



Kamau & another v Karuga & 2 others (Environmental and Land Originating Summons E022 of 2022) [2024] KEELC 7218 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7218 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E022 OF 2022**

JG KEMEI, J

OCTOBER 31, 2024

BETWEEN

LUCY WAMBUI KAMAU 1ST PLAINTIFF

PETER KIBE KAMAU 2ND PLAINTIFF

AND

LEONARD NG'ANG'A KARUGA 1ST DEFENDANT

PAUL MURAYA GACHAMBI 2ND DEFENDANT

KIAMBU LAND REGISTRAR 3RD DEFENDANT

JUDGMENT

1. On 18/7/2022 the Plaintiffs moved the Court vide the Originating Summons dated 30/6/2022 seeking the following Orders:-

- a. That the transfer of L.R. No. KABETE/GATHIGA/T.180 (the suit property) by the 1st Defendant to the 2nd Defendant, the registration of the 1st Defendant as proprietor thereof and the Certificate of Title issued to the 2nd Defendant are null and void for all intents and purposes for being in violation of Court orders in Thika ELC Suit No. 267 of 2018.
- b. That the registration of the 2nd Defendant as proprietor of the suit property and the Certificate of Title issued to him be and are hereby cancelled.

IN THE ALTERNATIVE TO ORDERS NO. 1 & 2 ABOVE

- c. That the rights of the 2nd Defendant to recover the land known as L.R. No.KABETE/GATHIGA/T.180 (the suit property) from the Plaintiffs are barred under Section 7 of the [Limitation of Actions Act](#) and his titles is extinguished under Section 17 of the said Act, on the



grounds that the Plaintiffs have openly and peacefully been in occupation of the suit property for a period of over 12 years.

- d. That the Kiambu Registrar of Lands be ordered to register the Plaintiffs as the absolute proprietors of the suit land without any pre-conditions.
 - e. That the costs of this suit be borne by the Defendants.
2. It is the case of the Plaintiffs that vide THIKA ELC 267 of 2018 they successfully sued the 1st Defendant and obtained orders in their favour.
 3. However before the decree of the Court in THIKA ELC 267 of 2018 was implemented the 1st Defendant sold and transferred the suit land to the 2nd Defendant rendering the Judgment impotent. The actions of the 1st Defendant amounted to contempt of Court orders that they have occupied the suit land since 1967 to date.
 4. The 1st Defendant denied the claim of the Plaintiffs and contended that the 2nd Respondent is an innocent purchaser for value without notice. In addition that the prayers sought have been overtaken by events.
 5. The 3rd Defendant denied the Plaintiffs' claim and vide the Grounds of Opposition dated 14/3/2024 on the grounds that:-
 - a. That the Originating Summons as drafted do not raise any reasonable cause of action as against the 3rd Defendant.
 - b. That the 3rd Defendant operates in accordance with statute and only effects changes in the register upon presentation of all the requisite documents from the registered proprietor/s.
 - c. That the 3rd Defendant has always operated in good faith in respect to the suit property and the 3rd Defendant will comply with any orders issued by this Honourable Court.
 - d. That the application is therefore defective and an abuse of the Court process.
 6. The 2nd Defendant through his Replying Affidavit sworn on 14/1/2023 stated that a claim in adverse possession does not lie because the Plaintiffs are tenants of the County Council.
 7. PW1 – Peter Kibe Kamau testified and relied on his witness statement dated 23/11/2022 in chief and produced documents marked as PEX No. 1 – 7 in support of his case.
 8. He stated that he and his family live on the suit land over 52 years. That they obtained Orders in ELC 267 of 2018 against the 1st Defendant, which Orders are still in force. That notwithstanding the 1st Defendant transferred the land to the 2nd Defendant before the decree was fully implemented.
 9. PW2 - Lucy Wambui testified and reiterated the evidence of PW1 and stated that she and her family have lived on the land for over 50 years.
 10. DW1 – Leonard Nganga Karuga testified and stated that he bought the land from James Ngugi Mungai in 2018 however upon visiting the land he found people in occupation, one of whom was the 1st Plaintiff. That on inquiry the 1st Plaintiff told her that she had rented the house from the County Council of Kiambu.
 11. He however confirmed that despite several attempts to remove her from the suit land, the Plaintiffs are still in occupation of the suit land.



12. Admitting the outcome of the ELC 267 of 2018 he stated that he sold the land to the 2nd Defendant after the Plaintiffs got Judgment in their favour.
13. James Ngugi Mungai testified as DW2 and confirmed that the Plaintiffs have been in occupation of the suit land, despite several attempts to remove them.
14. Evanson Kamenwa testified as DW3 and stated that he is aware that the Plaintiffs are in occupation of the land despite the local Chief of the area having asked them to vacate the land within 3 months.
15. Paul Muraya Gachambi testified as DW4 and stated that he purchased the land from the 1st Defendant in 2022. That though he carried out due diligence he later discovered that there was a dispute between the vendor and the Plaintiffs hence he is yet to take possession of the land. Interalia he visited the land and found the 1st Plaintiff living on the land.

Written submissions

16. I have perused the written submissions of the parties.
17. Having considered the pleadings, evidence and rival submissions of the parties the issues for determination are:-
 - a. Whether the suit against the 1st Defendant is res judicata.
 - b. Whether the transfer to the 2nd Defendant was valid.
 - c. Whether the Plaintiff is entitled to the orders sought.
 - d. Who bears the costs.

Res judicata

18. Section 7 of the [Civil Procedure Act](#) states as follows:-

“

“7. Res judicata

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.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.



Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

19. In this case it is not in dispute that the Plaintiffs successfully sued the 1st Defendant in ELC 267 of 2018 and obtained a favourable Judgment on 29/4/2021 as follows:-

“It follows that time for purposes of adverse possession began to run on 30th July 1977, when Kamenwa Mungai, was issued with a Certificate of Title and any registered owners title to the suit property were extinguished in 1989 when the 12 years lapsed. From the above analysis of evidence before the Court, this Court finds and holds that the Plaintiffs have established a claim of adverse possession and that the Defendant’s title to the suit property has long been extinguished. The upshot of the foregoing is that the Court proceeds to find and hold that the Originating Summons dated 5th November 2018, is merited and the same is allowed entirely with costs to the Plaintiffs. It is so ordered.”

20. The Court having found that the Plaintiffs are entitled to title by adverse possession, the rights of the Plaintiffs vis a vis the 1st Defendant had been determined by a competent Court. The suit therefore between the Plaintiffs and the 1st Defendant is res judicata.

Transfer of suit land to the 2nd Defendan

21. It is not disputed that the 1st Defendant sold 2nd Defendant on 19/4/2022 a period of 12 months post Judgment. It is the Plaintiffs’ case that when they went to the Land’s Office to register the decree and have the land registered in their names, they discovered that the land was now in the name of the 2nd Defendant. To secure their rights the Plaintiffs lodged a restriction on the title on 7/6/2022. The 1st Defendant admitted transferring the land to the 2nd Defendant after Judgment. The 2nd Defendant too admitted purchasing the land from the 1st Defendant although no iota of evidence of the alleged purchase was supplied to the Court. It is not in dispute that the Court held the 1st Defendant in contempt of the Court orders issued on 29/4/2021. See the Ruling of the Court issued on 13/3/2023.
22. The 2nd Defendant led evidence that he was not aware of the Judgment issued in the case and only realised when he failed to secure a loan from a bank using the suit land.
23. The Judgment of the Court is in rem. Judgment in rem upholds a right as against the whole world. It upheld the legal right of the Plaintiffs against all and sundry. The rights of the parties as against the suit land were settled. It is trite that the life of a Judgment is 12 years. Therefore the Judgment of the Court remains valid and enforceable.
24. The transfer of the land by the 1st Defendant was therefore contrary to the orders of the Court. Having been contrary to the orders of the Court, the transfer remains illegal, null and void.



25. The Court in the case of Macfoy Vs. United Africa Co. Ltd (1961) 3 AER 1169 stated as follows:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...” (Emphasis added)

26. The Court finds that the 2nd Defendant received nothing from the 1st Defendant and the title held by the 2nd Defendant is null and void to that extent. I am guided by the provisions of Section 80 of the [Land Registration Act](#) which mandates this Court to cancel the title.

27. In the end, the Plaintiffs’ suit succeeds and I grant orders as follows:-

- a. That the transfer of L.R. No. KABETE/GATHIGA/T.180 (the suit property) by the 1st Defendant to the 2nd Defendant, the registration of the 1st Defendant as proprietor thereof and the Certificate of Title issued to the 2nd Defendant are null and void for all intents and purposes for being in violation of Court orders in Thika ELC Suit No. 267 of 2018.
- b. That the registration of the 2nd Defendant as proprietor of the suit property and the Certificate of Title issued to him be and is hereby cancelled.
- c. That the Kiambu Registrar of Lands be and is hereby ordered to register the Plaintiffs as the absolute proprietors of the suit land without any pre-conditions.
- d. Costs in favour of the Plaintiffs.

28. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kamau for 1st and 2nd Plaintiffs

Gachie for 1st and 2nd Defendants

3rd Defendant - Absent

Court Assistant – Phyllis

