IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, M'INOTI & MURGOR, JJ.A)

CIVIL APPEAL NO. 36 OF 2017

BETWEEN

JEDIDAH WAMBUI KARANJA.....1ST APPELLANT

MARTIN THIRIMBU KARANJA.....2ND APPELLANT

(Legal Representatives of Mary Njoki Karanja Deceased)

AND

ESTHER NJOKI NDIRANGU.....1ST RESPONDENT

AMOS KINUTHIA NDIRANGU.....2ND RESPONDENT

(Legal Representatives of Peter Ndirangu Kinuthia deceased)

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (H.P.G Waweru, J.) dated 18th December 2013

in

HCCC No. 1678 of 2002

Formerly

CMCC No. 6474 of 2001)

****

JUDGMENT OF THE COURT

By this appeal the appellants **Jedidah Wambui Karanja** and **Martin Thirimbu Karanja** who are the legal representatives of their deceased mother **Mary Njoki Karanja** (Njoki) challenge the decision of the High Court at Nairobi (H.P.G. Waweru, J.) made on 18th December 2013 by which it was decreed as follows in favour of their uncle **Peter Ndirangu Kinuthia** (Peter) who was the plaintiff;

> ***"1. That it is declared that the 1st defendant wrongfully evicted the plaintiff from his own land parcel No. L.R. Muguga/Gitaru/1705, and the 1st defendant (and now the substituted 1st defendants) became a trespasser therein.***
>
> ***2. That the substituted 1st defendants shall vacate the plaintiff's land parcel L.R. Muguga/Gitaru/1705 within fourteen (14) days from the date of delivery of this judgment and give the plaintiff vacant possession thereof and in default they be forcibly evicted thereofrom and the plaintiff put into possession.***
>
> ***3. That a permanent injunction be and is hereby granted restraining the substituted 1st defendants from interfering with the plaintiff's quiet possession of his land parcel L.R. No. Muguga/Gitaru/1705.***

4. That the plaintiff be and is hereby awarded general damages as against the 1st defendant in the sum of Kshs. 800,000.00.

5. That the plaintiff's case against the 2nd defendant has not been proved to the required standard and is hereby dismissed, but with no order as to costs.

6. That the 1st defendants' counterclaim be and is hereby dismissed with costs.

7. That the plaintiff be and is hereby awarded costs of its suit against the defendants."

That judgment and decree was the culmination of a suit filed by Peter seeking the orders eventually granted following his and his family's forceful eviction from his L.R. No. **Muguga/Gitaru/1705** and the destruction of his houses built thereon. His entire worldly possessions, including carpets, sofa sets, radios, clocks, bicycles, clothes, books, fridge, cooker, utensils, beds and the likes, were either out rightly destroyed or left strewn all over the place. For the little that Peter tried to salvage, Njoki had him arrested and prosecuted for alleged theft, though those charges were later dropped. It is common ground that the eviction was carried over by Njoki and members of her immediate family together with hirelings while policemen procured for the purpose kept watch to ensure the eviction was completed, after which Njoki took possession of the said parcel **1705.**

In evicting Peter as she did, Njoki was armed with a court order which had decreed her to be the rightful owner of the adjoining L.R. No. **Muguga/Gitaru/805**. This was in High Court Succession Case **No. 1735 of 1995** which ordered that Peter and his brother Geoffrey be evicted therefrom. Their appeal to this Court was dismissed. It was pointed out to the police, and had been brought to Njoki's attention on many occasions, that Peter's property being **No. 1705** was different and distinct from Njoki's **No. 805**, but she would hear none of it. The position she took, which has been maintained by the appellants throughout, is as pleaded in their amended statement of defence;

"4(b) The 1st and 2nd defendant denies (sic) paragraph 6 of the amended plaint and avers that land parcel Title No. Muguga/Gitaru/804 was taken by the government together with land title No. Muguga/Gitaru/803 for a road construction and affected parties were fully compensated.

(c) The title No. Muguga/Gitaru/1705 in possession of the plaintiff is part of land title No. Muguga/Gitaru/805 which the plaintiff in liaison with the 3rd defendant, land registrar Kiambu subdivided unlawfully and issued title to the plaintiff despite existence of court orders and judgments (sic).

(d) The plaintiff therefore owns no land of its (sic) own save that he is using illegal title Deed to intimidate, disturb, harass, interfere and engage 1st and 2nd defendants into unendless (sic) litigation for no justifiable cause.

5(b) The 1st and 2nd defendants denies having wrongfully taken possession of land title No. Muguga/Gitaru/804 renamed plot No. 1705 and avers tht the defendants and OCS Kikuyu were executing a lawful court order as the plaintiff was a mere impostor on land parcel Muguga/Gitaru/805."

Their further case was that the subject matter of the suit *"land parcel No. Muguga/Gitaru/1705 was litigated …."* in some earlier

previous cases including **Civil Appeal No. 270 of 1997** before this court and that Peter was therefore *"a vexatious litigant who ought not be entertained as he has not come to court with clean hands."* They denied all the particulars of malice, trespass and damage alleged in the plaint and asserted that the house in question belonged to them. They mounted a counterclaim by which they claimed that the Government acquired former parcel *"Muguga/Gitaru 265 later renamed Muguga/Gitaru/803-804 and 805"* and that Peter and his brother were the proprietors of the latter two plots which were taken in full and the two were compensated and that as Peter was thereby rendered landless, they *"invited him as a relative to stay on the plot"* No. 805. They went on to plead that;

"6. In 1994 the defendant in collusion with the land registrar Kiambu fraudulently subdivided the plaintiff's land parcel Title No. Muguga/Gitaru/805 unlawfully and created Title

No. Muguga/Gitaru 804 measuring by area 0.424 acres and again they renamed it as Muguga/Gitaru/1705 in the name of the defendant.

7. The plaintiff's deceased mother, the 1st defendant in the amended plaint realizing the fraudulent acts of the defendant moved court and got eviction orders of the defendant on her land parcel No. Muguga/Gitaru/805 as the defendant was a mere impostor on the said land.

PARTICULARS OF FRAUD

(a) Accepting Title No. Muguga/Gitaru/1705 while knowing he do not own any land.

(b) Misleading the land registrar Kiambu that land Title No. Muguga/Gitaru/805 belongs to him thus causing unlawful subdivision of the same and consequent issuance of Title No. Muguga/Gitaru/1705.

(c) Purporting to own land parcel No. Muguga/Gitaru/804 which does not exist on ground save in paper work and the said defendant was compensated a sum of Kshs. 493,957 by the Government in full.

5.The plaintiffs avers that title No. Muguga/Gitaru/1705 measuring 0.121 Ha. Is part of land parcel No. Muguga/Gitaru/805 taken by the defendant through fraudulent means and now claims return of the same and title in his possession NO. Muguga/Gitaru/1705 be cancelled."

They therefore prayed that titles No. Muguga/Gitaru/1705 be cancelled and the 0.121 ha comprised therein do revert to them, plus damages and costs.

The evidence was taken before Aganyanya, J. (as he then was) but he was elevated to this Court before delivering judgment in the matter. The record shows that the file was placed before then Chief Justice Mutunga who directed that Mwera, J. (as he then was) do deliver judgment instead of the trial commencing ***de novo***. As fate would have it Mwera, J. was himself shortly thereafter elevated to this Court and those directions were finally given effect to by H. Waweru, J who wrote the impugned judgment.

The appellants by their self-crafted memorandum of appeal complain that the learned Judge erred by failing, to uphold *res judicata* and estoppel; failing to afford them a fair hearing and in particular failing to consider their defence, counterclaim and documentary evidence and preferring the plaintiff's witnesses' contradictory testimony; awarding Kshs. 800,000 without assessment or valuation; considering the plaintiff's professional witnesses testimony without their input; relying on the record of a previous judge and relying on the report of the Lands Registrar and Surveyor dated 6th May 2005.

Both parties filed written submissions and we directed when the matter came before us with the appellants were present but the respondents absent, that the appeal be disposed of by way of those submissions. We have carefully studied and considered the said submissions, namely the appellants' dated 3rd July 2017 and their further ones dated 18th April 2018 and the respondents' dated 11th October 2017. The issues that emerge from the grounds of appeal and the said submissions can be summarized as follows;

(i) Whether the suit was *res judicata* or otherwise barred by estoppel.

(ii) Whether the appellant were denied a fair hearing of their case.

(iii) Whether the plaintiff's case was contradictory and inadequate.

(iv) Whether the expert evidence was wanting for non-involvement of the appellants.

(v) Whether the learned Judge erred in deciding the case relying on previously recorded proceedings.

On the question of whether the suit before the learned Judge was *res judicata*, it is worth recalling that the principle is simply that no party is allowed to relitigate, and no court can competently entertain, an issue that has previously been heard and determined by a court of competent jurisdiction in an earlier suit. That is the essence of section 7 of the Civil Procedure Act 2010;

"7. 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.

It is not in dispute that as between the parties, and their deceased parents before them, there has been a long-standing feud over land and all manner of suits had been filed between them prior to the one heard by the learned Judge. The appellants raised objection to that suit on that basis and in fact listed no fewer than **eight** cases to make their point. Did the prior existence of those suits render the suit before the learned Judge *res-judicata* or otherwise stop the court from dealing with and determining the same? The learned Judge addressed this issue as follows;

"54. I have looked at the papers placed before the court concerning the suits mentioned by the 1st defendant that involved the plaintiff and the 1st defendant. As already seen Nairobi High Court Misc. Case No. 1735 of 1995 was an application by the plaintiff and his brother for revocation of the grant that had given parcel NO. 805 to the 1st defendant. Their application was dismissed. They appealed to the Court of Appeal vide its Civil Appeal No. 270 of 1997, which was also dismissed.

55. Nairobi HCCC No. 1572 of 1999 concerned an easement which the plaintiff herein was seeking over parcel No. 805 in order to access his own parcel No. 804.

56. The plaintiff herein filed Nyeri HCCC No. 76 of 2003 after filing a notice of withdrawal of the present suit. That notice of withdrawal was rejected by the court and the present suit proceeded to hearing. He apparently withdrew the Nyeri case thereafter.

57. The present suit arose out of the eviction of the plaintiff, as he has pleaded, from his own land. That particular issue has not been litigated before between him and the 1st defendant. I am thus not satisfied that the present suit is res judicata, vexatious or an abuse of the process of the suit."

We have taken the time to peruse the papers on record regarding those previous suits and we find that we cannot but agree with the learned Judge that they could not form a firm or proper basis for an objection on the basis of *res judicata* or estoppel. The matter before the learned Judge was specific to the issue of wrongful eviction and destruction of Peter's property on **LR No. 1705**. This was a fresh cause of action which had not been raised in any of the previous suits and had therefore never been conclusively or at all determined. It would follow, accordingly, that the appellants' complaints that the learned Judge in deciding the case disregarded earlier decisions of this Court and other judges of the High Court is entirely without foundation, and we reject them.

Turning now to the complaint that the learned Judge did not 'offer' or afford the parties a fair hearing, we have been quite unable to find the basis for it. From the record, the parties were given all the opportunity to present evidence on their own behalf and the appellant Jedidah did testify-at length - and produced evidence. She had also, like Njoki before her, taken time to searchingly and thoroughly cross-examine the plaintiff and the witnesses he had called in proof of his case. The appellants in addition called one other witness, their sister **Naomi Wanjiku Karanja** (DW1) at the end of whose testimony the appellants closed their case on 31st March 2009. They did not seek to call any other witnesses and from what we discern from the judgment of the learned Judge, he carefully considered the respective cases of the parties and analyzed the evidence tendered in a careful and judicious manner before arriving at his conclusions. We have not seen anything raised in the submissions, and there is nothing in the record, which we have scrutinized carefully, that at all suggests any infrigment of the appellants' sacrosanct fair hearing rights.

We think that, taken as a whole, the proceedings before the High Court and the handling of the case by the learned Judge did conform with ***Article 50(1)*** of the Constitution which provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court expected to be independent and impartial. We think that the appellant's reliance on ***Article 47*** on fair administrative action with regard to the actions of the surveyors is misconceived as their actions do not implicate the appellants' fair hearing before the court.

Regarding the learned Judge's consideration of the evidence, the appellant's contention is that the learned Judge relied on the plaintiff's and his witnesses' evidence which, according to the appellants, was contradictory. We have gone through the testimony of those witnesses and we have not been able to discern any material contradictions or inconsistencies. The general thrust of their evidence establishes quite consistently that the plaintiff before the High Court was the registered owner of **LR No. 1705**. This parcel came into being after he surrendered the title of his parcel **No. 804,** part of which was acquired by Government, leaving about 0.298 Acres which constituted **LR No. 1705**. It existed as a separate independent portion side by side with the appellant's **LR No. 805** which measures about 0.424 acres. Peter and his brother had in Nairobi High Court Misc. Case **No. 1735 of 1995** applied for a revocation of the grant under which LR 805 was given to the appellants but their application was dismissed as was their appeal against that dismissal. That was Civil Appeal No. 270 of 1997 before this Court.

After the dismissal of that appeal, an order was issued by the High Court in Misc. **No. 1735 of 1995** for the eviction of Peter and his brother from **805**. Now, it turns out that Peter was never in occupation of **805** having built and was living on his own **L.R. 1705**. The appellants do not deny, and both Jedidah and her sister did testify that they are the ones who, with the aid of people they had hired, effected the eviction of Peter and the destruction of the house and other structures. They did so all along maintaining that the said structures were on **805** and adamantly denying the existence of **L.R. 1705** which they considered to be but a fiction.

Under those circumstances, and given the weight of evidence that was tendered for the plaintiff, we think that it was inevitable that the learned Judge would find the case for trespass and wrongful eviction proved to the required standard. The evidence before him was cogent and led to that conclusion and the learned Judge cannot therefore be faulted.

The appellants in insisting that LR 1705 did not exist or was otherwise fraudulently created bore the burden of adducing evidence of such fraud. They also ought to have called expert testimony on the issue of the delineation and demarcation of the portions in question, but they did not do so. The plaintiff called **Jonathan Ndirangu Kingori** (PW1) who was the Land Registrar, Kiambu. He recounted the role he played in accompanying the District Surveyor and District Head Office Valuer to establish the position in the ground with regard to portion numbers 803, 804 and 805 as instructed by the Chief Land Registrar. His brief was to ensure that the two officers did a professional job and his evidence is that they did and they prepared a professional report. PW2 was **Simon Gataru Njikia,** the Kiambu District Land Surveyor and he delegated the task of visiting the site to his deputy and he was privy to the report that was prepared to the effect that **1705** was totally independent of **805**.

That report, dated 4th May 2005 was prepared by **Christopher M. Makau** (PW3) and tendered in evidence. PW4 was **John Muragori,** a qualified surveyor who was working with Geometrics Services, a Surveyors' firm. They were served with a court order requiring them to prepare a report on the demolished property. They did so after visiting the site. The appellants' complaint that being private surveyors they had no mandate to prepare such a report is plainly misconceived. As we have stated before, it was open to the appellants to commission a private surveyor of their own but they did not do so.

Also called was **Rosine Ndile Mule** (PW5) who was a Senior Registrar of Titles. She acted on instructions from the Chief Land Registrar for a visit to the site of **L.R 805** and **1705** to ascertain the correct position on the ground. Acting on a report by the District Surveyor, she prepared a report to the Deputy Registrar of the High Court in a letter dated 6th May 2005. We consider the said letter to be an accurate summary of what was found to be the position on the ground and therefore set it out herein in full;

> ***"6th May, 2005***

Deputy Registrar

High Court of Kenya

NAIROBI

Dear Sir,

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1678 OF 2002

PETER NDIRANGU KINUTHIA.....PLAINTIFF

VERSUS

MARY NJOKI KARANJA.....DEFENDANT

I refer to the above matter and to an order issued on 23rd day of February, 2005 and served upon the Chief Land Registrar wherein the said Chief Land Registrar was ordered to carry out investigation as to the correct position of L.R. Muguga/Gitaru/1705 and prepare a report within 2 months.

Muguga/Gitaru 265 was on 14th December, 1994 subdivided into 3 portions namely Muguga/Gitaru 803, 804 and 805. The respective acreage of each subdivision was each 0.424 acreas (see attached copy of the register)

On 4th October, 2001 Muguga/Gitaru/804 was subdivided into two portions. One portion was for a road reserve and the remainder was given Land Reference Number Muguga/Gitaru 1705 (see attached copy of register).

Land reference numbers Muguga/Gitaru 803 and 805 have never been subdivided (see attached copies of register).

The district land registrar, Kiambu made a site visit of the suit premises in the company of the district surveyor and the district land officer/valuer and their site inspection report is as follows:-

- ***Parts of land parcels Muguga/Gitaru 803 and 804 were taken up by the new Nairobi/Nakuru Highway (see the area shaded blue on the attached sketch)***
- ***The remaining portion from land parcel number Muguga.Gitaru 804 was given a new number Muguga/Gitaru/1705 and measures approximately 0.121 hectares on the ground (see area shaded on the sketch plan) in black on the sketch***
- ***Land parcel Muguga/Gitaru 805 is as shaded in black on the sketch plan and was found to measure 0.171 hectares on ground.***
- ***Land parcel numbers Muguga/Gitaru 1705 and 805 are independent land parcels on the ground.***
- ***I have attached a copy of the registry index map that shows the above mentioned subdivisions.***

R.N. MULE

FOR: CHIEF LAND REGISTRAR"

(Our emphasis)

The last expert or professional witness called was **Thomas Opondo**, (PW8) who was a senior surveyor. He was served with a court order issued by the Chief Magistrate's Court at Milimani in CMCC No. 6474 of 2001 requiring him to point out the exact location of beacons demarcations of No. 804. His testimony is that he visited the site in the company of two support staff, a driver, and six administrative policemen. Both Peter and Njoki were present.

Having ourselves considered the evidence of all these witnesses as is our duty to do as a first appellate court which proceeds by way of re-hearing and must independently reevaluate the evidence before drawing our own factual inferences (***SELLE vs. ASSOCIATED MOTOR BOAT CO. [1968] EA 123)***, we come to the same conclusion as did the learned Judge that the expert testimony was all consistent that **LR 805** and **1705** are two separate pieces of land existing side by side. The destruction of Peter's goods in the course of the demolition of his house built on his land was

indeed a grave act of malicious and imprudent destruction of private property under the guise of eviction. A man's house is his castle and in this case the appellants violated the Peter's right to private property by a wholly unwarranted invasion which must attract the full indignation of the law.

We think that the learned Judge's reasoning before arriving at the sum of Kshs. 800,000 compensation was entirely justified;

> ***"50. I find that plaintiff was not evicted from the 1st defendants parcel No. 805 but from his own parcel No. 1705. In the process his house and other buildings were brought to the ground.***
>
> ***51. Issue NO. 7 is, whether the plaintiff has proved his case to the required standard, and if so, what reliefs is he entitled to? As already set out above, I am satisfied on a balance of probability that the plaintiff was wrongfully evicted from his own parcel of land, L.R. No. Muguga/Gitaru/1705. In the process his houses were demolished. He has not quantified the value of his houses and other properties that may have been destroyed in the process, as he should have done. That aspect of his suit should have been a special-damage claim. But it cannot be gainsaid that he suffered a terrible injustice. His houses were demolished. His other worldly possessions were apparently strewn about in the compound. It is possible that he salvaged some or most of his possessions and took them to his rented premises. He has been kept out of his property all these years in which the 1st defendant has been in trespass thereof. There cannot be any doubt that he is entitled to general damages for trespass."***

We think that the nature of the violence and malevolence visited upon Peter and his property and the contumacious manner in which the appellants went about it, all the while ignoring pleas and entreaties, supported by clear evidence, that the houses were not on their land, and denying the obvious fact that Peter had title to 1705, called for the quantum of damages awarded even though there were no comparable cases cited by the learned Judge. We think that the circumstances of the case were quite peculiar, for rarely do citizens behave with such wanton and bold impunity in invading another's land and destroying his house and other property as happened in this case. Had Peter attached monetary value to the numerous items destroyed or lost as listed in the amended plaint and claimed the same by way of special damages, the same would have been a substantially larger sum.

The same not having been specifically pleaded and proved however, they did not lie and the learned Judge properly made no award thereunder and the appellants have literally got away scot free on that score. They should consider themselves fortunate.

The upshot of our consideration of this appeal is that it is without merit and must fail. We accordingly dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 8th day of February, 2019.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR