



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 36 OF 2014

KABUITU GAKUNDI.....APPELLANT

VERSUS

NICASIUS KABUITU GAKUNDI.....RESPONDENT

JUDGMENT

The appellant in this case filed an appeal in this case and set out five grounds of appeal as follows:

- 1. The learned trial Magistrate erred in law in not confirming that the appellant was the original registered owner besides the production of the documents to support the allegations.***
- 2. The learned trial Magistrate erred in law in hedging his arguments in a criminal case which was not properly investigated nor properly reasoned.***
- 3. The learned trial Magistrate failed to hold the appellant has been in occupation of the land since 1958 to date.***
- 4. The learned trial Magistrate erred in law in failing to give finding in respect of the counter-claim which failure renders the whole judgment void.***
- 5. The learned trial Magistrate was completely biased against the appellant and gave unjust judgment in the circumstances.***

This appeal arose out of Kerugoya Senior Principal Magistrate's Court Civil Case No. 214 of 1992 in which the plaintiff thereon now the respondent sued the defendant now the plaintiff and prayed that the restriction imposed on land parcel Kabari/Nyangati/1613 and Kabare/Nyangati/1614 which were the resultant sub-divisions of Kabare/Nyangati/548 owned by the plaintiff be removed. The plaintiff also asked for costs of the suit.

The defendant filed an amended statement of defence denying the plaintiff's claim and counter-claim against the plaintiff and alleged that the plaintiff fraudulently caused his name to be changed and caused it to be entered in the register and he caused the name of the defendant to be removed from the register in regard to Kabare/Nyangati/548. He prayed for a declaration that the plaintiff entered into the suit land unlawfully. Further that the registration of the plaintiff of land parcel No. Kabare/Nyangati/1613 and 1614 be rectified under **Section 143 of the Registered Land Act** and that the same be registered in the name of the defendant. He also prayed for costs of the suit.

During the hearing, the plaintiff in his evidence told the Court that the suit land is his property. That he was given by the clan in 1958. That he was a minor having been born in 1956. He was barely 2 years old. He alleged that he was shown the land when he became an adult. He alleged that he was initially registered as owner of the land in the name of Kabuitu Gakundi. He stated that he later changed his names and got the title deed. Further that he sub-divided land parcel Kabare/Nyangati/548 into 1614 and 1615. He admitted that he never occupied the land. He alleged that the defendant prevented him from doing so. He admitted further that he was charged in a criminal case for obtaining the suit land through false pretenses but he alleged that he was acquitted. He alleged that the title was given to him in 1958 but that he had documents. He said that he has never been in occupation of the suit land. He admitted that the defendant is the one who has been in occupation. The plaintiff admitted that he had no documents to show that he was Kabuitu Gakundi. He said that documents to show that he was Kabuitu Gakundi came from the area chief Gicharu Peter. He admitted that he did not know the chief and that the chief did not know him either. That it was the clan people who showed him to the chief. He admitted that he had no receipts for payments in the Land Registry to show that the land is his. The plaintiff called one Sebastian Ngigi who alleged that the clan gave the plaintiff land in 1958. That the defendant's father was present. That the plaintiff was a minor and that his father was in Mombasa working at Safari Hotel. The witness admitted that the defendant has always been in occupation.

PW3 was Muthee Julius Aruma, a District Land Registrar Kirinyaga who produced a green card in respect of Kabare/Nyangati/548. The first registered proprietor was Kabuitu Gakundi on 16th September 1982. There was a subsequent registration on 22nd December 1987 registering Nicasio Kabuitu Mwaniki through a correction of name. The land was later registered into Kabare/Nyangati/1613 and 1614 and was in the

names of Nicasio Kabuitu Mwaniki. The Land Registrar confirmed that there was a receipt of Ksh. 75 made by the registered owner on 16th September 1982.

The defendant told the Court that his names are Kabuitu Gikundi ID Number 2913163/65. That the suit land is his. That he got the same in 1958. He produced an original receipt for Ksh. 75. He alleged that he occupied the land in 1958 and is still there to-date. He said that he has 4 houses, one his, the others for his sons Francis Wachira Kabuitu, Peter Gitari Kabuitu, James Kabuitu and Bernard Kabuitu. He alleged that they occupy the entire 15 acres. He told the Court that he went to look for his title on 4th January 1988 when he learnt that there was an objection from the chief through a letter. One Nicasio Kabuitu had raised an objection. He went to the Police where upon the plaintiff was charged with a criminal offence but he was acquitted.

The defendant called Mathew Ndambiri Ngare who is a clan member and who alleged that he was there when the defendant was given the land by the clan in 1958. The witness said that he does not know the plaintiff and that he is not a clan member and that he comes from Mbeere. On cross-examination, the witness said that he was in the Committee that gave the land to the defendant and that he was with Gideon Muteti Kabiru, Gacha Kabiru, Ndambiri Mwambi and Magochu Kamau. That, that Committee consisted clan membership.

Richard Ngando Murathi gave evidence and said that he knows Kabutu Gakundi the defendant in that they are related. He denied any knowledge of the plaintiff. He stated that the defendant got land in 1958. That he appeared in the Committee with the defendant. That he got parcel No. 28 and the defendant No. 548 of 15 acres. Further that they put boundaries together. That the defendant is settled on the land to-date.

That was the evidence that was before the learned magistrate. Also produced before the learned magistrate was the proceedings and judgment in Kerugoya SRM Criminal Case No. 508 of 1997 which he relied in his judgment. I have therefore perused the evidence adduced therein. I am however, aware that the standards required in a criminal case are that of beyond reasonable doubt while the standards required in a civil case is that of balance of probabilities. The issue in the criminal case is whether the plaintiff herein had obtained title of the suit land by false pretences. Indeed, this case was on 23rd June 1994 pre-empted by the Senior Resident Magistrate on the above quoted criminal case when she stated:

“It appears there is one of the parties in this case who has committed an offence and DCIO should first do the investigation and if he finds any of the parties committed an offence, he be first prosecuted”.

The evidence adduced in that criminal case is important in determining this appeal. Indeed both parties have referred extensively to that criminal case. The judgment equally put a lot of emphasis on the evidence and judgment on that criminal case.

The complainant in the criminal case who is the respondent herein said he was the owner of the suit land. That he lives in the said land up to now. His evidence was similar to the one he gave in this case. He called witness Gikunyu Munene who owned parcel number Kabare/Nyangati/537. The witness said the complainant was a neighbour who owns parcel Kabare/Nyangati/548. He denied ever knowing the accused (respondent in the appeal). The witness said that the complainant was given the land by the clan. That the complainant had 3 sons and 2 daughters.

PW..... Gilbert Njenga said he did not know the accused. He said that in 1958, he was appointed to join the Committee distributing land for Rungare Clan. That the complainant belongs to it. That land was registered in his name Kabuitu Kagondi.

PW IV was Peter Gicharu Kanga Senior Chief Nyangati Location. He said that he knew the accused (respondent herein) when he was arrested in relation to the criminal case. That, ***“he is not from my area of jurisdiction”***. He said that he knew the complainant (appellant herein) that he came from his location. That land parcel Kabare/Nyangati/548 is registered in his name. indeed, the witness continued to testify and he told the Court:

“I recall, the complainant and accused came to settle a dispute involving land. I told them to bring elders. Who they did. Both were claiming ownership of the land. I was unable to reach a decision and I referred same to D.O. After this, it was referred to the Police. I do not know if the accused has a piece of land in my area”.

The Land Registrar one Samuel Kambo Kaitheru gave evidence that he was the Land Registrar in Kirinyaga. He recalled having certified documents relating to the accused. He said that those were change of names from Kabuitu Kagundi to Nicasio Kabuitu Mwaniki. That the accused had an affidavit on 24th November 1987 and a letter confirming this from chief of his area saying he is the same person. He said that he verified the declaration through a witness Peter Ndichu Kamau and that is the document they registered and had accused issued with title deed for Kabare/Nyangati/548 which was previously registered in the name of Kabuitu Kagondi.

There is no doubt therefore, from the proceedings in the Criminal Court, the Land Registrar relied on the identification **NOT** of chief Peter Gicharu Kanga but of Francis Gichangi Mbunya Sub-chief Mathenge Sub-location. The said Sub-chief said that he know the accused on the dock. That he came from Makima in Embu District. He said that on 23rd November 1997, he was the acting Chief of Nyangati Location. That the accused came with a letter from the Land Registrar Kirinyaga asking for confirmation that Nicasio Kabuitu is Kabuitu Wangundu and if he is the owner of Kabare/Nyangati/1548. It was the paper involved in change of names. He said that he confirmed that he was the one. He said that he did so after he told the accused to bring clan elders who confirmed that he was one and the same person. The Sub-chief said he did not know the elders, but the accused said they were from his place. He said that he did not know the accused or his house or his parents or whether he owned land.

That is the evidence that caused the change of name.

The accused after giving his defence, called his father who said that he went to Mombasa in 1950 and came back in 1960. He said that he was told much later about the suit land by one Mutugi Mbutei that the land in Kimbimbi was his. That his son did not tell him how the land was given to him. His son told him that someone called Gakundi had the land.

It is curious how a two year old baby would be given land when his father was alive and working in Mombasa. He came back in 1960 only two years after it had been given to his infant son. He never knew of it at all. Infact, something is very instructive from PW VII CPL Boniface Makau who gave evidence and said:

“The accused and complainant were referred to our office. We recorded their statements. Accused said he was from Makima in Eastern Province Accused was to take us to the piece of land but would not locate it”. We obtained document from Land office”.

The question that begs an answer is, how would a person who claims to own a piece of land and claims he has been prevented by another from entering the same be unable to locate it? I am completely aware that this was a criminal case, and that the accused was given the benefit of doubt and acquitted under *Section 215 of the Criminal Procedure Code* and that there was no appeal preferred. However, It is instructive to note what the magistrate said, that informed him of his decision, he said in page 4 of his judgment, last paragraph:

“The Court was unable to find any aspect of false pretence in this transaction as the person who confirmed this was a government official in the Location who in normal circumstances is expected to know all his subjects”.

From the evidence of the Location Chief, it is clear he said that he did not know the accused and that the land belonged to the complainant. It was the Assistant Chief who was acting for the Chief that wrote a confirmation. He confirmed that he did not know the accused. So he asked him to bring elders of the area to confirm that the accused names and confirm he owned the suit land. The accused himself brought elders, which he confirmed to the Assistant Chief that they came from his area. He then signed the document of change of name.

It is therefore now clear that the reliance on that identification which caused, the change of name of the accused and change of registration particulars for land parcel Kabare/Nyangati/458 was faulty.

The learned Resident Magistrate in this case relied on this criminal case fully. He stated, ***“The proceedings produced in Criminal Case No. 508/1997 wherein the plaintiff was the accused exonerated the plaintiff from any wrong”.***

“The Court was unable to find any aspect of false pretence in the transaction as the person who confirmed the same was a government official in the Location whom in normal circumstances is expected to know all his subjects. He could not therefore deny this when faced with this case. The criminal proceedings are the basis for proceedings herein in order to establish account of fraud”.

The learned Resident Magistrate therefore erred. The burden of proof in criminal proceedings is that of beyond reasonable doubt, while that of civil proceedings is on balance of probability. He had a duty to evaluate the evidence adduced by the parties. He did not. He did not consider or make any findings on the defendant’s counter-claim. It was left in abeyance.

If he had considered the evidence adduced, in the criminal case, and in the case before him, he would have noticed that the suit land has always belonged to the appellant. All his witnesses, his neighbours testified that he was given his land in 1958. He occupied it then and is still there. He lives there with his family. The area chief confirmed this. The learned magistrate would have noticed that the respondent was 2 years old in 1958, had a father who is alive and was working in Mombasa, who came back from Mombasa in 1960. Who has never known where this land is. The Resident Magistrate would have known that the respondent was unable to show the Police where the land was. Further that the accused had to change his name to match the name on the register for him to claim the suit land. Once that was done, he started selling the land. Finally that the respondent came from Makima in Mbeere in Eastern Province. He did not come from Kirinyaga where the land is situated and was unknown to the clansmen of the area where the land is situated.

The respondent took advantage of an unsuspecting acting assistant Chief and requested him to sign change of name papers, thereby, claiming the land of the appellant. If the learned Resident Magistrate had done that, he would have come to a different conclusion.

This appeal succeeds. The plaintiff’s suit in the lower Court is dismissed. The counter-claim is allowed with costs for the lower Court and this Court to the appellant in the following terms:

(a) That the registration of the plaintiff as owner of Land parcel No. Kabare/Nyangati/548 now sub-divided into Kabare/Nyangati/1613 and Kabare/Nyangati/1614 was irregular and unlawful.

(b) The Land Registrar Kirinyaga County is ordered to cancel that sub-division and registration of the plaintiff as owner of Kabare/Nyangati/1613 an 1614 and the said land shall revert to its original number Kabare/Nyangati/548 in the name of KABUITU GAKUNDI.

(c) Costs of the Court below and this Court shall be to the appellant.

DATED and SIGNED in open Court at Kerugoya this 28th day of June, 2019.

E.C. CHERONO

ELC JUDGE

28TH JUNE, 2019

In the presence of:

1. *Mr. Thangei holding brief for Mr. Ngigi for Plaintiff*

2. *Defendant/Advocate – absent*