



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 940 OF 1971**

**KAMAU GATIBARU NGUYAI.....PLAINTIFF**

**VERSUS**

**KAMAU GATIBARU NGUNAYU.....1ST DEFENDANT**

**CHEGE GACHIE.....2ND DEFENDANT**

**JUDGMENT**

The plaintiff in this suit, Mr Kamau Gatibaru Nguyai, filed action against the two defendants, claiming a piece or portion of land being 1.5 acres or thereabout out of the piece of land known as Lari/Kirenga/302 now registered in the name of the 2nd defendant. The plaintiff averred that by an agreement with the 1st defendants in 1958, he agreed to buy and the 1st defendant agreed to sell him 1.5 acres out of the said piece of land and in consideration of the said agreement, the plaintiff paid to the defendant the sum of Shs 400, one cow and one heifer. That the 1st defendant then gave the plaintiff possession of the 1.5 acres. That subsequently the 1st defendant sold the 4.5 acres to the 2nd defendant including the 1.5 acres alleged to have been sold to the plaintiff. This was alleged to be with mutual understanding that the 1st and 2nd defendants would transfer the said 1.5 acres to the plaintiff. That in breach of the understanding between the parties, the plaintiff transferred the entire land comprising in title number Lari/Kirenga/302 notwithstanding the plaintiff's claim for 1.5 acres. That the 2nd defendant now wishes to sell the said piece of land including the 1.5 acres belonging to the plaintiff having refused to transfer the same to the plaintiff.

The plaintiff claims for a declaration that he is entitled to 1.5 acres out of the piece known as Lari/Kirenga/302 and that the 2nd defendant be ordered to transfer the said piece of land to the plaintiff to the extent of 1.5 acres. The plaintiff is also claiming costs of the suit having already obtained temporary injunction against the 2nd defendant.

The defendants, on the other hand, deny the allegations of the sale agreement between the plaintiff and the 1st defendants and aver that the 2nd defendant bought the entire land (Lari/Kirenga/302) from the 1st defendant free from all encumbrances and without notice of any agreement between the plaintiff and the 1st defendant.

The defendants pleaded in the alternative that the sale agreement, if any, become void for all purposes under the provisions of the Land Control Act and or that the plaintiff's claim is time-barred under the provisions of the Limitation of Actions Act. In the further alternative, the defendants pleaded that the plaintiff's claim is *res judicata* by virtue of the decision in the resident magistrate's court being Kiambu

Civil Case No 115 of 1970 between *Chege Gachie v Kamau Gatibaru*.

The plaintiff and the 1st defendant are half-brothers with a common father, Gatibaru. The plaintiff is the son of Gatibaru's 1st wife while the 1st defendant is the son of the 6th wife. The 2nd defendant is the son of Gatibaru's brother. Gatibaru's land was divided into six portions in accordance with Kikuyu custom and the 1st defendant was given 6 acres which were registered in his name as Lari/Kirenga/302.

The plaintiff, who appeared 60 years old, gave evidence that he bought from 1st defendant 1 1/2 acres of that title and paid Shs 850, a cow and a heifer. That the land was demarcated and the 1st defendant gave the plaintiff vacant possession of the 1 1/2 acres. That he cultivated the land, planted trees, fruit trees, built houses and kept cattle there. That he lived there since and gave his daughter permission to live there also.

He said that the 1.5 acres is fenced off and in fact it was the 2nd defendant who measured the plaintiff's houses for construction in the said piece of land. That at the time of the sale of the 1.5 acres the headman of the area, Chege, was present and other witnesses. That he remained in possession of the land up to 1969 when the 2nd defendant sued him alleging that he the 2nd defendant had bought the land from the 1st defendant.

The 1st defendant had returned the purchase price saying that he had sold the entire land and that the plaintiff should vacate it. The 2nd plaintiff denied knowledge of the sale of the said land by the 1st defendant to the 2nd defendant.

The plaintiff called Gatibaru Ngari (PW 2) who confirmed that he saw the plaintiff give the 1st defendant a cow and a heifer as a part of the purchase price of a piece of land in which the plaintiff had built a house. That the house had been measured by one Chege. The plaintiff also called Mugani Gatibaru who confirmed the sale agreement between the plaintiff and the 1st defendants saying that he was there and helped in the demarcation of the 1 1/2 acres which the 1st defendant was selling to the plaintiff.

That he was there when a boundary was fixed. He said that he witnessed the plaintiff giving a cow and a heifer to 1st defendant. The 1st defendant gave evidence that he acquired the said piece of land comprising 6 acres and was registered in his name. That the portion originally belonged to the plaintiff who later moved leaving a cow *boma* and his son living there.

That he later sold the land in 1964 to the 2nd defendant, Chege Gachie, for Shs 6,000, i.e. Shs 1,000 per acre. That he wanted to sell the land to the plaintiff first because he owed the plaintiff money but the plaintiff refused to buy it. That it was after the plaintiff had refused to buy the land that he sold it to the 2nd defendant and had it transferred in the name of the 2nd defendant.

The 2nd defendant agreed that he bought the piece of land from the 1st defendant for Shs 6,000 and had it transferred in his name. That at the time of the purchase, the plaintiff's son was living on the portion of the land and that he had been informed by the 1st defendant that the plaintiff's son had been required to vacate the land. He agrees that a boundary demarcating the 1.5 acres still exists and that the plaintiff's son is still in possession. He said that after he had bought the said land he filed a case against the plaintiff at Kiambu. The court referred the matter to an arbitration whose decision was subsequently filed with the court.

Mr Duncan Njumbi (DW 3) gave evidence confirming the sale agreement between the 1st defendant and the 2nd defendant. He said that he reduced the sale agreement into writing (Exh A). He also said that he accompanied the 2nd defendant to the plaintiff to refund the latter some Shs 400 but the plaintiff refused

to accept it. He confirmed that he was the chairman of the arbitration which was ordered by Kiambu court and that he returned the verdict to the same court.

Mr Koigi Kamwiru (DW 4), the Assistant Chief of the area, testified that he was there at the arbitration and that the arbitration did not investigate the plaintiff's claim concerning the sale of 1.5 acres of land by the 1st defendant to the plaintiff. That the arbitration decided the whole land including 1.5 acres belonged to the 2nd defendant because he had the title deeds for it.

According to the evidence, it is clear that the plaintiff was the *Muramati* (Trustee) of Gatibaru's family and did in fact act as such during consolidation of Gatibaru's land.

Every witness testified that Gatibaru's land was divided among the members of the family under trusteeship of the plaintiff. That there were no serious disagreements concerning the distribution of the land. I am satisfied that the plaintiff was a good *Muramati* (Trustee) and that he distributed his father's land to his brothers and half-brothers fairly; he himself received his fair share.

There is no dispute that the 1st defendant received his share which was subsequently registered in his name as Lari/Kirenga/302 comprising approximately six acres. Up to that stage, the plaintiff had no claim over that piece of land although he may have been in possession. The evidence is not so clear about when he went into possession but this fact does not affect the issue now under consideration. However, whether the plaintiff was in possession at the time of consolidation, he was divested of any interest in that portion when it was allotted and registered in the name of the 1st defendant. He was bound to move to his legally allotted portion in any case and the 1st defendant agreed that he allowed the plaintiff to leave his cow *boma* on the disputed land. The 1st defendant could not give any reason or the conditions under which he allowed the plaintiff to remain on the land.

It is common ground that the plaintiff was in possession of that portion of the land which was to be allotted to the 1st defendant and that the portion was allotted to the 1st defendant. According to the plaintiff, the 1st defendant then agreed to sell a portion comprising 1.5 acres and the plaintiff agreed to buy it. The agreed purchase price was Shs 800 plus two cows. This was in 1958. The plaintiff said that he paid the agreed consideration to the 1st defendant who was in need of money to pay dowry. The 1st defendant denied any agreement but admitted owing the plaintiff money which he had borrowed from him.

The plaintiff did not claim the whole land but only 1.5 acres which he says he bought from the 1st defendant. Witnesses testified and I believe them that the portion is fenced off and that the plaintiff has a house there whether occupied by himself or by his son or daughter. If the plaintiff was a dishonest man, he would have claimed the whole portion. Yet he claimed only a small portion out of it. I believe the plaintiff and his witnesses when they say that the plaintiff bought 1.5 acres from the 1st defendant and that he paid in full the agreed purchase price.

I am strengthened in this finding by the fact that the piece of land in dispute is fenced off; the plaintiff has trees on it, has houses, a cow *boma* and that his son is in possession. I do not believe the 1st defendant when he says that he did not sell 1.5 acres to the plaintiff and that he only borrowed money from him. The evidence adduced by the defence witnesses was purely hearsay as they did not witness any agreement. The 1st defendant sold 1.5 acres to the plaintiff in order to get money to pay dowry. He gave the plaintiff possession of that piece of land and had it properly demarcated and fenced. If he had not, he would not have allowed the demarcation, fencing off and the plaintiff to remain on that portion. I have no doubt whatsoever that the 1st defendant sold 1.5 acres to the plaintiff but later refused to have it registered or transferred in the name of the plaintiff.

Mr Kamere, who appeared on behalf of the defendants, contended that the plaintiff had failed to substantiate his claim for 1.5 acres. I do not agree. On the contrary the plaintiff did establish his claim on the balance of probabilities. The evidence points to no other conclusion than that there was a sale agreement between the plaintiff and the 1st defendant of 1.5 acres out of the 6 acres comprised in Lari/Kirenga/302 and that the 1st defendant gave possession thereof to the plaintiff. That that portion was demarcated by proper authorities, fenced off, and the plaintiff continued to develop it through his son or daughter. In any case, Mr Kamere appeared not to attack plaintiff's case seriously from this point as will be seen later in this judgment.

There is no dispute that the 1st defendant sold the entire piece of land known as Lari/Kirenga/302 to the 2nd defendant and had the said title transferred to the second defendant in accordance with the provisions of the Land Control Act. This was in 1964 and the sale agreement (Exhibit A) confirmed this. It is true that the plaintiff did not object to that sale and never registered a caution against the title. However, there was no evidence to show that the plaintiff knew that the 1st defendant was negotiating to sell the said land to the 2nd defendant. The plaintiff said that he trusted the 1st defendant to transfer the 1.5 acres to him. Mr Kamere's main grounds were four, namely:

1. That this suit is *Res judicata* by virtue of the decision in Kiambu Resident Magistrate's Civil Case Number 115 of 1970.
2. That the purported sale agreement between the plaintiff and the 1st defendant was null and void by virtue of the provisions of the Land Control Act.
3. That the plaintiff is barred by limitation by virtue of the Limitation of Actions Act.
4. That the 2nd defendant's title is indefeasible for he obtained clear title without notice of any existing agreement and without fraud, commission a misrepresentation.

I will deal with these grounds *seriatim*.

1. With regard to the issue of *res judicata*, it is agreed that the second defendant did file through his advocate a Civil Suit in Kiambu Resident Magistrate's court being Civil Suit Number 115 of 1970. The parties to that suit were Chege Gachie as plaintiff and Kamau Gatibaru alias Nguyai as defendant. In that case, the plaintiff's claim against the defendant (Kamau Gatibaru alias Nguyai) was for eviction.

I note that Chege Gachie who was the plaintiff in that case is the 2nd defendant in this suit and that Kamau Gatibaru alias Nguyai who was the defendant in that case is the plaintiff in the present suit. Kamau Gatibaru Ngunayu, who is the 1st defendant in this suit, was not a party to the Kiambu Civil Case Number 115 of 1970.

It would appear that by consent of the parties, the Resident Magistrate referred the dispute to an arbitration. There was sufficient evidence to show that the arbitration was properly constituted in terms of the order and that the verdict of the arbitration was returned to court and was duly recorded as judgment by the court in the presence of the parties as follows:-

"The defendant will vacate and deliver up vacant possession of the land known as LARI/KIRENGA/302 on or before 30.6.71 Each party to bear its own costs. J S Patel Resident Magistrate 23.3.71"

Mr Kamere contended that the present suit is *Res judicata* by virtue of the above consent judgment. There was no appeal against that judgment.

I would have agreed with Mr Kamere if the 1st defendant in this suit, Mr Kamau Gatibaru Ngunayu, was a party to the Kiambu Resident Magistrate's Civil Case Number 115 of 1970. He was not and the issue between him and the plaintiff could not and was not finally determined.

What happened at the arbitration could be summarised from the evidence of DW 4, Koigi Kamwiru:

“ I did not know what price was for 1.5 acres because the vendor did not tell the elders. We did not investigate the plaintiff's claim because 1st defendant had said he sold the land to 2nd defendant. I asked for the title deeds and we decided that the land belonged to 2nd defendant who had the Title Deeds. I have never heard since 1969 that the plaintiff had paid cattle and money for 1.5 acres of land. I do not know what is the plaintiff's claim. The Chief was the Chairman of the Arbitration Committee.”

From this it is clear that plaintiff's claim was not investigated and in fact it could not be so investigated because the vendor with whom he had the claim (1st defendant) was not a party to that suit. He may or may not have been called as a witness but that is beside the point. Whatever decision was reached did not bind the 1st defendant and certainly the issues between him and the plaintiff were not investigated or resolved. I hold therefore that the doctrine of *res judicata* cannot operate against the plaintiff and the 1st defendant. Once the issue between them is resolved then the issue against the 2nd defendant cannot be resolved. In order to avoid duplicating of proceedings it was proper for the plaintiff to join the 2nd defendant in this suit. I may add here that the 2nd defendant was represented by his advocate at the Kiambu court. It was also clear that the advocate was aware that a third party, the 1st defendant, was involved. Under these circumstances it was prudent for the advocate to join the 1st defendant in the case in order to have all the issues determined.

The 2nd defendant who claimed to acquire his title from the 1st defendant was bound to have the 1st defendant joined in the case in order to establish his claim. What he did was to sue the plaintiff for his eviction without proving the root of his interest. I am of the opinion that the judgment between him and the plaintiff did not bar the plaintiff from suing a third party, (the 1st defendant in this case) for breach of the sale agreement. The issue in this case is founded on the sale agreement between the plaintiff and the 1st defendant quite distinct from the issue before the Kiambu court which issue was founded on eviction.

The parties in the Kiambu court were different in the sense that the 1st defendant in this case was not one of the parties. The total effect is that the issues before the Kiambu Court were not determined between the same parties. In these circumstances the doctrine of *res judicata* did not apply.

2. With regard to the bar of limitation, the plaintiff says that he bought the piece of land from the 1st defendant in 1968. No agreement was produced to determine the actual date. There was evidence that the plaintiff was in possession of the disputed piece of land prior to the date of the sale agreement and he continued to live on the said land up to date. The 1st defendant sold the land while the plaintiff was in such possession. Section 7 of the Limitation of Actions Act cap 22 Laws of Kenya provides that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him ...” Section 9(1) of the Act provides:

“Where the person bringing an action to recover land ... has been in possession of the land and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.”

It is clear from these two sections that the time will run against the person who claims to recover land from the date of accrual of the cause of action. In the case of the person claiming who has been in

possession of the land the date of accrual of the right of action runs from the date of his dispossession or discontinuance. In this case, the plaintiff has been in possession prior to the sale agreement between himself and the 1st defendant and has continued to be in possession to date. Up to the time the 1st defendant sold the land to the 2nd defendant in 1964, the plaintiff was in such possession and thought he was entitled to the land by virtue of the sale agreement of 1958. The 1st defendant then sold the same piece of land in 1964 when in effect he sought to dispossess the plaintiff of it.

Again under section 13(1) of the Act, the right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run. In other words no right of action can accrue unless the land is in possession of an adverse possessor. If the plaintiff may be regarded to be in adverse possession time will only run against him from the time 2nd defendant bought the land – in 1964.

The plaintiff is thus not time-barred. Looking at it from every angle the plaintiff who is in possession is not barred by limitation. For the purpose of the Act the 2nd defendant would be so barred if he himself brought action to recover the land from the plaintiff after the period of 12 years.

What the plaintiff is claiming is in effect that he is entitled to 1.5 acres out of the 6 acres comprised in the title number Lari/Kirenga/302 and for an order of specific performance ordering the 2nd defendant to transfer that portion to him. The plaintiff is in possession of that 1.5 acres of the land. It was only in 1964 when he came to know that he was being dispossessed of the same land. It is obvious therefore that even if the plaintiff was not in possession of the land and wished to claim it from the 2nd defendant, his cause of action could not have accrued before 1964 when the 2nd defendant bought the land from the 1st defendant. To date he would not be barred by limitation.

I hold therefore that this ground also fails. With regard to the third ground, namely that the sale agreement of 1958 between the plaintiff and the 1st defendant was null and void by virtue of the provisions of the Land Control Act, which came into force on December 12, 1967, it is clear from the long title of the Act that the object of the Act was to provide provisions for controlling transactions in agricultural land.

In order that this Act may apply, the land whose transaction is to be controlled must be declared to be an agricultural land. The issue then is whether the disputed land whose sale agreement is being challenged was agricultural land in 1958, i.e. at the time of consolidation or thereabout.

Section 3 of the Land Control Act requires the Minister to apply the Act to any land to be a controlled area, by a gazette notice. The Land Control Act did not have retroactive effect.

Under section 4 of the Act, the Minister is empowered to establish Land Control Board for every land control area. In order to bring the disputed land under the Act, it was necessary to have some evidence as to whether or not at the time of consolidation of the land at Lari and before the Land Control Act came into force on December 12, 1967, the disputed land was an agricultural land within the meaning of the Land Control Act. There was evidence that the plaintiff was the Trustee of Gatibaru's land and that he supervised its distribution.

That he entered into the sale agreement between himself and the 1st defendant before the disputed land was registered in favour of the 1st defendant. That there was an undertaking that the land would be registered in the name of the 1st defendant who would transfer 1.5 acres to the plaintiff subsequently. Instead of doing so the 1st defendant sold and had the entire disputed land transferred to the 2nd defendant secretly.

Although the date of the sale agreement is not known, it is clear that this was before the Land Control Act came into force and this was during demarcation of the land around Lari. This being so the disputed land was not agricultural land at the time of the sale agreement. It formed a part of the Reserves under Kikuyu customary law.

It would be iniquitous to deny the plaintiff his right by relying on the Land Control Act which came into force subsequent to the sale agreement. I hold therefore that the sale agreement was not nullified by the provisions of the Land Control Act which came into force subsequent to the agreement. The land in question was not an agricultural land within the meaning of the Act.

With regard to ground No 4, there is ample evidence that the 2nd defendant was fully aware that the plaintiff was in possession of the said disputed land. He is a member of the family and was aware of what was going on. Despite he proceeded to negotiate and have the entire land transferred to him without first enquiring why and under what terms was the plaintiff in possession of the disputed land. Being armed with the search at the Land Registry and later with the Title Deeds of the entire disputed land, he went forward to oust the plaintiff. I do not think he can be allowed to benefit from this. This ground also fails.

I find that the plaintiff is entitled to 1.5 acres out of the land comprised in Title Number Lari/Kirenga/302. I enter judgment for the plaintiff and order that the 2nd defendant do transfer the 1.5 acres out of the said land to the plaintiff. As this is not the 1st registration, I direct the Land Registrar to register the plaintiff as tenant in common with 2nd defendant of the said Lari/Kirenga/302 pending the subdivision of the said land when the plaintiff will be registered as the owner of 1.5 acres thereof.

I award the costs of this suit to the plaintiff against both defendants.

It is so ordered.

**Dated and delivered at nairobi this 16th dao of December, 1976.**

**M.G MULI**

**JUGDE**



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