



**REPUBLIC OF KENYA**

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

**THIKA LAW COURTS**

**ELC.NO.23 OF 2017**

**MAGDALINE NDUTA MWICIGI.....PLAINTIFF**

**-VERSUS-**

**ANNA WANJIKU MWICIGI.....DEFENDANT**

**JUDGEMENT**

By a *Plaint* dated **10<sup>th</sup> April 2015**, the Plaintiff herein **Magdaline Nduta Mwicigi** has brought a claim against the Defendant **Anna Wanjiku Mwicigi**, and has sought for these orders:-

- a) To nullify title deed No.Chania/Makwa/742 issued to Defendant.**
- b) Permanent injunction to restrain the Defendant and her concerned people from interfering with the parcel of land, Chania/Makwa/742.**
- c) Vacant possession.**
- d) Costs of this suit to be provided.**

The Plaintiff alleged in her claim that at all material times, her husband was the registered owner of land parcel **No.Chania/Makwa/742**, having inherited the same from his father, one **Joseph Mwicigi Kariuki**. It was her further claim that the Defendant is now in occupation of the said parcel of land at the detriment of the Plaintiff.

Further that the matter was heard at Land Dispute Tribunal – Gatundu North, and the tribunal ruled in favour of the Defendant. However, the **Plaintiff's husband appealed** against the said Award vide **Nairobi HCC App.No.109 of 2005**, but the said **Appeal was discontinued**. It was her further allegation that her **husband died on 12th August 2009**, as was evident from the **Death Certificate** attached and she has waited for a report on the appeal from her Advocate to no avail. She therefore urged the Court to nullify the title deed issued to the Defendant and grant her Vacant Possession of the suit land. She urged the Court to allow her suit entirely.

The Defendant was allegedly served with **Summons to Enter Appearance** as is evident from the **Affidavit of Service of David Njoro Mburu**, filed in Court on **6<sup>th</sup> January 2016**, but **failed** to enter appearance. Subsequently, **Interlocutory Judgement** was entered against her on **18<sup>th</sup> January 2016** and matter was set for formal proof.

The matter proceeded for formal proof on **26<sup>th</sup> July 2017**, wherein the Plaintiff gave evidence for herself and called no witness. She alleged that the Defendant is her sister-in-law who is occupying her parcel of land being **LR.No.Chania/Makwa/742**. It was her testimony that she inherited the same from her father-in-law as her husband **Joseph Mwicigi died** in the **year 2009**. She also told the Court that she lives on the suit land and so is the Defendant. she urged the Court to allow her claim and that the Defendant be directed to give the said land to the Plaintiff and that the same be registered in her name.

Though the **Defendant did not file any Defence**, the matter proceeded for **formal proof** and the Plaintiff having alleged, she had the *onus* of proving her case on the required standard.

There is no legal definition of the word formal proof, but in the case of **Samson S. Maitai & Another..Vs..African Safari Club Ltd & Another[2016]eKLR**, the Court held as follows:-

***“.....I have not seen judicial definition of the phrase ‘formal proof’. ‘Formal’ in its ordinary Dictionary meaning refers to being ‘methodical’ according to rules of evidence. On the other hand, according to Halsbury Laws of England Vol.15, Paragraph 260, ‘Proof’ is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the Court as to the truth or falsity of a fact. Generally as is well known, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.***

Therefore in this matter, the Plaintiff who has alleged had a duty to adduce evidence sufficient to sustain her suit and raise the presumption that whatever is claimed is true and therefore this goes to the merit of her case. Therefore, even if this is a formal proof, if the Plaintiff fails to satisfy the trite threshold, the matter would stand to be dismissed on the basis that there was no sufficient proof and therefore not merited. The Court in the case of **Penina Atieno & Another...Vs...Standard Chartered Bank Ltd & Another, Kisumu HCCC No.133 of 2002**, held that:-

***“whether the Plaintiffs have failed to formally prove their case, the interlocutory Judgement is set aside and the suit dismissed with costs.”***

The Court will also be persuaded by the findings in the Tanzania case of **Tanzania Saruji Corporation..Vs...African Marble Company Ltd(2002) 2 EA 613(CAT)**, where it held that:-

***“The duty was on the Judge to examine the evidence and the law and make a judicious decision and it is no answer to the Judge’s apparent inattention to the evidence that he did not have the advantage of the argument”.***

It is also trite that parties are **bound by their pleadings**. The Plaintiff herein is therefore **bound by her pleading** which is the Plaint filed in Court on **10<sup>th</sup> April 2015**. See the case of **Vijay Morjaria...Vs...Nansing Madhusingh Darabar Hulashib Nansingh Darbar, Civil App. No.106 of 2000 LLK 7349(CAK)**, where the Court held that:-

***“A party is bound by his or her pleadings and must either succeed or fail within those pleadings.”***

The Plaintiff being bound by her pleadings meant that she had to confine her adduced evidence to the pleadings filed in Court.

The Plaintiff in her paragraph 3 of the Plaint stated that the suit land **Chania/Makwa/742**, was initially owned by her husband who inherited the same from his father **Joseph Mwicigi Kariuki**. The Plaintiff also said that her husband died on **12<sup>th</sup> August 2009**, and attached a Death Certificate to her pleadings which indeed confirms that **Joseph Mwicigi Kariuki** died on **12<sup>th</sup> August 2009**. However, in her Plaint,

the Plaintiff stated that the father to her husband was one **Joseph Mwicigi Kariuki**. The question that is left unanswered is whether **Joseph Mwicigi Kariuki** was a husband to the Plaintiff herein or her father-in-law as she alleged in her Plaintiff.

Further from the Plaintiff, it is evidence that the Land Dispute Tribunal-Gatundu North entered an Award in favour of the Defendant on **17<sup>th</sup> April 2004**. The same was allegedly adopted as the Order of the Court on **31<sup>st</sup> October 2005**. Though the Plaintiff did not attach the said proceedings, she alleged that her husband filed an **Appeal no.109 of 2005**, which Appeal was later discontinued. The Plaintiff did not avail the proceedings of the said Appeal case and the Order of discontinuation. If the Defendant was registered as the proprietor of the suit property through a Court Order, then her registration is lawful. The said Court Order was never overturned in an Appeal and the matter is therefore settled. The Plaintiff cannot revive the said issue through another suit and the instant action is therefore *Resjudicata*. In the case of **Samuel Kiiru Gitau..Vs..John Kamau Gitau, Nairobi High Court, Civil Case No.1249 of 1998[1998] LLR 7669**, the Court held that:

***“For a matter to be resjudicata, it must be one which the Court has previously exercised its judicial mind and has after argument and consideration, come to a conclusion on the contested matter and for this reason, a matter is said to have been ‘heard and finally decided’ notwithstanding that the former suit was disposed off by a Decree or an Award”.***

It is evident that the suit property was registered in the name of the Defendant after the Award of the Land Dispute Tribunal was adopted as an Order of the Court. The Plaintiff cannot ask the Court to annul the said registration in a new suit as that matter is *resjudicata*. The Plaintiff should have pursued the **Appeal No.109 of 2005** as filed by her late husband but not in filing a fresh suit.

Further in her Witness Statement, the Plaintiff alleged that she lives in **LR.No.Chania/Makwa/743**, which was occupied by her husband from the time he came from detention. If the Defendant has been in occupation of **LR.No.Chania/Makwa 742**, from the time the Plaintiff’s husband left detention, then the Plaintiff’s claim has been caught by limitation of time as provided by Section 7 of the Limitation Actions Act Cap 22 Laws of Kenya, which provides that:-

***“an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him and if it first accrued to some person through whom he claim to that person”***

The Plaintiff in her own statement has stated that her husband voluntarily started to use **LR.No.Chania/Makwa/743**, after coming from detention. That is the parcel of land that the Plaintiff is utilizing and is still living on. Therefore, it is evident that the Plaintiff is not landless. She has not told the Court why she has not sought to be registered as the proprietor of **LR.No.Chania/Makwa/743**.

It is evident from the certificate of official search attached to the Plaintiff that **LR.No.Chania/Makwa.742**, is registered in the name of **Anne Wanjiku Mwicigi**, the Defendant herein. The same was done after the Award of the Land Dispute Tribunal was adopted as the Order of the Court. There was no evidence that the Defendant was registered as the proprietor of the suit land through fraud. Therefore, as provided by Section 26(1) of the Land Registration Act, she is deemed to be the absolute and indefeasible proprietor of the suit land. Section 26(1) of the Land Registration Act provides that:-

***“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.***

The Plaintiff has not adduced sufficient evidence to warrant this Court to order that the said registration be cancelled and the subsequent Certificate of title issued to the Defendant be annulled.

For the above reasons, the Court finds that the ***Plaintiff has not proved her case on the required standard of balance of probabilities.***

Consequently, the Court ***dismisses the Plaintiff's suit entirely with no orders as to costs.***

It is so ordered.

Dated, Signed and Delivered this **26th** day of **September, 2017.**

**L. GACHERU**

**JUDGE**

**26/9/2017**

In the presence of

In person Plaintiff - present

No appearance for Defendant

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

**26/9/2017**