



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC MISC. APPLICATION NO. 114 OF 2017**

**M M G.....PLAINTIFF**

**VS**

**J G aka J M G.....1<sup>ST</sup> DEFENDANT**

**A N aka J W.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. M M G filed suit on the 17/6/16 against the Defendants seeking Orders as follows;

- a) The Defendants be restrained by an Order of the Court from holding themselves as dependants of the Plaintiff.
- b) The Defendants be restrained from interfering with the Plaintiff's use of land parcel LOC 19/GACHARAGEINI/\*\*\*\* or any other of the Plaintiff properties.
- c) The Defendants be evicted from land parcel LOC 19/GACHARAGEINI/\*\*\*\*.
- d) Costs.

2. M M G vide an Order of the Court dated 14/9/99 took into custody the Defendants who were then minors and in need of care and protection. The committal Orders required her to take them into custody and care for them till the age of adulthood. The Plaintiff played that role and educated them through secondary school and whereupon they later obtained gained employment where the 1<sup>st</sup> Defendant is a teacher while the 2<sup>nd</sup> Defendant works in the insurance industry.

3. On the 7/1/2011 the Plaintiff having fulfilled the objective of the protection Order sought and obtained a discharge Order wherein the guardianship Order issued on 14/9/99 was revoked. The guardianship stood terminated.

4. It is the Plaintiff's case that despite being discharged as such the Defendants have failed to vacate her property LOC 19/GACHARAGEINI/\*\*\*\*. That the Defendants continue to occupy the property on the false belief that they are still her dependants. That they in collusion with the local chief illegally purported to partition the land into 3 parcels and the 1<sup>st</sup> Defendant has converted the Plaintiff s house into educational Institution without her consent and to her detriment as to her right of enjoyment of the suit land.

5. That the Defendants have ignored demand notices to vacate the suit property and insist on remaining

on the land without any legal justification.

6. As would be expected the Defendants filed a joint defence on 16/11/16 opposing the Plaintiff's claims. The Defendants averred that they were adopted by the Plaintiff in 1999 who gave them new names M G and the 2<sup>nd</sup> Defendant J W respectively. That they were named after the brother and father of the plaintiff respectively. They recount the alleged not so humane treatment received in the hands of their foster mother, the Plaintiff while growing up such as beatings, verbal insults, want in school fees provision *inter alia*. That they sought the help of their church Reverend and the local District Officer to resolve the dispute with their foster mother when she started selling her land reducing it from 7.7. ha to 3.7 ha. without providing for them.

7. In response to the allegation of forcefully partitioning of the suit land into 3, they aver that it was agreed in a meeting at the chief's office in the presence of the Plaintiff and the Defendants that the land be partitioned and each party to get 1.0 Ha. each with the Plaintiff remaining with 1.54 Ha. It is then that the surveyor was commissioned to subdivide the land into 3 parcels.

8. They aver that they are adopted under section 183 of the Adoption Act and therefore have rights of inheritance to the Plaintiff's land. They have also asserted their rights to the property under the Children's Act.

9. When the matter came for hearing on the 9/10/17 the Defendants were absent despite the hearing date having being fixed by consent of the parties on 26/7/17 in the Registry.

10. At the hearing the Plaintiff testified solely. She relied entirely on her witness statement and informed the Court that the 1<sup>st</sup> defendant is in occupation of the suit land thus preventing her from enjoying her rights to the property. She urged the Court to grant her prayers.

11. In her written statement she stated that out of a humanitarian heart while serving as a matron at the [Particulars Withheld] Centre she fostered the Defendants who at the time were aged 12 years and in class 3. That she educated them through primary to secondary successfully and are now adults in gainful employment.

12. That upon completion of secondary school she applied and obtained a discharge of the guardianship Order which was issued on 7/1/11. That she demanded that the two vacate her suit land as she had no obligations thereafter. She averred that in 2015 the defendants in collusion with the area chief entered the suit land and partitioned into 3 portions. That in further breach of her proprietorship rights the 1<sup>st</sup> Defendant set up a school in her compound without her consent. That as a result she has been unable to develop her land.

13. The Plaintiff's lawyers filed written submissions whilst the Defendants' lawyers then, Macharia Waiguru came on record on 17/10/17 and on the 18/10/17 when the matter came up for mention, he sought time to file written submissions and the Court granted him 2 weeks but by the time of writing the Judgement, the Defendants had not filed any written submissions.

14. In her submissions filed through Learned Counsel Ms Waithira Mwangi the Plaintiff reiterated the facts as stated in her evidence in Chief. She contended that upon discharge of her obligation as a foster mother (guardianship), she owes no further obligation to the Defendants. That the Defendants have no proprietary rights over her suit land and hence should be evicted as they have declined to vacate. She explained that the relationship between the parties have broken down and she cited threats to her life by 1<sup>st</sup> Defendant. In support of the plaintiff's case the Learned Counsel relied on the cases of;

(a) Eldoret Edward Kipkosgei Chemurbii & Ano vs Charles K Kosgei & Ano - ELC No. 338 of 2013.

(b) Nahashon Karengi & Justus Thiru Zakayo vs Lawrence Karengi Civil Appeal No. 222 of 2010

at Nyeri.

## **Determination**

15. This is a case pitting the Defendants against a former foster mother. The Defendants hold on to the belief that as “adopted” sons of the Plaintiff they are entitled to the suit property. The Plaintiff on the other hand has asserted title to her land and argued that the Defendants are not entitled to any rights over the suit land as the law has discharged her from her guardianship obligations. That as a registered proprietor of land she has unfettered right to deal with the land as she deems fit.

16. The Plaintiff has raised an issue of jurisdiction of this Court in her statement of issues. Although no evidence was led in trial or in the submissions, I feel duty bound to address the matter. Jurisdiction is everything. A Court derives its jurisdiction from the Constitution or legislation or both. The moment a judge does not have jurisdiction he/she must down his/her tools and take no further step. I have reviewed the pleadings and reliefs sought and as explained, this case revolves on ownership rights between a former foster mother and her benefactors, who are now adults. The Plaintiff’s claim is that they should vacate the land as they are interfering with her property rights. She has cited the forceful and unauthorized use of the land for purposes of a school without her consent. The defendants on the other hand have responded that as adopted sons of the Plaintiff, they are entitled to a share of the land. That indeed they had an agreement on how to share the remainder of 3.7 acres in the proportion of 1.0 Ha. 1.0 Ha & 1.5 Ha in favour of the 2 defendants and the Plaintiff respectively. That the Plaintiff later changed her mind and thus the dispute herein.

17. The ELC Court was established by the dictates of Article 162 (b) of the constitution of Kenya 2010. Under the ELC Act section 13 (1) & (2) the Court’s mandate is stated as ;-

“(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land”.

18. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

19. The dispute herein falls squarely under the precincts of this Court and I find and hold that this Court has jurisdiction to hear and determine this matter. It shall proceed to so determine

20. I have with much agony tried to understand the defence filed by the Defendants. Whilst I take cognizance that the Defendants are lay persons, their defence is a litany of complaints, frustrations and instances of alleged hitherto family disharmony that befell their childhood in the hands of the Plaintiff. The Plaintiff did not controvert the same in her pleadings. I did not see any reply to defence to deny the claims and therefore it is deemed that the Plaintiff has admitted the same. That notwithstanding I have been able to glean their defence to be;

- a) Denied the Plaintiff's claim that they are interfering with her property rights.
- b) Claiming entitlement to the suit land as adopted sons of the Plaintiff. That they were named after the Plaintiff's brother and father respectively.
- c) That there was an agreement on how the land should be shared amongst the three but the Plaintiff has changed her mind.
- d) That they have nowhere else to go.
- e) That in accordance to the Children's Act they are entitled to the land.

21. It is on record that the Plaintiff's guardianship Order was revoked. Under the Children's Act an Order for revocation may be made on the child attaining 18 years. At the time the Order was revoked the Plaintiffs were 25 years, well above the age permitted by law; they were therefore adults and it is on record that the 1<sup>st</sup> Defendant is even married. It is admitted by the Defendants that both are in gainful employment and therefore do not qualify for any rights under the Children's Act as they are now adults.

22. I would like to address the question whether or not the Defendants are entitled to the land (be they children or adopted children by the Plaintiff). The Court of Appeal in the case of **Nahashon Kerenge vs. Justus Thiru Zakayo Civil Appeal No 222 of 290 Nyeri** had this to say;

"There is no vested right to inheritance during the lifetime of parents. Let it be known that during the lifetime of their parents, and subject to beneficial and occupation rights, a child cannot force parents to sub-divide and distribute their land or assets unless the said land or assets were acquired and held in trust prior to the parents' acquisition of title to the same".

Even if I were to assume that the Defendants are indeed Children (which is not assumed) of the Plaintiff, there is no law in Kenya that obligates parents to distribute land to their Children during their lifetime.

23. In the case of **Marigi vs. Muriuki & 2 Others Civil case No. 189 of 1996 (2008) I KLR 1073**, the Court held as follows;

"It was stated that the law recognizes the rights of Children over their father's estate. These rights are inchoate and accrue upon the death of the father

The inchoate rights of the Respondent to the land owned by the 1<sup>st</sup> Appellant had not accrued at the time of filing suit before the High Court and at the time when this appeal was lodged. If the Respondent has any claim of land against his father, his inchoate rights accrued when his father (the 1<sup>st</sup> Appellant) died. It is our considered view that the learned Judge erred in making a declaration in favour of the Respondent against his father (the 1<sup>st</sup> Appellant) and enforcing rights that were inchoate that had not accrued. We find that the learned Judge erred in law in failing to note that the Respondent's right to claim any land from the 1<sup>st</sup> appellant were inchoate rights and she did not address this issue. Further, the Learned Judge ignored the fact that the 1<sup>st</sup> Appellant was the registered proprietor of the suit property and it was an error of law to restrain the 1<sup>st</sup> appellant from

trespassing and dealing with his own land”.

24. The rights of a registered owner of land is protected under section 25 of Land Registration Act and only exception is trusts and overriding interests under section 28 of the Act. Even then the pleader of trust must proof the presence of trust in evidence. The Defendants have not claimed any trust and even if they had, they were obligated to proof the same in evidence. The law provides under section 26 of Land Registration Act, subject to proof of ownership, the instances when a proprietor’s right to land can be challenged, none of which include rights by Children whether by birth or adoption. For avoidance of doubt it is clear that the defendants have no such rights in law over the suit land.

25. It is common ground between the Plaintiff and the Defendants that the Plaintiff is the registered owner of the suit property. The Plaintiff has beseeched this Court to grant eviction orders against the Defendants on the basis that she is the registered owner of LOC 19/GACHARAGEINI/\*\*\*\*\*. She did aver in the Plaint, her evidence in chief and in her written submissions that she is the owner of the suit land. I have painstakingly perused the suit file for any evidence of ownership presented by the Plaintiff in support of her ownership to no avail. It is expected that the Plaintiff should have presented to this Court a certified copy of title or at the very least a certified copy of official search or copy of the green card to confirm that she indeed owns the suit land. However, in their joint defence and witness statements the defendants have duly admitted that the Plaintiff is the registered owner of the suit property. That fact is not contested. The ownership is not disputed.

26. Section 24(a) of the Land Registration Act states as follows; -

“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”.

27. The defendants have not shown any legal and justifiable reason why they should be interfering with the plaintiff’s suit land. The Defendants being able bodied men should express their gratitude to their former foster mother for taking care of them and strive to acquire their own land. As regards the suit land they have not demonstrated any right over it. All the rights therein are vested in the plaintiff.

28. In the end the Plaintiff’s suit succeeds and I make orders as follows;

a. The Defendants are hereby ordered to voluntarily vacate LOC 19/Gacharageini/\*\*\*\*\* within the next 60 days from the date of this judgement and be permanently restrained from being on the suit land.

b. In default the plaintiff to take the liberty to initiate eviction of the defendants as laid down in the law.

c. The defendants to bear the cost of this suit.

**DATED, DELIVERED AND SIGNED AT MURANG’A THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2018.**

**J G KEMEI**

**JUDGE**