



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU**

**HCC 329 OF 2012**

**HORTENSIA WANJIKU CHEGE.....PLAINTIFF**

**VERSUS**

**SAMWEL CHEGE KIGOTHO.....DEFENDANT**

**JUDGMENT**

***(Suit by plaintiff for possession of land registered in her name; defendant taking possession and denying the plaintiff entry into the land; defendant filing counterclaim for cancellation of the plaintiff's title; plaintiff having acquired title in the year 1992; defendant having filed suit in the year 2002 for the same land but his suit dismissed in the year 2009 for want of prosecution; no leeway to file fresh suit through counterclaim but in the event of such leeway, limitation would apply; counterclaim filed way out of the limitation period of 12 years for recovery of land and cannot therefore support impeachment of the plaintiff's title; judgment entered for the plaintiff)***

1. In her amended plaint filed on 24 March 2016, the plaintiff avers that she is the registered proprietor of the land parcel Kiambogo/Miroreni Block 1/199 (Itherero) (the suit land) and that by virtue of the said registration, she is entitled to exercise all proprietary rights to the exclusion of all others. She has pleaded that about the year 2003, the defendant violently ejected her from the suit property and threatened her with dire consequences if she stepped on the land again, and that the defendant has allowed persons unknown to the plaintiff to cultivate crops thereon. She has averred that her efforts to remove the defendant from the suit land have been violently repulsed. She has alluded to a previous suit filed by the defendant against her, being Nakuru HCCC No. 189 of 2002, which was dismissed on 26 March 2009, for want of prosecution. In this suit she wants the defendant evicted from the suit land, and restrained from it, together with costs.

2. The defendant filed a defence and counterclaim in which he inter alia averred that he got married to the plaintiff in the year 1967 through Kikuyu customary law. He contended that before the marriage, he had purchased shares at Itherero Farmers Company, a land buying company, and that through his shareholding he acquired the suit land. He averred that in the year 1981, for reason of extensive travel and work, he donated to the plaintiff a general power of attorney dated 7 March 1981, which empowered her to transact on his behalf. He has pleaded that in exercise of the said authority, the plaintiff was involved in the processing of the title deed of the suit land, and while undertaking that exercise, the plaintiff illegally and fraudulently caused herself to be registered as the sole proprietor of the suit land. He pleaded the following particulars of fraud against the plaintiff :-

*(a) Without the consent and approval of the defendant, causing herself to be registered as the sole proprietor of the suit property fully aware that their arrangement was that the property be registered in the name of the defendant.*

*(b) Disregarding the fact that it is the defendant who acquired the suit land from Itherero Farmers Company Limited whenever she claims that she is the owner of the suit land and alleging that the defendant has no interest whatsoever over the suit property.*

*(c) Falsely claiming ownership of the land.*

3. The defendant has further pleaded that the plaintiff deserted their matrimonial home built on the suit land sometimes in the year 1983, when the defendant discovered her fraudulent actions and she has never gone back. The defendant has averred that he remained on the suit land undertaking extensive farming but that the plaintiff wants to evict him. In his counterclaim, he asked for orders that it be declared that the plaintiff fraudulently acquired title to the suit land; cancellation of the plaintiff's title and for the plaintiff to be perpetually restrained from the suit land.

4. The plaintiff filed a reply to defence, and a defence to counterclaim, where she refuted the claims of the defendant. She denied that she was ever married to the defendant as alleged and stated that there has never been any marriage ceremony involving herself and the defendant, nor has the defendant performed any prerequisites for a Kikuyu customary marriage, including payment of dowry. She has contended that she could not be married to him because he seduced and had children with her close relatives including her biological sisters and a marriage could not be performed without some customary cleansing rites being performed. She further pleaded that where there is a customary union under Kikuyu custom, the husband builds a matrimonial home, but none has been built on the suit land, as the temporary house on the land was built by the plaintiff's father and brother using materials that she procured from Dundori forest. She contended that it is her, in the year 1968, through one James Kaguima, who purchased one share in Itherero Farmers, from one Chege Ndwaru at Kshs. 2,050/=. Since she

believed that she would be married to the defendant, the receipts were endorsed by the said James Kaguima, with the names James Chege Kigotho. She has pleaded that if he indeed purchased the shares, the receipts would have borne his correct name which is James Chege Kigobo. She has pleaded that she had a dispute over the suit land with one Joshua Mwangi Muchina which was handled by various administrative offices, and that during the dispute, the District Officer Gilgil, Mr. Kaviti, came up with the idea of a power of attorney to enable the plaintiff handle the dispute and transact on the title, including applying for the title deed, without invoking the defendant's name.

5. In her evidence, the plaintiff testified inter alia that the defendant was his friend and that she came to know him in the year 1964 and that they separated in the year 1971. She stated that in the year 1966, she was employed as a house help and farm hand, and was living in westlands, Nairobi. In the same year, Mr. Kaguima, a friend of the defendant, informed her that there were shares of land on sale in Mbaruk, with each share going for KShs. 2,050/=. She asked him to register for her two shares. He came back in the year 1968 at her place of work and informed her that there was a person, Chege Nduaru, who had bought shares in Itherero company but was surrendering them. She then borrowed money from her employer and she gave Mr. Kaguima KShs. 2,050/=, which Mr. Kaguima passed over to Mr. Chege Nduaru. His name was crossed out and that of Samuel Chege Kigotho written and she was informed that balloting would be done in 1969. She went and balloted for the land but she did not like the location of the land and returned the ballot. She was then allocated a different parcel of land which is the suit land, identified as Plot No. 54. She stated that her father, who was a mason, built for her a house of four rooms, which is still intact to date, and that she started living on the land, alone, in the year 1972. She did farming on the land until the year 1980 when the lands were formally demarcated by a surveyor. A dispute ensued between her and James Mwangi Muchina, who wanted the plot No. 54, in place of his plot No. 48. She stated that the dispute went before the D.O and the court. The dispute was resolved in the year 1992. She testified that she used to respond when the name "Chege" was called out, which was the name in the receipt, and the D.O asked her to come with the defendant who affirmed that the land belongs to the plaintiff. It is then that the D.O advised that a power of attorney be done. She stated that the dispute that she had with James Mwangi Muchina was decided in her favour in 1992 and she was thereafter issued with a title deed.

6. She testified that in 1994, she started getting ill, and she went to live with her sister in Nairobi. In the year 2002, she was served with summons, in the case that the defendant had sued, and which case was dismissed in 2009 for want of prosecution. She stated that she tried coming back to her land in the year 2003 but the defendant threatened her with a panga and chased her away and from that time she has been living in fear. At the moment she lives in Kibagare in Nairobi.

7. Cross-examined, she testified inter alia that she was only a friend to the defendant, and that their friendship ended in the year 1970, when the defendant took the plaintiff's sister as his girlfriend. She denied that she ever lived with him. She admitted that it was the defendant's name which was entered in the register of Itherero FCS. She never met Chege Nduaru, the one who sold his share, as it was Mr. Kaguima who dealt with him. She stated that it was Mr. Kaguima who wrote the name of the defendant instead of her name in the company records. She stated that the share certificate was issued to Chege Nduaru and not to herself or the defendant. She mentioned that one was allocated a farm and a plot measuring ½ an acre. She sold this plot. She reiterated that the power of attorney was done following the instructions of the D.O and the aim was to remove the defendant's name from the register. She stated that the defendant came to her land in the year 2002 while she was in hospital and that he filed his suit after taking possession of the land.

8. The defendant donated a power of attorney to one Haron Maina Kigotho and it is the latter who testified on his behalf. He stated inter alia that he is a younger brother of the defendant, who was said to be unwell, and bed ridden. He relied on the defendant's witness statement. He mentioned that he was aware how the defendant got the suit land. He stated that the defendant approached their father for some money, to add to what he had, to enable him buy the suit land and that the defendant purchased the land from Itherero FCS. He contended that the plaintiff is married to the defendant through Kikuyu custom and that they lived together in Nairobi. He testified that after the defendant had purchased the suit land, their mother became ill and died, and the defendant removed them from their home in Engineer (Nyandarua), and in 1972, brought him and his sister to the suit land where they lived. He stated that the plaintiff used to come and visit them from Nairobi. At that time he was in Class 4 and his sister in Class 3. They however went back home in 1973 for they lacked food. The defendant, who was rarely around for he worked as a tour driver, came for them but their father refused. The defendant then sent one of his other brothers, called Jesse, who was older than DW-1, to live on the land, which he did in 1973, but he did not stay there for long because the plaintiff quarrelled him claiming that he had come to steal her property. He was also aware of the dispute with Francis Mwangi over the suit land which dispute he stated went to court. He testified that because the defendant was mostly not around, he donated a power of attorney to the plaintiff. He believed that the power of attorney was issued to the plaintiff so that she can handle the case. He mentioned that it was decided in the case that the land belonged to the defendant. The plaintiff however changed the title to herself and the plaintiff filed the suit Nakuru HCCC NO. 189 of 2002. He was not sure whether the said case was ever decided. He produced copies of receipts for the land in the name of the defendant.

9. Cross-examined, he stated that he was born in the year 1955. He did not know when the plaintiff and defendant got married only that he knew that they lived in Nairobi. He mentioned that he used to visit them in Kawangware but he did not know who owned the house that they lived in. He visited them thrice, the third time being in 1978. He stated that he was in class 5 in the year 1972 when he went to live on the suit land. He testified that it was in 1969 that the defendant brought the plaintiff home and introduced her as his wife. He stated that the defendant went to live on the land in 1983 after he retired from his place of work. He stated that on the land was a house which they found already built in 1972 when they went to reside here. He never saw the house being built although the defendant informed him that it was his house. He acknowledged that no title had ever been issued for the suit land in the name of the defendant. He was cross-examined on Kikuyu customary marriages, and he affirmed that there are ceremonies held that symbolize such a wedding including a "ngurario" and "ruracio" ceremonies, the latter of which he described as a dowry ceremony. He affirmed that he attended neither. He acknowledged that the receipts for the land initially bore the name Chege Nduaru, which was crossed out; he did not know Chege Nduaru. He testified that the defendant does not have children but has been living on the land with his nephew. He (the defendant) now resides in Engineer with DW-1.

10. With the above evidence, the defendant closed his case.

11. I invited counsel to file submissions which they duly did. I have taken note of these in arriving at my decision.

12. Before I proceed to tackle the issue at hand, counsel for the defendant raised a few technical issues in his submissions which I first wish to dispose of. First, he submitted that the law firm of M/s Raydon Mwangi & Company Advocates, are improperly on record for the defendant. It was pointed out that the defendant was at first represented by M/s Mirugi Kariuki & Company Advocates, and a notice of

change was filed by M/s Mwangi Mukira & Company Advocates. Later a consent was entered into between M/s Raydon Mwangi & Company Advocates and M/s Mirugi Kariuki & Company Advocates, allowing M/s Raydon Mwangi & Company, to take over the matter from M/s Mirugi Kariuki & Company, which was pointed out to be irregular. That may be so, but this irregularity does not cause anyone any prejudice. In any event, this is a matter that counsel for the plaintiff ought to have pointed out early so that the irregularity may be rectified. But since there is no prejudice to the other party, this is an irregularity that is curable under Article 159 of the Constitution. Secondly, it was argued that the power of attorney held by DW-1 is irregular for reason that stamp duty was not paid on it; that it lacks details of the property in respect of which it relates; that no registration fees was paid on it; that the PIN and passport size photos of the donor and donee are not shown. The power of attorney in point was issued to DW-1 on 10 April 2019, way after this case had been filed. I think it was only for purposes of having DW-1 testify and act generally for the defendant, for it was said that the defendant is unwell. It is difficult for me to know whether stamp duty was paid or not, or whether registration fees was paid, for what was produced was not the receipts but the power of attorney. I guess if the plaintiff wished to have these other documents, he could have filed a notice to produce. On my part, I do see evidence of registration, in a signature and a date of 21 May 2019, and a note of Kshs. 500/= as registration fees. I really do not see anything that would make me believe that the power of attorney is improper. There was also argument that DW-1 could not testify on matters known to the defendant, which position I have no problem with, but I do not agree with the argument that DW-1 could not appear to testify on behalf of the defendant; he could on matters of his own knowledge and on behalf of the defendant, since he holds his power of attorney. I of course warn myself that the witness statement that DW-1 produced was a statement of the defendant for which the defendant was never cross-examined on. Apart from that, I really see no issue on the power of attorney.

13. Back to the main issues in the case, the case of the plaintiff is that she is the registered owner of the suit land and therefore the defendant has no right to claim it. The defendant on the other hand has asserted that the plaintiff fraudulently registered herself as proprietor of the suit land after abusing the power of attorney that was donated to her.

14. The starting point in a dispute such as this is to appreciate that the law presumes that the title holder is the rightful proprietor of the land. The operative law is the Land Registration Act, Act No. 3 of 2012, which at Section 26 provides as follows :-

*S. 26 Certificate of title to be held as conclusive evidence of proprietorship*

*(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.*

*(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

15. From the above, it will be noted that the law is fairly protective of title. Once a person has a certificate of title, he/she is considered to be the absolute and indefeasible owner, and such title is only subject to challenge on the grounds of fraud or misrepresentation for which the title holder must be proved to be a party, or where the title of the title holder was procured illegally, unprocedurally or through a corrupt scheme. In our case, the plaintiff already has a title and thus the law, prima facie, regards her as having a good title. It follows therefore, that the burden of proving that the title of the plaintiff is a bad title that ought to be cancelled is upon the defendant, who is claiming that the title was procured through fraud. Apart from this, it should be recalled that the defendant had a case, Nakuru HCCC No. 189 of 2002, where he had sued the defendant for the same land. That case was dismissed for want of prosecution on 26 March 2009. At the time of dismissal, the pre-2010 Civil Procedure Rules applied, and for our purposes Order XVI was operative on the dismissal of suits for want of prosecution. I am not aware of a provision that allowed the plaintiff leeway to file another suit save where the dismissal was under Order XVI Rule 6, which was drawn as follows :-

*Rule 6 – In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed; and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit.*

16. The dismissal of the defendant's suit was based on Order XVI Rule 5, and not rule 6, and I do not think that the plaintiff could file a similar suit through the counterclaim herein. But assuming that the plaintiff could file a similar suit to that which was dismissed through the counterclaim herein, the counterclaim would be subject to the law on limitation. Section 7 of the Limitation of Actions Act, Cap 22, Laws of Kenya, provides for a limitation period of 12 years for actions to recover land. The said law is drawn as follows :-

*7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.*

17. The plaintiff acquired her title on 18 February 1992. The counterclaim herein was filed in 11 April 2013, which is over 21 years to the date that the plaintiff acquired title. It is apparent to me that the counterclaim of the defendant is thus time barred.

18. My view of the matter therefore is that this court cannot entertain the counterclaim of the defendant, and if it cannot, then there are no pleadings before me that can support the impeachment of the title of the plaintiff. On the ground of limitation, the counterclaim will automatically fail.

19. With the failure of the counterclaim, I have no basis upon which to disallow the case of the plaintiff. She is the registered proprietor of

the suit land and by virtue of that registration, she is entitled to all rights and privileges of such proprietorship. This is indeed enshrined in law in Section 24 of the Land Registration Act, which provides as follows :-

*Section 24 – Interest conferred by registration*

*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; and*

*(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.*

20. The plaintiff, being the registered proprietor, is thus vested with the rights of ownership of the land and these rights include the right of ingress and egress, and the right of exclusive use and possession of the suit land. The plaintiff is entitled to enjoy these rights without being threatened by the defendant and without her occupation being affected by the defendant chasing her away. The plaintiff is thus justified in asking that the defendant and/or any person deriving their right of occupation from the defendant, be ejected and to be permanently restrained from the suit land.

21. I thus allow the plaintiff's case and dismiss the counterclaim of the defendant and make the following final orders :-

**(i) That as between the plaintiff and the defendant, it is hereby declared that it is the plaintiff who is entitled to proprietorship of the land parcel Kiambogo/Miroreni Block 1/199.**

**(ii) That the defendant is hereby given 14 days from this judgment to remove himself, and/or any other person that he may have placed on the land parcel Kiambogo/Miroreni Block 1/199, and in default the defendant and/or such person/s be forcibly evicted and vacant possession be given to the plaintiff.**

**(iii) That upon the defendant and/or his servants/agents being removed from the land parcel Kiambogo/Miroreni Block 1/199, such person/s are permanently restrained from entering, being upon, using, threatening the plaintiff, or in any other way disturb the plaintiff's quiet possession of the said land.**

**(iv) That the plaintiff shall have the costs of both the main suit and of the counterclaim.**

22. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 31<sup>st</sup> day of July 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. Magata holding brief for Mr. Omae for the plaintiff.

Mr. Mureithi holding brief for Mr. Mwangi for the defendant.

Court Assistants- Nelima Janepher/Patrick Kemboi.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**