



**REPUBLIC OF KENYA**

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

**ELC CASE NO.377 OF 2017**

**MARY WANJIRU WAINAINA.....PLAINTIFF**

**VERSUS**

**JOHN NJUNG'E GACHIMU.....DEFENDANT**

**JUDGMENT**

By a *Plaint* dated **2<sup>nd</sup> February 2017**, and *Amended* on **29<sup>th</sup> May 2017** the Plaintiff herein has sought for Judgment against the Defendant herein in the following orders:-

- a) A restraining order directed to the Defendant ordering him to forthwith cease from claiming any share or entitlement against the Plaintiff's title and possession of all that parcel of land namely one (1) acre contained within LR.No.Lari/Magina/1579.***
- b) A permanent injunction restraining the Defendant, his family, kin, agents, employees or servants from trespassing upon, ingressing into, altering beacons or fences, cultivating, selling, leasing, disposing off, or in any other manner interfering with the Plaintiff's quiet possession and ownership of one(1) acre contained within LR.No.Lari/Magina/1579.***
- c) Costs of this suit.***
- d) Any other relief that this Honourable Court may deem just and fair to order.***

In her statement of claim, the Plaintiff stated that she was the registered owner of one (1) acre contained within LR.No.Lari/Magina/1579, having registered as such pursuant to ***Kiambu Succession Cause No.25 of 1995***. The Defendant purchased a piece of land from one ***Peter Njeri Thugi***, also a beneficiary of the deceased estate and they have been peacefully co-existing until the Defendant alleged that his parcel of land is smaller than the one (1) acre which he had purchased. The Defendant has threatened to hive off the allegedly missing portions from her parcel of land and brought a surveyor on the site. She averred that she was not privy to the sale agreement between the Defendant and ***Peter Ndungu Thugi***, and as such if the Defendant feels that he was short changed, he should pursue the said ***Peter***.

She further averred that the Defendant has been in possession of the parcel of land for ***over 20 years*** and cannot claim that all of a sudden he was short changed and that he is fully aware that she is the registered proprietor of the suit land and unless he is restrained by the Court, he may erect permanent structures or commence exhumation of the burial sites on the Plaintiff's land and she stands to suffer irreparable loss and damages.

The suit is contested and the Defendant filed a defence ***21<sup>st</sup> March 2017***. He denied all the allegations made in the ***Plaint*** and contended that the entire suit is fatally defective as the Plaintiff has no *locus standi* to institute the proceedings. He denied the existence of the suit land as indicated by the Plaintiff and contended that the alleged parcel of land was succeeded with land parcels ***LR.No.Lari/Magina/1578***, and ***1579*** upon the sub division and close of Title ***No.Lari/Magina/189*** and that he purchased one acre out of the said land and was confirmed to him pursuant to ***Land Case No.5 of 1999***. He averred that his parcel of land is small in size and he shall follow the due process to reclaim his portion. He further averred that he is the registered proprietor of ***LR. No.Lari/Magina/1578***, and that he has been pursuing his parcel of land over the years. He denied that the Plaintiff has ever been registered owner of either of the two land parcels and alleged that the Plaintiff illegally buried her family member on his piece of land and he shall seek to exhume the remains of the deceased and further averred that the said restraining orders should be issued as against the Plaintiff as she alleges ownership of a non-existent land parcel.

He further filed a ***Reply*** to the ***Amended Plaint*** dated ***21<sup>st</sup> June 2017***, and averred that he has no capacity to defend ***LR.No. Lari/Magina/1579***, and that he has never been a party with the Plaintiff in the said suit land.

In reply to the defence, the Plaintiff averred that she is unaware that the suit land was subdivided and that she never participated in the sub division if any and having been a joint owner, she ought to have been involved. She averred that if a subdivision occurred, it does not affect the beacons to her one acre nor entitle the Defendant to encroach into her land.

The matter proceeded via *viva voce* evidence on the **28<sup>th</sup> February 2018**, and on the **24<sup>th</sup> April 2018**. The Plaintiff called one witness and the Defendant called also called one witness

### **Plaintiff's Case**

**PW1 - Mary Wanjiru Wanaina**, the Plaintiff herein testified and adopted her witness statement dated the **3<sup>rd</sup> February 2017**. She testified that she has one acre out of **LR.No.Lari/Magina/189**, and that she was given the land by her mother in law after she filed a **Succession Cause** and that she has a title deed. It was her testimony that the land was sub divided and that the **Green Card** shows that she inherited the land. She further testified that the Defendant bought the land from one of the beneficiaries one **Peter Ndungu** and she was not involved in the sale agreement and that is how he got into the Green Card and later encroached into her land. She testified that there is her child's grave at the side of her land and urged the court to order the Defendant to stop encroaching on her land and also urged the Court to visit the suit land to see what she meant, she produced her **bundle of documents** as **exhibit 1**.

On cross-examination she stated that she owned the land and she has documents to that effect. It was her testimony that the Surveyor has never visited the land and that there are beacons and they were shown to her by the elders. She stated that the Defendant encroached on her land and that she did not have the title deed in court. She testified that the Defendant bought the land **20 years ago**.

On re-examination, she testified that the whole of the original title had beacons. She asked the Court to send elders to the ground, and further testified that the original title was subdivided into small portions and she was given a Green Card to show that she was given one acre. It was her testimony that they do not have the title deed but they have the green card and that she was not a party to the case in **Kiambu**.

### **Defendant's Case**

**DW1 - John Njunge Gachimu**, the Defendant herein appearing in person testified and gave evidence that his parcel of land is **1578**, while the Plaintiff's land is **1579**. He testified that he bought the land from one **Peter Ndungu**. He further testified that the Plaintiff is not the owner of the suit land and that the same is owned by **10 people**. It was his testimony that he assisted in acquisition of the title and that when the Surveyor came the Plaintiff's side did not appear and that after he finished his work, the said people threatened him with pangas, but he had already taken the measurements. He further testified that he had a court order for excision of his one acre from the mother title. He testified that he has not occupied the Plaintiffs land and that it is the surveyor who showed him the boundary of the two parcels of land and produced his bundle of documents as exhibit in court. He stated that after being reported to various authorities by the Plaintiff, he was given letters by the **District Commissioner** which he took to the **District Survey in Kiambu** and the Surveyor came to the field and the beacons were re-fixed in the presence of the Chief. He alleged that the Plaintiff obtained the title deed when there was a **Caution** on the said land and that the land was initially owned by the Plaintiff's mother. He urged the Court to dismiss the Plaintiff's suit.

On cross-examination he testified that it was the **District Commissioner** who placed the Caution and that he was registered as the owner of one acre and he took the Plaintiff to court in **Limuru**. He further testified that he was not shown the beacons as the Surveyor did not come to the land and that they did not bring the Surveyor to the ground. It was his testimony that he bought the land in the **year 1999**, and took the Surveyor in **2012** after noting that his land was so small. He testified that he did not live on the said land and that utilized the said land that was shown to him by the vendor and that the measurements were taken manually. It was his testimony that the **Surveyor's Report** came out in **2017**, but the same is dated **9<sup>th</sup> May 2011**. He further testified that in his defence he stated that he obtained the title deed in **2012**.

He further stated that **LR.No.189** was subdivided and the original title deed was recalled by the **Land Registrar**. He testified that he did not sue the vendor since he had not been shown the beacons and that it was the Plaintiff who buried her child on his parcel of land and that he has not filed any case to exhume the body. He stated that it was the Surveyor who reported that the Plaintiff has encroached on his land and that the Plaintiff has never brought any Surveyor to the land.

The Court directed that parties do file written submissions and in line with the said directions, the Plaintiff through the **Law Firm of Wachira Maina & Co. Advocates**, filed their written submissions on the **8<sup>th</sup> May 2018**. It was submitted that the Plaintiff was not privy to the **Sale Agreement** between the Defendant and **Peter Ndungu Thugi**, and therefore unaware of the particulars. It was further submitted that it was misleading for the Defendant to claim that beacons he admitted existed on the land before he bought the land are not actual beacons. The Plaintiff further submitted that the Defendant did not explain who attended the **Land Control Board**, for purposes of obtaining Consent for subdivision and the court was therefore urged to revoke and reverse the purported subdivisions. It was also submitted that the bundle of documents by the Plaintiff are unchallenged and that the Defendant did not have any plausible defence, the Court was urged to dismiss his defence and grant the Plaintiff her prayers.

The **Defendant** acting **in person** filed his submissions on the **21<sup>st</sup> May 2018**. He submitted that the Plaintiff has not proved any *prima-facie* case and he has fully established his case with supported reasons against the Plaintiff. He submitted that the land was subdivided pursuant to a **Court Order** directing the **Executive Officer** of the court to facilitate the transfer in his favour, facts which are within the Plaintiff's knowledge. He further submitted that the Plaintiff's claim is fictitious and the Court was urged to dismiss the Plaintiff's claim and allow the Defendant's prayers.

The Court has now carefully considered the pleadings together with all the rival written submissions. There are two issues for determination before this Court:-

- i. Whether the Plaintiff has *locus standi* to bring this suit.**
  - ii. Whether the Plaintiff is entitled to the Permanent Injunction Orders as against the Defendant.**
- i. Whether the Plaintiff has locus standi**

*Locus standi* connotes 'a right to bring action'. It is not contested that the Plaintiff is one of the beneficiaries of the original land namely **Lari/Magina/189**. From the evidence produced before court, the suit land to be subdivided and the Plaintiff was also one of the beneficiaries of the suit land that resulted into the subdivisions and is a registered proprietor.

The Plaintiff has alleged that the Defendant has trespassed into her suit land and is attempting to take over the suit land.

In the case of **National Environmental Tribunal...Vs...Overlook Management Limited & 5 Others (2019) eKLR**, the Court stated:-

**“In determining a person’s capacity to sue, the Court had to be satisfied that the action was justifiable and a dispute between the parties existed”.**

The Court quoted the case of:-

**Elendu...Vs...Ekwoaba(1998)12 NWLR (Pt.578)320** that in determining whether a person has *locus standi* or not, the following factors may serve as guidelines;

- i. For a person to have *locus standi* in an action, he must be able to show that his civil rights and obligations have been or are in danger of being infringed.**
- ii. The fact that a person may not succeed in an action does not have anything to do with whether or not he has a standing to sue.**
- iii. Whether a person’s civil rights and obligations have been affected, depends on the particular facts of the case.**
- iv. The court should not give an unduly restrictive interpretation to the expression *locus standi*.**

It is therefore the Courts opinion that the Plaintiff has *locus standi* to bring this suit.

**ii) Whether the Plaintiff is entitled to the prayers sought.**

The Plaintiff’s position is that the Defendant bought the suit land from her brother in law. They had both inherited the said parcel of land from her mother in law and since the Defendant already got his share of the suit land and has lived there for so many years he has no reason to complain. The Plaintiff has in her submissions urged the Court to revoke and reverse the purported subdivision.

The Court has had the chance to see the Ruling made by the **Subordinate Court** in **Case No.5 of 1999**, in which the Court ordered that **LR.Lari/Magina/189**, be subdivided and the Plaintiff was to get 1.00 acres and the Defendant was also to get **1.00 acres** of the suit property amongst other beneficiaries. These are documents that have been produced by the Defendant and in no way has the Plaintiff claimed that they are fraudulent nor has she proved fraud as alleged in her submissions and a further order authorizing the **Executive Officer** of the court to sign all the necessary documents. The Court has further seen proceedings in which the Plaintiff’s attempts to have the said Judgment set aside and which application was dismissed. The Court is therefore not in doubt that the Order of the Court granting the Defendant one acre stands.

The Plaintiff in her submissions has stated that the Court should revoke and reverse the subdivision, as the same were unprocedural. However, the Court has noted that these submissions were not part of the pleadings nor had the Plaintiff in her pleadings challenged the subdivisions. On the contrary the Plaintiff has acknowledged the subdivision in her **Plaint** by indicating her property as that which has resulted from the subdivision.

The Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano...Vs... Stephen Mutinda Mule & 3 Others (2014) eKLR**, which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

**“....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....**

**...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”**

The official search produced by the Defendant and the title deed shows that the approximate area of the Defendant’s title being **LR.No.Lari/Magina/1578** measures **0.405 Hectares** contrary to the allocation made in Court. The Defendant produced a letter dated **13<sup>th</sup> February 2017**, by the **County Surveyor** in which the surveyor indicated that he had visited the site and on the ground there is an existing fence that differed with the Surveyor’s measurements. The Surveyor attached a map that showed the disputed area and stated that **LR. 1578**, measures **0.405 Hectares** while **LR. 1579** measured **1.94 Hectares** and indicated that the disputed area is part of parcel **LR. 1578** which is the Defendant’s land.

Though the Plaintiff in her submissions had disputed this letter for the reason that the report took five years to prepare, she has not produced

in Court any evidence to the Contrary and the Court finds that the mere fact that the report was prepared **5 years** after, has not altered any evidence.

The Plaintiff did not bring any evidence to prove to the contrary. The Court is therefore inclined to believe the Defendant's evidence that the Plaintiff has encroached into his parcel of land. The Plaintiff had an opportunity to participate in the Survey and marking of beacons but she failed to do so and therefore she only has herself to blame. The allegations that the Defendant has been living in the suit property for over **20 years** but he has never complained nor was she part of the **Sale Agreement** between the Defendant and her brother in law does not hold water and the Court finds that these allegations were dealt with in the trial Court in **Land Case No.5 of 1995**, where the Court ordered for the subdivision of the land and acreage to be divided amongst the beneficiaries.

Further, the Court has considered the Green Cards produced in Court as evidence, It indicates that subdivision was carried out and the mother title **LR.No.Lari/Magina/189** closed on **20<sup>th</sup> January 2017**.

Though this Court do concur that the Defendant's recourse may lie in the person who sold him the land, the Court further finds that the present suit does not involve the **Sale Agreement** nor does it involve subdivision and there is no issue that bars the Defendant to have a recourse as against the Plaintiff. The Surveyors have clearly indicated that the beacons were tampered with and part of the disputed area belongs to the Plaintiff. It is the Court's findings that a recourse therefore lies automatically as against the Plaintiff as the same is part of her share of the suit property.

The process had nothing to do with the sale agreement as the suit land was already sold. What is in contention is the acreage and from the evidence, the Plaintiff has more than she was entitled to. Without any

explanation and evidence on record by the Plaintiff showing that the are forgeries or that subdivision was faulty, the Court's hands are tied.

**Sections 107** and **108** of the **Evidence Act** provide that; **'he who alleges must prove'**.

The Court of Appeal in **Jennifer Nyambura Kamau...Vs...Humphrey**

**Mbaka Nandi NYR, CA Civil Appeal No.342 of 2010/2013**leKLR, stated as follows:-

***"We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that "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." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side."***

Having now carefully considered the available evidence, the Court finds that the Plaintiff herein has failed to prove her case on the required standard of prove on the balance of probabilities. Consequently, the Court finds that the Plaintiff's claim is not merited and the same is dismissed entirely with costs to the Defendant herein.

It is so ordered.

**Dated, Signed and Delivered at Thika this 3<sup>rd</sup> day of April 2019.**

**L. GACHERU**

**JUDGE**

**3/4/2019**

In the presence of

No appearance for Plaintiff

No appearance for Defendant

Lucy - Court Assistant

**Court** – Notice of Entry of Judgment to be served upon all the parties by ELC Registry.

**L. GACHERU**

**JUDGE**

