



**REPUBLIC OF KENYA**

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

**HCCA. NO. 229 OF 2011**

**VERONICA NJOKI ..... APPELLANT**

**-VERSUS-**

**PHYLLIS WARUGURU MUYA ..... RESPONDENT**

**(Formerly Limuru CC 410 of 2010).**

**JUDGEMENT**

**INTRODUCTION**

1. By Plaint dated 30/12/2010 and filed on 30/12/2010, the Respondent sought reliefs that an order of permanent injunction restraining Appellant from interfering with the Respondent parties of the suit land and costs.

2. The Appellant lodged defence denying claim on 14/01/2011 via defence dated 13/01/2011. The Respondent pleaded her case to be that L.R No. Limuru/Bibirioni/814 is family land subdivided to portions occupied by each beneficiary including her and that Appellant trespassed and threatened to bury and dispose body of late Nduta Karumbu who was her daughter into portion she Respondent occupied.

3. The case was heard fully and the trial court granted prayers in the plaint as prayed.

4. The above decision aggrieved Appellant thus lodging instant appeal setting out 10 grounds of appeal namely;

***1) The Learned Magistrate erred in law and in fact in failing to take into account and analyze and rule on the evidence adduced in court by the Appellant and her witnesses.***

***2) The Learned Magistrate erred in law and in fact in deciding on the issue of the ownership of L.R. No. LIMURU/BIBIRIONI/814 a matter that was not in issue and which the court had no jurisdiction to decide on.***

***3) The Learned Magistrate erred in law in failing to appreciate and apply the legal principles applicable in the granting of injunctions.***

***4) The Learned Magistrate erred in law and in fact in failing to consider and rule on whether the Respondent had legal capacity to use the Appellant.***

***5) The Learned Magistrate erred in law and in fact in misinterpreting and misapplying the Certificate of Grant issued on HIGH COURT (NAKURU) SUCCESSION CAUSE NO. 68 OF 1983.***

***6) The Learned Magistrate erred in law in holding that she had no jurisdiction to decide on the ownership of L.R NO. LIMURU/BIBIRIONI/814 and then deciding that the Respondent had a specific portion on the said suitland.***

***7) The Learned Magistrate erred in law and in fact in failing to consider the Appellant's counter-claim and the evidence given in court in support thereof.***

***8) The Learned Magistrate erred in law and in fact in giving a judgment based on non-existent evidence/situation.***

***9) The Learned Magistrate erred in law in giving a judgment that was in conflict with her earlier Ruling on the same issue.***

***10) The judgment is against the relevant law.***

5. The parties agreed to canvass appeal vial submissions but only Appellant filed same as agreed. The Respondent has not filed the same.

### **APPELLANT'S SUBMISSIONS**

6. Appellant submitted that, in the Plaint filed by the Respondent she did not claim to be the owner of L. R No. LIMURU/BIBIRIONI/814 and declaration of ownership was not one of her prayers in the Plaint.

7. It is contended that, the trial court in a Ruling delivered on 14/01/2011 (Pg. 66) agreed that the Respondent was not the owner of L.R. No. LIMURU/BIBIRIONI/814 and held that both the Appellant and the Respondent are beneficiaries of L.R. No. LIMURU/BIBIRIONI/814.

8. On this ground the Trial Court dismissed the Respondent's Application. However in the judgment the trial Magistrate held that the Respondent was the owner of L.R. No. LIMURU/BIBIRIONI/814. She therefore erred in law and in fact.

9. It is argued that, in the Ruling delivered by the trial Magistrate on 14/01/2011 she stated clearly that the Respondent did not establish a "*prima facie case*" as she was not the Administratrix of the estate of the deceased, and on this ground she dismissed the Respondent's Application for an injunction.

10. However in the judgment, she granted the injunction though no further documentary evidence was tendered to alter the earlier position.

11. It is argued that the dispute concerned rights over L.R. No. LIMURU/BIBIRIONI/814. The parcel of land was registered in the name of FRANCIS KARIUKI MUYA as an Administrator of the estate of Appellants' deceased father and Respondent's father-in-law.

12. Under Section 79 of the Law of Succession Act (Cap. 160 Laws of Kenya) all the property of a deceased person vests in his/her personal representative who can in law sue or be sued in a dispute concerning the estate of the deceased person.

13. The Respondent was not the Administratrix of the estate of her late husband or that of her late father-in-law who was the registered owner of L.R. No. LIMURU/BIBIRIONI/814. She lacked capacity in law to bring the suit and the suit was therefore improperly before the court.

14. The Learned Magistrate appreciated/acknowledged this fact but nevertheless went ahead to hear the matter and grant judgment in favour of the Respondent.

15. The Appellant and the Respondent belonged to the "house of JANE WAMBUI KARIUKI" (See Pg. 69 of the Record of Appeal).

16. The Certificate of Confirmation of Grant issued by the High Court of Kenya at Nakuru on 20/02/1991 (See Pg. 26 & 27 of the Record of Appeal) gives 3.2 acres in L.R. No. LIMURU/BIBIRIONI/814 to the house of JANE WAMBUI KARIUKI (now deceased).

17. It does not state who are to share the 3.2 acres. It is only with regard to plot No. 5 LIMURU TOWNSHIP and Plot No. 8 GITITHIA LIMURU LOCATION that the beneficiaries thereto as identified.

18. The Learned Magistrate therefore erred in law and in fact in stating in her judgment that the Appellant had no share in L.R. No. LIMURU/BIBIRIONI/814.

19. The Learned Magistrate stated that the court had no power to determine ownership of L.R. No. LIMURU/BIBIRIONI/814. However at Pg. 91 of the Record of Appeal the Learned Magistrate held that L.R. No. LIMURU/BIBIRIONI/814 belonged to the Respondent.

20. The Learned Magistrate did not consider the Appellant's claim for special damages because she (Appellant) did not show she had a claim/right over L.R. No. LIMURU/BIBIRIONI/814.

21. It has now been established (See GROUND 5 hereinabove) that the Appellant has a share in L.R. No. LIMURU/BIBIRIONI/814.

22. The Learned Magistrate had also found that the Appellant and the Respondent were beneficiaries in L.R. No. LIMURU/BIBIRIONI/814. The Learned Magistrate erred in law and in fact in failing to consider and award the Appellant her counter-claim for special damages.

23. As at 18<sup>th</sup> February 2011 the amount spent by the Appellant on mourners, tents, chairs e.t.c and mortuary bill was Kshs. 405,500/= (See Pg. 80 of the Record of Appeal). This sum had been agreed upon by both counsels.

24. Mortuary bill was Kshs. 2,125/= per day. Judgement was delivered on the 20<sup>th</sup> May 2011. From 18<sup>th</sup> February 2011 to 20<sup>th</sup> May 2011, the Appellant paid mortuary bill for additional 90 days which is Kshs. 191,250/=.

25. The total sum that the Learned Magistrate should have awarded to the Appellant as special damages is Kshs. 596,750/=. Her reason for not considering the claim for special damages was based on a misapprehension of the certificate of confirmation of grant aforesaid.

26. In her Ruling the Learned Magistrate held that both the Appellant and Respondent were beneficiaries to L.R. No. LIMURU/BIBIRIONI/814 and that the Respondent had no case with any probability of success. However, in her judgment the Learned Magistrate gave a judgment which contradicted her earlier Ruling.

27. Finally, the Appellant opined that as the body of Ann Nduta was buried a few days after the judgment was delivered on the 20<sup>th</sup> May 2011 the only live issue is the award of special damages on the counter-claim, costs of the suit in the Subordinate Court and costs of this Appeal.

28. It is submitted for the Appellant that the Appellant has proved all her grounds of Appeal and prays that this Appeal be allowed and this court grants the Appellant Kshs. 596,750/= as special damages (Appellant was forced to spend this amount by the Respondent's conduct) costs of the suit in the Subordinate Court and costs of this Appeal.

### **DUTY OF 1<sup>ST</sup> APPELLATE COURT**

29. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

### **EVIDENCE IN SUMMARY**

30. PW1 testified that, Limuru/Boboropmo/814 is the land belonged her father-in-law before her husband and others inherited. There were succession proceedings in regard to her father in law. The case was not conducted before her husband died.

31. She stated that there were three (3) wives. She further stated that their house was divided in 3 portions i.e. Joseph Muthenji, James Rugu, Francis Muya (eldest) and her husband. Appellant was not included in the division of land and that she was to be evicted.

32. PW1 did not know if the Appellant has other pieces of land. The Appellant lives in the land/house of PW1's father in law. Appellant did not bury her deceased daughter on PW1's land but on Joseph Muthenji's land.

33. That the Appellant was her sister in law; her parents pre-deceased her husband and she was left in their home. She was not cultivating any land specifically but would cultivate with her mother.

34. That the portion is now shared between Appellant and PW1's children. The Appellant cultivates on PW1's road thus cannot access. That PW1's children use a back road to get into their portion.

35. She declines to allow Appellant to bury her dead on her piece of land. The husband to PW1 was the administrator of his father's property and that 814 belongs to him.

36. Their late mother signed a document to the effect that only her sons would inherit. That Appellant at one time buried her daughter on Joseph Muthenji's land.

37. PW1 have no objection with the burial taking place next to where the Appellant buried her other daughter but not to bury anybody on her (PW1) land. There was distribution of assets of Kariuki Muya by court. PW1 prays that her land should not be interfered with in terms of burying Anne Nduta.

38. PW2 Joseph Muthengi says that the letters of grant at para. 11 shows that his mother got. 3.2 acres (to hold jointly with all her sons; 2.5 acres – 2<sup>nd</sup> wife and 2.5 acres – 3<sup>rd</sup> wife).

39. Limuru Bbirioni was given to the wives as above. The 3.2 acres is divided between the sons of Jane Wambui i.e. PW1's mother. That the Appellant was not given any land by the parents of PW2. That the husband to PW1 Francis Muya often threatened to evict her. She is a squatter and a trespasser.

40. According to PW3 (Peter Kariuki Muya) Limuru/Bibirioni/814 is divided into 3 houses for each of the 3 wives. That Veronica Njioki does not have a portion thus did not have a problem with the division. The land was divided only to the sons of each of the 3 homes. That the matter was decided in Nakuru in 1985.

41. That the Appellant lives on Respondent's portion left to her by her husband who is the father of PW3. PW3 further stated that his father Francis Muya died in 2007 and he said his property should be divided only 3 years after his death. His father had said that the Appellant would have to move from the land but he died before completing the process.

42. That PW3 goes to the land but now where Appellant lives as she closed the road where they used to live. That he (PW3) cultivate very near her (Appellant) house and wish to confirm that as at 08/01/2011 not even a tent stood on her compound in relation to a funeral. All the matters relating to Limuru/Bibirioni/814 was settled in High Court Nakuru.

43. PW4 John Mwaura Muya states that the land in dispute belongs to his father which he inherited from Kariuki Muya his grandfather. That Limuru/Bibirioni/814 was divided into 3 sons of Jane Wambui i.e. James Rugu, Joseph Muthengi, Francis Muya.

44. That the people from Agricultural Ministry divided the land. That his grandfather's death was reported in Kenya Gazette Notice No. 4064. That the ruling at High Court confirmed the division.

45. PW4 further stated that he knew there was a certificate of confirmation of grant and that in para 11 shows what his grandmother got in 814. That her portion was divided as between her sons but the Appellant was not among them.

46. DW1 Veronica Njoki Kariuki stated that she had lived on 814 since she was born in 1952. She has 6 children one is deceased. Her parents are deceased. Her father died in 1981 while her mother in 1997.
47. That she lived with them on that piece of land and in the same house. She lived there with her children where 2 of them have built there. Her children are grown-ups and married. One of the deceased is her daughter in law Anne Nduta. That she cultivates on the place her mother cultivated.
48. DW1 claims that the Respondent came in 1991 and began cultivating her land and when she asked PW2, he told her that the land would be demarcated. She further states that she does not cultivate on the road reserve.
49. That there is a portion for burial without interfering with Respondent's portion. That other people have also been buried there. The land has not been demarcated and that they all cultivate where their parents left them. That her father had shown all of them where they were to farm.
50. DW1 further states that she had spent to date Kshs. 405,500/= for food, tents etc. They buy water, firewood, charcoal, rice, cooking fat, milk, beans and maize. She buys milk at Kwambira Dairy and have the receipts – DEXH 1. DW1 have the receipts DMFI 2. There is outstanding mortuary fee at Kshs. 2,100/= per day. No. 2 of her bill is fare for her brothers who come from Kitale.
51. DW1 further states that she does not know why she was sued. That there are no problems in their family even if she bury Ann Nduta he her father's land. There is enough space to bury the deceased. She prayed that court allows her to bury the deceased in that portion of land, mortuary fees and other costs.
52. Upon cross-examination, DW1 stated that Grace Wanjiku was her daughter and now deceased and buried somewhere in her father's land in 1983.
53. That her father was dead then but her mother was alive. That she buried her on PW2's land then which was not divided. She prays to bury her daughter-in-law where she lives now. That when Grace died, she was living in the same house where DW1 lives now.
54. She does not know of a succession was filed. She knew there was a caution and that she ought to have known of the succession. She further stated that they were 8 siblings. The land remains divided as between his wives.
55. That Kshs. 405,500/= is what she had used. She use about Kshs. 1,500/= per day. She is a farmer (carrots) and have dairly cattle. She get about Kshs. 20,000/= per month. She get soft loans from her daughters in Finland to feed her guests at Kshs. 1,500/= per day.
56. So far they have sent at lead Kshs. 1,000/= from Finland. As at 18/01/2011 she had spent Kshs. 219,630/= but Kshs. 405,500/= is how the amended figure as at 18/02/2011.

#### **ISSUES, ANALYSIS AND DETERMINATION**

57. After going through the material on record and the submissions, I find the issues are;

***i. Whether the appellant proved her case on balance of probabilities?***

***ii. If above is in negative, is the counter-claim meritorious?***

***iii. What is the order as to costs?***

58. I looked at the confirmation of grant and I am of the considered opinion that in the absence of any appeal then the grant binds the family as to distribution of property.

59. The grant reads that only the sons of Kariuki Muya deceased were to inherit. Nowhere does it read that a lady/daughter could inherit.

60. What court did determine is whether the rights of Respondent had been infringed by the intended action of the Appellant or not.

61. Again being a burial dispute it was evident that once buried and the division of the property finalized, it would be against public policy/customary law to have Appellant forced to rebury her dead again.

62. The trial court made a finding that the Appellant is not indicated anywhere as a beneficiary to the parcel No. Limuru/Bibirioni/814 and she failed to tender such evidence before court.

63. The final blow on whether or not the Appellant was entitled to any portion of the land in question was the exhibit which shows that the High Court at Nakuru dismissed the application for review.

64. The state indeed has got to step in and protect the rights of Respondent who is a widow and has exhibited her stake in the piece of land in issue. Not living in the piece of land allocated to her husband does not mean that Appellant can take over.

65. Finally in relation to the special damages, it is trite law that the same must be proven specifically. Since the Appellant has failed to prove

that she is entitled to bury her dead on that piece of land, and costs follow an event, the monies claimed in her counter claim being chair/tent rentals, food and mortuary fees among others cannot be paid by Respondent since Respondent has proven that she is entitled to her portion, and would suffer irrecoverable loss in the event that her portion of land was to become a cemetery.

66. I have observed in the submissions of the Appellant, that it is stated;

***“As the body of Ann Nduta was buried a few dates after the judgment was delivered on 20/05/2011 the only live issue is the ward of Special Damages on the counter-claim, Costs of the suit in Subordinate Court and Costs of instant appeal be awarded.”***

67. The Appellants was barred by court from burying the said late Ann Nduta in Respondent portion of suit land and immediately after verdict buried said deceased person elsewhere and did not wait to impugn trial court verdict.

68. It is apparent the same act makes the Appellant to abandon the issue of challenging the injunction issued by trial court which was the only relief sought in the plaint.

69. However, the Appellant counter-claim on special damages are being sought to be awarded against the Respondent. Of course the Appellant did not win the contest to warrant burial of Ann Nduta as desired on alleged portion of suit land occupied by the Respondent.

70. The option to bury the late Ann elsewhere was a concession that the Appellant could not have had a successful appeal to entitle her to bury Ann Nduta in the portion occupied by the Respondent. Thus the claims for mortuary charges and special damages in the counter claim have no legal basis.

71. It is an academic exercise for the court to proceed and determine whether Respondent should pay same in view of the abandonment by Appellant the challenge of the injunctive relief issued by the trial court, prior to burying Ann Nduta.

72. The entire substratum of the counter claim lost basis on burial of Ann Nduta on an alternative site in lieu of awaiting appeal determination and thus right to bury the late Ann Nduta in portion of the suit land in issue remained as adjudicated in Respondent favour.

73. Thus the court makes the following orders;

**i. The Appeal is dismissed.**

**ii. As Respondent never participated in the submission in this matter, the court awards no costs.**

**SIGNED, DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018 IN OPEN COURT.**

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**HON.C. KARIUKI**

**JUDGE**