



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KERUGOYA**  
**ELC CASE NO. 45 OF 2015**

**TARACIRA MICERE NJUKI.....PETITIONER**

**VERSUS**

**ANTHONY GACHUKI.....1<sup>ST</sup> RESPONDENT**

**PETER MUCHIRI NJUKI.....2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**RULING**

**TARACIRA MICERE NJUKI** the petitioner herein moved this Court by way of her amended Originating Summons founded under the following provisions:

- 1. Article 40 of the Constitution of Kenya 2010,***
- 2. Order 37 of the Civil Procedure Rules,***
- 3. Section 3A of the Civil Procedure Act,***
- 4. Sections 7 and 49 of the Land Act 2012 and***
- 5. Sections 25, 26, 60 and 75 of the Land Registration Act 2012.***

The petitioner seeks the following orders:

- 1. Spent.***
- 2. Whether a vesting order should issue vesting all that property known as WEST BARAGWE/KARIRU/2545 in the petitioner.***
- 3. Whether the Honourable Court should order the 3rd respondent to register or cause to be registered all that property known as WEST BARAGWE/KARIRU/2545 in the petitioner's name.***
- 4. Whether an order should issue compelling the 1st and 2nd respondent to vacate the suit***

*property known as WEST BARAGWE/KARIRU/2545.*

**5. Whether a declaration order should issue declaring that all that property known as WEST BARAGWE/2545 does not form part of the Estate of the late JAMES NJUKI MIANO.**

**6. Whether the respondents be compelled to pay the costs of this application.**

The gravamen of the petitioner's application as can be discerned from the grounds on which it is premised and the supporting affidavit sworn by the petitioner on 20th April 2015 is that she is the wife of **JAMES NJUKI MIANO** (deceased) who died on 20th December 2014 but before that, they had inherited land parcel No. WEST BARAGWE/KARIRU/2545 (the suit land) which they caused to be registered in their joint names. However, the 1st and 2nd respondents who are the deceased's sons caused to be registered a caution on the suit land yet it does not form part of the deceased's Estate. That upon learning of that caution, the petitioner wrote to the 3rd respondent to remove the caution but that has not been done and that conduct amounts to an abuse of her proprietary rights hence this application. Annexed to the application is a copy of the deceased's death certificate, the title deed to the suit land, the certificate of search, the petitioner's Identity Card and a letter addressed to the 1st and 2nd respondents demanding that they remove the caution – annexures **JMN 1** to **JMN 5**.

Neither the 1st nor 2nd respondent filed any response to the application. However, the 2nd respondent **PETER MUCHIRI NJUKI** a son of the deceased swore an affidavit with the authority of the 1st respondent in which he purported to adopt a replying affidavit sworn by **JANE WAMBU NJUKI** who is not a party in this case. I shall revert to that later but suffice it to state that since **JANE WAMBUI NJUKI** is a stranger to these proceedings, her replying affidavit is really of no consequence. Indeed in reaction to that replying affidavit of **JANE WAMBUI NJUKI**, the petitioner filed a further affidavit seeking to have it struck out as she is not a party to this suit.

On behalf of the 3rd and 4th respondents, **CATHERINE W. NJAGI** the Land Registrar Kirinyaga swore a replying affidavit in which she deponed that the suit land is a result of the sub-division of the parcel No. WEST BARAGWE/KARIRU/735 which was first registered in the names of the deceased. Following its sub-division, the suit land was on 24th June 2013 registered in the joint names of the petitioner and the deceased as joint proprietors and a title deed was issued. That on 8th January 2015, a caution was registered thereon in favour of the 1st and 2nd respondents claiming a beneficiary interest as children of the deceased who had developed mental illness upon the demise of his wife **ESTHER KARIUKO NJUKI** in 2010. The 1st and 2nd respondents alleged that they had reason to believe that during their father's illness, the petitioner registered herself as a joint owner of the suit land. That the 1st respondent is the registered proprietor of land parcel No. WEST BARAGWE/KARIRU/2543 and the 2nd respondent is the registered proprietor of land parcel No. WEST BARAGWE/KARIRU/2544. Therefore, since the parties are now present in Court, they should ventilate their issues and evidence regarding the allegation of mental illness of the deceased.

Submissions have been filed both by the firm of **F.N. NJANJA** Advocates for the 1st and 2nd respondents and the Attorney General for the 3rd and 4th respondents while the firm of **MUSYOKI MOGAKA & Co.** Advocates filed submissions on behalf of the petitioner.

I must first raise my concern about the manner in which the petitioner invoked this Court's jurisdiction. The central issue in this application is really the removal of the caution lodged by the 1st and 2nd respondents on the suit land. That is provided for under **Section 73 (1) of the Land Registration Act** in the following terms:

***"A caution may be withdrawn by the cautioner or removed by order of the Court or subject to Sub-section (2), by order of the Registrar"***

**Sub-section (2)** provides that:

***"The Registrar, on application of any person interested, may serve notice on the cautioner***

**warning the cautioner that the caution will be removed at the expiration of the time stated in the notice”**

**Sub-section (3), (4) and (5) of Section 73** then go on to provide for the steps that the Registrar shall take in removing a caution. It is not clear why the jurisdiction of the Registrar was not invoked in this case as far back as 24th March 2015 when counsel for the petitioner addressed the 1st and 2nd respondents about the caution. However, as the matter is now in Court, I will determine it as this Court also has the jurisdiction to do so. The only concern is that the issue for removal of the caution has been joined with other issues such as an eviction order which, in my view, ought to be addressed either through a substantive suit or as provided for under **Section 152 E of the Land Act.**

This may be the right time to re-visit the replying affidavit of **JANE WAMBUI NJUKI** who describes herself as the daughter of the deceased and goes on to depone how her late father had sub-divided his land parcel No. BARAGWE/KARIRU/735 into four portions two of which were given to his two sons, the 1st and 2nd respondents, one of which was to be registered in the deceased’s names to hold in trust for his seven daughters and the last one was to be sold to meet his medical bills. It is this replying affidavit that the 2nd respondent **PETER MUCHIRI NJUKI** wished to adopt. However, since the said **JANE WAMBUI NJUKI** is not a party in these proceedings, she cannot file an affidavit capable of being adopted by the respondents much as this Court appreciates that she is the daughter of the deceased. As the caution on the suit land was placed by the 1st and 2nd respondents, they are the parties to whom the notice should be served before the caution is removed. It is not clear to this Court why neither the 1st nor 2nd respondent filed any replying affidavit. **Order 51 Rule 14 (1) of the Civil Procedure Rules** provides as follows:

**“Any respondent who wishes to oppose any application may file any one or combination of the following documents –**

***a. a notice Preliminary Objection; and/or***

***b. replying affidavit and/or***

***c. a statement of grounds of opposition”.*** Emphasis added.

Since **JANE WAMBUI NJUKI** is not a respondent in this suit, she could not file a replying affidavit and therefore there is no way in which the 2nd respondent could depone, as he did in paragraph 4 and 5 of his replying affidavit that:

4: ***“That the history of the subject land is as set out in the affidavit of my sister Jane Wambui Njuki which I attach and file herein as a replying affidavit to the Originating Summons herein”.***

5: ***“That I wish to go word by word with the averments stated therein”.***

It is really unfortunate that the respondents herein who are the ones who placed a caution on the suit land saw it fit not to file any replying affidavit, grounds of opposition or Preliminary Objection as required by **Order 51 Rule 14 (1) of the Civil Procedure Rules.** The effect of that is that there is no opposition to the petitioner’s Originating Summons by the 1st and 2nd respondents and the ***“replying affidavit”*** by **JANE WAMBUI NJUKI** must be expunged from the record.

Nonetheless, that leaves only the replying affidavit of **CATHERINE W. NJAGI** the Land Registrar Kirinyaga whose contents I have summarized above.

It is not in dispute that the suit land is registered in the names of the petitioner and the deceased as joint proprietors. Under **Section 91 (4) (a) and (b) of the Land Registration Act,** it is provided that:

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

*a. disposition 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”.*

That means therefore that following the demise of the deceased on 20th December 2014, his share in the suit land automatically vested in the petitioner who became the absolute owner thereof. All that was required thereafter was for the Registrar, upon application by the petitioner, to issue a copy of the certificate of ownership as provided under **Section 92 (2) of the Land Registration Act**. No vesting order is really required as sought herein. A vesting order is defined in **BLACK'S LAW DICTIONARY** as:

***“A Court order passing legal title in lieu of a legal conveyance”***

That is not really necessary in the circumstances of this case because, following the demise of a co-tenant, the other tenant is entitled to the property that was owned jointly by virtue of the principle of survivorship and cannot form part of the deceased's Estate.

**Section 60 of the Land Registration Act** on the other hand provides that:

***“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of the death, delete the name of the deceased tenant from the register by registering the death certificate”.***

On the other hand, **Section 49 of the Land Act** provides that:

***“If one of two or more joint proprietors of any land lease or charge dies, the Registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate”.***

It is obvious from the above legal provisions that all that the petitioner was required to do was to move the Registrar to delete the deceased's names from the register of the suit land. It is clear from the submissions by the 3rd and 4th respondents that they would prefer that this matter be determined by the Court. This Court will do just that. First, however, I must deal with some jurisdictional issues.

In their submissions, counsel for the 1st and 2nd respondents has argued that the petitioner did not comply with the provisions of **Section 13 (A) of the Government Proceedings Act** and therefore this petition must fail because several claims are raised against the 3rd and 4th respondents. The 3rd and 4th respondents have not raised that issue. **Section 13 (A) of the Government Proceedings Act** provides as follows:

***“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings”***

The above provision has since been declared as un-Constitutional – see **KENYA BUS SERVICE LTD & ANOTHER VS MINISTER FOR TRANSPORT & OTHERS 2012 e K.L.R.** That finding was approved by the Court of Appeal in the case of **DAVID NJENGA NGUGI VS ATTORNEY GENERAL C.A CIVIL APPEAL No. 297 of 2004 (2016 e K.L.R)** where the Court held that though couched in mandatory terms, **Section 13A of the Government Proceedings Act** is merely directory and cannot render a suit incompetent for failure to issue notice. The issue of a notice being mandatory where a suit is against the Government as provided under **Section 13 A of the Government Proceedings Act** has therefore been put to rest and cannot be raised as a bar in these proceedings.

Counsel for the 1st and 2nd respondents also submitted that the suit land is trust property held in trust for the beneficiaries and cited **MUMO VS MAKAU 2002 1 E.A 70** adding that the claim by the petitioner that she bought the suit land jointly with the deceased is a lie and act of dishonesty and that no sale

agreement was produced. Counsel further submitted that the registration of the suit land in the joint names of the petitioner was done at the time when the deceased was suffering from mental illness. As indicated earlier, the respondents did not file any replying affidavit and were content to let their sister **JANE WAMBUI NJUKI**, a stranger to these proceedings, file a “**replying affidavit**” yet the onus was on them to demonstrate why the caution lodged by them should continue to remain on the suit land. No evidence was produced such as a doctor’s report to show that indeed the deceased was suffering from mental illness at the time the suit land was jointly registered in her names and that of the deceased. That would seem to impute fraud on the part of the petitioner but it is now well settled that fraud must be strictly proved to the required standard which is heavier than a mere balance of probabilities – **R.G. PATEL VS LALJI MAKANJI 1957 E.A 314**. Mere vague and general allegations of fraud will not suffice and mind you, these are only emanating from the replying affidavit of **CATHERINE W. NJAGI** the Land Registrar Kirinyaga who would not have been privy to such fraud. She has deponed in paragraph 7 as follows:

***“That they further allege that they have reason to believe that it was during the time of their father’s mental illness that the petitioner was registered as a joint owner of the suit property. Annexed and marked CWN 3 is a copy of the caution dated 15th January 2015”.***

The issue of trust has also been raised by counsel for the 1st and 2nd respondents but again, this was only mentioned in the affidavit of **JANE WAMBUI NJUKI** a stranger in these proceedings and whose “**replying affidavit**” is therefore of no evidential value. She may very well have a claim in trust but that can now only be pursued in a separate suit by her and her sisters but not in this petition where she is not even a party. For now, the Court must recognize the rights of the petitioner to the suit land as protected both by **Article 40 of the Constitution** and **Sections 25 and 26 of the Land Registration Act** and take the petitioner as the absolute and indefeasible owner of the suit land until her title is revoked and that cannot be done in this petition and neither is it among the remedies sought herein. I also find that the 1st and 2nd respondents have not placed any sufficient evidence before me as to why the caution placed on the suit land should not be removed.

Ultimately therefore and upon considering all the evidence herein, this Court makes the following orders with respect to the petition herein:

- 1. There is no need for a vesting order to be issued vesting the suit land to the petitioner. She already has a title to the suit land issued in her names and the names of the deceased. All she needs to do is approach the Land Registrar in terms of Section 49 of the Land Act to delete the deceased’s names from the register.***
- 2. The Court need not order the Land Registrar to register the suit land in the petitioner’s names. The power to do so is donated to that office by the law.***
- 3. This Court need not issue orders compelling the 1st and 2nd respondents from vacating the suit land. As it is private land, the registered proprietor thereof who is the petitioner is within his rights to invoke the provisions of Section 152 E of the Land Act before moving to this Court. Such an order would therefore be premature in view of the clear provisions of Section 152 F of the Land Act.***
- 4. An order is issued declaring that the suit land does not form part of the Estate of the late JAMES NJUKI MIANO.***
- 5. Each party shall meet their own costs of this petition.***

**B.N. OLAO**

**JUDGE**

**21<sup>ST</sup> APRIL, 2017**

Ruling delivered, dated and signed in open Court this 21<sup>st</sup> day of April 2017

Petitioner present

No appearance by the Respondents.

**B.N. OLAO**

**JUDGE**

**21<sup>ST</sup> APRIL, 2017**