



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU  
CIVIL CASE NO. 210 OF 2004**

**JANE MUTHONI NGUGI.....PLAINTIFF  
VERSUS  
JANE WAMBUI WARUTERE.....DEFENDANT**

**RULING**

The Plaintiff, Jane Muthoni Ngugi, has made an application under the provisions of **Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, Sections 3A and 63(e) of the Civil Procedure Act** seeking the orders of injunction from court to restrain the Defendant Jane Wambui Warutere from entering or remaining in all that piece or parcel of land known as *Nyandarua/Simbara/31* or any part thereof and further be restrained from interfering with the Plaintiff's quiet enjoyment of the said parcel of land pending the hearing and determination of the suit. The grounds in support of the application are that the Defendant being a trespasser had committed the criminal offence of forceable entry onto the Plaintiff's land. The Plaintiff has further stated that she is the registered owner of the suit land. The application is supported by the annexed affidavit of Jane Muthoni Ngugi and Arthur Waweru. The Plaintiff swore two further affidavits in support of her application. Arthur Waweru also swore a further supplementary affidavit. The Defendant filed grounds of opposition. She further swore an affidavit in reply to the Plaintiff's application. A Mr. Warutere Mbatia Gatheru has sworn an affidavit on behalf of the Defendant in opposition to the application.

At the hearing of the application, Miss Mathenge Learned Counsel for the Plaintiff submitted that the Plaintiff was the absolute registered proprietor of the suit land. It was contended on behalf of the Plaintiff that the Defendant was a trespasser which fact it was alleged had not been controverted by the Defendant in her replying affidavit. It was further contended that the only reason the Defendant was trespassing on the said parcel of land was that she was claiming to have been married to one Arthur Waweru Ngugi, who is a son of the Plaintiff. The Plaintiff concedes that the Defendant once cohabited with her son between the years 1981 and 1985 but had been separated from the said son since 1985. It is the Plaintiff's argument that the Defendant, without any colour of right, forcefully entered into the said parcel of land in 2002. The Plaintiff submitted that since coming back, the Defendant had harassed the Plaintiff and her other children to the extent that intervention from the Provincial Administration had been sought in vain. It was further contended on behalf of the Plaintiff that she had not given her consent for the Defendant to reside on the suit land. The Plaintiff argues that the suit land belonged to her and not her said son. The Plaintiff urged the court to allow her application for injunction pending the hearing and determination of the suit. The Plaintiff conceded that although she had filed another suit before the Nyahururu Principal Magistrate's Court, she withdrew the same when she realised that the said court did not have jurisdiction to hear and determine the dispute. Learned Counsel for the Plaintiff submitted that the fact that the Plaintiff was sickly and of advanced age,

was more the reason why the application should be allowed.

Mr Nderitu, Learned Counsel for the Defendant submitted that the Plaintiff had filed another suit which was still pending before the Nyahururu Principal Magistrate's Court being Civil Suit No. 199 of 2004. It was the Defendant's further submission that there was no proof that the said suit had been withdrawn. Mr Nderitu further submitted that the reliefs sought in the said suit were similar to the reliefs sought in the suit. He further argued that the fact of the existence of the said suit had not been disclosed in the plaint. He further submitted that the Defendant entered the suit land in 1980 when she was married to the son of the Plaintiff. It was contended on behalf of the Defendant that even if the court were to accept that the Defendant vacated the suit land in 1985 and returned in 2002, the Plaintiff had not given any explanation why she did nothing until she filed this suit two years later. The Defendant argued that to grant the orders sought by the Plaintiff in the application would in effect determine the suit. The Defendant further argued that she had raised triable issues which ought to be considered on merit. The Defendant submitted that the Plaintiff had not established a prima facie case nor shown that she would suffer irreparable damages were the injunction not be granted by the court.

Miss Mathenge in response submitted that the fact that the Plaintiff had not disclosed the existence of the suit at Nyahururu should not be considered to her detriment as the issue could be cured by the amendment of the plaint. Learned Counsel submitted that since the act of trespass was continuous, the Plaintiff was suffering a loss which could not be quantified.

I have carefully read the application and the affidavits filed both in support and in opposition of the application by the parties to this suit. I have also considered the rival submissions made by Counsels on record. The issue for determination by this court, is whether, on the facts of this case, the Plaintiff ought to be granted the orders of injunction sought. It is not disputed that the Plaintiff is the registered owner of all that parcel of land known as *Nyandarua/Simbara/31* measuring 27.5 Hectares or thereabout. It is further not disputed that the Defendant, between the year 1981 and 1985 resided on the suit land as the "wife" of a son of the Plaintiff known as Arthur Waweru Ngugi also known as Weru. Although the said Arthur Ngugi denies that he was legally married to the Defendant, he however admits that he cohabited with the Defendant and the cohabitation resulted in three issues being born namely John Ngugi, Eunice Muthoni and Francis Mutahi. It appears that after the year 1985, the Defendant's and the said Arthur Ngugi's relationship deteriorated to the extent that for sometime the two were separated. In the course of the separation the said Arthur Ngugi married another woman called Jane Wangui Munge under the Marriage Act at the Superintendent registrar's office in Nakuru on the 15th November 1996.

There is conflicting evidence from the parties to the suit whether or not the said Arthur Ngugi resided on the suit land with the Defendant after his marriage to the said Jane Munge. What is not however in dispute is that since the year 2002 the Defendant has been residing on the suit land on the portion which has been identified to belong to the said Arthur Ngugi. In mid 2004, a decision was made by the said Arthur Ngugi with his brothers to remove the Defendant from the suit land ostensibly because the Defendant was not a member of the family of the Plaintiff. The reason that the said Arthur Ngugi and his sibling have relied on to seek the removal of the Defendant from the suit land is twofold; one, that the Defendant was not a lawful wife of the said Arthur Ngugi and secondly, because the suit land, which they are all residing in belonged to "another" person, that is the Plaintiff who is their aged mother.

I will address the two issues and in addressing them determine the application. The Defendant has deponed that she was married to the said Arthur Ngugi, the son of

the Plaintiff in the year 1980 under the Kikuyu Customary Law. On the other hand the said Arthur Ngugi has deponed that he never at anytime married the Defendant but only cohabited with her between the years 1981 and 1985. The two however agree on one thing: The three children born during this period of their relationship are their legitimate children. The said Arthur Ngugi and to a larger extent the Plaintiff, are under a mistaken belief that because the Defendant was not married under either the Kikuyu Customary Law or the Statute, no valid marriage existed between the Defendant and the said Arthur Ngugi. From the evidence placed before me, and for the purpose of this application, I hold that the Defendant and the said Arthur Ngugi are common law husband and wife by virtue of their long period of cohabitation. The Defendant is therefore entitled to all privileges of marriage, including the right to be housed by the said Arthur Ngugi. I refuse to be persuaded that just because the said Arthur Ngugi has married another woman under Statute, then the marriage to his common law wife ceased to exist. To do so would result in the children born of the said relationship being made illegitimate. Such a prospect would be a travesty of justice.

Having held that the Defendant and the said Arthur Ngugi, the son of the Plaintiff, are husband and wife, the only issue left for determination by this court is whether the Defendant is entitled to reside in the suit land registered in the name of the Plaintiff. From the affidavits filed and also the submissions made, the sons of the Plaintiff and their wives and children reside on the suit land. The Plaintiff has caused the suit land to be sub-division and each of his son including the said Arthur Ngugi occupy an identifiable portion of the said parcel of land. According to the Defendant, she has been residing on the portion of land which has been identified as belonging to her husband. She has even deponed that she is residing on the said portion belonging to her husband with her co-wife Jane Wangui.

It is the Plaintiff's case that being the registered owner of the suit land, she had a right to determine who can live on the suit land. I however humbly disagree. In the African set up, and the Kikuyu being one of the African Communities, once a son has been shown a portion of land where he has erected his own house, his parents cease to have any interest on the said parcel of land. The sons become beneficial owners whilst the parents hold the title in trust for their said sons. In this particular instance, I do hold that the Plaintiff is holding the title of the portion of land where the Defendant resides in trust for the Defendant, her husband and their children. The Plaintiff therefore has no legally recognisable right to seek to remove the Defendant from the said suit land. The Plaintiff has therefore failed to establish that she has a prima facie case to entitle her to the orders of injunction sought.

In conclusion, I wish to refer to the suit filed by the Plaintiff before the Nyahururu Principal Magistrate's Court. When the Plaintiff filed this suit, she did not disclose that she had filed another suit over the same subject matter at Nyahururu Principal Magistrate's Court. In her submission before court, the Plaintiff stated that she had withdrawn the case before filing the present suit. However no evidence was put before this court, in form of a duly indorsed notice of withdrawal of suit, that the said suit had been withdrawn. When the Plaintiff swore the verifying affidavit to the Plaintiff that there was no other suit pending, she was not deponing the truth. The Plaintiff has therefore ridiculed the due process of the court. I am minded to strike out the Plaintiff's suit but due to the nature of the matter in dispute, I would refrain from taking such a drastic action. I however order that the Plaintiff formally withdraws the case pending at Nyahururu and make an appropriate application for amendment of her plaint to rectify her pleadings to conform with the law before the suit can be set down for hearing.

For the reasons stated, it is evident that the Plaintiff's application lacks merit and the same is dismissed with costs.

**DATED at NAKURU this 21st day of January 2005.**

**L. KIMARU**  
**JUDGE**