



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO.219 OF 2018**

**(FORMERLY NAIROBI ELC NO.1034 OF 2012)**

**RACHAEL MUKAMI NGUGI.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**MERCY WANJIRU THOGO.....DEFENDANT/RESPONDENT**

**JUDGEMENT**

By a *Plaint* dated **19<sup>th</sup> December 2012**, the Plaintiff herein **Rachael Mukami Ngugi** sought for Judgement against the Defendant, **Mercy Wanjiru Thogo** for:-

- a) An order for eviction.**
- b) Costs of the suit**
- c) Any other relief this court deems fit.**

The Plaintiff alleged in her claim that she is the registered owner

and/or exclusive proprietor of all that property known as **Limuru/**

**Kamirithu/625**, situated at **Kamandura area** within **Limuru, Kiambu County**. She also alleged that the Plaintiff herein is a trespasser in occupation of the suit property **Limuru/Kamirithu/625**, on a portion thereof without the consent and/or approval of the Plaintiff.

Further, she averred that the suit property was previously registered in the name of **Salome Wambui Ngugi**, and the Defendant herein was her licensee and she therefore has no proprietary interest or claim in the subject property. The Plaintiff's claim against the Defendant therefore is for vacant possession and or for an order for eviction to deliver vacant possession of the suit property **Limuru/Kamirithu/625** to the Plaintiff. She further contended that the Defendant herein had even filed a suit at **Limuru Court** being **SPM CC.No.349/2011**, which suit was determined in favour of **Salome Wambui Ngugi**, the Defendant therein and the former registered proprietor of the suit property. That even with the said verdict, the Defendant herein did not give vacant possession and despite demand and Notice of Intention to Sue, she has failed to heed the same.

The suit is contested and **Mercy Wanjiru Thogo**, filed her *Defence* and *Counterclaim* on **20<sup>th</sup> February 2013**. She averred that the Plaintiff herein became the registered proprietor of **Limuru/Kamirithu/625**, on **20<sup>th</sup> September 2012** and did not have exclusive possession of the suit land as the Defendant and other persons were in occupation at the time of the said registration.

The Defendant further denied that she is a trespasser on the suit property and contended that she has lived thereon since the **year 2005**, even before the Plaintiff became the registered proprietor thereof. Further she denied that she was a licensee on the suit property and also contended that the Plaintiff holds the suit property **Limuru/Kamirithu/625**, in trust for the Defendant.

In her *Counter-claim*, the Defendant alleged that the transfer of this suit property to the Plaintiff was obtained by **fraud** on the part of the

Plaintiff as she acquired the suit land **without any valuable consideration**. She urged the Court to order that the Register of the title **Limuru/Kamirithu/625**, be **cancelled** and/or **amended** by deleting the Plaintiff's name and **reverting** the same to the name of **Salome Wambui Ngugi**, the previous registered owner who was holding the same in trust for the Defendant. The Defendant prayed for

dismissal of the Plaintiff's suit and upholding of her prayers sought in the Counter-claim.

The hearing commenced on **6<sup>th</sup> November 2017**, wherein the Plaintiff gave evidence for herself and called one witness.

### **Plaintiffs Case**

**PW1 – Rachael Mukami** gave evidence and stated that she lives in **Limuru** at **Kamandura Village** and the Plaintiff herein is her sister-in-law. She also stated that the Defendant was married to her younger brother **George Mungai Ngugi** who died in **June 2011**. It was her testimony that she lives on the suit property **Limuru/Kamirithu/625**, which was transferred to her by the former registered owner **Salome Wambui Ngugi** who is her mother. She also clarified that the suit land initially belonged to her father **Appollo Ngugi**, who was also the registered owner before her mother became the registered owner. She asked the Court to order eviction of the Defendant from the suit land as she had filed a **Civil Case at Limuru Law Courts**, against her mother but the said suit was dismissed. It was her testimony that her mother distributed her property to her children and gave the Defendant land in **Subukia** which she declined to take. She denied having obtained the land by fraud and also denied that her mother was holding the suit property in trust for the Defendant. She therefore stated that the Counter-claim is not tenable and she asked the Court to dismiss it entirely.

**PW2 – Salome Wambui Ngugi**, the mother to the Plaintiff and mother-in-law to the Defendant testified that the suit property initially belonged to her and then she bequeathed it to the Plaintiff after distribution of her property to her children. It was her testimony that she also gave the Defendant a piece of land at **Subukia** which she declined and she also refused to move out of the suit property. She also testified that she gave the suit property to **Rachael Mukami Ngugi**, exclusively and that she also lives on the suit property. She asked the Court to order the Defendant to move out of the suit property. Further, that though the Defendant had sued **PW2 at Limuru Law Courts**, the said case was dismissed in favour of **PW2**. In cross-examination, she stated that the Defendant did not sire any child with her son as Defendant was married by **George Mungai Ngugi** while she had a child out of wedlock.

### **Defendant's Case**

**DW1 – Mercy Wanjiru Thogo**, stated that the Plaintiff is her sister-in-law and **PW2** her mother-in-law. That she was married to **George Mungai Ngugi** who is now deceased. That when he died, he left her behind

on the suit property and they also had one child called **Myna Wangare Mungai**. Further that when her husband was alive she had a good relationship with her in-laws and she lived on the suit property. However after the death of her husband, her in-laws started treating her badly and they now want her to move out of the suit property. She denied having been given any land in **Subukia**. It was her further testimony that her mother-in-law has never talked to her about the land in **Subukia**. She also stated that she had placed a caution on the suit property but it was removed without her knowledge and the land was transferred to **PW1**. She urged the Court to cancel the title deed which is in favour of **PW1** and **revert it to Salome Wambui Ngugi**, so that the land can be distributed in a **Succession Cause** for **DW1** to get a share of her husband. She urged the Court to allow her Counter-claim.

After the *viva voce* evidence, the parties filed their written submissions in support of their rival argument. This Court has now carefully considered the available evidence and the exhibits thereon. The Court too has considered the written submissions, the cited authorities and the relevant provisions of law and the Court makes the following findings:-

There is no doubt that the suit property is registered in the name of the Plaintiff herein. The said parcel was registered in the name of **Rachael Mukami Ngugi** (Plaintiff) on **20<sup>th</sup> September 2012**. Therefore as a registered proprietor who holds a **Certificate of Lease**, she is deemed to be the **absolute** and **indefeasible** owner as provided by **Section 26(1)** of the **Land Registration Act**, which states:-

**“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.**

However, the exceptions in **Section 26(1)(a)&(b)** provides that the said Certificate of title can be **challenged** if the same was acquired through **fraud, misrepresentation, unprocedurally, illegally** or through **corrupt scheme**.

The Plaintiff has come to court and alleged that though she is a registered owner of the suit property, the Defendant who is her sister-in-law, has refused to move out of the said suit property and thus she is a trespasser and should be evicted from the suit land through a Court Order.

However, the Defendant has denied that she is a trespasser and has alleged that she was on the suit property by virtue of being the wife of **George Mungai Ngugi**, who is now deceased and was entitled to a share of the suit property. She urged the Court to find that the suit land was registered **unprocedurally** in the name of the Plaintiff while there was a pending case in court.

The issues for determination are as follows:-

**i. Whether the Plaintiff is registered as an exclusive proprietor of the suit land Limuru/Kamirithu/625.**

ii. *Whether the Defendant is a trespasser over the suit property.*

iii. *Whether the property was legally acquired by the Plaintiff.*

iv. *Whether the Defendant has any proprietary interest over the suit property Limuru/Kamirithu/625.*

v. *Whether the Defendant is entitled to the prayers sought in the Counter-claim.*

vi. *Is the Plaintiff entitled to the prayers sought in the Plaintiff?*

vii *Who is to bear costs of the suit?*

**i) Whether the Plaintiff is registered as the exclusive proprietor of all the property known as Limuru/Kamirithu/625**

There is no doubt that the suit property *Limuru/Kamirithu/625*, is now registered in the name of the Plaintiff herein. She acquired the said registration on **20<sup>th</sup> September 2012**. It is also evident that prior to the said registration, the suit property was registered in the name of *Salome Wambui Ngugi*, in **1999**, who had acquired the said registration through transmission. Therefore, it is evident that the suit property herein belonged to the *father* of *PW1* and *husband* of *PW2*. Further, it is evident that the Defendant was married to one *George Mungai Ngugi*, on or about **2005** and lived on the suit property. However the said *George Mungai Ngugi* died in the **year 2011** and after the said death, the Defendant and *PW1* had a row over the suit property. The said dispute culminated in **Civil Case No.349/2011** at *Limuru Law Courts*. However, before the said case was determined, the said *Salome Wambui Ngugi* transferred the suit property to the Plaintiff herein. Therefore it is not in doubt that by the time the Plaintiff acquired registration of the suit property, the Defendant was still living on the suit property and had lodged a suit at *Limuru Law Courts*. The Defendant was in occupation of the suit property by virtue of the fact that she was a *widow* of **one of the sons** of *Salome Wambui Ngugi*, the former proprietor of the suit property. The Court therefore finds that though the Plaintiff is registered as exclusive proprietor of the suit property, her registration is subject to the overriding interests as stipulated in **Section 28** of the *Land Registration Act*. Particularly **Section 28(b)** provides:-

**“Trusts including customary trusts.”**

Therefore, the Court finds that the Plaintiff herein is registered as the exclusive proprietor of the suit property but this proprietorship may be affected by overriding interests as provided by **Section 28** of the *Land Registration Act*.

**ii) Whether the Defendant is a trespasser over the Plaintiff's property.**

As the Court has earlier found, the Defendant is in occupation of the suit property by virtue of being the *widow* of *George Mungai Ngugi*, who was a *son* to *Salome Wambui Ngugi*, the former registered owner of the suit property. The Defendant alleges that the suit property was initially owned by the husband of *Salome Wambui Ngugi* and therefore *George Mungai Ngugi* had a share in it. The Plaintiff and her witness did confirm that the suit land was initially owned by one *Apollo Ngugi*, who was a *father* to *PW1* and *husband* to *PW2*. It is therefore evident that the Defendant entered on the suit property as a family member, with the knowledge and permission of *Salome Wambui Ngugi*, who is her mother-in-law and therefore the Defendant is not a trespasser on the suit property. The Plaintiff got registered while there was still a case pending in court and that was against the doctrine of *lis pendens*. See the case of ***Fredrick Joses Kinyua & Another...Vs...G. N. Baird, Nairobi HCC No.4819 of 1989***, where the Court held that:-

**“The doctrine of *lis pendens* intends to prevent not only the Defendant from transferring the suit property when the litigation is pending but it is equally binding on those who derive their title through the Defendant, whether they had or not had notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during pendency of the suit so as to defeat the right of the other party”.**

The Plaintiff acquired the registration of the suit property during pendency of an active case between the Defendant and *PW2* and though the said case was dismissed, she cannot allege that the Defendant herein is a trespasser.

**iii) Whether the property was legally acquired by the Plaintiff**

It is evident that the suit property was transferred to the Plaintiff herein by *PW2* during the active prosecution of ***Limuru SPM CC.No.349/2011***. Expediency would have demanded that *PW2* await the outcome of the said case which had been filed by the Defendant herein. However, the said ***Limuru SPM CC.No.349/2011***, was eventually dismissed and now the Plaintiff wants the Defendant herein to be evicted from the suit property. It is evident that the Plaintiff acquired the suit property without any consideration. As provided by **Section 27(1)(a)** of the *Land Registration Act*, she holds the said land subject to the unregistered rights over the suit property. It provides:-

**“A proprietor who has acquired land, a lease or a charge by transfer without valuable consideration shall hold it subject to—**

**(a) any unregistered rights or interests subject to which the transferor held it”**

As the Court held earlier, such unregistered rights affect the proprietorship of a registered owner. One of such right is *trust* which the Defendant herein is claiming. Therefore the Court finds that though the Plaintiff was legally registered as the proprietor of the suit property after it was transferred to her by her mother who is a mother-in-law to the Defendant for **no valuable consideration**, the said registration is subject to the unregistered rights such as *customary trust*.

iv) Whether the Defendant has any proprietary interest over the suit property?

From the available evidence, the Defendant entered into occupation of the suit property by the fact that she was married to **George Mungai Ngugi** (now deceased). She lived on the suit property during the lifetime of her husband. Since **Salome Wambui Ngugi**, acquired the suit property by transmission, she ought to have considered the Defendant during the distribution of the said land, as the Defendant was also in occupation of a portion of the suit land. In the case of **Henry Muthee Kathurima...Vs...Commissioner of Land & Another (2015) eKLR**, the Court held:-

**“We note that it is not in dispute that the 2<sup>nd</sup> Respondent has always been in actual and physical occupation of the suit property..... The inference to be drawn to that is that the Appellant identified and knew the specific plot he desired and knew the 2<sup>nd</sup> Respondent was in physical possession.”**

It is also clear in this case that the Plaintiff knew that the Defendant who was her sister-in-law and wife to her late brother was in occupation of a portion of the suit property, but she went ahead and acquired registration of the whole portion and now wants the Defendant to be evicted from the suit property. The Defendant has acquired equitable right by virtue of being in possession and occupation. The Court of Appeal in the case of **Mwangi & Another....Vs...Mwangi (1986) KLR 328**, held that:-

**“The right of a person in possession or occupation of land is an equitable right which are binding on the land”.**

Equally in this suit, the Court finds that the Defendant has been in

possession and occupation of the suit property **since 2005** when she got married to the late **George Mungai Ngugi**, who was the son of **Salome Wambui Ngugi**, the former proprietor of the suit property and therefore, the Defendant has an equitable right which is binding on the suit property and cannot be dislodged by transfer to another proprietor without consideration.

v) Whether the Defendant is entitled to the prayers sought in the Counter-claim.

The Plaintiff and her witness **PW2** alleged that the Defendant was

given a parcel of land in **Subukia** which she declined. However, the Plaintiff produced various title deeds in the names of her other siblings who allegedly acquired those properties after **Salome Wambui Ngugi (PW2)** distributed her property. There was no title deed in the name of the Defendant. By admitting that she had given her portion of land to the Defendant, then **PW2** was admitting that she indeed had an **obligation** to cater for the Defendant as a **widow** of her **late son, George Mungai Ngugi**.

Indeed the suit property herein is **7.54 acres** which land initially belonged to the **husband** of **Salome Wambui Ngugi**. The Court is certain that if the late **George Mungai Ngugi** was alive, he would have claimed a stake on the said suit property. The Plaintiff and her witness have not denied that the Defendant was married to **George Mungai Ngugi**. They

have only alleged that the only child in the said union was not sired by **George Mungai Ngugi**. However, that is not a good reason to lock her out of the suit property.

The Court finds that the suit property herein is subject to the overriding interest as stipulated by **Section 28(b)** of the **Land Registration Act**. **Salome Wambui Ngugi's** proprietorship was affected by the said customary trust. **Salome Wambui Ngugi**, transferred the suit property to the Plaintiff herein without taking into account the equitable right or interest of the Defendant herein. Now the Plaintiff seeks to evict the Defendant from the suit property.

The Court finds that since **PW2** had alleged that she had given a portion of land to the Defendant in **Subukia**, then instead of giving the Defendant land in **Subukia**, **PW2** should give a portion of land to the Defendant from the suit property **especially the portion that she has occupied and used**.

Consequently, the **Court finds that the Defendant herein is entitled to the prayers sought in the counter-claim**.

vi) Is the Plaintiff entitled to the prayers sought in the Plaintiff?

The Plaintiff had sought for eviction order against the Defendant herein. The Court has found that the Defendant has an equitable right and interest over the suit property by virtue of being the **widow** of **George Mungai Ngugi** who was a son of **Salome Wambui Ngugi**, the former proprietor of the suit property.

The Court has also found that the said **Salome Wambui Ngugi's** proprietorship was affected by **overriding interest** and **customary trust** was one of such interest. The Court has further found for the Defendant and has allowed her Counter-claim.

For the above reasons, the **Court finds that the Plaintiff is not entitled to the prayers sought in the Plaintiff**.

vii) Who is to bear costs of the suit?

As provided by **Section 27** of the **Civil Procedure Act**, costs are granted at the discretion of the court. Ordinarily costs follow the event and the successful litigant is always granted costs. The Court has found for the Defendant as per her Counter-claim. However, the Court notes

that the parties herein are relatives. Therefore the ***Court will order that each party herein should bear their own costs.***

Having now carefully considered the available evidence, the Court finds that the Plaintiff has not proved her case on the required standard of balance of probability. Consequently, ***the Court dismisses the Plaintiff's claim entirely with an order that each party to bear her own costs.***

Further, the Court finds that the Defendant has proved her claim as stated in the Counter-claim. The ***Court allows the Defendant's prayers as stated in paragraph 6 of the Counter-claim.***

Further, ***after the suit reverts to Salome Wambui Ngugi, she is ordered and/or directed to transfer 1½ acres to the Defendant herein.***

In conclusion, the Court directs the Land Registrar Kiambu to rectify the Register in respect of the suit property ***Limuru/Kamiruthu/625***, by cancelling the title which is in favour ***Racheal Mukami Ngugi***, and revert it back to the name of ***Salome Wambui Ngugi*** and after the cancellation and rectification, then ***1½ acres*** from the suit property be transferred and registered in the name of the Defendant herein ***Mercy Wanjiru Thogo***. This is in accordance with ***Section 80(1)*** of the ***Land Registration Act***.

It is so ordered.

***Dated, Signed and Delivered at Thika this 28<sup>th</sup> day of September 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Munawa holding brief for Mr. Mose for Plaintiff

Present in person for Defendant

Lucy - Court clerk

**Court** – Judgement read in open court in the presence of the above stated persons.

**L. GACHERU**

**JUDGE**

**28/9/2018**