



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 642 OF 2017**

**SIMON THUKU KANUI**

**ANN FIDELIS NG'ENDO(Suing in their Capacity as Administrators of the  
Estate of LILIAN WANJIKU THUKU (Deceased).....PLAINTIFFS**

**VERSUS**

**LILIAN WATHITHI MUIGAI.....DEFENDANT**

**JUDGMENT**

By an **Amended Plaintiff** dated **12<sup>th</sup> May 2014**, the Plaintiffs herein suing in their capacity as administrators of the Estate of **Lilian Wanjiku Thuku**, sought for the following prayers against the Defendant:-

**a) A declaration that the Plaintiffs are the legal owners of land parcel known as Plot No.014 comprised in a certificate No.014 issued by Kamae Resettlement Project Phase Two situated in Githurai Division within the County of Nairobi.**

**b) An injunction restraining the Defendant whether by herself, her employees, servants or agents or otherwise howsoever from trespassing into or interfering with the occupation and ownership of parcel of land known as Plot No.014 comprised in a certificate No.014 issued by Kamae Resettlement Project Phase Two situated in Githurai Division within the County of Nairobi.**

**c) An injunction compelling the Defendant to remove forthwith any structures illegally erected on parcel of land known as Plot No.014 comprised in a certificate No.014 issued by Kamae Resettlement Project Phase Two situated in Githurai Division within the County of Nairobi, or in default thereof the Plaintiffs do proceed and remove such structures at the cost of the Defendant.**

**d) Costs of this suit.**

**e) Any further or other order as this Honourable court may deem fit.**

In the **Statement of Claim**, the Plaintiffs alleged that the late **Lilian Wanjiku Thuku** (deceased), was allocated the suit property herein, **Plot No.014** by **Kamae Settlement Project, Phase Two**, as is evident from the ownership **Certificate No.014**. Further, that the officials of **Kamae Resettlement Project Phase II**, had represented to the said **Lilian Wanjiku Thuku** that the Certificate of ownership was the legally recognized title document for the suit premises and that the Plaintiff was the sole legal owner thereof. That it was also presented to her that no other document was necessary to prove ownership of the suit premises. It was also alleged that since the said allocation to the late **Lilian Wanjiku Thuku**, she was in possession of the same together with the Plaintiffs.

However, in **September 2013**, the Defendant trespassed onto the said suit property and excavated thereon and commenced construction with the intention of defeating the interest of the Plaintiffs herein. Though the Plaintiffs sought the intervention of the **Kenya Police DCIO** and **Assistant County Commissioner, Githurai**, the Defendant has persisted with the trespass. Further, that without the intervention of the court, the Defendant will persist with the illegal trespass and thus the filing of this suit. It was further alleged that despite **demand** and **notice** of intention to sue issued, the Defendant has neglected to cease the trespass and the

Plaintiffs urged the court to allow their claim.

Tough the Defendant had filed her **Replying Affidavit** to the interlocutory **Notice of Motion** application on **20<sup>th</sup> January 2014**, and averred that she is the rightful owner of the suit property **Plot No.014** situated in **Kamae Settlement Phase II**, having purchased the same from **Lilian Mwende Nzambu** as was evident from the sale agreement dated **4<sup>th</sup> May 2013 (LWM-1)**, she failed to file her statement of Defence. In her **Replying Affidavit**, she also annexed ownership certificate issued to her on **4<sup>th</sup> May 2013**.

The Defendant had also attached an alleged hand written register showing **Plot No.014** belonged to **Lilian Mwende Nzambu**. A note from **Kamae Resettlement Scheme II**, which was allegedly signed by the Chairman and Treasurer of the said **Kamae Resettlement Scheme** wherein the two officials had indicated that **Plot No.014** belonged to **Lilian Wathithi Muigai**, the Defendant herein and the original owner was **Lilian Mwende Nzambu**. There was also an affidavit by **Francis Nganga**, the Chairman of **Kamae Resettlement Scheme**, who averred that according to their records, **Lilian Wathithi Muigai** purchased the suit property from **Lilian Mwende Nzambu** and that the share certificate issued to **Lilian Wathithi Muigai** was issued by **Kamae Settlement Scheme** but he denounced the Share Certificate purportedly issued to **Lilian Wanjiku Thuku** (deceased) and that **Lilian Wanjiku Thuku** was a stranger to **Kamae Resettlement Scheme Phase II** and so was her certificate of ownership.

At the interlocutory stage, the court observed that the Plaintiffs had failed to establish the principles for grant of injunctive orders. However, the court directed that *status quo* subsisting be maintained.

As the court had stated earlier, after the grant of the *status quo* order, the Defendant failed to file her Defence and therefore the matter proceeded for formal proof on **16<sup>th</sup> October 2017**.

### **PLAINTIFFS CASE**

**PW1 – Simon Thuku Kanui**, one of the Plaintiffs gave evidence and adopted his witness statement as part of his evidence in court. He also produced exhibits such as letter of administration to confirm that he is one of the administrators of the Estate of his wife the late **Lilian Wanjiku Thuku**. He also produced the certificate of death as exhibit No.2 and certificate of allotment as **exhibit No.3**. It was his evidence that his late wife owned the suit property which is at **Kamae Settlement Scheme Phase II** near Kahawa West. He also testified that his wife was shown the suit land and she placed beacons on it in the **year 2002**. However, she died before she could build on it. He further testified that in the **year 2013**, the Defendant encroached on the suit land and that she constructed thereon as was evident from **exhibit no.5**. The Plaintiff urged the court to order that the Defendant be evicted from the suit property since that is where she lives and that she should pay costs of the suit.

After the close of the Plaintiff's case, written submissions were filed on **11<sup>th</sup> December 2017**, which this Court has carefully read and considered. The Court has also considered the pleadings in totality and the annexures thereto.

Though the Defendant did not file her Defence to controvert the Plaintiffs' case, it is evident that the Defendant did file a **Replying Affidavit** to the **Notice of Motion** application and annexed various documents to contest the interlocutory application. These documents do form part of the court record and they have not been expunged. The Plaintiffs are the ones who alleged that, therefore the burden of proof lied upon them to prove their case as provided by **Section 107** of the **Evidence Act**, which provides:-

**(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.**

It is therefore trite that he/she who alleges must prove.

There is no doubt that there are two ownership documents herein for **Plot No.014**. The one held by the late **Lilian Wanjiku Thuku**, which was allegedly issued on **3<sup>rd</sup> May 2002** by **Kamae Re-settlement Project Phase II**. The said ownership certificate is over **Plot No.014**.

The second ownership certificate for the same plot was issued in favour of **Lilian Wathithi Muigai** which was issued on **4<sup>th</sup> May 2013**. The Plaintiffs alleged that the late **Lilian Wanjiku Thuku** was shown this plot by the officials of **Kamae Re-settlement Project Phase II** and she placed beacons in the **year 2002**. Unfortunately, she died before she could put up any structure on the suit property.

Since the Plaintiffs are the ones who has alleged, they ought to have called evidence to prove their case. How could they have done this? The Plaintiffs ought to have called officials from **Kamae Re-settlement Project Phase II** to confirm who indeed is the rightful allottee of the suit property. The court says so because from the annexures attached to the Defendant's **Replying Affidavit**, she produced a copy of handwritten register which showed that **Lilian Mwende Nzambu** was one time registered as owner of **Plot No.014**. Further there was a sale agreement annexed as **LWM-1** which showed that **Lilian Mwende Nzambu**, sold the suit property to **Lilian Wathithi Muigai** the Defendant herein.

Again there was a letter from some alleged officials of **Kamae Re-settlement Scheme**, who alleged that the Defendant is the current owner of the suit property as per their records and also an affidavit of **Francis Nganga**, which also confirmed that the certificate of ownership held by the Defendant was issued by the said **Kamae Re-settlement Scheme Project Phase II**, and he disowned the Certificate of ownership issued to **Lilian Wanjiku Thuku**.

Though the above evidence was not subjected to the usual test of cross-examination, and since the Defendant did not file

her Defence nor appear in court, the burden of proving the case was squarely on the Plaintiffs. The Plaintiffs did not call the crucial evidence from ***Kamae Re-settlement Scheme Project Phase II*** to clear the air on whether ***Lilian Wanjiku Thuku*** (deceased) was the rightful allottee of the suit property and whether her ownership Certificate emanated from the said ***Kamae Resettlement Scheme Project Phase II***.

The Plaintiffs testified that the Defendant has built her house on the suit property and that is where she lives. Then it meant that the Plaintiffs were never in possession of the suit property.

Having now carefully considered the available evidence, the Court finds that the Plaintiffs have not proved their case on the required standard of balance of probability. Consequently, the Court finds that the Plaintiffs' case is not merited and the same is dismissed entirely with no orders as to costs since Defendant did not file any Defence nor appear in court.

It is so ordered.

***Dated, Signed and Delivered at Thika this 5<sup>th</sup> of April 2019.***

**L. GACHERU**

**JUDGE**

In the presence of

No appearance for Plaintiffs

No appearance for Defendants

Lucy - Court Assistant

**Court** – Judgement read in open court in the absence of the parties herein.

**L. GACHERU**

**JUDGE**

**5/4/2019**