



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL CASE 450 OF 1993**

**ANNA KWAMBOKA MASESE ..... PLAINTIFF**

**VERSUS**

**MABERA NYAMWAYA ..... DEFENDANT.**

**JUDGMENT**

Plaintiff in his plaint filed on 3/9/1993 sought for a declaration that the defendant acts of trespass and illegal burial of a body on her land NO.NORTH MUGIRANGO/MOKOMONI/1055 are illegal, for an order to evict the defendant, her agents and servants from the said land and also for exhumation of the body of a child buried on that land. She also prays for costs.

The defendants defence was struck out on 1/8/03 and the suit therefore provided for formal proof. The plaintiff (PW1) told court that she and the defendants are widows of the late ZEPHANIA MASESE who died in 1987. The deceased Masese had four wives. The plaintiff was the 3rd wife and the defendant the fourth wife. In 1976 the deceased moved with the defendant to his land in Molo where they were living. Later the defendant abandoned the husband to go and live with another man. The husband while still alive transferred land No. NORTH MUGIRANGO/MOKOMONI/1055 to the plaintiff. That was in 1986. The first two wives also got their portions of land. Defendant was to remain with land NO.MOLO SOUTH/KUROSUI BLOCK 5/345. She however had moved in with another man. In September 1993 the defendant's child died.

She forcibly buried the child in the plaintiff's land. She also built in the said land and started to live there and hence this suit. During the hearing the plaintiff abandoned her prayer for exhumation of the body buried on the land. The defendant was in court and though her defence had been struck out court allowed her to cross examine the plaintiff. The evidence of the plaintiff was very candid. Her husband transferred the land to her in 1986 when he was still alive. From 1976 the defendant had moved to Molo where there is land belonging to the deceased. The first two wives also were given land by their deceased husband. It is clear therefore that the husband gave the land to the plaintiff exclusively. If he had wanted her to share it with the defendant he would have indicated so. There is no reason why the defendant chose to go into the plaintiffs land when all along she had lived in the land in Molo. She did not go into occupation of the lands of the 1st and 2nd widows. Thus though the two were widows of the same man, he had clearly transferred his lands before he died. The defendant therefore is living in the land of the plaintiff illegally. Plaintiff filed this suit in 1993 immediately she trespassed into the land.

I therefore enter judgment for the plaintiff as prayed and order that the defendant, her servants or agents be evicted from the suit land. Plaintiff will also have the costs of the suit.

**Dated and delivered at Kisii on 26th November, 2004**

**KABURU BAUNI**

**JUDGE**

**Mr. Mogire for Mr. Masese for plaintiff.**

**KABURU BAUNI**

**JUDGE**