

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 338 OF 2017

LUCY NDUTA NJUGUNA.....PLAINTIFF

VERSUS

CHARLES KABUTHA NJUGUNA.....1ST DEFENDANT

IGNATIOUS MWAURA.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendants seeking the following orders;

a) A declaration that the Defendants lacked capacity and locus to register and/or cause the caution to be registered against the title number LOC.1/MUKURWE/1029.

b) An order directing the Defendants to remove and/or cause the removal of the caution registered against the title number LOC.1/MUKURWE/1029 forthwith and at their own cost.

c) A permanent injunction restraining the 1st and 2nd Defendants whether by themselves or through their agents and/or servants from trespassing upon, entering into, farming, leasing, letting, subdividing, selling or in any other manner howsoever interfering with the Plaintiff's proprietorship, use and enjoyment of the suit property namely title number LOC.1/MUKURWE/1029.

d) Mesne profits.

e) The sum of Kshs. 449,100.00 as particularized at paragraph 17 above.

f) Interest on the sum at (d) above at Court rates from the date of filing this suit until payment in full.

g) Costs of this suit.

2. The Plaintiff averred that the suit land belonged to her father Ngarachu Muheria. Upon his death it was succeeded by herself and her 3 sisters namely Anastasia Nyagathu Maina (deceased), Gladys Wairimu Njuguna and Esther Wangari as joint tenants.

3. On 25/1/12 the late Anastasia Nyagutha Maina and Gladys Wairimu Njuguna purported to donate a general power of attorney to the 2nd and 1st Defendant respectively in relation to the suit land. The general power of Attorney is dated 25/1/11.

4. She averred that the 2nd Defendant in reliance to the said general power of Attorney registered a caution against the title No. LOC.1/MUKURWE/1029 on 5/6/12 claiming beneficiary interest. That the caution was unlawful, null and void. The Defendants also filed a suit CMCC No. 473 of 2012 at Thika where an inhibition was issued against the suit land. It is her claim that as a result of the inhibition that lasted 3 years she lost income from the use of the land.

5. The Defendants have admitted the joint ownership of the suit land. That the caution lodged against the

land was to prevent Esther Wangari and Lucy Nduta from selling the suit land despite opposition from the other 2 sisters. In addition the Defendants sought and obtained an inhibition through CMCC 473 of 2012 restraining any dealings in respect to the suit land. The Defendants have denied any loss of income and sought to put the Plaintiff to strict proof. Further the Plaintiffs pleaded that the issues raised by the plaint are resjudicata because they were dealt with in CMCC No. 473 of 2012.

Plaintiff's case.

6. PW 1 – Lucy Nduta Njuguna stated that the suit land was inherited by their father and is owned jointly by 4 of her sisters, one namely Anastacia is deceased. She stated that she cultivated the land before with the knowledge of her co-owners. She however stopped tilling the land during the subsistence of the inhibition which lasted 3 years. She informed the Court that the CMCC case No. 375 Thika was filed by the Defendants arising from a sale of the land which was objected by her two sisters despite them agreeing at first. That she refunded the sale proceeds to the seller and the land was not sold. She informed the Court that she only cultivates a portion and grows avocados, bananas, nappier grass on $\frac{1}{4}$ of an acre. That the Nappier fetch 10000/= annually. Bananas went for Kshs. 200/= per bunch/stool and the avocados @ 5/= per piece.

7. In addition, she is seeking transport costs and the farm hand wages when she was attending Court. She admitted being paid costs CMCC case No. 375 Thika in the sum of Kshs 35,000/= but insists that cannot be sufficient compensation. She disclosed that she did not seek consent of the co-owners to file the suit. She informed the Court that she has not stopped her co-owners from tilling the land. That they have not shown any interest in so cultivating the land.

8. PW 2- Tirus Nzukuna Mukunzi informed the Court that he is an Agricultural Officer employed by the Ministry of Agriculture. He did not produce any documents however to back his credentials though he stated that he is an expert in assessing loss of farm income. He explained that he visited the land in 2016 and on it were bananas, avocados and nappier grass. That the land is rectangular in shape and measuring one acre. He informed the Court that he did not take any photos of the land. He stated that the prices of the farm produce are derived from the Ministry of Agriculture rates as published. He informed the Court that he did not produce the same in Court to support the figures that he recommended in the crop assessment report. He reported that he did not see any buildings or stones on the land.

9. DW 1-Gladys Wairimu Njuguna stated that she did not give the Plaintiff consent to farm on the land jointly owned by herself and 3 other sisters, the Plaintiff included. She stated that she is aware that the Court stopped any dealings on the land for 3 years and during the period the Plaintiff was tilling the land. She however stated that she did not visit the farm for the duration of 3 years. She however confirmed that she gave a power of Attorney to her son the 1st Defendant to file the suit at Thika in which the inhibition was issued. She denied that the Plaintiff should be paid any damages.

10. DW 2 – Esther Wangari Mbugua confirmed that she is one of her co-owners of the land. She stated that she did not give the Plaintiff consent to cultivate the land. That she was last on the land in 2008. She indicated that she does not till the land and no one has stopped her from tilling it. She stated that she did not ask for damages for the land arising from the inhibition. She was aware of the caution lodged on the land by the 2nd Defendant but was unsure if it had been removed.

11. DW 3 – Ignatius Mwaura testified that the Plaintiff continued to harvest the farm produce from the farm whilst the inhibition was in force. In respect to the claim for loss of income the witness stated that the area under cultivation on nappier was only $\frac{1}{4}$ of an acre and therefore production on $\frac{1}{4}$ acre appeared exaggerated. She informed the Court that bananas covered $\frac{3}{4}$ of an acre and the cash claimed under this item of Kshs. 10,800/ was high. In his opinion it would only fetch 3000/=. In respect to transport costs, he urged that the same was covered under costs granted in the CMCC case at Thika.

12. DW 3 continued to inform the Court that he filed the suit on behalf of his mother whom he had a power of Attorney. He stated that the Plaintiff continued cultivating the land during the subsistence of the inhibition. He stated that he however did not inform the Court that the Plaintiff was disobeying the court

orders in so cultivating whilst the orders had prohibited her. While disagreeing with the report of the expert witness, the witness informed the Court that he did not produce any evidence to counter the same.

13. DW 4 – Charles Kabutha Njuguna testified that the Plaintiff’s workers were tilling the land. That he did not raise any complaint about it to the Court during the subsistence of the inhibition.

14. Parties have filed written submissions which I have read and considered.

15. There are facts that are not in dispute. The land is owned jointly by 4 sisters. One is deceased. The right of survivorship has vested on the living 3 sisters. The Plaintiff admits selling the land with her sister Esther to David Ngarachu at Khs. 800,000/=. A sale agreement is on record. It is also on record that the other 2 sisters protested the sale and that explains why they were not parties to the agreement of sale dated 21/5/2012. This prompted the 2 sisters through their agents the Defendants to file suit at CMCC Thika No. 473 of 2012.

16. An inhibition was issued by the said Court on 30/10/2013 in the following terms;

a) That an inhibition order be and is hereby issued against Defendant/Respondents inhibiting all dealings relating to land parcel No. LOC.1/MUKURWE/1029 until full and final determination of this case and/or till further orders.

b) That the Defendants/Respondents be condemned to pay the costs of this application.

17. The Plaintiffs claim is that during the 3 years that the inhibition subsisted she lost income from the farm. That she had been farming avocados, bananas and nappier grass.

18. The other issues of joint ownership of land were determined by the CMCC Court in 473 of 2012. I find no justifiable cause to delve into the same. As to whether the suit is resjudicata, I have perused the lower Court record which determined among other issues; locus of the Defendant in bringing the suit as well as the joint ownership. I am satisfied that the matter of damages was not canvassed. I am satisfied that the suit does not offend section 7 of Civil Procedure Act.

19. As to whether the Plaintiff suffered loss of income DW 2 presented a report that showed as follows;

CROP	AREA/ NO OF TREES	MANAGEMENT LEVEAL	AGE/ MATURITY LEVEL	ESTIMATED PRODUCTION/ TREE/ YEAR	YEARS OF PRODUCTION	ESTIMATED VALUE
Avocados	5	High	Mature	250kg	3	187,500
“	3	Average	Medium	100kg	3	45,500
Nappier	0.5 acres	High	Mature	15 tonnes	3	180,000
Banana	6 stools	High	Mature	18 bunches	3	10,800
TOTAL						423,800

The witness did not table his credentials so as to support his expertise in the area of assessment of loss of income. He produced a scanty report but failed to produce the Agricultural guide which he said was the basis of his figures. He did not satisfy the Court as to the authenticity of the report. He further stated that the nappier grass is growing on ½ acre while DW1 stated that it is on ¼ of acre. He also stated that there were no buildings on site while the DW1 reported that there were building stones on the land. This casts

doubt as to whether he indeed visited the land. The credibility of the report is in doubt.

20. Further the Defendants have not assisted the Court at all by not producing evidence to challenge the assessment. I am in agreement with the Defendant that the costs relating to transport of the Plaintiff to and from Court was catered for in the costs provided in the case CMCC No. 347/2012. In respect to the wages paid to the worker while attending Court no evidence was presented to Court and the claim remain fully unsupported.

21. It is on record that the Plaintiff has admitted that she and her sister sold the land to one David Ngarachu against the will of the other joint tenants. Section 91 (4) of Land Registration Act state as follows;

“If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—

(a) dispositions may be made only by all the joint tenants;

(b) on the death of a joint tenant, that tenant’s interest shall vest in the surviving tenant or tenants jointly; or

(c) each joint tenant may transfer their interest *inter vivos* to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void”.

It follows that such action of purporting to dispose the land was null and void *abinitio*. It is this action that triggered the filing of the Thika suit with the intention to safeguard the joint asset by the agents of one of the joint owners. The action cannot entirely be said to be unfounded.

22. Evidence was led by the D3 and D4 that the Plaintiff continued to utilise and farm on the land during the subsistence of the inhibition. This evidence was not controverted by the Plaintiff and the Court finds it probable.

23. The Defendants have not shown good cause why the caution lodged on the property should be left standing. I order that the same be removed.

24. I make the following orders;

a. An order directing the Defendants to remove and/or cause the removal of the caution registered against the title number LOC.1/MUKURWE/1029 forthwith and at their own cost.

b. A permanent injunction restraining the 2nd Defendant whether by himself or through his agents and/or servants from trespassing upon, entering into, farming, leasing, letting, subdividing, selling or in any other manner howsoever interfering with the suit land.

c. Mesne profits is declined.

d. The sum of Kshs. 449,100.00 as particularized at paragraph 17 is declined.

e. Each party to meet the costs of the suit.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 31ST DAY OF OCTOBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Kariuki for Plaintiff

Wambui for the Defendants

Irene and Njeri, Court Assistants