



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 867 OF 2017

CYRUS KOMO CHEGE.....PLAINTIFF

VERSUS

PETER NDAIWA NJOROGE1ST DEFENDANT

MARY WAIRIMU KUNGU2ND DEFENDANT

KABUCO GACHOCHI3RD DEFENDANT

GEORGE NJUGUNA GACHOCHI 4TH DEFENDANT

MICHEAL NJUGUNA NJOROGE.....5TH DEFENDANT

AND

RUTH WANJIKU KAMAU.....INTERESTED PARTY

JUDGMENT

By a Plaintiff dated **13th December 2017**, the Plaintiff sought for Judgment against the Defendants jointly and severally for the following orders:-

- a) General Damages for trespass.**
- b) A permanent injunction restraining the Defendants their agents and or servants from trespassing or dealing in any way with L.R Nos. Githunguri/ Gathangari 3106, 3107, 3108, 3109, 3110, 3111, 3112 and 3113.**
- c) Mesne profits.**
- d) The Defendants be evicted from the suit properties herein.**
- e) Costs of this suit.**
- f) Interest on (a), (b) and (d) above at Court's rates.**

The Plaintiff averred that the 3rd and 4th Defendant's father had filed a suit against him in **High Court Civil Suit No. 1702 of 1976**, which was dismissed. That there have been other suits, which were consolidated with the said suit, and they were all dismissed. Further that an Application to review the ruling was dismissed and the Defendants cannot bring any suit as it will be **res judicata**. That the Plaintiff has been the registered owner of the suit property and the Defendants entered onto the suit property without any lawful justification and started cultivating it and his efforts to remove them has been in vain.

The 2nd, 3rd & 4th Defendants filed their Amended Statement of Defence and Counter claim dated **4th November 2019**, and denied all the allegations made in the Plaintiff. They averred that the stated suits were never heard on merit but were dismissed on a technicality and therefore the doctrine of **Res Judicata** is not applicable and or does not arise. That the Plaintiffs in the consolidated suits appealed against the said dismissals. Further, that the late **Gachohi Njuguna** and **Stephen Kungu Gachohi**, purchased a total of **8.25 acres**, of the parcel of land known as **Githunguri/Gathangari/355**, measuring **16.7 acres** from one **Kamau Kinuthia** between **1959 to 1972** for a total of Kshs. **14,300/=**. That the deceased persons and their families have been in occupation of their portion of land from **1959** to date. That

Kamau Kinuthia, passed away before transferring the said **8.25 acres** to the Deceased person and his widow **Ruth Wanjiku Kamau**, inherited the whole parcel of land with the expectation that she would then transfer the **8.25 acres**, but she never did so, leading to the filing of **NRB HCC 1702 of 1976**.

In their Counter Claim, 2nd to 4th Defendants, averred that while aware of the pending cases in the High Court, the Interested Party fraudulently sold **L.R 355**, to the Plaintiff on **February 1983**. It was their contention that the said sales were fraudulent as the Interested Party was aware that the said parcel of land had been sold by her late husband; that the Plaintiff purchased the parcels of land well aware of their interests and occupation by the said **Gachohi Njuguna** and **Stephen Kungu**. That the Interested Party's Deceased husband and her have been refusing to complete registration of the said land in favour of the Estates of the Late **Gachohi Njuguna & Stephen Kungu Gachohi**. They sought for orders that;

a) An order that any agreement entered into between the Interested party and the Plaintiff herein touching on Land parcel No. Githunguri/Gathangari/355, owned by the Defendants and or any of its subdivisions is null and void.

b) An order that the Land register in respect of L.R Githunguri / Gathangari/ 355, now closed and illegally opened into L.R Githunguri/Gathangari/3106, 3017, 3108, 3109, 3110,3111, 3112 and 3131, are all curved from Githunguri /Gathangari/1219 which was curved from Githunguri/Gathangari/355, be rectified and the said subdivisions be cancelled and the said land be recombined into the original L.R Githunguri/Gathangari/355.

c) An order that the Land Registrar in respect of L.R Githunguri/Gathangari/355, be subdivided and the Interested party do transfer 8.25 acres to and or a directive to the Chief Land Registrar to issue Certificates of title in favour of the Estates of the said Gachohi Njuguna & Stephen Kungu Gachohi.

d) Costs of this suit.

The 5th Defendant filed a statement of Defence and Counter Claim dated **4th June 2019**, and denied all the allegations made in the Plaint. That there is an Application to file an Appeal out of time against the Orders of the High Court in the Ruling delivered on **27th October 2005**. He averred that he is the Administrator of the estate of the Late **Njuguna Njoroge**, and as such occupies, cultivates crops on **L.R 3106 to 3113**, plots that were excised from **L.R 355**. That the late **Njoroge Njuguna** who was the lawful owner of the said property by virtue of having purchased the same and a Decree in **Civil suit No. 1632 of 1968**, was issued on **23rd June 1969**.

That the bone of contention has always been the failure of the initial owner one **Kamau Kinuthia** (Deceased) not to transfer the suit property to **Njuguna Njoroge(Deceased)**, but that there exists a **Decree** directing for Specific Performance.

In his Counter Claim, the 5th Defendant sought for orders that the Plaintiff be ordered to surrender the suit property to the 5th Defendant to give effect to the **Decree** issued on **25th June 1969**, and the purported title be cancelled.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called one witness and the Defendants called two witnesses and closed their case.

PLAINTIFF'S CASE

PW1 Cyrus Komo Chege, adopted his witness statement as part of his evidence in Court. He produced his list of documents as exhibit 1 and list of Further documents as Exhibit 2 and urged the Court to grant the prayers he had sought.

That the family of **Josephat Njuguna (Deceased)** and **Gachohi Njuguna (Deceased)**, occupy the suit property because their parents occupied the land. That the matter was in Court and they were declared not to be purchasers. Further that he registered cautions and his parcels have no Court orders. Further, that his land is **Githunguri/Gathangari/219**, and is registered in the name of **Ruth Wanjiku**. That it was initially registered in her husband's name **Kamau Kinuthia**, being initially **L.R 355**. That there existed **Civil suit No. 1633/1968**, between **Njoroge Njuguna** and **Kamau Kinuthia**, and the cases were dismissed in **1989**. That in case **1633/1968**, there is a **Judgment** and **Decree** that was appealed against and dismissed in **1989**. That as per the register from **L.R 355**, the title was closed in **1974**, after subdivision. That the restrictions and caution were removed by the **Land Registrar Kiambu**, to allow for subdivision.

That upon subdivision, he bought 6 acres of **1218**, and the registered owner then was **Muchai Karu** (Deceased). That he subdivided the parcel of land into two i.e **L.R 1720 and 1721**. That he owns **1720**, which he holds title to and **1721**, was left in the name of **Muchai Karuu**. That as per the list of documents, the matter of **1720**, was adjudicated in Court and he purchased **1219**, which was registered in the name of **Ruth Wanjiku**. That she subdivided her land and sold to him two portions which he also subdivided.

Further that the Land Register was opened in **1958**, in the name of **Kamau Kinuthia**, the Interested Party's husband and the Plaintiff bought the land in **2006**, and some of the Defendants were in possession to date. That he had filed suits that were dismissed and he was a party but did not give evidence. That all the suits by the Defendants were dismissed and he is thus seeking for their eviction.

DEFENCE CASE

DW1 Micheal Njuguna Njoroge, adopted his witness statement dated **4th June 2019**, as his evidence. He produced his list of documents as Exhibit 1. He further testified that he has no relationship with the Plaintiff and that he stays on the suit property. That his father bought the suit property in **1967** to wit **L.R 355**, which was about **15 acres**. That they had sued the vendor in **1968**, and the matter was settled. That other cases were filed and were never heard for **30 years**. That three suits were consolidated and the claim was for transfer of the said parcel

of land. That the cases were not heard and decided on merit and no Judgment over the said cases was delivered and they occupy the land by virtue of being purchasers.

DW2 George Njuguna Gachohi, adopted his witness statement dated **9th July 2018**, as part of his evidence. He produced his list of documents dated **9th July 2018**, as exhibits 1 to 19, 2nd list of documents dated **14th February 2020** as Exhibits 20 to 25.

That they had a case with the Plaintiff to wit **Civil Case No. 1702 of 1976**, and it was dismissed on technicalities. That he stays on **L.R 355**, and it has been subdivided. That he has lived on the said land since **1959**, as the land was bought by his father and brother. That the land was **16.7 acres** and they claim **8.25 acres**, which they are in possession of.

The parties thereafter filed written submissions which the Court has carefully read and considered. The Court has also read and considered the Pleadings by the parties, the evidence adduced and the relevant provisions of law and render itself as follows:-

In his Complaint, the Plaintiff contended that the issues between himself and the Defendants over the suit properties had already been adjudicated and therefore any **Counter claim** brought forth by the Defendants would be **Res Judicata**. However, the Defendants contended that when the Court dismissed their suits and further their Appeal, the cases had not been determined on merit and having not been determined on merit, they are still in a position to bring a fresh suit.

The guiding law with regards to **Res Judicata** is found in **Section 7 of the Civil Procedure Act**, which provides that the Court should not hear a matter which has already been heard and determined. However, the matter ought to have been heard and determined on merit and not dismissed based on a technicality. See the case of **Re Estate of David Wang'ang'a Gichuhi (Deceased) [2020] eKLR where the Court held that:-**

"I make reference to the decision of Ngugi, J in MWK vs. AMW [2016] eKLR where the learned Judge cited the Court of Appeal decision in Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97 and rendered himself thus:

"Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata."

19. From the determination of the court in the ruling that is the subject of this application, it is clear that the court did not make substantive findings on the issue of enhancement of the monthly allowance sought by the applicant in the summons. From the foregoing jurisprudence, it is clear that the issue of enhancement of monthly allowance cannot be said to be res judicata because it is yet to be heard and determined on merit to its conclusion."

The Court has seen the Ruling delivered in the consolidated cases No. **1702 of 1975**, that had been filed by the Defendants and it is not in doubt that the same was dismissed due to the failure by the Defendants to file their documents and or comply with the Court's direction. It is thus clear that the suit was not heard on merit. Given that the suit was not heard on merit, the Defendants' Counter Claim are therefore in order and not **Res Judicata**.

However, it must also be noted that the same does not affect the **Limitations of time**, as time did not stop running. The suit must therefore have been brought within the Limitation of time as the **Limitation of Actions Act**, only provides two ways in which the **time** stops running and filing of suits and the said suit being dismissed did not stop the running of time. See the case of **Albert Magu Musa v Samuel Kagundu Muchira & 3 others [2017] eKLR** where the Court held that

"The suit No. 168/1997, was not heard and determined on merits. It was determined on a procedural technicality that is, dismissal for want of prosecution. Upon the dismissal of a suit for want of prosecution, a party has two options. The first is to apply to the court without unreasonable delay to have the suit reinstated. The second option is to file a fresh suit, but bearing in mind the limitation period within which to file the suit."

It is not in doubt that the Defendants' Counter Claims are based on either a Decree that was dated **1969**, and or the sale agreements that were entered into between **1959 and 1972**. The Counter Claims by the Defendants are dated **2018 and 2019**, **Section 7 of the Limitation of Actions Act** provides that a claim to land cannot be brought after the lapse of **12 years**. Further, the **Limitation of Actions Act** provides that a claim based on a Contract must also be brought within **6 years**. It is therefore not in doubt that the Defendants' Counter Claims fall short of these provisions and the same are therefore **Statute** barred.

The Plaintiff has averred that he is the registered owner of the suit properties having bought the same from the Interested Party. The Defendants had challenged the Plaintiff's claim, but the same is based on their claim to the suit property. The Court has held and found that their claims to the suit property are Statute barred and therefore cannot stand. It has been acknowledged that the **Interested Party** was the registered owner of the larger suit property, before the same was subdivided and sold to the Plaintiff, having acquired the same by transmission from her husband's Estate. It is therefore not in doubt that she held a good title that she could pass to anyone. The Interested Party has not disputed selling the suit property to the Plaintiff.

The Plaintiff has produced in evidence Certificate of titles, that show that he is the registered owner of the suit property. The Plaintiff has also produced in evidence a green card confirming that the suit property was transferred to him. **Section 26 (1) of the Land Registration**

Act provides:-

“ The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a 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, restrictions 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.”

The Plaintiff was issued with a certificate of registration, and there is no evidence that the Plaintiff's registration was acquired either by fraud or unprocedurally. Therefore the same could only mean that the Plaintiff's registration is absolute and indefeasible.

Being the absolute and indefeasible owner of the suit property, the Plaintiff is therefore entitled to all the rights and privileges that relate to the suit property as provided for under **Sections 24 and 25** of the Land Registration Act.

Having held that the Plaintiff is the rightful owner of the suit property, the Court then need to determine whether he is entitled to the orders sought. The Plaintiff has sought for General damages for trespass.

Trespass has been defined as an unjustifiable intrusion of another person's land. From the pleadings, the Defendants were claiming to be purchasers of the suit property and that they had a legitimate claim to the land. However, the Court has found that the same is not merited, and therefore their possession of the suit property was by virtue of the alleged purchase and are therefore not trespassers per se. Though their possession is unjustifiable the Court finds that they cannot be condemned to pay damages. Plaintiff is therefore not entitled to the said orders.

The Plaintiff has also sought for Permanent Injunction. Being the owner of the suit properties, he is entitled to the said orders and further he is entitled to quiet and peaceful; possession of the said land and hence he is entitled to the eviction Orders as sought.

The Plaintiff sought for mesne profits. These are special damages that must be specifically pleaded and proved. The same were not specifically pleaded and therefore not merited.

Section 27 of the Civil Procedure Act provides that the Court has discretion to grant costs. However, it is trite that costs usually follow the events. The Plaintiff herein being the successful party is therefore entitled to the costs of the suit.

Having now carefully read and considered the pleadings, the evidence adduced, the written submissions and the relevant provisions of law, the Court finds and holds that the Plaintiff has proved his case on the required standard of balance of probabilities and therefore his claim vide the Plaint dated **13th December 2017**, is partially merited and the same is allowed in terms of prayers **b, d and e**. However, the Defendants failed to prove their Counter Claims and the said counter claims are dismissed entirely with costs to the Plaintiff.

It is so ordered.

Dated, signed and Delivered at Thika this 29th day of July 2021.

L. GACHERU

JUDGE

29/7/2021

Court Assistant – Dominic

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Waweru for the Plaintiff

Mr. Irungu Mwangi for the 1st and 5th Defendants

Mr. Rakoro for the 2nd, 3rd and 4th Defendants

L. GACHERU

JUDGE

29/7/2021