



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 274 OF 2017

(FORMERLY NAIROBI ELC CASE NO.722 OF 2014 (O.S)

AS CONSOLIDATED WITH HCCC NO. 972 OF 2006(O.S)

(FORMERLY ELC HCCC NO. 317 OF 2006(O.S)

IN THE MATTER OF KIAMBAA/WAGUTHU/385

STEPHEN NJAU NJOROGE.....1ST PLAINTIFF

RICHARD GICHINI NJOROGE.....2ND PLAINTIFF

JAMES NJOROGE NJAU.....3RD PLAINTIFF

JANE NYAMBURA NJAU.....4TH PLAINTIFF

GRACE WAMBUI RAGACHA.....5TH PLAINTIFF

MUCHENE NJOROGE.....6TH PLAINTIFF

CECILIA NDURUKA NJAU.....7TH PLAINTIFF

FRED NJUKU NJAU.....8TH PLAINTIFF

VERSUS

LILLIAN WAIRIMU NGATHO.....1ST DEFENDANT

ELIZABETH MURUNGARI NJOROGE.....2ND DEFENDANT

JUDGEMENT

The instant suit is a consolidation of two suits **ELC CASE NO. 274 OF 2017(FORMERLY ELC CASE NO.722 OF 2014 (O.S)**, filed by the Plaintiffs against the Defendants and **HCCC NO. 972 OF 2006(O.S), FORMERLY ELC HCCC NO. 317 OF 2006(O.S)** filed by the Defendants against the 3rd and 7th Plaintiffs.

On **16th December 2020**, the Court dismissed **ELC CASE NO. 274 OF 2017(FORMERLY ELC CASE NO.722 OF 2014 (O.S)** the Plaintiffs suit for non-attendance with costs to the Defendants and proceeded with the Defendant's Counter Claim. This Court will therefore deal with the said Counter Claim.

By an Originating Summons dated **13th September 2006**, the Defendants herein who were the Plaintiffs in **Civil Suit No. 972 of 2006** sought for determination of the following matters;

- 1. That parcel L.R No. Kiambaa/ Waguthu/385, is the registered land of Wanjiku Njau (Deceased) who until her demise**

on 9th April 1998, was in possession of the said parcel of land and the Plaintiffs being the appointed legal administrators under the grant of letters of Administration intestate dated 2nd November 2000, have the exclusive rights to administer the suit premises herein in accordance with the succession law. Further, that the Defendants have no right legal or otherwise to occupy, interfere or in any manner whatsoever prevent the Plaintiffs from entering into the said suit premises herein in dispute and administering as such as is lawfully and or legally required under the Succession Act.

2. That if this Court should issue permanent restraining orders against the Defendants their agents and or servants from interfering, constructing and or cultivating within parcel no. Kiambaa/ Waguthu/385, the suit premises herein and further should the Court order that the Plaintiffs be allowed to peacefully administer the suit premises herein and further should the Court order that the Plaintiffs be allowed to peacefully administer the suit premises as per the grant of letters of Administration issued to them by the High Court of Kenya in Nairobi Succession Cause No. 2616 of 1999.

3. That the Defendants by an order of Court be made to account and pay to the estate of the Wanjiku Njau the profits they have continued to illegally retain to date from 9th April 1998 estimated at Kshs.20,000/= per day for 9 years (Kshs.180,000/=) when wanjiku Njau the registered owner of the suit premises died.

4. That the costs of this Application be provided for

In her Supporting Affidavit **Elizabeth Murungari Njoroge**, averred that they are the duly appointed Administrators of the estate of **Wanjiku Njau**, who died domiciled in Kenya on 9th April 1998, who was the registered owner of the suit property. That the suit property is unoccupied and the parties herein were parties in HCC No. 2616 of 1999, consolidated with HCCC No. 1074 of 1998, which was determined in their favour on 2nd November 2000, wherein they were appointed the Legal Administrators.

That it is impossible for them to administer the Deceased property in particular the suit property, since the Defendants herein who occupy the large parcel for land surrounding the suit property have threatened to resort to violence if they attempt to administer the said Estate. That the pendency of HCC No. 2616 of 1999, and the ensuing **Appeal** to the **Court of Appeal**, had prevented them from taking any remedial proceedings, but as there is no existing suit between the parties, they seek the Courts order for permanent Injunction. Further, that the Defendants have been unlawfully making use of the suit property by leasing it out and illegally retaining the profits realized and therefore preventing the administrators of the Deceased estate from administering it.

The Originating Summons was opposed and **Cecilia Nduruka Njau**, who was the 1st Defendant swore a Replying Affidavit on 16th October 2006, and averred that the Originating Summons and the suit are bad in law as the same offend the provisions of **Order VII** of the **Civil Procedure Rules**, which provisions are mandatory. That the issue of rights over the suit property cannot be determined summarily as proposed by the Applicants, as the Defendants amongst other claim right over the suit property by way of Prescription and have moved the Court by way of Originating Summons. That there is no proof before this Court of what irreparable injuries that the Applicants stand to suffer if the orders are not granted.

Further, that the Defendants having been on the suit property for over the prescription period, they stand to suffer more on a balance of convenience, if the injunctive orders are confirmed. Further that the Plaintiffs rights over the suit property are secondary, to any of the Defendants and cannot supersede the Defendants rights over the same property. That they have peacefully cultivated the land for over a period of **12 years**, and the Plaintiffs cannot put truth to the allegations of violence over them, as they own the land. That the Plaintiffs have been guilty of great delays, which delays have not been properly explained and cannot be granted.

The said **Cecilia Nduruka Njau** filed a further Replying Affidavit, sworn on 28th September 2007, and averred that the Plaintiffs moved this court only after the Defendants amongst other persons sued the Plaintiffs. That they amongst other family members have been in actual and effective occupation of the suit property, and their use of the suit property have never been unlawful.

Elizabeth Murungari Njoroge, swore a Supplementary Affidavit on 3rd November 2008, and averred that the Defendants have not had exclusive and or uninterrupted occupation, as they only invaded the suit property upon the demise of the Deceased. That they had attempted to misrepresent themselves as the beneficiaries, only for the Court to dismiss their Grant of Probate. That the Defendants illegally disinherited the estate of **Wanjiku Njau** and they should be compelled to compensate the said Estate, and their suit should be struck out.

The suit proceeded by way of viva voce evidence wherein the Defendants called **two** witnesses and closed their case. Despite being aware of the Hearing of this matter, the Plaintiffs failed to attend Court and the hearing of the matter proceeded in their absence.

DEFENDANT'S COUNTER CLAIM

DW1 Peter Wakahura Kanyungo testified that he prepared an assessment report which he prepared in **January 2007**, in relation to Kiambaa/ Waguthu/385, and the instructions were to inspect the property and advise the profit to be acquired for the preceding **9 years**. That he prepared a report and found that the land is **2.3 acres** and an acre of land would secure **Kshs. 25,000/=**, and for the **2 acres** it was **Kshs. 57,500/=** gross revenue and for the 9 years, the total was **Kshs.517, 500/=**. He produced the Valuation Report as Exhibit 1.

DW2 Elizabeth Murungari Njoroge testified that she is the administrator of Estate of **Wanjiku Njau**, who was the owner of the suit property, She adopted her witness statement dated **13th September 2006**, and further adopted her Affidavit filed on **26th March 2008**, as her evidence in Court. She further adopted all her affidavits and produced her list of documents as Exhibit No. 2 and urged the Court to allow her claim.

After close of viva voce evidence, the Defendants filed written submissions which the Court has carefully read and considered and finds that the issue for determination is **whether the Defendants are entitled to the orders sought in their Counter Claim.**

The Defendants have sought for the determination of various questions amongst them whether **Wanjiku Njau** (Deceased) is the registered owner of the suit land and them being the administrators of her Estate, whether they have exclusive rights to administer the said estate and whether the 3rd and 7th Plaintiffs have legal rights to occupy and interfere with the suit property. They also sought for the accrued profits that the 3rd and 7th Plaintiffs have continue to illegally detain for 9 years.

It is not in doubt that the Defendants Counter Claim was contested by the said Plaintiffs herein. However, despite filing Affidavits in opposition to the said Originating Summons, the said Plaintiffs did not adduce any evidence in support of their claim and therefore the evidence by the Defendants is unchallenged. The Claims made by the Plaintiffs are unsubstantiated and therefore the claims made by the Plaintiffs remain mere allegations. See the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers LimitedVs... City Council of Nairobi [2019] eKLR** where the Court held that ;

21. It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged.

However, uncontroverted evidence is not automatic evidence as the Defendants still have an obligation to prove their case.

The Defendants sought for a determination of the prayers that the suit property is the registered land of **Wanjiku Njau** and that they have exclusive rights to administer it. The Defendants produced in evidence Letters of Administration dated **2nd November 2000**, which indicated that the Defendants are the Administrators of the Estate of **Wanjiku Njau**. Further, the Defendants did produce in evidence various Certificates of official search, one being a search dated **11th March 2002**, and another one was dated **18th April 2006**, and a final one is dated **23rd January 2007**, which confirmed that the Deceased is the registered owner of the suit property.

In the absence of any evidence to rebut the said evidence adduced, the Court has no option but to finds that the Defendants have proved that the said suit property belong to **Wanjiku Njau**, and the Defendant have exclusive rights to administer it. Therefore, the Court finds and holds that the Defendants are entitled to the said orders and the Court would not hesitate to grant the said orders as they are merited.

The Defendants have also sought for the profits that the Plaintiffs continued to illegally detain for the period that they have been in occupation. The 3rd & 7th Plaintiffs did acknowledge that they were in possession of the suit property, and this is further buttressed by the fact that they sought to be registered as owners by way of **Adverse Possession**. It is thus clear that the Defendants were prevented from realizing the profits and the use of the suit property. Though the Defendants pleaded for a profit of Kshs.20,000/= per day, DW1 who prepared the report did testify that the suit property would have realized an income of **Kshs. 57,500/= per year and that the gross revenue for the 9 years total was Kshs.517, 500/=.**

Parties are bound by their pleadings, and the Defendants did plead for the profits for the years, that the Plaintiffs had occupied the Land. Evidence has been adduced that the property would have fetched **Kshs. 517, 500/=** for the said **9 years** and given that no evidence has been brought forth to challenge nor rebut the said evidence, the Court finds and holds that the said prayer is merited.

The Defendants had also sought for Permanent Injunction against the 3rd & 7th Plaintiffs. It is not in doubt that the Defendants are the Administrators of the estate of the registered owner and thus they have an obligation to protect the rights and interest of the said Estate. The deceased **Wanjiku Njau**, being the registered owner, then her estate has the absolute and indefeasible rights as provided for by the provisions of **Section 26 of the Land Registration Act**. Being the absolute and indefeasible owners, the said Estate should be allowed to enjoy all the rights and privileges that appertains to the said property. In order for such enjoyment to happen, it would only be fair that a permanent injunction granted against the Plaintiffs.

This Court finds and holds that the Defendants have proved their case on the required standard of balance of probabilities and are consequently entitled to the orders sought.

Having carefully read and considered the pleadings by the parties, the Originating Summons, the available Affidavits, the evidence adduced, the written submissions by the Defendants and the relevant provisions of law, the Court finds and holds that the **Originating Summons** dated **13th September 2006**, is **merited** and the prayers sought in the said Originating Summons are allowed with costs to the Defendants.

Further, the Court finds that the amount to be paid by the 3rd and 7th Plaintiffs to the estate of **Wanjiku Njau (Deceased)** for profits that they have continued to illegally retain is **Kshs. 517,500/=** for the **9 years** as sought by the Defendants.

It is so ordered.

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

L. GACHERU

JUDGE

Court Assistant – Kuiyaki