



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 190 OF 2015 (FORMERLY ELC NO. 52 OF 2013 KERUGOYA)

IN THE MATTER OF SECTION 38 OF LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF REGISTRERED LAND ACT

KIRANGI NYAMUAPPLICANT/RESPONDENT

VERSUS

IRERI MBOGO1ST RESPONDENT/DECEASED

NGURI NTHAUTHO.....2ND RESPONDENT/DECEASED

GABRIEL NGAI 3RD RESPONDENT /APPLICANT

EDWARD IRERI 4TH RESPONDENT/DECEASED

RULING

On 25th February 2010 **KIRANGI NYAMU**, the respondent in the application dated 22nd September 2015 and which is the subject of this ruling, filed an Originating Summons against **IRERI MBOGO, NGURI NTHAUTHO, GABRIEL NGAI** and **EDWARD IRERI** (1st to 4th applicants) seeking orders that he be registered as the lawful owner of land parcels No. EMBU/GANGARA/265, 266, 267 and 268 by virtue of having been in adverse possession thereof since 1940 without any interruption. The Originating Summons was accompanied with his supporting affidavit and copies of search certificates showing that the above mentioned parcels of land are registered in the names of the following persons:

- 1. IRERI MBOGO - EMBU/GANGARA/265**
- 2. NGURI NTHAUTHO - EMBU/GANGARA/268**
- 3. GABRIEL NGAI - EMBU/GANGARA/266**
- 4. EDWARD IRERI - EMBU/GANGARA/267.**

A response to that Originating Summons was filed. However, as no action was taken to prosecute this suit, and on the application of **GABRIEL NGAI**, the same was dismissed on 10th December 2013. An application to review the dismissal order dated 10th December 2013 was filed by **MOTANYA & CO. ADVOCATES** for the respondent on 29th January 2014 but there is nothing to indicate that it was even

listed before a Judge for hearing. What I can see from the record however is an order dated 27th April 2015 allegedly made by the Deputy Registrar **V.O. NYAKUNDI** with respect to that application dated 29th January 2014. That order made by the Deputy Registrar could not have been in respect of the application filed on 29th January 2014 for two reasons. Firstly, the said Deputy Registrar would have no jurisdiction handling such an application. Secondly, and more importantly, the orders issued by the said Deputy Registrar on 27th April 2015 did not even address the application for review. The orders that the Deputy Registrar made read as follows:

1: “That the plaintiff’s suit is hereby dismissed with costs.

2: “That the matter is hereby set (sic) and cost vide (sic) the Court’s ruling of 10th December 2013”

The import of the above is that whereas the application to review this Court’s order dismissing the suit was placed before the Deputy Registrar on 27th April 2015, he did not in fact make any orders on the same but simply repeated what this Court had done on 10th December 2013. So for all practical purposes, the application to review the order of this Court dismissing the Originating Summons remain un-prosecuted and the suit still stands dismissed as ordered on 10th December 2013.

GABRIEL NGAI has now filed an application dated 22nd September 2015 seeking the following remedies:

1. That KIRANGI NYAMU, his servants, heirs and/or dependants be evicted from land parcels No. EMBU/GANGARA/265 266, 267 and 268.

2. That the Officer Commanding Siakago Police Station do provide security in enforcing the eviction order.

3. That costs of this application be provided for.

The application is based on the grounds set out therein and supported by the affidavit of **GABRIEL NGAI** in which he has deponed, inter alia, that the Originating Summons herein was dismissed for want of prosecution and an application to review that dismissed order was also dismissed. However, the respondent has adamantly refused to vacate the land parcels No. EMBU/GANGARA/265, 266, 267 and 268 hence this application for his eviction.

In opposing this application, **KIRANGU NYAMU** the respondent filed a replying affidavit confirming that the applicant is one of the registered proprietors of the land parcels subject of this suit and specifically parcels No. EMBU/GANGARA/266. He then blames his advocate for laxity leading to the dismissal of his suit adding that the orders sought are drastic and in any event, the applicant doesn’t reside on the land parcels in dispute. He also depones to other matters which are not really relevant for purposes of this application.

I have considered the application and the rival affidavits.

It is common knowledge that the 1st and 2nd defendants in the Originating Summons are deceased and to-date, they have not been substituted. The 4th defendant was also reported to be sick way back on 17th July 2014 and has never attended the Court. Since the 3rd defendant who is the applicant herein is not the legal representative of the 1st or 2nd defendants, he cannot prosecute the application on their behalf. In any case, the application subject of this ruling is brought in his names only.

It is clear from the certificates of search filed with the Originating Summons that the applicant is the registered proprietor of only land parcel No. EMBU/GANGARA/266 and so he can only seek orders for eviction of the respondent in respect to that parcel of land. The respondent’s claim to that parcel of land among others, through adverse possession having been dismissed way back on 10th December 2013 and no appeal having been preferred against that order, it follows that he, and those claiming that land parcel

under him, have no legitimate reason to continue remaining thereon notwithstanding the length of period that they have lived thereon. That is because, before the Court makes an order that a party has acquired land by way of adverse possession, the registered owner thereof remains the absolute and indefeasible proprietor with all the rights and privileges appertaining thereto including the right to eject trespassers. A party occupying land registered in the names of another does not acquire any right through prescription until a Court declares him to have acquired such rights. The respondent lost that opportunity when he failed to prosecute his claim leading to its dismissal on 10th December 2013. The application seeking his eviction is therefore well merited but only in respect to land parcel No. EMBU/GANGARA/266 which is the one registered in his names.

With regard to the prayers that the Officer Commanding Siakago Police Station provides security in enforcing the eviction order, Courts have been slow to involve the Police in purely civil processes. In **KAMAU MUCHINA VS THE RIPPLES C.A CIVIL APPEAL No. 186 of 1992**, the Court stated the following:

“Paragraph 4 of the formal order extracted on 22nd September 1992 says that Police assistance may be enlisted to ensure that the plaintiff (i.e. respondent) is reinstated in the premises. It would be unlawful to utilize the Police in civil action for the purpose of effecting or aiding private evictions or reinstatements”.

Nonetheless, having said so, it is the duty of the Police under **Section 24 of the National Police Act** to preserve peace and maintain law and order. The Police do not therefore need any Court order to do so. That section provides as follows:

“The functions of the Kenya Police Service shall be –

- (a) provision of assistance to the public when in need,***
- (b) maintenance of law and order,***
- (c) preservation of peace ,***
- (d) protection of life and property,***
- (e) investigation of crimes,***
- (f) collection of criminal intelligence,***
- (g) prevention and detection of crime,***
- (h) apprehension of offenders,***
- (i) enforcement of all laws and regulations with which it is charged; and***
- (j) performance of any other duties that may be prescribed by the Inspector-General under the Act or any other written law from time to time”.***

It is therefore the general duty of the Police to maintain law and order and they do not need any prompting from any person to do so.

Ultimately therefore and upon considering all the matters herein, I make the following orders with respect to the application dated 22nd September 2015:

- 1. That KIRANGI NYAMU, his servants, agents, heirs and/or dependants be evicted from land parcel No. EMBU/GANGARA/266.***

2. That such eviction be carried out in the manner prescribed under the provisions of Section 152 of the Land Act.

3. KIRANGI NYAMU the respondent herein shall meet the costs of this application.

B. N. OLAO

JUDGE

14TH JULY, 2017

Ruling delivered, dated and signed in open Court this 14th day of July 2017

3rd Applicant present

Respondent is absent.

B. N. OLAO

JUDGE

14TH JULY, 2017