



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 334 OF 2017**

**SERAH NYAMBURA NDUNGU**

***(Suing as the Administrator of the estate of Evanson Ndungu Muriu).....PLAINTIFF***

**VERSUS**

**NDICHU MUCHIRI.....1<sup>ST</sup> DEFENDANT**

**NJOROGE MUCHIRI.....2<sup>ND</sup> DEFENDANT**

**JOHN KARIUKI NGUGI.....3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR KIAMBU.....4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....6<sup>TH</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KIAMBU.....7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a Plaint dated 15<sup>th</sup> March 2017, the Plaintiff brought this suit against the Defendants and sought for the following orders against them, jointly and severally.

- 1. A Declaration that the title Number Karai/Karai/ 283 and its subsequent subdivision title numbers being Karai/ Karai 4603, 4604 and 4605 belongs to the Estate of the Late Evanson Ndungu Muriu, and accordingly the Land Registrar Kiambu be ordered to cancel the said subdivision and title deed numbers and transfer the land in the mother title deed number Karai/ Karai/ 283, of the estate of Evanson Ndungu Muriu.***
- 2. That the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> Respondents be ordered to sign all documents and do everything required to register Land Title Number Karai/ Karai/283, and its subdivision Title numbers Karai/ Karai 4603,4604 and 4605 in the names of the estate of Evanson Ndungu Muriu.***
- 3. That the decision of the County Council of Kiambu in its works , Town Planning Markets and Housing Committee of 16<sup>th</sup> October 2008, and the decision of the full Council meeting of 20<sup>th</sup> November 2008, in regard to Title Number Karai/ Karai/283, be quashed and all the documents, resolutions and letters prepared by any person to give effect to the said decisions be declared invalid and illegal.***
- 4. Loss of profits and damages for loss of use of land.***
- 5. Costs of this suit and any other relief the Court deems fit to grant.***

In her statement of Claim, the Plaintiff averred that the suit property emanates from land **L.R 283**, which was at the material times in the name of County Council of Kiambu, That the suit property has since been subdivided into **L.R 4603,4604 and 4605**, which are under the names of **Njoroge Muchiri, John Karuri Ngugi & Ndichu Muchiri**. That the **County Council of Kiambu**, had granted a lease to one

**Wairimu Muchiri**, the mother of the 1<sup>st</sup> & 2<sup>nd</sup> Defendants. That after experiencing various challenges with the lease including inability to pay the land rent and charges applicable **Macharia Muchiri** sought assistance of **Evanson Ndungu Muriu** to assist in paying the applicable and accrued charges to avoid the lease terminating and the lessor taking over the property and possibly allocating it to someone else.

That on 22<sup>nd</sup> March 1996, **Wairimu Muchiri**, applied in writing to transfer the said land to **Evanson Ndungu Muriu**, indicating that she was unable to pay rent charges for four years and on 7<sup>th</sup> May 1966, she publicly transferred the lease of **L.R 283 to Evanson Ndungu** in the County Council of Kiambu Council meeting vide **Minute 16/1966 (4)**. That the transfer of lease was paid and **Evanson** continued paying the rent charges. That a dispute in acreage commenced between **Evanson** and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and their mother passed on and the dispute was based on the alleged promise, he had given that he would give some acreage to the family of **Wairimu**. That he was chased away from the land and he took various steps before the County Council of Kiambu to get his land back. That the dispute culminated in a Court matter in the **Senior Residents Magistrate Court at Kiambu** being Land Case No.46 of 1983, and the Court gave a judgment that **Evanson** do obtain **10 acres** out of the **16 acres**. That the Execution of the Judgment was frustrated by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the County Council of Kiambu and **Evanson** passed on, without having resolved the matter, That he had obtained **Land Control Board consent**, to subdivide the land and in 1980, the Clerk of the County Council of Kiambu had written to the Commissioner of lands advising him to jointly register the land in the name of **Evanson, Ndungu Muchiri, Kabiru Muchiri & Njoroge Muchiri**. That in **Succession Cause No. 2975 of 2005**, the suit property devolved to the Plaintiff for life. That subsequently, the 1<sup>st</sup> Defendant Petitioned for letters of Administration in which he misrepresented that the suit property was an asset of the late **David Kabiru Muchiri**, and listed the 1<sup>st</sup> & 2<sup>nd</sup> Defendants as the brothers, while 3<sup>rd</sup> Defendant was listed as a cousin. That a Principal Magistrate could not lawfully interfere with a property already distributed.

Further that sometimes in 2009-2015, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants **fraudulently** transferred and registered and subdivided the suit property in their names and the name of **Kabiru Muchiri** was deleted and replaced by the name of the 3<sup>rd</sup> Defendant. The Plaintiff particularized **irregularity, illegality** and **fraud** by the 1<sup>st</sup> to 4<sup>th</sup> defendants and the County Council of Kiambu and further averred that she is apprehensive that unless the Honourable Court intervenes, she will suffer irreparable loss.

The suit is contested and the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their statement of Defence dated 28<sup>th</sup> March 2017, and averred that they are the registered owners of **L.R 4603,4604 and 4605**, which were hived off from **L.R 283**. That the Defendants commenced and proceeded with Succession Cause **No 2975 of 2007**, and obtained a Certificate of Confirmation of Grant fraudulently with knowledge that that the suit property was occupied by heirs of the Deceased since 1958. That their mother sought assistance from **Evanson Ndungu Muriu**, to pay accrued charges to avoid the lease being terminated and that upon the payment of the charges, the said **Evanson** only paid the receipts to indicate his name instead of the deceased. That the said **Evanson** took advantage of their lack of knowledge about the Court proceedings and filed land Case **No. 46 of 1983**, solely to obtain a document to indicate that he was supposed to acquire **10 acres** of the suit property. That, it was their discretion to distribute the suit property as they wished as the property was rightfully divided amongst themselves as the estate of **David Kabiru**, who inherited from their mother. That the Committee noted that the plot had been occupied by heirs of **Wairimu Muchiri**, and they have developed it and there was need to settle them. The Court was urged to dismiss the suit.

The 6<sup>th</sup> Defendant filed its Statement of Defence dated 27<sup>th</sup> June 2017, and denied all the allegations made in the Plaintiff. It admitted paragraph 10 of the Plaintiff and further put the Plaintiff to strict proof. That due process was followed in handling all the aspects of the land in assigning **Land Title Number Karai/Karai/283**. That the registration of the land was pursued and concluded in favour of **Evanson Ndungu Muriu, Ndichu Muriu, Kabiru Muchiri and Njoroge Muchori**, when the dispute first commenced and the land was subdivided into four, in favour of the said parties

The 4<sup>th</sup> & 5<sup>th</sup> Defendants filed their statement of Defence dated 8<sup>th</sup> June 2017, and denied all the allegations made in the Plaintiff. They averred that if there was any Judgment as alleged or at all, the same was not brought to the attention of the 4<sup>th</sup> Defendant for implementation. That in transferring the suit land from the then **County Council of Kiambu** to the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> Defendants, the 4<sup>th</sup> Defendant relied on documents presented before it by the said Defendants to wait transfer of land Form. **R.L 1** and in no way did he act irregularly, illegally or fraudulently as alleged or at all.

The matter proceeded by way of viva voce evidence wherein the Plaintiff called 3 witnesses and the Defendants called two witnesses and closed their case.

#### **PLAINTIFF'S CASE**

**PW1 Serah Nyambura Ndungu Muriu** testified that **Evanson Ndungu** was her husband and she is the administrator of his Estate. She adopted her witness statement and further testified that her husband purchased the suit property from **Wairimu Muchiri**. That **Wairimu Muchiri** failed to pay the Land Rent and Rate at the **County Council of Kiambu** and her husband paid all the debt owed over the suit property. That her family later went to Tanzania and the 1<sup>st</sup> and 3<sup>rd</sup> Defendants changed the land to their names. Further, that her husband bought all the **16 acres** of the land and the elders requested him to give the children of **Wairimu Muchiri**, **6 acres** which he did. That the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants are the ones in control of the **10 acres**. She produced her bundle of documents as **Exhibit 1** and urged the Court to allow her claim.

That there was no sale agreement, however there were witnesses. That she was not aware of how much her husband was paid. Further that **Wairimu Muchiri**, was not related to her husband and that she cultivated on the suit property before she went to the Tanzania. That the suit land was sold to other purchasers and they did not report the matter after they were chased way by the Defendants. That the County Council of Kiambu gave her husband document of ownership and there were no title deeds and they got transfer from **Wairimu**.

That the Land Registrar allowed change of the title from her husband to the Defendants and that was before the Land Register had changed from **Wairimu to Evanson Ndungu Muriu**. That there was a Judgment in Kiambu Court and her husband was to have **10 acres** and the

Defendants **6 acres**. That she only wants **10 acres** out of the suit property, but not the whole suit land. That the **County Council of Kiambu** had allowed the transfer of the suit land to her and **Wairimu Muchiri**, was alive by then and she has produced minutes of the County Council.

**PW2 Hannah Muthoni Njoroge** adopted her witness statement dated **18<sup>th</sup> July 2017**, and testified that the Plaintiff is her Aunt and she had leased the land to her and some other men who were on the other portion of land and who were using the land. That she cultivated the land for one year and the Plaintiff's husband had purchased the land though she was not present. That the land had a live fence but not barbed wire.

**PW3 Joseph Waweru Mbaria** adopted his witness statement and testified that he was a community employee now called KARI and he was working together with **Evans Ndungu Muriu**. That Evans asked him to take him to the Chief and they discussed about the land, and it was agreed that he was to give the sons of **Wairimu** land. That **Evanson** had purchased the land from **Wairimu** and he felt pity for **Wairimu's** sons and agreed to give them with **6 acres**. That **Evanson** allowed his wife to cultivate the land. That he did not know for how much the suit property was bought for.

#### DEFENCE CASE

**DW1 John Matheka Kithuka**, testified that he is the **Land Registrar Kiambu**, at the Lands Registry, He adopted his witness statement dated **18<sup>th</sup> June 2018** as part of his evidence. He produced the bundle of documents as Exhibits 1 to 8. That he reviewed the documents at the date of registration. That the transfer document was transferred by the County Government of Kiambu. That the date of the transfer is **7<sup>th</sup> September 2011**, and all the transferees have signed the transfer. That he was not aware that **Kabiru Muchiri**, was deceased as he died in the year **2011**. That the transfer is not signed by the **Land Registrar** and that is not proper as a Registrar, he was supposed to sign the transfer form. Further that **RL19** is not signed and that is not proper as it should be dated. Considering one of the transferees is deceased, and the document is not signed, he would not rely on the document. That the transfer documents were complete as per the Commissioner of lands. Further that the transfer is dated **7<sup>th</sup> October 2011**, and it was forwarded on **13<sup>th</sup> January 2012**, and the grant came later and that means the Deceased was still alive. That the grant has inconsistent dates.

That the Commissioner of lands wrote letters to them and requested them to transfer the land to the **1<sup>st</sup> & 2<sup>nd</sup> Defendants** and **Kabiru Muchiri** and the Commissioner of Lands did not indicate the land was for **Evanson Ndungu**. That he never received any request from the **County Government of Kiambu** to have the land transferred to **Evanson Ndungu**. Further that from the Green Card, he did not find any supporting documents executed by the Town Clerk of Municipal Council of Kiambu. That procedurally documents are attached by the County Council in support of allocation of any land. That as per **1973**, the registered owner was the County Council of Kiambu. That documents from the County are forwarded to Ardhi House for purposes of allocating the lease. That once lease has been processed from Ardhi House, it is forwarded to the District Lands Officers and the beneficiaries are alerted. That there is letter dated **13<sup>th</sup> January 2012**, forwarding transfer to District Land Registrar, Kiambu and it is copied to the owner.

#### 1<sup>ST</sup>, 2<sup>ND</sup> & 3<sup>RD</sup> DEFENDANTS DEFENCE

**DW2 John Karuri Ngugi**, adopted his witness statement and testified that **L.R 283**, was allocated to **Wairimu Muchiri** by **ADC** in **1958**. That she did not sell the land and she was murdered in **1969**, and was buried on the suit property and the family is using the land and the site inspection was done in **July 2009**. That they were given a letter to take to the Permanent Secretary Ministry of Lands for investigations. That the Commissioner of Lands also investigated the matter and found that the land was being used by **Wairimu's** family and they have the title deed over the suit property. He urged the Court to remove the restrictions. That the **1<sup>st</sup> & 2<sup>nd</sup> Defendants** mother was a sister to **Wairimu Muchiri**.

That he was testifying on behalf of the **1<sup>st</sup> & 2<sup>nd</sup> Defendants** and that his mother also utilized part of the land. That **Wairimu** had five children and they were using the land and there was consent from other family members. That there was a case that was filed in **1983**, which he did not know about and only heard about it at the High Court. That he did not know **Evanson Ndungu** and the said **Evanson** did not assist **Wairimu** with payment of the Lease. That in **1966**, he was about 12 years and did not understand the relationship between **Evanson** and **Wairimu**. That from **1966** to date the Plaintiff's family had not utilized the suit property.

Thereafter, the parties filed written submissions which the Court has carefully read and considered. The issue for determination is **whether the Plaintiff is entitled to the orders sought**.

The instant dispute arises from a prolonged dispute between the Estate of **Evanson Ndungu Muriu**, and the estate of **Wairimu Muchiri**. Most of the oral evidence produced in Court is being disputed by each party and it is clear that none of the original owners of the agreement entered into between the two is in Court to tell the truth. While the dispute seems to have arisen way before in the **1970's**, it seems the cause of action arose in **2008**, when the County Government of Kiambu sought to have the **1<sup>st</sup> to 3<sup>rd</sup> Defendants** registered as the owners of the suit property.

It is not in doubt that the suit property was initially allocated to **Wairimu Muchiri (Deceased)**. It is further not in doubt that the said **Wairimu Muchiri**, fell into arrears and sought the help of the Late **Evanson Ndungu Muriu**, to help her out with the payments of the said arrears. It is alleged by the Plaintiff that in seeking the help of **Evanson Ndungu** the late **Wairimu Muchiri** sought to transfer the suit property to him and wrote a letter to the **County Council of Kiambu**. That after the death of the said **Wairimu Muchiri**, her sons sought to evict the said **Evanson Muchiri** from the suit property and claimed sole proprietorship. It is also the Plaintiff's contention that while the whole suit property was to be registered in the name of **Evanson Ndungu**, seeing as the sons of the Late **Wairimu Muchiri** did not have land, he agreed to grant them **six acres** of the said property.

The Court notes that while the Defendants claimed that the documents that were produced in evidence by the Plaintiff were not genuine but the same was not proved in any way. It is trite that whoever alleges must prove. The Plaintiff has produced in evidence a letter that the said **Wairimu Muchiri**, had written to the County Council of Kiambu transferring the lease to **Evanson Ndungu**. Further the Plaintiff has produced in evidence an award by the Elders which indicated that he was to get **10 acres** and further documentation that proves he had paid for the land rents and therefore entitled to the same.

The 1<sup>st</sup> to 3<sup>rd</sup> Defendants have indeed acknowledged that the late **Evanson Ndungu**, helped out the Late **Wairimu Muchiri**, and that he paid for the arrears. However, it is their contention that the said help did not entitle him to the suit property as he was only helping out.

The Court notes the contents of the letter dated **21<sup>st</sup> July 2016**, by the County Government of Kiambu to the Chief Officer, Lands and Housing & Physical Planning. In the said letter, it is indicated that the records of the particular land does not appear in their records, but appeared in the records maintained by the former County Council of Kiambu until **1971**, when it was reported that the transfer to **Evanson**, should be cancelled. That it was resolved and recommended that the land be transferred to **Mr. Ndungu Muchiri, Kabiru Muchiri and Evanson Ndungu**, in joint registration. The Court has seen the letter dated **11<sup>th</sup> February 1980**, produced by the Plaintiff, which support the said position

It is thus not in doubt as per the documentations produced in evidence by both parties that indeed there was a consensus that the suit property would be registered in joint registration between the parties. It is further clear that there was no allocation to each individual as to how the parties would be allocated the said property.

As already noted above by the Court, the Plaintiff has produced in evidence an award by the elders, which award has not been set aside and which has not been controverted and or found not to be genuine. For the said reasons, it is this Court's considered view that in the interest of justice and equity that the Estate of **Evanson Ndungu and Wairimu Muchiri** share the suit property equally. The suit property was **16 acres** and therefore each Estate should get **8 acres**, and then the parties to share the same.

The Court notes that there were minutes of a meeting held by the Kiambu County Council on **16<sup>th</sup> October 2008**, purporting to allocate the land to the 1<sup>st</sup> to 3<sup>rd</sup> Defendants. However, there is no doubt that once land has been allocated, it cannot be reallocated again and any attempts to decide who owns the land was not in away within the realms of the County Council as it was not initially allocating land, but reallocating the land that had already been allocated. Consequently the Court finds the said action was null and void.

The Upshot of the foregoing is that the Court after a thorough analysis and consideration of the available evidence makes the following findings;

**1. A Declaration be and is hereby made that title Number Karai/Karai/ 283, and its subsequent subdivision title numbers being Karai/ Karai 4603 , 4604 and 4605 belongs to the Estate of the Late Evanson Ndungu Muriu and Wairimu Muchiri. Accordingly the Land Registrar Kiambu be and is hereby ordered to cancel the said subdivision title deed numbers and transfer the land in the mother title deed number Karai/ Karai/ 283, to the Estate of the Late Evanson Ndungu Muriu and Wairimu Muchiri**

**2. That the 1<sup>st</sup> , 2<sup>nd</sup> 3<sup>rd</sup> , 4<sup>th</sup> 5<sup>th</sup> 6<sup>th</sup> and 7<sup>th</sup> Respondents be ordered to sign all documents and do everything required to register Land title Number Karai/ Karai/283, and its subdivision Title numbers Karai/ Karai 4603,4604 and 4605 in the names of the Estates of the Late Evanson Ndungu Muriu and the late Wairimu Muchiri.**

**3. That the decision of the County Council of Kiambu in its works , Town Planning Markets and Housing Committee of 16<sup>th</sup> October 2008 and the decision of the full Council meeting of 20<sup>th</sup> November 2008 in regard to Title Number Karai/ Karai/283, be and is hereby quashed and all the documents, resolutions and letters prepared by any person to give effect to the said decisions be and are hereby declared invalid and illegal.**

**4. That each Estate of the Late Evanson Ndungu Muriu and the late Wairimu Muchiri to get 8 acres out of the suit land and the same to be transmitted in accordance to the succession Laws.**

**5. Each party to bear its own costs**

**It is so ordered**

**DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.**

**L. GACHERU**

**JUDGE**

**Court Assistant – Kuyiki**