



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 111 OF 2018**

**MICHEAL MUGO.....PLAINTIFF**

**VERSUS**

**WANGUI MWANGI KAMAU.....DEFENDANT**

**JUDGMENT**

By a **Plaint** dated **9<sup>th</sup> April 2018**, the Plaintiff sought for the following orders against the Defendant:-

- a) A declaration that the Plaintiff is the rightful owner of the property known as Ruiru/ Mugutha/ Block 1/ 4927***
- b) An order that the Defendant vacates the property known as Ruiru/ Mugutha/ Block /4927, forthwith or be forcefully evicted therefrom.***
- c) A permanent Injunction to restrain the Defendant by herself, her servants or agents or otherwise from remaining on or continuing in occupation or entering the Plaintiff's property known as Ruiru/Mugutha/Block 1 /4727.***

In her statement of claim, the Plaintiff averred that she is the beneficial owner of the suit property having inherited it from the late **Wanjiku Kamau** through **Succession Cause No.169 of 2016**. It was her contention that the deceased was the owner of the property upon purchasing it through membership in **Nyakinyua Investment**. She further averred that the Defendant has entered into occupation of the said suit property illegally.

Though the Defendant was personally served with the Summons and the **Plaint**, she did not enter appearance nor file her defence and thus did not participate in the proceedings. The matter proceed for formal proof hearing wherein the Plaintiff testified and closed his case

**PLAINTIFF'S CASE**

**PW1 Micheal Mugo** adopted his witness statement dated **9<sup>th</sup> April 2018** and produced his list of documents dated **20<sup>th</sup> September 2018** as exhibits in Court. He urged the Court to allow his Claim as per the **Plaint**.

The Court thereafter directed the Plaintiff to file brief *written submissions* to support his claim which he filed on **16<sup>th</sup> July 2019** This Court has now carefully read and considered the pleadings and the exhibits produced. The Court has also considered the written submissions, the cited authorities and the relevant provisions of law and makes the following rendition:-

The Defendant failed to enter appearance and thereby defend the suit. The fact that the suit has not been opposed means that the Plaintiff's evidence remained unchallenged and uncontroverted. However the Plaintiff is still required to prove her case on the required standard of balance of probability. See the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR**, where the Court cited the case of **Karuru Munyororo.....Vs....Joseph Nduhia Murage & Another, Nyeri HCCC No.95 of 1988**, where it was held that:-

***“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the **Plaint** and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”***

The fact that the Plaintiff's evidence is not challenged does not mean that the Court will not interrogate it. The Court still has an obligation to interrogate the tendered evidence and determine whether the same is merited to enable the Court come up with a logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff had a duty to discharge the burden of proof. See the case of **Kenya Power &**

Lighting Company Limited...Vs...Nathan Karanja Gachoka & Another [2016] eKLR, where the Court stated:-

***“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason***

***only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”***

Further in the case of Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR, the Court held that:-

***“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”***

Having considered the available evidence, the court finds the issue for determination is **whether the Plaintiff is entitled to the orders sought.**

The Plaintiff has averred that he is the rightful owner of the suit property having inherited it from the Late **Wanjiku Kamau**, who was the owner of the suit property. This Court has seen a letter from **Nyakinyua Investment limited** dated **23<sup>rd</sup> October 2015**, which confirmed that the **Late Wanjiku Kamau**, was indeed the owner of the suit property. The Court has further seen grant of letter of Administration which in the absence of any evidence to the contrary, confirms that indeed the said **Wanjiku Kamau** is deceased. Further this Court has seen a Certificate of Confirmation of Grant and under the schedule for distribution of the assets, the Plaintiff has been listed as the sole heir of the suit property- **Ruiru/Mugutha Block 1/4927** – whole share.

With the above evidence, this Court has no doubt that indeed the suit property belongs to the Plaintiff and he is therefore the rightful owner of the same. The Plaintiff has further claimed that the Defendant has wrongfully taken possession and erected structures on the said parcel of land. Again without any evidence to controvert the Plaintiff’s evidence, the Court has no choice but to find that this is the true position. See **Order 2 Rule 11(1)** of the **Civil Procedure Rules 2010**, which provides:-

***“Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposing party unless it is traversed by that party in his pleading.....”***

The Defendant herein did not traverse the said allegations by way of a defence.

The Plaintiff being the owner of the suit land is entitled to all the interest and privileges that pertain to it. See **Section 24(a)** of the **Land Registration Act** which provides:-

**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”***

Further the said right can only be taken away as provided by the relevant laws. **Section 25(1)** of the same Act provides:

***“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever”.***

Therefore by entering into the Plaintiff’s parcel of land without authority or his permission, the Defendant has committed an illegality. Consequently, the Court finds that the Plaintiff has proved his claim on a balance of probability and is therefore entitled to the orders of permanent injunction and that the Defendant should give Plaintiff vacant possession of the suit property by vacating the said land forthwith.

Having now carefully read and considered the pleadings by the Plaintiff, the witness statement, the evidence adduced and the written submissions, the Court finds that the Plaintiff’s claim is merited and consequently enters Judgment for the Plaintiff against the Defendant as prayed in the Plaintiff in terms of prayers no.(a),(b),(c) and (d).

It is so ordered.

**Dated, Signed and Delivered at Thika this 29<sup>th</sup> day of November 2019.**

**L. GACHERU**

**JUDGE**

**29/11/2019**

In the presence of

Mr. Kibathi holding brief for Mr. Nganga for Plaintiff

No appearance for Defendant

Lucy - Court Assistant.

**Court** – Judgment delivered in open court in the presence of the above advocate and absence of the Defendant.

**L. GACHERU**

**JUDGE**

**29/11/2019**