



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 138 OF 2015**

**BENSON NDERITU WAMBUGU.....PLAINTIFF**

**-VERSUS-**

**JOHN MUKUNDI.....1<sup>ST</sup> DEFENDANT**

**MUGO KAROKI.....2<sup>ND</sup> DEFENDANT**

**MWANGI WANEE.....3<sup>RD</sup> DEFENDANT**

**MARGARET WARUKIRA NDERITU.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**BACKGROUND**

1. By his Plaint dated 30<sup>th</sup> April, 2015 and filed herein on 6<sup>th</sup> May 2015, Benson Nderitu Wambugu (*the Plaintiff*) prays for:

(a) *An order that the Defendants jointly and severally be evicted from LR No. Mahiga/Kamoko/486;*

(b) *Costs of the suit; and*

(c) *Any other or better relief.*

2. Those prayers arise from the Plaintiff's contention that he is the registered proprietor of the suit property and that the Defendants have entered the suit land and occupied the same without his consent. The Plaintiff accuses the 4<sup>th</sup> Defendant who is his daughter of conniving with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to unlawfully occupy the land and deny him access thereto.

3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants neither entered appearance nor did they respond to the Plaintiff's claim despite service of summons.

4. By her statement of Defence dated and filed herein on 29<sup>th</sup> March 2016, Margaret Warukira Ndiritu (*the 4<sup>th</sup> Defendant*) avers that the Plaintiff is her father and that they live on the suit land which is their family land together with her mother Milka Wanjiku Ndiritu.

5. The 4<sup>th</sup> Defendant further avers that the suit land is a family property and that no member of the family is supposed to evict, abuse or assault or deny any other member access thereto. The 4<sup>th</sup> Defendant contends that that the Plaintiff's suit is misconceived, incompetent and discloses no reasonable cause of action against herself.

**THE PLAINTIFF'S CASE**

6. At the trial herein the Plaintiff called two witnesses who testified in support of his case.

7. PW1 – Benson Nderitu Wambugu is the Plaintiff himself and a farmer from Subukia. He told the court he is the registered proprietor of the suit property and the father of the 4<sup>th</sup> Defendant herein. PW1 further told the Court that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were brought into the suit property by the 4<sup>th</sup> Defendant without his consent.

8. PW1 told the Court it was not true as stated by the 4<sup>th</sup> Defendant that he had together with his former wife Milka Wanjiku brought the Defendants into the land. He testified that he had left his wife Milka and her 6 children in Nyahururu where he gave them 12 acres of land. The 4<sup>th</sup> Defendant was one of Milka's six children and had previously been married in Njoro. PW1 further told the court the 4<sup>th</sup> Defendant had left Njoro to come and live in the suit property. She had become abusive to PW1 and even assaulted him once when PW1 went to the land.

9. PW1 testified that he had 3 other wives and he wished to sub-divide his property while he was still alive. He told the Court he wished to give the suit property to his wife Jane Wanjiru and her children. He denied that he wanted to take the property and to sell it to someone else. He further told the court he had already given the 4<sup>th</sup> Defendant a piece of land.

10. On cross-examination, PW1 told the court he bought the suit property in 1958 long before he came to marry the 4<sup>th</sup> Defendant's mother in 1994. He testified that he had been living with his other wife Jane in Subukia but the said Jane passed away. He had moved to Subukia 20 years ago leaving the suit property under the care of his first wife who had passed away without bearing children.

11. PW1 further testified that he had some tenants on the suit land. The 4<sup>th</sup> Defendant had also secretly built rental houses on the land. He had given the mother of the 4<sup>th</sup> Defendant land in Gichau, Nyandarua. The said mother had left PW1 and went back to live in her parents' home some 40 years ago. PW1 further told the Court that the 4<sup>th</sup> Defendant and her mother were out to disinherit his other children.

12. PW2 – John Muriu Wandithi is a farmer based in Othaya. He told the Court he knows the parties herein and that the land in question belongs to the Plaintiff. PW2 testified that the Plaintiff has leased out part of the suit premises to himself and that the 4<sup>th</sup> Defendant has rented out business Kiosks to other tenants on the same land.

13. PW2 further told the Court the 4<sup>th</sup> Defendant moved into the suit property when the suit was filed. He further testified that the Plaintiff had two other wives who have since died. The Plaintiff's first wife is buried on the suit property.

14. On cross-examination, PW2 testified that he has been operating a Kiosk leased to himself by the Plaintiff on the land since 2012. The 4<sup>th</sup> Defendant has also built temporary structures on the land which she has leased to other people.

#### **THE DEFENCE CASE**

15. On her part, the 4<sup>th</sup> Defendant called 3 witnesses who gave testimony in support of the defence case.

16. DW1 – Margaret Warukira Nderitu is the 4<sup>th</sup> Defendant herself. She told the Court the Plaintiff is her father. DW1 denied allowing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's or anyone else into the suit premises.

17. DW1 testified that her mother had asked her to help her build some fabricated rooms for her to lease on the land to enable her earn some money as the Plaintiff had neglected her. The Plaintiff had gone to live in Subukia far away from DW1's mother who was old and ailing. In that respect, DW1 told the Court it was her mother who had brought in the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as tenants and DW1 had no control over them save for the fact that she would collect rent from them and transmit the same to the mother.

18. DW1 further told the Court that she also lives on the suit premises together with her adult children who were born and raised up there.

19. DW1 told the Court the suit premises were bought jointly by her mother and the Plaintiff and she (the mother) therefore had a right to deal with the same as she desired. DW1 denied abusing or assaulting the Plaintiff at any point in time.

20. On cross-examination, DW1 told the Court that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were once the tenants of her mother but they are no longer on the suit property after they were chased away by one John Mureithi. She told the Court the land belongs to his parents jointly but she did not know in whose name it was registered.

21. DW2 - Jackson Maina Nderitu is a brother to the 4<sup>th</sup> Defendant and a son of the Plaintiff. He told the court the suit property was purchased in 1957 through the joint efforts of both his mother and the Plaintiff. He further told the Court his mother used here savings from Pyrethrum farming to help in the purchase of the land although the same was registered in the name of the Plaintiff as a trustee on behalf of their mother.

22. On cross-examination, DW2 told the Court he was born in 1966 and that he has built his home and lives on the suit land. He admitted that at some point in time the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were residing on the suit property but told the Court that they were chased away by the Plaintiff. The said Defendant had come onto the land through DW2's mother and the 4<sup>th</sup> Defendant.

23. DW3 - Milkah Wanjiku Nderitu is the wife to the Plaintiff and the mother of the 4<sup>th</sup> Defendant. DW3 told the Court the current suit was instituted by the Plaintiff out of malice after she refused to grant him consent to alienate the same. She further told the Court the 4<sup>th</sup> Defendant was being victimized for supporting her.

24. DW3 testified that she is afraid the Plaintiff who is now very old was being duped by some third parties to sell the land at throw away prices and that if the same is sold, she stands to suffer as she derives her daily bread from leasing out portions of the land to various

individuals after the Plaintiff neglected her in her old age.

25. DW3 further told the Court that the suit property was purchased jointly by herself and the Plaintiff in the year 1963 after she saved money from the sale of pyrethrum. DW3 told the Court that their understanding at the time was that her husband was to be registered as the proprietor in trust for herself as family land.

26. On cross-examination, DW3 testified that she did not inform the Plaintiff when she brought in the tenants because the Plaintiff had abandoned her and the children on another parcel of land. It was the tenants who sustained her through payment of rent. DW3 told the Court she still lives in Kieni where the Plaintiff had left them. She further told the Court the Plaintiff had remarried in 1977 and that he had other children.

27. DW4 - Gicheru Wangechi hails from Mahiga in Othaya and is a village elder in Muchathaini where the parties come from. DW4 testified that the suit property belongs to both the Plaintiff and his wife and that the 4<sup>th</sup> Defendant lives on the land to support and take care of her mother.

### **ANALYSIS AND DETERMINATION**

28. I have carefully perused and considered the pleadings, the testimonies of various witnesses who testified herein and the evidence adduced at the trial. I have equally considered the submissions and authorities placed before the Court by the Learned Advocates for the parties.

29. The Plaintiff herein prays for an order of eviction to issue against the four (4) Defendants herein from all that parcel of land known as Mahiga/Kamoko/486 (*the suit property*). He also craves for a permanent injunction to issue restraining the Defendants from entering the land and/or interfering with his quiet enjoyment thereof.

30. It is the Plaintiff's case that he is the registered proprietor of the suit property. He accuses the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants of colluding with the 4<sup>th</sup> Defendant who is his daughter to enter into and occupy the suit property without his consent or authority.

31. As it turned out, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants neither entered appearance nor responded to the Plaintiff's claim. On her part the 4<sup>th</sup> Defendant denies colluding with and/or bringing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants onto the suit property. On the contrary, the 4<sup>th</sup> Defendant asserts that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants entered into the land as the tenants of her mother and that she was only collecting rent on behalf of her mother who is old and ailing.

32. It is the 4<sup>th</sup> Defendant's case that the suit property was jointly bought by her mother and the Plaintiff herein and that the mother had an equal right to use the property in the manner that she deems fit. On that account, the 4<sup>th</sup> Defendant avers that she built some rental structures on the land on behalf of and to support her mother and that she also resides on the suit property as a daughter of the proprietors of the property.

33. From the material placed before me, there was no dispute that the suit property is registered solely in the name of the Plaintiff. The Plaintiff produced a search certificate (Pex. 1) to that effect. It was however the 4<sup>th</sup> Defendant's position that the property was jointly acquired by both the Plaintiff and her mother and that the Plaintiff was therefore registered as the proprietor and as a trustee for his wife Milkah Wanjiku Nderitu and their family.

34. As it were, once she questioned the legitimacy of the Plaintiff's title, the burden of proving that the land was jointly acquired and that the Plaintiff held the title in trust for the family fell upon the 4<sup>th</sup> Defendant. The principle that he who alleges must prove is clearly captured under **Section 107(1) of the Evidence Act (Cap. 80 of the Laws of Kenya)** as follows:

**“107. (1)Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

35. In support of her proposition that the suit property is family land, the 4<sup>th</sup> Defendant called her brother (DW2) and mother (DW3) who both testified that DW3 contributed to the purchase of the suit land in the early 1960's out of the savings she made from the sale of pyrethrum. That position was however not supported by any tangible evidence. There was neither evidence that DW3 engaged in pyrethrum business nor that she made any contribution to the purchase of the land from the proceeds thereof.

36. A perusal of the Certificate of Official Search (Pexh. 1) produced by the Plaintiff herein reveals that the suit property was registered in his name as Nderitu S/O Wambugu on 4<sup>th</sup> December, 1962. While the 4<sup>th</sup> Defendant contends that the registration was in trust for her mother and the family, I could not find any evidence of such trust and this Court could not make an inference that the registration was in trust merely because the Plaintiff was married to the 4<sup>th</sup> Defendant's mother.

37. As it turned out, there was no dispute that the Plaintiff is a polygamous man. The Plaintiff testified that he had three wives and that he now wishes to sub-divide his properties to his family members. According to the Plaintiff, he had given 12 acres of land to the 4<sup>th</sup> Defendant's mother in Gichau, Nyahururu and he desired to give the suit property to his other wife Jane Wanjira and her children. It was the Plaintiff's testimony that the suit property was previously occupied by his first wife who died childless and was buried on the land. He accused the 4<sup>th</sup> Defendant and her mother of trying to disinherit the other members of the family in laying claim to the suit property.

38. That evidence by the Plaintiff was not controverted. The 4<sup>th</sup> Defendant and her mother did not deny that they had been given land in

Gichau. Indeed in her testimony before the Court, the 4<sup>th</sup> Defendant accused the Plaintiff of abandoning their mother at the matrimonial home and going to live far away in Subukia. During her cross-examination, the 4<sup>th</sup> Defendant's mother admitted that she still resides in Kieni where she told the Court the Plaintiff had left her when he remarried in 1977.

39. That being the case, it was clear to me that the suit property was not the matrimonial home of the Plaintiff and the 4<sup>th</sup> Defendant's mother. On the contrary, it was the Plaintiff's first wife who was settled on the suit property and was later upon death, buried on the land. It was difficult to believe that the 4<sup>th</sup> Defendant's mother contributed to purchase the suit property where the Plaintiff lived with his first wife and then accepted to go and settle elsewhere in Kieni with the Plaintiff.

40. While the Defendants submitted that the suit property is family land and that the 4<sup>th</sup> Defendant had a right to occupy the same, such a right, given the circumstances herein could only arise out of customary law given that the Plaintiff is a polygamous man. Such rights are however extinguished upon registration of land. Dealing with a similar situation in **Mbui Mukangu -vs- Gerald Mutwiri Mbui (2004)eKLR**, the Court of Appeal had this to say:

**“We earlier set out the provisions of Sections 27 and 28 of the Registered Land Act which in effect state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interest which are set out in Section 30 of the Act. The evidence on record is silent on whether or not the respondents' Kikuyu customary law rights over the suit property are noted in the land register respecting the land. In the absence of such evidence, we may not properly infer or imply that they are. The only other aspect outstanding for consideration is whether the customary law rights, if they exist at all, are overriding rights or interest recognizable under that section. The issue was considered in the following two reported cases of Obiero -vs- Opiyo and Others (1972) EA 227 and Esiroyo -vs- Esiroyo & Another (1973) EA 388, and in both cases it was held that they are not. The Court in both cases was bound to come to that conclusion because of the clear language of Section 30 above. However, considering the provisions of Section 3(2) of the Judicature Act which we partly reproduced above, customary law rights being subject to rights under a written law, the respondents rights are clearly excluded by clear language of Sections 27 and 28 of the Registered Land Act.**

41. The **Land Registration Act 2012** retains the overriding rights and interests under **Section 28** thereof in much the same way as they were under the repealed Registered Land Act and it was clear to me that the position as held by the Court of Appeal remains the correct position in law to-date.

42. It was clear to me that while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants may have left the land, the 4<sup>th</sup> Defendant continues to remain on the land forcefully and without the consent of the registered proprietor. The Plaintiff told the Court that the 4<sup>th</sup> Defendant was previously married in Njoro, Nakuru before she left and came back to live on the suit land. The 4<sup>th</sup> Defendant in her own testimony admitted that she lives on the land with her adult children who she claims were born and grew up on the suit land.

43. As I have found, there is no basis for their continued occupation of the land as the same was not the original home occupied by their father and mother. An entry on another person's land without lawful authority amounts to trespass. As the registered proprietor of the suit property, the Plaintiff is entitled to all rights and privileges associated with such ownership. In that respect, **Section 24 of the Land Registration Act, 2012** provides as follows:

**“The registration of a person as the proprietor of land shall vest**

**in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

44. While it may be true as contended by the 4<sup>th</sup> Defendant and her witnesses that her father is very old and that he appears to favour his brothers in regard to his properties as opposed to his blood and family, I did not think that that was a good reason to try and hold onto his property without his consent. As the Court of Appeal stated in the case of **Mbui Mukangu -vs- Gerald Mutwiri Mbui (supra)**:

**“The appellant as the registered owner of the suit property is still alive. His property is not yet available for sub-division and distribution among his wives and children except if he personally on his own free will decides to sub-divide and distribute it among them. He may not be urged, directed or ordered to do it against his own will.”**

45. The upshot is that I find merit in the Plaintiff's suit. The Plaintiff has proved to the required standard that there was trespass to his parcel of land. I hereby grant him his wishes by allowing the suit as prayed.

46. While in ordinary circumstances this Court would not grant costs in a family dispute such as this, I think this is a case that warrants a departure from that practice. For the torments she has caused her old father, I condemn the 4<sup>th</sup> Defendant to pay the costs of this suit.

**Judgment dated, signed and delivered in open court at Nyeri this 10<sup>th</sup> day February, 2022.**

In the presence of:

Mr. Karanja holding brief for Kiminda for the Plaintiff

Mr. Mwangi holding brief for Muchiri wa Gathoni for the 4<sup>th</sup> Defendant

Court assistant – Kendi

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**J. O. Olola**

**JUDGE**