Kariuki v Koigi & another; Ngari (Interested Party) (Environment & Land Case 1120 of 2014) [2024] KEELC 5992 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5992 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1120 OF 2014

AA OMOLLO, J

SEPTEMBER 19, 2024

BETWEEN

WAMBURU KARIUKI ..... PLAINTIFF

AND

WAMBUI KOIGI ..... 1ST DEFENDANT

GITHINJI WACHEGE ..... 2ND DEFENDANT

AND

GEORGE NJUGUNA NGARI ..... INTERESTED PARTY

RULING

1. The interested party George Njuguna Ngari moved this court vide the application dated 15th January, 2024 and brought under the provisions of Sections 1A, 1B, 3A, 34 and 63 of the *Civil Procedure Act* and Order 1 of the *Rules*. He seeks for orders;

    1. That the Honourable Court be pleased to certify this application urgent and to hear the same exparte initially due to the said urgency.

    2. That the Honourable Court be pleased to stay the execution of the decree extracted from the judgment of this court delivered on the 24th June, 2021, pending the interpartes hearing of this application.

    3. That the Honourable Court be pleased to set aside the judgment of this court delivered on the 24th June, 2021 together with all consequential orders.

    4. That the Honourable Court be pleased to grant leave to the Interested Party to be joined as a Defendant in this suit.

    5. That the Honourable Court be pleased to order that this suit be heard de novo and on merit.

2. The application was based on several grounds listed on its face. Inter alia;

    a. That the Interested party is the occupier of and has extensively developed, land parcel No. Ngenda Gatukuyu T.258 since 1985 under the mistaken belief that he was developing his own land parcel No. Ngenda Gatukuyu T 241.

    b. That neither the 1st Defendant who sold the suit land to the 2nd Defendant or the 2nd Defendant who have been ordered to move out of land parcel No. Ngenda Gatukuyu/T 258 is and has ever been in possession of land parcel No. Ngenda Gatukuyu/T 258.

    c. That the 2nd Defendant's husband purported to buy land parcel No. Ngenda Gatukuyu/T 258 has all along actually been in possession of land parcel No. Ngenda Gatukuyu/T 241 which has too developed and also mistakenly believed to be parcel No. Ngenda Gatukuyu/T 258.

    d. That the Plaintiff has all along been aware since 1985 that the Interested Party has been in occupation of and was developing land parcel No. Ngenda/Gatukuyu/T.258 and yet the Plaintiff neither stopped the Interested party from undertaking the development thereon nor did he join the Interested Party to this suit,

3. The Applicant also swore an affidavit in support of the application. He deposed that he occupies and has extensively developed the suit property Ngenda/Gatukuyu/T.258 which he confused for Ngenda Gatukuyu/T 241. He avers that he only discovered this mix-up in 2015 when he applied for electricity and Kenya Power refused to supply him since he was not the owner of T.258. That he became aware of this suit on 5th December 2023.

4. That on hearing of this mix-up, he undertook a search and learnt the two parcels are of same size and neighbours each other. The Applicant continued to state that he started negotiating with the 2nd Defendant who was the registered owner of Ngenda Gatukuyu/T 258 Ngenda Gatukuyu/T 258 so they could switch the titles as the 2nd Defendant has also developed T.241. Unfortunately, the 2nd defendant died in May, 2022 before the negotiations were completed.

5. It is deposed by the interested party/Applicant that he and his mother have lived on T.258 since 1985 and no one has ever stopped them from occupying or developing the said land. That the plaintiff lives on the same locality of Gatukuyu/T.258 and has always been away of their presence on the land. He asserts that it is only constitutional that the judgment entered he set aside. He also relied on the documents annexed to the supporting affidavit.

6. No one responded to the application. Ms. Gulanywa Jonathan & Co. Advocates did a letter dated 3rd May, 2024 and filed in the CTS. In the letter, Counsel stated that she no longer had instructions as the plaintiff is deceased. She advised the Applicant to serve the family of the plaintiff with the application. The Applicant has pleaded that the 2nd defendant died in May, 2022 and that none of his family has taken out letters of administration to succeed him.

7. The Applicant filed written submissions dated 30th April, 2024. He cited the provisions of Order 12 rule 7 of the *Civil Procedure Rules* which states thus;

> " Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

8. He also restated that provisions of Section 34(1) & (3) of the *Civil Procedure Act* thus;

> "(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
>
> (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court."

9. Thus the Applicant submits that as a non-party who could be a representative of any of the parties in the suit, has locus standi to apply to the court for the discharge of a decree that has been issued against a defendant but which is being executed against him (the non-party). Discharge for the purposes of the application before court means setting aside.

10. On the merit of the application, he submits the facts deposed have not been controverted by any of the Respondents. He cited the case of *Maina v Mugiria* (1983) EA 78 which held that there is no limit in exercise of the judge's discretion, the discretion is intended to avoid hardship or injustice from excusable mistake or error but not to assist a party in obstructing or delaying the cause of justice.

11. I note that the application is undefended but the reasons for not doing so come out of the Applicant's pleadings and the letter of plaintiff's counsel. The Applicant pleaded that the 2nd Defendant who was the registered owner of the suit property is deceased as of May, 2022. The plaintiff's Counsel has also stated the plaintiff is dead. The Applicant deposed that the plaintiff lived in the same locality where the suit property is situated. Thus an inference is drawn that the Applicant must be aware of the demise of the Plaintiff.

12. The applicant has brought the application almost two years post the death of the 2nd defendant. He did not take steps to cite the family of the 2nd defendant before bringing the present application. Since the plaintiff is also dead, the court cannot make orders against the deceased parties. On this front alone, the current application is a non-starter.

13. The Applicant wants the judgment set aside to allow him be joined as a defendant and that the suit commence denovo. He annexed a draft defence to justify why he should be joined in the present proceedings. In the draft defence, the Applicant sought prayers that;

    a. A declaration that the Defendant has acquired LR No. Ngenda Gatukuyu/T 258 by adverse possession.

    b. An order that the Defendants title be cancelled and the same be registered in the plaintiff's name

    c. In the alternative, the Defendant be ordered to compensate the plaintiff for the developments on the suit land.

14. The initial dispute between the plaintiff and the two defendants was to determine who was the legal owner of Ngenda Gatukuyu/T 258. The trial judge Okong'o found in favour of the plaintiff Wamburu Kariuki in a judgment delivered on 24th June, 2021. One of the orders granted was for the 2nd Defendant to transfer the suit land to the plaintiff. The Applicant in his supporting affidavit admits that he is not the registered owner of the suit property T.258.

15. One would then wonder how his interest would be taken care of by setting aside an order which determined the ownership. Given the two parties were claiming the same, it is my considered opinion and so I hold that the claim for adverse possession is independent of the determined suit and does not fall under claims envisaged in section 34 of the *Civil Procedure Act*.

16. I also find that the application was brought after undue delay. In the opening remarks of the judgment, Okong'o J. stated that this suit was filed on 29th May, 1985 in the High Court and later transferred to this court for hearing and determination. The Applicant deposed that his mother started living on the land around the same time (1985). Since the land they thought as theirs neighboured the suit property, the Applicant wants this court to believe he never heard about this court case.

17. To make it worse, he deposes that he learnt they had developed the wrong parcel of land in 2015. Between 2015 and 2022 when the 2nd defendant whom they were negotiating with died is a period of 7 years. Again he wants the court to believe that even with due diligence, he did not learn of the existence of the suit? Taking cognizant of the fact that the 2nd Defendant was a party to these proceedings may have disclosed to him. On this limb, I find the Applicant is not truthful and brought the application after undue delay thus not meriting the exercise of this court's discretion in his favour.

18. The upshot of my foregoing analysis is my finding/conclusions that;

    i. The orders sought do not lie for having been brought against the deceased parties without substitution.

    ii. The application lacks merit for the reasons stated in the body of this ruling

    iii. The application is dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024

A. OMOLLO

JUDGE