



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

E.L.C CASE NO. 288 OF 2014

MICHAEL WACHIRA GAKUOPLAINTIFF/APPLICANT

-VERSUS-

ELIZABETH WAMUYU GITHINJI.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant moved the court by way of Originating Summons dated **27th August, 2012** seeking determination of the following questions:

- 1) whether the plaintiff is the beneficial owner of 1.3 acres out of Title Number Konyu/Ichuga/340 (the suit property) registered in the name of the defendant;**
- 2) whether the defendant holds the suit property in trust for the plaintiff;**
- 3) If number 1 and 2 are found in favour of the plaintiff, the defendant to transfer 1.3 acres to him and**
- 4) In the alternative, the court to declare that the plaintiff has acquired 1.3 acres of the suit property by way of adverse possession and award him costs of the suit.**

2. In his supporting affidavit sworn on **27th August, 2012** the applicant depones that the suit property was registered in the name of his deceased grandmother Gathoni Gichingiri, to hold in trust for the family including the applicant; that he has lived on the suit property for over 40 years, in exclusive and uninterrupted possession of 1.3 acres. For the above reasons, it is his view that he has acquired 1.3 acres by way of adverse possession.

3. He further depones that the defendant obtained letters of administration for the estate of the late Gathoni Gichingiri vide Karatina SRM Succession Cause No 53 of 2001 and excluded him and his entire family from the estate.

4. The respondent swore a replying affidavit on **26th September, 2012**. She depones that she became the registered owner of the suit property after she obtained a Certificate of Confirmation of Grant on **22nd July, 2009** in Succession Cause No 244 of 2009.

5. On 6th June, 2013 the respondent raised a Preliminary Objection that this suit is res judicata; the issue of title to land and occupation having been conclusively heard and determined by three courts. The preliminary objection was disposed off by way of written submissions.

6. On behalf of the defendant/applicant, it is submitted that the issue of title to land and occupation of the suit property had been determined by the High Court in both HCCA No 13 of 2003 and in Succession Cause No 244 of 2009, whereby both courts found in her favour. It is her contention that the Originating Summons is an abuse of the court process and should be dismissed with costs.

7. In his submissions, the plaintiff/respondent states that the applicant is a “family thief” having obtained the grant through a fake death certificate. He contends that it would be in the interest of justice if the matter proceeded to full hearing. He further submits that the applicant has committed acts of waste on the suit property by cutting down his blue gum trees and coffee bushes.

8. In determining the objection before me, I am guided by the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) E.A 698** where it was observed:-

“A preliminary objection consists of a point of law which has been pleaded, or arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

and by **Section 7 of the Civil Procedure Act** which provides;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

9. I have also perused the following cases referred to by the applicant;

1. **HCCA No 13 of 2003 Paul Njonge Kariuki & 3 Others v Elizabeth Wamuyu Githinji**) and

2. **High Court Succession Cause No 244 of 2009 – In the Matter of the Estate of Gathoni Githinji (Deceased) between Elizabeth Wamuyu Githinji and Michael Wachira Gakuo** both decided by **Makhandia J** (as he then was) and made the following observations:-

10. **HCCA No 13 of 2003 was** an appeal from the decision of Hon **J.N. Nyagah**, SRM in Succession Cause No 53 of 2001. **Makhandia J** (as he then was) dismissed the appeal and upheld the finding of the trial Magistrate who had found that the respondent (defendant/respondent in this matter) was entitled to the suit property. He was satisfied that she had proved that she was the daughter in law to the deceased Gathoni Gichingiri, having been married to her late son, Githinji.

11. In **High Court Succession Cause No 244 of 2009 Makhandia J** (as he then was) shed more light on the matter and wrapped up the bone of contention. The ruling was on an objection by the plaintiff/applicant (in this matter) where he sought to block the defendant from petitioning for letters of administration for the estate of Gathoni Gichingiri. On page 2 of the said ruling, the learned Judge stated;

“Aggrieved by the learned Magistrate’s judgment, the objectors preferred an appeal to this court being Civil Appeal Number 13 of 2003. The appeal was subsequently heard and determined. In a judgment dated and delivered on 21st July 2008, this court dismissed the appeal thereby paving way for the petitioner to apply for the confirmation of the grant.”

12. In page 3 he noted the plaintiff’s/applicant's protests as follows:

“His [the Plaintiff- Michael Wachira Gakuo] protest was still anchored on the fact that he

was entitled to 1.3 acres out of the suit premises. This is the very issue that had been canvassed before the learned magistrate as well as in the appeal. He lost on both occasions.”

13. In the latter case, **Makhandia J** (as he then was) in a nutshell found that the plaintiff/applicant was bringing a suit where the issues before the court had already been determined. In dismissing the application he stated;

“As I have already outlined above, this dispute has been the subject of a judgment by the Senior Resident Magistrate’s Court, Karatina as well as this court on appeal. The issues raised in the protest were indeed the same issues canvassed and ventilated in the two courts and decisions made thereon. The decision of the learned magistrate which in essence was to the effect that the petitioner was the right heir to the suit premises was upheld by court on appeal. The protestor’s claim to the same or a portion thereof was in effect dismissed.”

The learned Judge also observed that the plaintiff/applicant had admitted to filing that suit to resolve issues that had already been conclusively determined when he stated;

“Even the protestor agrees that the issues he has raised in his protest were actually the subject of the proceedings in the trial magistrate’s court as well as in the appeal” (emphasis mine)

14. Having found this suit to be *Resjudicata* HCCA No. 13 of 2003 and Succession Cause No. 244 of 2009, I dismiss the same with costs to the respondent.

Dated, signed and delivered at Nyeri this 30th day of January, 2017.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiff/applicant

Elizabeth Wamuyu Githinji – defendant

Court assistant - Esther