



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 14 of 2018**

**ELIUD NICHOLAS GITONGA.....PLAINTIFF**

**VERSUS**

**VIRGINIA WANGARI NJENGA.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the Defendant on the 23/2/18 seeking orders for;

- a. The title deed in respect of Land Parcel No. LOC2/MAKOMBOKI/86 (suit land) issued to the Defendant on 21/10/15 be cancelled.
- b. The Defendant be evicted from the suit land and she be permanently enjoined from interfering with the Plaintiff's quiet enjoyment of the suit premises known as LOC2/MAKOMBOKI/86.
- c. Costs of the suit.
- d. Further relief as may be just.

2. It is the Plaintiff's case that he is the absolute owner of the suit land having been issued with a title on the 9/9/14. That he is a purchaser for valuable consideration. He avers that the Defendant fraudulently caused the said title to be registered in her name on the 21/10/15 after he had acquired the suit land by way of purchase from the previous owners. He claims that the Defendant perpetuated a fraud and caused his title to be cancelled without an order of the Court. He now wants the Court to cancel the Defendant's title and the Defendant be evicted from the suit land.

3. The Defendant denied the Plaintiff's claim in her statement of defence filed on the 5/4/18. She averred that she is the rightful owner of the suit land having obtained a title on the 21.10.15 pursuant to the orders of the Court issued on 20/4/15 in ELC No 135 of 2015(OS). She stated that the alleged title of the Plaintiff was annulled by the Court in Judicial Review (JR) No 3 of 2015 at Kerugoya which rendered its verdict on the 9/10/15. Further she averred that there was no privity of contract between the Plaintiff and the Defendant and that the Plaintiff has no cause of action against her and in the unlikely event that he has any claim, that claim, if any, would lie elsewhere.

4. At the hearing of the case the Plaintiff gave evidence and stated that in 2007 he purchased the suit land from the persons namely; Edward Kinyua Nduriri, Simon Kamore Nduriri, John Mukundi Nduriri and James Mwangi Nduriri. He produced a copy of the agreement for sale dated the 8/5/07 which indicated that the suit land was sold at the price of Kshs 1,292,000/- out of which the sum of Kshs 100,000/- was paid and the balance was to be paid in installments. Para 2 of the terms and conditions of the agreement stated that the Vendors are selling the suit land without any encumbrances or liabilities. Vacant possession was to be given upon completion of a Court case (details not given). He produced a copy of a title in his name issued on the 29/9/14.

5. The Plaintiff states that the Defendant had raised an objection to the issuance of grant in the estate of Henry Nduriri Nyaga in Succ cause No 694 of 2006 but the said objection was dismissed on 20/2/09. That the Defendant further lodged a caution on the suit land which caution was removed vide a Court order issued on 2/2/11 in Misc Application No 21 of 2010 in Muranga. A second caution lodged by the Defendant suffered the same fate through SRMCC Misc Application No 4 of 2013, Kigumo issued on the 25/7/2014. That the cautions having been removed, the sellers transferred the land to him on 29/9/14. That thereafter the Defendant caused the land to be transferred to herself on the 21/10/15 and avers that the title of the Defendant is not genuine.

6. On cross examination by the Defendant's Counsel on record Mr. Mugo, the Plaintiff stated that he has not filed any other case against the Defendant. That he was not a party to ELC No 135 of 2015, Nyeri. He stated that he was not aware of the Judicial Review No 3 of 2015 at Kerugoya but when he was shown the pleadings, he confirmed that he is the one named as the 3<sup>rd</sup> Respondent in the said Judicial Review proceedings. He confirmed that by the time he entered into the agreement for sale, the land was in the name of Nduriri Nyaga, the father of the vendors and that no letters of administration had been sought and obtained in respect of the estate of the said Nduriri Nyaga. He stated

that the vendors represented to him that they were the owners of the suit land then as the succession cause was only determined in 2009. He stated that though he was not shown a title by the vendors but according to the search he carried out later, the land was registered in the name of Edward Kinyua Nduriri. That at the time he purchased the suit land there was a caution registered against the suit land. That he was unaware that the Defendant had bought the land from the vendor's father. He confirmed that he does not live on the suit land. That he bought the suit land from Edward Kinyua Nduriri who had inherited the suit land from his father vide the grant issued on 4/3/10. He further testified that at the time of purchase of the suit land, the land was unencumbered, as the cautions lodged had been removed through Court orders issued in 2011 and 2014 at Muranga and Kigumo respectively.

7. The Defendant testified and gave the history of the suit land since 1977. She informed that Court that she is the registered owner of the suit land having been registered as such on the 21/10/15. On the 8/6/77 her late husband one Charles Njenga Mukuna purchased the suit land from Henry Nduriri Nyaga at the price of Kshs 29,000/- and the entire consideration was paid in full and the agreement was sealed with a ram and a goat under Kikuyu Customs. The vendor handed over the title deed to her husband for safe custody and the process of transfer was to be carried out later. In the same year 1977, she and her husband took possession of the suit land and has occupied it uninterrupted to date. Her husband died on 8/2/02 and Henry Nduriri Nyaga died on the 9/7/03. On the 11/2/07 she was appointed the administratrix of the estate of her late husband. She filed an objection in the succession petition in respect to the estate of Henry Nduriri Nyaga in succession cause No 694 of 2006 in Nakuru, where the Court advised her to seek relief in a civil suit as she was not qualified under the law of succession to be a heir to the estate of Henry Nduriri Nyaga.

8. She filed suit in ELC No 135 of 2015(OS) in Nyeri in 2013 where she sued Edward Kinyua Nduriri as the legal Representative of the estate of Henry Nduriri Nyaga because he had refused to transfer the suit land to her claiming more money and yet the land had been purchased outright in 1977. That as the case was ongoing, in Nyeri, she learnt that the said Edward Nduriri Kinyua had removed the caution on the suit land and got the land registered in his name. Unknown to her the said Edward Kinyua Nduriri had further transferred the suit land to the Plaintiff allegedly through a sale. The Court issued orders of prohibition against the Land Registrar Muranga prohibiting her from registering any other entries as well as directing her to remove all the illegal entries on the title between the said Edward Kinyua Nduriri and the Plaintiff made on the 9/10/15. That judgment in ELC 135 of 2015 was finally rendered on the 20/12/13 in her favour whereupon the title was registered in her name.

9. Parties filed written submissions which I have read and considered.

10. As to whether the suit is resjudicata, the Plaintiff submitted that it is not on the grounds that the Plaintiff was not a party to the ELC 135 of 2015 Nyeri. That the Plaintiff is not litigating under the same title as that in the previous suits in Nyeri and Kerugoya. The Defendant on the other hand urged the Court to declare the suit is resjudicata in that prayer No. a) in the plaint that the title deed be cancelled was determined by the Court in JUDICIAL REVIEW No 3 of 2015 Kerugoya. Equally that the Plaintiff's prayer of eviction of the Defendant had been heard and determined by the ELC Court in 135 OF 2015 which declared the Defendant as the owner of the suit land.

11. On the issue of adverse possession, the Defendant submitted that she entered the suit land in 1977 pursuant to a sale between her husband and Henry Nduriri Nyaga. That she took possession occupying the land peacefully, uninterrupted and unbroken occupation for the last 41 years, which is in excess of the 12 years mandatory period. The Court in ELC 135 of 2015 found as much. The said decision has not been appealed, set aside or varied.

12. The Plaintiff has submitted that the Plaintiff remains the owner because where there are two equities the first in time prevails. He submitted that the Defendant obtained a title through an unlawful order in suits in Nyeri and Kerugoya where the Plaintiff was not a party to the suits. That the Defendant enjoys a latter equity and therefore given the Plaintiff's equity is the first then the land should belong to the Plaintiff.

13. Both parties filed a list of issues which I have crystalized into four main issues; who owns the suit land; Has the Plaintiff proved fraud on the part of the Defendant; whether the suit is resjudicata; whether the Defendant is entitled to the suit land by way of adverse possession.

14. The history of this suit is stated as thus; In 1977 the Defendant's husband bought the suit land from one Henry Nduriri Nyaga. The Defendant and her husband took possession of the suit land and has occupied the same from that time till this date. The parties to the sale trusted each other and upon full payment the seller even handed over the title to the buyer, the Defendant's husband for safe custody. She produced in evidence the agreement for sale together with the evidence of payments in respect to the purchase of the land. This has not been challenged by the Plaintiff. Infact, in his own words he stated in evidence that he did not know that the suit land had been sold by the original owner to the Defendant. The Defendant's husband died in 2002 and shortly thereafter in 2003 Henry Nduriri Nyaga died before the transfer of the land was done. The Defendant has led evidence that she pursued the sons of the seller, Edward Kinyua Nduriri, included, who were hesitant to transfer the land to her wanting to be paid more money which she refused.

15. In 2006 a succession cause was filed in respect to the estate of Henry Nduriri Nyaga and the Defendant in a bid to secure her interest in the suit land filed an objection. The Court rightly ruled that her claim lay in a civil suit prompting her to file a suit in the High Court Nyeri in 2011 which later became ELC 135 OF 2015.

16. Back to the succession cause in respect to the estate of Henry Nduriri Nyaga, the letters of administration were issued to his son Edward Kinyua Nduriri on 20/2/09. The grant was issued on 4/3/10 appointing the said Edward Kinyua Nduriri as the administrator of the estate and the heir to the suit land thereof.

17. As the case in Nyeri filed in 2011 was ongoing and unknown to the Defendant, the Plaintiff enters into a sale agreement with the sons of Henry Nduriri Nyaga over the suit land in 2007. The agreement for sale was produced in evidence in Court. The sons were namely; Edward Kinyua Nduriri, Simon Kamore Nduriri, John Mukundi Nduriri and James Mwangi Nduriri. The Court notes that at this point the land is still registered in the name of the original owner as letters of administration were only issued on 20/2/09. According to section 45 of the Succession Act, the purported sale of the land amounted to intermeddling with the deceased estate. Section 45 of Succession Act provides as follows;

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration”.

18. Given the provisions of the above Act, the purported sale of the suit land amounted to intermeddling of the deceased estate and consequently no interest was conveyed by the three sons of Nduriri Nyaga to the Plaintiff going by the said agreement as they did not have the capacity to so transact on the suit land.

19. The grant of letters of administration were issued on 4/3/10. Armed with the grant of letters of administration, the son of the original owner namely Edward Kinyua Nduriri, the legal administrator of the estate set out to remove the cautions that the Defendant had lodged on the title to protect her interest. The cautions were removed vide Misc. Application No 21 of 2010 issued on 2/2/11 at Muranga. Unrelenting, she lodged another caution which was again removed vide Misc. Application No 4 of 2015, the orders were issued on 25/7/14 at the instigation of the said legal administrator of the estate of Henry Nduriri Nyaga at Kigumo. It would appear that following the successful removal of the two cautions, the way was paved for the registration of the suit land in the names of Edward Kinyua Nduriri and later the Plaintiff on the 29/9/14. This transaction is being done whilst the suit against Edward Kinyua Nduriri, the Defendant in the ELC 135 OF 2015 is ongoing. The Court holds that this transfer for all intents and purposes offended the common law principle of Lis pendens which prohibits a transfer of the suit land during the pendency of a suit. Equally the principle dictates that the new owner is bound by the determination of the suit as if he was a party.

20. The Defendant led evidence that she learnt sometime in 2014 that the Plaintiff had acquired the suit land from Edward Kinyua Nduriri who was the Defendant in ELC No 135 of 2015 in Nyeri. She filed a Judicial Review in Kerugoya where she sued the said Edward Kinyua Nduriri, the Plaintiff and the Land Registrar Muranga. The Court on 9/10/15 granted the following orders;

“ That an order of Prohibition is granted barring the Land Registrar , Muranga from entertaining any further transactions or from making any further entries against the parcel of land known as LOC 2/MAKOMBOKI/86 at the request of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents until further orders of the High Court.

That an order of mandamus is granted ordering the land Registrar, Muranga to remove the entries against the parcel of land known as LOC 2/MAKOMBOKI/86 made on the 9/9/14 i.e removal of caution in favour of the applicant herein and transfer of the parcel of the land known as LOC 2/MAKOMBOKI/86 to the 3<sup>rd</sup> Respondent.

21. According to the said orders in the Judicial Review the Plaintiff was sued as the 3<sup>rd</sup> Respondent. The import of the orders above is that the Court issued a mandamus ordering the Land Registrar to cancel or remove all entries such as the removal of caution and transfer of title to the Plaintiff and also issued a prohibition against any further entries. It therefore follows that the removal of caution made on 25/7/14 as well as registration of title in the name of the 29/9/14 in the name of the Plaintiff was nullified and cancelled. The Plaintiff stated in evidence at the trial that he was unaware of the suit in Kerugoya and therefore he was not a party. He did not produce any evidence to support that position and that evidence is taken as doubtful. In view of these orders, therefore, it is clear that the title that the Plaintiff purports to wield was cancelled by the orders of the Court issued on 9/10/2015. The Court holds and finds that the title is null and void. There is no evidence that the orders of the Court were appealed, set aside and or varied.

22. The Court rendered its decision on ELC No 135 of 2015 on 20/5/13 in the following terms;

a) “ That a declaration be and is hereby issued that the Respondent’s right to recover the parcel of land Reference number LOC.2/MAKOMBOKI/86 measuring 3.4 Acres from the Applicant is barred under Section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya).

b) That the Title was extinguished under Section 17 of the said Limitation of Actions Act on the ground that the Applicant has become entitled to the aforesaid parcel of land by virtue of Section 38 of the Limitation of Actions Act.

c) That the Applicant be registered as the proprietor of the parcel of land known as Land Number LOC.2/MAKOMBOKI/86 in place of the Respondent under Section 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya).

d) That the costs of this summons be and is hereby awarded to the Applicant”.

The above orders were extracted and issued on the 27/5/15 in Nyeri.

23. The Court in the above case determined the rights of the Defendant in respect to the suit land and held that she had proven title by way of adverse possession. Armed with the Court order the Defendant became registered as owner of the suit land on the 21/10/15. Being in cognizance of the said judgment, it is on record that the Plaintiff filed a Notice of Motion on the 27/4/18 in ELC No 135 of 2015 as an interested party seeking orders of review of the orders issued by the Court on the 27/5/15. In that motion the Plaintiff avers that he purchased the property and was issued with a title on the 29/9/14 before the suit ELC No 135 of 2015 was filed. This averment in all respects is false

because the suit ELC No 135 of 2015 (formerly NYERI HCCC NO 146 OF 2011(OS) was filed on 13/10/11 initially in the High Court before the establishment of the ELC Court in Nyeri. At this time the title of the suit land was in the name of Henry Nduriri Nyaga. The Court dismissed the application on grounds that the application had been filed after a delay of 3 years after the delivery of the judgment which the Court found inordinate, no discovery of new and important matter, mistake or error on the face of the record.

24. Section 7 of the Civil Procedure Act provides as follows;

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”

25. The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

26. The answer as to whether or not the suit is *resjudicata* is no. I say no because it is on record that the parties in ELC No 135 of 2015 were the Defendant and one Edward Kinyua Nduriri. The Plaintiff was not a party and to that extent the suit is not *resjudicata*. An attempt by the Plaintiff to be enjoined post judgment was dismissed for the grounds cited in the preceding paragraphs. The subject matter of the suit therefore was the same in both this suit and the ELC suit in Nyeri with the exception of the parties. The issue that the Plaintiff attempted to file before the Court was a review. The issues were not similar thus further falling out of the doctrine of *resjudicata*. Although the parties in Judicial Review No 3 of 2015 were similar the issues raised were of a Judicial Review nature.

27. The learned authors of *Mulla, Code of Civil Procedure*, 18<sup>th</sup> Ed. 2012 have observed that the principle of *res judicata*, as a judicial device on the finality of Court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p.293):

“The principle of finality or **res judicata** is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a judgment becomes conclusive, the matters in issue covered thereby cannot be reopened **unless fraud or mistake or lack of jurisdiction** is cited to challenge it directly at a later stage. The principle is rooted in the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”

28. The Plaintiff has pleaded that the Defendant did fraudulently caused herself to be registered as owner of the suit land. Alternatively, he has also pleaded that it is through the fraud committed by the Defendant that his title was cancelled. The Plaintiff has not pleaded particulars of fraud for the Defendant to rebut them. It is trite that he who alleges must prove. It is not enough for the Plaintiff to throw around the word fraud. He must not only particularize but prove it as well to the standard of the balance of probabilities. The Plaintiff has not tabled any evidence to vitiate or oust the doctrine of *resjudicata* through fraud, mistake or lack of jurisdiction. The Court that heard the Kerugoya JUDICIAL REVIEW No 3 of 2015 had the requisite jurisdiction to hear and determine the matter, which they did. Those orders remain in force to date.

29. It is the Court’s view that to that extent the Plaintiff was a party in the JUDICIAL REVIEW No 3 of 2015 and the issues were relating to title to land and in respect to the same subject matter the suit is *Resjudicata*.

30. Who owns the suit land? According to the Judgment of the Court in ELC No 135 of 2015 and the JR No 3 of 2015 the suit land belongs to the Defendant.

31. That notwithstanding I shall look at the issue of adverse possession and whether the Defendant has proven title against the Plaintiff. A claim for adverse possession is supported by the following factors;

- i) Whether entry and continued occupation of the suit land is adverse to the person in respect of whom adverse possession is alleged.
- ii) Whether the occupation is open, continuous, peaceful and uninterrupted.
- iii) Whether entry and or occupation has not been disrupted in at least 12 years.
- iv) Whether entry is permissive.

In the instant suit it is not in dispute that the Defendant’s husband bought the land from Henry Nduriri Nyaga in 1977 and was put in possession. According to Madan J in the case of **PUBLIC TRUSTEE VS WANDURU (1984) KLR 314**

“adverse possession should be calculated from the date of the payment of the purchase price to the full span of the twelve years if the purchaser takes possession of the property because from this date the true owner is disposed of possession.”

32. Going by the above decision, it then follows that 12 years expired by 1989. Adverse possession accrued and vested to the Defendant’s husband by 1989 and thereafter the said Henry Nduriri Nyaga continued to hold the title in trust on behalf of the Defendant’s husband. On the death of the said Henry Nduriri Nyaga in 2003 and appointment of his son as the legal administrator of the estate, he continued to hold the title in trust for the Defendant.

33. The purported sale of the land and transfer to the Plaintiff by Henry Kinyua Nduriri did not convey any interest in the suit land as the same had accrued and vested to the Defendant through adverse possession in 1989 during the lifetime of the original owner. The said Henry Kinyua Nduriri was a constructive trustee or a mere paper owner holding in trust for and on behalf of the Defendant.

34. The Defendant has led evidence that she occupied the suit land from 1977 to date without any interruption from the original owner. The original owner did not retake the suit land nor did the Defendant relinquish the possession of the suit land to either the original owner or the administrator of the estate. The occupation was open, peaceful and uninterrupted for over 12 years, was in the full knowledge of the original owner and his son, Henry Kinyua Nduriri respectively. The original owner died in 2003 and at no time did he reclaim the land back.

35. The Court finds and holds that the Defendant has established title by way of adverse possession.

36. Whether the Plaintiff has proved fraud, I have already held that no evidence was tabled and proven. The Plaintiff has submitted that he has a better equity in the title of the suit land. The Court is unable to follow this line of evidence because the title that the plaintiff claims to own was cancelled vide a Court order and consequently has no title in the suit land.

37. In view of the finding above, I do not find any reason to disturb the title of the Defendant. It is the view of the Court that the relief of the Plaintiff lies against the sellers who sold him the suit land and not with the Defendant and he retains the liberty to pursue his remedies elsewhere.

38. In the end the Plaintiff's suit is dismissed with costs to the Defendant.

**It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 13<sup>TH</sup> DAY OF DECEMBER 2018**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Kimani James HB for TM Njoroge for the Plaintiff

Mugo for the Defendant.

Irene and Njeri, Court Assistants