



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 114 OF 2014**

PETER NJUGUNA GITAU..... PLAINTIFF

VERSUS

AGNES MUTHONI NYAGA.....1<sup>ST</sup> DEFENDANT

MARK KABUTE.....2<sup>ND</sup> DEFENDANT

LEWIS KABUTE.....3<sup>RD</sup> DEFENDANT

MERCY WAWIRA.....4<sup>TH</sup> DEFENDANT

**JUDGMENT**

The plaintiff herein (PETER NJUGUNA GITAU) is the Member of Parliament for Mwea Constituency. He filed this suit on 8<sup>th</sup> May 2014 seeking the following orders against the defendants.

- 1. A declaration that the defendants, their children, servants, employees or agents are illegal trespassers onto the suit property and that the defendants by themselves or any other beneficiary of the Estate of the late Cyrus Nyaga Kabute are not entitled to be, remain, enter, cross, trespass or in any way interfere with the plaintiff's occupation of the suit property title No. GICHUGU/SETTLEMENT/SCHEME/232 measuring 7.5 Hectares.***
- 2. A permanent injunction to issue against the defendants by themselves or any other beneficiary of the Estate of the late Cyrus Nyaga Kabute from cultivating, sub-dividing, entering, trespassing onto the suit property GICHUGU/SETTLEMENT/SCHEME/232.***
- 3. An order of eviction and demolition of structures of the defendants erected on the suit property GICHUGU/SETTLEMENT/SCHEME/232.***
- 4. Costs of this suit.***

The suit was premised on the pleadings that the defendants are family members of the late Cyrus Nyaga Kabute the previous owner of the land known as GICHUGU/SETTLEMENT/SCHEME/232 measuring 7.2 Hectares (hereinafter the suit property) which is currently registered in the plaintiff's names after he purchased it at a consideration of Ksh. 3.1 million on 30<sup>th</sup> October 2008 when it was offered for sale by the Housing Finance Company of Kenya exercising its Statutory power of sale. Prior to that, the late Cyrus Nyaga Kabute had filed multiple suits including Court of Appeal Civil Appeal No. 158 of 1996 ( Nairobi) which held that the only way open to him to redeem the property was by paying the loan advanced to him plus interest. That notwithstanding, the defendants have not only refused to vacate the suit property but have sub-divided it into plots and attempted to offer the same for sale thus violating the plaintiff's rights to the same.

The defendants filed a joint statement of defence in which they pleaded, inter alia, that the sale of the property by the Housing Finance Company of Kenya was fraudulent and is the subject of a pending case No. 6 of 2008 in the Court of Appeal at Nairobi. It is further the defendants' pleadings that the plaintiff and the Housing Finance Company of Kenya conspired to defraud the late Cyrus Nyaga Kabute of his property and that in any event, this suit is res-judicata in view of WANGURU S.P.M.C.C No. 40 of 2011. The defendants further plead that they are not trespassers.

The parties having complied with **Order 11 Civil Procedure Rules**, the suit first came up for hearing on 5<sup>th</sup> March 2015 when Mr. Ndegwa advocate for the defendants sought an adjournment on the ground that he had just come on record. The hearing was by consent put off to 23<sup>rd</sup> April 2015 but was again adjourned as Mr. Ndegwa was indisposed. It was fixed to come for hearing on 29<sup>th</sup> September 2015 when Mr. Nganga holding brief for Mr. Ndegwa for the defendants sought an adjournment on the basis that Mr. Ndegwa needed to get some documents and also to amend the defence. Although Mr. Ngigi advocate for the plaintiff strenuously objected to the application for adjournment, this Court allowed the defendants time to amend their defence and the case was adjourned to 12<sup>th</sup> October 2015 but come that date, there was no appearance either by the defendants or their advocate and neither had any amended defence been filed. The Court therefore allowed the plaintiff to prosecute his case.

In his evidence the plaintiff told the Court that the suit property is registered in his names after he bought it in 2008 through an auction conducted by Garam Investment for Ksh. 3. 1 million being the highest bidder. He produced the copy of the title deed to the suit property, copy of the banker cheque for Ksh. 750,000/= paid at the fall of the hammer and the receipt issued to him, the memorandum of sale and the receipt for Ksh. 2.325,000/= being the balance paid – see exhibits 1 to 6 of plaintiff's lit of exhibits.

He also paid the stamp duty of Ksh. 148,000/= and obtained the receipt and also obtained the necessary Land Control Board consent for which receipts were issued e.t.c – see exhibits 7 to 11.

He added that the previous owner of the suit property Nyaga Kabute had charged it to Housing Finance Company of Kenya which sold it after various suits instituted by the said Nyaga Kabute were dismissed. These included the following cases:-

1. H.C.C.C No. 149 of 2008 at Embu Court
2. H.C.C.C No. 4610 of 1990 at Milimani Court
3. C.A. Civil Appeal Case No. 158 of 1996 at the Court of Appeal Nairobi.

He told the Court that after purchasing the suit property, he charged it with the Parliamentary Service Commission which holds the original title. He added that the defendants who are the wife and children of the late Cyrus Nyaga Kabute have denied him access to the suit property thus giving rise to this suit.

As indicated above, there was no appearance by the defendants or their advocate on the date of hearing and therefore the plaintiff's evidence is un-rebutted save for an un-prosecuted defence.

I have considered the plaintiff's evidence, un-controverted as it is together with the exhibits produced herein. There is no doubt that the plaintiff bought the suit property in an auction on 30<sup>th</sup> October 2008 after the Housing Finance Company of Kenya exercised its power of sale following a default on the part of the late Cyrus Nyaga Kabute to service the loan. It is clear also from the ruling of Wanjiru Karanja J. (as she then was) that an application by the said Cyrus Nyaga Kabute to injunct Housing Finance Company of Kenya from selling the suit property was dismissed in High Court of Kenya at Embu Civil Case No. 149 of 2008. His appeal to the Court of Appeal was dismissed in C.A Civil Appeal No. 158 of 1996 at Nairobi. Therefore, notwithstanding that the defendants' defence herein was not prosecuted, it appears from the documents presented before me that the plaintiff's interest in the suit property is beyond reproach. Most importantly, the suit property is now registered in his names and under the **Registered Land Act** (now repealed) under which the suit property is registered, the plaintiff is entitled to the rights and privileges protected by **Sections 27 and 28** of the said Act which are similar to **Sections 25 and 26 of the new Land Registration Act**. Clearly therefore, the defendants remain trespassers on the suit property

and are liable for eviction.

This Court is therefore satisfied that the plaintiff has established his case against the defendants and is entitled to the orders prayed for by his plaint.

Ultimately therefore, judgment is entered for the plaintiff against the defendants as prayed.

This Court was told that the defendants have semi-permanent clay structures on the suit property. I give them six (6) months from the date of service upon them of the decree herein to remove them. Thereafter, the plaintiff may evict them. The plaintiff also is entitled to costs.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**27<sup>TH</sup> NOVEMBER, 2015**

27/11/2015

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Ngigi for Ndubi for Plaintiff – present

Mr. Waweru for Ndegwa for Defendant – present

MR. WAWERU: There is an application for arresting the judgment.

COURT: They can apply to set the judgment aside. That application came in late yesterday. Judgment was already drafted.

COURT: Judgment delivered this 27<sup>th</sup> day of November, 2015 in open Court.

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**27<sup>TH</sup> NOVEMBER, 2015**