



**Ndegwa v Gichuhi (Environment and Land Case 307 of 2017)
[2018] KEELC 4918 (KLR) (8 March 2018) (Judgment)**

John Mwangi Ndegwa v Kanyi Gichuhi [2018] eKLR

Neutral citation: [2018] KEELC 4918 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE 307 OF 2017**

JG KEMEL, J

MARCH 8, 2018

BETWEEN

JOHN MWANGI NDEGWA PLAINTIFF

AND

KANYI GICHUHI DEFENDANT

JUDGMENT

1. The Plaintiff filed an Originating Summons under section 17 & 38 of *Limitation of Actions Act*, Section 7 (d) of *Land Act* and under Order 37 rule 7 of *Civil Procedure Code* and sought the following Orders;
 - a) A declaration that the title of the said Kanyi Gichuhi to a portion measuring zero point five (0.5) acres or thereabouts out of land parcel No. Loc.15/Geitwa/70 which portion was the subject of Kerugoya Environment and Land Court Case No. 51 of 2014 (O.S) has been extinguished and now belongs to the Plaintiff.
 - b) An Order do issue requiring and directing the Land Registrar Murang'a to sub-divide land parcel No. Loc.15/Geitwa/70 in such a manner that the portion of 0.5 acres aforesaid is excised from the said parcel and to register that portion in the name of the Plaintiff John Mwangi Ndegwa in place of Kanyi Gichuhi.
 - c) The costs of this suit be borne by the Defendant.
2. The background of this suit is that the suit land was originally registered in the name of Wairatu Waimiri deceased. His personal representative Eliud Macharia Maina was sued by the Plaintiff in



Environment and Land Court Kerugoya No. 51 of 2014. Judgement was delivered on 415/2015 in favour of the Plaintiff as follows;

“a) That Judgement be and is hereby entered for the Plaintiff against the Defendant as prayed in the Originating Summons dated 24th February, 2014;

3. However it turns out that during the pendency of the said suit in Kerugoya the said Eliud Macharia Maina transferred the suit to the Defendant. This matter was raised by the Plaintiff in the suit and the Court determined that since the Defendant was not enjoined as a party then the Court could not issue any orders as against him.
4. The Plaintiff proceeded to file an application seeking the title of the Defendant to be cancelled and reverted to Wairatu Waimiri to facilitate the execution of the decree in favour of the Plaintiffs. After due consideration the Court delivered its verdict as;

“a) the notice of motion is dismissed with no orders as to costs.

2. To prevent abuse of the courts process, an order of inhibition is hereby placed on the land parcel No Loc 15/Geitwa /70 inhibiting the registration of any dealings with the land. That order is to last 12 months from today to enable the applicant file and prosecute his claim against the said Kanyi Gichuhi, if he decides to do so, in which case, an extension of the said order can be sought in the fresh suit”.

5. The Plaintiff contends that following the holding of the Court above it follows that since the title of Wairatu Waimiri had been extinguished by the time Eliud Macharia had acquired it, neither the acquisition by Eliud Macharia Maina nor the Defendant could acquire a good title to 0.5 acres portion of Loc.15/Geitwa/70 in the occupation of the Plaintiff.
6. The Originating Summons was supported by the Supporting Affidavit of John Mwangi Ndegwa who confirmed that he has been in occupation of 0.5 acres of a portion of Loc.15/Geitwa/70 since 1994 to date and that he has constructed a house. That he obtained Judgement in 51 of 2004 Kerugoya against Eliud Macharia Maina declaring him to have acquired title to 0.5 acres by adverse possession. He annexed a copy of the Judgement and decree in that regard. That unknown to him the suit land had been transferred to the Defendant during the pendency of the suit and therefore the execution of the source was frustrated. He annexed copy of the certificate of official search dated 24/3/16 in respect of the suit land registered in the name of the Defendant on 12/1/15.
7. He deponed that he applied for the cancellation of the said title but the application was dismissed and the Court granted an inhibition to allow him time to file suit against the Defendant.
8. Further that he has acquired title by adverse possession and the title of the Defendant to that portion of 0.5 acres is extinguished. That the Defendant had knowledge of his occupation of the land since 1994.
9. The Defendant opposed the Plaintiff's Originating Summons in his Replying Affidavit where he deposed inter alia that the plaintiff having failed to enjoin the Defendant in Kerugoya 51/2004 cannot re-litigate the matter in this Court as the same was finalized in Kerugoya. Further that the Defendant succeeded title through Succession Cause No. 1121 of 2013 Murang'a which decision has not been appealed and this Court has no power to deregister the Defendant as owner of the suit land. Contending that adverse possession could not run against the Defendant because he was only registered in 2014 and therefore required has not been attained.



10. The Plaintiff filed issues for determination while the Defendant did not. Directions having been taken on 7/12/17, both parties agreed that the matter do proceed by way of the documents filed by each side. Parties agreed to file written submissions which they did as the issues involved were purely legal. In effect the matters of fact pleaded by the Plaintiff and the Defendant are not in dispute.
11. I have considered the originating summons, the replying affidavit, the rival affidavits of the parties as well as the annexures thereto. Since the facts are not being disputed the Court will proceed to determine the issues as follows;-
- a) Did the Defendant acquire a better title?
 - b) In the suit incompetent by reason of non joinder of the Defendant in ELC No 51/2014, Kerugoya?
 - c) When did time start running?
 - d) Who meets the costs of the suit?
12. As to whether the Defendant acquired a good title, it is on record that the Defendant obtained title by way of transfer from the personal representative of Wairatu Waimuri and was dully granted the land measuring 1.0 acres vide Succession Cause No. 1121 of 2013. The Defendant has averred that the Defendant has a good title on ground that the land was granted to him in the judgement in Succession Cause No. 1121 of 2013 which Judgement has not been appealed. Further that the Plaintiff recourse should be to revoke the grant in the Succession cause. The Hon. Court in Kerugoya stated as follows;
- “The Court can only state that the High Court in Murang’a Succession Cause No. 1121 of 2013 could not have been in a position to adjudicate the Plaintiffs claim because he was a stranger in the suit. The Succession proceedings could not determine the claim for adverse possession.”
- The position still obtains in respect to that issue. Any rights of adverse possession in land are in the purview of the Environment and Land Court. The case is therefore not incompetent in that regard.
13. Based on the finding of the Court in the ruling in ELC NO. 51 of 2014, where the Court determined that the transfer of the land to the defendant during the pendency of the case was suspect, it cannot be said that the defendant was a bonafide purchaser for value without notice.
14. It is on record that the claim is for adverse possession. The Plaintiff has stated in evidence, which evidence has not been controverted that the Defendant was not ignorant of his occupation since he could see the Plaintiff occupying the land. That shows that he had knowledge that the land was not free from overriding interest. Section 28 (h) of the Land Act recognize rights of an adverse posseser as an overriding interest. Unless state in the Register all registered land shall be subject to the overriding interest which subsist on the land which may not be noted on the register. Such overriding interest is adverse possession. Guided by the case of Githu v. Ndeete 1984 KLR 776 the CA stated as follows;
- “the mere change of ownership which is occupied by another person under adverse possession does not interrupt such persons adverse possession.”
- The Court holds that the Defendant did not acquire any good title and the defence of being a bonafide purchaser cannot be sustained. The Court will not canvass the issue of fraud as the same is not relevant.
15. As to whether this suit is incompetent by reason of non joinder of the Defendant in the suit No. 51/2014. It is a fact that the Defendant was not enjoined in the suit 51/2014 as a result no Orders could



be issued against him. It is also a fact that the Defendant became registered as owner of the property during the pendency of the said suit. This fact had been appreciated by the Court when it granted the Plaintiff time to file a fresh suit against the Defendant. The Court must have been guided by Order 1 rule 9 that states that no suit can be defeated by reason of misjoinder or non joinder only non joinder only and the Court was right to deal with the matter in controversy so far as regards the rights and interests of the parties that were actually before it.

16. When did time start running?

It is clear from the Judgement of my Senior brother Judge that time started running from 1994 when the Plaintiff entered the suit portion of the land on account of a void contract. The Court disagrees with the Defendant's submission that time started running from 2014 when he became registered owner. As already stated elsewhere in this Judgement the change of ownership of the suit land to both the Defendant in ELC NO 51/2004 and the current Defendant did not defeat the rights of adverse possession that had accrued to the Plaintiff.

17. Who meets the costs? Costs follow the event. I see no reason to deny the Plaintiff costs in this case. The Court has aptly captured that the land was transferred to either defeat the claim of the Plaintiff or frustrate his claim or both.

18. For the above reasons the Plaintiffs case succeeds and the Court makes the following Orders;

- a) A declaration that the title of the said Kanyi Gichuhi to a portion measuring zero point five (0.5) acres or thereabouts out of land parcel No. Loc.15/Geitwa/70 which portion was the subject of Kerugoya Environment and Land Court Case No. 51 of 2014 (O.S) has been extinguished and now belongs to the Plaintiff.
- b) An Order do issue requiring and directing the Land Registrar Murang'a to sub-divide land parcel No. Loc.15/Geitwa/70 in such a manner that the portion of 0.5 acres aforesaid is excised from the said parcel and to register that portion in the name of the Plaintiff John Mwangi Ndegwa in place of Kanyi Gichuhi.
- c) The costs of this suit be borne by the Defendant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 8TH DAY OF MARCH 2018.

J G KEMEI

JUDGE

