



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 64 OF 2013**

**JOYCE WAMBUI MBUKO )**

**LYDIA PAULINE WAIRIMU MBUKO ) .....PLAINTIFFS**

**DAVID BUNDI MBUKO )**

**VERSUS**

**KIRINYAGA COUNTY COUNCIL.....DEFENDANT**

**JUDGMENT**

By his plaint filed herein on 17<sup>th</sup> July 2006, the plaintiff **NAHASHON MBUKO STEPHANO**, (who later died on 18<sup>th</sup> August 2013 and was substituted by his wife **JOYCE WAMBUI MBUKO** and two others) filed this suit against the then **KIRINYAGA COUNTY COUNCIL** seeking judgment in the following terms:

- 1. An order for the defendant to compensate the plaintiff with another agricultural land plus two commercial plots or pay the plaintiff money equal to the value of one acre out of L.R No. NGARIAMA/MERICHI/695.***
- 2. Costs and interest.***
- 3. Any other or further relief that this Honourable Court deems fit and just to grant.***

The claim was predicated on pleadings that at all material times, the plaintiff was the registered proprietor of land parcel No. NGARIAMA/MARICHI/695 situated within **KIRINYAGA DISTRICT** (as it then was) and sometime in 1974, the defendant requested the plaintiff to give it one acre out of the said land for purposes of establishing **KIMWEAS** Shopping Center and in return, the defendant agreed to compensate the plaintiff with another portion of agricultural land and two commercial plots. Pursuant to that request, the plaintiff gave the defendant one acre from the land which was sub-divided into commercial plots and allocated to third parties. The defendant agreed to compensate the plaintiff with two acres out of L.R No. KIRINYAGA/GATHIGIRIRI/157 and a further two commercial plots. However, in flagrant breach of the said agreement and despite demand notice thereof having been issued, the defendant has failed to effect the transfer of two acres and two commercial plots thus rendering this suit necessary.

In its defence filed on 23<sup>rd</sup> August 2006, the defendant, while admitting the agreement, pleaded that it was over 32 years since it occupied, sub-divided and allocated the land to third parties and hence it has acquired it by way of adverse possession. It further pleaded that it is the plaintiff who has not followed

up on the issue of compensation by not looking for alternative land to be allocated to him and the land that the plaintiff was to be compensated with has pending cases. The defendant further pleaded that the suit is bad in law and an abuse of the Court process and a Preliminary Objection would be raised. However, no such Preliminary Objection was raised by the time the trial commenced on 4<sup>th</sup> May 2017.

Though served with hearing notice, neither the defendant's counsel **MR. D.N. GITONGA** nor its representative appeared in Court for the hearing and so the trial proceeded in their absence.

**JOYCE WAMBUI MBUKO** (PW1) is the wife to **NAHASHON MBUKO STEPHANO** (the deceased) and obtained a grant of letters of administration in respect of his Estate on 29<sup>th</sup> February 2016 and by her application dated 10<sup>th</sup> December 2015, which was not opposed, was allowed to substitute him. She testified that prior to his death, the deceased was the proprietor of land parcel No. NGARIAMA/MERICHI/695 (the suit land) and sometime in 1974, the defendant requested him to transfer to it one (1) acre for purposes of establishing **KIMWEAS** Shopping Center and in return, the deceased would be compensated with two (2) acres out of land parcel No. KIRINYAGA/GATHIGIRIRI/157 and two (2) commercial plots. However, although the deceased kept his side of the agreement, the defendant failed to do so notwithstanding a promise to that effect and even after a consent had been recorded in Court. That necessitated the filing of this suit and the plaintiff had the one (1) acre valued. The plaintiff produced as part of her evidence the following documents:

1. Certificate of search in respect of land parcel No. NGARIAMA/MERICHI/695 – Plaintiff's Exhibit 1
2. Minutes of meeting of 15.1.2002 – Plaintiff's Exhibit 2
3. Receipt dated 16.3.04 – Plaintiff's Exhibit 3.
4. Receipt dated 4.3.04 – Plaintiff's Exhibit 4.
5. Letter dated 13.3.02 – Plaintiff's Exhibit 5
6. Letter dated 18.10.02 – Plaintiff's Exhibit 6
7. Letter dated 26.2.04 – Plaintiff's Exhibit 7
8. Letter dated 14.7.04 – Plaintiff's Exhibit 8
9. Valuation Report – Plaintiff's Exhibit 9

**DAVID CHEGE KARIUKI (PW2)** is a registered valuer and testified that on 8<sup>th</sup> June 2007, he received instructions to value one (1) acre out of the suit land which the defendant had excised into plots. He valued the one (1) acre at Ksh. 977,500 and prepared a report (Plaintiff's Exhibit 9).

At the end of the trial, counsel for the plaintiff **MR. MURIITHI** filed submissions.

I have considered the evidence by the plaintiff, her witness (PW2) and the submissions by counsel. As the defendant did not adduce any evidence, the plaintiff's case is not challenged.

It is clear that the suit land is still registered in the names of the deceased. Indeed it is part of the deceased's property that has since been distributed pursuant to the confirmation of grant issued in **PRINCIPAL MAGISTRATE'S COURT GICHUGU SUCCESSION CAUSE No. 219 of 2016** (previously **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 636 of 2015**). It is also clear from the Minutes of the Kirinyaga County Council Special Works, Town Planning Markets and Housing Committee dated 15<sup>th</sup> January 2002 that the deceased gave one (1) acre out of the suit land to the defendant in exchange for two (2) acres out of land parcel No. KIRINYAGA/GATHIGIRIRI/157 plus

two commercial plots (Plaintiff's Exhibit 2). According to the plaintiff, that undertaking has not been fulfilled yet although there was even a consent to that effect. That evidence has not been rebutted. Indeed from the record, it is clear that the following consent order was recorded by **WANJIRU KARANJA J.** (as she then was) on 22<sup>nd</sup> April 2009:

**(1) "By consent, the defendant do execute all the necessary documents to facilitate the sub-division and transfer of 2 acres out of L.R No. KIRINYAGA/GATHIGIRIRI/157 in favour of the plaintiff.**

**(2) Matter to be mentioned on a date to be fixed in the registry to record a further consent in regard to 2 commercial plots to be given to the plaintiff by the defendant".**

It would appear that by 14<sup>th</sup> July 2005, the defendant had neither transferred the two (2) acres out of land parcel No. KIRINYAGA/GATHIGIRIRI/157 to the plaintiff nor granted him two (2) commercial plots. That is notwithstanding the fact that on 13<sup>th</sup> March 2002 (see Plaintiff's Exhibit 5), the defendant addressed the deceased in the following terms:

**"RE: COMPENSATION FOR PORTION OF YOUR LAND NGARIAMA/MERICHI/695**

**Our conversation in the Council Clerk's office on 6<sup>th</sup> March 2002 on the above subject refers.**

**You donated a portion of your land NGARIAMA/MERICHI/695 measuring 1.00 acre for the establishment of Kimweas Shopping Center.**

**The Council was supposed to compensate you with three plots. However, you preferred to be allocated the plots in some selected township only, namely Kianyaga, Wanguru or Kagio.**

**Although you were allocated a plot at Kimweas Shopping Center, you claim that the Council owes you three additional plots.**

**The Council has resorted to compensate you with land parcel Kirinyaga/Gathigiriri/1476 measuring two acres. Meanwhile, search for plots in preferred township continues.**

**S.N. MUCHIRI**

**For Ag. CLERK TO COUNCIL".**

The plaintiff's un-controverted evidence is that the defendant is yet to compensate the deceased with the land or two plots. Indeed the defendant has admitted this claim because in paragraphs 4, 5, and 6 of its defence, it has pleaded as follows:

**4: "The defendant reply to paragraphs 4, 5 and 6 admits the issue of compensation but avers that the plaintiff has over the years been adamant and has never followed the same with the defendant.**

**5: "That further in answer to paragraph 4, 5 and 6 of the plaint, the defendant states that the plaintiff has not been co-operative as the defendant has to look for alternative land to allocate him and the same has been explained to no avail.**

**6: That further, the land he was to be compensated has Court cases pending which are yet to be resolved and hence the said agreement could not be effected in those circumstances".**

Those pleadings, taken together or singularly, show that the defendant has really no defence to the plaintiff's claim. I have also considered whether this suit is time barred as the agreement was entered into in 1974 but it is obvious from the correspondences produced by the plaintiff and the consent order

recorded herein that this claim was acknowledged by the defendant. The letter dated 13<sup>th</sup> March 2002 (Plaintiff's Exhibit 5) which I have reproduced above is a clear acknowledgement of the plaintiff's claim. The plaintiff is therefore entitled two (2) acres of land out of land parcel No. KIRINYAGA/GATHIGIRIRI/157 and two commercial plots and the defendant cannot be heard to plead, as it has done, that the land it was to compensate the plaintiff with is subject to pending cases. It is the defendant's responsibility to compensate the plaintiff with other suitable land if the land it had in mind is not available any more.

What has concerned me is the plaintiff's claim that she be awarded the value of one (1) acre out of land parcel No. NGARIAMA/MERICHI/695 in lieu of the land and two (2) commercial plots. That is a special damage claim and although the plaintiff called a valuer who testified that the value of the land donated by the plaintiff to defendant is Ksh. 977,500 which is what counsel has also submitted, a special damage's claim must not only be strictly proved (as the plaintiff has correctly done) but it must also be pleaded. Evidence cannot be led to prove what has not been pleaded and neither can submissions be used to fill gaps in pleadings. The plaintiff ought to have amended the plaint to specifically plead that sum. In the absence of that, this Court cannot consider that prayer even if there is evidence adduced in support thereof.

Before I end this judgment, I need to comment on the defendant's defence where it pleaded in paragraph three (3) thereof that it has occupied and allocated the land for over thirty two (32) years and is therefore entitled to it by way of adverse possession. As the defendant did not send a representative during the trial, that claim cannot be considered as in any event, there was no counter-claim. Even if the defendant had counter-claimed for the land on the basis of adverse possession of the land, it is un-likely that it would have been entitled to orders on adverse possession in view of the un-disputed fact that it occupied the land with the consent of the plaintiff.

Ultimately therefore, there shall be judgment for the plaintiff against the defendant in the following terms:

***1. An order that the defendant compensate the plaintiff with another agricultural land measuring two (2) acres plus two commercial plots.***

***2. Costs and interest.***

**B.N. OLAO**

**JUDGE**

**20<sup>TH</sup> DECEMBER, 2017**

Judgment dated, delivered and signed in open Court at Kerugoya this 20<sup>th</sup> day of December 2017

Ms Kiragu for Mr. Muriithi for Plaintiffs present

Mr. Gitonga for Defendant absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**20<sup>TH</sup> DECEMBER 2017**