmers (2<sup>nd</sup> defendant) who were present at the time said that they did not buy the land.
4. PW2 was Gichobi Ngure who was referred his statement dated November 3, 2014 which he adopted in his evidence. The witness stated that he was the treasurer of Kabare Farmers' Cooperative Society in 1982 while the Chairman was one Mugiri Mutanjura. He further stated that on December 22, 1982, they returned the suit land parcel No. Kabare/Kiritini/317 to the owner, Karani Wambu. He stated that Kinyingi Nyaga is the brother to Karani Wambu and that Francis Nyaga and Kinyingi Nyaga are from the same clan. He said that Kababi Kanyingi is the one who transferred the suit land to Kabare farmers, though the land did not belong to him.

## **1st Defendant's Summary of Facts**

5. The 1<sup>st</sup> defendant who is acting in person had not recorded his witness statement by the time this case came up for hearing and the Court exercised its discretion and allowed him to testify without a statement. He gave sworn testimony and stated that the suit land parcel No. Kabare/Kiritini/317 does not belong to him but belongs to Karani Wambu. He said that Keringa Society had passed a resolution to construct a factory on the land belonging to Karani Wambu. However, they were directed to another land belonging to Mzee Kavoyo and after inspecting the said land, they found that it was full of water and stones. They went to the farm of one Gachoki Wa Ngatunyi where they found his land was good. They passed a resolution to build their factory on that land. However, Kabare Society did not return back the farm belonging to Karani Wambu which they had resolved to acquire.

## **2nd Defendant's Summary of Facts**

6. The 2<sup>nd</sup> defendant called two witnesses. PW1 was Samuel Maina who works for the 2<sup>nd</sup> defendant as Secretary/Manager. He referred to his statement which he asked the Court adopted in his evidence. He was also referred a list of documents dated May 27, 2014 containing six items which he produced in evidence. He was further shown a supplementary list of documents filed on January 28, 2020 containing one item which he also produced in his evidence. On cross-examination, the witness admitted that the company has not been utilizing the suit land and that they have never used the land since he became secretary of the Society in the year 2005. He further stated that there is nothing to show that the Society has ever used the suit land from the time they were registered proprietor in 1966.



7. The second witness was Ephantus Mwaniki Thuo. He stated that he is a retired employee of Kabare Farmers Cooperative Society Ltd. He said that he worked as Chairman of the Society and negotiated for the purchase of the suit land. However, he did not produce any documents but averred that the documents must be in the records of the Society. The witness said that they did not occupy the suit land after they bought it.

### **Analysis and Determination**

8. I have considered the pleadings, proceedings, the documentary evidence and the testimony of the witnesses. I have also considered the rival submissions and the applicable law. From my evaluation of the pleadings and evidence in general, the following comment as probable issues for determination:-
  1. Whether the plaintiff has proved his claim to the required standard?
  2. Whether the 2<sup>nd</sup> defendant's counterclaim has been proved on the required standard?
  3. Whether the 2<sup>nd</sup> defendant's title has been extinguished by operation of law under Section 7 of the *Limitation of Actions Act*, cap, 22 Laws of Kenya?
  4. Who is liable to pay costs?

### **Whether the Plaintiff has proved his claim to the required standard**

9. The plaintiff is seeking to have the 2<sup>nd</sup> defendant's title to the suit land parcel No Kabare/Kiritine/317 cancelled and the same registered in his name. Under paragraph 6 of the plaint, the plaintiff averred that sometimes in the year 1980s, his father, one Kinyinyi Nyaga discovered that the 1<sup>st</sup> defendant had, without his knowledge, fraudulently caused land parcel No. Kabare/Kiritine/317 to be Registered in his name on September 6, 1966 and thereafter transferred the same to the 2<sup>nd</sup> defendant on October 18, 1966. The particulars of fraud allegedly committed by the 1<sup>st</sup> defendant are set out thereunder.
10. The 2<sup>nd</sup> defendant is also accused to have contributed to the fraudulent acts as shown from particulars set out in paragraph 8 of his Further Amended plaint filed in court on December 2, 2013.
11. It is trite that fraud is a serious offence which is not only actionable in law, but also a criminal offence punishable by imprisonment. The burden of proof in cases of fraud lies on the person who wishes the court to believe that fraud was indeed committed. The standard of proof in cases of fraud is usually above that required in civils claims but not beyond reasonable doubt.
12. From the evidence on record, the following facts are not in dispute:-
  1. That the suit land parcel No. Kabare/Kirintine/317 was registered in the name of the 2<sup>nd</sup> defendant on October 18, 1966.
  2. There are no records or evidence produced by the 2<sup>nd</sup> defendant how they acquired the suit land from the 1<sup>st</sup> defendant.
  3. That the 2<sup>nd</sup> defendant has never taken possession or occupied the suit land since it was registered in their name on October 18, 1966.
  4. The family of the plaintiff have lived on the suit land from the time it was registered in the name of their patriarch, one Kinyinyi Nyaga on December 12, 1958 to date.
13. Having carefully evaluated the evidence adduced, I find no iota of evidence has been adduced showing that the defendants committed any fraud in the transfer of the suit property from the original



proprietor namely Kinyinyi Nyaga to the 1<sup>st</sup> defendant or the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant. However, it is trite that where the root of a title is challenged, it behoves the holder of that title to render an explanation how the said title was obtained and/or acquired. It is not enough for the proprietor to dangle the very title under attack as prove of ownership. He/she must go an extra mile and supply a sale Agreement, receipt for payment, application to the land control board for consent etc. Despite the 2<sup>nd</sup> defendant being a corporate entity, there was no evidence of how they acquired the suit property from the 1<sup>st</sup> defendant herein.

14. Where a title is challenged and the title holder cannot give account, such a title can be deemed to have been acquired illegally, unprocedurally or through a corrupt scheme and the same is liable to be cancelled under the [Land Registration Act](#), No 3 of 2012. Section 26 of the said Act provides as follows;-

“26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restriction and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

15. Since the plaintiff has not proved that the certificate of title by the 2<sup>nd</sup> defendant was acquired fraudulently and/or by misrepresentation, it is inescapable that the 2<sup>nd</sup> defendant have not rendered a reasonable explanation how they acquired the same 58 years ago and why to date, they have not taken possession and occupation of the same. That leaves this court with one logical conclusion to make that the said title was acquired illegally, unprocedurally and/or through a corrupt scheme.

#### **Whether the 2<sup>nd</sup> Defendant’s counter-claim has been proved to the required standard?**

16. Other than the title which was registered in their name, the 2<sup>nd</sup> defendants have not been in possession nor occupation of the suit property. They admitted that they have never occupied the suit land from the time they were registered on October 18, 1966. Section 7 of the [Limitation of Actions Act](#), CAP 22 Laws of Kenya provides as follows;-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

17. The 2<sup>nd</sup> defendant became registered as proprietor of the suit land on 18/10/1966 and to date, they have not taken physical possession and occupation of the same. The plaintiff averred that the suit property was originally registered in the name of his uncle, one Karani Wambu and left to his father, Kinyinyi Nyaga. That clearly shows that the 2<sup>nd</sup> defendant cannot be allowed to recover stale claim of land 58 years after its acquisition
18. Whether the 2<sup>nd</sup> Defendant’s title has been extinguished by operation of law under Section 7 of the [Limitation of Actions Act](#), cap 22 Laws of Kenya



19. From my evaluation of the pleadings and the evidence in totality, it is clear that despite being registered as proprietor of the suit land on October 18, 1966, the 2<sup>nd</sup> defendant did not take physical possession and occupation of the suit land No Kabare/Kiritine/317. It also came out clearly that the plaintiff and his family have been in open continuous and uninterrupted occupation and possession of the suit land from when it was first registered on 12/12/1958. It can be presumed, and rightly so, that the suit land is a clan/family land as it coincides with the land consolidation and Adjudication period in Kenya. I therefore come to the irresistible conclusion that the plaintiff has acquired the suit land parcel No. Kabare/Kiritine/317 by way of adverse possession and that the 2<sup>nd</sup> defendant's title to the suit land parcel No kabare/Kiritine/317 has been extinguished by operation of law.

### **Final Order**

20. In view of all the matters aforesaid, I find that the plaintiff has proved his claim against the defendants to the required standard. I therefore enter judgment as for the plaintiff as follows;-

1. A declaration that the plaintiff as acquired title to land parcel No Kabare/Kiritine/317 by way of adverse possession.
2. The Land Registrar, Kirinyaga County is ordered to rectify the register by cancelling the name of Kabare Farmers Cooperative Society Ltd and the land be registered in the name of the Plaintiff.
3. The 2<sup>nd</sup> Defendant to surrender the original title to the said land parcel No. Kabare/Kiritine/317 and execute all statutory documents for the transfer to Land Registrar, Kirinyaga County within thirty days from today failing which the Land registrar to dispense with the same and proceed to effect the transfer.
4. The 2<sup>nd</sup> Defendant's counterclaim is hereby dismissed for lack of evidence.
5. The costs of this suit and the counterclaim plus interest thereon shall be paid by the 2<sup>nd</sup> Defendant.

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 1ST JULY, 2022.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

- 1. Mr. Munyori for the 2<sup>nd</sup> Defendant**
- 2. 1<sup>st</sup> Defendant – present**
- 3. Plaintiff – present**
- 4. Kabuta – Court Assistant.**

