



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL CASE NO. 53 OF 2009

CECILIA WANJIRU KAMAU.....1ST PLAINTIFF

PETER KAMAU KAHUNGI.....2ND PLAINTIFF

VERSUS

GEOFFREY THUO MBIRA.....1ST DEFENDANT

ANTHONY KIMANI MBIRA.....2ND DEFENDANT

SERAH WANJIRU MBIRA.....3RD DEFENDANT

EDWIN MUBI MBIRA.....4TH DEFENDANT

RULING

The Plaintiffs brought the application dated 31/7/2019 seeking to vary or to have the judgement delivered on 30/8/2018 reviewed. The court dismissed the Plaintiffs' suit on the basis that it was time barred. The application was brought on the grounds that the Plaintiffs filed this suit seeking eviction orders against the Defendants from land reference number Kiambaa/Karuri/T.538 ("the Suit Property"). The Plaintiffs averred that there was an apparent error of law on the face of the record and that there were sufficient grounds to merit the review sought.

The application was supported by the 1st Plaintiff's affidavit in which she deponed that the Plaintiffs were the joint registered owners of the Suit Property having purchased it from Geoffrey Thuo vide a sale agreement dated 30/11/1979. That upon purchasing the land, the Plaintiffs discovered that the Defendants were still in possession and that despite several demands they declined to deliver vacant possession of the Suit Property. Ms. Cecilia Kamau averred that on 27/10/1992 Justice Githinji in **High Court Misc. No. 737 of 1991** ordered that **Sheria House RMCC No. 3536 of 1990** be transferred to the High Court. She deponed that the file was transferred and relied on the letters dated 27/11/1992 acknowledging receipt of the file and assigning it case number **HCCC No. 5982 of 1992**. She deponed that Alice Wangui Mbira (now dead) lodged case number 16/20/83 of 1998 before the Land Disputes Tribunal at Karuri claiming that the sale of the Suit Property was illegal. That despite the Tribunal giving its ruling, the 3rd Defendant refused to vacate the Suit Property. She added that the Plaintiffs instituted **Kiambu CMCC No. 59 of 2002** seeking to evict Anthony Kimani Mbira and Sellah Wanjiku Mbira. She averred that having acquired proprietary interests which were registered on 30/11/1979, that the Plaintiffs acquired absolute interest and the right to use the suit land. Further, that the expiration of more than twelve years did not create any rights for the Defendants' authorised occupation of their land and that the expiration of more than twelve years did not deprive the Plaintiffs of the right to file a claim against the Defendants for eviction.

She reiterated that they commenced the suit for eviction in 1991 in RMCC No. 3536 of 1990 which was transferred to the High Court in 1992 and later became ELC No. 53 of 2009 hence the issue of laches does not apply since the present suit had metamorphosised from the original suit filed in 1990. The 1st Plaintiff annexed a copy of the title deed issued to both Plaintiffs on 11/6/2013 and various correspondence.

The 4th Defendant swore the replying affidavit in opposition to the application for the review of the court's judgement. He averred that the registration of the Plaintiffs as the proprietors of the Suit Property in 2013 was illegal because they had not explained how they got the title while urging that the seller had no authority to sell the land. He denied that anybody had ever asked the Defendants to vacate the Suit Property which belonged to the Defendant's late father. Further, that no service or notice of the proceedings which took place in 1991 and 1992 was ever given to the Defendants. He pointed out that CMCC No. 69 of 2002 was instituted against their late mother and that the Defendants were never served with any court proceedings regarding that suit. He maintained that the person who sold the Suit Property to the Plaintiffs was not authorised to sell the land which he termed as a gift from the great grandfather to the Defendants' father and that the Plaintiffs had no basis for seeking eviction. He averred that a case was taken before the Chief's Tribunal and the elders directed in 1988 that the seller did not have authority to sell the land. He deponed that he was born and raised on the suit land and that the doctrine of adverse possession would therefore apply. He claimed that they were entitled to ownership of the Suit Property because of the length of time that they had lived on it.

Stephen Mbugua Karanja also swore a replying affidavit having served as the Chief of Kiambaa Location from 1983 to 2007 when he retired. He averred that the case was taken before the elders in 1998 and he chaired the meeting as the Chief then. That the matter was heard and determined and the elders found that the seller had no authority to sell the suit land. To the best of his knowledge the Defendants had no other home.

The 1st Plaintiff swore a further affidavit in response to the replying affidavit filed by the Defendants. She averred that the 2nd and 3rd Defendants were served with summons and the plaint and that they filed their defence. She reiterated that they filed a suit for eviction in 1991.

The 4th Defendant filed a further replying affidavit and averred that the suit was *res judicata* having been adjudicated upon in RMCC No. 3536 of 1990 and ELC 53 of 2009. He urged that the court was *functus officio* after it delivered judgement on 30/8/2018.

Parties filed submissions which the court considered. The Plaintiffs relied on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules and several decisions while urging that there was an error on the face of the record regarding when the cause of action arose.

The Defendants relied on Section 7 of the Civil Procedure Act in arguing that the suit was *res judicata*. They submitted that they had proved their claim for adverse possession of the Suit Property and argued that the Plaintiffs were trying to litigate concluded matters by bringing issues which should have been raised in the former suit. They urged that the application did not raise any triable issues and that the Plaintiffs had not shown what prejudice they stood to suffer. The Defendants maintained that they were entitled to ownership of the Suit Property and that they had no other place to call home.

The issue for determination is whether the court should vary or review the judgement it delivered on 30/8/2018. The court notes that in that judgement it found that the suit was statute barred because it was filed more than twelve years from the date the Plaintiffs' claim arose. From the documents which the Plaintiffs exhibited to the instant application, it is clear that the initial suit was filed in 1990 and an order was made for its transfer to the High Court in 1992. That being the case, the court agrees with the Plaintiffs that there is an error apparent on the face of the record and that the Plaintiff's suit was filed in court within the limitation period prescribed by law.

The judgement entered on 30/8/2018 is hereby set aside. The costs of the application shall be in the cause.

DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF JULY 2021.

K. BOR

JUDGE

In the presence of: -

Mr. William Mugo for the Plaintiffs

Mr. Charles Kimathi for the Defendants

Mr. V. Owuor- Court Assistant