



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

**E.L.C 92 OF 2013**

**MIRIAM NJERI KIRATHI .....PLAINTIFF**

**VERSUS**

**SHIPHIRA NAGUTHII NGUGI.....1<sup>ST</sup> DEFENDANT**

**MICHAEL KAMUNYA NGUGI .....2<sup>ND</sup> DEFENDANT**

**RULING**

By originating summons dated 26<sup>th</sup> April, 2012 the plaintiff (respondent) brought the suit herein seeking among other orders, that:

1. The plaintiff is the beneficiary of land parcel Nyandarua /Lesirko/369 ("suit land") by virtue of being the second wife to the 1<sup>st</sup> Defendant's late son, Paul Karanja Njugi which the plaintiff had possession and the defendants be restrained from using the said title for any transactions whatsoever pending the hearing and determination of this suit.
2. That the 1<sup>st</sup> Defendant be compelled by this Honorable Court to transfer the suit land to the plaintiff or in the alternative the Deputy Registrar to sign the consent and transfer documents in favour of the plaintiff.
3. That the 2<sup>nd</sup> Defendant be compelled by this Honorable Court to remove the caution he lodged against the suit land.

Aggrieved by the suit the defendants (applicants) have brought the motion dated 29<sup>th</sup> June, 2012 praying that the suit (originating summons) be struck out with costs as the same is an abuse of the process of court which also does not disclose any reasonable cause of action under order 37 of the civil procedure rules.

The application is premised on the grounds that the 1<sup>st</sup> Defendant is the registered proprietor of the suit land thus vested with absolute ownership: That the originating summons does not fall under the ambit of the provisions of order 37 of the Civil procedure rules: That the suit does not fall under the tenants of acquisition of title to land under section 7 of the land Act 2012: That the respondents claim is remote and farfetched as she does not have any overriding interests in the suit premises: That the applicant (1<sup>st</sup> Defendant) is alive and her property is not yet available for inheritance and she cannot be forced to distribute it among her children against her will.

The application is supported by the affidavit of the 1<sup>st</sup> applicant in which she has deponed that she is the Registered proprietor of the suit land, having purchased the same from the settlement fund trustees in 1971 by rights conferred to her by the married Women's property Act of 1882: That her land is not available for inheritance as she is still alive and the Respondent does not have any legal rights against her in the suit land.

The respondent did not file any reply to the application although she was served through her advocate on 18<sup>th</sup> July 2012.

When the application came up for hearing, counsel for the applicant in his submissions made reference to section 7 of the Land Act 2012, section 24(a) 25(1) and 28 of the Land Registration Act Cap 300 and submitted that marriage into a family does not necessarily guarantee one's right to property .

This suit is brought by way of originating summons. Under Order 37 of the Civil procedure rules, a party can only approach court under very specific instances. These are listed to include a claim against the executor or administration of Estates of a dead person, a purchaser or vendor of land, a mortgagee or mortgagor of the suit premises, adverse possession, extension for limitation period, variation of trust, persons interested in wills and deeds and partnership.

The applicant's claim does not fall within any of these categories.

Secondly, Section 7 of the Land Act 2012 outlines the methods through which one may acquire title to land. These include Allocation, land adjudication process, compulsory acquisition, prescription, settlement programs, transmission, transfers and long term leases exceeding twenty one years created out of private land.

I find that the plaintiffs' claim does not fall within any of the above methods either.

The 1<sup>st</sup> defendant in the instant case purchased the suit land from the late Wambugu wa Muria in 1971. No evidence has been presented to the contrary. The 1<sup>st</sup> defendant is still alive. Her estate is not free property for distribution under section 3(1) of the law of succession Act Cap 160 therefore she is free to deal with it as she deems fit. She is under no obligation while still alive to share or divide her property with any person against her will, not even her children. I find that her interest in the suit property is indefeasible. She is protected by Sections 27 and 28 of the Registered land Act, Chapter 300 laws of Kenya (repealed). Which **provide:-**

**“(27) Subject to this Act-**

**(a) 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;**

**(b).....**

**28. The right of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

**(a) to the lease, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) unless the contrary is expressed in the register, to such liabilities, rights and interests**

**as effect the same and are declared by section 30 not to require Noting on the register Provided that nothing in this section shall be taken to relieve a proprietor from any duty obligation to which he is subject as a trustee.**

Although courts should aim at sustaining rather than terminating a suit, I find that this is one such suit which is beyond redemption. See **DT Dobie & Company (Kenya) Ltd V. Muchina** (1982) KLR 1 in which the Court of Appeal held:-

**“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”**

To me this suit does not disclose any reasonable cause of action and is an abuse of the court process. The upshot of the foregoing is that the application dated 29<sup>th</sup> June 2012 has merit and is allowed. I invoke the inherent power of the court under section 3A of the civil procedure Act and dismiss the suit with costs to the defendants.

**Dated, signed and delivered at Nakuru this 19<sup>th</sup> day of July 2013**

**L N WAITHAKA**

**JUDGE**

**Present**

**Mr Kibiru holding brief for Mr Njuguna the defendants.**

**N/A for plaintiff**

**Cc: Stephen Mwangi**

**L N WAITHAKA**

**JUDGE**