



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CAUSE 38 OF 2017

(FORMERLY KERUGOYA ELC NO.129 OF 2015)

PAULINE GATHONI WABI.....PLAINTIFF

VERSUS

NGOIRI MUCHANGIRU.....DEFENDANT

JUDGMENT

By a Plaint dated **16th October 2015**, the Plaintiff herein filed this Suit against the Defendant for orders that;

- a) A Declaration be made that the Defendant whether by herself, children, Agents, servants and/ or employees continued stay on the said land L.R No. Ngenda/Mangu/951 without permission of the Plaintiff is unlawful.***
- b) That the Defendant, her children, agents servants and/or employee be evicted from the suit premises being L.R No. Ngenda/Mangu/951 forthwith.***
- c) Costs of thus suit and interest thereof.***
- d) Any other relief that this Honourable Court may deem fit.***

In her statement of Claim, the Plaintiff averred that she is the registered proprietor of the suit property in which she stays with her family. It was her contention that she acquired the suit property through **Succession Cause No.14 of 1999**, in the matter of the Estate of the Late **Wabi Muchangiru**, her late husband and she was the registered as the sole proprietor on **2nd March 2005**.

She averred that the Defendant and her husband were invited by her late husband to live in the suit premises temporary and were supposed to vacate the suit premises as soon as their family dispute with their late father, the father (uncle) to the Plaintiff was over. However during the hearing of the Succession Cause of her husband's Estate the Plaintiff's husband and his late brother **Kairu Muchangiru** filed objection proceedings to the Succession Cause claiming the land and objecting to the issuance of the grant but the Application was dismissed and they were advised to file the Objection proceedings once the grant had been issued. However they failed to do so and the grant was confirmed without any objection. She further averred that the Defendant has refused to vacate the suit property despite repeated demands and has laid false claims on the land with filing a suit that was dismissed.

The suit is contested and the Defendant filed a Defence and Counter claim and in her Counter claim she sought for orders against the Plaintiff for;

- a) The Plaintiffs suit be dismissed with costs.***
- b) An order for declaration that land parcel number Ngenda/Mangu/951, belongs to the plaintiff the defendant and the estate of Johanna kariuki Muchangiru (now deceased).***
- c) in the alternative declaration that the defendant had adversely acquired a third share of land parcel number Ngenda /Mangu/951 having remained in occupation and lived uninterruptedly on the said parcel for a period spanning over twelve years.***
- d) A further declaration that the plaintiff herein is illegally and unlawfully in possession of title to land parcel number Ngenda/Mangu/951 and an order for cancellation of the said title and reversion of the same into the joint names of the plaintiff, defendant and the estate of Kariuki Muchangiru (Deceased).***

e) Costs of the suit.

In her statement of Defence, the Defendant denied all the allegations made in the Plaintiff's suit. Further in her Counter claim she reiterated the contents of her Defence and averred that the suit property initially belonged to one **Muchangiru Munene (deceased)**, who subsequently passed the suit land to **Wabi Muchangiru(now deceased)** to hold in trust for himself and his other siblings **Kairu Muchangiru** and **Kariuki Muchangiru**, both deceased since the two were working away from home at the time of demarcation. She contended that soon thereafter the two siblings settled in the suit land which were mutually agreed to share equally and continued residing and tilling the said portion. That the suit property belongs to the Plaintiffs, the Defendants and the estate of **Johana Kariuki Muchangiru (Deceased)**.

The Plaintiff filed a Reply to Defence and a defence to Counter claim and denied all the allegations in the Defence and reiterated the contents of her Plaintiff. She averred that the issue of ownership had been confirmed in **Succession Cause No.14 of 1999**, and that the issue of adverse

acquisition does not apply in this case as the demand for the defendant and her children to vacate the suit property had been made severally and that the said claim cannot arise when there have been Court proceedings

ongoing between the parties including **Gatundu SRM LDT No. 21 of 2007** between herself and the Defendant wherein the Application was dismissed for want of prosecution .

She further averred that the Defendant has not informed the Court that she is the widow of to **Muchangiru Kariuki(deceased)** son of **Kariuki Muchangiru** from whom she claims the ownership and the claim is too remote as she does not have Letters of Administration of the late **Kariuki Muchangiru**. It was her contention that the late **Kariuki Muchangiru** left his son in the ancestral land **L.R Ngenda/Karuri/20** which was registered in the name of **Muchangiru Munene(Deceased)**, but the Defendant insisted to staying on the suit land which belonged to her late husband . She therefore averred that Defendant's Counter claim is baseless and she is not entitled to the orders sought.

The matter proceeded for viva voce evidence and the Defendant despite being served did not appear on the hearing dated and the Plaintiff herein called one witness and closed her case. The Defendant did not call any witness.

PLAINTIFF'S CASE

PW1 Pauline Gathoni Wabi adopted her witness statement dated **22nd September 2015**, and produced her list of documents as Exhibit 1 and the Copy of the Green Card as exhibit 2 and a further list of document dated **5th April 2016**. She testified that the Defendant who had filed a

Counter claim and wanted to be registered as the owner of the suit property. Further that she had sued her father and that she had lived on the suit land but they have had cases in Court. It was her testimony that she requested him to move out but he declined. That the Defendant was married to her nephew as his father is a stepbrother to her husband. She further testified that the Defendant has no title deed to the suit property and does not have any letters of Administration.

The Plaintiff filed written submissions which this Court has now carefully read and considered and renders itself as follows.

Though the Defendant filed Defence and Counter claim, she did not appear in Court to defend the claim nor prosecute her counter claim and therefore no single witness as called on behalf of the Defendant. The Plaintiffs evidence remaining uncontroverted and unchallenged as the Defendenat did not come to Court to prove her claim. See the case of **North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi [2019] eKLR** where the Court held that;

"It is settled law in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.

In the case of **Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002**, Lesiit, J. citing the case of **Autar Singh Bahra and Another vs. Raju Govindji, HCCC No.548 of 1998** appreciated that:

"Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

Further the Court cited the case of the case of **Karuru Munyororo ...Vs... Joseph Ndumia 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 defendants and or their counsel to cross-examine her on the 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 Plaintiff testified that she is the owner of the suit property and to this effect she produced a title deed that showed that she is the registered owner of the suit property. Though the Defendant had claimed that she held the suit property in trust for the other members of the

family, this Court has already held and found that the evidence of the Plaintiff remains uncontroverted and Unchallenged as the Defendant failed to appear in court and give evidence. Therefore the court finds that the title held by the Plaintiff is absolute and indefeasible as per section 26 of the *Land registration Act* which provides;

“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.

Further the plaintiff being the registered owner of the suit property bears all the rights and privileges that come with it and therefore deserves the protection of this Court. 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”

The Plaintiff has sought for the Court’s declaration that the Defendant’s continued stay on the suit property is unlawful. As the Court has already held that the Plaintiff is the duly registered owner of the suit property and she owns all the rights and privileges appertaining thereto, then once she demands that the Defendant vacates the suit premises, it became incumbent upon the Defendant to vacate and her continued stay on the suit property on the suit land. Her rights cannot be taken away without following the right procedure or by lawful order of the court. See **Section 25(1)** of the **Land Registration Act**, which 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”

The above provision of law therefore confers the interest to the registered proprietor of the land and the Plaintiff being the registered owner of the sit land has all the rights and privileges that appertain to it and the use of the land by the Defendant contrary to the wishes of the Plaintiff is therefore unlawful and this Court finds that the prayer by the Plaintiff is merited. See the case of **Kiplangat Shelisheli Mutarakwa ...Vs... Joseph Rotich Kones [2018] eKLR** where the Court held that;

“Nothing has been presented by the defendant to prove that the plaintiff's title is unlawful or that it was fraudulently acquired. Thus, from the evidence that has been presented before me, I

have no difficulty in holding that the plaintiff's title is a good title which deserves protection. As title holder, it is only the plaintiff who is vested with proprietary rights over the suit property.

It is therefore only the plaintiff who is vested with proprietary rights over the suit land and not the defendant. It is a violation of the plaintiff's proprietary rights for the defendant to purport to use the land either for his benefit or for the benefit of others or purport to attempt to use it as property belonging to the Government. The defendant has no right to be on the property, or to lease it out, or to use it in any way.”

Therefore the court finds that the Defendant has no right over the suit property or any reason to be on it. Defendant cannot occupy the land contrary to the wishes of the Plaintiff and as such she is unlawfully in occupation and the prayer to have the Defendant evicted is merited. The Defendant failed to prosecute her Counterclaim and therefore the same is not proved at all.

Having now carefully read and considered the pleadings by the parties, evidence adduced in court and the written submissions, the Court finds that the Defendant has failed to prove her **Counter claim** on the balance of probability and therefore the same is dismissed with costs to the Plaintiff. However the Plaintiff has proved her case on the required standard of balance of probability and the Court allows the Plaintiffs suit entirely in terms of prayers No.(a), (b) and (c).

It is so ordered.

Dated, Signed and Delivered at Thika this 15th day of November, 2019.

L. GACHERU

JUDGE

15/11/2019

In the presence of

Mr. Kiwinda holding brief for Mr. Magani for Plaintiff

No appearance for Defendant

Jackline - Court Assistant

L. GACHERU

JUDGE

15/11/2019