



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wachira & another v Ngaruiya & another (Environmental and Land Originating
Summons 21 of 2019) [2024] KEELC 826 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 21 OF 2019
JM MUTUNGI, J
FEBRUARY 22, 2024**

BETWEEN

DORIS MATHA WACHIRA 1ST APPLICANT

JAMES NGARUIYA KOINANGE 2ND APPLICANT

AND

EMILY NUNA NGARUIYA RESPONDENT

AND

JANE NYANJURU THUO INTENDED RESPONDENT

RULING

1. The Court vide a Judgment delivered on 12th February 2021 decreed that the Applicants had acquired land title number LR. NO. Mwerua/Kiandai/282 by way of adverse possession and directed the Land Registrar Kirinyaga to cancel the name of the Respondent as the owner of the suit property and in place thereof to register the same in the name of the Applicants. The suit was undefended.
2. By an application dated 22nd August 2023, Jane Nyanjuru Thuo, the Intended Respondent sought *inter alia* to substitute the Respondent, Emily Nuna Ngaruiya, an order of inhibition of any dealings in regard to title No. Mwerua/Kiandai/282 pending the hearing of the application and the suit; order of injunction restraining any dealings with the suit property and an order setting aside; reviewing and/or varying the Judgment dated 12th February 2021 and decree dated 18th January 2022 and all consequential orders arising therefrom.
3. The Intended Respondent/Applicant in support of the application averred that the Applicants had misled the Court into believing that the Applicants did not know the whereabouts of the Respondent yet they were aware she resided at Thika and both the Applicants and the Respondent had infact had a meeting at the Chief's Office in March 2019 barely two months before the filing



of the suit. The Intended Respondent/Applicant averred that the Applicants were fully aware of the Respondent's whereabouts but chose to deliberately mislead the Court resulting in the matter proceeding *ex parte* to the prejudice of the Respondent. The Intended Respondent/Applicant further averred that the Applicants concealed material information that the suit property had in fact been lawfully and validly acquired by the Respondent before the same was legally transmitted to the Intended Respondent through succession in February 2022. The Intended Respondent/Applicant averred that the Respondent was aged and died on 27th December 2019 aged 95 years and that immediately before her death she was bedridden and was under the care of the Intended Respondent/Applicant. The Applicant maintained that the Applicants/Respondents had not been in peaceful occupation of the suit premises as the Respondents family had since 1981 upto 2014 made various efforts to assert their right over the property as particularized under paragraph 11 of the Supporting Affidavit. The Intended Respondent/Applicant thus asserts the Applicants obtained Judgment in their favour through concealment of material information and by misleading the Court and hence prays to be granted the orders sought in the application.

4. The 1st Applicant/Respondent swore a Replying Affidavit dated 11th September 2023 on her own behalf and on behalf of the 2nd Applicant/Respondent in opposition to the Intended Respondents application. The 1st Applicant/Respondent averred that they filed the instant Originating Summons against the Respondent, Emily Nuna on 3/6/2019 and as the whereabouts of the Respondent was unknown to them they instructed their Advocates to seek leave to serve the Respondent by way of substituted service and were granted leave to do so on 4/7/2019 and the Respondent was duly served through an advertisement in the Daily Nation Newspaper on 16/8/2019. The Respondent did not appear or file any defence and the Applicants sought and were given directions to proceed with the suit an undefended suit.
5. The Applicants aver that the Judgment of the Court delivered on 12/2/2021 has since been executed and implemented and the Applicants have been registered as the joint owners of the suit property. The Applicants further aver that the Respondent had never set foot on the suit property and had never initiated any action to evict them. The Applicants contend that they had peacefully and uninterruptedly occupied possessed and developed the suit property by constructing permanent structures and at no time did the Respondent seek to have them evicted. The Applicants aver that the valuation report they adduced in evidence at the trial clearly demonstrated the nature of developments they had effected on the suit property. They maintained the Intended Respondent's application lacked any merit and the same ought to be dismissed with costs.
6. The Intended Respondent/Applicant filed a further affidavit dated 30/10/2023 with leave of the Court together with her submissions in support of the application. The Intended Respondent/Applicant reiterated that the Applicants were aware that the Respondent was advanced in age and that there was no possibility she would have been able to see the Newspaper advert ordered pursuant to leave granted for substituted service. The Applicant herself denied she saw the advert so that she could draw the Respondent's attention to it. The Applicant further reiterated the Applicants/Respondents having only met the Respondent only 2 months before the commencement of the suit at the Chief's office should have been able to effect physical service on the Respondent. The Applicant further reiterated various efforts were made by the Respondent to retake possession of the suit property as highlighted in the Supporting Affidavit.
7. The parties canvassed the application dated 22/8/2023 by way of written Submissions. The Intended Respondent filed her submissions dated 30th October 2023 on 31st October 2023. The Applicants/Respondents filed their submissions on 20th November 2023.



8. The Intended Respondent/Applicant submitted that the Respondent having died on 27th December 2019, it was imperative that she be substituted to enable the matter to proceed. The Intended Respondent submitted further that having been awarded the suit property following succession proceedings in respect of the Respondent's estate, she had a direct interest in the subject matter of the suit property and was therefore an Interested and a necessary party in the proceedings. For that reason, she sought to be substituted in the suit in place of the Respondent and to be afforded an opportunity to defend the suit. The Intended Respondent/Applicant in support of this submission placed reliance on the Case of *Gladys Nduku Nthuki v Letshego Kenya Ltd; Mueni Charles Maingi (Intended Plaintiff)* (2022)eKLR.
9. On the issue whether the Court should exercise its discretion to review the Judgment dated 12th February 2021 and the resultant decree dated 18th January 2022, the Intended Respondent/Applicant submitted that there was sufficient reason to justify the exercise of the discretion to review. In this regard the Applicant argued the Respondent was aged and sickly and depended on other persons to care for her and she could therefore not have been expected to see the Newspaper advertisement through which service was purportedly effected on her. In support of this submissions the Applicant placed reliance on the Case of *Sylvester Nthenge v Johnstone Kiamba Kishili* [2021] eKLR where the Court considered what would constitute sufficient reason.
10. The Applicants/Respondents in their brief submissions submitted that they applied and were granted leave to serve the Respondent with the Originating Summons by way of substituted service since they did not know her whereabouts and the process server could not trace her. The Applicants submitted that service was effected through advertisement in the Daily Nation Newspaper on 16/8/2019 and after the Respondent failed to appear the Applicants sought and were granted leave to proceed with the suit as an undefended suit. The Applicants/Respondents further submitted that the Applicant was guilty of undue delay as the Judgment has already been executed and further that the Applicant lacked the locus standi to bring the instant application as she was not a party to the suit.
11. I have given due consideration to the application and to the Affidavits in support and in opposition and have considered the rival submissions of the parties and the twin issues for determination are whether the Intended Respondent/Applicant has satisfied the conditions to warrant a review and/or setting aside of the Judgment and whether the Intended Respondent/Applicant should be joined as a party to the proceedings.
12. The Applicants filed the Originating Summons on 3rd June 2019. On 24th June 2019 they filed an application dated 19th June 2019 seeking leave to be allowed to serve the Originating Summons on the Respondent by way of substituted service since they did not know the Respondent's physical location at Thika where she was resident. The Court after considering the application granted leave and service on the Respondent was effected by way of advertisement in the Daily Nation Newspaper on 16/8/2019. As per the Court's directions at the time of granting leave for substituted service the Respondent was to be as duly served within 14 days of the date of advertisement. In the premises the Respondent was deemed to have been duly served by 30th August 2019. As the Defendant did not appear the Applicants properly applied to be allowed to proceed with the suit as undefended and were duly allowed. The service of the Originating Summons on the Respondent was regularly done by way of substituted service after leave was granted by the Court. The hearing also proceeded regularly and a regular judgment was delivered by the Court.
13. The issue for consideration is whether the Applicant has laid any basis to warrant a review or setting aside of the Judgment and whether a case for joinder and/or substitution of the Intended Respondent/Applicant in place of the Respondent has been made out by the Applicant. The foundation of



the Intended Respondent's application as I understand, is that there was no proper service of the Originating Summons upon the Respondent. The Applicant's position appears to be that since the Respondent was very old at 95 years and was unlikely to have been able to see the advertisement, the service should be ruled as improper and that physical service should have been effected. While it is apparent the Respondent was truly advanced in age, it is also true that an order for substituted service is not restricted and/or confined to any specific group of persons, be they elderly and/or under any infirmity. The test is whether the Court was satisfied that substituted mode of service was appropriate. The Court was satisfied and it granted leave for the Respondent to be served by way of substituted service. I see no basis to fault the Court in the exercise of its discretion to allow service by way of substituted service. The rules of procedure permit it, and the Court exercised its discretion to allow it.

14. As I have observed earlier in this ruling, the Court properly made a regular Judgment against the Respondent since the Respondent was duly served and entered no appearance prompting the suit to proceed as undefended. The Court upon evaluation of the evidence adduced by the Applicants found their case to have merit and entered Judgment in their favour as prayed in the Originating Summons. The Applicants were decreed to have acquired title to the suit property by way of adverse possession and the Respondent's title to the suit property was held to have been extinguished such that she had no title that she could transmit to the Intended Respondent/Applicant through succession as purportedly happened in the instant case.
15. The Intended Respondent/Applicant in her Affidavit in support of the application admits the Applicants have been in possession and occupation of the suit property over a long period and gave particulars of the attempts that had been made since 1981 to have the Applicants vacate the suit property as detailed under paragraph 11 of the Supporting Affidavit.
16. The Applicants evidence before the trial Court was that they and their families have been in occupation of the suit property since 1978 and have established their homes thereon and the valuation report they tendered in evidence attested as to the nature of developments that they had effected on the land. It does appear that although the Respondent may have requested and/or given notice to the Applicants to vacate from the suit land, the Applicants never vacated and hence their possession and occupation was never interrupted. The Respondent never initiated any action to evict the Applicants and hence notwithstanding that the Respondent may have issued notices and/or demands to the Applicants to vacate the land, that could and did not interrupt the Applicants possession as adverse possessors. Only the institution of a suit for eviction would have operated to interrupt the running of time of adversity. However even if a suit for eviction had been instituted the Applicants would have had a complete defence to the suit, if prior to the institution of the suit, they had been in adverse possession of the land for a period in excess of 12 years. Such would be a suit for recovery of land and by virtue of Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya would be statute barred.

Section 7 of the *Limitation of Actions Act* provides as follows:-

7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

17. In the instant case, the Intended Respondent's claim is as a beneficiary of the Respondent who was also a beneficiary pursuant to Thika Succession Cause No. 78 of 1991 from the *estate of Vincent Ngaruiya Karau alias Ngaruiya Karau (Deceased)*. As per the Intended Respondent/Applicant's Supporting Affidavit paragraph 11 there were efforts by Vincent Ngaruiya Karau and the Respondent to recover the land from the Applicants from way back in 1982, 1992, 2000, 2005 and 2014 but no suit for



eviction was instituted against the Applicants until the Applicants filed the present suit in June 2019 seeking to be declared as owners by reason of having adversely possessed the land for a period in excess of 12 years.

18. Upon careful evaluation of the Intended Respondent's application, I find no basis upon which I could exercise my discretion to review or set aside the Judgment entered on 12th February 2021. I find that the Judgment was regularly obtained after due process. I hold there is no sufficient reason adduced to warrant a review of the Judgment. The claim by the Intended Respondent/Applicant arises by way of inheritance of the suit land from the Respondent (now deceased). The title held by the Respondent had become extinguished by virtue of adverse possession by the Applicants and there was no valid title that the Intended Respondent/Applicant could legally inherit from the Respondent.
19. The upshot is that I find no merit in the intended Respondent's application and I hereby order the Notice of Motion application dated 22nd August 2023 dismissed. I make no order for costs and I direct that each party will bear their own costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH VIDEO LINK THIS 22ND DAY OF FEBRUARY 2024.

J. M. MUTUNGI

ELC - JUDGE

