



REPUBLIC OF KENYA

IN THE E.L.C COURT OF KENYA AT EMBU

E.L.C. CASE NO. 169 OF 2015

(FORMERLY KERUGOYA ELC 732 OF 2013)

(FORMERLY EMBU CIVIL CASE NO. 14 OF 1983)

GATHURI NGARI.....PLAINTIFF

VERSUS

ALLAN NYAGA GATHURI NGARI.....DEFENDANT

JUDGEMENT

1. By a plaint dated 2nd February 1983 and filed on a date which is unclear from the court file, the Plaintiff sought eviction of the original Defendant (Mucuri M'Rugendo) from *Title No. Gaturi/Nembure/2107* (hereinafter known as the '*suit property*') which the Plaintiff averred belong to him. It was pleaded that sometime in 1969 the Defendant started cultivating the suit property without his permission claiming it to be hers.
2. The original Defendant, Mucuri M'Rugendo, passed on in the course of this litigation and was replaced by her son, Allan Gathuri Ngare who is the current Defendant. The Defendant appears to have been appointed the administrator of the estate of his late mother.
3. The Defendant filed a written statement of defence to the suit on 20th November 1989. The Defendant denied the Plaintiff's ownership of the suit property and stated that it was actually registered in the name of her son, one Gathuri Ngari, and not the Plaintiff who is also Gathuri Ngari and the son of her brother, Ngari Muruarugendo. The Defendant further stated that if the Plaintiff was the registered owner, then he 'falsely' registered himself as such since he shared the same names with her own son. She, therefore, prayed that the suit be dismissed with costs.
4. It is obvious that this suit took inordinately long to be heard. The parties filed their witness statements and lists of documents between 2010 and 2012. The suit was ultimately heard on 17th July 2017 when the Plaintiff called 2 witnesses whereas the Defendant called 3 witnesses. The parties had not agreed on the issues for determination by the time the suit was called out for hearing and the court had to adjourn for 30 minutes to allow their advocate to do the needful. They finally agreed on a handwritten statement of seven (7) issues which the court shall consider at the opportune moment.
5. The Plaintiff was the first to testify as PW 1. He adopted his witness statement dated 27th March 2012 and filed on 3rd April 2012 as his sworn testimony. In the said witness statement, it was his case that he was given the suit property measuring about 5.42 acres by his father upon sub-division of a larger parcel of land measuring about 15.42 acres which belonged to his father. This was around 1961. It was his case

that sometime in 1969, the Defendant's mother, Mucuri M'Rugendo went to the Lands Office and laid a claim to the suit property as belonging to his son (the Defendant herein).

6. The Plaintiff further stated that the Land Registrar then summoned his father and the Defendant's mother for resolution of the dispute. The matter was then resolved in favour of the Plaintiff as the rightful owner and he was then issued with a title deed even though he was still a minor. He stated that his father and some clan elders signed on his behalf.

7. The Plaintiff's second witness was his father, Ngari Muruarugendo who testified as PW 2. He confirmed that the Plaintiff was his son and that the Defendant was the son of his late sister Mucuri M'Rugendo. He also adopted his witness statement dated 27th March 2012 as his sworn testimony. It was his testimony that the suit property was once part of a larger parcel of land which his father had bought jointly with a Mr. Kibere Njagi. He stated that out of his share of about 15 acres, he gave out about 5 acres to his son (the Plaintiff) and remained with 10 acres.

8. PW 2 confirmed that her late sister Mucuri had lodged a claim for the suit property with the Land Registrar during her lifetime. However, it was his son, the Plaintiff, who was issued with a title deed. During cross-examination, he stated that the Plaintiff was also known as John Muriithi but Gathuri Ngari was the name entered in the Land Records by the surveyor.

9. The Defendant was the first to testify on his behalf as DW 1. He adopted the witness statements dated 1st November 2012 and 10th March 2016 as his sworn testimony. It was the Defendant's case that the suit property was part of a larger parcel which originally belonged to his grandfather who had 3 children. There was one son (the Plaintiff's father), and 2 daughters one of whom was his mother (Mucuri).

10. It was the evidence of DW 1 that upon the death of his grandfather, the said land was sub-divided into 3 portions and that one of the portions (the suit property) was given to his mother who was unmarried. It is this portion which was then given to him since a woman could not be issued with a title deed at the time. It was his further evidence that when the Plaintiff tried to interfere with the suit property in 1969, his mother reported the matter to the Lands Office for resolution. He accused the Plaintiff's father and some clan elders of lying to the Land Registrar in consequence of which the Plaintiff was issued with a title deed for land which did not belong to him.

11. The Defendant's statement of 10th March 2016 is substantially the same as his earlier statement of 1st November 2012 save for one noticeable variation. It was averred in the latter statement that upon subdivision of his grandfather's land into 3 portions the portion belonging to his mother (Mucuri) was registered in his brother's name since he was the eldest son and because at the time women could be registered as proprietors of land. However, Mucuri and her family continued to live on the suit property from the 1960s to-date. In the latter statement, the Defendant denied that the Plaintiff was known as Gathuri Ngari and stated that he was known as *John Muriithi Gathuri Ngari*.

12. During cross-examination, DW 1 conceded that the Plaintiff was issued with a title deed for the suit property. He was present in the meeting at the Lands Office where the title deed was issued. However, he stated that the title deed was issued irregularly and fraudulently. He also disowned his averment in his 2nd witness statement that the suit property was registered in the name of his eldest brother. He stated that he was the eldest son in his mother's family.

13. During re-examination by his advocate, DW 1 stated that his first national identity card bore the name Gathuri Ngari and that upon baptism he acquired the names *Allan Nyaga* which were added to his identity card. It was his testimony during re-examination that the title deed for the suit property was actually in his name but it should be cancelled because the title deed was not in his possession.

14. The second witness to testify on behalf of the Defendant was Mwaniki Njenga who testified as DW 2. He adopted his witness statement dated 10th March 2016 as his sworn testimony. He was one of the elders who were invited by the Defendant's mother as a witness at the District Officer's office at

Runyenjes in a land dispute over the suit property. He stated that she was claiming that her son had been denied the suit property. His testimony was that the panel heard and decided that the suit property belonged to the son of Mucuri M'Rugendo (i.e. the Defendant).

15. The third witness on behalf of the Defendant was James Ngari who testified as DW 3. He stated that he was the Defendant's brother and that the Plaintiff was the son of his uncle. He also adopted his witness statement dated 10th March 2016 as his sworn testimony. His evidence was that the suit property belonged to the Defendant but the title deed was issued to his uncle, Ngari Muruarugendo. He further stated that following a hearing which took place in the office of the District Officer at Runyenjes, the Defendant was recognized as the owner of the suit property. It was his case that they have since the 1960s to-date resided on the suit property.

16. The advocates for the parties framed the following 7 issues for determination on 17th July 2017;

a) Who is the rightful owner of land parcel No. Gaturi/Nembure/2107?

b) Did the Plaintiff collude with the Land Registrar to have land parcel No. Gaturi/Nembure/2107 registered in his name?

c) Is the Defendant legally in occupation of parcel No. Gaturi/Nembure/2107?

d) Who is in occupation of land parcel No. Gaturi/Nembure/2107?

e) How did the Defendant come into parcel No. Gaturi/Nembure/2107?

f) Who should meet costs of the suit?

g) Does the Plaintiff deserve the evictions orders sought?

17) The 1st issue is who is the rightful owner of the suit property. This is the main and, in reality, the only issue in dispute between the parties. That is the reason why the land dispute ended up in court. Both the Plaintiff and the Defendant claim to be the owners and registered proprietors of the suit property because at some point both of them were called Gathuri Ngari.

18) From the evidence on record, the Plaintiff is variously known as Gathuri Ngari, Kathuri Ngari, Kathuri John M, John Kathuri Ngari, Muriithi Ngari and John Muriithi. At the trial hereof, he informed the court that he is also known as John Muriithi Gathuri Ngari. That is quite confusing and perplexing. Why would one person have such numerous aliases? Anyhow, he claimed to be the Gathuri Ngari who is registered as proprietor of the suit property.

19) The Plaintiff was not alone in this challenge of mutating names. The Defendant claimed to be the original Gathuri Ngari who is the registered proprietor of the suit property. However, at the trial hereof, he claimed that upon baptism, he was given two additional names i.e. Allan Nyaga. He therefore became Allan Nyaga Gathuri Ngari. Whereas it is common for some Christians to add a Christian name after baptism, it is quite unusual for such a name as "Nyaga" to be added to already existing African names. Be that as it may, the court will look at additional material evidence to establish who is who in relation to the ownership of the suit property.

20) The Plaintiff testified that he acquired the suit property from his father (PW 2) who had in turn acquired it from his father. This was before land adjudication and demarcation was done. When the suit property was finally registered, he was registered as proprietor after the Land Registrar resolved the complaint on ownership in his favour. DW 1 confirmed during cross-examination that he was present when the title deed was issued to the Plaintiff. He, however, claimed it was irregularly or fraudulently issued because the Plaintiff's father and some clan elders had given some false information to the Land Registrar.

21) The court has examined the exhibits produced by the Plaintiff and noted that the copy of the adjudication register dated 27th September 1961 (exhibit P.5) indicates the land owner of plot 2107 as Gathuri Ngari. The said exhibit is thumb printed by Ngari son of M'Rugendo. The court has also considered the certificate of appointment of a guardian for parcel 2107 (exhibit P.4) which indicates that Ngari M'Rugendo was one of the persons appointed on 2nd April 1969. The court is satisfied that it is the Plaintiff's father who was appointed as one of the guardians of the Plaintiff.

22) In the circumstances, the court is satisfied that the Gathuri Ngari referred to in the Land Registrar for the suit property is the Plaintiff and not the Defendant. The process of land demarcation and registration took place in 1960s and it was upon the Defendant's mother (Mucuri) or the Defendant to take steps to file objections with the relevant authorities in accordance with the law. The 1st issue is, therefore answered in favour of the Plaintiff.

23) The 2nd issue is whether the Plaintiff colluded with the Land Registrar to have the suit property registered in his name. The court has considered the pleadings and the evidence on record. The Defendant pleaded in paragraph 4 of the defence that the Plaintiff "falsely" registered himself as proprietor of the suit property. It would appear that the Defendant intended to plead that the Plaintiff was fraudulently registered as proprietor. However, no particulars of falsehood or fraud were pleaded and the court cannot make a decision upon an unpleaded issue. See **Kisumu Civil Appeal No. 168 of 2011 Dakianga Distributors (K) Ltd Vs Kenya Seed Co. Ltd [2015] eKLR.**

24) It was averred by the Defendant in his statement that the Plaintiff's father and some clan elders misled the Land Registrar through false representations into issuing a title deed to the Plaintiff. There is no material evidence on record on what those elders may have said or done before the Land Registrar in 1969 or thereabouts. In any event, such particulars were not pleaded in the statement of defence. In those circumstances, the court finds that there is no evidence of collusion. The 2nd issue is therefore answered in the negative.

25) The 3rd issue is whether the Defendant is legally in occupation of the suit property. Although the court has found that the Plaintiff is the registered proprietor of the suit property, the Defendant's occupation could not be said to be unlawful. There is some evidence on record that the Defendant's mother was allowed to reside there with her children in the 1960s. She was the sister of the Plaintiff's father and therefore a close relative. The Defendant and his siblings appear to have grown up on the suit property. They have built some houses thereon and cultivated the suit property for many years with full knowledge of the Plaintiff.

26) That, of course, does not mean that a registered proprietor cannot withdraw or terminate his consent or permission to continued occupation at any time. Such consent can be withdrawn and a registered proprietor can sue for eviction if the occupier does not heed a notice to vacate. So, the answer to the 3rd issue is that the Defendant has been legally in occupation all along but occupation may be terminated through a legal process such as the instant proceedings.

27) The 4th issue is who is in occupation of the suit property. From the totality of the evidence on record, it is clear that the Defendant's mother and his family entered the suit property in 1960s. It was disputed whether her occupation was continuous or intermittent. What is clear, however, is that some of her children have lived there since 1960s and some have erected some houses thereon. It is also clear that the Plaintiff is in occupation of part of the suit property as the registered owner. The answer to the 4th issue is that both the Plaintiff and the Defendants are in occupation of the suit property.

28) The 5th issue is on how the Defendant came into the suit property. As indicated hereinbefore, the Defendant came into the suit property with his late mother (Mucuri) while he was still a young boy. As indicated before, his entry into the suit property was lawful as a minor accompanying his mother.

29) The 6th issue is on costs. Although costs of a suit are usually at the discretion of the court, the general

rule is that costs follow the event. See **Hussein Jan Mohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.** Consequently, a successful party is usually awarded costs unless the court, for good reason, orders otherwise. The court is aware that the parties are first cousins. The court will therefore be inclined to make an order for each party to bear own costs.

30) The 7th and final issue is whether the Plaintiff is entitled to the order of eviction sought. In view of the court's findings on the various issues for determination, the court is satisfied that the Plaintiff is the registered proprietor of the suit property. The court has found that the Defendant has failed to demonstrate any fraud or illegality in the Plaintiff's acquisition of the suit property. The court has also noted that the Defendant has no counterclaim in this suit. In those circumstances, the Plaintiff is entitled to the reliefs sought. The 7th issue is therefore answered in the affirmative.

31) The upshot of the foregoing is that the court finds merit in the Plaintiff's suit for an eviction order and the same is hereby allowed. Each party shall bear own costs for reasons given earlier in the judgement. Consequently, the court makes the following orders:

- a) An eviction order is hereby issued for the eviction of the Defendant from Title No. Gaturi/Nembure/2107. The eviction shall be carried out in accordance with all applicable laws including the Land Laws (Amendment) Act 2016.
- b) Each party shall bear own costs.
- c) The eviction order is hereby suspended for 90 days to enable the Defendant to prepare to vacate.
- d) Orders accordingly.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 7th day of DECEMBER, 2017

In the presence of the Plaintiff in person and Ms Muthoni holding brief for Mr Momanyi for the Defendant.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

07.12.17