



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO.1147 OF 2016

PAUL NGARUIYA GATHURU.....PLAINTIFF

VERSUS

NGURE THONGO.....1ST DEFENDANT

MARTHA MAGIRI GICHUHI (sued as the administrator

of the estate of GICHUHI THONGO).....2ND DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendants by way of a plaint dated 19th September, 2016 seeking the following reliefs:-

- a) An order for the transfer of 1/3 share of Land Parcel No. Githunguri/Kanjai/ 289 by the defendants to the plaintiff or in the alternative, an order for the court to sign all necessary documents on behalf of the defendants for the transfer of the said parcel of land to the plaintiff.
- b) Costs of the suit.
- c) Any other relief that the court may deem fit to grant.

The plaintiff averred that he is the legal representative of one, Gathuru Thongo, deceased while the 2nd defendant is the administrator of the estate of Gichuhi Thongo, also deceased. The plaintiff averred that at all material times, Land Parcel No. Githuguri/Kanjai/289 measuring 1.2 hectares (hereinafter referred to as “the suit property”) was registered in the names of Gichuhi Thongo(deceased), Gathuru Thongo (deceased) and Ngure Thongo, the 1st defendant herein, each holding 1/3 share of the property. The plaintiff averred that that Gichuhi Thongo (deceased) and the 1st defendant collaborated in the absence of Gathuru Thongo (deceased) and altered the register of the suit property by cancelling the name of Gathuru Thongo (deceased) and causing themselves to be registered as holding ½ share each of the suit property. The plaintiff contended that the 1st and 2nd defendants had taken possession of the suit property and in the process denied him his rightful share thereof.

The 1st and 2nd defendants entered appearance and filed separate statements of defence on 6th October, 2016. The defendants denied that the suit property was registered in the names of Gichuhi Thongo (Deceased), Gathuru Thongo (deceased) and Ngure Thongo (hereinafter referred to only as “the 1st defendant”) with each holding 1/3 share thereof as alleged by the plaintiff. The defendants averred that the plaintiff’s father Gathuru Thongo (Deceased) sold his share of the suit property to the 1st defendant and Gichuhi Thongo (Deceased) for Kshs 20,000/- which sale was consented to by the Land Control Board. The defendants averred that following that sale, the suit property was transferred and registered in the names of Gichuhi Thongo (Deceased) and the 1st defendant.

The suit came up for hearing on 12th July, 2017 when the parties gave evidence and closed their respective cases. The plaintiff (PW1) adopted his witness statement filed in court on 20th September, 2016 as his evidence in chief. In his witness statement, the plaintiff stated as follows. He is the son and administrator of the estate of Gathuru Thongo, deceased (hereinafter referred to as “Gathuru”. Gathuru was registered as the proprietor of 1/3 share of the suit property. Gichuhi Thongo (deceased) and the 1st defendant who were the other co-registered owners of the suit property fraudulently deleted the name of Gathuru in the register of the suit property and caused themselves to be the sole registered owners of the suit property thereby denying Gathuru his rightful share of the said property. The plaintiff (PW1) produced the documents that were attached to his list of documents dated 19th September, 2016 as Pexh. 1-6. He also produced a caution dated 20th April, 2011, an application for registration of the caution dated 26th April, 2011 as well as the receipt for Kshs 500 as Pexh. 6(a), (b) and (c) respectively.

On cross examination by the 1st defendant, the plaintiff denied that Gathuru sold his share of the suit property to the 1st defendant and Gichuhi Thongo (deceased). He stated that the title deed for the suit property was issued in three (3) names that were also reflected in the Green Card. He denied that Gathuru, his brother and he, sold Gathuru's share of the suit property to the 1st defendant and Gichuhi Thongo (deceased). He denied that he was involved in the discussions leading to the sale of Gathuru's share of the suit property. He also denied that Gathuru was paid for his share of the suit property.

On cross-examination by the 2nd defendant, the plaintiff stated that he was about 25 years old when the name of his father was cancelled from the register of the suit property. In further examination by the court, the plaintiff stated that Gathuru who died in 1991 was alive when his name was cancelled from the register of the suit property and that Gathuru had filed a suit against the defendants at Kiambu Law Court which suit was transferred to the High Court. He stated that Gathuru died before the said suit could be heard in the High Court.

The 1st defendant (DW1) testified that he was 87 years old. He stated that Gichuhi Thongo (deceased) and he purchased Gathuru's share of the suit property in 1979 at Kshs 20,000/-. He produced in evidence an application for registration of mutation dated 17th May, 2005, undated application for consent of the Land Control Board and undated letter of consent of the Land Control Board as Dexh. 1(a), (b) and (c) respectively. The 1st defendant stated that the suit property was subdivided in the year 2005 into two (2) portions namely, Githunguri/Kanjai/2027 and Githunguri/Kanjai/2028. He produced in evidence the mutation form dated 14th January, 2005 and a copy of an extract of the register for the suit property as Dexh. 2 and 3 respectively.

The 1st defendant was not asked any question by the plaintiff in cross- examination. On examination by the court, the 1st defendant stated that the sub-division process was never completed because Gichuhi Thongo who was undertaking the exercise passed on. He stated that it was for that reason that he did not get a title for his portion of the suit property. The 1st defendant stated that they purchased Gathuru's land because he offered the same for sale since he had another parcel of land.

The 2nd defendant (DW2) testified that she was the widow of Gichuhi Thongo (deceased). She told the court that she was 55 years old and had 10 children. She stated that her husband died in 2014. She adopted the evidence of the 1st defendant. She stated that she had no title to her portion of the suit property. She stated that the subdivision of the suit property was not completed because the plaintiff had registered a caution against the title thereof.

After the close of evidence, the parties who were all appearing in person informed the court that they wished to rely on their respective evidence on record.

The only issues that arise for determination in this suit are, whether the 1st defendant and Gichuhi Thongo (deceased) unlawfully acquired Gathuru's 1/3 share of the suit property and whether the plaintiff is entitled to the reliefs sought in the plaint. I have considered the plaintiff's claim, the defences that were filed by the defendants and the evidence on record. I am not satisfied that the plaintiff has proved his case against the defendants to the required standard. I am of the view that the plaintiff's claim is statute barred. Extracts of the register for the suit property that were produced in evidence by the plaintiff and the defendant show that the name of Gathuru was cancelled from the register of the suit property and the 1st defendant and Gichuhi Thiongo (deceased) registered as the sole proprietors of the suit property holding ½ share each on 24th January, 1979. Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides that actions for recovery of land must be brought within 12 years from the date on which the right of action accrued. Section 26 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides for extension of the period of limitation in cases of fraud or mistake. It provides as follows:-

“Where, in the case of an action for which a period of limitation is prescribed, either -

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it...”

The plaintiff did not plead fraud or mistake and none was proved. The provisions of section 26 of the Limitation of Actions Act, Chapter 22 Laws of Kenya do not therefore apply to the plaintiff's case. The plaintiff's cause of action having arisen on 24th January, 1979, the suit herein should have been brought by 24th January, 1991. The present suit was filed as I have stated earlier on 20th September, 2016. The suit was therefore filed several years out of time.

The plaintiff is the administrator of the estate of Gathuru. The plaintiff testified that Gathuru died in 1991 and that as at the time of his death, he had filed a suit against the defendants in relation to the alleged illegal cancellation of his name from the register of the suit property and the transfer of his 1/3 share of the said property to the defendants. The plaintiff did not provide the court with the details of the case that was filed by Gathuru against the defendants. The plaintiff did not also explain why as the legal representative of Gathuru he did not pursue that case instead of filing the present suit. If Gathuru had filed a suit against the defendants as claimed by the plaintiff, the suit abated in 1992, one (1) year after Gathuru's death.

Under Order 24 rule 7 of the Civil Procedure Rules, where a suit abates upon the death of a plaintiff, the legal representative of the deceased plaintiff is not permitted to bring a fresh suit on the same cause of action. The only remedy available to him is to apply to the court for the revival of the suit. It follows therefore that if Gathuru had filed a suit against the defendants as claimed by the plaintiff that abated in 1992 upon his death in 1991, the plaintiff's suit is barred by the provisions of Order 24 rule 7 of the Civil Procedure Rules aforesaid.

The foregoing findings by the court notwithstanding, I am also not satisfied that the plaintiff has proved his case against the defendants to the required standard. The burden of proof was upon the plaintiff. Apart from making allegations that the defendants acquired Gathuru's 1/3 share

of the suit property illegally, the plaintiff adduced no evidence in proof of these allegations. The plaintiff did not challenge during cross-examination the evidence that was tendered by the 1st and 2nd defendant to the effect that they acquired Gathuru's share of the suit property on a willing seller and willing buyer basis at a consideration of Kshs. 20,000/-.

In the final analysis and for the foregoing reasons, it is my finding that the plaintiff's claim is time barred, incompetent and not proved. The suit is dismissed accordingly with costs to the defendants.

Delivered and Dated at Nairobi this 16th day of February 2018

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Present in person for the Plaintiff

Present in person for the 1st Defendant

Present in person for the 2nd Defendant

Catherine Court Assistant