



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO.242 OF 2017**

**MIRIAM WAITHIRA MUCHICHU.....PLAINTIFF**

**VERSUS**

**MARY WANJIRU NDUNGU.....DEFENDANT**

**JUDGMENT**

By a Plaint dated **16th January 1996** the Plaintiff herein filed a suit against the Defendant and sought for the following orders:

- a) ***A declaration that the Plaintiff is the Legal owner of the said LR.No.Ruiru Ruiru Block 2/1404.***
- b) ***A declaration that the Defendant is a trespasser on the said LR.No.Ruiru/Ruiru East Block 2/1404.***
- c) ***Eviction order against the Defendant.***
- d) ***Permanent Injunction restraining the Defendant and/or Defendant's agents from trespassing on the Plaintiff's said land***
- e) ***Mesne profits at the rate of Kshs.2,000/= only per month from January 1993 up to the date of handing over vacant possession of the said piece of Land***
- f) ***General Damages***
- g) ***Costs of the suit***
- h) ***Interest on (e), (f) and (g) above at Court rates***
- i) ***Such other or further relief as this Honorable Court may deem fit.***

In her statement of claim, the Plaintiff stated that she was the registered proprietor of the freehold piece of land Known as ***Ruiru/Ruiru East Block 2/1404***. It was also her claim that around the ***year 1993***, the Defendant entered and remained on the suit land without her consent or lawful justification and threatens to trespass on her piece of land claiming to be registered owner but has failed to produce any title deed.

She also alleged that despite notice to sue having been served, the Defendant has neglected to vacate the said plot. The Plaintiff therefore urged the Court to allow her claim entirely.

The suit is contested. The Defendant filed two statements of Defence and later filed an Amended statement of Defence together with a Counter-claim, dated ***16th June 2005***, after the parties had consented to the same vide a ***Consent*** filed in court on ***25th July 2005***.

It was the defendant's contention that the allegations that she entered the suit land in ***1993*** was false and without foundation and therefore the issue of trespass cannot arise. She further contented that if any title has been acquired in respect to the suit land it has been acquired fraudulently.

In her further Defence and Counterclaim she contended that she has been in occupation of the suit land for the past sixteen years. That she was settled on the Land by ***Nyakinyua Investment Limited***, where the parties

are shareholders. The defendant further alleged that by its resolution, at an ***Annual General Meeting*** held in ***April 1990***, the Company resolved that all properties that had been allocated and for which documents of title issued be nullified and the Plaintiff's title for the suit

property was nullified.

The Defendant further alleged that the Plaintiff as a former Director of the Company fraudulently influenced the issuance of the documents of the title to the property with the knowledge that the Defendant had been allocated the suit land.

The defendant denied that she is a trespasser on the Plaintiffs premises and contented that as a result of her continued occupation of the suit property **since 1980**, she is an adverse possessor.

In her counterclaim the Defendant contented that the Plaintiff used fraudulent means to acquire title with the knowledge that she was in possession and was still contributing towards the same. She further alleged that the Plaintiff had vested interest in the **Nyakinyua Investments Company Ltd**, especially to the plots allocated to illiterate shareholders and was a well-known grabber of plots allocated to illiterate shareholders by using her influential position to the detriment of other shareholders. It was her contention that she is the lawful owner of the suit land and therefore urged the court to allow her counter claim and dismiss the Plaintiffs suit with costs.

The Plaintiff further filed a Reply to Defence dated **11<sup>th</sup> August 2005** and filed on the same day through her Administrators. She reiterated the contents of her **Plaint** and denied that the Defendant had lived on the said piece of land for **sixteen years** and further denied that **Nyakinyua Investments Limited** held any meeting resolving to cancel titles. The Plaintiff further contented that she was the legal and registered owner of the suit land and having been transferred by the Government of Kenya, the Defendant cannot claim there was fraud. The Plaintiff denied ever acting fraudulently and maintained that she was the registered owner and further more **Ruiru/Ruiru 2/1404** does not exist

After various interlocutory applications, the hearing commenced on **14<sup>th</sup> February 2018**. The hearing notice was served upon the Plaintiff's Advocate through registered post as per the **Affidavit of Service** filed by **John Nzivu** dated **7<sup>th</sup> March 2018** and dated **11<sup>th</sup> April 2018**. The said Advocates did not appear in court and therefore the hearing proceeded in their absence. The Defendant called 2 witnesses in support of her counterclaim.

#### **DEFENDANT'S CASE**

**DW1 - Mary Wanjiru Ndungu** the Defendant herein told the court that she signed her witness statement on **19<sup>th</sup> July 2017** and she adopted it fully as part of her evidence. She further confirmed that she filed a Counter claim.

It was her testimony that on **8<sup>th</sup> July 1976**, her mother bought shares on **Nyakinyua Investment**. She produced the receipt in court. She then produced her list of documents filed on **19<sup>th</sup> July 2017**, and the documents attached thereto as **Defence Exhibit 1 to 14**.

She further testified that she would like the court to cancel the Plaintiff's title of the suit Land and the same to be reinstated in her name.

**DW2 - Nduta Ndirangu Chege** also adopted her witness statement of **2<sup>nd</sup> February 2018**. She testified that she is the **Chairlady of Nyakinyua Investment Co. Ltd** and she was aware of the facts of the case. She further testified that she has a **Clearance Letter** to show that the suit land is owned by the Defendant. She produced the Clearance Letter and the same was marked as **Defence Exhibit 15**. The Defendant was directed to file written submissions.

In compliance of the courts directions, the **Law Firm of Kabue Thumi & Co. Advocates** for the Defendant filed their written submissions on **12<sup>th</sup> April 2018**, and submitted that the court do grant the Defendant the orders she sought in her Counterclaim.

It was their submission that the **Title Deed** issued in the name **Miriam Waithira Muchichu** on **6<sup>th</sup> October 1988**, of the suit property was issued irregularly and illegally and the Plaintiffs lack of interest in her suit was a clear indication.

The Defendant relied on the case of **Elijah Makeri Nyang'wae vs Stephen Mungai Njuguna & Another (2013)eKLR**.

The Court has now carefully considered the available evidence and

the exhibits thereto. The Court has also considered the written submissions and the cited authorities together with the relevant provisions of law and makes the following rendition;-

The Plaintiff filed this suit on **2<sup>nd</sup> February 1996**, and sought for various declarations among them, that she be declared the legal owner of **LR.No.Ruiru/Ruiru East Block 2/1404**, and that the Defendant herein be declared a trespasser.

During the subsistence of this suit, the Plaintiff **Miriam Waithira Muchichu** died on **7<sup>th</sup> August 2000**, as is evident from the **Certificate of Death** marked **PK-1** attached to the affidavit of **Philip Kahiu Muchichu**. The deceased Plaintiff was substituted with **Eli Kiiru Muchichu** and **Philip Kahiu Muchichu** vide an **Order** of the Court granted on **11<sup>th</sup> March 2002**. However, the pleadings were never amended to reflect the substituted Plaintiffs.

Further, vide a **Consent Order** filed in court on **25<sup>th</sup> July 2005**, the Defendant **Mary Wanjiru Ndungu** was allowed to amend her defence and include a **Counter-claim**. It is evident that the Defendant denied the allegations made in the **Plaint** and averred that she has been in occupation of the suit property **16 years** prior to the filing of the suit. She also sought in her **Counter-claim** to be declared the owner of **Ruiru/Ruiru East Block 2/1404** by adverse possession and that the **Land Registrar Thika** do cancel the title deed issued to the Plaintiff on

6<sup>th</sup> October 1988.

As the Court has stated, the pleadings were never amended and therefore the suit herein is still reflecting that it was brought by **Miriam Waithira Muchichu** (deceased) and not her estate.

Though the Plaintiff's advocate was served with a hearing **Notice**, he did not appear in court nor his clients. Therefore the Plaintiff's claim was never prosecuted and this Court finds that the claim herein by the Plaintiff was never prosecuted and it is accordingly dismissed vide **Order 12 Rule 3** of the **Civil Procedure Rules**.

Having now dismissed the Plaintiff's suit, the Court finds that the next issue for determination is whether the Defendant has proved her case on the required standard of balance of probability as stated in the **Counter-claim** and as required by **Order 12 Rule 3(1) & (3)** of the **Civil Procedure Rules**, which states:-

***“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.***

***If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him”.***

The Court has noted that the claim by the Defendant herein is against **Miriam Waithira Muchichu**. The Defendant did not amend her pleadings to be tandem with the substituted Plaintiffs. Therefore even if the court is to find for the Defendant as stated in here Counter-claim the said Order would show that she is claiming against **Miriam Waithira Muchichu**, who is now deceased. Be that as it may, the Defendant's claim was hinged on fraud. She alleged that the deceased fraudulently caused the suit property to be registered in her name whereas the said property was owned by the Defendant herein. However, it is evident that the late **Miriam Waithira Muchichu** was registered as the proprietor of the suit property in **1988**. There is a Certificate of title attached to the pleadings.

Though **Nyakinyua Investments Ltd** wrote a letter dated **14<sup>th</sup> August 2001**, stating that the suit property belonged to **Mary Wanjiru Ndungu (Kimani)**, which was allocated to her in **1990**, it is evident that by **1990**, the suit land was already registered in the name of **Miriam Waithira Muchicha**.

There was no evidence tendered either from the Lands Office or elsewhere to prove the allegations of fraud on the part of the said **Miriam Waithira Muchichu**. Fraud is serious allegation and it has to be proved on the required standard. See the case of **R.G Patel...Vs...Laiji Makanji (1957)EA 314**, where the court held that:-

***“Allegation of fraud must be strictly proved. It was incumbent upon the Plaintiff therefore to demonstrate to this court that the transfer of the titles to the Defendants names was fraudulent and specifically explain the actions which constituted the fraud”.***

Further, the Defendant is the one who has alleged, and therefore she had the onus of calling sufficient evidence to prove her case on the required standard. See **Section 107** and **109** of the **Evidence Act**, which provides:-

***107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

The Defendant herein did not call such evidence. Further, her prayer

is that she be declared the owner of the suit property by virtue of adverse possession. However, the Defendant never adduced any evidence at all to support a claim for adverse possession. There was no evidence at all whether the Defendant disposed the Plaintiff herein and whether she has been in open and uninterrupted possession of the suit property. See the case of **Wambugu...Vs...Njuguna (1983) eKLR**, the Court held that:-

***“In order to acquire by statute of limitation, a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it”.***

Having now carefully considered the available evidence, the Court finds no sufficient evidence to find and hold that **Miriam Waithira Muchichu (deceased)** fraudulently transferred to the suit property to her name and deprived the Defendant ownership of the same. Further, there is no evident a claim of adverse possession and consequently, the Court finds no reason why it should direct the **Land Registrar Thika** to cancel the title deed issued to **Miriam Waithira Muchichu (deceased)** on **6<sup>th</sup> October 1988** and to also declare that the Defendant is the owner of the suit land **Ruiru/Ruiru East/1404**, by virtue of adverse possession.

For the above reasons, the Court finds that the Defendant herein **Mary Wanjiru Ndungu** has failed to prove her claim in the **Counter-claim** on the required standard of balance of probabilities. Consequently, the

Defendant's claim as stated in the **Counter-claim** is dismissed entirely

with no orders as to costs as Plaintiff did not attend court.

It is so ordered.

***Dated, Signed and Delivered at Thika this 10<sup>th</sup> day of December 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Kinyanjui holding brief for Kanyi for Plaintiff

Mr. Muriuki holding brief for Mr. Kabue for Defendant/Counter-claimant

Lucy - Court Assistant

**L. GACHERU**

**JUDGE**

**Court** – Judgment read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**10/12/2018**