



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 716 OF 2011**

**KINUNGA NJIRAINI.....PLAINTIFF**

**VERSUS**

**NJUGUNA NYAMBURA.....1<sup>ST</sup> DEFENDANT**

**NYAWIRA WANDIA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

The Plaintiff instituted this suit by way of a Plaint dated 14/12/2011 whereby he averred that he is a grandson of the late Wanjiku Kinunga Njuguna the registered proprietor of the property known as Ndumberi/Riabai T.221 measuring 0.20 of an acre. It is the Plaintiff's averment that the deceased died on 16/4/1994 before transferring the property to his late father Njiraini Kinunga whose wish of passing was to transfer the parcel of land to the Plaintiff before his demise.

The Plaintiff stated that he obtained letters of administration of the deceased's (his grandmother's) estate on 24/9/2002 and subsequently was issued with a title deed for the said parcel in his name on 30/9/2002. The Plaintiff alleged that sometime in 2005, the Defendants illegally trespassed upon the parcel of land and built thereon temporary structures. The Plaintiff thus prays for an order of permanent injunction restraining the Defendant from encroaching by trespassing, constructing, erecting temporary structures, alienating or in any way dealing whatsoever with the suit property and an order of eviction to remove the Plaintiff from the suit property.

The 1<sup>st</sup> Defendant, despite being served with summons failed to enter appearance or file a Defence. Consequently, upon the Plaintiff's request, an interlocutory judgment was entered on 15/3/2012. The 2<sup>nd</sup> Defendant on her part through the firm of K.N. Nyamweya & Co. Advocates filed a Memorandum of Appearance on 7/2/2012 and a Defence dated 7/2/2011. The 2<sup>nd</sup> Defendant denied the contents of the Plaint save for the descriptive parts thereof. She averred that the Plaintiff obtained the letters of administration fraudulently and as a result, he was wrongly issued with the title deed to the suit property. She also stated that the structures were put up by her deceased mother, who is also a sister of the Plaintiff's father who was never married.

This matter came up for directions on 4/2/2013 when neither the Defendants nor the 2<sup>nd</sup> Defendant's

counsel attended court. The Court directed that both parties do comply with Order 11 of the Civil Procedure Rules and issued a further mention notice for 20/3/2012. On this date, the Defendants still did not attend Court despite the Plaintiff's advocate effecting service of the pre-trial questionnaire and witness statements upon the 2<sup>nd</sup> Defendant's advocate. The Court scheduled a further mention notice for 29/4/2013 when the Defendants and their advocate also failed to attend, despite the 2<sup>nd</sup> Defendant's advocate receiving a Mention Notice dated 20/3/2013. There is on the court record an invitation by the Plaintiff's advocate served upon and received by the 2<sup>nd</sup> Defendant's advocate to meet at the registry and take a suitable hearing date. There is also a notice dated 20/5/2013 received by the 2<sup>nd</sup> Defendant's advocate notifying the said firm of the hearing that has been scheduled for 2/7/2013. The Process Server, Lawrence Mulinge Mwanza swore Affidavits of service on the diverse dates detailing how and to whom he effected service upon the 1<sup>st</sup> Defendant in person and the 2<sup>nd</sup> Defendant's advocate.

On the date of the hearing, the Court admitted the matter for hearing having satisfied itself that service was properly effected upon the Defendants. The Plaintiff (PW1) reiterated the contents of his plaint and produced a certified copy of the title to the suit property (P.Ex.1) and a copy of the official search (P.Ex.2). The Plaintiff also availed a copy of Grant of Letters of Administration issued on 4/6/2002; a Certificate of Conformation of Grant dated 24/9/2002; Will made by Njiraini Kinunga dated 20/5/1998 bequeathing the suit property to the Plaintiff; copy of the Kenya Gazette No. 2807 dated 3/5/2002. The Plaintiff testified that the Defendants are his cousins and are children of one Wandia to whom sometime in 1995 he had given permission to occupy the land. It is his evidence that he notified the Defendants that the property was not theirs and that on 28/7/2011 he issued them a notice to vacate. The Plaintiff prayed that the Court does issue the orders as prayed. The Plaintiff's second witness, Nyambura Kinyua stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are her son and niece respectively. PW2 testified that the property was left for the Plaintiff by her brother who is the Plaintiff's father. PW2 testified that she lives on the suit property having been given permission by the Plaintiff to do. It was her evidence that the Defendants also reside on the property but that they had no authority to do so, as they were there without the Plaintiff's permission. The Plaintiff's third witness is his mother, Agnes Njeri. It was her evidence that the Plaintiff was given the suit property by her deceased husband. She stated that the Defendants have refused to vacate the land whereas they have their ancestral land situate in Ngong.

Counsel for the Plaintiff filed submissions dated 10/7/2013. Counsel referred the Court to Article 40 of the Constitution which protects the owner of the property from being arbitrarily deprived of his property. It was his submission that the Plaintiff's evidence being uncontroverted had proved his case on a balance of probabilities and thus judgment be entered as prayed in the plaint.

This is a dispute between family members. The Plaintiff avers that the Defendants have occupied his property without his consent. He has demonstrated how he acquired the property through transmission from his grandmother. The 2<sup>nd</sup> Defendant in her defence alleged fraud on the part of the Plaintiff. It was her averment that the Plaintiff obtained the letters of administration fraudulently and mischievously had the title of the suit property issued in his favour. However, the 2<sup>nd</sup> Defendant failed to give evidence to support her allegation. Suffice to say it is evident, from the documents in support of the Plaintiff's case that the process of obtaining letters of administration was not objected to by the 2<sup>nd</sup> Defendant or any other party. It is a well-established rule of evidence that whoever asserts the fact is under obligation to prove it in order to succeed. Furthermore, *fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt* See **Virani t/a Kisumu Beach Resort v Phoenix East Africa Assurance Company Limited (2004) 2KLR 269**

In the absence of any evidence to support the allegations of fraud and the evidence in support of the Plaintiff's case being uncontroverted, I find that the Plaintiff has proved his case on balance of probabilities and enter Judgment in his favour as follows:

- 1. A permanent injunction be and is hereby granted restraining the Defendants by themselves or by their servants, agents or employees from encroaching by trespassing, constructing, erecting temporary structures, alienating or in any way dealing whatsoever with the parcel of land known as Ndumberi/Riabai/T.221**

2. **The Defendants are given a grace period of 45 days from the date of this Judgment to voluntarily vacate the parcel of land known as Ndumberi/Riabai/T.221, failing which eviction order to issue without further reference to this Court.**
  
3. **On the issue of costs, I have taken note that the Plaintiff did not ask for costs in the Plaint. This being a dispute between family members I make an order that each party shall bear their own costs.**

Dated, signed and delivered this 25<sup>th</sup> day of February, 2014

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the 1<sup>st</sup> Defendant

.....For the 2<sup>nd</sup> Defendant

.....Court Clerk