



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 41 OF 2014**

**FRANCIS WAITHAKA NGARIUKO.....PLAINTIFF**

**VERSUS**

**MARGARET NYAWIRA KARIUKI.....DEFENDANT**

**RULING**

1. By an originating summons dated 20<sup>th</sup> July 2011 and filed on 21<sup>st</sup> July 2011 under the provisions of **Section 38 of the Limitation of Actions Act (Cap. 21) and the relevant provisions of the Civil Procedure Rules** (hereafter the *Rules*), the Plaintiff sought determination of several questions on adverse possession relating to *Title No. Mbeti/Gachoka/742* (hereafter *the suit property*). The pertinent questions were whether the Defendant's title to the suit property had been extinguished and whether the Plaintiff had acquired title to the suit property through adverse possession.

2. The record shows that the said originating summons was never prosecuted for several years in consequence whereof it was dismissed for want of prosecution under **Order 17** of the **Rules** on 15<sup>th</sup> November 2018. There is no indication on record of the Plaintiff having appealed the said dismissal order. There is also no indication of the Plaintiff having sought review of the said order.

3. By a notice of motion dated 17<sup>th</sup> January 2018 brought under **Section 63 of the Civil Procedure Act and all enabling provisions of the law**, the Defendant sought the following orders against the Plaintiff:

*a) This honourable court be pleased to order that the Plaintiff and or his agents or any one claiming by him or through him to immediately vacate from the land parcel Title No. Mbeti/Gachoka/742 and in default the court bailiff of this honourable court to evict them.*

*b) This honourable court be pleased to order that the OCPD Mbere Police Station to oversee the exercise and provide the security.*

*c) Costs of this application be provided for.*

4. The said application was based upon the grounds set out on the face of the motion and supported by the supporting affidavit of the Defendant sworn on 17<sup>th</sup> January 2019 and the 14 annexures thereto. In a nutshell, it was contended that the Plaintiff's suit having been dismissed on 15<sup>th</sup> November 2018, the Plaintiff had no further claim on the suit property hence he should be evicted therefrom.

5. The supporting affidavit gave a detailed history of the suit property and the dispute thereon over the past twenty years or so. The material on record indicates that the Plaintiff had filed a claim against the Defendant before the Land Disputes Tribunal at Gachoka which was decided in his favour in 2011. The resultant award of the Tribunal was subsequently adopted as a judgement by the Principal Magistrate's Court at Siakago in *PMCC Land Tribunal Case No. 36 of 2011*. However, the award of the Tribunal and the resultant decree were quashed by the *Environment and Land Court in Kerugoya J.R. Application No. 38 of 2013* on 14<sup>th</sup> November 2014 for want of jurisdiction on the part of the Tribunal.

6. The Plaintiff filed a replying affidavit sworn on 21<sup>st</sup> March 2019 in opposition to the said application. He contended, *inter alia*, that the Defendant's said application was an afterthought and brought in bad faith; that it was *res judicata* under **Section 7 of the Civil Procedure Act**; that the dispute between the parties was conclusively determined before the Tribunal; and that the application had been overtaken by events. He further contended that he had been in occupation of the suit property for over 37 years and developed it extensively. The Plaintiff filed several photographs on 20<sup>th</sup> May 2019 depicting some developments on the suit property.

7. When the said application was listed for hearing on 20<sup>th</sup> May 2019, it was directed that the same be canvassed through written submissions. The Defendant was given 45 days to file her written submissions whereas the Plaintiff was granted 45 days upon the lapse of that period to file his. The record shows that the Defendant filed her submissions on 11<sup>th</sup> September 2019 but there were no submissions on

behalf of the Plaintiff at the time of preparation of the ruling.

8. The court has considered the Defendant's said application, the Plaintiff's replying affidavit in opposition thereto and the submissions on record. The court has also considered the entire material on record. It is evident that the parties have had a long running dispute over the suit property over the past 20 years or so. It is also clear from the material on record that the Plaintiff's victory before the Tribunal was short-lived since it was nullified in *Kerugoya J.R. Application No. 38 of 2013*.

9. It is also evident that the Plaintiff's originating summons seeking adverse possession of the suit property was dismissed for want of prosecution on 15<sup>th</sup> November 2018. At the moment, the Plaintiff has no pending suit or claim against the Defendant over the suit property. In those circumstances, it would follow that the Defendant is entitled to possession of the suit property as the registered proprietor thereof. The court is of the view that none of the grounds raised in the replying affidavit would avail the Plaintiff in resisting the Defendants application for possession. The litigation between the parties has effectively come to an end since there is no pending appeal or application for review against the decree in *Kerugoya J.R. Application No. 38 of 2013* or the dismissal order of 15<sup>th</sup> November 2018.

10. The upshot of the foregoing is that the court finds merit in the Defendant's notice of motion dated 17<sup>th</sup> January 2019. The same is consequently allowed as prayed with costs to the borne by the Plaintiff.

11. It is so decided.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 17TH DAY OF OCTOBER 2019.**

In the absence of both the Plaintiff and Defendant.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**17.10.19**