



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENTAL & LAND DIVISION**  
**H.C ELC CASE NO. 2103 OF 2007**

**JOSEPH GICHURI MARARO.....1<sup>ST</sup> PLAINTIFF**

**WINFRED WANJIKU GICHURI.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**GRACE WAMBUI KIRUTHI**

**(Sued as WATAIYA KIRUTHI).....DEFENDANT**

**JUDGMENT**

The plaintiffs who are husband and wife by a plaint dated 11<sup>th</sup> December, 2006 filed the instant suit and seek the following orders:-

- a. A declaration that the defendants are trespassers on the suit land and an order for their eviction to issue against the defendant themselves, their servants, agents or employees and/or anyone claiming under them.
- b. A permanent injunction restraining the defendants by themselves, their servants agents or employees or any one claiming under them from entering upon or trespassing on or in any other way whatsoever from interfering with the plaintiffs quiet enjoyment of Kiambaa/Thimbigua/1368 or any portion thereof.
- c. Costs of the suit.
- d. Any other or further relief the court may deem fit to grant.

The defendants filed a joint defence and counterclaim dated 27<sup>th</sup> July, 2007. The plaintiffs vide a notice of withdrawal of suit dated 9<sup>th</sup> October, 2008 withdrew the suit against the 1<sup>st</sup> Defendant who they stated had passed away. On application by the plaintiff vide a letter dated 27<sup>th</sup> January, 2009 summons to enter appearance were re issued and the 2<sup>nd</sup> defendant **Grace Wambui Kiruthi** filed a memorandum of appearance on 15<sup>th</sup> May, 2009 and filed a statement of defence and counterclaim on 28<sup>th</sup> May, 2009. On 9<sup>th</sup> November, 2010 the 2<sup>nd</sup> Defendant filed a Notice of change of address and the court on 10<sup>th</sup> October, 2012 gave directions that the suit could be fixed for hearing at the registry as the parties had complied with the provisions of Order 11 of the Civil Procedure Rules.

The suit was listed for hearing before me on 23<sup>rd</sup> April, 2013 when the plaintiff and his counsel appeared

but there was no appearance by the defendant who had been served by way of registered post at the address she had notified by notice of change of address. On the basis that the defendant may not have received the letter I directed that the defendant be personally served and fixed the matter for hearing on 3<sup>rd</sup> July, 2013. On the said 3<sup>rd</sup> July, 2013 the suit was again listed before me and only the plaintiff was in attendance and after satisfying myself that the defendant had indeed been personally served as per the affidavit of service sworn by one John Ndirangu Nguru on 28<sup>th</sup> June, 2013 and filed in court on 2<sup>nd</sup> July, 2013 I allowed the hearing to proceed *ex parte*.

The 1<sup>st</sup> plaintiff, Joseph Gichuri Mararo testified in support of the plaintiff's case. The witness had adopted his witness statement dated 2<sup>nd</sup> March, 2011 and filed in court on 5<sup>th</sup> March, 2012 as his evidence in chief. The plaintiff in his evidence stated that he and his wife the 2<sup>nd</sup> plaintiff are the registered proprietors of Title Number Kiambaa/Thimbigua/1368 measuring approximately 1.03 hectares having purchased the same from Gatheca Itate. The plaintiffs were registered as owners of the suit property on 2<sup>nd</sup> February, 2006 and were issued with a title deed on 3<sup>rd</sup> February, 2006. The plaintiff produced a copy of abstract of title and Title Deed as contained in the plaintiff's bundle of documents to verify their claim of ownership. The abstract of title shows the history of transactions in respect of the suit property.

The plaintiff testified that they are in occupation of the suit property but averred that on diverse dates between February, 2006 and December, 2006 the defendants with their servants and/or agents invaded the suit property and damaged a portion of the plaintiffs fencing. The plaintiffs claim the defendants do not have any colour of right or justification for their trespass and intrusions into the suit property. It is the plaintiffs' evidence that the dispute with the Defendants relating to the land has been heard before the Land Disputes Tribunal and that the Tribunal has ruled that the plaintiffs are the rightful owners of the suit property. The decision by the Land Disputes Tribunal was adopted by Resident Magistrates Court on 8<sup>th</sup> September, 2006 and a Decree issued by the court on 11<sup>th</sup> September, 2006 as per the annexure marked "JGM3" in the plaintiffs bundle of documents. The sale of the suit property from Gatheca Itate to the plaintiffs was consented to by the Kiambaa land Control Board on 4<sup>th</sup> October 2005 as per the copy of Land Control Board's consent marked as annexure 'JGM4' in the plaintiffs bundle of documents.

The plaintiffs further testified that at the time they filed suit they contemporaneously sought an injunction to restraint the defendants from further trespass and/or interference and the court granted an interim injunction pending the hearing and determination of the suit and the plaintiff now seeks a confirmation of the injunction.

As regards the Defendants claim of ownership of the suit property through their deceased brother, Mugo Mwangi, who the defendants claim to have held the suit property in trust for them the plaintiff contends such claim is baseless as he bought the property from the person to whom the defendant's brother (Mugo Mwangi – deceased) had transferred the land to. The plaintiffs claims there was no notice of any trust and that they were bonafide purchasers for value without any notice of any defect in the title and that all due process was followed in making the acquisition.

The Defendant in her defence contends that the registration of the suit property in the plaintiffs name was fraudulent. The particulars of fraud have been itemised as misrepresentation of facts to the Land Control Board; acquiring a title from Gatheca Itate who had a void title for lack of the Land Boards consent when the land was transferred to him; and further acquiring the title for no consideration.

The defendant further claims to be in occupation and by her counter claim reiterates that Mugo Mwangi who was her late husband's (Kiruthi Mwangi) the initial 1<sup>st</sup> Defendant, brother held the suit land in trust. The defendant states that she and her late husband have been in occupation of the suit property since 1958 and that it is the plaintiff who intruded onto the property following the fraudulent transaction. By her counterclaim the defendant seeks a revocation of the title in favour of the plaintiffs and for the same to be reverted to the name of Mugo Mwangi who held the title as trustee.

Two defendants' witness statements have been filed by **Peter Kamau Kiruthi** and **Joyce Nyokabi**

**Njoroge** both dated 19<sup>th</sup> May, 2011 and filed in court on 7<sup>th</sup> June, 2011. Both statements confirm Mugo Mwangi was the person who was seized of the suit property and that before Mugo Mwangi's demise the defendants were cultivating the suit property until other persons came claiming to have bought the land. The said defendants witness statement to a large degree contain averments that constitute hearsay evidence and cannot be relied upon.

I have reviewed and considered all the pleadings and evidence including the documentary evidence adduced herein and make the following observations:-

- i. Mugo Mwangi was registered owner of Title L.R. Kiambaa/Thimbigua/1368 on 2<sup>nd</sup> October, 1975 as per abstract of title.
- ii. Suit property transferred to Gatheca Itate on 14<sup>th</sup> March, 1977 for consideration of Kshs. 12,000/= as per abstract of title.
- iii. On 6<sup>th</sup> October, 2005 the plaintiffs registered a caution over suit the property claiming purchaser's interest.
- iv. Consent of land Control Board for sale of suit property was given on 4<sup>th</sup> October, 2005.
- v. Suit property transferred to the plaintiffs jointly on 2<sup>nd</sup> February, 2006.

On the basis of the testimony by the 1<sup>st</sup> plaintiff and the documentary evidence tendered, I am satisfied the plaintiffs applied due process in the acquisition of the suit property and that they were innocent purchasers for value and that upon registration of the transfer in their favour they became owners of the suit property and as such registered owners their title is indefeasible.

The evidence by the plaintiffs was uncontroverted and I found the 1<sup>st</sup> plaintiff to be a credible witness.

As regards the defendant, she did not attend court to prosecute her defence and counterclaim and on the material evidence before me I hold that the particulars of the alleged fraud was not proved and I dismiss the allegations as unfounded. The said Mugo Mwangi who the defendant claims to have been holding the land in trust ceased to be owner of the suit property in 1977 when he transferred the land to Gatheca Itate who subsequently sold the property to the plaintiffs. I cannot in the circumstances hold there was any trust and at any rate there was no notation of the land being held in trust at the Lands Office.

In the premises, I hold and find that the plaintiffs have proved their case on a balance of probabilities and I enter judgment in favour of the plaintiffs in terms of prayers (a) and (b) of the plaint. I further find and hold that the defendant did not prove her counterclaim and I order the same to be dismissed.

Having regard to the attendant circumstances of this case I order that each party bears their own costs of the suit and the counterclaim.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**J. M. MUTUNGI**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendant