



**REPUBLIC OF KENYA**

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

**ELC NO. 316 OF 2017**

**WMM.....PLAINTIFF**

**VS**

**CWM.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed suit against the Defendant on the 24/3/17 seeking the orders interalia;

- a. A permanent injunction to issue restraining the Defendant whether by herself, her agents, servants or any one purporting to claim through him or acting under her authority or instructions or in any manner howsoever from interfering with the Plaintiff's occupation possession use and quite enjoyment of his said land parcel LOC6/GIKARANGU/[particulars withheld]
- b. An order for the Defendant to vacate and remove any structure and or development that she may have constructed on the said parcel of land.
- c. In the alternative to (b) above the Plaintiff be granted leave to remove the Defendant and demolish any structures put up by the Defendant on the said parcel of land.
- d. An order authorizing the removal and or forceful eviction of the Defendant from the suit land at the Defendants cost.
- e. An order of payment of mesne profits by the Defendant for the period that she has illegally occupied the Plaintiff's property.
- f. Damages for opportunity cost
- g. Costs of the suit
- h. Interest at commercial rates on e, f and g above

2. The Plaintiff's case is that he is the registered owner of the suit land having succeeded the suit land from his late father through a succession cause. That the Defendant has without any color of right illegally trespassed onto the suit land, resided thereon and cultivated crops without the authority of the Plaintiff. Despite demand to vacate the Defendant has been refused to so vacate the suit land with the consequences that the illegal trespass has deprived the Plaintiff of the right to occupation, utilization and enjoyment of the suit land.

3. The Defendant denied the Plaintiff's claim through her statement of defence filed on the 23/5/17. She averred that she lives on the land with her children which land belonged to her father in law. She sought to put the Plaintiff to strict proof thereof.

4. During the hearing of the case the Plaintiff testified and informed the Court that he is the registered owner of the suit land. He produced a certified copy of the title that shows that he became registered of the suit land measuring 0.53 acres on the 26/3/15. He stated that he inherited the suit land from his later father MM alias MM through a process of succession. The original land before subdivision was LOC 6/GIKARANGU//[particulars withheld] which was registered in the name of his father MM on the 27/1/67. He produced a copy of the certificate of confirmation of grant issued on the 21/10/2014 where the said LOC 6/GIKARANGU//[particulars withheld] was distributed to him and his two brothers to share equally. The suit land is a resultant subdivision of LOC 6/GIKARANGU//[particulars withheld].

5. The Plaintiff testified that the Defendant was his former sister in law having been married to his brother in 1973 but separated over 26 years ago. He informed the Court that he did not know where the Defendant was living after the long separation with his brother save that she had gotten married elsewhere. That the Defendant illegally entered into the suit land in 2015 whereupon through his lawyers caused a demand letter dated the 30/7/15 to be sent to her demanding that she vacates the suit land but the Defendant ignored, refused and or neglected to vacate hence the filing of the suit.

6. PW2 – MN testified that the Plaintiff is his brother and the Defendant is his former wife whom they separated for more than 24 years from 1988 and thereafter the marriage was dissolved through a divorce in 2014. That she left the children with him when she deserted the matrimonial home but returned in 2013. That the suit land belongs to the Plaintiff having inherited it from his later father. He confirmed that he was the administrator of the estate of his father and distributed the suit land to his three brothers, the Plaintiff, included. He refuted the Defendant's claim that he is the owner of the suit land and stated categorically that the Defendant has no claim on the suit land by virtue of the fact that she was his former wife. He stated that if the Defendant has any justifiable claim, she should claim from him and not his brother.

7. The Defendant testified and gave evidence and relied on her witness statement filed in Court on the 12/10/17. She stated that she got married to one MGN under kikuyu customary law and established a home at /[particulars withheld] Village Muthithi Location in Kigumo Muranga County. That she was blessed with 5 children in the marriage. That the Plaintiff and her husband are brothers being the sons of M M and his 1<sup>st</sup> wife MG. MM had 2 wives. He owned parcels no LOC 6/GIKARANGU//[particulars withheld] which he apportioned to his 4 sons; MGN, the Plaintiff, BN and FN, each to hold one acre. She informed the Court that she has lived in her portion since marriage, constructed semi-permanent houses and practiced small scale farming of trees bananas and food crops. That she resides on the said parcel of land with her son and daughters and grandchildren. She testified that her husband moved out of the family home in 1979 and started another family in /[particulars withheld] leaving her on the land with the children. That in 2013 her husband filed a divorce case No 156 of 2013 whose cause was intended to disinherit her of the family land and she contends that the said divorce cause was brought in bad faith by her husband.

8. Further the Defendant stated that the Plaintiff colluded with her husband to disinherit her and exclude her from the distribution of the suit land in Muranga in the succession cause HCCC No 1095 of 2013. That her husband was appointed the legal administrator of the estate and renounced his interest in his father's land without any notice knowledge and regard to her and her children who are entitled to inherit from him. That the Plaintiff has acquired the title to her share of the inheritance and has filed suit to harass her together with her children. That the original suit land was shared between three brothers to the exclusion of her husband and the land subdivided into three portions, one of which is the suit land LOC 6/GIKARANGU//[particulars withheld]. She stated that her possession of the suit land is lawful since she is the legal heir and beneficiary duly entitled to inherit her husband's share of the land.

9. On being cross examined by the Plaintiff's counsel, she informed the Court that she was asked by the Plaintiff to bring the will of MM to Court. She however informed the Court that she does not know the contents of a valid will. She informed the Court that she was not aware of the succession cause filed in respect to the estate of her father in law. She further confirmed that she was not a beneficiary in the said cause. That the land she resides in belongs to the Plaintiff and that her husband was not given any share of his father's land in the succession cause.

10. DW2 – JNM testified and adopted his witness statement filed on the 12/10/17. In brief, he stated that he is the brother of the Plaintiff and the brother in law to the Defendant. That the Defendant is the legal wife of MGN married in 1973 and were blessed with 5 children. That their father shared the LOC 6/GIKARANGU//[particulars withheld] among his 4 sons, the Defendants husband included, each getting one acre of the original land owned by their father. That the Defendant has been in possession of the portion of land belonging to her husband. He stated that the distribution of the estate of his late father in Muranga HCCC No 1095 of 2013 was discriminative. That his brother renounced his entitlement of his interest in his father's land without consideration of the Defendant and her children. That the subdivision of the original land was done without the involvement of the whole family.

11. On cross examination he informed the Court that he was not aware that the Defendant was divorced. He stated that his father left a will with him which is not signed but there were witnesses who witnessed the same but some are dead. He however informed the Court that the estate of his father was distributed through the Court succession which succession he was not informed or involved. He confirmed that the subject suit land was not given to the Defendant but to her husband. That the land was subdivided into two portions according to the two wives of his father and one portion was given to the Plaintiff and another to the Defendant's husband. That he was given a share of another land separate from the suit land and has no interest in the suit land.

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

13. The Plaintiff submitted that the suit land was acquired from his late father through the process of succession. He was issued with a certificate of confirmation of grant in which he was to share the land amongst his other 2 brothers. None of them was the Defendant's husband. That there is *prima facie* evidence that the suit land was legally transmitted to the Plaintiff. Relying on section 24,25 and 26 of the Registration of Land Act, he submitted that having proved that he is the sole owner of the suit land he is entitled to the protection of law as aforesated.

14. In respect to trespass the Plaintiff submitted that the Defendant trespassed on to the suit land in April 2015 and despite being notified to vacate the suit land the Defendant has persisted in the wrongful trespass. He relied on case law *inter alia* of **Martha Kigen Vs Johnson Tibino (2014) ECLR** where the Court observed that trespass to land consists of unjustifiable intrusion by one person upon the land of another.

15. The Defendant submitted that the Plaintiff did not deny that the Defendant is a family member with children. That the Plaintiff failed to show to the Court why the Defendant and her children were not involved during the succession cause of the estate of her father in law. That the Defendant was unaware of the succession cause, distribution, subdivision and transfer of the suit land to the Plaintiff. The Defendant submitted that the Plaintiff and her husband colluded to disinherit her of the suit land. That she has no other land to call home other than the suit land. That she has all along had possession of the suit land and that the procedure followed by the Plaintiff to acquire the land was discriminative unlawful and based on bad faith and meant to harass the Defendant and her children.

16. There is no dispute that the Plaintiff is the registered owner of the suit land having been so registered on the 26/3/15 pursuant to a certificate of confirmation of grant issued on the 21/10/14 in respect to the estate of MM alias MM, his late father. According to the said green card on record the said MM owned LOC 6/GIKARANGU//[particulars withheld]. According to the grant aforesated this land was distributed to BNM, FNM and WMM to share in equal portions. The Defendant's husband was not one of the beneficiaries of the suit land. It is not in dispute that the Defendant's husband is the son of MM and the brother of the Plaintiff. It is also not in dispute that the Defendant was the former wife of M G N, the brother of the Plaintiff. Their divorce is also not in dispute.

17. As to the ownership of the suit land, it is clear from both the certificate of grant and the copy of title and the green card that the suit land is registered in the name of the Plaintiff. It is the Plaintiff's claim that the Defendant trespassed onto the land in April 2015 and despite demand to vacate, she has persisted in her wrongful occupation of the suit land. The Plaintiff led evidence that the Defendant was married to his brother in 1973 and separated in 1988 but returned back in or around 2013. This evidence was corroborated by his witness PW2, who was the Defendant's husband. The Defendant's husband stated that he filed a divorce with the Defendant which divorce was finalized by a divorce nisi absolute on the 19/9/2015. The Defendant has not denied the divorce but insists that the distribution of the family land in the succession cause discriminated her and her children and that her husband had renounced her interest in the family land to disinherit her. There is no evidence tendered by the Defendant to support her allegations on the renunciation of the interest of her husband in the family land. PW2 informed the Court that he was the legal administrator of the estate of his late father but not one of the beneficiaries of the family land. He confirmed that the suit land belongs to his brother, the Plaintiff and that if the Defendant has any claim she should claim from him and not the Plaintiff.

18. It is clear that the issues raised by the Defendant in respect to the succession cause, the alleged will of the late MM, the alleged discrimination in the distribution of the assets of the father in law, the divorce and the entitlements thereto, if any, are issues that this Court is not clothed with jurisdiction to determine. They belong to the family Court and the Defendant's claims will be better served if she approaches the right forum. According to the divorce absolute on record the Defendant is divorced from the Plaintiff's brother.

19. In respect to whether or not the Plaintiff is a trespasser, it is clear that the Plaintiff has demonstrated that he is the registered owner of the suit land. Trespass is any unauthorized entry of another land without permission. Going by section 25 and 26 of the Land Registration Act the law offers protection to such land owner. In this case the Defendant has alleged that she settled on the suit land upon marriage in 1973. She did not deny the Plaintiff's evidence and that of the former husband who gave evidence that the Plaintiff had deserted the family home and land for over 26 years and reappeared only in 2013. At this time divorce proceedings had commenced vide SPMCC No 156 of 2013. Evidence was led by PW2 that he completed the divorce and obtained a decree absolute dissolving the marriage on 29/9/15. The evidence of the Plaintiff and PW2 is believable and on a balance of probabilities the Court finds that the Defendant is a trespasser on the suit land.

20. In respect to the issue of mesne profits, it is trite law that mesne profits must be pleaded and proved as it is part of special damages. The Plaintiff has not proved the same. It is declined.

21. In the end the Plaintiff's claim succeeds and the Court makes orders as follows;

- a. The Defendant is hereby ordered to vacate the suit land voluntarily within the next 60 days in default she will be evicted in accordance with the provisions of the law as set out in the Land Registration Act, 2012.
- b. A permanent injunction to issue restraining the Defendant whether by herself, her agents, servants or any one purporting to claim through him or acting under her authority or instructions or in any manner howsoever from interfering with the Plaintiff's occupation possession use and quiet enjoyment of his said land parcel LOC6/GIKARANGU/[particulars withheld] is hereby ordered.
- c. The Plaintiff shall have the costs of the suit.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 20<sup>TH</sup> DECEMBER 2018**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Ogeto HB Maina for the Plaintiff

Defendant: Present in person

Irene and Njeri, Court Assistants