



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 247 OF 2013

GITATHURU KARIOBANGI COMPANY LIMITED.....PETITIONER

VERSUS

KARIUKI GATHECHA RESOURCES LIMITED.....RESPONDENT

JUDGEMENT

1. Initially, the Petitioner filed **Petition No. 29 of 2013** in the Constitutional and Human Rights Division of the High Court at Milimani, Nairobi. The High Court transferred the matter to the Environment and Land Court on 6/2/2013, and the file was allocated E.L.C Case Number 247 of 2013. The Petitioner contends that it bought land measuring 58 acres which was a portion of **L.R No.31 Ruaraka /Nairobi** from the Respondent on various dates. It claims it purchased 34 acres of land on 26/3/1979 for valuable consideration from the Respondent. In order to effect the subdivision from the mother title, the Respondent granted the Petitioner a power of attorney, a copy of which it produced.

2. The Petitioner contends that it bought an additional 24 acres on 18/12/1979 for valuable consideration and was granted possession by the Respondent. The Petitioner produced copies of the sale agreements in respect of the two separate transactions. It is the Petitioner's case that L.R No.31 Ruaraka/Nairobi was surveyed and 58 acres hived off the parent title and that the new subdivided portion was given L.R. No. **Nairobi/Block 31/33**. The Petitioner claims that the Respondent failed to transfer the title over Nairobi/Block 31/33 to it, prompting the filing of **HCCC No. 2587 of 1994** which sought to compel the Petitioner to transfer the land. That case was dismissed for contravening the Limitation of Actions Act and the Land Control Act.

3. On appeal, the Court of Appeal upheld the High Court's decision in **Civil Appeal No. 2587 of 1994**. The court ruled that the Petitioner should have sued by 1985 and was therefore statute barred. Further, that since the land control board consent was not obtained within the prescribed period, the two sale agreements that gave rise to the subdivision of L.R NO.31 Ruaraka/Nairobi were void and a nullity.

4. The Court of Appeal observed that the Plaintiffs, who included the Petitioner, were not completely without a remedy if they carefully studied their relationship with the Defendant and the law applicable. The court noted that the Plaintiffs, who included the Petitioner, had made an alternative claim based on adverse possession yet a suit for adverse possession ought to be brought by way of originating summons.

5. The Petitioner urged that vide Gazette Notice Number 39 of 24/7/1998, the subject land was exempted from controlled transactions. The gazette notice was published two years before **Civil Appeal No. 3587 of 1994** was determined. This court notes that the Court of Appeal considered the issue of the gazette notice and concluded that it was not clear whether the parcels of land in the transactions that were exempted by the gazette notice were the same as the land in dispute.

6. The Court of Appeal decision was given on 14/7/2000. The Petitioner does not seem to have pursued any of the avenues proposed in the ruling of the Court of Appeal. Instead, the Petitioner filed the petition on 25/1/2013 contending that the Respondent had not concluded the conveyance to date, and that the refusal amounted to a violation of its right to property as enshrined in Article 40 of the Constitution.

7. The Petitioner sought a declaration that the Respondent's act of refusing to complete the conveyance of the land known as L.R No. Nairobi/Block 31/33 measuring 58 acres situated in Ruaraka, which is a portion of L.R No. 31 violates the Petitioner's rights under Articles 19, 22 and 40(1) and (2) of the Constitution of Kenya. In the alternative, the Petitioner prays to be deemed to have acquired the property by operation of law and seeks a permanent injunction to restrain the Respondent or its agents from claiming any rights in the property; and an order to compel the Respondent to convey the land known as L.R No. Nairobi/Block 31/33 to the Petitioner.

8. The firm of Ochieng' Ogutu & Co. Advocates entered appearance for the Respondent on 6/3/2014, but they did not file a response to the petition. Mr. Ogutu informed the court on 13/2/2017 that he intended to apply to cease acting for the Respondent. The firm never made the application to cease acting for the Respondent. The court is satisfied that the Petitioner's Advocates served the Respondent even though it did not participate in the hearing of this matter or file submissions.

9. The Petitioners relied on their written submissions. The court has considered the pleadings filed and the submissions filed by the Petitioner. The Court of Appeal dealt with the issues canvassed in this matter in **Civil Appeal No.3587 of 1994**. The decision of the Court of Appeal was final and is binding on this court which cannot try a matter that was already canvassed and decided by the Court of Appeal. Section 7 of the Civil Procedure Act bars this court from trying any issue which was directly and substantially in issue in a former suit between the same parties, and which has been heard and decided by a competent court. The Court of Appeal dealt with issues which are directly and substantially in issue in this suit. The Court found that by virtue of section 6(1) of the Land Control Act, the sale transactions between the Petitioner and Respondent were void and the exemption that the Petitioner has relied on, that is Gazette Notice Number 39 of 24/7/1998 which exempted Nairobi/Block 31/33 from controlled transactions could not be applied retrospectively.

10. The prayer for specific performance must fail because this court cannot validate a contract that was declared void by the Court of Appeal. The Petitioner has failed to prove that the Respondent's actions violated its right to own and acquire property or that the actions complained of were unconstitutional. The Petitioner's alternative prayer for the suit land to be deemed to have passed by adverse possession or operation of law also fails. A Suit for adverse possession should be brought by way of Originating Summons.

11. The court finds no merit in the petition, it is dismissed with no orders as to costs.

Dated and delivered at Nairobi this 18th day of February 2019.

K. BOR

JUDGE

In the presence of: -

Mr. H. Ongicho holding brief for Mr. Kahonge for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendant