



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.479 OF 2017**

**JOHN MUGO MUROKI.....PLAINTIFF**

**-VERSUS-**

**CATHERINE WANJIRU GICHA.....DEFENDANT**

**JUDGMENT**

By a **Plaint** dated **23<sup>rd</sup> April 2012**, the Plaintiff herein **John Mugo Muroki** sought for Judgment against the Defendant in the following terms:-

**(a) A declaration that the continued occupation of the suit property known as Ngenda/Kahugu-ini/T.115 by the Defendant post 2009 is illegal and an act of trespass.**

**(b) An eviction Order directed against the Defendant requiring her to vacate the suit premises within 90 days of pronouncement of the Judgment.**

**(c) An Order requiring the Defendant to forthwith cause the structures erected on the suit property to be demolished and crops harvested, cut or uprooted failure of which the Plaintiff to be at liberty to undertake the exercise.**

**(d) Costs and interest of this suit.**

The Plaintiff in his statement of claim alleged that the Defendant

herein **Catherine Wanjiru Gichia** is his step-sister and that the suit property **Ngenda/Kahugu-ini/T.115**, belongs to the Plaintiff as a *bonafide* and registered proprietor. It was his further allegations that he allowed the Defendant to put up a temporary structure on the suit property in the **year 2007**, after the Defendant requested him to allow her as she looked for alternative shelter. It was his further claim that since the Defendant was his sibling and she had been denied land to settle at her biological father's homestead, he allowed her to settle on the land on condition that she vacates after one year. He further alleged that in the **year 2009**, the Plaintiff requested the Defendant to vacate the land as per their original agreement, but she declined alleging that the land where she had constructed her house belonged to her. The matter was referred to a panel of elders who acknowledged the land belonged to the Plaintiff, but allowed the Defendant to continue residing thereto. It was therefore his contention that the Defendant's action amounts to trespass and is illegal and an attempt to deny the Plaintiff what rightfully belongs to him. He urged the Court to allow his claim.

The Defendant filed her statement of Defence dated **21<sup>st</sup> July 2012**, and denied all the allegations made in the Plaintiff. She further averred that the Plaintiff is not a *bonafide* owner of the suit property **Ngenda/Kahugu-ini/T.115**, but he is registered proprietor in Succession, in trust for the Defendant and other siblings as the same belonged to the estate of their late father. It was her contention that in the **year 2007**, the Defendant went to demand for a share of the estate of their deceased's father who though not her biological father had adopted her after the death of their mother. It was her contention that she was legally settled on the aforesaid plot and was not a trespasser to be evicted by the Plaintiff as the Plaintiff is only registered proprietor of the suit plot in trust for the Plaintiff and other siblings. She also contended that when the matter was arbitrated before the local Chief, it was decided by the elders that the Defendant was entitled to the said plot as of right and she should continue occupying the same as a life interest. Further the Defendant denied ever receiving any demand and notice of Intention to Sue in this case and the Plaintiff was put to strict proof thereof. She urged the Court to strike out the suit with costs.

When the matter proceeded for hearing, the Plaintiff gave evidence for himself and called no witness. The Defendant too gave evidence for herself and called no witness.

**Plaintiff's Case**

**PW1 – John Mugo Muroki** adopted his witness statement that was signed on **23<sup>rd</sup> April 2012**, and further averred that the land in issue

*Ngenda/Kahugu-ini/T.115* was registered in his name after it was bequeathed to him by his late father **Peter Muroki Mugo**. That his father had left a *Will*, dated **10<sup>th</sup> March 1989**. He also admitted that the Defendant is his step sister who was sired by a man called **Gichia Kahugi** after his mother separated with his biological father **Peter Muroki Mugo**. Therefore the Defendant is not a beneficiary of his father's estate and she was not even named in the father's *Will*. He further reiterated that he only allowed the Defendant on the suit land as she had been locked out of her father's parcel of land. That he had only allowed her to use the land for **2 years** but after the end of **2 years**, the Defendant refused to vacate the suit land and reported the matter to the Chief.

At the Sub-chief's proceedings, it was noted that the Plaintiff was the owner of the suit property, but Defendant refused to vacate the suit property and even put up a permanent house on the said parcel of land. He identified the demand letter sent to the Defendant as **exhibit No.6**. He however testified that the Plaintiff has now moved out of the suit property, but has left her house still intact. He urged the Court to allow his claim. The Plaintiff further admitted that their mother was buried on the suit property. It was his contention that Defendant's father had land in **Kilimambogo** and that is where the Defendant is supposed to move to.

### **Defence Case**

**DW1 – Catherine Wanjiru Gichia** testified that the Plaintiff is her elder brother though from another father. She admitted that she has lived on the suit property since the **year 2007**. She also testified that their mother separated with the father to the Plaintiff and got married to one **Gichia**, who is her biological father. However, her mother died in **1979** but was buried by the father to the Plaintiff since they had not divorced. Further, that after the burial of her mother, the said **Peter Muroki Mugo** adopted the Defendant and her other siblings and allowed them to remain on the suit property. That even after her sister Agnes died in the **year 2003**, she was buried on the suit property. It was her testimony that she built on the suit property as of right since it was her inheritance from her adopted father. She also denied ever having been given land by her biological father **Gichia** as **Muroki** had already adopted them. She also averred that the *Will* produced in court by the Plaintiff was not a valid *Will*, as there was no probate over the estate of the late **Peter Muroki Mugo** and therefore the suit land herein is ancestral land and that since the Defendant and her siblings were left under the care of the Plaintiff, she is not encroaching on the suit property. It was her further evidence that her mother sired five children with **Gichia** after separating with **Peter Muroki Mugo** and that the Plaintiff allowed her to built on the suit land. She also admitted to have moved out of the suit land as she await the outcome of this case.

Thereafter, the parties filed their respective written submissions which this Court has carefully read and considered. The Court has considered the pleadings in totality and the exhibits thereon. The Court too has considered relevant provisions of law and the cited authorities and the Court makes the following findings:-

There is no doubt that the Plaintiff and the Defendant herein are siblings, being a step brother and sister. They share the same biological mother but have different fathers. There is also no doubt that their mother **Pauline Njeri** was once married to **Peter Muroki Mugo**, the father to the Plaintiff herein but the two separated. The Plaintiff was left behind with his father but **Pauline Njeri** allegedly got married to **Gichia Kahugi** with whom she sired five other children, the Defendant herein being one of them. It is also not in doubt that the said **Pauline Njeri** died allegedly in **1979** and was buried by **Peter Muroki Mugo**, on the suit property. It was alleged that the said **Peter Muroki Mugo** buried **Pauline Njeri** because they had not officially divorced.

The Defendant alleged that after the burial of her mother by **Peter Muroki Mugo**, he adopted her children and treated them as his own. It was her allegations that the suit property, where her mother was buried was bequeathed to the five children of **Pauline Njeri**, who had been sired by **Gichia Kahugi** and who were later adopted by **Peter Muroki Mugo**, the father to the Plaintiff herein. However, there was no evidence called to support that allegation.

What is not in doubt is that the suit property *Ngenda/Kahugu-ini/T.115*, is registered in the name of the Plaintiff herein as is evident from the Certificate of official *Search* dated **19<sup>th</sup> August 2010**, and produced in court as **exhibit No.3**. The title deed was produced in court as exhibit no.1 and it is evident that the suit property was registered in the name of the Plaintiff on **12<sup>th</sup> January 1980**. Though the Defendant alleged that their adopted father **Peter Muroki Mugo**, gave the land to the Plaintiff to hold it in trust for the children of **Pauline Njeri**, it is not clear why the said **Peter Muroki Mugo**, did not indicate so in his *Will* which he allegedly wrote on **10<sup>th</sup> March 1989**. In the said *Will*, the suit property is not even mentioned.

There is also no doubt that the Defendant herein put up a house on the suit property in the **year 2007**. The Plaintiff alleged that he allowed the Plaintiff to put up the said house upon her request and since the Defendant had a land dispute with her biological father's family.

However, the Defendant alleged that she actually put up the house as of right, since she had been bequeathed the said suit property by her adopting father. This matter was arbitrated by the village elders and it was acknowledged that the suit property belonged to **Mugo**. However, the Plaintiff was besieged to allow the Defendant to remain where she had put up her house as shown by the Plaintiff. The Plaintiff did not agree with the said verdict and wrote a demand letter to the Plaintiff requesting her to vacate the suit property. After failing to do so, the Plaintiff filed this suit against his step sister on **23<sup>rd</sup> April 2012**. It was however acknowledged in the course of the hearing that the Defendant had moved out of the suit land voluntarily as she awaited the outcome of this case.

The issues now for determination are:-

**i. Is the Plaintiff a bonafide and registered proprietor of the suit property or he is registered proprietor in Succession to hold the land in Trust for the Defendant and her other siblings?**

**ii. Was the Property known as *Ngenda/Kahugu-ini/T.115* acquired by the Plaintiff or did it belong to the estate of their late father?**

**iii. Is the Defendant legally in possession of the suit property or she is a trespasser?**

iv. Is the Plaintiff entitled to the prayers sought?

**i) Is the Plaintiff a bonafide and registered proprietor of the Suit property or he was registered proprietor in succession to hold the suit land in Trust for the Defendant and her other siblings?**

The Court has considered the land Certificate in favour of **John Mugo Muroki** for **Ngenda/Kahugu-ini/T.115** issued on **12<sup>th</sup> January 1980**. The said land was registered under **Cap 300 (now repealed)** and as provided by **Section 27(a)** of the said **Cap 300(now repealed)** the registered proprietor held the said land with all rights appurtenant thereof. **Section 27(a) of Cap 300** (now repealed) states:-

**Subject to this Act -**

**(a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

The Defendant has alleged that the Plaintiff was registered as a proprietor in Succession to hold the suit land in trust for the Defendant and her siblings. It is not in doubt that the Defendant and her siblings were not sired by **Peter Muroki Mugo** but by one **Gichia Kahugi**. The Defendant has not told the court what became of her biological father **Gichia Kahugi**. Further the suit property was registered during the lifetime of **Peter Muroki Mugo**, who allegedly adopted the Defendant and her siblings. There was no evidence brought by the Defendant to support the allegations of her having been legally adopted by the said **Peter Muroki Mugo** and thus entitled to inherit from his estate.

The Defendant correctly submitted that **'he who alleges must prove'** as provided by **Section 107** of the **Evidence Act** which states:-

**(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.**

Further, the facts of adoption were within the knowledge of the Defendant and it was upon her to avail such facts in court. See **Section 112** of the **Evidence Act**, which provides:-

**"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the facts is upon him".**

It is evident herein that the Defendant did not avail any evidence to prove her facts. This Court will therefore not doubt the Plaintiff's evidence that he only granted the Defendant a place to put up a house in **2007**, since she had a land dispute with her biological father's family.

As the Court observed earlier, the suit property was registered in the name of the Plaintiff in **1980**, during the lifetime of his father. It was not registered after the Succession Cause. Though the Defendant alleged that the Plaintiff did acquire the title deed fraudulently, there was no evidence to that effect. Fraud is a serious allegation which must be proved. See the case of **R.G Patel..Vs..Laiji Makanji (1957)EA 314**, where the Court held that:-

**"Allegation of fraud must be strictly proved. It was incumbent upon the Plaintiff therefore to demonstrate to this court that the transfer of the titles to the Defendants names was fraudulent and specifically explain the actions which constituted the fraud".**

Therefore as provided by **Section 26(1)** of the **Land Registration Act**, the Plaintiff is the registered owner of the suit property and this Court will hold that he is the **absolute** and **indefeasible** proprietor of the same. See **Section 26(1)** of the **Land Registration Act** which states:-

**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

Having found that there was no evidence that Defendant and her siblings were adopted by the late **Peter Muroki Mugo**, and given that the suit property was registered in **1980**, before the demise of the said **Peter Muroki Mugo**, the Court finds that the Plaintiff was not registered as a proprietor of the suit property to hold it in trust for the Defendant and her siblings instead, the Court finds that the Plaintiff is the **absolute** and **indefeasible** owner of the suit property herein.

**ii) Is the property known as Ngenda/Kahugu-ini/T.115 acquired by the Plaintiff or did it belong to the estate of their late father, Peter Muroki Mugo?**

The late **Peter Muroki Mugo** died in **1989**. The suit property was registered in favour of the Plaintiff on **12<sup>th</sup> January 1980**. That was **9 years** before the demise of the said **Peter Muroki Mugo**. Once the suit property was registered in the name of the Plaintiff, he became the

absolute owner and held rights as provided by **Section 27** of the **Cap 300** (now repealed). Therefore a privately registered property in favour of the Plaintiff cannot become part of the estate of the late **Peter Muroki Mugo**, who died in **1989**. Though the Defendant alleged that the Plaintiff might have backdated the land Certificate in a fraudulently manner, there was no evidence to that effect and the Court will treat that allegation as just mere allegations.

Therefore, the Court finds that the suit property herein did not belong to the estate of **Peter Muroki Mugo** as it was not even mentioned in the alleged **Will** of **Peter Muroki Mugo** drawn in **1989**.

***iii) Is the Defendant legally in possession of the suit property or she is a trespasser?***

Having found that the suit property belongs to the Plaintiff, then the Defendant can only be in occupation or possession of the same with the permission of the Plaintiff who is the registered owner. It is evident that the Defendant put up the house on the suit land in the **year 2007**. However, in the **year 2009**, the Plaintiff demanded that she vacates the said suit premises. Without the permission of the owner of the suit property, then the Defendant is a mere trespasser

***iv) Is the Plaintiff entitled to the prayers sought in the Plaintiff?***

As rightly submitted by the Plaintiff and as provided by **Section 24** and **25** of the **Land Registration Act**, the rights of a registered proprietor are absolute and can only be taken away through operation of the law. See **Section 24(a)** and **25(1)** of the **Land Registration Act**, which provides:-

**24. Subject to this Act—**

***(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;***

***25.(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;***

The Plaintiff is therefore entitled to an order of vacant possession of the suit property so that he can use it as he so wish as an **absolute** and **indefeasible** owner of the said suit property. The Court finds that the Plaintiff is entitled to the prayers sought in the Plaintiff.

***v) Who is to bear costs of the suit?***

**Section 27** of the **Civil Procedure Act** provides that costs are granted at the discretion of the court. However, ordinarily costs follow the event and are normally awarded to the successful litigant. The Plaintiff herein is the successful litigant and is entitled to costs. Therefore the Court finds that the costs of this suit should be borne by the Defendant.

Having now carefully considered the available evidence and the exhibits thereto, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities. Consequently, the Court enters Judgment for the Plaintiff against the Defendant in terms of **prayers no.(a), (b), (c) and (d)**.

However, in regard to **prayer no.(b) and (c)**, the Defendant is granted a period of **90 days** from the date of this Judgment to give vacant possession of the suit land to the Plaintiff and in default, the Plaintiff is at liberty to move in and remove and/or cause the removal of the structures

erected on the suit property thereon.

It is so ordered.

**Dated, Signed and Delivered at Thika this 18<sup>th</sup> day of March 2019.**

**L. GACHERU**

**JUDGE**

**18/3/2019**

In the presence of

M/S Kavata for Plaintiff

No appearance for Defendant

Lucy - Court Assistant

**Court** - Judgment read in open court in the presence of the above stated Advocate and absence of the Defendant and/or her Advocate

**L. GACHERU**

**JUDGE**

**18/3/2019**