



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 413 OF 2016

MARYANN WACEKE KABERERE.....PLAINTIFF

=VERSUS=

GRACE WANJIKU KIROMO.....DEFENDANT

JUDGMENT

Plaintiff's Case

1. The plaintiff initiated this suit through a plaint dated 25/4/2016. Her case was that she was the administrator of the estate of the late Michael Gachingiri Kaberere (**the deceased**). The deceased purchased **Land Parcel Number Dagoretti/Thogoto/1068** measuring 2.00 Acres (**the suit property**) from one **Hannah Wanjiru Wainaina** in 1993 at Kshs 150,000. The said Hannah Wanjiru Wainaina was the registered proprietor of the suit property at the time of sale to the deceased. The suit property was subsequently registered in the name of the deceased on 10/6/1993. The defendant subsequently caused a caution to be registered against the deceased's title on 12/8/1994. She added that the defendant further caused a semi-permanent structure to be erected on the suit property.
2. The plaintiff further averred that the deceased previously filed **Kiambu SPMCC No 1365 of 1996** which subsequently abated upon his death on 17/7/2010.
3. Consequently, the plaintiff sought the following verbatim orders against the defendant:

- a) The court do order that the Land Registrar, Kiambu, to remove/cancel the caution placed on all that piece of land LR No. Dagoretti/Thogoto/1068.*
- b) The court do order that the defendat to remove any structure put up on LR Dagoretti/Thogoto/1068 and in default eviction orders do issue to be supervised by the OCS Kikuyu Police Station*
- c) Damages for wrongful caution*
- d) Mesne profits*
- e) Any other order that the court may deem fit to grant*
- f) Costs of this suit and interest*

Defendant's Case

4. The defendant opposed the plaintiff's claim through a statement of defence dated 9/10/2017. The case of the defendant was that the suit property belonged to her husband, Albert Kiromo Julius, and formed part of their matrimonial property, where they lived before her husband deserted the home. She had lived on the suit property since 1966 when she got married to Albert Kiromo Julius. If indeed the suit property was sold to the deceased, the sale was fraudulent because the suit property was matrimonial property. She lodged the impugned caution because she had a beneficial interest (as licensee) in the suit property, and the suit property was the only home she had known since she got married to Albert Kiromo Julius.
5. The defendant further averred that she filed Nairobi HCCC No 917 of 1992 against Hannah Wanjiru Wainaina, in which she obtained an order barring registration of further entries in the parcel register relating to **Parcel Number Dagoretti/Thogoto/53** but the Land Registrar ignored the court order and partitioned the said parcel. She urged the court to dismiss the plaintiff's suit and order the Land Registrar to cancel all the entries and register the suit property in her name and those of her children.

Plaintiff's Evidence

6. The plaintiff testified as **PW1** and closed her case. She adopted her written statement dated 25/4/2016 as part of her sworn evidence-in-chief. In summary, her evidence was that, she was the widow of the late Michael Gachingiri Kaberere (**the deceased**). She was the administrator of the deceased's estate. In 1993, the deceased purchased the suit property from one Hannah Wanjiru Wainaina at Kshs 150,000 and the suit property was registered in the deceased's name. The defendant subsequently caused a caution to be registered against the parcel register of the suit property on 12/8/1994. The defendant did not initiate court proceedings to ventilate her alleged interest in the suit property. Aggrieved by the defendant's actions, the deceased initiated **Kiambu SPMCC No 1365 of 1996** seeking eviction of the defendant and removal of the caution. The deceased died on 14/7/2010 before determination of the said suit. The said suit abated before she obtained the grant of letters of administration relating to the deceased's estate.

7. PW1 added that, upon obtaining the grant of letters of administration, she was unable to complete transmission of the suit property to the beneficiaries of the estate of Michael Gachingiri Kabere because of the caution. She made demands to the defendant to remove the caution but the defendant declined to heed her demands. She urged the court to grant her the prayers sought in the plaint.

8. In cross-examination, she stated that they were chased away by the defendant when they went to the suit property. She did not know the defendant before then. She was not sure if the existing semi-permanent structure was on the suit property at the time her deceased husband purchased the suit property. They learnt about the caution in 1995. The defendant has a permanent house on a neighbouring parcel of land where she lives.

9. She produced 12 documents, among them: (i) copy of title relating to the suit property; (ii) copy of parcel register relating to the suit property; (iii) grant of letters of administration relating to the estate of Michael Gachingiri Kaberere; (iv) certificate of confirmation of grant; and (v) plaint relating to Kiambu SPMCC No 1365 of 1996.

Defendant's Evidence

10. The defendant testified as DW1 and closed her case. She adopted her written statement dated 9/10/2017 as part of her sworn evidence-in-chief. Her evidence was that she had resided on the suit property since 1966 when she got married to Albert Kiromo Julius. She lived on the suit property with some of her grandchildren. She placed a caution against her husband's land. She knew nothing about **Parcel Number Dagoretti/Thogoto/1068**. Hannah Wanjiru Wainaina was her mother-in-law. Albert Kiromo went to Mombasa in 1984 and had not come back since then.

11. In cross-examination, she stated that the suit property was part of a bigger parcel of land which previously belonged to her father-in-law. Her father in law sub-divided the land and gave it to his sons in 1963. She got married to Albert Kiromo in 1966 after Albert Kiromo had already acquired the land from his father. She did not participate in the acquisition of the suit property. She did not know anything about the parcels subdivided out of Parcel Number 53. The court order she was relying on was undated and unsigned. She did not have a counter-claim although she made a prayer in her defence.

Submissions

12. The plaintiff filed written submissions dated 7/1/2020. The defendant did not file submissions despite being granted the opportunity to do so.

Analysis & Determination

13. I have carefully considered the parties' pleadings and evidence. I have similarly considered the plaintiff's written submissions and the law applicable to the suit before me. The plaintiff's pleadings and evidence, together with the legal framework in Order 24 of the Civil Procedure Rules, raise the question as to whether this court has jurisdiction to entertain and adjudicate this suit. It is now a settled principle of law that whenever a question of jurisdiction of the court is disclosed, the court is obligated to determine that question before venturing into the merits of the dispute. Emphasizing this principle, the **Court of Appeal** stated the following in **Owners of Motor Vessel Lillian "S" v Caltex Oil (K) Ltd (1989) IKLR**:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"

14. The plaintiff made the following averments in paragraphs 3 and 8 of her plaint respectively:

3. The plaintiff is the legal representative of the Estate of Michael Gachingiri Kaberere (deceased)

8. The deceased instituted proceedings at the Senior Principal Magistrate (SPM) Court, Kiambu No. 1365 of 1996, which abated upon his death on 17th July 20210

15. Further, the plaintiff made the following statements in paragraphs 14 and 15 of her written witness statement which forms part of her sworn evidence- in-chief:

14. Aggrieved by the defendant's actions, the deceased instituted SPMCC No 1365 of 1996 seeking eviction and removal of the wrongful caution placed by the defendant. A true copy of the plaint is attached hereto as "PEX7".

15. Unfortunately, the deceased passed away on 14th July 2010 before the said suit could be determined and the suit thus abated before I could obtain the Grant of Letters of Administration Intestate or obtain a substitution.

16. The plaintiff produced as an exhibit, an amended plaint relating to **Kiambu SPMCC 1365 of 1996**. Paragraphs 3, 4, 5 and 6 of the said amended plaint reads as follows:

3. The plaintiff bought a land no Dagoretti/Thogoto/1068 from Mrs Hannah Wanjiru Julius on 10th June 1993 and the same was transferred and registered to the plaintiff as absolute proprietor without any problems

4. The Defendants had build a semi-permanent house before the plaintiff bought the said land and cultivating as well.

5. The 2nd defendant has without any lawful or reasonable cause placed a caution on the said property thereby placing further restrictions on the rights and interest of the plaintiff as absolute proprietor.

6. The plaintiff has requested the defendants to demolish the said house and stop cultivating the said land and also the 2nd defendant to remove the caution but they have failed or refused to do hence the suit.

17. Lastly, the plaintiff prayed for the following orders in Kiambu SPMCC 1365 of 1996:

a) The defendant and their agents be evicted from the land LR DAGORETTI/THOGOTO/1068.

b) The 2nd defendant do remove the caution placed and in default the land registrar do remove the caution

c) Costs of this suit.

18. What emerges from the plaintiff's pleadings and from the evidence in this suit is that the cause of action and the prayers in this suit are the same as the cause of action and the prayers in **Kiambu SPMCC No 1365 of 1996**. What further emerges from the said pleadings and evidence is that prior to his death, Michael Gachingiri Kaberere instituted Kiambu SPMCC No 1365 of 1996. The said suit subsequently abated in July 2011 following his death in July 2010. Subsequently, in 2016, the plaintiff brought the present suit as a fresh cause, on behalf of the estate of Michael Gachingiri Kaberere, to ventilate the same claim which had abated in Kiambu SPMCC No 1365 of 1996.

19. Kenya's legal framework on the effect of abatement of a suit expressly forbids the bringing of a fresh suit in relation to an abated cause of action. Order 24 rule 7 (1) of the Civil Procedure Rules provides thus:

"where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action."

20. Kiambu SPMCC 1365 of 1996 abated under Order 24 rule 3(2) of the Civil Procedure Rules. Consequently, this court is expressly barred against entertaining the present suit which relates to the same abated cause of action.

21. In light of the foregoing, it is apparent that this court cannot entertain the present suit. The present suit is consequently hereby struck out without venturing into the merits of the plaintiff's claim. For avoidance of doubt, the estate of the late Michael Gachingiri Kaberere shall nonetheless be at liberty to initiate appropriate revival proceedings relating to Kiambu SPMCC 1365 of 1996, and if successful, ventilate its claim in the said abated suit. The plaintiff shall bear costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER 2020.

B M EBOSO

JUDGE

In the presence of: -

Mr Kamau for the Plaintiff

Court Clerk - June Nafula