



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO 409 OF 2017**

**GABRIEL GEORGE GACHERU**

**(Suing as Administrator of the**

**estate of the late MONICA WANGARU).....PLAINTIFF**

**VS**

**FRANCIS MACHARIA NJUGUNA.....1<sup>ST</sup> DEFENDANT**

**THE CHIEF LANDS REGISTRAR**

**MINISTRY OF LANDS MURANG'A.....2<sup>ND</sup> DEFENDANT**

**MARTIN IRUNGU MACHARIA.....3<sup>RD</sup> DEFENDANT**

**CHARLES MWANGI MACHARIA.....4<sup>TH</sup> DEFENDANT**

**PETER NJUIE MACHARIA.....5<sup>TH</sup> DEFENDANT**

**MERCY WAITHIRA MUIRURI.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The parties in this suit are blood relatives. The mother of the Plaintiff and the 1<sup>st</sup> Defendant are sister and brother being children of Grace Magiri, the 2<sup>nd</sup> wife of the family Partriach Wabacha Waititu alias Njuguna Waititu. The Plaintiff therefore is the nephew of the 1<sup>st</sup> Defendant and cousin to the 3<sup>rd</sup> -6<sup>th</sup> Defendants who are the sons of the 1<sup>st</sup> Defendant.

2. On the 21/6/17 the Plaintiff filed suit against the Defendants. Vide leave of the Court the plaint was amended on the 27/2/18. She sought the following orders;

a. A permanent injunction restraining the Defendant s their agents, servants and or employees from trespassing, damaging, wasting, erecting structures and or interfering whatsoever way with parcels NOS. LOC 18/MARUMI 804, LOC 18/MARUMI 805, LOC 18/MARUMI / 806. LOC 18/MARUMI /807, LOC 18/MARUMI / 808, LOC 18/MARUMI /809, LOC 18/MARUMI /810 derived from LOC 18/MARUMI/431 measuring 8 acres in Muranga County.

b. costs of the suit and interests thereon.

c. any other relief this honourable Court may deem fit to grant.

3. The Plaintiff's case is that he is the administrator of the estate of her deceased mother. Vide a judgment of the Court in SRMCC No 170 of 1988 delivered on the 15/2/90, the Court found that the 1<sup>st</sup> Defendant held ½ share of the land in trust for her. The 1<sup>st</sup> Defendant was ordered to transfer ½ share of the land to the Plaintiff's mother. The total acreage of the suit land is 4.175 acres or 1.69 ha.

4. The 1<sup>st</sup>, 3<sup>rd</sup>-6<sup>th</sup> Defendant s denied the plaintiff's claim through a joint statement of defence filed on the 10/9/18. Terming the plaintiff's claim incompetent, frivolous and fatally defective, they averred that the plaint as drawn is not tenable in law as the Plaintiff is purporting to execute orders issued in SRMCC No 170 of 1988. That the suit herein is therefore res judicata and should be struck out. The claim against

the Defendants is time barred and unsustainable and finally the suit is an abuse of the process of the Court. That the Court may not have jurisdiction on account of the suit being res judicata.

5. The 2<sup>nd</sup> Defendant filed a statement of defence on the 31/8/2018 wherein it denied the plaintiff's claim. The Plaintiff was faulted for providing scanty information which does not disclose how and when the mother owned the property. The 2<sup>nd</sup> Defendant averred that the Plaintiff is guilty of laches.

6. On the 26/11/18 the parties represented by their counsels on record recorded a consent to prosecute the suit by way of written submissions. They relied and adopted the pleadings, witness statements, list of documents and final written submissions in determining the suit.

7. In his witness statement the Plaintiff stated that the mother was the legal registered owner of 2 acres of the suit land and was in full possession. That he later learned that the suit land had been subdivided and transferred to the Defendants through a provisional title. That further subdivisions are ongoing with the aim of disposing the parcels to unsuspecting buyers and to deprive him of his beneficial share of the land.

8. Robert Macharia, the brother of the plaintiff, in support of the plaintiff's claim, stated that the 1<sup>st</sup> Defendant declined to convey to his late mother her portion of 2 acres in the suit land leading to the Court case in Murang'a which decided in her favour. Joyce Wanjiru Njuguna, the sister to the Plaintiff reiterated the evidence of the other witnesses. Francis Kihato, secretary of the Muhiriga Wa Angari, Mbari Ya Waititu, Githaku gia Kanyi stated that the matter was brought to the attention of the clan upon the demise of the Plaintiff's mother. He stated that the 1<sup>st</sup> Defendant and his sons have denied the Plaintiff his mother's entitlement of 2 acres and despite the clans advise they have remained adamant.

9. The Plaintiff placed reliance on the following documents; grant of letters of administration in the estate of Monica Wangaru Macharia dated 20/3/14, letter dated the 17/2/17 by the chief of Dandora A confirming that the Plaintiff is the son of the late Monica Wangaru Macharia, official searches dated the 10/4/17 in relation to parcel Nos. LOC 18/MARUMI/810, 809, 808, 807, 806, 805 804 registered in the names of the 1<sup>st</sup>, 3<sup>rd</sup> -6<sup>th</sup> Defendant s, judgment in SRMCC No 170 of 1988 between Monica Wangaru Macharia and the 1<sup>st</sup> Defendant delivered on 15/2/90, orders issued in HCCA No 68 of 1990 between the 1<sup>st</sup> Defendant and Monica Wangaru Macharia in which the appeal was dismissed for want of prosecution, and mutation form registered on the 31/1/2017 where the suit land OC18/MARUMI/431 was subdivided into 7 parcels to wit; LOC 18/MARUMI/804-810.

10. The 1<sup>st</sup> Defendant filed a Witness Statement on the 2/10/18 where he stated that the land originally belonged to Wabacha Waititu who died in 1975. The deceased had two wives; Kabui and Grace Magiri. The 1<sup>st</sup> Defendant and the plaintiff's mother are children of Grace Magiri, the 2<sup>nd</sup> house. The original land measuring 8 acres was therefore subdivided into two houses, each getting 4 acres in accordance with Kikuyu customs. He states that the plaintiff's mother was not given any land as she was married and that the Plaintiff should be seeking land from his father, one Kamero Kahuria. Further he added that he has been in possession of the suit land for a period in excess of 30 years. That the plaintiff's mother accepted her fate that she was not entitled to any land and this was a position taken by the clan and the entire family. That he has now distributed the suit land to his children.

11. Parties have filed Written Submissions with the exception of the 2<sup>nd</sup> Defendant.

12. The Plaintiff submitted that the original land LOC 18/MARUMI/431 measuring 4 acres belonged to the Plaintiffs and 1<sup>st</sup> Defendant father Njuguna Kanyi. Upon his death the Plaintiff's mother sued the 1<sup>st</sup> Defendant in SRMCC No 170 of 1988 culminating into a decree that the 1<sup>st</sup> Defendant was ordered to transfer 2 acres to the plaintiff's mother. The 1<sup>st</sup> Defendants appeal vide HCCA 68 of 1990 was dismissed for want of prosecution. Before execution of the decree in SRMCC No 170 of 1988, the Plaintiff mother died in 1996 and the Plaintiff obtained letters of grant of administration in her estate vide Thika Succ cause No 549 of 2014.

13. Armed with the letters of grant of administration, the Plaintiff submitted that he filed an application in the chief magistrate Court in Murang'a seeking for execution of the decree issued in 1990. In addition he sought orders to be allowed to execute the transfer forms in favour of the Plaintiff to enable him be registered as the owner of the 2 acres as the administrator of the estate of Monica Wangaru Macharia. He claims that upon service of the application on the 1<sup>st</sup> Defendant, he proceeded to secretly subdivide the suit land creating 7 sub plots registered in the names of the Defendants. He submits that these actions were intended to frustrate the decree of the chief magistrate Court. That the actions of the Defendants in transferring the land to themselves are fraudulent. He urged the Court to grant orders of cancellation of the titles and to revert to the original title No LOC18/MARUMI/431. That the Deputy Registrar of the Court to execute all the transfer forms in favour of the Plaintiff in relation to the 2 acres as per the decree of the Murang'a Chief Magistrate Court.

14. The Defendants submitted that the decree was issued on the 15/2/90 in favour of the plaintiff's mother and that in the instant suit the Plaintiff seems to be seeking orders for the execution of the said decree. They submit that the Plaintiff ought to have filed for substitution in the lower Court file instead of filing a fresh matter. That the suit herein is resjudicata so much so that it is an abuse of the process of the Court. The issues of proprietary rights and interests were duly adjudged by the lower Court in 1990. further that the said judgement is time barred by the provisions of the Limitations of Actions Act. The plaintiff, they submit does not own the sit land and therefore cannot be afforded the prayers of permanent injunction. That the land was physically subdivided 30 years ago and the Defendants have been in physical possession and urged the Court to determine whether their prescriptive rights have accrued in their favour. Finally the Defendants argued that the plaintiff's claim is time barred coming 25 years after the death of his mother.

15. The facts of the case are that the Plaintiff is the administrator of the estate of the late Monica Wangaru who was the deceased proprietor of a portion of L.R. No. LOC 18/MARUMI/431. The suit land was family land that belonged to their grandfather. The Plaintiff avers that the 1st Defendant subdivided the said land and caused new titles to be registered as L.R NoS. LOC 18/ MARUMI/804 – LOC 18/MARUMI /810 which are subsequent titles that have been registered in favour of the 3<sup>rd</sup> – 6<sup>th</sup> Defendants.

16. Having considered the pleadings, the witness statements, the list of documents and the written submissions placed before me, the following issues fall for determination by the Court;

- a. Whether the suit is resjudicata
- b. Whether the plaintiff's claim is time barred
- c. Whether the judgement and orders in Murang'a SRMCC No. 170/1988 can be enforced or upheld.
- d. Whether subdivision transfer and registration by the 1<sup>st</sup> Defendant was illegal and subsequent registration to the 3-5<sup>th</sup> Defendants was legal
- e. Whether the orders of injunction can be issued restraining the Defendants from dealing with the suit parcels.

17. From the evidence on record, the Plaintiff's mother sued the 1<sup>st</sup> Defendant in SRMCC No 170 of 1988 claiming a share of the original land LOC 18/MARUMI/431. The Court in its judgment delivered on the 15/2/90 determined that the 1<sup>st</sup> Defendant held ½ share of the suit land in favour of the Plaintiff's mother. The 1<sup>st</sup> Defendant was ordered to transfer ½ share equivalent to 2 acres to the Plaintiff's mother. In the instant suit the Plaintiff has sued the Defendants as the administratrix of the estate of his late mother claiming 2 acres of land out of the original LOC 18/MARUMI/431. It is on that basis that he is seeking a permanent injunction against the Defendants from interfering with the suit land which he avers has been subdivided and registered in the names of the Defendants as shown on the official searches on record.

18. Section 7 of the Civil Procedure Act provides as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

19. In the case of **Attorney General & Another ET vs [2012] e KLR** it was held:

“ *The Courts must always be vigilant to guard litigants evading the doctrine of resjudicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the Plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of Omondi vs NBK & Others [2001] EA 177 the Court held that “ parties cannot evade the doctrine of resjudicata by merely adding other parties or causes of action in a subsequent suit.” In that case the Court quoted Kuloba J, ( as he then was) in the case of Njanju v Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated : If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to Court, then I do not see the use of doctrine of resjudicata...*”

20. The import of the above provisions and case law is that the subject matter of the suit in SRMCC 170 of 1988 is the same as in the current suit. The previous suit was determined by a competent Court that is to say the rights and interest of the parties were adjudged with finality. The parties in the previous suit are the same parties with the Plaintiff now suing as administratrix of the estate of the previous Plaintiff. It is public policy that litigation must come to an end.

21. The Court finds that this current suit is resjudicata. The Court concurs with the Defendants submissions that the suit is resjudicata and the Court is therefore barred from entertaining it.

22. The Plaintiff has referred to a case at the Chief Magistrates Court at Murang'a which he purportedly filed after obtaining grant of letters of administration. He has not disclosed to the Court details of the suit and the Court is unable to follow his line of argument. Further he has averred in his pleading that he learnt that the title had disappeared and the parcel of land had been subdivided and transferred to the Defendants. He did not lead any evidence as to the ownership of the title that disappeared, when and how and whether the mother had become registered as owner of the 2 acres of land pursuant to the judgment.

23. Does the Plaintiff have a valid cause of action? The case of the Plaintiff is anchored on the judgment of the suit in SRMCC No 170 of 1988. The Plaintiff in Para 4 and 5 of the amended avers that his late mother was the owner of 2 acres out of the LOC18/MARUMI/431 having acquired pursuant to the judgement delivered in SRMCC 170 OF 1988. That she was in possession of the said portion. The Plaintiff did not disclose to the Court any title deed in the name of Monica Wangaru and it is clear from the pleadings that the Plaintiff is now seeking through the instant suit to execute the said judgement. The basic principle of law is that section 7 of the Limitations of Actions Act prohibits recovery of land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. In the instant case the right of action accrued to the Plaintiff's mother in 1990 and the same expired in 2002. The Court agreed with the 2<sup>nd</sup> Defendants Counsel that the Plaintiff claiming under his late mother is caught up with the doctrine laches. His claim is time barred by statute.

24. This brings me to the next question which is whether the judgement is available to found a cause of action as contemplated by the Plaintiff? The Court is guided by section 4(4) of the Limitations of actions Act which 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 the 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.”

25. I rely on the dicta in the case of **Adnam v Earl of Sandwich (1877) 2QB 485**, where the Court held;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

26. Similarly, 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 where an application for execution of judgment had been brought before the expiry of the 12 years had lapsed observed thus;

“What I understand the law to be is 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”.

27. The judgment of the Court in SRMCC NO 170 of 1988 was delivered in 1990 and therefore the same expired in 2002. By the time the Plaintiff petitioned for letters of grant of administration in the estate of his late mother in 2014, the judgement had long expired. The judgement therefore is not available to found a cause of action in favour of the Plaintiff as the same expired. The Plaintiff has not disclosed if he has sought leave for extension of time as provided for under Part 111 of the Act. Such instances would include disability, acknowledgement and part payment, fraud and misrepresentation of material facts. A claim seeking to execute the same 28 years later is an act of futility. It is not available. It expired.

28. As to whether the subdivision, transfer and registration by the Defendants was illegal, it is on record that the subdivision was procured sometime on 29/1/2017. This is after the expiry or lapse of the judgement delivered in 1990. The Plaintiff has not pleaded any particulars of fraud against the Defendants. He has also not set out a case of trust against the Defendant. The Defendants titles in this case have not been encumbered in any way and if there was any form of interest limiting their rights over the land, he failed in his duty to establish these facts and clear particulars before this Court. Unfortunately, Plaintiff failed to enforce that award and as the Court has determined in the preceding paras, he is guilty of laches. If the 1<sup>st</sup> Defendant held the title in trust, such fiduciary capacity must be clear and pleaded. Customary trust must also be proved as a matter of evidence. He did not do that. He is bound by his pleadings. Even if he had pleaded customary trust, it would be Resjudicata.

29. As to whether the orders of injunction can be issued restraining the Defendants from dealing with the suit parcels, Section 23, 24 and 26 of the Land Registration Act provide that a certificate of title is prima facie evidence that the person registered as owner of the land is the absolute proprietor of the land and has acquired absolute rights and privileges appurtenant to his title. In this case, the Defendant’s titles were registered after the 12 year period for limitation under Section 4(4) of the Limitations Act had lapsed. There was no restriction against any dealings of the main title. It is noted that the favorable award in favour of the Plaintiffs mother was not executed nor registered against the main title. The titles that were issued by the Registrar are deemed as valid titles unless the contrary is established. None has been established. It must also be noted that the Plaintiff proceeded on the wrong assumption that her mother was registered as owner of the 2 acre portion of land. He failed to establish this and such an order is not available to him. Equity does not assist the indolent and he cannot urge a case for an injunction when he was indolent in pursuing his rights when the time was ripe.

30. In answer to issues No c, d and e, the Court in view of its holding in the proceeding paras answers the same in the negative.

31. In the end the Court finds that the Plaintiff’s claim fails for the reasons adduced above. It is dismissed with costs to the Defendants.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 28<sup>TH</sup> FEBRUARY 2019**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Plaintiff: Present in person. Advocate is absent.

Kirubi for the 1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant – Attorney General is absent

Kirubi for the 3<sup>rd</sup> to 6<sup>th</sup> Defendants

Njeri and Irene, Court Assistants