



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**E.L.C.A NO 22 OF 2014**

**REUBEN KAMWOCERE.....PLAINTIFF**

**VERSUS**

**HELLENA WAKINA MAURICIO.....DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

Mr Reuben Kamwocere the plaintiff herein filed this declaratory suit seeking the following orders:

1. A declaration that the decision/award in Eastern Province Land Dispute Appeals Committee case number 82 of 2006 was ultra vires, illegal, null and void ab-nitio and to be set aside and/or quashed.
2. A declaration that the plaintiff is the rightful owner of land parcel No Gaturi/Nembure/2548.
3. An order of permanent injunction to restrain the defendant either by herself, her agents, servants or persons acting under her (sic) from interfering, wasting, damaging, alienating or in anyway dealing with land parcel No. Gaturi/Nembure/2548.
4. Costs and interest of the suit.

He is the only witness in the case. He testified before Hon Lady Justice Karanja and closed his case.

When I took over this part heard case, both the plaintiff and the defendant were desirous of having the case proceed from where it had stopped. For reasons I gave in my ruling dated 6<sup>th</sup> October 2014, I decided to recall the plaintiff for further examination. This procedure is authorized by Order 18, Rule 10 of the Civil Procedure Rules of 2010. The plaintiff duly complied and gave evidence as a recalled witness.

This declaratory suit is opposed by the defendant who testified in her own behalf and called her daughter (DW 2) in support of her case.

**The Case for the Plaintiff:**

The case for the plaintiff is that he is the rightful owner of the suit land following the succession cause number 5 of 1978 in the court of the District Magistrate III at Runyenjes and that court decreed that the plaintiff was to be the sole beneficiary to the suit land. According to him, the mother of the defendant, Patricia Wanjiru, who attended the succession proceedings consented to the plaintiff being the person entitled to her piece of land.

The plaintiff's further evidence is that he was duly registered as the owner of the suit land. He produced the certificate of title as P. Ex 4.

The evidence of the plaintiff is riddled with contradictions. According to the record of the proceedings of the Embu District Land Disputes Tribunal, plaintiff stated that the defendant was informed to attend the Runyenjes Succession Cause but she refused to do so. This is clear from the plaintiff's exhibit marked P. Ex.5.

Furthermore, he is also recorded to have told the Eastern Province Appeals Committee that he (the plaintiff) admitted that he did not tell the defendant about the succession cause at Runyenjes. This is clear from the proceedings of the Appeals Committee which the plaintiff produced as exhibit P. Ex. 6. When this was pointed out to him in his recalled evidence, he stated that his evidence before the two tribunals was not contradictory. In his recalled evidence he stated that these two tribunals did not do justice to his case.

According to him, the two tribunals were writing down evidence contrary to what he had told them. For example he stated as follows: ***“even the tribunal that recorded that the defendant was told to attend the Runyenjes succession wrote down contrary to what I had told it”***. He says in his further evidence that he did not tell the panel of elders that he had informed the defendant to attend the succession cause at Runyenjes. He even went further to contradict himself that the tribunal correctly recorded that the defendant was told to attend court and she refused to do so.

It is also his evidence that under Kiambu Customary Law, the eldest son was entitled to inherit all properties of the widow following the death of her husband. Even in that capacity, he inherited the properties as a trustee on behalf of the beneficiaries. His other evidence is that he told the panel of elders (the Appeals Committee) that he owned 5.55 acres and not 5.55 hectares (see exhibit P Ex. 6).

Furthermore, the plaintiff testified that only male beneficiaries were entitled to inherit property under Embu Customary Law and female family members were not allowed to inherit the property. In this regard, he gave evidence that he never told the defendant to attend court. According to him, it was the duty of the mother of the defendant (Patricia Wanjiru) who was supposed to inform the defendant to attend the Runyenjes Succession cause. He denied inheriting the suit land as a trustee.

### **The Case for the Defendant:**

The defendant is the aunt of the plaintiff. She is aged between 70 and 80 years. Her evidence is that they were allowed to plant coffee on the suit land by his father Nginyane Njamwitha which they used to pluck. It is also her evidence that her father told her that she was going to inherit this suit land as she did not have a male child with her mother.

Furthermore, the mother of the defendant told her (the defendant) that she was to continue plucking the coffee and use the proceeds therefrom for her children. She was unable to remember the year. Her other further evidence is that her mother was very old and blind. She was too old to the extent that she was unable to walk. Following her death, the plaintiff told her not to go back to her parents' home. The defendant then asked him if he was willing to give her a portion of her mother's land to enable her to cultivate it. The suit land was being cultivated by the defendant's daughter (DW 2).

According to DW 2, she continued to cultivate the suit land between 1991 to 1997, but during 1997 she was chased away from cultivating the suit land by two young men who assaulted her in the process. According to this witness (DW 2) she did not know that the suit land belonged to the plaintiff. It is also her evidence that she was given permission to cultivate the suit land by her grand mother (Patricia Wanjiru) and not by the plaintiff. This assault was never reported to the police because she was preoccupied with the burial of her husband. She showed the court a gap in her teeth which was the position of the tooth knocked out by the two young men. Like her mother, she stated that she was illiterate.

On the advice of DW 2, the defendant filed a case before the Embu District Land Disputes Tribunal which awarded her 1 ½ acres of the suit land. It is the evidence of DW 2 that the 1 ½ acres of land included the part on which the coffee plants had been planted. The filing of the suit before the tribunal was as a result of the plaintiff's refusal to give the defendant the suit land. Before the defendant filed the case in the tribunal, she had taken the matter to Nembure Chief's Office for arbitration, which turned out to be unfruitful.

The plaintiff was aggrieved by this decision of the Embu District Land Disputes Tribunal. He therefore appealed to the Eastern Province Appeals Committee. That committee confirmed the award of the subordinate tribunal.

### **The Applicable Law**

The law that governs the issues in this case include the principles governing the grant of declaratory orders. This law is found in **Order 3, Rule 9 of the 2010 Civil Procedure Rules** which states as follows:

***9. No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not.***

Secondly, the law also requires this court to assess the evidence produced by both parties and make findings of fact based on the evidence. According to the Court of Appeal in **Opolot v. Attorney General 1969 (EA 631)** the grant of a declaratory order involves the exercise of discretion. In other words, it is not an order that is granted as of right. The other requirement is that before it is granted by the court care should be exercised.

Furthermore, according to the Court of Appeal in **Okethi Okale and Ors V. Republic 1965 (EA 555)** it is the duty of the trial judge to consider the evidence as a whole before reaching a verdict.

### **Issues for Determination:**

In the light of the evidence produced by both parties, the submissions of both counsel and the applicable law, the following are the issues for determination:

1. Whether or not the plaintiff is entitled to a declaratory order.
2. Whether or not the plaintiff obtained the confirmed grant of letters of administration fraudulently.
3. Who should pay for the costs of this suit.

### **Evaluation of the Evidence and the Law**

In the light of the evidence produced by both parties, the submissions of both counsel and the applicable law, it is necessary to consider the issues raised for determination. The grant of declaratory is not as of right. It is a discretionary remedy. In this regard it is my finding on the evidence produced that the obtainment of the title deed of the suit land by the plaintiff is tainted with fraud. He did not inform the defendant to attend the Runyenjes Succession Cause proceedings. In this regard, the defendant should have been informed by the plaintiff to attend the succession cause proceedings as she was a potential beneficiary. He materially contradicted himself as to whether he informed her or not.

I find him to be an incredible witness. For example, he went to the extent of telling this court that the two tribunals recorded contrary to what he told them. The plaintiff's evidence that the mother of the defendant voluntarily consented to him being sole beneficiary of the suit land is not correct.

In this regard, I believe the evidence of the defendant (DW 1) and her daughter (DW 2) that their mother and grandmother respectively was blind and deaf. I find them to be credible witnesses. It is therefore clear that the title deed was tainted with fraud because it did not include the defendant as a

beneficiary. Under cross-examination, DW 2 stated that her grandmother was aged over 90 years. She was unable to remember when she became blind. During the life time of her grandmother, she continued cultivating the suit land.

It is also her evidence that the plaintiff told them that their grandmother signed by thumb printing because she was blind and deaf. Finally, she stated that the only witness who gave evidence at the Runyenjes succession cause proceedings, was the plaintiff.

Furthermore, she stated that she continued cultivating the suit land until 1997. In his recalled evidence the plaintiff (PW 1) stated that it took 26 years before the defendant went to court to challenge the plaintiff's ownership in respect of this suit land. However, there is evidence from the defence that the delay on the part of the defendant to proceed to court is explained by the evidence they tendered in court which explains that delay. I am aware that delay defeats equity. In this regard, delay has been satisfactorily explained by the defence witnesses.

Having considered the entire evidence, I find that the plaintiff is not entitled to the declaratory order sought. His conduct is tainted with fraud. The fraud consists of the fact that he did not tell the court in the Runyenjes Succession Cause that the defendant was a beneficiary of her mother's land. Furthermore, I find that the plaintiff is the person who organized for the two young men to assault the (DW 2) of the defendant in an effort to assert his ownership and control of the suit land.

**Verdict and Disposal Order:**

The plaintiffs claim is hereby dismissed. As regards costs, this being a case involving close family members, I make no orders as to costs.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **21<sup>st</sup>** .....  
.day of .....**JANUARY....2015**

In the presence of

Both the plaintiff and the defendant and in the absence of their advocates

Court clerk Mr Muriithi

Right of Appeal under Section 66 Civil Procedure Act explained to the parties.

**J.M. BWONWONGA**

**JUDGE**