



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 322 OF 2017

WAMAI GITHERE.....PLAINTIFF

VS

CHRISTOPHER KIARIE NJOROGE.....1ST DEFENDANT

DANIEL MAINA NJOROGE.....2ND DEFENDANT

MWANGI NJOROGE.....3RD DEFENDANT

JESSE CHEGE NJOROGE.....4TH DEFENDANT

MWANGI GITAU.....5TH DEFENDANT

JUDGMENT

1. On the 30/3/17 the Plaintiff filed suit against the Defendants and sought the following orders;

- a. An injunction restraining the Defendants their servants and or agents from disposing of selling charging transferring and or interfering with Land Ref No LOC3/MUKURIA/649 and LOC3/MUKURIA/650 (suit lands) or any part of it.
- b. A declaration that the Plaintiff has a right of ownership over LOC3/MUKURIA/649 and LOC3/MUKURIA/650.
- c. Costs of the suit.
- d. Any other further relief that this honourable Court may deem fit and just to grant.

2. The Plaintiff's case in this suit is based on a claim that the parcels LOC3/MUKURIA/649 and LOC3/MUKURIA/650 are resultant titles that were issued after subdivision of LOC 3 /MUKURIA/81 .The Plaintiff avers that LOC 3 /MUKURIA/81 belonged to the late Githere Kiarie who was his father. That the suit lands were owned by his late father and upon his demise, his mother. He contends that the Defendants through their mothers Wanjiku Njoroge (deceased) and Wangari Gitau transferred the suit lands to their names without any letters of administration in the estate of the Plaintiff's father. It is also his claim that the Defendants illegally and fraudulently acquired title to the suit parcels through their mothers Wangari Gitau and the late Wanjiku Njoroge who subdivided the mother title (LOC 3 /MUKURIA/81) and transferred the lands to themselves without his knowledge and consent. That subdivision by the Defendants' mothers was in breach of orders and decree in Nairobi HCCC 597/1984 where the Plaintiff obtained an award against the Defendants' mothers and was declared to have an equal share in the suit lands. He avers that the Defendants have defied the orders and decree aforesaid and have deprived the Plaintiff of his legal share of the suit lands. He has particularized instances of illegality and unlawfulness on behalf of the Defendants.

3. The Defendants denied the Plaintiff's claim in their statement of defense filed on the 24/4/17. The Defendants aver that the Plaintiffs suit is incompetent, defective and an abuse of the process of the Court on account of HCCC No 597/1984 which Court had competent and concurrent jurisdiction and determined the case on its merits and therefore rendering the instant suit resjudicata. They aver that they are the registered owners of the suit lands having received lawfully from their mothers who in turn got the suit lands legally from one Karuru Gathii. That Wangari Gitau, the 5th Defendant was the daughter in law of Muchora Gathii, who was the brother of Karuru Gathii, the original owner of LOC 3 /MUKURIA/81, from which the suit lands resulted from upon subdivision.

4. At the hearing of the suit the Plaintiff testified solely and adopted his witness statement dated the 30/3/17 and relied on the annexures attached to the Notice of Motion dated 30/3/17 and filed on even date. He stated that his father Githere Kiarie owned two parcels of land; LOC3/MUKURIA/81 and LOC3/MUKURIA/82 measuring 7.2 and 6.6 acres respectively. Upon his demise, his mother inherited the lands and later devolved to him and Njoroge Githere, his brother (the father of the 1-4th Defendants). Parcel LOC3/MUKURIA/82 was transferred

to his name whereupon it was later shared equally between himself and the mother of the 1-4th Defendants pursuant to a Court order in CMCC 281 of 2008. He stated that upon the death of his brother LOC3/MUKURIA/81 became registered in the name of Karuru Gathii who was his Uncle as per the proposal of the late Wanjiku Njoroge (1st - 4th Defendant's mother). She later registered the title in her name after the late Karuru Gathii passed on and fraudulently together with Wangari Gitau procured subdivision of the land to create LOC 3 /MUKURIA /649 & Land Parcel No. LOC 3 /MUKURIA / 650 which they registered in their names without his knowledge.

5. It is his evidence that aggrieved by the actions of Wanjiku Njoroge and Wangari Gitau, he moved the Court in HCCC No 597 of 1984 and sued the two whereupon the Court awarded him ½ share of the suit lands. The Court excluded Wangari Gitau, the mother of the 5th Defendant on the ground that she was not entitled to the parcel LOC 3 /MUKURIA /649.

6. That subsequently the Defendant's mothers frustrated his efforts in getting his ½ share of the suit lands whereupon he unsuccessfully sought help from various offices to wit; Kituo Cha Sheria and Land Registrar, Muranga. Later, he discovered that the suit lands had been registered in the names of the Defendants in total disregard to the Court orders aforesaid.

7. DW1 - Jesse Chege Njoroge stated that the Plaintiff is his Uncle and brother to his late father Njoroge Githere. That the two parcels of lands LOC3/MUKURIA/81 and LOC3/MUKURIA/82 are two different properties located in different places and owned by two different families respectively. That LOC 3/MUKURIA/81 was owned by Karuru Gathii and his grandfather Githere Kang'ee owned LOC3/MUKURIA/82. That both had no relations but just friends. That the parcel LOC3/MUKURIA/81 did not come from the lineage of the Plaintiff. That the two parcels were separated by two river valleys and had different map sheets in LOC .3 MUKURIA Block (Map sheets produced). It was not true that Karuru Gathii was the Plaintiff's uncle as alleged and the Plaintiff did not have any rights over this land.

8. That in 1972 the late Karuru Gathii subdivided his land LOC 3 /MUKURIA /81 into LOC 3 /MUKURIA /591 and LOC 3 /MUKURIA /592 measuring 2 acres and 5.2 acres respectively. He then registered land parcel No. LOC 3 /MUKURIA/ 592 in the names of the Defendants' mothers and retained LOC 3 /MUKURIA/ 591. That LOC 3 /MUKURIA /592 was later subdivided by into two parcels; LOC 3 /MUKURIA/649 and LOC 3 /MUKURIA/650. Wanjiku Njoroge and Wangari Gitau were given 650 measuring 3.1 acres and 649 measuring 2.1 acres respectively. He stated that dissatisfied with the subdivision the Plaintiff instigated criminal proceedings against the said Wanjiku Njoroge and Wangari Gitau in RMCR No 104 of 1980, Muranga where they were charged, convicted and fined Kshs 2000/- on charges of procuring titles by false pretences. The said conviction was later quashed on appeal.

9. The witness further stated that Wangari Gitau was the daughter in law to Muchora Gathii who was the brother of Karuru Gathii. That subsequently the original owners lawfully transferred the suit lands to the Defendants as their heirs. In response to the orders issued in HCCC No 597 of 1984, he alluded that the said Wanjiku Njoroge and Wangari Gitau were unaware of the orders.

10. DW1 produced the documents annexed in the list of documents as EXHIBIT 1-10.

11. DW2- Mwangi Gitau, the 5th Defendant testified and stated that LOC3/MUKURIA/81 was owned by his grandfather Karuru Gathii who subdivided the suit land into two parcels; LOC 3 /MUKURIA/591 and LOC 3 /MUKURIA/592. He then gave parcel LOC 3 /MUKURIA/592 to Wanjiku Njoroge and Wangari Gitau which was later subdivided into the two suit lands. Subsequently, LOC3/MUKURIA/649 has been subdivided into two parcels LOC 3 /MUKURIA/1301 and LOC 3 /MUKURIA/1302 and registered in the name of the 5th Defendant. LOC3/MUKURIA/1302 was further subdivided into LOC3/MUKURIA/1464 and LOC 3 /MUKURIA /1465. That the two suit lands have been occupied by the Defendants for over 30 years.

12. DW3- Joseph Nganga Njoroge stated that he is a relative of Karuru Gathii and reiterated the evidence of DW2 by stating that the suit lands were given out by Karuru Gathii to Wanjiku Njoroge and Wangari Gitau. That the suit lands did not belong to the Plaintiff nor his family.

13. DW4 -Esther Njeri Karanja stated that the Plaintiff is the brother of his father in law, Njoroge Githere. She succeeded her husband Samuel Samson Karanja Njoroge who was the brother of the 1-4th Defendants.

14. The parties filed written submissions which I have reviewed and considered.

15. Having considered the pleadings, the evidence and the submissions of the parties including all the relevant materials presented before this Court, the Court finds that the following issues fall for determination;

- a. Whether or not the Plaintiff has a cause of action.
- b. Whether the instant suit is res-judicata.
- c. Whether the Plaintiff is entitled to the prayers sought.
- d. Who meets the cost of the suit?

16. It is important to set out the background of this case as thus; The Plaintiff is the paternal uncle to the 1st-4th Defendants. Wanjiku Njoroge (deceased) and Wangari Gitau was/is the mother(s) of the 1st -4th Defendants and the 5th Defendant respectively. The Plaintiff claims that Karuru Gathii was his uncle while the 1st -4th Defendants claim that he was not related to the family of the Githere. The 5th Defendant however states that Karuru Gathii was his uncle. His mother was the daughter in law to Muchora Gathii who was the brother of Karuru Gathii. It is claimed by the Defendants that Wanjiku Njoroge and Wangari Gitau were friends and had no relations.

17. According to the evidence of the Plaintiff his late father owned two parcels of land to wit; LOC 3 /MUKURIA /81 and LOC 3 /MUKURIA /82 during demarcation. Upon the death of his father the lands fell in the hands of his mother through inheritance. After the death of his mother the lands devolved to him and his brother Njoroge Githere, the father of the 1-4th Defendants. He averred that afterwards (he does not disclose when) the mother transferred parcel No LOC 3 /MUKURIA /82 to his name. It is not in dispute that in 2008 the Court ordered that this parcel of land be subdivided equally between the Plaintiff and Wanjiku Njoroge, the mother of the 1st -4th Defendants. That is how LOC 3 /MUKURIA /82 was settled.

18. Turning to LOC 3 /MUKURIA /81, the Plaintiff led evidence that upon the death of his brother, this parcel became registered in the name of his uncle Karuru Gathii upon the proposal by Wanjiku Njoroge. That upon the death of Karuru Gathii, the Land became subdivided into two portions LOC 3 /MUKURIA /649 and LOC 3 /MUKURIA /650 in the name of Wangari Gitau and Wanjiku Njoroge respectively without his knowledge, leaving him without a share of the suit land. That aggrieved with this development he sued both Wangari Gitau and Wanjiku Njoroge in HCCC NO 597 of 1984 where the Court determined the case in his and that of Wanjiku Njoroge's favour. It is this decision that the Plaintiff has based his cause of action in the current suit. It is his claim that execution of the orders were frustrated by the mothers of the Defendants.

19. On the other hand, the case of the Defendants is that the original suit land LOC 3 /MUKURIA /82 was registered in the name of Karuru Gathii. That the land did not belong to Githere Kangee at all. They contend that the two lands were owned by separate people and located in different locations from each other. That Karuru Gathii subdivided this land into land LOC 3 /MUKURIA 591 and 592 in 1972. He retained 591 in his name and subdivided land LOC 3 /MUKURIA 592 into 650 and 649 and transferred to Wanjiku Njoroge and Wangari Gitau respectively. Thereafter the said two ladies transferred the suit lands to the Plaintiffs' as their heirs. It is their case that the Plaintiff is not entitled to the suit lands at all.

20. It is this transfers that the Plaintiff claims were done contrary to a Court order issued in 1987 in HCCC No 597 of 1984. Does the Plaintiff then have a valid cause of action on account of this decision?

21. According to **Black's law Dictionary** a cause of action is defined as;

“a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person. The state of acts may be a primary right of a Plaintiff actually violated by the Defendant or the threatened violation of such right, which violation the Plaintiff is entitled to restrain or prevent as in cases of injunction or suits for injunction; or it may be that there are doubts as to the duty or right or the right beclouded by some apparent adverse right or claim, which the Plaintiff is entitled to have cleared up, that he may safely perform his duty or enjoy his property“

22. Having reviewed the pleadings of the Plaintiff his cause of action arises from the decree of the Court issued in 1987 in HCCC No 597 of 1984 which states as follows;

“1. That judgment be and is hereby entered in terms of the award herein.

2. That Land parcel No.s LOC 3/MUKURIA/649 and LOC3/MUKURIA/650 be shared equally between Wamai Githere and Wanjiku Njoroge”

23. It is his case that despite the said orders the Defendants became registered owners of the suit lands through the act of disobedience of the Court orders by their mothers thus depriving him of the fruits of the judgment in his favour as cited in the above case. He pleaded illegality and unlawfulness on the part of the Defendants.

24. The Court has noted that decree which forms the core appendage of the Plaintiff's suit was issued in 1987. Unfortunately, the judgment and /or proceedings were not produced nor did he call for the file to be presented to this Court to form part of his evidence. As regards the judgment, this Court notes that this judgment cannot be enforced since it has been over 12 years since it was issued. It therefore offends the provision of Sec 4(4) Limitation of Actions Act Cap 22 of the Laws of Kenya on enforcement of orders and decrees which provides: -

“4.(4) *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 the default in making the payment or delivery in question, in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.*”

25. **In the case of Hudson Moffat Mbue –vs- Settlement Fund Trustees & 3 others ELC NO. 5704 of 1992 (OS) (unreported) Mutungi J** while considering the application of Section 4(4) of the Limitation of Actions Act observed thus;

“.....that once a judgment has been rendered ,execution of that judgment must be commenced within the 12 year period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the Limitation of Actions Act will bar you from carrying on with such execution.

26. It follows that the decree was not enforced as a result of which the judgment lapsed. The Plaintiff in whose favour the judgment stood has not put any material before the Court which would show that extension of the period of limitation was made. Such extensions as are provided for under Part ii of the Limitation of Actions Act would include disability, fraud, acknowledgement, part payment, mistake and ignorance of material facts. The Plaintiff therefore cannot found a cause of action based on a stale judgement. The Plaintiff in this case seems to have slept on his rights for the past 30 years and moved the Court to enforce a judgment that was void abinitio as at time of filing suit in 2017. The Court finds and holds that the Plaintiff does not have a valid cause of action and therefore his claim is untenable.

27. Is the Plaintiff guilty of laches? The doctrine of laches is an equitable relief which will be given if the applicant has unduly delayed in bringing the action. When considering the doctrine, the Court looks at three factors; the delay by the Plaintiff, acquiescence by the Plaintiff in the delay and the change of the position of the Defendant arising from the delay. In the instant suit it is not in dispute that the Plaintiff had a judgement in his favour but he failed to execute it. The delay and acquiescence on the part of the Plaintiff is such that it could lead a reasonable person to believe that he may have abandoned his claim.

28. I have examined the green card for the original parcel LOC3 MUKURIA/81 and it is clear that the said parcel of land was registered in the name of Karuru Gathii in 1962. In 1979 the same was subdivided into two parcels land LOC 3 /MUKURIA 591 and 592. Land reference land LOC 3 /MUKURIA 592 was later subdivided into land LOC 3 /MUKURIA 649 and 650. The said parcels were transferred to the mothers of the Defendants on the 14/8/1979 respectively according to the official searches on record dated the 7/3/2008. Give the decree was issued in 1987, its validity being 12 years, the same expired in 1999. The Defendants became registered as owners of the suit lands in 2009, 10 years after the lapse of the judgment by operation of law. It is fundamental to note that at the time of the transfers of the suit lands there was no valid order so as to occasion any disobedience by Wangari and Wanjiku. Their actions in 2009 were not in breach of any existing Court order. They would have been in contempt of a Court order if they did so within 12 years while the orders were in force.

29. As to whether the instant suit is res-judicata, the Court is careful to warn itself that as far as the decision of the High Court in HCCC No 597 of 1984 is concerned, this Court was not furnished with the evidence, proceedings and the judgment in full text. That notwithstanding it is clear that the parties were the same as far as the Defendants in this case are claiming or defending a right acquired under the title of the previous Defendants in HCCC NO 597 of 1984 (the previous suit). The current Defendants are the sons of the Defendants in the previous suit. The subject matter is the same suit lands as in the previous suits and certainly the issues in the previous suits as can be deduced from the decree was in relation to ownership of the suit lands. The previous suit was determined and decided by a competent Court on its merits and a relief thereof given. There is no evidence that the said orders in HCCC No 597 of 1984 were ever appealed, set aside or vacated. The order therefore has become stale by affluxion of time before the same was executed.

30. Although the information is scanty, the Court finds that on the balance of probability, reliance being placed in the material placed before it, this Court is of the view that the suit offends section 7 of the Civil Procedure Act. The matter of ownership is resjudicata on account that it stood adjudged by a competent Court of law as at 1987. It is not open for the Plaintiff to relitigate the same question of ownership of the suit lands. It is a policy in public interest that litigation must come to an end.

31. This Court associates itself with the decision in **George W M Omondi & another v National Bank of Kenya Ltd & 2 others [2001] eKLR** the Court stated as follows;

The doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction, but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined.

32. Further the Court held that;

“.....the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a Court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in instalments. I wholly agree with the opinion of **Kuloba J** in **Mwangi Njangu v Meshack Mbogo Wambugu** (supra) where he said:-

“If a litigant were allowed to go on forever re-litigating the same issue with the same opponent before Courts of competent jurisdiction, merely because he gives his case some cosmetic face-lift on every occasion he comes to a Court, then I do not see what use the doctrine of res judicata plays”.

33. Is the Plaintiff entitled to the orders sought? In view of the holding of the Court in issues No 1-3 the Court shall answer this in the negative.

34. In the end the Plaintiff's case is dismissed with costs to the Defendants.

Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 17TH DAY OF JANUARY 2019

J.G. KEMEI

JUDGE.

Delivered in open Court in the presence of:

Plaintiff – Present in person. Advocate is absent.

Defendants 1 – Absent

2 – Present

3 – Present Advocate absent

4 – Absent

5 – Present

Irene and Njeri, Court Assistants