



**Gatere v Gathuthi & another (Environment and Land Appeal
E052 of 2021) [2024] KEELC 664 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 664 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E052 OF 2021
JO OLOLA, J
FEBRUARY 15, 2024**

BETWEEN

DAVID KAHUTHU GATERE APPELLANT

AND

CHARLES IRIMU GATHUTHI 1ST RESPONDENT

SAMMY MAINA GATHUTHI 2ND RESPONDENT

(Appeal arising from the Judgment of the Honourable Nelly W. Kariuki, Principal Magistrate delivered on 11th November, 2021 in Nyeri CMELC Case No. 110 of 2018)

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable Nelly W. Kariuki, Principal Magistrate delivered on 11th November, 2021 in Nyeri CMELC Case No 110 of 2018.
2. By a Plaint dated 20th May 2013, David Kahuthu Gatere (the Appellant) had sought for Judgment against the Respondents herein jointly and severally for:
 - (a) Vacant possession (and) in the alternative, eviction from parcel No Naromoru/Naromoru/Block 1/487;
 - (b) Mesne profits from date of 2008 (sic) to yield vacant possession; and
 - (c) Costs and interests.
3. Those prayers were hinged on the Appellant's contention that at all times material to this suit, he was the registered proprietor of the parcel of land known as Naromoru/Naromoru/Block 1/487 (the suit property) measuring 1.62 Ha. The Appellant accused the Respondents of encroaching on his said parcel of land, destroying its boundary features and committing various acts of wastage and damage thereon.



4. But in their Joint Statement of Defence and Counterclaim dated 2nd July, 2013 as amended on 4th March 2019, Charles Irimu Gathuthi and Sammy Maina Gathuthi (the Respondents) asserted that the registration of the Plaintiff as the registered owner of LR No Naromoru/Naromoru/Block 1/487 was done illegally and fraudulently as the said parcel of land was illegally excised from the larger parcel known as Naromoru/Naromoru (Kieni East) Block 1/31 which was registered in the name of the Respondents' father.
5. The Respondents while admitting that they are in occupation of LR No Naromoru/Naromoru/Block 1/173 denied the existence of the parcel claimed by the Appellant.
6. By way of their Counterclaim, the Respondents averred that their father Geoffrey Gathuthi Karaya (deceased) had purchased Plot No 292 from one George Gikandi Gatere in the year 1985 and that the same was consolidated with other parcels to form Naromoru/Naromoru (Kieni East) Block 1/31 measuring approximately 11.02 Ha.
7. It was the Respondents case that a dispute thereafter occurred as to the ownership of the said plot No 292 after the Appellant herein purported that he was also known as Macharia Karue who was the previous owner of the land but had since passed on. Subsequently the Appellant was charged with a criminal offence which was later discontinued.
8. The Respondents accused the Appellant of proceeding to illegally cause the sub-division of the said LR No Naromoru/Naromoru (Kiene East) Block 1/31 into Naromoru/Naromoru/Block 1/487 and thereafter transferring to himself the said LR No Naromoru/Naromoru Block 1/487 which was previously Plot No 292.
9. Accordingly, the Respondents sought for:
 - (a) An Order dismissing the Plaintiffs suit with costs to the Defendant;
 - (b) Cancellation of Title No Naromoru/Naromoru Block 1/487 and the subsequent registration of the same in the name of the Defendants; and
 - (c) Any other relief that the Court may deem fit to grant.
10. Having heard the dispute and in her Judgment delivered as aforesaid on 11th November 2021, the Learned Trial Magistrate dismissed the Appellant's suit with costs and allowed the Respondents' Counterclaim in its entirety with costs.
11. Aggrieved by he said determination, the Appellant moved to this Court on 16th December, 2021 lodging a Memorandum of Appeal dated 10th December, 2021 in which he urged this Court to review the said Judgment and substitute it with an order allowing the Appellants claim on the grounds that:
 1. The Learned Trial Magistrate erred in fact and in law in failing to appreciate the evidence adduced on behalf of the Plaintiff/Appellant;
 2. The Learned Trial Magistrate erred in fact and in law in finding that the Appellant had acquired the suit land fraudulently;
 3. The Learned Trial Magistrate erred in fact and in law in finding on the issue of the identity of the Plaintiff and making a finding otherwise and in contrary from the evidence tabled before the Court;



4. The Learned Trial Magistrate erred in fact and in law in making a finding that the Appellant's case was incompetent for failure to avail a witness of documentary evidence on the issue of his identity; and
5. The Learned Trial Magistrate erred in fact and in law in failing to find (that) the Appellant had proved his ownership of the suit land.
12. This being the first Appellate Court, the duty of the Court is to re-evaluate the evidence before the trial Court as well as the Judgment and to arrive at its own independent judgment on whether or not to allow the Appeal. A first Appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand (*Selle & another v Associated Motor Boat Company Limited & others* (1968) EA 123).
13. Accordingly, I have carefully perused and considered the Record of Appeal as well as the Judgment of the Trial Court. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
14. The suit before the Lower Court was instituted by David Kahuthu Gatere (the Appellant) against two brothers, namely, Charles Irimu Gathuthi who passed away in the course of the proceedings, and Sammy Maina Gathuthi (the Respondent).
15. By his prayers before the Trial Court, the Appellant sought to have the Respondent and his now deceased brother to grant him vacant possession of the parcel of land described as Naromoru/Naromoru/Block 1/487 and that in the alternative, an order be issued for their eviction therefrom. In addition, the Appellant sought an order for mesne profits against the Respondent and his brother to be calculated from the year 2008 when they were said to have encroached upon the suit property until the moment when the brothers would yield vacant possession.
16. On their part, the Respondent and his deceased brother denied that the Appellant was entitled to any of the orders sought. Instead it was their case that the Appellant had illegally and fraudulently excised the parcel of land known as Naromoru/Naromoru/Block 1/487 from a larger parcel of land that was registered in the name of their father, one Geoffrey Gathuthi Karaya, and which land was known as Naromoru/Naromoru (Kieni East) Block 1/31 measuring approximately 11.02 Ha.
17. By way of their Counterclaim, the brothers stated that their now deceased father had purchased Plot No 292 from one George Gikandi Gatere in the year 1985 and that the same was consolidated with other parcels of land owned by their father to make up the 11.02 Ha. comprised in the parcel of land known as Naromoru/Naromoru/(Kieni East) Block 1/31.
18. Accordingly, the Respondents had sought an order for the cancellation of the title registered in the Appellant's name and to have the same reversed to the original parcel that was registered in the name of their father.
19. Upon hearing the Parties herein and considering the evidence placed before her, the Learned Trial Magistrate made a finding that the Appellant had fraudulently registered LR No Naromoru/Naromoru/ Block 1/487 in his name and proceeded to dismiss his case while upholding the Respondent's Counterclaim.
20. By the Memorandum of Appeal lodged herein, the Learned Trial Magistrate has been faulted for failing to appreciate the evidence that was placed before her by the Appellant which fact is said to have led her to arrive at the wrong finding that the Appellant had fraudulently acquired the suit property.



21. From a perusal of the material placed before the Court, it was not in dispute that the Respondent's father the late Geoffrey Gathuthi Karaya and a man identified as Macharia Karue were members of a land-buying company formed in the 1960s and known as Kieni East Farmers Company Limited. As a consequence of his shareholding at the company, the Respondent's father became entitled to some plots then designated as Plot No.s 290, 293, 294, 324 and 325. He took possession of the same in the 1970s and started developing them.
22. On the other hand, it was apparent that the said Macharia Karue was at the same time designated plot No 292. As it turned out, the said Macharia Karue did not occupy his said plot No 292. Instead, the Plot was left in the occupation of one George Gikandi Gatere, a man the Appellant describes as his step-brother.
23. It was also not in dispute that sometime around 1985, the Respondent's father, attracted by the proximity of Plot No 292 to his own plots of land, did approach the said George Gikandi Gatere to sell to him the said Plot No 292 to enable the Respondent's father to merge the same with his other Plots of land aforesaid. The two agreed on the request by the Respondent's father.
24. As the plots were yet to be formally registered, the two approached the Kieni East Farmers Company to facilitate the transfer of the plot. There was however one little problem. As it turned, Plot No 292 was registered in the name of Macharia Karue and not that of the said George Gikandi Gatere. To solve that problem, George walked to an Advocate's office where he swore an Affidavit to the effect that he was also the same person known as Macharia Karue.
25. Subsequently, the sale transaction went through and the Respondent's father took possession of Plot No 292 thereafter and proceeded to have it merged with his other parcels of land. It would appear that all was well then until some three years later when the Appellant happened on the scene. Having learnt of what had transpired, he filed a complaint with the police and his said step-brother George Gikandi Gatere was charged in Nyeri District Magistrate's Criminal Case No 1672 of 1988 with the offence of swearing a false affidavit contrary to Section 114 of the Penal Code.
26. The records reveal that on 9th August 1988, George pleaded guilty to the charge and was convicted and sentenced to serve 18 months imprisonment. The sentence was later revised to six (6) months upon his Appeal to the High Court (Page 60 of the Record).
27. As it turned out, one (1) year before his step-brother was so-jailed, the Appellant herein also appeared before a Commissioner of Oaths on 6th March, 1987 and swore an Affidavit stating as follows:

“I, David Kahuthu Gatere of care of Post Office Box Number 19, Naromoru in the Republic of Kenya make oath and state as follows:

1. That I am (a) shareholder of the Company known as Kieni East Farmers Company Limited being a registered shareholder of six (6) shares;
2. That according to the official receipts issued to me by the said company my name appears as Macharia Karue;
3. That according to my identity card number 3092102/69 my name appears as David Kahuthu Gatere;
4. That I am one and the same person known by the said names Macharia Karue and David Kahuthu Gatere as appearing in my said documents;



5. That I make this affidavit in support of my application for correction of my names with the said Kieni East Farmers Company Limited now to read as appearing in my said identity card; and
 6. That the facts herein deponed to are true and from my personal knowledge, information and belief.”
28. It would appear that having lodged the Affidavit with the company the same was accepted and the Appellant then made an effort to reclaim Plot No 292 from the Respondent’s father. Like the Appellant had done to his step-brother, the Respondent’s father also lodged a complaint with the Police and the Appellant was equally charged in Nyeri SRM’s Criminal Case No 13 of 1989 with the offence of swearing a false Affidavit. Unlike his step-brother, the Appellant pleaded “Not Guilty” to the charge. Sometime after his trial began however, the Honourable the Attorney General entered a nolle prosequi and the proceedings were discontinued on 22nd August, 1989.
29. Feeling emboldened by the discontinuation of the Criminal proceedings against himself, the Appellant went back to the said Kieni East Farmers Company Limited. This time round, the Company appears to have agreed with the Appellant that the former Plot No 292 measuring some 1.62 Ha. ought not to have been consolidated with that of the Respondent’s father. Accordingly, the Appellant and the Company caused a re-survey of the land already registered in the name of the Respondent’s father and curved out the parcel of land formally registered in the name of the Appellant on 13th August, 2002.
30. Considering the circumstances under which the Appellant came to be registered as the proprietor of the said parcel of land, the Learned Trial Magistrate observes as follows at paragraphs 8 and 9 of the impugned Judgment:
- “8. Secondly, with respect to the acquisition of LR 292, the Plaintiff claimed that he bought the piece of land from the Kieni East Farmers Company Limited. He stated that he did not have the transfer forms or the documents with respect to the purchase as they got lost in Court files as he had two cases before Nyeri Law Courts. He produced a title deed issued on 13th August, 2002 in his name for LR 487. I have seen the receipts submitted before the Honourble Court by the Plaintiff for the purchase of Plot No 292. However, they are in the name of Macharia Karue. It is interesting to note that one of the receipts was issued in 1968. If indeed the Plaintiff started to use the name Macharia Karue in 1969, then why would he be in possession of a receipt in his “name” issued a year before he allegedly started using that name?
 9. With this in mind, the defendant availed a letter dated 21st October, 1988 by the Kieni East Farmers Company Limited addressed to the District Commissioner informing him that their Surveyor a Mr. Gatome had corrected them to wit that Plot No 292 was consolidated and is what is now LR No Naromoru/Naromoru/Block 1/173 owned by Geoffrey Gathuthi and not LR 31. The author further stated that Plot No 292 was excised from LR 173 and its new number is LR 487. They did not have any objection to the preparation and registration of transfer documents in the name of Geoffrey Gathuthi with respect to LR 173 and 31 respectively. The author also stated that the said Geoffrey had filed a civil suit with respect to LR 487 and therefore they did not recommend the preparation of the transfer documents during the pendency of the suit. The defendant availed pleadings from Nyeri CMCC No 139 of



1988 – Geoffrey Gathuthi Karaya v Kieni East Farmers Company Limited and David Kahuthu Gatere in which his late father sued the Plaintiff herein seeking in substance, the same prayers sought in the Counterclaim. The suit abated in 2001 when he regrettably passed away. Be that as it may, the Court has seen the green card for LR 31 with a title deed issued on 16th May, 1989 in the name of Geoffrey Gathuthi Karaya. The Defendant and his late brother were bequeathed LR 31 by way of transmission via succession cause upon the death of their father. How then could the Plaintiff have obtained registration of Plot 292 as it were in his name considering that there were decisions at the Government level to wit that he was not the person he was claiming to be?”

31. It was clearly on the basis of those considerations that the Learned Trial Magistrate proceeded to conclude that the Appellant had fraudulently acquired registration of the suit property in his name and proceeded accordingly to dismiss his suit.
32. From the material placed before this Court, it was difficult to find any fault with the conclusions reached by the trial Court. As we have seen hereinabove, the Respondent’s father had purchased several plots of land from the said Kieni East Farmers Company Limited sometimes around the year 1968. These were plot Nos. 290, 293, 294, 324 and 325. Sometimes in 1985, the Respondent’s father purchased another plot, being plot No 292 from George Gikandi Gatere whom the Appellant acknowledged to be his step-brother and who had all along been in occupation of the suit property.
33. It was apparent that upon purchase of the additional Plot No 292, the same was consolidated with the other 5 plots of land that were already in the name of the Respondent’s father and the same formed what became known as LR No Naromoru/Naromoru (Kieni East) Block 1/31 measuring approximately 11.02 Ha. The Respondent’s father was subsequently issued with a title deed for the said consolidated parcel on 16th May, 1989.
34. As it were the former plot No 292 had not been registered in the name of the Appellant’s step-brother. The same was instead registered in the name of one Macharia Karue. To enable the sale to be approved by the said Kieni East Farmers Company Limited which was still holding the records of the parcels of land, the Appellant’s step-brother swore an Affidavit claiming that he was also the person known as Macharia Karue in whose name the Plot No 292 was registered.
35. Some three (3) years later when the Appellant got wind of what had happened, he lodged a complaint against his step-brother who was charged and on his own plea of guilt, convicted for the offence of swearing a false affidavit contrary to Section 114 of the Penal Code, on 9th August, 1988.
36. As it turned out and as can be seen from Paragraph 27 hereabove, a year before his step-brother was jailed, the Appellant had equally sworn an exact similar affidavit on 6th March, 1987 wherein he asserted that he was also the same person known as Macharia Karue who had been registered as the owner of Plot No 292. On the basis of that Affidavit, the Appellant started claiming to be the owner of the suit property.
37. When the Respondent’s father heard of the claim, he like the Appellant before him, lodged a claim with the Police against the Appellant. The Appellant was subsequently also charged with the same offence as had faced his step-brother. The criminal trial was however discontinued by the State. Thereafter, the Appellant and the land buying company re-surveyed the land now registered in the name of the Respondent’s father and caused what was hitherto Plot No 292 to be registered in the Appellant’s name.



38. As it were, other than the Affidavit sworn by the Appellant, I was unable to find anything that was placed before the trial Court to demonstrate that the Appellant herein was also the person known as Macharia Karue. That name neither appears in his pleadings nor in his recorded statement both lodged in Court on 24th May, 2013. In the said statement, he avers that though the land was registered in his name on 13th August 2002, he has never taken possession thereof since his attempts to do so were thwarted by the Respondent's father who was claiming to have bought the same from his (the Appellant's) step-brother. The Appellant further asserts that the said sale was disapproved as he (the Appellant) was the only one who could validly deal with the parcel of land.
39. As it were, I was unable to find anywhere where it had been declared that it was only the Appellant who could deal with the suit property. From a perusal of the facts read to his step-brother on 9th August, 1988 when he was charged and convicted by the Court, it was apparent that the said Macharia Karue was another step-brother of the Appellant who had long passed away. It was the Appellant's complaint to the Police that he discovered that the land had been sold to the Respondent's father when he went to the land to try and sub-divide the same to give a portion to the widow of his step-brother.
40. Be that as it may, it was evident that following the disposition of the suit property to the Respondent's father, the same became consolidated and was on 16th May 1989 registered in his name as LR No Naromoru/Naromoru (Kieni East) Block 1/31 measuring 11.02 Ha. Where that process was found to have been tainted by any mistake or fraud, the resultant title could only be reversed through a lawful process. I did not think it was open to the Appellant to proceed in cahoots with officials of the land buying company and to purport to re-survey and sub-divide the land in the manner they did resulting in the title that was issued to the Appellant in the year 2002 without the Land Registrar giving a hearing to the Respondent's father.
41. At any rate, it was also apparent to me that as at the time the suit in the trial Court was instituted by the Appellant in the year 2018, the same was hopelessly time-barred. From his testimony before the trial Court, he had discovered the fraud allegedly committed by his step-brother and the Respondent's father in the year 1988. By his own admission, he has never been in possession and/or occupation of that portion of land ever since. By the time he filed this suit, some thirty (30) years had lapsed since the discovery of the alleged fraud.
42. As it were, Section 7 of the *Limitation of Actions Act* provides that an action to recover land may not be brought after the end of 12 years from the date on which the right accrued. This means that since the Appellant claims to have learnt of the fraud and the occupation of the land by the Respondent's father in the year 1988, the Appellant herein had 12 years from that time to seek to recover the land. Having waited for 30 years to do so, his claim was clearly dead on arrival and unsustainable in law.
44. As the Court of Appeal stated in *Gathoni v Kenya Co-operative Creameries Limited* (1982) KLR 104:
- “ ... The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
45. It follows in the circumstances herein that I was not persuaded that there was merit in this Appeal. The same is dismissed with costs to the Respondents.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 15TH DAY OF FEBRUARY, 2024.

In the presence of:



Mr. Macharia for the 2nd Respondent

Mr. Ng'ang'a holding brief for Nderi for the Appellant

Court assistant – Kendi

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J. O. OLOLA

JUDGE

