



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL MISC. NO. 552 OF 2007**

**CHARLES GAITHO KIARIE..... PLAINTIFF**

**VERSUS**

**SAMUEL KINYANYUI GAITHO (as the Personal Representative of the Estate of**

**Mary Wambui Njabuya).....1<sup>ST</sup> DEFENDANT**

**THE KIAMBU DISTRICT LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff commenced the instant suit by way of originating summons dated 18<sup>th</sup> February 2002 and filed in court on 8<sup>th</sup> March 2002. The suit sought the following orders:-

- a. That the caution and restriction registered against title NO. **Githunguri/Githiga/2157** at the Kiambu Lands office by the respondent or at her behest be removed immediately,
- b. That the Defendant be ordered to vacate the house erected on the Applicant's land title NO. **Githunguri/Githiga/2157** and on default, eviction do issue after 30 days from the date of the order.
- c. That the costs of the suit be borne by the Respondent.

The plaintiff's prayers in the suit are supported firstly, on the grounds set out on the body of the originating summons and secondly by the affidavit of the plaintiff/applicant dated 18<sup>th</sup> February, 2012 and filed on 8<sup>th</sup> March 2002. Interlia the plaintiff sets out the following grounds in support of his originating summons:-

- i. That the applicant is the registered owner of all that parcel of land known as **Githunguri/Githiga/2157** measuring 0.66 hectares,
- ii. That a caution was registered against the applicant's title NO. **Githunguri/Githiga2157** by the Respondent claiming some right as a licensee and on 12<sup>th</sup> December, 2001 a restriction was placed against the same title by the Kiambu District Commissioner following a claim by the respondent that she was entitled to half of the applicant's land, **Githunguri/Githiga/2157** on the basis of a claim that she was a wife to the applicant.
- iii. The Land Registrar has declined to remove the caution because of the restriction, and has indicated that a court order is required to enable him to take any action at all in respect of the

- applicant's title.
- iv. That the applicant's claim is bad in law because she is seeking to force a gift inter vivos where there is no legal right to compel a living Registered and absolute owner of land to give property to another person against his wish,
  - v. The Respondent is no longer a lawful licensee, as the applicant's consent to the Respondent's son, **Kiarie** to occupy the house at the applicant's land expired when **Kiarie** died,
  - vi. That a licence such as that which **Kiarie** had enjoyed, cannot be inherited,
  - vii. That the Respondent's continued occupation of the late **Kiarie's** former house is illegal.
  - viii. That in the circumstances, the Respondents caution dated 8<sup>th</sup> July, 1997 and the restriction dated 12<sup>th</sup> September 2001 are not justified and should be removed to leave the applicant's title free of encumbrances.

In the supporting affidavit the applicant depones that he allowed **Joseph Kiarie** to construct a house on the suit land and following the death of **Joseph Kiarie** on 14<sup>th</sup> September 1997 he did not give a similar licence to the mother of the deceased, the Respondent herein. The applicant depones that owing to the unjustified claims by the Respondent to the Applicant's land he terminated any constructive licence that the Respondent may have claimed. The Applicant further asserts that the Respondent has never been his wife and cannot thus have any basis to stake a claim to his land. The applicant acknowledges having cohabited with the Respondent between 1965 and 1967, a relationship that led to the birth of **Joseph Kiarie (deceased)** but states the Respondent deserted the Applicant in 1967 and went to live elsewhere until 1992 and during which period the Respondent got some nine (9) children with other men.

The Applicant asserts that the Respondent was not his wife under any category of marriage known to law and that he has never had any conjugal relations with her since 1967 when she left and entered into liaisons with other men. The applicant depones that he got married to his present wife, **Rahab Mukami Gaito** in 1969 under Kikuyu customary law and that they have eight (8) children out of their union. The Applicant avers that the Respondent since September 2001 had been using the Provincial Administration to assert her claims to the Applicant's land on the basis that she is a wife of the Applicant.

The respondent upon being served with the originating summons application on the 13<sup>th</sup> March 2002 entered appearance and on the same date filed an affidavit apparently responding to the originating summons and the affidavit filed in support. In the affidavit the Respondent avers as follows:-

- a. That the applicant is her lawful husband under the Kikuyu customary law,
- b. That she and the Applicant had three children and while two of them have died, one of them, Anna Nyambura is still alive.
- c. That she had separated from the applicant for 20 years, but in 1989 they agreed to reunite and undertook the required customary ritual to actualize the reunion.
- d. That the house in which she lives on the suit premises was constructed by herself at the request of the applicant,
- e. That as a wife of the applicant, the deponent is entitled to a share in the suit premises which is their matrimonial property.
- f. That, in the circumstances the caution should not be removed from the suit premises,
- g. That the applicant should be compelled to give the deponent a share of the suit land.

The foregoing represents the state of the pleadings at the time the suit was filed in 2002. It does appear however that notwithstanding the pendency of the suit filed in this court and of which the Respondent had notice, the Respondent filed a dispute before the Kiambu District Land Disputes Tribunal being land Dispute **NO.LND/16/20/14/2002** on 8<sup>th</sup> April 2002. The plaintiff as per the record of the proceedings before the Land Tribunal did not participate during the hearing.

At the hearing before the Kiambu Resident Magistrate after the award of the Tribunal was filed the plaintiff protested that the Respondent had referred the matter to the Tribunal when there was already a matter pending in the High Court being the present matter dealing with the same subject matter. The Resident Magistrate overruled the objection by the Applicant and proceeded to adopt the award and to

enter judgment in terms of the award from the Tribunal.

The Resident Magistrate in my view correctly appreciated his role under the provisions of section 7(2) of the Land Disputes Tribunal (repealed) Act which gave the magistrate no other option other than to enter judgment in accordance with the decision of the Tribunal once the Chairman filed the decision of the Tribunal in the court. Under section 8 of the Land Disputes Tribunal any party aggrieved with the decision of the Tribunal could only appeal the decision to the Provincial Appeals and from whom an appeal could lie to the High Court only on issues of law.

The Applicant it would appeal did not file any appeal to the Provincial Appeals Committee but opted to file an application for judicial Review in the High Court Vide **Misc. Civil Application NO. 1199 of 2002**. In the Judicial Review application **Hon. Justice Rimita** (as he then was) on 16<sup>th</sup> October 2002 granted the applicant the following orders:-

1. **That leave be and is hereby granted to the Plaintiff/Applicant to apply for orders of certiorari and prohibition against the respondents to stop any dealing with the applicant's absolute proprietorship of all that parcel of land known as GITHUNGURI/GITHIGA/2157.**
2. **That the leave granted do operate as stay against all dealings by the third and fourth Respondents against title NO. Githunguri/Githiga/2157.**

A certificate of official search dated 1<sup>st</sup> November 2002 shows the court order was on 22/10/2002 registered against the title restraining any dealings until **Misc. Civil application NO. 1199 of 2002 H.C Nairobi** is determined. There is no evidence that **H.C Misc. Civil application NO. 1199 of 2002** was ever determined and the record of this case does not show that the two matters were ever consolidated meaning that the **JR Misc. Civil application NO. 1199 of 2002** that stayed the decision of the Tribunal and the decree issued in Resident magistrate's court Kiambu still remain in force. During the pendency of both suits the Judicial Review application and the present suit the initial 1<sup>st</sup> Respondent **Mary Wambui Nyambu** died on 6/5/2007 and one **Samuel Kinyanjui Gaitho** was issued with Limited Grant of letters of Administration ad Litem on 21/2/2008 and was subsequently substituted as the legal representative **ad litem** of the estate of the Respondent. The said **Samuel Kinyanjui Gaitho** was substituted on 25/4/2008 to represent the estate of the 1<sup>st</sup> Respondent.

When the parties appeared before me on 27/6/2013 for directions the parties agreed to have the matter determined on the basis of the affidavit evidence and documents on record and on the directions of the court the parties filed written submissions. The plaintiff in his submissions relied on his witness statement dated 2<sup>nd</sup> April 2012 and 25<sup>th</sup> April 2012 and on the documents set out in the list of his documents namely:-

- a. Copy of title deed no. **Githunguri/Githiga/2157** in the name of **Charles Gaitho Kiarie**.
- b. Certificate of official search of title **Githunguri/Githiga/2157** dated 2/10/2002.
- c. Copy of official search of title **Githunguri/Githiga/2157** dated 1/11/2002.
- d. An order by the **H.C in Misc Civil application NO. 1199 of 2002** that stayed the proceedings and orders of the Land Dispute's Tribunal and the Resident Magistrate's court until the matter was heard and determined by the High Court.

The Applicant denies he was married to the 1<sup>st</sup> Defendant but admits they cohabited between 1965 and 1967 and that they had one child, one **Joseph Kiarie** who he states he allowed a place to build a house in 1991 where he (**Joseph Kiarie**) lived until 1967 when he died. The Applicant states that the 1<sup>st</sup> Defendant in 1997 following the death of their son came back and occupied the house which hitherto was occupied by the deceased. The Applicant further states the 1<sup>st</sup> Defendant during the same period (1997) misled and misrepresented to the Land Registrar Kiambu that she was the Applicant's wife and procured the registration of a caution against the suit property claiming a licensee interest. The Defendant avers that he has never granted any licence to the Respondent to occupy his land and the land Registrar has failed to remove the caution inspite of the Applicant requesting that he does so.

The 1<sup>st</sup> Defendant before her death swore an affidavit dated 13<sup>th</sup> March 2002 claiming she was the wife of the Applicant after being served with the originating summons in this matter. **Mr. Samuel Kinyanjui Gaitho** who was substituted as the personal legal representative of the 1<sup>st</sup> Defendant following her death in his witness statement asserted that he was the eldest son of the 1<sup>st</sup> Defendant and maintained that the applicant was his father and that his deceased mother and the applicant were married in 1965 but admits that the 1<sup>st</sup> Defendant left the Applicant in 1968 and went to live with her parents until 1991 when he states the Applicant and his mother reconciled and the 1<sup>st</sup> Defendant came back to live with the applicant in the suit property and that the 1<sup>st</sup> Defendant had a house built for her in the suit property where she lived until she died in 1997.

The 1<sup>st</sup> respondent in her submissions filed on 6<sup>th</sup> March 2014 submits that there was a customary law marriage between the Applicant and the 1<sup>st</sup> Defendant. Counsel for the 1<sup>st</sup> Respondent submits that it is the 1<sup>st</sup> Respondent who built the house in which she lived until she died. Counsel submits that the 1<sup>st</sup> Defendant had acquired a proprietary interest on the portion of land where she had built her house and lived.

The 1<sup>st</sup> Defendant argues that the Applicant acquiesced to her occupation of the suit property and would therefore be estopped from asserting his absolute rights of ownership of the suit property to the exclusion of the estate of the 1<sup>st</sup> Defendant.

The 1<sup>st</sup> Respondent further submits that the Land Disputes Tribunal gave a decision in regard to the dispute referred to it by the late **Mary Wambui Njabuya** and that its decision was adopted by the Resident Magistrate's court in Githunguri as the judgment of the court in terms of section 7 (2) of the Land Disputes Act and the 1<sup>st</sup> Respondent contends the Land Disputes Tribunal was properly seized of the matter and it had jurisdiction to deal with the matter. Under section 3 (1) of the Land Disputes Tribunal the jurisdiction of the Tribunal is given as all cases of a civil nature involving a dispute as to:-

- a. **The devision of, or the determination of boundaries to land including land held in common.**
- b. **A claim to occupy or workland or,**
- c. **Trespass to land.**

The jurisdiction of the tribunal did not extend to determining title and/or ownership. The High Court has repeatedly held that the Land Disputes Tribunal did not have jurisdiction to hear and determine disputes relating to ownership and title to land. The Applicant has pointed to the fact that as at the time the Respondent referred the matter to the Land Disputes Tribunal she already was aware of the pendency of the instant suit she having already filed an affidavit in response to the originating summons. The Respondent also in 1997 had filed a caution over the suit property claiming interest as a licensee and upto the time the Applicant filed this suit the Respondent had not taken any action to establish her interest as regards the suit property. All indications therefore point to the fact that the Respondent referred the matter to the Land Disputes Tribunal as a reaction to the Applicant's instant suit. It is not clear why the Respondent sought to pursue this cause but the end result was that there was then two parallel legal processes involving the same subject matter and the same parties going on at two different fora. The Applicant states he declined to participate in the Land Disputes Tribunal proceedings in view of the pending suit that he had filed in the High Court being the instant suit.

I am in agreement with the Applicant's submission that section 6 of the Civil Procedure Act Cap 21 Laws of Kenya bars the filing of a subsequent suit when an earlier suit has been filed substantially on the same matter. Section 6 of the Act provides-

**6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed:-**

The Respondent in the instant suit was aware of the suit brought against her by the Applicant and she had even entered an appearance and filed an affidavit in response to the Applicant's originating summons by the time the Respondent initiated the proceedings before the Land Disputes Tribunal in May 2002. The Applicant's suit against the Respondent sought orders for removal of the caution placed by the Respondent against the suit premises and for the Respondent to vacate the suit premises. At the Land Disputes Tribunal the Respondents claim related to a claim to occupy and have the suit land subdivided. Quite clearly if the Respondent had any claim and/entitlement to occupy the suit land and/or to have the same subdivided those would have been issues which the High Court would have competently dealt with in the suit filed by the Applicant. It is my view therefore that the matters/issues that the Respondent referred to the Land Disputes Tribunal were directly in issue in this suit and in terms of section 6 of the Civil Procedure Act the same ought not to have been entertained at the Land Disputes Tribunal particularly as the Applicant drew attention of the fact to the Tribunal.

Be it as it may be, the Land disputes Tribunal exceeded its mandate/jurisdiction when it proceeded to consider and determine issues touching on and relating to title to land. It simply did not have that jurisdiction and it is on that account the applicant filed **HC Misc. Civil application NO. 1199 of 2002** challenging its jurisdiction and the High Court in that application ordered a stay of the proceedings and orders of the Tribunal and the Resident Magistrate's court which had adopted the ruling/decision of the Tribunal as a judgment of the court.

The Respondent predicates her submission of having acquired a proprietary estopped on the ground that the Land Disputes Tribunal had awarded her a portion of the suit premises and on the basis that she was in occupation and possession. Regrettably the Respondent cannot avail herself of the doctrine of proprietary estopped because even if it is accepted that she was the wife of the applicant she would only have been entitled to the right of occupation and use and not to acquire legal title as the Land Disputes Tribunal thought she could. **Hon. Justice J.B. Ojwang** (as he then was) in the case of **Muchoki –vs- Mwangi (2005) eKLR** held that the rights of a registered proprietor could not be defeated by claims founded on the moral duties of a family as the Respondent sought to do in the present matter. Claimants founding their claims as family members can only do so in succession matters and/or in proceedings for division of matrimonial property.

The Respondent before she died staked a claim to the portion of the land on account of her assertion that she was a customary law wife of the Applicant. Her son **Samuel Kinyanjui Gaitho** who was substituted as her personal legal representative equally placed a lot of premium on the question of the Respondent, her late mother, having been married to the applicant under the Kikuyu customary law. The Respondent now being deceased I do not consider the decision in this matter will turn on whether or not she was married to the Applicant. The issues for determination was whether the Respondent could properly refer the matter to the Land Disputes Tribunal when the Applicant had already initiated this suit before this court and further whether indeed the Land Disputes Tribunal had jurisdiction to deal with the matter when it related to title to land and finally whether the decision of the Land Disputes Tribunal conferred any proprietary interest to the Respondent in regard to the suit property.

It is not in dispute that the Applicant was registered as the absolute proprietor of the suit property and as such registered owner his rights as a proprietor were protected under the provisions of section 28 of the Registered Land Act Cap 300 Laws of Kenya (repealed) and his rights could not be defeated otherwise than as provided by the Act. Thus the rights of ownership by the Applicant could not be defeated by the claims by the Respondent founded on family relationships. The court of Appeal in the case of **MURIUKI MARIGI –VS- RICHARD MARIGI MURIUKI, LYDIA NJOKI MURIUKI & ANOTHER CIVIL APPEAL NO. 189 of 1996** (unreported) while considering the rights of registered proprietors having regard to sections 27 and 28 of the Registered Land Act (repealed) being the present day sections 25 and 26 of the Land Registration Act NO. 3 of 2012 put it succinctly when it stated thus-

**It is however, noteworthy that the Law of Succession Act, Cap 160 Laws of Kenya does recognize rights of wives and children over their husband's or father's estate as the case may be. Those rights accrue after death. Otherwise the rights remain a choate and are not legally enforceable in any court of law or otherwise whenever they accrue the estate is shared either according to the**

**personal laws of the deceased in case of agricultural land or as provided in the relevant provisions of the law of Succession Act. The Appellant as the registered owner of the suit property is still alive. His property is not yet available for subdivision and distribution among his wives and children except if he personally on his own free will decides to subdivide and distribute it among them. He may not be urged directed or ordered to do it against his own will.**

**In the result and for the foregoing reasons, to the extent that the respondents wanted the superior court to compel the appellant to share the suit property during his lifetime in a particular manner and in designated shares, they did not have a cause of action in law respecting which the court would aid them to enforce.....”**

The court of Appeal in the above case proceeded to hold an award rendered by elders in the matter a nullity and set the same aside. In the present case it is clear the Respondent in referring the dispute to the Land Disputes Tribunal sought to have the Tribunal determine issues that touched on the proprietorship rights of the Applicant. The Tribunal had no jurisdiction to do so and their decision was a nullity and of no legal effect. The Tribunal’s decision was properly stayed in the **HC.Misc. application NO. 1199 of 2002.**

On the evidence and material placed before the court by the parties I am satisfied that the plaintiff has proved on a balance of probabilities that the respondent had no basis to have the caution and restriction registered against the Applicant’s land title **Githunguri/Githiga/2157** and I accordingly order the same to be removed.

As regards the prayer for the Respondent to vacate the suit premises the same was personal and directed against the Respondent and following her death the same is spent and I decline to make any order for eviction. In the result therefore I enter judgment in favour of the plaintiff in terms of prayer number (1) of the originating summons and I direct that each party shall bear their own costs of the suit.

Judgment dated, signed and delivered this 14th day of July 2014.

**J.M. MUTUNGI**

**JUDGE**

**In presence of:**

..... for the Plaintiff

..... for the Defendant