



**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Appeal 231 of 2004**

**PETER KIMONDO GITONGA ..... 1<sup>ST</sup> APPELLANT**

**JOHN KANYUNGU NJOGU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DANIEL KIMANI MAINGI ..... RESPONDENT**

*(Appeal from the ruling and order of the High Court of Kenya at Nyeri (Khamoni J.) dated 17<sup>th</sup> June, 2004*

*in*

*H.C.C.C. NO. 299 OF 1996)*

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**JUDGMENT OF THE COURT**

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This is an appeal from the ruling of the superior court (Khamoni, J.) delivered on *17<sup>th</sup> June, 2004* in which the learned judge dismissed the appellants' notice of motion dated *22<sup>nd</sup> November, 2002*.

In *1996*, the appellants filed a plaint in the superior court being *H.C.C.C. NO. 299 of 1996* (the suit) seeking eviction of the respondent from the land parcel *No. Gatarakwa/Gatarakwa/Block 1/213* (the suit land) on the grounds that they, and not the respondent, were the joint registered proprietors of the suit land. They averred in the plaint that the respondent had been unlawfully trespassing on the suit land by cultivating the same, without their consent, and claimed damages from him.

The respondent, in a written statement of defence, denied those allegations and claimed that he was the true owner of the suit land, having purchased shares from Gatarakwa Farmers Co. Ltd., which eventually issued him with the title documents. He averred further that he had been in occupation of the suit land since *1987*, and that he had developed it extensively.

That suit came up for hearing before Juma, J. who, by a judgment delivered on *9<sup>th</sup> December, 1999* found for the respondent and dismissed the suit filed by the appellants. Aggrieved by that decision, the appellants promptly appealed against the same.

While the appeal was pending in this court, the appellants filed a notice of motion in the superior court dated *13<sup>th</sup> November, 2002*, and amended on *22<sup>nd</sup> November, 2002* seeking:-

***“That the registration of land parcel No. Gatarakwa/Gatarakwa/Block 1/213 in the name of the respondent Daniel Kimani Maingi be cancelled or any other resultant (sic) registrations.”***

That was a strange application, in our view, as it sought exactly the same result as was sought in the suit, and which suit had been determined by Juma, J. The matter was clearly *res judicata*. Be that as it may, the application came up for hearing before Khamoni, J. who, after hearing the same, rendered a brief two-page ruling dismissing the same. The learned Judge rendered himself thus:-

***“I have perused the case file after hearing the application. My view is that, since this is a case where there may be someone who knows how to manouvre contents of documents, I should be careful in what I say and should say it only briefly.***

***Accordingly as the applicants have appealed to the Court of Appeal and as I believe that is the right place for the parties to canvass what is before me in this Amended Notice of Motion dated 22<sup>nd</sup> November, 2002, the said Amended Notice of Motion be and is hereby dismissed.”***

Aggrieved by that decision, the appellants filed an appeal to the Court, outlining seven needlessly long and repetitive grounds of appeal, seeking in the main that the appellants be declared the rightful owners of the suit land.

While this appeal was pending before this Court, the appeal arising from the judgment of Juma, J. in the main suit came up for hearing before this Court, differently constituted. In a judgment delivered on 10<sup>th</sup> June, 2005, this Court (*Omolo, O’Kubasu & Deverell, J.J.A.*) dismissed the appellant’s appeal, and made conclusive findings as to ownership of the suit land, declaring the respondent the true owner. Here is how the Court of Appeal rendered itself:-

***“We have examined the recorded evidence and the exhibits produced in the superior court and it is our view that the learned Judge cannot be faulted for having believed the evidence of the respondent and his witnesses. It may be interesting to consider the character of the 1<sup>st</sup> appellant, Peter Kimondo Gitonga. When being cross-examined in the superior court, he had the following to say:-***

*‘True we applied for a loan to K.F.C. using this land as a security. The C.I.D. stopped the transaction ..... I agree that I was prosecuted for giving false information to the Presidential Probe Committee on Gatarakwa for producing receipts he bought cows*

purporting it to be receipt for purchase of land in Criminal Case No. 2066/96 and convicted and sentenced to 12 months imprisonment.’

***The impression we get is that the 1<sup>st</sup> appellant having been convicted for giving false information by producing receipts in respect of cows as receipt for purchase of land he is not a truthful person. He is a man who is likely to tell lies. Again, it is to be observed that when the issue of ownership of the suit land was being investigated, the appellants never presented themselves to the relevant authorities i.e. District Lands Office and Provincial Commissioner’s Office but were quite ready to pledge the title as security for a loan of K.Shs.900,000/=. Although we did not see these appellants, from the record, we have an impression of sly people who were not genuine owners of the suit land. The lawful owner of this land was the respondent who went to great lengths in trying to establish what happened to the title. He proved that he had been in occupation of the suit land and that he had carried out developments. He was not a trespasser but a lawful registered proprietor.”***

That concluded the matter, or so we would have thought! However, the appellants are before us, yet again, wanting to pursue the pending (interlocutory) appeal arising from the decision of Khamoni, J. who had dismissed the appellant’s motion seeking cancellation of the title in the name of the respondent. At the hearing before us in Nyeri on 27<sup>th</sup> October, 2010, their learned counsel, Mr. Gathiga Mwangi, persisted in arguing the appeal, asking that we “cancel” one of the two decrees that emanated from the decisions of the superior court, one dated 9<sup>th</sup> December, 1999 and issued on 21<sup>st</sup> January, 2000 and the other dated 9<sup>th</sup> December, 1999 and issued on 7<sup>th</sup> June, 2001. Both were from the Judgment of Juma, J. delivered on 9<sup>th</sup> December, 1999. This is a red herring, and completely irrelevant since the validity of the Decree relied on by the Court of Appeal in deciding the appeal was not challenged and the matter before us has nothing to do with those decrees but with the order of Khamoni, J. issued on 28<sup>th</sup> July, 2004.

Ms. Lucy Mwai, learned counsel for the respondent, submitted that the main issue of ownership of the suit land had been determined by the Court of Appeal; that the situation on the ground had changed based on the Court of Appeal judgment; that the suit land had since been sub-divided and new owners had taken over.

We are in agreement with Ms. Mwai that the Court of Appeal having determined the main appeal, and especially the issue of ownership of the suit land, in its detailed judgment delivered on 10<sup>th</sup> June, 2005, there remains nothing further to hear or determine. The appeal before us has been overtaken by events, and is *res judicata*.

Accordingly, and for reasons outlined, we dismiss this appeal with costs to the respondent.

*Dated and delivered at Nyeri this 19<sup>th</sup> day of NOVEMBER, 2010.*

***M. OLE KEIWUA***

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***JUDGE OF APPEAL***

***P.N. WAKI***

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***JUDGE OF APPEAL***

***ALNASHIR VISRAM***

.....

***JUDGE OF APPEAL***

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**



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