



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**E.L.C. CASE NO. 375 OF 2013**

**SYMON NYAMU MUTHIGANI ..... PLAINTIFF**

**VERSUS**

**CHARITY WANGUI MUNENE ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit by way of a plaint dated and filed on 28<sup>th</sup> July, 2011 whereby he prays that judgment be entered against the Defendant for: -

- (a) That the Plaintiff be declared the sole proprietor vested with absolute ownership of parcel of land Mwerua/Kagio/18.**
- (b) That the Defendant and her servants/agents do move and vacate out of land parcel Mwerua/Kagio/18 failing which the Court Bailiff of this Court (Hippo General Merchants) do forcibly evict them at their own costs.**
- (c) That the defendant and her servants/agents do exhume the remains of any of their person(s) who might have been buried in the land known as Mwerua/Kagio/18 which belongs to the Plaintiff.**
- (d) A Permanent Injunction do issue restraining the Defendant, her agents/servants and or assigns from occupying and or dealing in any manner with the parcel of land known as Mwerua/Kagio/18.**
- (e) That the defendant do pay mesne profit and pecuniary damages to the Plaintiff for preventing the Plaintiff from using his land from 1998 to date.**
- (f) Costs of this suit and interests thereto at court rates.**
- (g) Any other relief that this Court deems fit to grant.**

2. The defendant denied the claim by filing her defence dated 30<sup>th</sup> January, 2012 on 1<sup>st</sup> February, 2012.

**PLAINTIFF'S CASE**

3. The plaintiff testified that the Defendant was a squatter living in his land parcel No. Mwerua/Kagio/18. He adopted his statement dated 12<sup>th</sup> November, 2013 and filed on 14<sup>th</sup> November, 2013.
4. He testified that the suit land belonged to his late father Mutigani Kathitu Warui who until his demise on 18<sup>th</sup> October, 1998 possessed absolute title to the suit land.
5. He further testified that he came to know the Defendant in 1998 when together with her husband, they invaded the said parcel of land without any colour of right and have been squatting thereon despite repeated notices to move out.
6. He also testified that in early 1998, the deceased's husband caused the CID Kerugoya to arrest his late father, two uncles and cousins accusing them of stealing and defrauding them the said land which led to the institution of Criminal Case No. 1943 of 1998. The said case was eventually decided in favour of his deceased father on 3<sup>rd</sup> August, 2001.

7. The plaintiff later filed succession cause No. 560 of 2005 so as to inherit his father by transmission as required by law which led to confirmation of grant dated 16<sup>th</sup> November, 2006 and a grant of absolute title deed dated 20<sup>th</sup> December, 2006.

8. In the course of the hearing of Cr. 1943 of 1998, it was established that before the defendant's deceased husband squatted on the suit land in 1998, his real name was Kariuki Kihohia and his late fathers' name is Kihohia Gachanja of Mururiini Village and that he frantically tried to forge a lot of identification documents so as to have himself registered in his late uncle's name to give credibility to his case.

9. He testified that the Defendant's late husband hailed from Mururiini Village and her mother-in-law is still alive and resides thereon.

10. He further testified that the defendant's continued stay on the suit land has caused him to incur hefty losses in terms of opportunity and pecuniary costs since he cannot develop the same for commercial purposes and hence economic gain.

11. He produced the documents in his List of Documents, Further List of Document and Supplementary Further List of Documents dated 28/7/2011, 14/11/2013 and 18/3/2015 as Plaintiff's Exhibits 1 – 33 respectively.

12. He prayed that this Honourable Court grants him all the orders in the Plaintiff.

#### **DEFENDANT'S CASE**

13. The Defendant adopted her statement filed on 1<sup>st</sup> February, 2012 in her evidence.

14. She testified that when she got married, she was taken to the suit land as it belonged to her father-in-law who was known as James Mabembe.

15. She further testified that she came to know the Plaintiff in 1983 when she was married and has been living thereon ever since. Her husband died and was buried in the suit land in the year 2009.

16. She testified that the suit land belonged to her father in law who was also buried in the suit land and that the Plaintiff filed a succession cause in Nyeri and obtained a title.

17. She stated that she came to learn of the said succession cause after the death of her husband and that she had filed an application to have the grant revoked as the same had been obtained fraudulently.

18. She prayed that this suit be dismissed.

#### **PARTIES SUBMISSIONS**

19. On 12<sup>th</sup> July, 2021 the parties agreed to file submissions. The plaintiff filed his on 17<sup>th</sup> August, 2021 and the Defendant filed hers on 17<sup>th</sup> September, 2021.

#### **PLAINTIFF'S SUBMISSIONS**

20. The plaintiff submitted that issues for determination are: -

- a. Whether the defendant's late husband was entitled to the suit property.
- b. Whether the defendant is entitled to the suit property.
- c. Whether the plaintiff has made a case to warrant issuance of the orders as prayed in the plaintiff.

21. The plaintiff submitted that there are no family ties between the Plaintiff and the Defendant's deceased husband but that the Defendant over the course of time changed his name disguised as the family name of the Plaintiff and proceed to claim rights to the land.

22. He submitted that the Defendant's deceased's husband real name was Kariuki Kihohia and both David Ibate and him only obtained an identification document in the said name at the age of 51.

23. He also submitted that this Honourable Court orders eviction against the defendant as he is the registered proprietor of the land. He further submitted that the Defendant and her husband should be evicted because they failed to heed the previous notices to vacate the land and that he was not under any obligation to offer alternative accommodation to the Defendant. He relied on the case of *Moi Education Co. Ltd Vs William Musembi & 16 others (2017) e K.L.R.*

24. He argued that the testimony of the Defendant cannot be relied on as the Defendant and her late husband have blatantly lied to the Court on several occasions.

25. He submitted that the Defendant's deceased husband was an impostor, a fraudster and a lawbreaker with an elaborate scheme to disinherit the Plaintiff of the suit property and that it would be a promotion of anarchy for persons to believe that they can be rewarded with

property for engaging in forgery, soft robbery, theft and impersonation.

26. In conclusion, the Plaintiff prayed that the Court grants the orders sought in the plaint.

### **DEFENDANT'S SUBMISSIONS**

27. The Defendant on the other hand proposed the following issues for determination:-

- a. Whether the Defendant is entitled to the suit property.
- b. Whether the Plaintiff has proved his case on a balance of probabilities.

28. She submitted that if the orders sought by the plaintiff are granted, she and her children will be rendered destitute yet she has called the suit land her home for the past 38 years. Further that she is not a woman of means and has no parcel of land where she can settle with her children and thus this Honourable Court is bound by the provisions of *Article 53 (2) of the Constitution of Kenya, 2010*.

29. She further submitted that the plaintiff did not produce any material that she opposed the burial of her deceased husband and that if the exhumation of her deceased husband from the suit property will be granted, it will be detrimental and cause emotional and psychological trauma to her and her children.

30. She submitted that there exists a customary trust as the suit property falls within ancestral land. She relied on the case of *Justus Maina Muruku Vs Jane Waithira Mwangi (2018)*. Further that *Section 28 of the Land Registration Act, 2012* makes it clear that all registered land is subject to various overriding interest without being noted on the Register.

31. She submitted that the Plaintiff had recognized the Defendant's stake in the suit land as he did not put any restrictions against the defendant's occupation as per *Section 76 of the Land Registration Act*.

32. She also submitted that since the Plaintiff has never lived or utilized the suit property, he is not entitled to mesne profits or pecuniary damages from 1998 as the Plaintiff issued an eviction notice in 1998 and demand notice in 2010.

33. She submitted that the Plaintiff did not call any expert witness on the issue of multiple personalities and thus the plaintiff cannot start raising irrelevant issues against a dead person who cannot defend himself while in the grave.

34. In conclusion, she prayed that the Plaintiff's suit be dismissed with costs for failure to prove the same on a balance of probabilities.

### **ANALYSIS**

35. I have considered the parties' rival pleadings, submissions and documents thereof. I have identified the following as probable issues for determination:-

- a. Whether the Plaintiff is the sole and absolute owner of land parcel registration No. Mwerua/Kagio/18 and whether he has proved his claim to the required standard?**
- b. Whether the Defendant ought to be evicted from land parcel Mwerua/Kagio/18.**
- c. Who should bear the costs.**

### **WHETHER THE DEFENDANT IS THE SOLE AND ABSOLUTE OWNER OF LAND PARCEL REGISTRATION NO. MWERUA/KAGIO/18 AND WHETHER HE HAS PROVED HIS CLAIM TO THE REQUIRED STANDARD?**

36. The Plaintiff claims that he is the registered proprietor of land parcel No. Mwerua/Kagio/18. He furnished this Honourable Court with a title deed issued to him on 20<sup>th</sup> December, 2006.

37. He claimed that he acquired the suit land by way of transmission as the beneficiary of the Estate of his deceased father. He furnished a certificate of confirmation of grant dated 16<sup>th</sup> November 2006 to prove this.

38. It is on this basis that he claims his registration as proprietor of the suit land is indefeasible.

39. *Section 25 of the Land Registration Act, 2012* provides that: -

*“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject — (a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the*

*person is subject to as a trustee.”*

40. It is evident that a litigant holding a title deed is not relieved from obligations such as overriding interests provided under **Section 28** of the same Act.

41. The Plaintiff testified that the Defendant invaded the suit land in the year 1998 and have been living thereon together with her family since then as squatters.

42. At the time the Plaintiff instituted the suit, this Honourable Court noted in its Ruling delivered on 13<sup>th</sup> December 2011 that the Defendant had been in occupation of the suit land for a period of 13 years.

43. The Defendant testified that she has been living thereon since 1983 when she got married. When her husband died in the year 2009, he was buried thereon. She also stated that she lives on the suit land with her 10 children.

44. The Defendant submitted that there was a customary trust existing between her and the Plaintiff in that the suit land belonged to her father-in-law who was the brother of the Plaintiff's father.

45. On the relationship between the Plaintiff and the Defendant's deceased husband, I find that the same has already been determined by Courts with competent jurisdictions. Firstly, by Kerugoya PMCC 1943 of 1998 and also by Kerugoya High Court Succession Cause Number 1014 of 2014. It is evident from the finding of the two Courts that the Defendant's deceased husband was not related to the Plaintiff's family, and thus cannot be entitled to customary trust.

46. Be that as it may, it is evident that the Defendant has been in open and uninterrupted occupation of the suit land since 1998, that is 13 years prior the institution of suit. This means that at the time of institution of this suit, the applicant was entitled to be registered as owner by way of Adverse possession.

47. The Plaintiff claimed that he wrote a notice to vacate and demand letter which he produced during hearing. I also note that there have been several suits relating to the suit land, however the same did not interrupt the Defendants possession of the same. This is because disruption of possession is a physical event.

48. I have also noted that the plaintiff only acquired ownership of the title in the year 2005, however in the case of **Mombasa Teachers Co-operative Savings & Credit Society Limited Vs Robert Muhambi Katana & 15 others [2018] e KLR**, the Court of appeal held that:

*“19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their rights thereon had crystallized prior to the purchase of the suit property by the appellants. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person's favour. See Titus Mutuku Kasuve vs Mwaani Investments Limited & 4 Others (supra).”*

49. In the case of **Gabriel Mbui Mukindia Maranya [1993] e KLR, Kuloba J.** held that:

*“The cases lay down that where a plea of adverse possession of land registered under any of the land registration statutes is upheld, the registered proprietor holds the land in trust for the person who had acquired title against the owner, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by the Limitation of Actions Act. So, at the expiration of the statutory period, the registered owner holds the land in trust for the person who has adverse possession (Simpson, J (as he then was), in Hosea v Njiru and others [1974] E A 526 at 531). And according to one judicial view, the creation of a trust, like a mortgage or charge, amounts to a disposal or dealing in land requiring the consent thereto of the relevant Land Control Board under the Land Control Act (Harris, J, in Githuci Farmers Co Ltd v Gichamba [1973] E A L 8 at 10, 11; but Madan J (as he then was), disagreed with Harris, J, on this point, in Kinguru v Gathangi [1976] Kenya L R 253 at 264).”*

50. From the above decisions, it is evident that once a litigant is entitled to orders of adverse possession, the registered proprietor holds the same in trust for the adverse possessor.

51. It is therefore my finding that the Plaintiff, though the registered proprietor of the suit land, holds the same in trust for the Defendant.

#### **WHETHER THE DEFENDANT OUGHT TO BE EVICTED FROM LAND PARCEL MWERUA/KAGIO/18**

52. In view of the finding that the Defendant was living on the suit land for approximately 13 years prior to the institution of this suit, the Plaintiff is estopped from evicting the Defendant under **Section 7 of the Limitation of Action Act, Cap 22** which provides that: -

*“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”*

#### **CONCLUSION**

53. In conclusion it is my finding that the Plaintiff has not proved her case on a balance of probabilities. The same is hereby dismissed with

costs to the Defendant.

***Judgment READ, DELIVERED in open Court at Kerugoya and SIGNED this 12<sup>th</sup> day of November, 2021.***

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**HON. E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

1. Makura for Plaintiff
2. Defendant – present
3. Kabuta, Court clerk – present