



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C CASE NO. 21 OF 2018

TABITHA GITHUMBI (Suing as the Administrator

of the Estate of JOHN CHERERE MWANGI (deceased)..... PLAINTIFF

VERSUS

GICHUHI GITHUMBI (Sued as the Administrator

of the Estate of KITHUMBI KICHUHI (deceased)...1ST DEFENDANT

PATRICK CHARAI GICHUHI.....2ND DEFENDANT

JOSEPH GITARI EZEKIEL.....3RD DEFENDANT

JUDGMENT

By a plaint dated 11th April 2018, the Plaintiff is seeking the following orders:

(a) An order of cancellation the registration of the 3rd defendant's name as the owner of land parcel number MWERUA/KAGIO/2732 and the said land be registered in the names of the plaintiff herein.

(b) Costs of this suit with interest.

The 3rd defendant Entered Appearance and filed defence denying the plaintiff's claim on 31st May, 2018. The plaint was filed simultaneously with a Notice of Motion for interlocutory injunction orders pending hearing and determination of the suit. The 1st and 2nd defendants on 20th January 2020

filed a joint statement of defence also denying the plaintiff's claim. The parties filed their respective compliance documents pursuant to *Order 3, 7 and 11 of the Civil Procedure Rules*. After the parties complied, the Court certified the suit as ripe for hearing

PLAINTIFF'S CASE

The plaintiff testified on 02/11/2020 at 11.50 a.m. and stated that JOHN CHERERE MWANGI (deceased) was her husband. She took out letters of administration in Succession Cause No. 164 of 2016. She produced a copy of certificate of Grant dated 11th January, 2017 as Plaintiff Exhibit No.10. The plaintiff stated that Kithumbi Kichuhi (deceased) was the initial registered owner of land parcel No. MWERUA/ KAGIO/646. However, the aforesaid land was later acquired by the County Council of Kirinyaga (now defunct) for town expansion purposes.

After the aforesaid acquisition, the said Kithumbi Kichuhi was compensated with land parcel number KIRINYAGA/MARUMUMO/234 beside an additional monetary compensation vide Kenya Commercial Bank cheque number 771190 dated 7th February, 1990 paid to him by the aforesaid County Council.

The plaintiff stated that after the land parcel number MWERUA/KAGIO/646 was acquired by the aforesaid County Council, the land ownership was supposedly changed into a leasehold and the same was sub-divided and allocated to other persons who were prospective developers as it was prime land for the expansion of Kagio town. She further testified that her late husband, John Cherere Mwangi was one such prospective developer who applied and was allocated plot number MWERUA/ KAGIO/630/179 which was converted to plot number 179 Kagio. He complied with the requisite conditions including payment of the premium and rent. After the death of her husband, she conducted a Succession Cause Number 164 of 2016 and a certificate of confirmation of Grant was issued on 11th January, 2017.

Upon visiting the Lands registry with a view of registering the aforesaid Grant, she was shocked to realize that the supposed change of ownership was never registered by the aforesaid County Council and that the land remained in the 1st defendant's names all along despite her late husband having been issued with the ownership documents by the defunct County Council. That she also learnt that the 1st and 2nd defendants had, through Embu Succession Cause Number 80 of 1993, already fraudulently and illegally caused the transmission of land parcel number MWERU/KAGIO/646 to themselves.

The plaintiff further stated that after the aforesaid transmission of land number MWERUA/KAGIO/646 to the names of the defendants herein, the said land was then partitioned into four portions with one of the resultant parcel numbers being MWERUA/KAGIO/2637 which resultant parcel number was later sub-divided with one of the resultant parcel numbers being MWERUA/KAGIO/2732. That land parcel number MWERUA/KAGIO/2732 was registered in the name of Patrick Charai Gichuhi, the 2nd defendant who later transferred the same to the 3rd defendant. That the aforesaid portion number MWERUA/KAGIO/2732 is the portion that bears the plot number 179 Kagio which was allocated to her late husband, John Cherere Mwangi and was issued with title documents thereof. That is the portion where she is in occupation to date. That the aforesaid impugned transmissions and transfers were irregular and fraudulent as the late Kithumbi Kichuhi had no clean title or any title whatsoever over land parcel number MWERUA/KAGIO/646 for the defendants to benefit from or to transfer to anybody else.

THE 1ST & 2ND DEFENDANTS' CASE

The 2nd defendant Patrick Charai Gichuhi alone testified as DW1 and stated that his father is Kichuhi Githumbi who is suffering from arthritis and could not attend court. He stated that Joseph Gitari Ezekiel bought a plot from him. He referred to his statement recorded on 4/9/2020 which he adopted in his evidence. On cross examination, the 2nd defendant confirmed that his father is Kichuhi Githumbi while his brother is Githumbi Kichuhi. That his brother passed away but his father is alive. He was referred D-Exhibit 1 which is a decree in HCCC NO. 42 OF1999 'A' which he said was between Gichuhi M. Githumbi and John Cerere Mwangi. The 2nd defendant also stated that the subject of the dispute in the aforesaid decree was land parcel number MWERUA/KAGIO/2626 while the subject of the dispute in the current suit is land parcel number MWERUA/KAGIO/2732. He stated that before the suit land was registered in his name, the same was registered in Gichuhi Githumbi, who is his father.

3RD DEFENDANT'S CASE

Joseph Gitari Ezekiel, the 3rd defendant also testified and stated that Patrick Charai, the 2nd defendant herein sold him a plot being land parcel number MWERUA/KAGIO/2732 which is now registered in his name. He denied having committed any fraud.

On cross-examination, the 3rd defendant stated that he bought the suit land at a consideration of Ksh. 1,400,000 (1.4 million).

PLAINTIFF'S SUBMISSIONS

The plaintiff did not file submission pursuant to the directions and timelines given by the court.

1ST & 2ND DEFENDANTS SUBMISSIONS

The 1st and 2nd defendants did not also file their submission pursuant to the directions of the Court.

3RD DEFENDANT'S SUBMISSIONS

The 3rd defendant through the firm of F.K. OMENYA & COMPANY ADVOCATES filed their submission on the following issues;

- (1) *Whether the suit is res judicata*
- (2) *Whether the suit is bad in law vexatious an abuse of the court process*
- (3) *Whether the suit is time barred and*
- (4) *Whether the 3rd defendant holds a clean title to land parcel No. Mwerua/Kagio/2732?*

Whether the suit is res judicata

The 3rd defendant submitted that the matter is res-judicata by virtue of the judgment of **Lenaola J.** delivered on 16th March 2005 in Embu High Court Civil Case No. 42 of 1999 'A'. He submitted that the Honourable Court ordered the then defendant to be evicted from the land parcel No. MWERUA/KAGIO/646. He further submitted that the court in the said judgment did satisfy itself that the now deceased Plaintiff (John Cherere) did not have any claim over land parcel No. MWERUA/KAGIO/2636, a sub-division of parcel No. MWERU/KAGIO/646. He submitted that the plot in question being plot No. 179 Kagio is allegedly situated in parcel No. MWERUA/KAGIO/2732, which is a further sub-division of land parcel No. MWERUA/KAGIO/646. Lastly, he submitted that the parties, the subject matter as well as the issues which were determined in the Embu case were also substantially similar to those raised in the current case and therefore the current case is res-judicata by dint of the Embu case. He cited the following cases; *Henderson Vs Henderson (1843) 67 E.R 313, Joshua Ngatu Vs Jane Mpinda & 3 others (2019) e K.L.R.*

Whether the suit is bad in law, vexatious, an abuse of the court process

The 3rd defendant submitted that this suit is an abuse of the court process for the reason that the matter is based on facts which have already been determined in a previous suit between the parties. He cited the case of *Trust Bank Limited Vs Amin Company Ltd & Anor. (2000) KLR 164*. He also referred to *Order 2 Rule 15 CPR*.

Whether the suit is time barred

On this issue, the 3rd defendant submitted that the plaintiff lost the chance to claim the plot of land in question in the year 2005 when his claim over and occupation of plot No. 179 Kagio situated on land parcel No. Mwerua/Kagio/630/179 alleged located on land parcel No. Mwerua/Kagio/2732 was dismissed by the Court and an order of eviction issued against the now deceased plaintiff who was the defendant in the Embu High Court matter. He submitted that the plaintiff ought to have sought the leave of the court before moving the Honourable Court in the filing of the instant suit since she alleges that her husband had been allocated the plot in 1992 and that it is more than 12 years since the cause of action arose and the time former suit filed by her husband was dismissed in the year 2005.

Whether the 3rd Defendant holds a clean title to land parcel No. MWERUA/KAGIO/2732

The 3rd defendant submitted that he is a purchaser for valuable consideration without notice and that he has not been faulted by the plaintiff for any wrong doing in procuring registration of the suit land in his favour. He further submitted that the plaintiff has not demonstrated through evidence why his title ought to be cancelled. In conclusion, the 3rd defendant argued that his right to property is guaranteed and protected under Article 40 of the Constitution which this court is under an obligation to protect.

LEGAL ANALYSIS AND DETERMINATION

I have considered the pleadings of the parties, the documents produced in evidence and their submissions. The issues for determination in this case are as follows:

- (1) **Whether the suit is res judicata**
- (2) **Whether the defendants claim over the suit land based on the judgment and decree issued by Justice Lenaola on 16/03/2005 is statute barred under Section 4(4) of the Limitation of Actions Act**
- (3) **Whether the 3rd defendant's title to land parcel No. MWERUA/KAGIO 2732 is liable to be cancelled**
- (4) **Who will bear the costs of the suit?**

Whether the suit is Res-judicata

The 1st and 2nd defendants in their joint statement of defence dated 17/01/2020 averred that the suit herein is res-judicata in that there was a previous suit in which the issues being raised in the current suit were substantially raised, heard and determined. He noted that the former suit was Embu High Court No. 42 of 1999 'A'. A copy of the said judgment and decree was produced as exhibits in this case. I have looked at the said judgment which proceeded ex-parte after the defendant and his advocate failed to attend court. In the Judgment, the Court observed that the plaintiff was the registered proprietor of land parcel No. MWERUA/KAGIO/2636 and had sued the defendant for unlawfully entering into his land and starting to make improvements thereon without his consent. The court also noted that the defendant in his defence had averred that it was the plaintiff who wanted to take his land forcefully. The court further observed that the defendant had averred that he was lawfully occupying his plot No. MWERUA/KAGIO/630/179 allocated to him by the County Council of Kirinyaga. In the judgment, the Judge observed as follows;

"4. The plaintiff in his evidence produced the title deed for the suit land and being the registered proprietor, I do not see that any other person has a lawful claim to possession thereof. The defendant's defence was not given teeth during the hearing and I shall dismiss it as no proof of the averments in it was made. I am satisfied that the plaintiff is entitled to his land and shall enter judgment as prayed in the plaint."

It is clear from the judgment in the former suit that the plaintiff was claiming land parcel NO. MWERUA/KAGIO/2636 while the defendant was laying claim to land parcel No. MWERUA/KAGIO/630/179 which he was in occupation with improvements thereon. From my reading of the said judgment, it is clear that a surveyor was a necessary witness to conduct a survey on the ground with the help of the area survey map to verify whether the defendant's land NO. MWERUA/KAGIO/630/179 had indeed encroached the plaintiff's land NO. MWERUA/KAGIO/2636. Since that was the main issue in the former suit which was not resolved, I find that the issues in contention in the current suit, though raised in the former suit, were not directly and substantially determined on merit. I therefore find and hold that the current suit is not res-judicata.

Whether the defendants claim over the suit land based on judgment and decree issued in HCCC NO. 42 OF 1999 'A' is statute barred under Section 4(4) of the Limitation of Actions Act on 16/03/2005

The defendants in this suit are laying claim to the suit land parcel No. MWERUA/KAGIO/2732 based on the judgment and Decree in HCCC NO. 24 of 1999 issued on 16/03/2005.

Section 4(4) of the Limitation of Actions Act provides as follows;

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due”.

The defendants in this case have not removed the plaintiff, her servant, agents and/or structures from the suit land as decreed by the court on 24/05/2005. The plaintiff in this case testified that she is in occupation of the suit land. The defendants have not made any attempt to execute the decree in the former suit. The issue whether a decree holder can enforce a decree after twelve years was discussed by the Court of Appeal in the case of **M’Ikiara M’Rinkanya & Another Vs Gilbert Kabeere M’Mbijiwe (2007) e K.L.R** where it was held;

“If the judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in Section 17 of the Act and the judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of Lougher Vs Donovan, which we consider as still good law in this country, and the previous decisions of this court, there is a statutory bar in Section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows, therefore, that, to hold that execution proceedings to recover land are excluded from the definition of ‘action’ in Section 4 (4) of the Act would be inconsistent with the law of adverse possession.”

I agree with the reasoning and findings of the Superior Court which is binding on me. Since the defendants failed to enforce the decree of the court in the former suit from the 24/05/2005, the plaintiff who has been in possession of the suit land for more than twelve years acquires the same under the doctrine of adverse possession. Consequently, the defendants title, including that of the 3rd defendant being land parcel No. MWERUA/KAGIO/2732 is extinguished by operation of law.

Whether the 3rd Defendant’s title to land parcel Number MWERUA/KAGIO/2732 is liable to be cancelled

Since the 3rd Defendant’s title to land parcel number MWERUA/KAGIO/2732 is a sub-division of land parcel No. MWERUA/KAGIO/2636 which was the subject of the judgment in HCCC No. 24 of 1999 ‘A’ issued on 24/05/2005 and which this Honourable Court has found statute barred pursuant to **Section 4(4) of the Limitation of Actions Act**, the title to the suit property is equally liable to be cancelled.

In view of my analysis herein above, I find the claim by the plaintiff merited and hereby enter judgment as follows:-

- (1) The registration of GICHUHI GITHUMBU and/or Administrators in land parcel No. MWERUA/KAGIO/646 and all resultant sub-divisions are hereby cancelled.**
- (2) The 3rd defendant’s land parcel number MWERUA/KAGIO /2732 being a portion of the resultant sub-division of land parcel number MWERU/KAGIO/2636 be and is hereby cancelled.**
- (3) The Land Registrar, Kirinyaga County is hereby directed to rectify the register by entering the plaintiff, TABITHA NJERI CHERERE as owner of land parcel number MWERUA/KAGIO/2732.**
- (4) The costs of this suit shall be borne by the defendants, jointly and severally.**

JUDGMENT READ, DELIVERED IN OPEN COURT AND SIGNED AT KERUGOYA THIS 12TH DAY OF NOVEMBER, 2021.

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HON. E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:-

1. Mr. Omenya for Defendant
2. Ms Wanjiru Waweru holding brief for C.S Macharia
3. Kabuta – Court clerk.