



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME, & OTIENO - ODEK, J.J.A.)**

**CIVIL APPEAL NO. 36 OF 2014**

**BETWEEN**

**PETER NGUGI KABIRI .....APPELLANT**

**VERSUS**

**ESTHER WANGARI GITHINJI ..... 1<sup>ST</sup> RESPONDENT**

**FLORAH WANJIKU GITHINJI ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Nyeri,*

*(Ombwayo, J.) dated 11<sup>th</sup> October, 2013*

*in*

***H. C. (L&E) Civil Case No. 111 of 2010***

**JUDGMENT OF THE COURT**

1. The appellant Peter Ngugi Kabiri is a brother to Githinji Kabiri (deceased). The respondents are two widows of the deceased. The suit properties in dispute are **LR Maragwa/Ridge 559** measuring 3.15 hectares registered in the name of the 1<sup>st</sup> respondent and **LR Maragwa/Ridge/560** measuring 3.15 hectares registered in the name of the 2<sup>nd</sup> respondent. Prior to registration of the two properties in the names of the respondents, the two parcels of land were one large parcel of land known as **LR Maragwa/Ridge/18** measuring 6.3 hectares which was registered in the name of the deceased Githinji Kabiri. After the death of the deceased, the large parcel of land was sub-divided into two equal portions to give rise to the two parcels registered in the names of the respondents.
2. The background facts relevant to this appeal are that the appellant by a plaint dated 16<sup>th</sup> September 2010 and filed in court on 24<sup>th</sup> September 2010 lodged High Court Civil Suit No. 111 of 2010 against the respondents claiming to be entitled to one third of the suit properties. In his plaint, he averred that the deceased Githinji Kabiri was his elder brother and the deceased was registered as proprietor of the large parcel of land known as LR Maragwa/Ridge/18 measuring 6.3 hectares to hold in trust for himself, the appellant and their common mother the late Mary Njoki Kabiri who had been identified by the government as landless and was considered for allocation of settlement land in 1962 but because she did not have an identity card, the land was registered in the name of her elder son the late Githinji Kabiri as trustee for the family.
3. The appellant's claim against the respondents is that the suit properties are trust property and the

respondents are registered as owners of the two disputed properties as trustees for themselves and the appellant in equal shares; in the alternative, the appellant claims customary law trust of one third share in each of the two suit properties. It is the appellant's contention that the suit properties should be sub-divided and one third of thereof measuring 2.1 hectares (5 acres) be transferred to him.

4. The respondents in their statement of defence averred that the appellant was non suited and his claim was statute barred under the provisions of **Section 7** of the **Limitation of Actions Act**; that the registration of the respondents as owners of the suit property was pursuant to Nairobi Succession Cause No. 174 of 1994, in the Matter of the Estate of Githinji Kabiri (deceased) and the appellant's claim if any, should be presented in the Succession Cause; that the appellant's claim has been the subject of judicial determination in Thika Resident Magistrate's Civil Case No. 26 of 1990 and Nairobi High Court Civil Appeal No. 213 of 1992 between the same parties to this suit. These two suits were never heard and determined on merit.
5. Despite the earlier suits, the appellant filed an Originating Summons being Nairobi HCCC No. 2061 of 1995 against the respondents. The Originating Summons was premised on the doctrine of adverse possession and customary trust. The same was dismissed for want of prosecution and instead of filing an application to set aside the order dismissing the suit and reinstate the Originating Summons, the appellant file Nyeri High Court Land and Environment Case No. 111 of 2010 which is the subject of the instant appeal and which suit was struck out by the High Court (Ombwayo, J.) as an abuse of the process of court.
6. The thrust of this appeal is that the High Court erred in striking out the appellant's Nyeri High Court (L&E) Civil Case No. 111 of 2010, without hearing the suit on its merits.
7. Analysis of the High Court judgment shows that on the issue whether the appellant's suit raises triable issue, the court observed that the suit raises the triable issue of Kikuyu customary trust; the court also stated the fact that the appellant occupies five (5) acres of the land in dispute and has been in such occupation for a long period of time and that the respondents are the registered proprietors raises the triable issue of adverse possession; that the court should at least be told during full trial how the appellant came to be in possession of the five acres and continues to utilize the same; that the appellant's claim of overriding interest in accordance with **Section 30** of the **Registered Land Act** (repealed) is an issue to be tried by law; on the issue whether the appellant's suit was frivolous and or scandalous, the learned judge found that the suit was neither frivolous nor scandalous. Upon making the foregoing findings, the learned judge proceeded to evaluate the appellant's suit as filed to determine if it was an abuse of the court process; upon evaluation, the learned judge held that the appellant's plaint dated 16<sup>th</sup> September, 2010 and filed on 24<sup>th</sup> September, 2010, was an abuse of court process and he struck it out with costs.
8. In striking out the plaint as an abuse of the court process, the learned judge expressed as follows:

*“The Originating Summons dated 15<sup>th</sup> June, 1995, in HCCC No. 2061 of 1995 was taken out by the plaintiff through the firm of Muguku Muriu & Co. Advocates. In an application dated 6<sup>th</sup> and filed on 13<sup>th</sup> October 2005 (sic) the defendant sought the dismissal of the same for want of prosecution and for failure to comply with an order by the court that the plaintiff pays Ksh. 2,500/= as thrown out costs and fix the suit for hearing within 30 days of the order. On the 19<sup>th</sup> May 2004, the application was placed before Justice Ojwang for hearing who ordered that the same be placed before Justice Nyamu. Justice Nyamu ordered that the plaintiff to pay Ksh.2, 500/= before fixing the same for hearing. The plaintiff ignored the court order and took a lackluster attitude towards the case. When the matter came up in court on 1<sup>st</sup> October 2007, neither the plaintiff nor his counsel appeared in court despite counsel having been served with the hearing notice through registered post on 5<sup>th</sup> June 2007. In a nut shell, the Originating Summons was dismissed by Justice D.K.S. Aganyanya (retired) on grounds that the plaintiff had lost interest in the case and did not file any response or appear in court. Instead of filing an application to review or set aside the decision of the court by Justice Aganyanya, the plaintiff filed the current suit. The plaintiff has not indicated that he has paid the costs of Ksh. 2,500/= as ordered in the Originating Summons. He has not explained why he abandoned the Originating Summons in Nairobi HCCC No. 2061 of*

**1995. I do hold that the actions by the plaintiff amount to abuse of the process of the court and ultimately allow the application dated 10<sup>th</sup> August, 2011 that the plaint dated 16<sup>th</sup> September 2010 and filed on 24<sup>th</sup> September, 2010 be struck out for being an abuse of the process of the court”.**

9. Aggrieved by the decision to strike out the his plaint, the appellant has lodged this appeal raising *inter alia* the following grounds:
  - a. **that the learned judge erred in law in holding that the suit was an abuse of the process of court which is a procedural matter while he had found all other substantive legal issues in favour of the appellant;**
  - b. **the learned judge erred in law in finding that the suit was an abuse of process of court merely because the appellant had failed to set aside the dismissal of Nairobi Originating Summons HCCC No. 2061 of 1995;**
  - c. **that the appellant was not heard and the suit has never been determined on its merits;**
  - d. **that the learned judge erred in failing to invoke the provisions of Article 159 (2) (d) of the 2010 Constitution which provides that justice shall be administered without undue regard to technicalities;**
  - e. **the learned judge erred in law in striking out the appellant’s suit when he had found that the suit raises triable issues;**
  - f. **the learned judge erred in law in visiting lapses of counsel on the appellant;**
  - g. **the learned judge erred in law in not making any finding whether the appellant’s suit was statute barred under Section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.**
  - h. **the learned Judge erred in failing to determine the appellant’s claim under Kikuyu customary law trust and his claim of overriding interest in respect of the five (5) acres he has been occupying since 1962.**
10. At the hearing of this appeal, learned counsel, Mr. Muguku Muriu, represented the appellant while learned counsel Ms Wairimu Mwangi appeared for the respondents. Both parties filed written submissions in the appeal.
11. During oral highlight of the submissions, counsel for the appellant reiterated the grounds of appeal emphasizing that the appellant has never been heard on merits of his case; that having found that the appellant’s suit raised triable issues, the High Court erred in striking out the suit; that the appellant has been in occupation of five (5) acres the suit properties since 1962 and his claim for customary trust and overriding interest have never been determined on merit; that the learned judge correctly held that the suit between the parties is not *res judicata* and the appellant’s claims are neither frivolous nor scandalous; that the upon the Originating Summons having been dismissed, the appellant had the legal option of either setting it aside or filing a fresh suit and he exercised the option to file a fresh suit; that the Civil Procedure Act and Rules allowed the appellant to file a fresh suit subject to the law on limitation; that the appellant having been in possession of the suit property for over 50 years and still being in possession, the limitation provisions are inapplicable; that the appellant being in possession of five (5) acres of the dispute property has an overriding interest that the learned judge erred in not taking into account. The appellant urged this Court to set aside the ruling striking out the plaint and make an order that Nyeri HCC( L&E) Civil Case No. 111 of 2013 do proceed for hearing on its merits.
12. Counsel for the respondents in opposing the appeal submitted that the dispute between the parties is *res judicata*; that the appellant has been in court since 1995 and has never prosecuted his claim; that it is over 28 years since the dispute arose and it would be unfair and unjust for the appellant to keep the respondents in court for over 28 years without prosecuting his case; that the dispute

- between the parties should be addressed in the Nairobi Succession Cause in the Matter of the Estate of the deceased; that the appellant should have filed an application to set aside the order that dismissed his Originating Summons instead of filing a fresh suit; that the appellant was guilty of inordinate delay of over 10 years before filing a fresh suit after his Originating Summons was dismissed; counsel urged this Court to note that 28 years of being taken round and round in various courts without prosecuting his claim is an abuse of the process of court and delayed justice to the parties. This Court was urged to dismiss the appeal with costs.
13. We have considered the grounds of appeal as well as the written and oral submissions by learned counsel in this matter. There are various principles of law that fall for consideration in this appeal namely the right to be heard on merit; litigation must come to an end; a litigant must take steps to prosecute his claim promptly; no party is allowed to abuse the court process; justice must be administered without undue regard to technicalities and the need for substantive justice between the parties.
14. It is not in dispute that the appellant's claim has never been heard on merit since 1995. It is also on record that the appellant delayed in prosecuting his claim despite the Originating Summons having been fixed for hearing before the High Court; it is not in dispute that the Originating Summons was dismissed for non attendance on the part of the appellant's counsel on the date scheduled for hearing; it is not in dispute that the appellant is still in occupation of five (5) acres of the disputed properties and he has lived thereon for over 50 years.
15. A right to a hearing is a fundamental right and as this Court stated in the case of **Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 others, Nyeri C.A. No. 18 of 2013,**

***“The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law”.***

16. On the facts of this case, a balance needs to be struck between the right to be heard and the principle that a litigant should prosecute his claim promptly and there should be no abuse of the court process. We note that for over 28 years, the appellant's claim has not been heard and determined on merit. The learned Judge correctly found that issues of customary trust, overriding interest and limitation period can only be determined after a full hearing of the case. On our part, we take note that the appellant is in actual physical occupation of five (5) acres of the suit properties; we have considered that striking out the appellant's suit still leaves him in possession of part of the suit properties and the respondents cannot evict the appellant without instituting a suit against him. Practical and substantive justice dictate that it is prudent that the dispute between the parties should be resolved and determined through a full hearing on merit. The right to be heard is a fundamental principle of the rule of law and in striking out the appellant's suit without hearing on merit, the learned judge erred. The learned judge also erred in failing to give due weight and consideration to the fact that the appellant has been in occupation of the part of the suit property for over 50 years and continues to be in occupation and the possessory right of the parties to the suit property cannot be determined without a full hearing. For these reasons, this appeal has merit and we hereby allow the same.
17. On costs, we reiterate that costs are at the discretion of the court. The delay in prosecuting his claim for 28 years has largely been caused by lethargy on the part of the appellant. It is inequitable and unconscionable for a party to drag another in court and then take a lackluster approach and be indolent in prosecuting his claim; this is akin to holding another at ransom before the courts. For this reason, we order that the appellant be and is hereby condemned to pay the respondents costs both at the High Court and before this Court.
18. The final orders of this Court are that we hereby set aside the Ruling and Order of the High Court (Ombwayo, J.) dated 11<sup>th</sup> October, 2013; we reinstate Nyeri High Court (L& E) Civil Case No. 111 of 2010 and order that the case proceed to full hearing on merit. This matter having been in court for over 28 years, we order that Nyeri HC (L&E) Civil Case No. 111 of 2010, be mentioned before the High Court within 60 days of the date of this Judgment for the Judge to give directions for hearing of the case on priority basis. The appellant shall pay the respondents' costs at the High Court and before this Court.

*Dated and delivered at Nyeri this 18<sup>th</sup> day of March, 2015.*

***ALNASHIR VISRAM***

***JUDGE OF APPEAL***

***M.K. KOOME***

***JUDGE OF APPEAL***

***J. OTIENO - ODEK***

***JUDGE OF APPEAL***

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**