



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 73 OF 2012**

**(FORMERLY NYER HCCC NO. 120/2012)**

**NICODEMUS MURIUKI Alias (MURIUKI SAMSON MURIITHI.....PLAINTIFF**

**VERSUS**

**JACINTA WAIRIMU**

**FRACIA NJOKI.....DEFENDANTS**

**JUDGMENT**

**INTRODUCTION**

This suit was initially commenced by the plaintiff in Nyeri High Court where it was registered as HCC No. 120/2012. The suit had been filed simultaneously with a Notice of Motion under certificate of urgency in which the Plaintiff/Applicant was seeking a prohibitory order restraining all dealings with the suit land parcel number KIINE/SAGANA/356 pending hearing and determination of this suit. By the plaint dated 6<sup>th</sup> June 2012, the Plaintiff was seeking an order that the Court do order the Defendant to sign necessary papers for sub-division and transfer of 3 acres in land parcel number KIINE/SAGANA/356 to the Plaintiff within 7 days in default the Executive officer of this Honourable Court do sign necessary papers to facilitate the transfer and production of the original title deed of parcel No. KIINE/SAGANA/356 to be dispensed with during registration of the sub-division and transfer and all encumbrances be lifted. The Plaintiff also sought the costs of the suit and interest. On 9<sup>th</sup> July 2012, the 1<sup>st</sup> Defendant Entered Appearance through the firm of Wairimu Rugaita Advocates and on 14<sup>th</sup> October 2013, the firm of Maina Kagio & Co. Advocates filed Notice of Change to act in place of M/S Jacinta Wairimu Rugaita for the 1<sup>st</sup> Defendant. In their defence dated 14<sup>th</sup> March 2018, the Defendants denied the Plaintiff's claim and put him to strict proof.

At paragraph 3, 4 and 5 thereof, the Defendants averred as follows:

***“3 The defendants are strangers to all the allegations raised in the plaint, save that;***

***All the issues raised by the plaintiff herein are the subject matter in Kerugoya ELC Case No. 517/2013 where the plaintiff is a party”.***

***“4 The defendants further aver that the consent order that gave rise to this suit was made in Kerugoya ELC Case No. 417/2013 (formerly Nyeri HC 14/2000) and the same was set aside in the same case. Any party aggrieved by the orders made in Kerugoya ELC 417/2013 (formerly Nyeri HC 14/2000) can only seek redress in the same file”.***

***“5 It is the defendants' averments that the plaintiff who is also a party in Kerugoya ELC 417/2013 is totally out of order in filing this suit, and the defendants hereby give notice of intention to raise a Preliminary Objection to this suit as it is bad in law, sub-judice and meant to cause confusion and frustration in Kerugoya ELC 417/2013***

***In view of paragraph 5 above, this Court's jurisdiction is not admitted”.***

**PLAINTIFF'S CASE**

The Plaintiff testified on oath and stated that he bought land from James Mwangi Gerald being land parcel No. KIINE/SAGANA/356. He bought a portion of that land measuring 3 acres. He produced the sale agreement dated 4<sup>th</sup> November 2009. He stated that the land had a dispute in another case in Nyeri being HCCC No. 14/2000 (Nyeri). That dispute was resolved by recording a consent. He referred to the

letter of consent contained in his list of documents item No. 2. After the dispute was resolved through the aforesaid consent, the land was sub-divided and he was given land parcel No. KIINE/SAGANA/3921. He sub-divided that land. The Plaintiff produced all the documents contained in the list of documents as Plaintiff Exhibits 1 – 11. He also referred to his witness statement dated 30<sup>th</sup> May 2012 which he adopted in his evidence.

### **DEFENDANTS CASE**

The Defendant did not offer any evidence to the Plaintiff's claim as the application for adjournment by her advocate was declined by the Court and since the Defendant was absent, the matter proceeded Ex-parte.

### **PLAINTIFF'S SUBMISSIONS**

The Plaintiff through his counsel relied in the testimony of the Plaintiff and the documents produced.

### **DEFENDANTS SUBMISSIONS**

The Defendants also elected not to make any written submissions to this case.

### **ANALYSIS AND DETERMINATION**

The issues for determination in this case can be framed as follows:

- 1. Whether James Mwangi Gerald instructed Eliud Rugaita Murango (deceased) to recover for him land from Kirinyaga County Council.***
- 2. If the answer to paragraph (1) above is in the affirmative, whether Eliud Rugaita Murango (deceased) after he recovered the land transferred the same to his name illegally?***
- 3. Whether the Plaintiff bought three (3) acres of land from James Mwangi Gerald out of land parcel No. KIINE/SAGANA/356 in November 2009.***
- 4. Whether the issues raised in this suit are the subject matter in ELC Case No. 517/2013 (Kerugoya) where the Plaintiff is a party.***
- 5. Whether the Plaintiff has proved his claim on a balance of probabilities.***
- 6. Who is liable to pay costs of this suit?***

### **1<sup>ST</sup> ISSUE**

The Plaintiff averred in the plaint that Eliud Rugaita Murango (deceased) was instructed by James Mwangi Gerald to recover land for him from Kirinyaga County Council but the said Eliud Rugaita Murango (deceased) illegally transferred the land to himself. The Plaintiff did not lead any evidence to prove his allegations as averred in the plaint. As such, I find that the Plaintiff has not proved his claim on that issue. There is no evidence that the suit property belonged to James Mwangi Gerald and that the same was recovered by Eliud Rugaita Murango on behalf of James Mwangi Gerald from Kirinyaga County Council.

### **2<sup>ND</sup> ISSUE**

On the second issue, the Plaintiff has not demonstrated that the suit property was recovered by Eliud Rugaita Murango (deceased) from Kirinyaga County Council on behalf of James Mwangi Gerald.

### **3<sup>RD</sup> ISSUE**

The Plaintiff has produced in his evidence a supplementary sale agreement between himself as the purchaser and one James Mwangi Gerald Mbogo dated 6<sup>th</sup> November 2009. The subject matter of the agreement is 3 acres inclusive of Road indicated as Plot Nos. A – J & M – N being sub-division of land parcel No. KIINE/SAGANA/356 in the Scheme Plan.

The first and second terms of that agreement referred to earlier agreements dated 2/2/2006, 12/11/2001 respectively. These two earlier agreements were not produced by the Plaintiff in his evidence to enable this Honourable Court to appreciate the nature and contents of the subsequent agreement. The green card produced by the Plaintiff as Plaintiff Exhibit No. 4 showed that the suit property was first registered in favour of James Mwangi Gerald on 21/1/1961. There has been no other dealings until the property was acquired by Wari Gitari Kinya and Eliud Rugaita Murango as joint proprietors as a consideration of Ksh. 80,000/= on 25<sup>th</sup> February 1993. The Plaintiff has not proved any link between the acquisition of the suit property by the two registered proprietors and the alleged James Mwangi Gerald.

### **4<sup>TH</sup> ISSUE**

When the Plaintiff purported to have purchased the suit property from James Mwangi Gerald in November 2009, the said James Mwangi Gerald had no proprietary rights capable of being transferred to the Plaintiff in law. The property was registered in third parties and not the alleged James Mwangi Gerald. The purported sale agreement in my view amounted to nothing in law.

## **5<sup>TH</sup> ISSUE**

The 5<sup>th</sup> issue relates to another case being HCC No. 14 of 2000 (Nyeri) which was later transferred to ELC Kerugoya and registered as ELC No. 417 of 2013. That case is still pending. The parties in that case were James Mwangi Gerald as Plaintiff Versus Warui Gitari Kinya and Eliud Rugaita Murango as Defendants. In an amended plaint filed in Nyeri Court on 9<sup>th</sup> July 2012, the Plaintiff in that case averred at paragraph 5 thereof as follows:

***“Following a dispute involving land parcel No. KIINE/SAGANA/356 in which the plaintiff was the registered proprietor, the plaintiff and the defendant agreed that the 1<sup>st</sup> defendant would finance a suit to its conclusion, and further that the plaintiff would pay back in cash or kind by giving the 1<sup>st</sup> defendant a portion of the said land parcel should the plaintiff’s suit be decided in the plaintiff’s favour”.***

Again in paragraph 6, the Plaintiff averred as follows:

***“6 The plaintiff appointed the firm of M/S Rugaita & Co. Advocates to act in HCC No. 61/95 and the 1<sup>st</sup> defendant agreed to pay the legal fees involved”.***

At paragraph 7, 8, 9, 10 and 11, the Plaintiff averred as follows:

***“7 The plaintiff look the title deed of land parcel No. KIINE/SAGANA/356 to the custody of the 1<sup>st</sup> defendant as security for the money”.***

***“8 The judgment in HCC No. 81/95 was decided in favour of the plaintiff therein who is also the plaintiff in this suit”.***

***“9 Without the knowledge of the plaintiff, all prohibitions were removed on 23/2/93, the parcel was transferred to the 1<sup>st</sup> defendant herein and later on 29/6/96, the said title was transferred and a title deed was issued to the defendants herein”.***

***“10 The 1<sup>st</sup> and 2<sup>nd</sup> defendants after the judgment conspired to conceal the name of the plaintiff from the Land register proprietors thereof:.***

***“11 The 2<sup>nd</sup> defendant is now alone registered proprietor of the whole parcel and the name of the 1<sup>st</sup> defendant has been removed from the register”.***

The Plaintiff then sought an order that the defendants jointly and severally do re-transfer the land parcel No. KIINE/SAGANA/356 to him or its sub-divisions. That suit was later amended where new parties were joined as defendants and orders issued upon several interlocutory applications. While that other suit was pending, the Plaintiff filed this case claiming ownership of the suit property. However, the Plaintiff has not proved that he is the owner of the suit property. He has not demonstrated his interest in the suit land. To my mind, the Plaintiff’s claim is a red herring which he has not shown to the satisfaction of this Court how he acquired the suit land. It is curious to note that in a consent letter in a case before it was transferred from Nyeri High Court registered as HCCC No. 14 of 2000, the firm of Ann Thungu & Co. Advocates who acted for the Plaintiff James Mwangi Gerald, Kimwere Josphat & Co. Advocates who acted for Anthony Warui for the 1<sup>st</sup> Defendant and Jacinta Wairimu and Francis Njoki who were the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acting in person agreed by consent as follows:

***1. All sub-divisions including roads of Kiine/Sagana/356 which were reflected in Kiine/Sagana/3501 to 3511 are hereby nullified and cancelled and the land to revert to Kiine/Sagana/356.***

***2. The registration of Eliud Rugaita or any other party as registered owner of Kiine/Sagana/3501 – 3511 are hereby cancelled and nullified the land parcel Kiine/Sagana/356 to be registered in the name of the plaintiff and the defendants family and thereafter the said land to be sub-divided into two equal portions. One portion to be registered in the name of the plaintiff being the portion which is nearest Sagana Town and the other portion jointly in the name of the three defendants.***

***3. The portion occupied by Sagana Health Centre to be sub-divided in two equal portions half in the name of the plaintiff and half portion in joint names of the defendants.***

***4. The plaintiff and the three defendants jointly to surrender an equal area in the middle/boundary of the sub-division being a road as per measurements required by law.***

***5. The District Land Registrar to dispense with the production of all title deeds of Kiine/Sagana/3501 – 3511.***

***6. All cautions, restrictions and encumbrances of Kiine/Sagana/3501 – 3511 are hereby lifted.***

***7. Costs of surveyor be shared equally by both parties.***

**8. The said transaction be effected within two months from the date of this consent.**

On the same day, the said consent order was placed before Justice Makhandia (as he then was) where the same was adopted as an order of the said Honourable Court. That consent order was subsequently adopted as an order of the Court. I hasten to add that in an application filed by one Joyce Watiri and Eva Njeri Muchiri who were the Administratrix of the Estate of Joseph Kariuki Muchiri (deceased) was the 4<sup>th</sup> defendant in that suit and dated 26/07/2010, the Honourable Court in a ruling delivered by **Justice J.K. Sergon** on 23<sup>rd</sup> September 2011 observed as follows:

*“It is apparent from the record that the aforesaid consent orders were recorded without involving the 4<sup>th</sup> and 5<sup>th</sup> defendants herein. It is also clear from the affidavit of the 4<sup>th</sup> defendant upon the death of Joseph Kariuki Muchiri, the parcel of land known as L.R. No. KIINE/SAGANA/3110 was transmitted to the 4<sup>th</sup> defendant vide Nyeri HCSC No. 3022 of 2003 on 4<sup>th</sup> July 2004. It is obvious that by the time the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants purported to record a consent order, affecting the aforesaid parcel of land, the same had already been transmitted to 4<sup>th</sup> defendant hence she should have been involved in the transaction”.*

My overall analysis of this suit is that there is a pending suit being ELC Case No. 417 of 2013 (formerly HCCC No. 14 of 2000) Nyeri and where all the parties are involved and the matter was filed long before the present suit was filed. I find that the principle of sub-judice applied in this case. **Section 6 of the Civil Procedure Act** provides as follows:

*“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instructed suit or proceedings between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or other Court having jurisdiction in Kenya to grant the relief claimed”.*

In the upshot, I find that the Plaintiff’s claim has not been proved on a balance of probabilities and the same is hereby dismissed. Each party to bear her own costs.

**READ and DELIVERED in open Court at Kerugoya this 14<sup>th</sup> day of February 2019.**

**E.C. CHERONO**

**ELC JUDGE**

**14<sup>TH</sup> FEBRUARY, 2019**

*In the presence of:*

1. Mr. Kagio holding brief for Ann Thungu for Plaintiff
2. Ms Cherono holding brief for Rugaita for Defendants