



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 101 OF 2017

NYANGI KIUMBI)

DAVID MUCHIRI GAKURU).....PLAINTIFFS

KIURA KIANJIGI)

VERSUS

COUNTY GOVERNMENT OF KIRINYAGA.....DEFENDANT

AND

MARGARET KATHUNGU)

SICILY WAMBUI KATHURI)

ANNAH WANJA KAGO (As Legal representative).....APPLICANTS

Of the Estate of EDWARD KAGO NJOKA)

RULING

[1] By a Notice of Motion dated 25th July 2017, the applicants herein prayed for an order of inhibition against land parcel Baragwe/Raimu/389. They also asked for a review of the orders granted by the Principal Magistrate's Court at Embu on 14th January 2016 and prayed for a reinstatement of the sub-division of land parcel Baragwe/Raimu/389 that were existing as at 14th January 2016.

[2] The plaintiffs opposed this application. They alleged that they were suing on behalf of Agaciku Mbari ya Gatugu for whom they claimed the land belonged. It was alleged, and indeed, it was common ground that the Kirinyaga County Council was registered as owner of the land parcel Baragwe/Raimu/389 as trustee for Agaciku Mbari ya Gatugu.

The plaintiffs alleged that the clan had agreed that the land be registered in the name of Kiura Kianjigi who was to hold it in trust and that he was allowed to live there and preserve it for the clan. They alleged that the transfer to the applicants was illegal and fraudulent. The plaintiffs said that as early as 18th August 1991, the defendant Kirinyaga County Council vide its minutes had recommended that the land reverse to M/S Nyangi Kiumbi, David Muchiri Gakuru and Kiura Kianjigi and that, that did not happen due to corruption or rank and file of County officials. The plaintiffs allege that the transfer to the 1st applicant hereon on 27th January 1993 who later sub-divided it on 27th May 1997 into land parcels Baragwe/Raimu/1570, 1521 and 1522 was illegal and fraudulent.

[3] The history of this case is simple. One Nyaga Kiumbi, David Muchiri Gakuru and Kiura Kianjigi filed a civil case in SPM's Court at Embu Civil Case No. 218 of 1997 against Kirinyaga County Council. They claimed to act for themselves and the rest of clan members of Agaciku Mbari ya Gatugu Clan and alleged that land parcel Baragwe/Raimu/189 was reserved for the said clan and was registered in the name of Kirinyaga County Council in trust for their clan. They prayed that:

(a) Title Baragwe/Raimu/389 be released and transferred to them on behalf of Agaciku Mbari ya Gatugu Clan and

(b) Costs of the suit.

The plaint was filed on 30th September 1997. It should be noted that Baragwe/Raimu/389 was sub-divided on 27th May 1997 and new titles Baragwe/Raimu/1520, 21 and 22 came into being. The said plaint did not plead to pray that those titles be cancelled.

On 18th September 2018, a Notice of Motion was filed to that suit (SPM Embu No. 218 of 1997) and prayed that judgment be entered against the defendant Kirinyaga County Council in favour of the plaintiffs plus costs of the suit.

In the supporting affidavit there was an affidavit of David Muchiri Gakuru, which depones that the suit was withdrawn by consent of the parties following an out of Court settlement and an order to that effect issued on 27th July 2007 and the same was annexed to the amended Notice of Motion. It was also alleged in paragraph 5 of David Muchiri Gakuru's affidavit that the defendant Kirinyaga County Council through a letter addressed to the plaintiff on 28th September 2007, did express the defendant's readiness to support the plaintiffs/applicants through the Court to move the Land Registrar to revoke the transfer in favour of Margaret to the clan land. Copy of the letter was annexed to that Motion. Margaret is the first applicant herein.

This matter came before the Magistrate R.O. Ongara on 13th January 2016 in the presence of counsel for the plaintiff/applicant and in the absence of the defendant/respondent, Kirinyaga County Government and judgment was entered for the plaintiffs as prayed in the plaint. It was ordered that Title No. Baragwe/Raimu/389 be released and transferred to the 1st, 2nd and 3rd plaintiffs to hold on behalf of Agaciku Mbari ya Gatugu Clan. The order was issued on 13th January 2016 and signed on 14th January 2016.

The plaintiffs apparently were unable to execute their orders. They filed a Notice of Motion dated 16th February 2016 in which they prayed that the transfer of Baragwe/Raimu/389 by the County Council of Kirinyaga in favour of Margaret Kathungu Muriuki be revoked. That the resultant title numbers Baragwe/Raimu/1520, 1521 and 1522 be cancelled and the same be consolidated to the original title number Baragwe/Raimu/389 in the names of County Government of Kirinyaga as trustee for Agaciku Mbari ya Gatugu Clan. This application is still pending in Court.

[4] That being the state of affairs what orders should be made?

It is common ground that land parcel Baragwe/Raimu/389 was registered in the name of Kirinyaga County Council as a trustee for Agaciku Mbari ya Gatugu Clan. It is not disputed that the plaintiff and applicant in this case are from the same clan. Further, that the other clan members have not been disclosed in these proceedings. There is no consent to act on behalf of Agaciku Mbari ya Gatugu Clan annexed or produced to any of these proceedings. The Court is not told whether that clan consists of the plaintiffs and applicants only or whether there are others whose identities should be disclosed to enable the Court to make appropriate orders.

When judgment in Embu SPM Civil Case No. 218 of 1997 was entered by the Court, land parcel Baragwe/Raimu/389 did not exist.

According to the affidavit of David Muchiri Gakuru a plaintiff herein, this suit was withdrawn by the parties on 23rd July 2007 – a copy of the withdrawal was filed in Court.

According to *Black's Law Dictionary* 10th Edition, ***withdrawal*** means, ***to take back something presented. To refrain from presenting or proceeding with an action. The act of taking back or away, the act of retreating from a place, position or situation.....***"

Once a suit is withdrawn, it ceases to exist completely. The orders the magistrate made on 13th January 2016 were made on suit that had ceased to exist. The orders were equally made of a land parcel that had equally ceased to exist. It is no wonder the plaintiffs found difficulties when they tried to execute those orders. They were orders made in futility. The registered owners of Baragwe/Raimu/1520, 1521 and 1522 the applicants herein were known OR at least they were capable of being established by doing a simple search in the Land Registry. They were not made parties to this suit. They had titles. No one ever asked that their titles be cancelled. An order requiring that land parcel Baragwe/Raimu/389 be reinstated was an affront to their titles. They were not given an opportunity to be heard. The order by the magistrate was not only adverse to their titles. It profoundly impeached their proprietary rights without due process being followed.

[5] I therefore for those reasons set aside the orders of the Senior Principal Magistrate Embu given on 13th January 2016 and issued on 14th January 2016. I do order land parcels Baragwe/Raimu/1520, 1521 and 1522 be reinstated as they were prior to 13th January 2016.

I also find that the Notice of Motion filed on 16th February 2016 which was based on the impugned order of the Senior Principal Magistrate Embu of 13th January 2016 as having no merit and I strike it out with no order as to costs. The end result is that this Notice of Motion dated 26th July 2017 by the applicants is allowed in terms therein before stated with costs.

READ and SIGNED at Kerugoya in open Court this 22nd day of March, 2019.

E.C. CHERONO

ELC JUDGE

22ND MARCH, 2019

In the presence of:

1. Mr. Maina Kagio
2. Mr. Ngigi Gichoya

3. Mr. A.P. Kariithi Kariithi

4. Court clerk - Mbogo