



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 507 OF 2017**

**(FORMERLY NAIROBI SUIT NO.2532 OF 1992)**

**MARY WAMBUI KINYANJUI.....PLAINTIFF**

**VERSUS**

**NGABA GATHIRUA KIBABUA.....1<sup>ST</sup> DEFENDANT**

**JACINTA WAIRIMU MUTURI.....2<sup>ND</sup> DEFENDANT**

**HANNAH NJERI NJIHIA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By a **Plaint** dated 8<sup>th</sup> May 1992 and Amended on the 29<sup>th</sup> June 2011, the Plaintiff herein brought a claim against the Defendants and sought for the following orders:

- a) That the Honourable court issue an order that Land Parcel Number Githunguri/Ikinu/1496 lawfully belongs to the Plaintiff under the provisions of the Registered Land Act, Cap 300 Laws of Kenya.***
- b) An order that the District Surveyor Kiambu District or any other competent and licensed surveyor to visit the suit premises and thereat determine the area boundaries of the suit premises with specific reference to Maingoroti River the southern natural boundary and delineate the boundary between the Plaintiffs Land parcel Number Githunguri/Ikinu 1496 and the Defendants land parcels Number Githunguri/Ikinu/3007, Githunguri/Ikinu/3008, Githunguri/Ikinu/3009.***
- c) Order and provide for the costs of this suit or any other order relief that the court may deem meet and just to grant.***

In her statement of claim, the Plaintiff claimed that she is the registered proprietor of parcel of Land **Githunguri/Ikinu/ 1496**, together with the improvements and that the 1<sup>st</sup> defendant was the registered proprietor of land parcel number **Githunguri/Ikinu/436**, which borders the Plaintiff's land with the Maingoroti River forming their common boundary. She alleged that the 1<sup>st</sup> Defendant has since subdivided his land into parcels No. **Githunguri/Ikinu/3007, 3008 and 3009**. She further alleged that the Defendants have claimed to own portion of the suit premises bordered by a natural boundary namely **Maingoroti River**, to the south and had involved Administration officials in the dispute to influence the allegations in the defendants favour. The Plaintiff further alleged that a written notice dated **7<sup>th</sup> May 1992**, purported to be a quit warning was addressed to her and that she is now faced with eviction from the suit premises. It was her contention that the 1<sup>st</sup> Defendant has by inference and acts encroached upon the suit premises and has declared possession and thus she continues to suffer irreparable loss.

The suit is contested and the 1<sup>st</sup> Defendants filed a Defence **dated 22<sup>nd</sup> May 1993**, and Amended on **6<sup>th</sup> July 2011**, together with a Counter claim. The 1<sup>st</sup> defendant denied the Plaintiff's allegations as contained in the Plaintiff and contended that the suit premises border his parcel of land previously known as **Githunguri/Ikinu/436**, measuring 6.7 acres while the suit premises comprises 4.1 acres. He further contended that the boundaries of the parcels of land extend up to the stream referred to in paragraph 3 of the Defence and run cross the island created by the said stream and Maingoroti River. He further alleged that he has been lawfully claiming a portion of **0.3 acres**, being an island cut out of a natural stream bordering the two parcels of land and **Maingoroti River**, which island comprises part of the 1<sup>st</sup> Defendant's parcel of land and which the Plaintiff has wrongfully entered and encroached on the island and prevented the 1<sup>st</sup> Defendant from using the portion of land. He further alleged that he referred the boundary dispute to the Land Registrar and denied that he influenced a favorable outcome. He further denied that he intends to evict the Plaintiff from the suit premises.

He filed his counterclaim and prayed for the following orders;

- i) Delivery of the said portion of land comprising 0.3 acres or thereabouts being the island created by the natural stream called***

*Maingoroti River*

- ii) An injunction to restrain the Plaintiff or her servants or agents or otherwise howsoever from entering or using the said island*
- iii) Mesne profits.*
- iv) Costs of this counterclaim.*
- v) Any further or other relief that this Honourable Court may deem just and fit to grant.*

After various Applications, the suit was finally set down for hearing wherein the Plaintiff called 3 witnesses and the Defendant called two witnesses. PW1 and PW2 testified on the **27<sup>th</sup> of July 2017** whilst PW3 testified on the **5<sup>th</sup> December 2017**. The 1<sup>st</sup> Defendant and his witness testified on the **1<sup>st</sup> March 2018** and closed their case.

**PLAINTIFF'S CASE**

**PW1; Mary Wambui Kinyanjui**, the Plaintiff herein stated that she recorded her statement dated **28<sup>th</sup> January 2011** and adopted it as evidence in court. She testified that she has sued the Defendants in relation to initial parcel of Land **Githunguri/Ikinu/522** which was later changed to **1496**. She testified that the land initially belonged to her father **Gachire Kinyanjui**, and was transferred to their mother **Serah Wambui Gachire**. She further testified that the land was later divided into two portions that is for **Edward Muchau Gachire** her stepbrother and herself. She stated that she knows about **Githunguri/Ikinu/436**, and that the land belongs to the 1<sup>st</sup> Defendant herein. It was her evidence that the 1<sup>st</sup> Defendant is her neighbor and that she has sued him because he has encroached on her land. She testified that the 1<sup>st</sup> Defendant has taken a portion of her land and that their land are divided by **River Maingoroti** and that she plants arrow roots at the River bank and dug a trench and that she did it in the year **1979**.

It was her evidence that when subdivision was done, the trench was not there and that she is the one who dug the trench after the land was subdivided. It was her evidence that the 1<sup>st</sup> Defendant encroached on the suit land in 1986. Further that she inherited the land in 1970 and in that year the 1<sup>st</sup> Defendant had not claimed her portion of land. She stated that before the trench was used to draw the water from the land and taking it to the river to prevent damage to her land. She also confirmed that no other person has encroached on her land. She further testified that after the 1<sup>st</sup> Defendant encroached on her land, she reported the matter to the Assistant chief. It was her testimony that the Assistant chief then called the Land Registrar who came to the ground and told them to use the village elders to resolve the boundary dispute. She testified that the 1<sup>st</sup> Defendant did not cooperate and instead brought a private surveyor.

She asked the court to direct the Land Registrar to go to the ground and point out the boundary and to further direct the 1<sup>st</sup> Defendant to

return a portion of the land that he has encroached on and that the River has now changed its course and therefore urged the court to allow her claim.

On cross examination she reiterated that the land is hers and that she has a title deed for the suit land and the same is in her name and that of her mother, **Serah Wambui Gachire** and that **Gachire** was her father. She further testified that the name **Kinyanjui** is her husband and that **Gachire Kinyanjui**, was her husband's father and who is now deceased. She further testified that **Serah Wambui Gachire** is her mother in law.

She also testified that the land **No.1496** was **5.2 acres** and that **Muchai** was given 1 acre while she has **4.2** acres. She further testified that **L.R 1496** is **4.10 acres** and that she does not know the size of the 1<sup>st</sup> defendant's land. She gave evidence that when she got married in the 1970's she dug the trench and that later **Ngaba** encroached on her land. It was her further testimony that the 1<sup>st</sup> Defendant complained to the Assistant Chief and that the Land Registrar and herself were summoned in **1992**. She is aware that a decision was made by the Land Registrar, stating that the portion was for **Ngaba** and she then filed the present suit. It was her testimony that someone interfered with the mutation form but

she does not know who interfered with it. She further gave evidence that the trench that she dug drains at the river and that she cultivates between the trench and the river and that she has not been cultivating on the defendants land.

On further re-examination she testified that the issue in dispute is one small portion of **1496** and not the whole portion of land and that the portion in dispute is an **1/8 of an acre**. It was her contention that that somebody interfered with the boundary since she is the one who placed the trench.

**PW2; Hillary Mwangi Mbuthia**, stated that he recorded a witness statement dated **28<sup>th</sup> January 2011**, and asked the court to adopt it. He confirmed that he knows the Plaintiff and the 1<sup>st</sup> defendant and that they are his neighbours. He further testified that at the time of demarcation and consolidation, the plaintiff and the 1<sup>st</sup> Defendant were his neighbours. He also testified that the River is the boundary of their separate parcels of land. Further that the dispute between the parties is of the River and a small portion of land and that the river has never changed course and that the 1<sup>st</sup> defendant has taken a small portion of land from the Plaintiff's side. It was his further testimony that he did not know if the trench was dug by anyone and that he has not seen the trench dug by the Plaintiff and that there is no any other person on the 1<sup>st</sup> Defendant's side of the parcel of land. He confirmed that he bought his land before demarcation and that the Plaintiff's **father in law** had no dispute but the 1<sup>st</sup> Defendant always claimed that portion of land.

On cross examination he stated that he knew the 1<sup>st</sup> defendant and could not be able to identify him now. She testified that that **Serah**

**Wambui** was a mother in law to **Mary Wambui**. It was his further testimony that **Mary Wambui** was married to **Serah Wambui's** son called **Gachire** and she was later married to **Serah wambui**. It was his testimony that when the Plaintiff got married the land dispute arose and the matter was even discussed at chief's office who confirmed that the plaintiff had dug that trench. He testified that he has gone to the boundary and the river course was changed by the 1<sup>st</sup> defendant and that the trench drains the water to **River Maingoroti** and that the trench does not drain water from the Plaintiff's side and that the two parcels are sliding to the River and there is no need of trench. It was his evidence that he does not know who cultivates the portion of land that is divided by the trench dug by the plaintiff.

On further re-examination he testified that the river divided the two parcels of land and that there is no parcel of land that has crossed on the other side of the river. It was his evidence that people fetch water from the river and cultivate the same.

**PW3 Joseph Muchungu**, the District Surveyor, stated that on **17<sup>th</sup> October 2017**, he visited land parcels **No.Githunguri/Ikinu/1496** and **Githunguri/Ikinu/436** as there was a dispute between the two parcels. He stated that **Githunguri/Ikinu /436**, had been subdivided into three parcels **3007, 3008** and **3009** and he wanted to establish the boundary between the two parcels. He testified that he found that there are two rivers which flows from a small island and that the island is the disputed area. He further testified that the island is approximately **0.3 acres**. He found that the boundary of the affected parcels are used in the R.I.M and also found that the island belongs to Land parcels no. **436**, owned by **Ngaba Gathirua Kibabua** .He stated that he wrote a report which he presented in court. He further testified that as far as the survey point, the two rivers are the ones that caused the confusion and that one river has a lot of water and the other one is almost dry and that the boundaries were well established. He stated that when they went to pick the boundaries, there was a small area that the boundary was not well established between parcel **No. 3007** and **1238**.

He also testified that on his report, there are marks which shows that he was dealing with the said parcel of land and that there are braces which shows that area is one and the same. He stated that his report is based on what happened after the subdivision and that the old boundaries do not change. He stated that the braces mean that is a continuation of the other piece of land and that there is a problem between no.**3009** and **1238**.

It was his further testimony that all surveyors use the same method to arrive at a finding. He testified that they only have one map that comes from the Directorate of Survey who is the custodian of all maps. He further testified that to confirm the boundaries, one must compute the acreage add to the registered acreage. The acreage on the ground and the registered acreage was equal and that the acreage is always approximated guided by the maps. He testified that the second map he used to prepare the report is from the Directorate of Survey. He further testified that from his report **L.R No. 1496** ,after the river, there was a curved area. He stated that he dealt with the ground and the Map.

On cross examination, he testified that he took actual measurements in the presence of both parties. He gave evidence that the shaded area is part of **436** and not part of **1496** and that there is a small portion where the boundary is not marked and it is between **3007** and **1238** and that the area does not affect **1496**.

## **DEFENCE CASE**

**DW1 Jeremiah Ngaba Gathirua** the 1<sup>st</sup> Defendant herein adopted his witness statement dated **7<sup>th</sup> May 2011**. He further testified that the Plaintiff was married to **Serah Wambui Gachire**, who left the land to the Plaintiff. He further testified that **Serah Wambui Gachire** was not born on the suit land .It was his testimony that the boundary dispute died when the boundaries were fixed in **1957**.He planted boundary features on the common boundary and that there is a small river and the boundary of the two parcels is Maingoroti River. That he reported the matter at Kiambu lands office and the Surveyor went and did survey work and the Surveyor's report was produced as **D. Exhibit 1**.He also produced the Map of the area as **D.Exhibit 2** and stated that he has never changed the course of the river.

On cross examination he testified that he was given his land in 1957 and that was the same year that **Serah Wambui Gachire** also got her land. He testified that he had no dispute until the Plaintiff got in the land and she is the one who had encroached on his land. It was his testimony that the Surveyor came and aligned the boundaries and further that there is a river that divides the two parcels of land. It was his evidence that **River Maingoroti** is not the boundary and that the small river (tributaries) has divided the parcels of land. He further testified that River Maingoroti is on his side and that the boundary features (Mikungungu) are on the common boundary and that he is the one who prunes the said Mikungungu.

**DW2 Dominic Kinya Ngaba** also adopted his witness statement dated **16<sup>th</sup> May 2011** as his evidence. He testified that **Ngaba Gathirua** is his father. He also testified that there are two rivers being **River Maingoroti** and a small other river and there is a small island between the two rivers and that the Island belongs to his father. He testified that the boundary is **River Maingoroti** and not the stream to the river.

On cross examination he stated that there are two rivers and that **River Maingoroti** borders the two parcels of land. It was his further testimony that the main River separates the two parcels of land. It was his further evidence that the parcels of land were alienated in 1958 and that the Plaintiff had two families and that the island was initially cultivated by the 1<sup>st</sup> Plaintiff who is now deceased and she left the land to the 2<sup>nd</sup> Plaintiff. He further testified that he does not know why his father has not retrieved his title deed. It was his testimony that he does not agree with the Sketch, map produced as Exhibit 1.

After the close of Viva Voce evidence, parties filed their written submissions which the Court has carefully considered.

This Court has also carefully considered the available evidence and the exhibits thereto. There is also no doubt that the Plaintiff and the 1<sup>st</sup> defendant are neighbours whose land border each other. There is no doubt that though the Plaintiff has not produced a certificate of title to confirm that she owns land parcel **No. Githunguri/Ikinu/1496**, she has lived on the suit land since **1970's**. It was acknowledged by all parties that **Githunguri/Ikinu/1496**, is a subdivision of **Githunguri/Ikinu/522** which was initially owned by the fore kins of the Plaintiff herein.

It is also acknowledged by both parties that the Plaintiff was not born on the suit land and she is in occupation by virtue of marriage. In her testimony, the Plaintiff averred that she was married to one **Kinyanjui Gachire**, who was a son to **Serah Wambui Gachire** the initial owner of the land parcel No. **Githunguri/Ikinu/1496**, and therefore **Serah Wambui Gachire** was her mother in law. However, the 1<sup>st</sup> Defendant and PW2 alleged that the Plaintiff herein **Mary Wambui Kinyanjui** was married to **Serah Wambui Gachire**, who did not have children. Irrespective of who had married the Plaintiff herein, it is not in doubt that she has been in occupation of **Githunguri/Ikinu/1496** for a while now. There is also no doubt that the other resultant subdivision of **Githunguri/Ikinu/522** which is **Githunguri/Ikinu 1495** owned by one **Edward** is not in dispute and not involved in the suit.

Further it is evident that the 1<sup>st</sup> Defendant owned land parcel No. **Githunguri/Ikinu/436**, which borders on **Githunguri/Ikinu/1496** that is utilized by the Plaintiff herein, since she did not produce certificate of ownership for the Court to find and hold that she is the **absolute and indefeasible** owner of the said parcel of Land.

Further it is not in doubt that between the two parcels of land runs **River Maingoroti** which the parties have alleged forms the boundary of the two parcels of land **Githunguri/Ikinu/1496** and **Githunguri/Ikinu/436**, which was owned by the 1<sup>st</sup> Defendant. Further it is evident that the suit herein was filed in **1992**, and has been in the Judicial system for that long because of various factors as at one time the suit had even been dismissed for non attendance of the Plaintiff but it was later reinstated after the Plaintiff filed an Application to that effect.

Further from the Court's record and the exhibits produced in Court, It is evident that land parcel No. **Githunguri/Ikinu/436**, is not in existence now as it was subdivided into three portions to give rise to **Githunguri/Ikinu/3007, 3008, and 3009**. It is also evident that **Githunguri/Ikinu 3007**, is now registered in the name of the 2<sup>nd</sup> Defendant **Jacinta Wairimu Muturi** and **Githunguri/Ikinu/3008** is registered in favour of **Hannah Njeri Njihia**, the 3<sup>rd</sup> Defendant and **Githunguri/Ikinu /3009** remained in favor of the 1<sup>st</sup> Defendant **Ngaba Gathirua Kibabua**.

From the available evidence, it is evident that the dispute herein is a boundary dispute between the owner of **Githunguri/Ikinu/1496, and 436**. There was a common agreement that **River Maingoroti** forms the boundary of the two parcels of land. There was also common evidence that there is a small stream running between the two parcels of land which later joins the bigger Maingoroti River and thus an island is formed. From the Surveyors report, this Island measures **0.3 acres** and it is the bone of contention between the Plaintiff and the 1<sup>st</sup> Defendant.

The Plaintiff in her evidence alleged that **River Maingoroti** is the common boundary of the two parcels of land. She further averred that the Island formed by the small stream and River Maingoroti is on her parcel of land and her family and herself have utilized this small island of **0.3 acres**, since the initial land was demarcated and registered between 1957/58. The said initial land was **Githunguri Ikinu/522**. That she is still utilizing the land and has planted arrow roots on the said land and has also dug a trench to drain water from the said Island.

However the 1<sup>st</sup> Defendant and his witness alleged that the Island is on the 1<sup>st</sup> Defendant's land and that they lived peacefully until 1980's when the Plaintiff herein got married to **Serah wambui Gachire**, the former 2<sup>nd</sup> Plaintiff and then Plaintiff caused disharmony by claiming the parcel of land. That due to the said disharmony the 1<sup>st</sup> Defendant reported the matter to the Land Registrar Kiambu, and one **M.K Njogu**, Land Registrar visited the disputed **parcels** of land and prepared a report dated **19<sup>th</sup> May 1992**. In the said Report, the Land Registrar considered that;

*'According to the R.I.M(Registry Index Report) the disputed portion was part of Githunguri/Ikinu/436, which was registered in the name of the 1<sup>st</sup> Defendant.*

A legend was attached to the said report which showed the location of **Githunguri/Ikinu/1496 and 436**, with a shaded area marked B. The shaded area on the map produced in court was the disputed Island which according to the Boundary Dispute Report on **Githunguri/Ikinu/436 and 1496** belong to the 1<sup>st</sup> Defendant.

It is also evident from the said map that there is **River Maingoroti** which is allegedly the boundary of the two parcels of land.

Further it is evident that the court has severally ordered that the **Land Registrar** and **District Surveyor Kiambu** do visit the two parcels of land and prepare a Report over the disputed boundary.

The Court has considered the Court record and seen that on **14<sup>th</sup> April 1993**, one **C. Mwangi** Director of surveys prepared a Report and confirmed that the disputed Island was part of land parcel no. **Githunguri/Ikinu/436**, which was owned by to the 1<sup>st</sup> Defendant. However, there were crops on the disputed portion of land which he was informed belonged to the Plaintiff who had been utilizing the land since the time of land demarcation.

Again the Court has seen another report by **Thagishu Associates** who had visited the ground on **5<sup>th</sup> November 2012**, in relation to the boundary dispute over **Githunguri/Ikinu/1495,1496** formerly **522** and **Githunguri/Ikinu 3007,3008and 3009** formerly **Githunguri/Ikinu/436** and concluded that **Maingoroti River** cuts through part of the original Land Parcel No. **Githunguri/Ikinu/436**. There is another finding of the District Land Surveyor, **JD Muchungu** who was PW3 dated **17<sup>th</sup> October 2017**. He stated that the correct boundary was according to the available **R.I.M** and that the disputed Island which comprises of **0.3 acres** was part of **Githunguri/Ikinu/436**, which formerly belonged to the 1<sup>st</sup> Defendant. He produced the report as an Exhibit in court together with the map and GPS positioning. From the evidence of the Land Surveyor and the Land Registrar, then there is no doubt that the disputed Island measuring 0.3 acres is part of former **Githunguri/Ikinu/436**, which belonged to the 1<sup>st</sup> Defendant herein **Ngaba Gathirua Kibabua**.

The Plaintiff brought this matter to Court because she was dissatisfied with the findings of the **Land Registrar** which Report was prepared

in 1992. However the subsequent visits by the Surveyors have confirmed that the disputed Island is part of former land parcel **No. Githunguri/Ikinu/436** belonging to the 1<sup>st</sup> Defendant. The Court finds that the 1<sup>st</sup> Defendant was right when he referred the dispute to the **Land Registrar Kiambu** as the Land Registrar is the one mandated to fix boundaries of parcels of land.

The District Surveyor **Mr. Muchungu** (PW3) confirmed that the Registry Index Map (**R.I.M**) that he relied on clearly indicated the correct boundaries and as provided by **Section 18(1)** of the Land Registration Act, it is deemed that the said R.I.M and the filed plan indicate the approximate boundaries and the approximate situations only of the parcels of land.

The Land Registrar was the one who was mandated to deal with this dispute concerning the boundaries of the registered land. The Land Registrar did so and prepared a Report dated **19<sup>th</sup> May 1992**. That conclusion of 1992 has been reiterated by the subsequent visits by the District Surveyor and the Court finds no reason to divert from the said findings. The Court therefore finds and holds that indeed the disputed Island measuring approximately **0.3 acres** is part of former land parcel No. **Githunguri/Ikinu/436** which has now been subdivided into **Githunguri/Ikinu/3007, 3008 and 3009**.

For the above reasons the Court finds that the Plaintiff has not proved her case on the required standard of balance of probabilities. However, the 1<sup>st</sup> Defendant has discharged his onus of prove on the required standard of balance of probabilities that the disputed land comprising of **0.3 acres** belongs to him and therefore the Court finds, his counter claim merited and is allowed in terms of prayers no (i) and (ii) with an award of General Damages in the tune of Kshs. 100,000/=. The 1<sup>st</sup> Defendant is also entitled to costs of the suit in the counter claim.

Having now carefully considered the available evidence, the Court finds the Plaintiff's suit is not merited and it is dismissed entirely with costs to the 1<sup>st</sup> Defendant.

Further the Court finds the 1<sup>st</sup> Defendant counter claim contained in the amended Defence dated **6<sup>th</sup> July 2011** is merited and it is allowed in terms of prayers no. I, II and General Damages of Kshs. 100,000/=. He is also awarded Costs of the Counter claim.

It is so ordered

**Dated, Signed and Delivered at Thika this 14<sup>th</sup> day of June 2019**

**L. GACHERU**

**JUDGE**

**14/6/2019**

**In the Presence of**

**Mr.Kinyanjui for the Plaintiff**

**N/A for the Defendants**

**Lucy Court Assistant**