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Date Delivered:	14 Nov 2007
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Daniel Kennedy Sultani Aganyanya
Citation:	PETER MUNGAI KINYOHO v JOSHUA MURIGI GATHAIYA [2007] eKLR
Advocates:	-
Case Summary:	CIVIL PROCEDURE-...
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
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Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 285 of 1992

PETER MUNGAI KINYOHOPLAINTIFF

VERSUS

JOSHUA MURIGI GATHAIYADEFENDANT

JUDGMENT

In a suit filed in this Court on 21st January 1992 the plaintiff **Peter Mungai Kinyoho** sought the following orders; namely:

(a) ***A perpetual injunction to restrain the defendant whether by himself, his servants or otherwise howsoever from remaining entering or using or continuing with occupation of the said land.***

(b) ***An eviction order be issued against the defendant to vacate L.R. No. Location 17/Sabasaba/1138 forthwith***

(c) ***Mesne profits***

(d) ***Costs of the suit***

(e) ***Any other or further relief this Honourable Court may deem just to grant.***

The plaintiff is the brother of one **Kiarie Jackson** who died in 1977; 3rd February. Prior to his death, he was the registered proprietor of the Land Loc 17/Sabasaba/1138, hereinafter referred to as "**the suit land**".

After the death of the deceased the plaintiff instituted **Succession Cause No. 158 of 1983 at Murang'a** Resident Magistrate's Court.

He testified before this Court on 21st November 2002 that being family land family members met in 1983 and authorized him to take out these letters of administration over the suit land and that after he took out the letters of administration; he had the suit land registered in his name as its proprietor.

He testified further that he knows the defendant as the son of the person who was living on the suit land known as **Gathaiya Gakuru**; who occupied it from the year 1963 to the time the deceased passed on.

That even after the deceased passed on the said **Gathaiya Gakuru** continued to stay on the suit land until he died; but that the plaintiff did not know when **Gathaiya Gakuru** died or where he was buried. But that even then the defendant was staying on the suit land.

According to the plaintiff, the basis upon which the said **Gathaiya Gakuru** lived on the suit land with

his family including the defendant, was that he had leased it from the deceased but that after he, the said plaintiff, obtained letters of administration in respect to this estate, he asked the area Chief to evict **Gakuru** and return him the lease money he had been paying for using the land.

That elders deliberated over the matter at the Chief's office and allowed **Gathaiya Gakuru** to stay on the land freely for three (3) years, then vacate it;

That after three years, **Gakuru** did not vacate the land, neither did he accept refund of his money which was put at Kshs.682/=. This is why the plaintiff resorted to this Court action.

During cross-examination, the plaintiff stated that it was the deceased who lived on the suit land and that name of the members of plaintiff's family including him, lived on it.

That during the lifetime of the deceased he never heard of any dispute between him and the defendant.

The plaintiff called his brother **Chrispus Kinyanjui Kinyoho**, and **Evanson Waweru Muiruri** former area Assistant Chief as witnesses to support his case.

The defendant testified that though the land belonged to **Kiarie Kinyoho**, he had sold it to the defendant's father in 1963. That in fact he himself was born when his father was living on this land.

That up to the time the deceased **Kiarie** died, he had not asked his the defendant's father to vacate the land and that it is the plaintiff who has tried since 1987 to evict the family of the defendant's father from the suit land; on allegation that this land had been left to him by his deceased brother.

According to the defendant although the plaintiff complained to the area Chief over this dispute and each party was allowed to select three (3) elders to an arbitration meeting, such elders did not deliberate over the dispute but that his father was only told to vacate the land.

The defendant produced to the Court documents to show payment and receipts of a sum of up to **Kshs.682/=** being purchase price paid by his father to the deceased **Kiarie**.

The defendant stated that his father was not a tenant or leasee on the suit land but as a purchaser thereof. He had built thereon and also planted cash crops thereon. He prayed that the suit be dismissed.

The defendant called his mother **Loice Njoki** and **Michael Munyagi** as his witnesses. **Loice** testified that when her husband died, he was buried on the suit land.

That when the deceased sold this land to **Gathaiya Gakuru**, it was vacant and that the purchaser moved in as such with her.

Michael Munyagi confirmed that the defendant's father started using this land in 1963 and that apart from the defendant who is using the land, there is another son of **Gathaiya** known as **Gichuhi** who is also using the land.

That apart from these children the deceased **Gathaiya's** wife **Njoki** is still alive and also living on and using this land.

The witness also remembers this dispute being arbitrated upon either at the assistant Chief's or Chief's level when he was involved.

That in fact there were no arbitration proceedings except the Assistant Chief who read a document saying that **Gathaiya** should be refunded his money (Kshs.682/=) but that the deceased **Kiarie's** brothers had never lived on the land.

This is the evidence adduced in this case for consideration and decision.

Although the case was adjourned for counsel for the parties to file their written closing submissions and that the plaintiff's counsel filed his on 11th June 2003 counsel for the defendant has never filed his despite various mentions for that purpose.

The plaintiff's bone of contention is that the occupation of the suit land by the father of the defendant was as lessee and not purchaser. If this be so and the payments made in respect thereof was on that basis, then there was no reason why the said lessee was to be refunded that money on being asked to vacate the same.

This evidence was in some way a confirmation that the father of the defendant had occupied the suit land as purchaser and not as a tenant or lessee.

There is also evidence that the plaintiff's brother – the deceased, did not at any time live on this land; neither were members of his family including the plaintiff.

And even when the said deceased died he was not buried on this land. Evidence did not indicate the deceased ever visited this suit land, not did any member of his family, including the plain tiff, which confirms that this was not family or ancestral land.

The plaintiff even admitted that during his lifetime the deceased never talked to him about this land; which means it is even a mystery how the plaintiff came to know about its existence.

And even when the plaintiff went to take out letters of administration in relation to this land, and in spite of the fact that he has other relatives including PW1 – his own elder brother, he did not mention them in the application for these letters. At the same time, he did not include in the application any other property the deceased may have owned, including the land where he was buried.

Moreover, after **Gathaiya Gakuru** died in 1991, he left his wife **Loice Njoki**, the defendant and another son called **Gichuhi**, according to the evidence of DW2, **Michael Munyagi**; on the land. The plaintiff does not explain why he chose only to sue the defendant and to leave out the other two.

A person who hires out land for cultivation purposes in rural areas does not put up his home thereon. He/she cultivates that land from his/her home. The plaintiff does not explain why **Gathaiya Gakuru** came to occupy the suit land and establish his home thereon.

What do all these facts disclose to us" They disclose to us that the plaintiff was fully aware of **Gathaiya Gakuru's** occupation and possession of the suit land and/or the terms of such possession and occupation but took advantage of the fact that the title to it remained in the name of his deceased brother and that as proper heir to the estate of his said deceased brother he could apply for letter of administration to the same, obtain title to the suit land get the family of Gathaiya Gakuru out of it and then deal with the suit land in any manner he likes.

But he is the second registered owner and if what he did as expressed above does not amount to fraud then I cannot tell what it is – (Section 143(1) of the Registered Land Act). This aside, all the witnesses in this case agreed that **Gathaiya Gakuru** was allowed to occupy this suit land by the deceased **Kiarie** in the year 1963 – the year Kenya attained self rule.

The deceased asked him nothing until he passed on in the year 1977. This is fourteen (14) years down the line. Even if the deceased lived on thereafter, he could not have instituted a suit to recover this land from **Gathaiya** or the defendant, for that matter, given the provisions of Section 7 of the Limitation of Action – Chapter 22 Laws of Kenya. It provides.

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the cause of action accrued to him ...”

Let me assume this action accrued to the plaintiff through his deceased brother after the year he died in 1977 he first went to Murang’a Resident Magistrate’s Court to apply for letters of administration in the year 1983. Then he filed this case in Court in 1992, all this time the defendant’s family was on this land since 1963, a whole period of twenty nine (29) years. He is too late to try and force the defendant out of this land through this Court action even if he has the title in his name.

Given these circumstances, I would not believe Section 6 of the Land Control Act can aid the plaintiff because I am not certain these provisions existed in 1963.

On the other hand, the length of time the **Gathaiya** family has occupied the suit land with the consent of the deceased **Kiarie**, twenty nine (29) years, cannot just be wished away.

Section 30 of the Registered Land Act (Chapter 300 Laws of Kenya) provides as follows:

“Unless the contrary is expressed in the register, all registered Land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:-

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation save where inquiry is made of such person and the rights are not disclosed”.

All parties have given evidence as to the possession and occupation of the suit land by the family of **Gathaiya Gakuru** who died in 1991. The plaintiff asserts that this possession or occupation is as a result of a lease agreement between deceased **Gathaiya Gakuru** and deceased **Kiarie Jackson**. No such agreement has been exhibited and I do not think it existed.

The plaintiff has overtaken the **Gathaiya** family to obtain title to this suit land due to a lacuna in Land Law. But I do not feel this Lacuna should be used to disturb an otherwise lawful occupation and possession by the family of **Gathaiya**.

I am only sorry that **Gathaiya Gakuru** is dead and that the person sued in this case is only one of the surviving close relatives. I am not their lawyer to advise them on the proper steps to take to regularize their possession or occupation of the suit.

But I am not satisfied the plaintiff has convinced me, on the evidence he has adduced, that he is entitled to the orders he has sought in the suit filed herein on 21st January 1992. I do dismiss the same

with costs.

Delivered, signed and dated at Nairobi this 14th day of November 2007

D. K. S. AGANYANYA

JUDGE



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