



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO. 218 OF 2013**

**KABURO M'MAGIRI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ERASTUS KITHINJI .....1ST DEFENDANT**

**DOUGLAS MEME MURONGA.....2ND DEFENDANT**

**J U D G M E N T**

1. In her Complaint dated 6th August, 2013, the Plaintiff prays for judgment for:-

***a. A permanent injunction restraining the defendants and their family members, representatives, employees, servants, agents and anybody else acting at their behest from entering into trespassing onto, and/or whatsoever interfering with the Plaintiff's actual and exclusive possession of L.R. NO. ABOTHUGUCHI/GAITU/3008.***

***b. Costs of the suit and interest thereon against the defendants jointly and severally.***

2. In her evidence, PW1, the Plaintiff told the Court that she wished her witness statement dated 06/08/2013 to be adopted as her evidence in this suit. The witness statement was adopted as PW1's evidence in this suit.

3. In her witness statement, PW1 avers that the 1st defendant was her grandson whom she brought up after he was deserted by his mother at the age of 3 months. She also says that she took care of his circumcision which ushered him into manhood in accordance with Meru Customary Law.

4. PW1 avers that when her husband M'Magiri M' Itwamwari died, she filed Meru H.C Succession Case No. 298 of 1998 and she and the 1st defendant were each awarded 4.4 acres out of the deceased's L.R NO. ABOTHUGUCHI/ GAITU/287 and that the apposite shares were transferred to her, her grandson and other beneficiaries.

5. PW1 avers that out of her share , which was registered as L.R NO. ABOTHUGUCHI/GAITU/2887, she authorized her grandson, the 1st defendant who she had complete trust in having single-handedly brought him up, to excise and sell 1 acre thereof to one Veronica Ngugi Murithi to raise money for the surveyor and to help herself.

6. PW1 avers that she allowed her daughter Judith Nkirote, who had been left out in the distribution ordered by the Succession Court, to be cultivating on 1 acre of land.

7. PW1 avers that the 1st defendant breached the trust she had him and subdivided her parcel No.

ABOTHUGUCHI/GAITU/2887 into three for his selfish gain. She says that she and her daughter have been utilizing her land and have developments thereon such as maize , black beans, bananas and mature trees such as MIRINGA AND MITUATI.

8. PW1 avers that in July, 2013, the 2nd defendant who is not related to her family and who knew that the suit land was her only source of livelihood stormed into her land forcibly, intending to assume possession, upon allegation that he had bought the land from the 1st defendant.

9. PW1 avers that she reported the matter to the area chief and the District Officer and upon hearing her complaint advised her to file a suit in Court after the 1st defendant revealed that he had subdivided L.R. NO. ABOTHUGUCHI/GAITU/2887 into 3 portions, among them, ABOTHUGUCHI/GAITU/3008 and transferred it to the second defendant at a consideration of Kshs. 450,000 without her consent or knowledge.

10. PW1 avers that the 1st and 2nd defendants confronted her while she was in her aforementioned land and vowed to combine efforts to evict her from her land so that the 2nd defendant could take possession. She claims that the 2nd defendant laconically told her that a woman could not be allowed to inherit family land.

11. PW1 avers that in April, 2013, the 1st defendant, her grandson, and his wife locked her in her house while sick and without food for about 3 days so that she would die and pave way for them to take her land with ease. She says that she was graciously saved by her daughter, Monica Kathambi.

12. During cross-examination by the 2nd defendant's advocate, PW1 denied that she had allowed the 1st Defendant, her grandson, to sell the suitland. She denied having been given a share of the sale price. She also denied attending a Land Control Board meeting . She also denied having allowed the 2nd defendant to occupy the suit land.

13. On a balance of probability, I find that the 2nd defendant did not controvert PW1's evidence.

14. The matter was fixed for further hearing on 08/09/2016. On that day, Mr. Carlpeters Mbaabu, the Plaintiff's Advocate said that he was ready to have his 3 witnesses give evidence.

15. However, Mr. Igweta, holding brief for Mr. Mugambi, for the 2nd Defendant, told the Court that Mr. Mugambi was not ready to proceed with further hearing because he had a sick child he was attending to.

16. The names of the 1st and 2nd defendants were called out in and out of Court but they were absent.

17. Mr. Mbaabu, for the Plaintiff, protested that though sickness was a sensitive matter, Mr. Mugambi ought to have informed him. He told the Court that the Plaintiff was an old lady and lamented that the defendants had vowed to delay hearing and determination of this suit until she died.

18. The case was fixed for further hearing to take place on 6/12/2016.

19. Mr. Mbaabu told the Court that he had filed an affidavit of service showing that all parties had been served with a notice indicating that further hearing was to take place on 06/12/2016.

20. I find that the 1st and 2nd defendants were aware of this date for further hearing.

21. Mr. Mark Murithi, holding brief for G.G. Mugambi , the 2nd defendant's advocate, told the Court that Mr. Mugambi could not proceed with the hearing claiming that he had lost contact with his client.

22. Mr. Mbaabu decried this new situation. He opined that the defendants were employing delaying tactics . He reminded the Court that on 8/9/2016, it was claimed that hearing could not proceed because Mr. Mugambi was attending to a sick child.

23. Mr. Mbabu told the Court that if the claim that Mr. Mugambi had lost contact with his client he should have filed an application under Order 9 CPR.

24. Mr. Mbaabu told the Court that there was no correspondence showing that Mr. Mugambi had tried to contact his client. Mr. Mbaabu also told the Court that there was no written correspondence showing that Mr. Mugambi had written to him, asking him not to bring his witnesses to Court on account of his having lost contact with his client.

25. Mr. Mbaabu told the Court that it was on record that the defendants had vowed to delay the hearing and determination of this case until the Plaintiff died. He told the court that she was over 90 years old. He asked the Court to allow hearing of the suit to proceed.

26. I found that no convincing reasons had been proffered to persuade the Court to adjourn hearing of the suit.

27. The Court ordered the Court Clerk to call out inside and outside Court the names of the 1st and 2nd defendants.

28. They were nowhere to be heard or seen. They were absent.

29. In terms of Order 12 Rule 2 of the Civil Procedure Rules, I was satisfied that the apposite notice of hearing had been duly and properly served. I directed hearing to proceed ex- parte.

30. PW2 told the Court that she wished to adopt her witness statement as evidence in this suit. The statement, by and large, supported the evidence of PW1.

31. PW 3 told the Court that he wished to adopt his statement dated 9/8/2016 as his evidence in this suit. The statement, by and large, supported the evidence of PW1.

32. PW 4 told the Court that he wished to have his witness statement dated 9th August, 2016 adopted as his evidence in this suit. By and large, the statement supported PW1's evidence.

33. I do find the evidence tendered by the Plaintiff and her 3 witnesses credible.

34. It is noted that the 1st defendant refused to take part in the apposite proceedings despite all along being aware of the various hearing dates.

35. I have carefully considered the pleadings proffered by the parties and the evidence tendered in this suit.

36. I find that the 1st defendant callously and in an egregious manner took advantage of his elderly grandmother, now over 90 years old, and abused the trust she had bestowed upon him. He has not denied that he was abandoned by his mother when he was only three months old, was brought up by his grandmother and was eventually ushered into adulthood by her. I find that in collaboration with the 2nd defendant the 1st defendant perpetrated fraud against the Plaintiff. I decry the unconverted claim that women could not inherit family land. This veritably atavistic and anachronistic attitude does not fit in the modern times we live in. It is unconstitutional and merits stinging opprobrium and deprecation.

37. I find that the Plaintiff has proved her case.

38. As the 2nd defendant has not prosecuted his counterclaim, it merits dismissal.

39. It is ordered as follows:-

***1. Registration of L.R. NO. ABOTHUGUCHI/GAITU/3008 in the name of DOUGLAS MEME MURONGA, the 2nd defendant, be cancelled by the apposite registrar forthwith.***

*2. A permanent injunction is issued restraining the defendants, their family members, representatives, employees, servants, agents, and anybody else acting at their behest, from entering into, trespassing into, and/ or whatsoever interfering with the Plaintiff's actual and exclusive possession of L.R No. ABOTHUGUCHI/GAITU/3008.*

*3. The 2nd defendants' counter-claim is dismissed.*

*4. Costs are awarded to the plaintiff.*

**DELIVERED IN OPEN COURT AT MERU THIS 20TH DAY OF DECEMBER, 2016 IN THE PRESENCE OF:**

C:A Daniel

Carlpeters Mbaabu for the Plaintiff

Kieti h/b G.G Mugambi for 2nd Defendant

**P. M. NJOROGE**

**JUDGE**