



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 237 OF 2010 (O.S)

PETER THUU KARANJA.....PLAINTIFF

VERSUS

KIGATHI WAMAGATA

NYOTA WAMAGATA

WARIKO WAMAGATA

MAGWA WAMAGATA.....DEFENDANTS

RULING

The Plaintiff filed the Originating Summons dated 14/05/2010 seeking to be declared the owner of the parcels of land known as Dagoretti/Kinoo/203 and Dagoretti/Kinoo/T.62 by virtue of adverse possession. He further sought to have the Deputy Registrar of this court authorised to sign all the requisite transfer documents if the Defendants failed to sign. The Defendants were served with the court process by advertisement in the *Daily Nation* of 13/9/2010 but they did not enter appearance or file their defence. The Plaintiff requested for judgement which was granted and the case went for formal proof on 13/12/2011. Judgement was granted to the Plaintiff in the terms sought in the Originating Summons on 18/05/2012.

The Defendants brought the application dated 27/07/2015 seeking to set aside the *ex parte* judgement entered on 18/05/2012 and, an order that the administrators of the estates of all the Defendants be allowed to file a defence in this suit. The application is based on the grounds that all the Defendants died before this suit was instituted yet the Plaintiff irregularly obtained an order to effect service on the Defendants by substituted means knowing too well that they were all dead at the time. The application was supported by the affidavit of Josphat Karanja Kigathi sworn on 27/07/2015. He deponed that he is the son of the late Kigathi Wamagata who was also known as Kigathi Wamagathii and Kigathi Wamagathii Mage (deceased), who was sued as the 1st Defendant. He further deponed that he obtained a limited Grant of Letters of Administration *ad litem* in **High Court Succession Cause Number 545 of 2015**, and attached a copy of the grant. He averred that his father had six siblings, five of whom were deceased at the time he swore the affidavit. He attached copies of the death certificates for all the Defendants to show that they all died before 13/09/2010 when service of summons was effected by way of an advertisement in the *Daily Nation*.

He attached a copy of the judgement issued in this matter, dated 18/05/2012. He further deponed that the Defendants are the rightful owners of Dagoretti/Kinoo/T.62 and Dagoretti /Kinoo/203, and annexed copies of the title deeds of these parcels of land. He deponed that the beneficiaries of the deceased Defendants' together with David Peter Njoroge who is the Defendants' surviving sibling, are all entitled to shares in the two parcels of land, but that they only got to know of the suit in January 2015. He urged that unless the prayers sought are granted, the beneficiaries of the estates of the deceased Defendants and the Defendants' surviving brother David Peter Njoroge, will be left landless and homeless without being accorded a fair hearing by the court.

The application was opposed by the Plaintiff through the Replying Affidavit he swore on 05/11/2015. He deponed that he had been in occupation of the suit properties from the time he was born and, that he applied for leave to serve the summons by substituted means because he did not know the Defendants or their whereabouts and whether they were alive, or dead. He maintained that the summons were properly served and the Applicant should have responded at that time instead of waiting for five years to challenge the process. He deponed that in the absence of participation by the Defendants or their representatives in the suit, the court correctly gave judgement in his favour and urged the court not to disturb the judgement.

Gladwell Njoki Karanja, the Plaintiff's mother also swore the replying affidavit dated 05/11/2015 in opposition to the application. She deponed that on or about 1955, she married the Plaintiff's father, Karanja Thuo, now deceased, who took her to the suit property where she found her husband's father, one Thuo Kigathi alias Thuo Karanja residing there alone since his wife had died while giving birth to the

Plaintiff's father. She further averred that she brought up her family on the suit land and even buried her husband on the suit property and resides there to date. She stated that during her stay on the suit property, she learnt from her father in law, Thuo Kigathi alias Thuo Karanja that her father in law had a brother called Wamagata Kigathi, who was sued as the 1st Defendant, and who it was said had left the ancestral land long before the Plaintiff's mother got married. She deponed that none of the Defendants ever visited the suit property and that her husband did not travel to visit them. She deponed that Wamagata Kigathi had only appeared in the title as a trustee for his younger brother, that is, her father in law, Thuo Kigathi alias Thuo Karanja. She averred that there was no fraud or mistake with the Plaintiff's chamber summons as it was filed in consultation with her so that the Plaintiff could be issued with a title deed to hold the property in trust for her family.

The court has considered the application, replying affidavits, and submissions made by counsel. The fatal defect pointed out by the Applicant is that this suit was commenced against dead Defendants, which fact was confirmed by the death certificates for all the Defendants. The court is satisfied that all the Defendants died prior to the filing of the Originating Summons dated 14/05/2010, and this suit was therefore a non-starter. Consequently, the judgement entered on 18/05/2012 was irregular and is hereby set aside. There is no suit capable of being salvaged even through substitution of parties. Each party shall bear its own costs.

Dated and delivered at Nairobi this 29th day of July 2019

K.BOR

JUDGE

In the presence of:-

Mr. T. Ochieng holding brief for Ms. Maira for the Plaintiff

Mr. Karuga Maina for the Applicants

Mr. V. Owuor- Court Assistant