



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 99 OF 2017**

**CHARITY WAKAGUYU KANGOTE.....PLAINTIFF**

**VERSUS**

**GRACE MUTHONI GATUNDA.....1<sup>ST</sup> DEFENDANT**

**GERALD MUNENE MUGO.....2<sup>ND</sup> DEFENDANT**

**ANN NYAWIRA MUNENE.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

In a plaint dated 22<sup>nd</sup> June 2017 and filed the same date, the plaintiff sought the following orders:

- 1. A declaration that land parcel No. INOI/KERUGOYA/77 belongs to the Estate of Kangote Gatunda and the same be registered in the names of Charity Wakaguyu Kangote as the administrator of the said Estate.***
- 2. The Registrar Kirinyaga District Land Registry do rectify the register with regard to the property known as INOI/KERUGOYA/77 and the registration of Gerald Munene Mugo and Ann Nyawira Munene be accordingly cancelled.***
- 3. Costs of this suit and interest thereon.***

The suit is accompanied by a verifying affidavit, plaintiff's list of witnesses and list of documents. On 24<sup>th</sup> August 2017, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a joint statement of defence and counter-claim. On 25<sup>th</sup> June 2019, the defendants filed a Notice of Preliminary Objection and a list of documents.

**PLAINTIFF'S CASE**

The plaintiff testified and stated that she has sued the defendants because they took away their family land after her husband passed away. She stated that the defendants also took away their properties such as cows and land. She stated that her late husband Kangote Gatunda was the registered proprietor of land parcel No. INOI/KERUGOYA/77 measuring approximately 1.46 Ha. She further stated that they were blessed with five children namely Muthee Gatunda, Waguthii Wambura, Njeri Kangote, Kangangi Kangote (deceased) and Wanjovi Kangote (deceased). She said that she does not live in the suit property. She was evicted from the suit property and her house demolished. She lives in Kiangai in a rented house. Her husband died about 50 years ago. Gatunda Gachau is the brother of Gatunda. She stated that there was an appeal in Embu between Gatunda and the clan. She said that the defendants are related to her and that the person who lives in the suit property is Weka Njagi.

The plaintiff said that after her husband passed on, they went to the headman, the Chief and the Court who agreed that she was going to inherit the land in question. She stated that she was chased away from the suit land five years ago and her house demolished.

PW2 was Samuel Mukingo Michingu who testified on oath and stated that he knows Charity Wakaguyu Kangote and her late husband Kangote Gatunda. He said that the two lived as husband and wife until the demise of Kangote Gatunda. Upon his demise, the plaintiff faced a hostile relationship from Gatunda Gachau who wanted to disinherit Charity Wakaguyu Kangote from the Estate of her deceased husband. He stated that Charity Wakaguyu Kangote has been in the corridors of justice for long but she has not been able to succeed. He

said that in the year 2004, Charity Wakaguyu Kangote and her children were evicted from their land and have since been living under the mercies of well wishers.

PW3 was Richard Cema Kamica who stated that the plaintiff and her husband, the late Kangote Gatunda got married under Kikuyu ceremony law whereby a goat was slaughtered. The two were blessed with children and they lived in Kiaritha until they were chased away. The land is now being occupied by Gerald Weka.

PW4 was Nancy Wanjiku Kabui. She stated that she is a Clan Elder of Unjiru wa Mbari ya Mutuamba where the plaintiff is a member. She said that she has known the plaintiff since she got married to Kangote Gatunda. She said that the late Kangote Gatunda performed the normal customary marriage ritual ceremonies and lived as husband and wife until the demise of Kangote Gatunda in 2004 when she was chased away from the suit land with her children.

PW5 was Jeniffer Mabuti Ndanga who also testified on oath and stated that she knows the plaintiff as the wife of Kangote Gatunda (deceased). She stated that the plaintiff was cultivating the suit land before she was chased away by Gatunda Gachau. She stated that dowry was paid by Kangote Gatunda.

#### DEFENDANTS CASE

The first defence witness was Gerald Munene Mugo who is also the 2<sup>nd</sup> defendant in this case. He stated that he bought the suit land from one Grace Gathoni Gatunda. He was transferred the land and a title issued to him. The land is registered jointly with Anne Nyawira Munene who is the wife. Before they bought the land, he did due diligence by conducting a search. He produced the green card showing the history of the suit property from 29/9/1958 when the land was registered in the name of Kangote Gatunda. On 16<sup>th</sup> May 1970, a title deed was issued. On 5<sup>th</sup> December 1978 a caution was registered in favour of Wakaguyu Kangote. On 12<sup>th</sup> August 1980, Gatunda Gachau was registered as owner of the suit land. On 14<sup>th</sup> August 1980, land title was issued. On 30<sup>th</sup> October 1992, the caution was removed by the Court. On 30<sup>th</sup> October 1992, Grace Muthoni Gatunda was registered as the new proprietor. On 18<sup>th</sup> May 1993, title was issued. On 16<sup>th</sup> January 1999, a restriction was placed on the suit land through a Court order. On 25<sup>th</sup> July 2000, the restriction was removed by the Court. On 25<sup>th</sup> July 2000, the land was registered in favour of Gerald Munene Mugo and Anne Nyawira Munene. On 25<sup>th</sup> July 2000, a title deed was issued. On 11<sup>th</sup> August 2000, a caution was registered through a Court order in Misc. Civil Application No. 150 of 2000 (Nyeri) which is still pending. That application is for revocation of a grant.

#### ISSUES FOR DETERMINATION

- (1) Whether the plaintiff's suit is res-judicata?***
- (2) Whether land parcel No. INOI/KERUGOYA/77 was fraudulently acquired by the 1<sup>st</sup> defendant and then transferred to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants?***
- (3) Who was the first registered owner of the suit property parcel No. INOI/KERUGOYA/77?***
- (4) Whether the plaintiff should be granted the prayers sought in the plaint?***
- (5) Who shall bear the costs of this suit?***

#### LEGAL ANALYSIS

The plaintiff Charity Wakaguyu Kangote has instituted this suit for a declaration that land parcel No. INOI/KERUGOYA/77 belongs to the Estate of Kangote Gatunda and that the same be registered in her name being the administrator of his estate. From her testimony, the plaintiff stated that the original registered owner of the suit property Kangote Gatunda (deceased) was her husband and that they were blessed with five (5) children. Her testimony was supported by the four witnesses she called to testify in her favour. The documents contained in the defendant's list of documents include a judgment in the District Magistrate's Court Class III Succession Cause No. 18 of 1979 (Kerugoya), a judgment in Civil Appeal Case No. 4 of 1983 in the Resident Magistrate's Court at Nyeri and a ruling in Civil Appeal No. 6 of 1992 in the High Court of Kenya (Nyeri). The claimant in Succession Cause No. 18 of 1979 was one Gatunda Gachau and the Respondent was Kangote Gatunda (deceased) while the objector was Wakaguyu Kangote who is also the applicant in the present case. The claimant was contesting the marriage between Kangote Gatunda (deceased) and Wakaguyu Kangote on grounds that the objector was married by one Mucheru Gatege and not Kangote Gatunda (deceased). After hearing the application, the learned District Magistrate Hon. P.K. Kariuki (as he then was) held that there was no customary law rites that had been performed and that the objector had no right of inheritance over the Estate of Kangote Gatunda. The trial Court went ahead and awarded a certificate of succession to the claimant Gatunda Gachau who was the brother to Kangote Gatunda (deceased). The objector was dissatisfied with the judgment of the trial Court and appealed to the Resident Magistrate (Nyeri) vide Civil Appeal No. 4 of 1983. Upon hearing the parties and their submissions, Hon. L.W. Gitari delivered her ruling on 12<sup>th</sup> August 1991 dismissing the appeal with costs. The plaintiff later filed another case in Nyeri being Misc. Application No. 150 of 2000 (Nyeri) between her and Grace Muthoni Gatunda under certificate of urgency. She also filed an application for injunction restraining her from interfering with dealing in and/or in any way disturbing her from using the suit property L.R. No. INOI/KERUGOYA/77 until the hearing and determination of that application. The trial Judge Hon. Mr. Justice Tuiyot (as he then was) on 9<sup>th</sup> August 2001 granted temporary orders pending the inter-partes hearing. The plaintiff had brought that application under *Order XXXIX Rule 1 & 2 CPR, Rule 72 of the Probate and Administration Rules*. The applicant/plaintiff was seeking the revocation of the grant of letters of administration issued to Grace Muthoni Gatunda on 21<sup>st</sup> August 2000. That application is still pending.

The defendant has stated that this suit is res-judicata as the issues being raised in the present suit has been raised and determined by a Court of competent jurisdiction in previous cases between the same parties or parties litigating under them. It is not in dispute that a succession cause involving the subject matter of this suit had been filed and determined in Succession Cause No. 18 of 1979. The dispute went to appeal before the Resident Magistrates Court No. 4 of 1983 (Nyeri) which upheld the decision by the District Magistrate III. The plaintiff later filed an application before the High Court for revocation of the grant issued vide High Court Misc. Application No. 150 of 2000 (Nyeri). That application is still pending. The plaintiff was even granted temporary injunction orders in that case in Nyeri. The present suit by the plaintiff in my view is an attempt to re-litigate over the very same issues that were determined in Succession Cause No. 18 of 1979 and the same issues she moved the High Court for revocation in High Court Misc. Application No. 150 of 2000. I agree with counsel for the defendant that the plaintiff's suit is res-judicata.

Consequently, this suit is hereby dismissed. On the issue of costs, I note that the plaintiff had been granted leave to file this suit as a pauper. As such, I order each party to bear her own costs of this suit. It is so ordered.

***READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 25TH DAY OF OCTOBER, 2019.***

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**E.C. CHERONO**

**ELC JUDGE**

**25<sup>TH</sup> OCTOBER, 2019**

*In the presence of:*

- 1. Charity Wakaguyu Kangote – Plaintiff present*
- 2. Mr. Ombachi holding brief for M/S Mungai for Defendant*
- 3. Njeru – Court clerk*