



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC No. 39 OF 2018

FORMERLY NYERI HIGH COURT CIVIL SUIT No. 257 OF 2014)

MONICA NYAWRIA WAHOME.....PLAINTIFF

VERSUS

VERONICA WAMBUI.....RESPONDENT

JUDGEMENT

1. Before me for determination is a matter that was filed in the Nyeri High Court on the 19th October 2000 vide a plaint dated the 29th May 2000 wherein the Plaintiff herein sought for orders that the Defendant and her agents and/or servants were trespassers to parcel of land No. LR No. Nyandarua/Kianjogu/Block 1 (Muririchua)/ 186, 168, 133 and 116 and therefore they should be evicted from thereon. The Plaintiff also sought for Mesne profit for the use of the suit land by the Defendant and for costs of the suit.
2. The suit was defended by the Defendant who filed her defence on the 7th May 2001 vide her defence statement dated the 4th May 2001 wherein she claimed that the Plaintiff is registered in the suit land as a trustee for her and her children and she has no interest at all in the suit land as she has her land at Othaya where the deceased husband settled higher. That in the alternative she had acquired interest in the suit land by way of adverse possession having continuously resided on the same for period of over 12 years since 1979 and therefore the Plaintiff's title to the suit land had become extinguished by affluxion of time.
3. The matter proceeded for hearing on the 11th February 2014 in the absence of the Defendant wherein Judgment was delivered on the 4th July 2014, following which the Defendant vide an application dated the 21st July 2014, successfully had the said Judgment and all the consequential orders set aside vide a ruling delivered on the 10th August 2016.
4. The Plaintiff's case then started de novo on the 9th April 2019 wherein the Plaintiff's legal representative, Ibrahim Wambugu Wahome, (the Plaintiff having passed away in the year 2005) testified to the effect that the Plaintiff, Monica Nyawira Wahome was his mother, that after her death, he and his brother Isaac Thuku Wahome had been issued with Letters of Administration and a certificate of confirmation of Grant dated the 23rd June 2010, in Succession Cause No. 402 of 2007.
5. That the dispute in this case was in regard to parcels of land No. Ndaragwa/Kianjogu Block 1(Muririchua)/ 186, 168, 133 and 116 land which belonged to his mother, who had inherited the same from their deceased father David Wahome Ndabi vide a Nyeri High Court Succession Cause No. PMCC No. 60 of 1992 wherein she had then been issued with a Certificate of Grant on the 10th December 1996.
6. That after the Grant had been issued to their mother, she had gone on the ground where she had found the Defendant Veronica Wambui thereon. That his mother had then sued the Defendant seeking that she be evicted from the said suit land.
7. That the Defendant used to work as their house help in Nyeri and Nyahururu in the farm at Ndaragwa. That he had met her when he was 3 years old and that she had 3 children at the time, one who was called Peter Nderitu, the other John Mwangi and the 3rd one was Njeri Teresia and that sometimes they would visit the Defendant's husband whom they knew as "baba Peter".
8. He testified that his parents got married in the year 1976 in the church although they had started co-habiting earlier because the oldest sibling was born in 1947, the last born 1972, while he was born in 1968. That the marriage was solemnized in PCEA Munyange Church in Nyeri on the 23rd October 1976 and a certificate, Pf exh 1 bearing serial No. 331970 issued.
9. The witness testified that at that time, he was about 8 years old and their father had no other wife. The Defendant was working at their home as a nanny and farm hand and had raised no objection to the wedding. That his father did not live with the Defendant as husband and wife and further that he was not aware of any divorce proceedings between his parents even after their death.

10. The witness testified that he knew one Jacob Mburu Magu as a person from their village, Munyange in Nyeri – Othaya. That Jacob Mburu was a person who was always available when one needed something to be done. That he had accompanied him to Mathenge & Muchemi Advocate to sign some court documents in the Succession Cause No. 60/1992 at Nyeri where he had signed the guarantee by personal surety and petition for Letters of Administration intestate, documents which were witnessed by Jacob Mburu and Veronica Wambui and which were produced as Pf exh 2 and 3 respectively. That the Succession Causes were not fraudulent as Jacob was one of the persons who had participated in their execution since he used to be a leader of PCEA Munyange Church.

11. He testified that his father had only one sister called Abigail Nyokabi and one brother called Ithagi Thuku. That his father's father had one wife called Hannah Wairimu. That Jacob was not one of the immediate family members and that he did not know John Njeru Gituku.

12. He also confirmed that he had the original title deeds for land parcel Numbers.;

i. Nyandarua/Kianjogu Block 1(Muririchua)/116 which was registered in the name of Monica Wahome on the 2nd February 1998, produced as Pf Exhibit 4 –

ii. Nyandarua/Kianjogu Block 1(Muririchua)/133 which was registered in the name of Monica Wahome on 2nd February 1998 produced as Pf Exhibit 5.

iii. Nyandarua/Kianjogu Block 1(Muririchua)/186 which was registered in the name of Monica Wahome on 2nd February 1998 produced as PFF Exhibit 6.

iv. Nyandarua/Kianjogu Block 1(Muririchua)/168, registered in the name of Monica on 2nd February 1998

13. That pursuant to the confirmation of Grant in Succession Cause No. 492/2007 the above parcels of land were distributed as per the schedule hence;

i. Nyandarua/Kianjogu Block 1(Muririchua)/116 -Pf exh No. 4 was given to Ibrahim Wambugu (himself), Isaac Wahome (his younger brother), Ann Wairimu (sister), Margaret Wanjiku (sister), Gladys Wanjiru (sister), Mary Wambui (sister) and Elizabeth Waihaki (sister).

ii. Nyandarua/Kianjogu Block 1(Muririchua)/133-Pf exh No. 5 was given to Ibrahim Wambugu (himself), Isaac Wahome (brother), Ann Wairimu (sister), Margaret (sister), Gladys (sister), Mary (sister)and Elizabeth (sister).

iii. That Nyandarua/Kianjogu Block 1(Muririchua)/186-Pf exh 6 was given to himself as the sole beneficiary.

iv. Nyandarua/Kianjogu Block 1(Muririchua)/168-Pf exh 7 was given to Isaac Wahome

14. That the Grant which had been issued on the 23rd June 2010, herein produced as Pf exh 8, had never been challenged although the Defendant was aware of the proceedings. That the Defendant and her 3 children were not beneficiaries to his mother's estate and that they should be evicted from these parcels of land which they occupy.

15. In cross examination the witness testified that his father had many farms wherein he had employed many workers the Defendant included. That the witness did not inquire of his father's relationship with the Defendant because he knew her as a worker. Further that he could not tell whether his father had any relationship with the Defendant but that if he had another family, he would have disclosed to him.

16. That in as far as he was concerned, nobody had filed any dispute regarding his father's estate and neither did he know of any application seeking revocation of the Grant by Shelmith Wagaki Wahome whom he neither knew nor had heard of.

17. That at the time of his father's death his mother used to live in Nyeri. In the early years, his parents resided on the suit land wherein his father used to visit other farms where he had residences. When his mother moved to Nyeri, she still used to visit the suit land regularly wherein he used to accompany her mother on her visits.

18. That is grandfather was a pure Maasai while his mother was a Kikuyu. That his father was a half-cast of a Maasai and Kikuyu and that he was not familiar with the customs of Kikuyu and Maasai. He testified that Polygamy was only allowed where there was no church wedding and that it was not true that his father was polygamous since he was a learned person.

19. He also confirmed that there was a time they had tried to settle the matter out of court, but the initiative had been abandoned when it had been discovered that the village elder Jacob Kaburu was not telling them the truth.

20. That they had discovered that the Defendant had been living in a different house on the suit land with her children, after his father's death. That there were many houses in the compound which houses had been constructed by Europeans.

21. In re-examination, the witness re-affirmed that there was no revocation of the Grant which was still valid. That as a family, they had wanted to appreciate the Defendant after having worked for them for many years, but the talks collapsed after they had found out that Jacob Kaburu was lying to them and secondly because the Defendant had wanted the whole property.

22. PW 2, Dan Gachau Wambugu testified that Monica Nyawira was his elder sister. That she was married to David Wahome Ndabi in the

PCEA Church in Mahiga Location in a ceremony where he and the Defendant attended. He also confirmed that indeed the Defendant had been employed as a house help by Monica. That he did not know if the Defendant had any children or whether she had been given land. That David Wahome's house was near his house and that he did not have another wife. He also confirmed that when the Defendant went to the farm, she already had children of her own although he did not know how many. The Plaintiff thus closed its case.

Defence case.

23. The Defendant herein testified as DW1 to the effect that she was a farmer who lived on Muririchua farm No. 133. That whereas David Wahome Ndabi was her husband, Monica Nyawira Wahome and Shelmith Wagaki were her co-wives. That she got married to David Wahome Ndabi in a traditional wedding in the year 1971 when she had had her own children.

24. That they did not stay together with the other wives. That she was the 3rd wife and had known about the other wives before she got married. That she had been taken to Muririchua in 1979 by her husband where she was to stay there permanently because the Plaintiff, Monica, lived in Nyeri. That they had been in the same area with Shelmith but everybody had their own piece of land.

25. That upon their husband's death, he had left her on the land wherein the Plaintiff's children had filed a Succession Cause behind her back. That she did not know if they were given Letters of Administration but that they had procured titles and taken all the deceased's properties.

26. That there had been a meeting held at Mr. Njiru Advocate's office in July 2013. Where she, alongside the Plaintiff's children were present. That the children had been given 6 (six) acres of land wherein she was to be given 20 (twenty) acres out of the whole parcel of the suit land which comprised 26 acres. She also confirmed that Jacob Kaburu was a brother to David Wahome and that he too had been in that meeting where he had agreed with the decision which had been made by David Wahome.

27. That on the 30th July 2013 there had been an agreement with advocates of both sides to go to the suit land where everybody had gone but the Plaintiff's children had refused to take up the 6 acres. That they had subsequently been issued with court orders to evict her vide Nyeri ELC No. 202 of 2000 whereon she had applied for a review of the judgment which application had been allowed and the case re-opened.

28. She testified that she sought for 20 acres because she had developed the land by planting trees and farming and further she had lived thereon for 40 years and had had raised her children on the land which they had grown to know as their home.

29. During her cross-examination, the Defendant testified that she had witnesses as well as documents to show that she had been married to David Wahome and denied that she had been an employee at David Wahome's home but conceded that initially she had worked there as a young girl before getting married to him in the year 1976.

30. She also confirmed to having attended the Plaintiff's wedding ceremony in 1976 at PCEA Munyaki, but that at that time she was already married and her husband David had told her not to object which orders she had obeyed.

31. That she had stayed on the suit land since 1979 but between the year 1964 and 1979 she had stayed with the Plaintiff and David in Nyeri where she still worked for David Wahome. That after the Plaintiff had taken out letters of Administration, she had been unable to access the Kenya Gazette wherein she had gone to the District Officer's office who cancelled the titles.

32. That vide a letter dated the 12th February 1998, she had placed a caution on the suit land. Later she also went to the court and revoked the Grant issued to the Plaintiff. (She was unable to produce the said order)

33. The Defendant further testified that she was claiming only suit land No. 133, land which was in Ndaragwa, and not the other 3 parcels of land. That Shelmith was staying in Oljo Orok but was now deceased.

34. DW2, Jacob Mburu, testified that Wahome who was his brother through the clan relationship had married the Defendant herein, Veronica Wambui. That Monica Nyawira was the elder wife of Wahome, Veronica was Wahome's second wife, while Wagaki was Wahome's 3rd wife whom he had inherited from his brother.

35. That having been close friends with Wahome, they had shared everything and that he had been present when Wahome had taken dowry to the Defendant's home. That both the Plaintiff and the Defendant knew each other as they were co-wives. That while the Plaintiff had been left on the land in Munyange, the Defendant had been brought to Ndaragwa, and the 3rd wife had been taken to Olkalou.

36. That he knew about the meeting that had taken place in Advocate Njiru's office in July 2013 because he had been a witness and Wahome's children, had been present in the absence of their mother the Plaintiff. That he had informed them how Wahome had asked that the land be subdivided. That when the parties went to Ndaragwa to be shown the piece of land, Wahome's children had visited a certain home after which they had emerged very furious with him and had wanted to assault him, refusing to believe what he had told them on the wishes of Wahome.

37. He confirmed knowing about the Succession Cause where the Plaintiff had been the administrator. That he had thought everyone would benefit because before David died, everybody had lived on their own piece of land and there had been no animosity.

38. In cross-examination, he confirmed that the Defendant and David started living together in the year 1973 but that she had gone to work at David's home in 1964. That although she had been an employee, later she had got married to Wahome in 1973 and although he had nothing to show that they got married, yet he knew that for a fact.

39. That although he had signed some papers in the Succession Cause, he did not inform the Defendant of the Succession Cause because there had been no objection and he thought the properties would be fairly distributed to everyone. He later informed the Defendant after 6 months after the confirmation of the Grant.

40. He also confirmed that at the meeting with the Advocate, it had been agreed upon that he shows both the parties children the boundaries of David's land which measured 13.6 hectares and which the David had informed him that it all belonged to the Defendant.

41. That he did not show anybody the boundaries as the Plaintiff's children became hostile wherein they had refused to be shown the boundaries. He also confirmed that at the time, the Defendant had been present but he had also not shown her the boundaries.

42. DW3 John Njeru Gituku, testified that he knew David Wahome as his brother in law since he had married his sister the Defendant through customary law on the 27th April 1983. That his family had demanded for dowry wherein he had listed the items so needed. That David was his good friend and therefore he was surprised when he heard that a Succession Cause had been filed by the Plaintiff without considering his sister.

43. In cross – examination, he confirmed that David had three wives but that at the time he recorded his statement, David had two wives by then, the 3rd wife having already passed away. That he was unaware of the church wedding of 1976 but confirmed that before the Defendant got married to David, she had not been married before and had only one child, the rest having been born later. He confirmed that he did not know how many children his sister got later and further that he did not know their names but that she had lived at Wahome's homestead although he did not know the land the Defendant was laying claim to.

44. The defence closed its case wherein parties filed their written submissions.

Plaintiff's submissions.

45. The Plaintiff's submissions were to the effect that following the death of the original Plaintiff, her sons, Ibrahim Wambugu Wahome and Isaac Thuku Wahome filed the Nairobi High Court Succession Cause No. 492 of 2007 where they were appointed as joint administrators wherein the Grant was confirmed on 23rd June 2010 pursuant to which they had filed an application dated 6th December 2011 to substitute the Plaintiff herein. The said application was unopposed and was subsequently allowed on 23rd June 2013.

46. After a summary of their case, the Plaintiff's submission was that the following issues were not in dispute;

i. That Monica Nyawira Wahome, the initial Plaintiff is the duly registered owner of all those parcels of land known as No. LR No. Nyandarua/Kianjogu/Block 1 (Muririchua)/ 186, 168, 133 and 116

ii. That the Defendant Veronica Wambui is occupying the suit premises.

47. That the only issue that now remained for determination is whether Veronica Wambui is a legal occupant of the suit property and more specifically LR No. Nyandarua/Kianjogu/Block 1 (Muririchua)/133 considering that she stated that she was not interested in the rest of the parcels in her testimony.

48. The Plaintiff framed the issues for determination as follows;

i. Whether the suit property is held in trust.

ii. Whether the Defendant is entitled to a claim of ownership by adverse possession as claimed.

iii. Whether the Defendant has been a valid claim to the suit property.

49. On the first issue for determination it was the Plaintiff's submission that parcels of land No. LR No. Nyandarua/Kianjogu/Block 1 (Muririchua)/ 186, 168, 133 and 116 were registered under the Registered Land Act (now repealed). That part VII of the Land Registration Act is substantially similar to the repealed Registered Land Act and which provides for transmission and trusts. That section 61 of the Land Registration Act expressly provides for the procedure of registration by transmission as proprietor in place of the deceased.

50. In compliance with the law, the Plaintiff had applied for Letters of Administration in Nyeri PMCC No. 60 of 1992 where she had subsequently received the confirmed Grant procedurally. The Defendant who claims to be the Plaintiff's co-wife did not raise any objection as is provided for in the Law of Succession and neither did she prove that she was David Wahome's wife as provided for under section 3(5) of the Act.

51. That at the hearing of the instant suit evidence was tendered in to the effect that a statutory marriage had been conducted between David and the Plaintiff on 23rd October 1976 under the African Christian Marriage and Divorce Act. By virtue of contracting a statutory marriage, David was incapable of contracting another legal marriage and the Defendant cannot therefore claim to have been his wife in this suit.

52. Further in her defence, the Defendant's witnesses contradicted themselves as to when the Defendant actually got married and there was no evidence led of the existence of any marriage between the Defendant and David, in fact there was an express admission that she had gone to David's house as a servant. Claims of marriage were therefore an afterthought.

53. That since the Defendant had pleaded fraud on the part of the Plaintiff in acquiring the suit parcels of land, it was her duty to lead evidence in support of such allegation as it was held in the findings in the case of **Marion Thirimu Gitagia & 2 Others vs Moses Karambo Njenga [2002] eKLR**. No such evidence was led.

54. That further although the Defendant in her case alleged that she was unaware of the succession cause until 1999, no steps were taken to have the Grant revoked after making her discovery. That notwithstanding the present court was not the proper forum to ventilate issues of succession that had already been canvassed in the proper forum.

55. That the claim of existence of a trust has been a subject of many court decisions wherein the Court of Appeal at Nairobi in **Maingi Mutisya Nzioka vs Mbuki Kisavi [2014] eKLR** cited the earlier holdings in **Muiruri vs Kimemia [2002] 2 KLR 677** where the court held that a party relying on the existence of a trust must prove its existence to evidence. The Defendant had failed to discharge the burden of proving the existence of any trust if at all.

56. On the a second issue of determination as to whether the Defendant is entitled to a claim of ownership by adverse possession the Plaintiff s are relied on the Court of Appeal case in **Kweyu Vs Omuto Civil Appeal No, 8 of 1990** to submit that the Defendant had not proved the ingredients necessary to prove adverse possession. That the suit premises were in possession of David Wahome Ndabi until his death in 1991 wherein after, the Plaintiff took out Letters of Administration and the Grant to that effect was confirmed on the 10th December 1996. The Plaintiff commenced legal proceedings against the Defendant within a period of four years and as such she was within the timeframe not contemplated by section 38 of the Limitation of Actions Act. Furthermore there was a clear-cut procedure under Order 37 Rule 7 of the Civil Procedure Rules for making an application for adverse possession under Section 38 of the Limitation of Actions Act. The Plaintiff herein had not invoked any legal action in this regard at any one given time.

57. On the third issue as to whether the Defendant had any claim to the suit property, the Plaintiff submitted that the Defendant had not laid any basis for her claim that she was entitled to No. LR No. Nyandarua/Kianjogu/Block 1 (Muririchua)/133. That the Plaintiff having been registered as proprietor to the parcels of land, the Defendant had no valid claim to the said land pursuant to the provisions of Section 24, 25 and 26 of the Land Registration Act provisions which conferred interest by registration to a proprietor of land and held the fact that the certificate of title should be held as conclusive evidence of proprietorship respectively. The Plaintiff relied on the decided case of **Margaret Njeri Wachira vs Eliud Waweru Njenga [2018] eKLR** to buttress their submission. That since the Plaintiff had been registered as proprietor of the suit properties through a valid transmission, then she ought to be held as the absolute proprietor. The Defendant was therefore a trespasser on the suit parcels of land and as such the orders sought by the Plaintiff in the plaint, ought to be granted as prayed.

Defendant's submission.

58. The Defendant in defending her case submitted her matters for determination as follows;

- i. Whether the evidence shows that the Defendant was legally married to the deceased in accordance with the Kikuyu customary law.
- ii. Whether the deceased cohabited with the Defendant and therefore there was a presumption of marriage.
- iii. Whether the Defendant became a dependent under the law of succession.
- iv. Whether the Defendant is entitled to the suit property.

59. On the first issue for determination the Defendant conceded that although she had been employed as a house help, she had subsequently been married to the deceased David Wahome, herein referred to as 'the deceased' for ease of reference, around the year 1976 where he had lived with her and her children as husband and wife.

60. That around 29th April 1983 in order to solemnize and formalize their marriage, the deceased had conducted a traditional marriage referred to in Kikuyu culture as 'ruracio' and 'Ngurario' wherein one Francis Njeru Gatweku had acknowledged receiving part of the dowry (ruracio) from the deceased, dowry which comprised of ksh 200/= in cash for the purpose of a she-goat and ewe (Known as Mwati and Harika in Kikuyu) as well as Ksh 1,050/= as an equivalent of two goats and one can of honey. That the ceremony was witnessed by DW 3, wherein the deceased appended his signature to the document evidencing payment of the critical Kikuyu customary law process. The Defendant relied on the decided case of **Re-Estate of James Mwangi Gakure (Deceased) [2019] eKLR**

61. On the second issue for determination as to whether the deceased cohabited with the Defendant and therefore a presumption of marriage, the Defendant submitted that from the evidence adduced in court, upon their marriage, the deceased had settled the Defendant in the suit property as his 3rd wife wherein the other two wives had been settled in different parcels of land owned by the deceased.

62. That the fact that the Defendant cohabited with the deceased was supported by the Defendant's witnesses who testified that the deceased used to visit the Defendant on his suit property as one of his wives.

63. It was further the Defendant's submission that the elders had also recognized the Defendant as the deceased's wife to the extent that in a meeting held by them to resolve the difference between the deceased's 2nd wife and the 3rd wife, the Defendant herein, they had pleaded with the deceased to allow the Defendant's co-wife back after she had left the following an altercation with the Defendant herein. Alongside this evidence it was also the Defendant's testimony that she had lived with the deceased from the year 1976 until his demise in 1991. Marriage by cohabitation was therefore established by the long period that the two had carried themselves as husband and wife to the whole world. That the conditions for the presumption of marriage were laid down in the case of **R L A vs F O & Another [2015] eKLR**.

64. As to whether the Defendant is entitled to the suit property, it was the Defendant's submission that being one of the wives of the

deceased, she was entitled to part of his estate and specifically the suit land she had called home for more than 43 years. That it was not in dispute that the deceased had died intestate and therefore the provisions of Section 40 of the Law of Succession Act would apply.

65. The Defendant also relied on the decided case of **Re Estate of John Musambayi Katumanga (deceased [2014] eKLR)** to submit that the suit filed by the Plaintiff where a judgment had been delivered giving her all the deceased's properties was inconsistent with the above provisions of the law and that the said judgment was obtained fraudulently and should be revoked and the property distributed in accordance with the law of succession. That the Grant of Letters of Administration to the Plaintiff without citing the consent of involvement of other family members was illegal null and void and such Grant should be nullified. That the titles obtained by the Plaintiff in respect to the properties belonging to the other house were all held in trust for the said houses.

66. On the issue as to whether the Defendant became a dependent under the law of succession, it was the Defendant's submission that in accordance with the provisions of Section 26 of the Law of Succession Act, the Defendant and her children were dependents of the deceased and should be provided for from the estate of the deceased. That the Defendant was one of the wives of the deceased and therefore was entitled to the suit property as that was the matrimonial home to which she was entitled to hold in trust for the children of that house.

67. That the Plaintiff sought to deny the Defendant her entitlement to the suit property when it was very clear that she was the beneficial owner of that part of the estate of the deceased. The Defendant therefore urged the court to Grant her rightful shares of the Estate she had called home for the last 43 years and to revoke the Grant issued to the Plaintiff.

Determination.

68. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. I find that the Plaintiff's case is centered around parcels of land No. LR Nyandarua/Kianjogu/Block 1 (Muririchua)/ 186, 168, 133 and 116, land which she inherited from her deceased husband David Wahome Ndabi herein referred to as 'the deceased,' vide a Grant in Succession Cause in Nyeri PMCC No. 60 of 1992. That the Defendant herein, who had worked as their house help had subsequently trespassed on the said parcels of land and claimed entitlement on allegations that she was one of the deceased's wives. The Plaintiff thus sought for eviction orders against the Defendant as well as for Mesne profit for the use of the suit land and for costs of the suit.

69. The Defendant's case on the other hand is that she was a 3rd wife to the deceased David Wahome Ndabi who had settled her and her children on these parcels of land but that she was more interested in parcel of land No. LR Nyandarua/Kianjogu/Block 1 (Muririchua)/133 where she had been living for more than 43 years. Her further defence was that the Plaintiff herein had fraudulently and without informing her filed succession proceedings in Nyeri PMCC No. 60 of 1992 wherein she had deceived the court and had had all their husband's properties registered in her name. The Defendant thus urged the court to Grant her rightful shares of the estate she had called home for the last 43 years and in the alternative that she had acquired the suit lands by way of adverse possession having resided therein for over 12 years since 1979. She further sought to have the Plaintiff's Grant revoked for having been acquired fraudulently.

70. Having considered the fact of the matter as well as the rival submission to the said suit, I find the matters for determination being;

- i. Whether the Defendant was married to the proprietor of the suit lands Mr. David Wahome Ndabi.
- ii. Whether the Defendant was a trespasser on matrimonial property.
- iii. Whether the Plaintiff had procured the suit land fraudulently
- iv. Whether the Defendant is entitled to the suit property by virtue of adverse possession
- v. Whether the Plaintiff herein is entitled to the orders sought

71. On the first issue for determination, it is clear from the evidence adduced in court by PW1 that his parents, the Plaintiff herein and Mr. David Wahome Ndabi solemnized their marriage in PCEA Munyange Church in Nyeri on the 23rd October 1976 wherein they had been issued with a certificate bearing serial No. 331970 herein produced as Pf exh 1. That subsequently upon the death of his father, who was the proprietor of the suit lands herein, in the year 1991, his mother, Monica Nyawira Wahome, the Plaintiff herein had petitioned for Letters of Administration in Nyeri PMCC No. 60 of 1992 wherein she had been issued with the Grant and had inherited the suit lands which were subsequently been registered in her name.

72. That upon the death of the Plaintiff in the year 2005, PW 1 and his brother Isaac Thuku Wahome had also petitioned and been issued with Letters of Administration and a certificate of confirmation of Grant dated the 23rd June 2010, in Succession Cause No. 402 of 2007 wherein the suit and had been distributed to the deceased's children as per the schedule on the Grant herein produced as Pf exh 8, which Grant has never been challenged the Defendant being aware of the proceedings.

73. The basis of the Defendant's defence was that at all material times she was a wife to the Mr. Samuel Ndirangu Wambugu the proprietor of the suit lands and as such she was entitled to his property namely plots No. LR Nyandarua/Kianjogu/Block 1 (Muririchua)/ 186, 168, 133 and 116.

74. The Defendant set out to prove that she was married under Kikuyu customary law and that by virtue of that marriage she was entitled to be recognized as having beneficial interest in Mr. David Wahome Ndabi's Estate. That she got married to David Wahome Ndabi in a traditional wedding in the year 1971 when she had had her own children. That she was his 3rd wife and that she had been taken to Muririchu in 1979 by her husband the deceased where she was to stay there permanently because the Plaintiff, lived in Nyeri.

75. In their submission, the Defendant submitted that around the 29th April 1983, in order to solemnize and formalize their marriage, the deceased had conducted a traditional marriage referred to in kikuyu culture as 'ruracio' and 'Ngurario' wherein one Francis Njeru Gatweku had acknowledged receiving part of the dowry (ruracio) from the deceased, dowry which comprised of ksh 200/= in cash for the purpose of a she-goat and ewe (Known as Mwati and Harika in Kikuyu) as well as Ksh 1,050/= as an equivalent of two goats and one can of honey. That the ceremony was witnessed by DW 3, wherein the deceased appended his signature to the document evidencing payment of the critical Kikuyu customary law process.(this document was not produced as an exhibit)

76. I wish to point out at this stage that based on the evidence herein adduced by the Defendant, I find that no customary marriage had taken place. I say so with humility as there was no evidence adduced in court proving that the laid down procedures in a kikuyu customary marriage were conducted.

77. **Madan, J**, as he then was, in **Zipporah Wairimu vs Paul Muchemi, HCCC No 1280 of 1970**, (unreported), but referred to in Cotran's Casebook on Kenya Customary Law, considered in great detail the essentials of a valid marriage under Kikuyu Customary law and in particular the essence and celebration of ngurario. where he concluded that;

"No Kikuyu marriage is finally valid unless Ngurario is performed."

78. The essentials of a valid Kikuyu customary marriage are now well settled. In his pioneering work, **Restatement of African Law: Kenya Volume 1 The Law on Marriage and Divorce, Sweet & Maxwell, 1968**, Dr Eugene Cotran states that there can be no valid marriage under Kikuyu law unless a part of ruracio (dowry) has been paid and more categorically, that "No marriage is valid under Kikuyu law unless the Ngurario ram is slaughtered".

79. The elaborate procedures entailed in the Ngurario ceremony are described in detail in **Jomo Kenyatta's Facing Mount Kenya, Heinemann Books, 1988, Chapter VII**. Those procedures were also considered by **Madan, J**, as he then was, in **Zipporah Wairimu vs Paul Muchemi, HCCC No 1280 of 1970**, where he concluded that;

"No Kikuyu marriage is finally valid unless Ngurario is performed."

The learned Judge observed that;

" Ngurario is performed to show that the boy and the girl have been united and that Ngurario gives the marriage the final sanction of validity".

80. The importance of Ngurario to a valid customary Kikuyu marriage has been emphasized in other judicial decisions including **Case vs. Ruguru (1970) EA 55**, and the decision of the court of Appeal in **Eliud Maina Mwangi vs. Margaret Wanjiru Gachangi, CA No 281(A) of 2003**.

81. The Defendant herein did not adduce any evidence regarding the performance of this critical ceremony to a valid Kikuyu customary marriage. In **Priscilla Waruguru Gathigo vs. Virginia Kanugu Kathigo, [2004] eKLR** which involved a protest by a lady alleging to have been married to the deceased under Kikuyu customary law, **Okwengu, J.** (as she then was), rejected the claim on the following basis:

"Having carefully considered the evidence I find that the evidence adduced by the Protester in proof of her alleged marriage to the deceased fell short of proving the alleged marriage. Apart from her daughter and 2 brothers there were no other independent witnesses to the customary formalities. There was no evidence that there was any Ngurario ram slaughtered nor was there any evidence that there were any elders from the deceased's relatives who participated in the alleged formalities."

82. It was for the Defendant to prove that she was married to the deceased under kikuyu customary law and is therefore a wife under section 3(5) of the Law of Succession Act.

83. It was not sufficient for the Defendant to testify that the Kikuyu customary marriage was performed wherein all the above captioned rites were performed and in so doing, placing reliance on the statements that were recorded, statements which mentioned documents and which documents were not produced as exhibits. The documents alluded to, for example included the minutes of the meeting held by the elders and the documents appended by the deceased proving that indeed the dowry had been paid. The mere mention of documents without their production so as to subject them through three stages of interrogation before they were held proved or disproved as exhibits, had no weight to the case.

84. Secondly, it must be remembered that submissions cannot take the place of evidence as they are generally the parties' "marketing language", with each side endeavoring to convince the court that its case is the better one. Submissions cannot therefore constitute evidence at all.

85. On the evidence before the trial court, I find that the Defendant was not married to the deceased and therefore has no beneficial interest in the estate of the deceased more specifically the suit lands herein.

86. On the Second issue for determination, I find that there is no dispute that the Plaintiff herein and Mr. David Wahome Ndabi solemnized their marriage in PCEA Munyange Church in Nyeri on the 23rd October 1976 wherein they had been issued with a certificate bearing serial No. 331970 produced as Pf exh 1. This being the case, it is therefore clear that the deceased's marriage was under the then African Christian Marriage and Divorce Act Cap 151, now Repealed by Marriage Act, No 4 of 2014 and therefore he lacked capacity to contract another marriage to the Defendant pursuant to the provisions of section 37 of the Marriage Act Cap 150 *since his marriage to the Plaintiff remained*

valid and undissolved. To this effect thereof the Defendant was not a wife in law.

87. The provisions of Cap. 150 Laws of Kenya apply to marriages solemnized under Cap. 151 Laws of Kenya and pursuant to the provisions of Section 4 of Cap 151 Laws of Kenya which states as follows:

“Except as otherwise provided in this Act, the provisions of the marriage Act, shall apply to all marriages celebrated under this Act.”

88. Section 37 of the Marriage Act Cap 150 Laws of Kenya stipulates as follows:

“Any person who is married under this Act or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under native law or custom, but save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.”

89. **This position was also reiterated by the Court of Appeal in the case of Irene Njeri Macharia vs Margaret Wairimu Njomo & another [1996] eKLR** where the court held that;

“The deceased, having married the appellant under and in accordance with the provisions of Cap 151, lost the capacity to contract any other marriage as long as his marriage to the appellant remained valid and undissolved.”

90. Given the said background and having found that the Mr. David Wahome Ndabi, lacked capacity to contract a second marriage to the Defendant pursuant to the provisions of Section 37 of the Marriage Act, and further that the Defendant was not a wife as per the law, her presence on the matrimonial property constituted trespass thereon.

91. The Defendant had also pleaded fraud against the Plaintiff in the acquisition of the Grant and her subsequent registration as the proprietor of the suit lands. Having pleaded fraud and illegality on the part of the Plaintiff in the manner in which she obtained the suit land, the onus was on the Defendant to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

92. I find that the undisputed facts of this case being that the Plaintiff herein in compliance with the law, applied for Letters of Administration in Nyeri PMCC No. 60 of 1992 where she had subsequently received the confirmed Grant procedurally and the suit parcels of land were registered to her name by virtue of transmission. The Defendant did not raise any objection as is provided for in the Law of Succession Act. This ground must therefore fail.

93. As to whether the Defendant is entitled to the suit property by virtue of adverse possession, it is trite law that the legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

94. **Section 7 of the Limitation of Actions Act** provides as follows:

“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...”

95. *Sections 37 and 38 of the Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

96. In terms of *Section 38 of the Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in *Order 37 Rule 7 of the Civil Procedure Rules as follows:*

i. An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

97. Clearly from the pleading herein, this ground was not pleaded as stipulated in the statute, further the suit land was registered to the Plaintiff on the 2nd February 1998, wherein the present suit was filed on the 19th October 2000 wherein the Defendant filed her defence on the 7th May 2001 vide her defence statement dated the 4th May 2001, clearly a period of 12 years had not lapsed.

98. **On the last issue for determination, I find that** the law that applies to the deceased’s estate in this instance was Section 2 of Law of Succession Act. The effect of this proviso is that the property of a deceased person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a Grant of representation, and any person who handles estate property

without authority is guilty of intermeddling.

99. In this respect thereof it has not been disputed that the Plaintiff herein was the wife of the deceased and that upon his demise, she had lodged succession proceedings, at the Nyeri PM Court being Succession Cause No. 60 of 1992, wherein the Grant of Letters of Administration was confirmed and she inherited the properties of the deceased after which she had obtained title to the suit property and became registered as proprietor on 2nd February 1998.

100. The registration of the Plaintiff as proprietor under the repealed **Registered Land Act, Cap 300** constituted her an absolute proprietor and conferred on her all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided under **section 28 of** the said Act.

101 In the decided case of **Esiroyo –vs. - Esiroyo [1973] EA 388** the court reiterated the absolutism of registration and stated that even though the Defendant had customary rights over the land, the same were extinguished by registration of the Plaintiff as proprietor. In essence therefore, the alleged rights of the Defendant herein to the suit property could only accrue during a Succession and/or in a Matrimonial Cause in which this court has no jurisdiction.

102 Trespass is described under the Trespass Act Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

103 In the case of **Duncan Nderitu Ndegwa v. KP&LC Limited & Another (2013) eKLR** P. Nyamweya J. held:-

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendant s' trespass”

101. In the circumstances of this case therefore, and since the Defendant's occupation of the suit plots is a continuing act which is not denied, In essence therefore, I now make the following final orders :

i. I award an amount of Kshs 100,000/= to the Plaintiff as compensation for the infringement of their right to use and enjoy their suit properties occasioned by the 1st Defendant's trespass.

ii. There was a prayer for mesne profits of which no evidence was led and which was abandoned by the Plaintiff in his submission. That issue rests.

iii. The net result is that I find and hold the Plaintiff's suit against the Defendant has been proved on a balance of probabilities. I accordingly enter judgment in favor of the Plaintiff as against the Defendant as pleaded in the plaint.

iv. Defendant and her members of the family do voluntarily vacate the parcels of land No. LR No. Nyandarua/Kianjogu/Block 1 (Muririchua)/ 186, 168, 133 within the next 60 days from the date of this judgment and be permanently restrained from being on the suit land.

v. In default the Plaintiff to take the liberty to initiate eviction of the Defendant as laid down in the law.

vi. I also award the costs of this suit to the Plaintiff.

Dated and delivered at Nyahururu this 3rd day of December 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE