



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 694 OF 2013

NATHAN MUNYAO MUTISO.....1ST PLAINTIFF

WAYUWA NGETI GACANGI.....2ND PLAINTIFF

VERSUS

SABAN SAID GATHURI.....1ST DEFENDANT

FRANCIS KARIUKI MARIVA.....2ND DEFENDANT

LAND REGISTRAR, KIRINYAGA.....3RD DEFENDANT

COUNTY COUNCIL OF KIRINYAGA.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

MORRIS KARIUKI.....6TH DEFENDANT

JUDGMENT

The plaintiffs filed this suit vide a plaint dated 30th April 2009 in which he sought the following orders:

- (1) The 1st and 2nd and 4th defendants be restrained by way of an injunction by themselves, their agents, servants or anyone claiming under them or on their behalf from selling, disposing, transferring, leasing, charging or in any manner interfering with the quiet possession and enjoyment by the plaintiff herein of all those parcels of land reference Kirinyaga/Gathigiriri/303 and Kirinyaga/Gathigiriri/304.*
- (2) The 3rd and 5th defendants be compelled to cancel the title deed issued fraudulently to the 1st and 2nd defendants on the 20th June 1975 and 13th April 2005 respectively and the same be declared null and void.*
- (3) The record be rectified by issuing title to the plaintiffs herein to the respective parcels of land i.e. Kirinyaga|Gathigiriri/303 and Kirinyaga/Gathiigiriri/304.*
- (4) Exemplary damages be awarded to the plaintiff.*
- (5) Costs of the suit herein be provided for.*
- (6) Any other suitable relief this Honourable Court may deem fit and just to grant.*

On 24th August 2009, the 4th defendant filed defence. On 29th October 2009, the 2nd defendant filed their defence. On 20th July 2010, the 6th defendant filed his statement of defence and counter-claim in which it sought to have the suit dismissed and judgment entered for vacant possession of the suit property L.R. Kirinyaga/Gathigiriri/303 failing which the plaintiff be forcefully evicted by a Court bailiff of this Honourable Court. The 6th defendant also sought costs of the suit and interest thereon at Court rates. The 1st interested parties were subsequently enjoined into this suit and on 24th August 2017, they filed their response to these proceedings.

PLAINTIFFS CASE

The plaintiffs could not proceed with their claim during the hearing of this case as their lawyer Mr. Osoro was absent and no satisfactory explanation was given. Since the plaintiffs were not ready to proceed in the absence of their lawyer, the suit was therefore dismissed for want of prosecution under **Order 17 Rule 1 CPR**.

2ND AND 6TH DEFENDANTS CASE

The 2nd and 6th defendants proceeded with their counter-claim and called one witness namely Morris Gikuri Kariuki who is a resident of Wanguru Township. The witness who is also the 6th defendant was referred to his statement dated 12th May 2015 which he adopted in his evidence. The witness stated that the 2nd defendant is his father. He stated that sometime in the year 2005, he had gone to check on their land parcel No. Kirinyaga/Gathigiriri/303. The land by then was registered in the name of his father who is the 2nd defendant herein Francis Kariuki Marira. His father transferred the land to him as a gift on 16th September 2009. He was then issued with a title deed on 17th September 2009. He stated that his father acquired the suit land L.R. No. Kirinyaga/Gathigiriri/303 from the County Council of Kirinyaga as compensation after the Council acquired his own land for the expansion of Sagana Township. He stated that his father was registered as proprietor on 20th June 1975 and that his family continued occupation of the property until sometime in the year 2005 when the 1st plaintiff started trespassing on the land and by the year 2007, he started farming on part of the land and even started constructing a temporary structure. He told him to vacate the land but he refused. He reported to Wanguru Police Station where he was arrested together with the 2nd plaintiff. He stated that they requested to be given two (2) weeks to vacate but upon expiry of the two weeks, they still refused to vacate. He went to the area Chief and later the District Commissioner but the plaintiffs moved to Court and filed the instant suit. The plaintiffs also filed an application for a temporary injunction pending the hearing of the main suit which they have been enjoying to-date. The witness produced a list of documents dated 4th December 2014 as Defence Exhibits 1, 2, 3 and 4th respectively.

4TH DEFENDANT'S CASE

The 4th defendant did not file any counter-claim but only sought to have the suit dismissed with costs.

3RD DEFENDANT'S CASE

The 3rd defendant did not Enter Appearance nor file defence. Her case is therefore moot.

5TH DEFENDANT'S CASE

The 5th defendant did not also Enter Appearance or file defence to the plaintiffs claim.

1ST AND 2ND INTERESTED PARTIES CASE

The case against the 1st and 2nd interested parties is contained in their statements filed on 24th August 2017. According to the 2nd interested party, the suit land parcel No. Kirinyaga/Gathigiriri/304 belongs to her father Saban Said Gathuri (deceased) whom she stated died on 13th May 1983. She stated that the 1st interested party is her biological sister whom they were appointed together as the administratrix of their late father's Estate on 5th April 2007 vide CM's Succession Cause No. 105 of 2017. The 2nd interested party further stated that their father Saban Said Gathuri (deceased) owned land parcel No. Kiiine/Sagana/409 and later the defunct County Council of Kirinyaga acquired the said land from their late father for the expansion of Sagana Township and that the said land parcel No. Kiine/Sagana/409 is where the Sagana Police Station is currently situated. Subsequently, their father Saban Said Gathuri was given land parcel No. Kirinyaga/Gathigiriri/304 by the said County Council of Kirinyaga as compensation for his land parcel No. Kiine/Sagana/409 which he surrendered to the said County Council of Kirinyaga. He stated that after he was compensated the land in question by the County Council of Kirinyaga sometime in 1975, their father took possession and began developing the same by farming until his health started deteriorating in the year 1979. She stated that due process by the relevant authorities and his father was followed in acquiring the suit property.

ISSUES FOR DETERMINATION

The following are appropriate issues for determination:

- (1) Whether the 2nd and 6th defendants have proved their counter-claim to the required standard?**
- (2) What are the suitable orders to issue?**
- (3) Who shall bear the costs?**

Whether the 2nd and 6th defendant have proved their counterclaim?

The 2nd and 6th defendants have explained that the suit property land parcel No. Kirinyaga/Gathigiriri/303 which is currently registered in the name of the 2nd defendant, Francis Kariuki was acquired after Kirinyaga County Council compulsorily acquired his land for expansion of Sagana Township. He produced a title deed, a certificate of official search and a green card confirming the correctness of the status which facts have not been controverted. I am satisfied that the 2nd and 6th defendants have discharged their onus of proof regarding their

counterclaim.

What are the suitable orders to issue?

Having dismissed the plaintiffs' suit and found that the 2nd and 6th defendants counterclaim has been proved on the required standard, I now enter judgment in the following terms:

1. The plaintiffs' suit is dismissed with costs.

2. The 2nd and 6th defendants counterclaim is allowed as follows:

(a) The plaintiffs to give vacant possession of L.R No. KIRINYAGA/GATHIGIRIRI/303 to the 2nd and 6th defendants failing which they shall be forcefully evicted.

3. The costs of this suit and the counter-claim to be borne by the plaintiffs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 14th day of February, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:

1. M/S Githaiga holding brief for Mr. Kahiga for the 2nd and 6th Defendants
2. 8th Defendant – present
3. Mbogo, Court clerk – present