



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 27 OF 2017**

**CATHERINE MUTHONI KAMUTU.....PLAINTIFF**

**VERSUS**

**KENYA PLANTERS CO-OPERATIVE.....DEFENDANT**

**JUDGMENT**

The plaintiff, vide a Complaint dated 7<sup>th</sup> March, 2017 and Amended on 2<sup>nd</sup> August, 2018 is seeking an order for eviction of the Defendant from the suit land parcel number KIINE/SAGANA/5311. The plaintiff is also seeking an order for a permanent injunction restraining the defendant, its agents and/or servants from entering, developing and/or interfering with the suit land in any way whatsoever. By a statement of defence dated 24/03/2017, the defendant denied the plaintiff's claim and sought to have the suit dismissed with costs. The matter was fixed for case conference on 09/06/2021 whereby the defendant was given 14 days to fully comply. The case was thereafter fixed for hearing on 02/09/2021.

**PLAINTIFF'S CASE**

The plaintiff testified alone and was referred to her witness statement recorded and filed in court on 26/04/2021 which she adopted in her evidence. According to the plaintiff, she is the registered proprietor of the suit property land parcel number KIINE/SAGANA/5311 which was a subdivision of L.R No. KIINE/SAGANA/353. She stated that the original land parcel number KIINE/SAGANA/353 was given to her late husband WANJOHI KITHUNGURU by the clan during land Demarcation and consolidation in 1960. Some-time in the year 2000, her husband died and she filed a succession cause at Kerugoya court for purposes of succeeding his estate and after cause was finalized, she was issued with a grant of letters of administration to inherit his property on 28/06/2002. The plaintiff further stated that she recently engaged a surveyor to put beacons at the boundaries of land number KIINE/SAGANA/5311 and found out that the defendant had encroached her land and occupying part of her land. She said that the defendant has its own land which neighbours her land being number KIINE/SAGANA/388. She further testified that the defendant has constructed some structures on her parcel of land which she seeks an order to have them removed. The plaintiff also seeks an order of permanent injunction restraining the defendant from entering the suit land.

**PLAINTIFF'S SUBMISSIONS**

The plaintiff through the firm of R. MUTHIKE MAKWORO & CO. ADVOCATES submitted on the following two issues;

- 1) Whether the Defendant has encroached on land parcel number KIINE/SAGANA/5311?**
- 2) Whether the plaintiff is entitled to the orders sought in the Amended plaint?**

**WHETHER THE DEFENDANT HAS ENCROACHED ON LAND PARCEL NUMBER KIINE/SAGANA/5311?**

The plaintiff submitted that she has satisfied the conditions of the law under *Section 107 of the Evidence Act* by producing her ownership documents which are a green card, Title deed for land parcel number KIINE/SAGANA/353 and KIINE/SAGANA/5311 (P-Exhibit No. 2 & 6). She also produced photographs showing that the defendant constructed offices and go-downs on land parcel number KIINE/SAGANA/5311 (P-Exhibit No. 3). The plaintiff further submitted that the defendant was also served with a demand letter asking her to remove the structures within 30 days (P-Exhibit 4). In conclusion, the plaintiff submitted that she has proved that she is the owner of land parcel number KIINE/SAGANA/5311 and that the defendant is illegally occupying the same.

**DEFENDANT'S CASE**

The defendant did not call any witness(s) and/or tender any evidence at the trial.

## LEGAL ANALYSIS AND DETERMINATION

I have considered the pleadings, the testimony by the plaintiff and the exhibits produced in evidence as P-Exhibits 1, 2, 3, 4, 5, 6, 7, 8, & 9 respectively. The issues for determination in this case can be framed as follows;

- 1) **Whether the defendant has encroached the plaintiff's land parcel number KIINE/SAGANA/5311?**
- 2) **Whether the plaintiff is entitled to the orders sought in the Amended plaint?**
- 3) **Who is liable to pay the costs of this suit?**

### WHETHER THE DEFENDANT HAS ENCROACHED ON THE PLAINTIFF'S LAND PARCEL NO. KIINE/SAGANA/5311

The plaintiff in the Amended plaint dated 16/11/2017 is seeking orders for inter-alia eviction of the defendant from the suit land parcel number KIINE/SAGANA/5311. In her witness statement dated 07/03/2017 which was adopted in her evidence, the plaintiff stated that the original land parcel number KIINE/SAGANA/353 was given to her husband WANJOHI KITHUNGURU by the clan in 1960 and when her husband died in the year 2000, she filed succession proceedings at Kerugoya Law Courts and on 28/06/2002, she was issued a grant and thereafter acquired the suit property by transmission. She further stated that recently, she engaged surveyors to put beacons at the boundaries of the suit land when she discovered that the defendant had encroached her land and are occupying part of her land. She also stated that the defendant has constructed some structures on her land which she seeks an order for removal/eviction. However, the plaintiff did not call the surveyor who conducted the purported survey to show the extent/acreage of the encroachment by the defendant into her land. The survey report could have shown the acreage/portion of the plaintiff's land encroached by the defendant, if any. There is also no beacons certificate showing that the defendant has encroached the plaintiff's land. The list of documents filed by the defendant dated 21/09/2017 indicates that the defendant is the registered owner of land parcel number KIINE/SAGANA/388/177 measuring approximately 5.143 Ha. Contained in the same list of documents is a certificate of official search confirming that indeed the defendant is the registered proprietor. A survey report would have shown/indicated the total acreage of both the plaintiff's and the defendant's land on the ground. That way, the report would be compared with the acreage on paper/title deed to see if indeed the defendant encroached the plaintiff's land. There being no surveyor called and no survey report conducted, or even a beacon certificate produced, I find that there is no empirical evidence of the plaintiff's land being encroached by the defendant.

### WHETHER THE PLAINTIFF IS ENTITLED TO THE ORDERS SOUGHT IN THE AMENDED PLAINT?

The general Principle in law is that the onus of proof is placed on the person who asserts and/or alleges. This position is succinctly captured in Section 107, 108 and 109 of the Evidence Act, CAP 80, Laws of Kenya. The said Sections of the

Evidence Act provide as follows;

#### **“107. Burden of proof**

*(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

#### **108. Incidence of burden**

*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

#### **109. Proof of particular fact**

*The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

The Superior Courts have discussed these in a myriad of decisions. In the case of Mbuthia Macharia Vs Annah Mutua Ndwiga & Another (2017) e K.L.R., the Court of Appeal pronounced itself as follows;

*“----- The judge alluded to the provisions of Section 107 of the Evidence Act, which deals with the burden of proof in any case and aptly stated that it lies with the party who desires any Court to give judgment as to any legal right or liability, is for that party to show that the facts which he alleges his case depends upon exists. This is known as the legal burden-----”*

The Supreme Court of Kenya in the case of Gwer & 5 others Vs Kenya Medical Research Institute & 3 Others (2020) e KLR has also weighed in and reiterated the provisions of Sections 107, 108, and 109 and stated as follows;

*“{49} Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side, “and Section 109 of the Evidence Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact lie on any particular person”.*

The plaintiff in this case wants this Honourable Court to give judgment and order the defendant out of a portion she believes forms part of the suit land parcel number KIINE/SAGANA/5311 which belongs to her. The burden of proof lies on her to prove that the portion of land where the defendant occupies and has constructed permanent structures indeed belong to her. The only verifiable evidence on whether the defendant occupies the plaintiff's land is that of a surveyor or an expert on land issues. The plaintiff did not call a surveyor or an expert to ascertain the boundaries and the extent of occupation of the plaintiff's land if any, by the defendant.

In view of the matters aforesaid, I find that the plaintiff has failed to prove her case against the defendant on the required standard. Consequently, this suit is hereby dismissed with costs to the defendant. It is so ordered.

***JUDGMENT READ, DATED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 4TH DAY OF FEBRUARY, 2022.***

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**HON. E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

- 1. Ms Wambui holding brief for Makworo for Plaintiff*
- 2. Ms Amba holding brief for Gitonga Muriuki*
- 3. Kabuta – Court clerk.*