



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA ATANAIROBI

ELC CIVIL SUIT NO 255 OF 2013

TERESIA WANGUI KABAIKU.....PLAINTIFF

VERSUS

KURIA GATAIYU.....DEFENDANT

JUDGEMENT

In a Plaint dated 18th February 2013, the Plaintiff herein ***Teresia Wangui Kabaiku*** claimed against the Defendant ***Kuria Gataiyu*** . The Plaintiff sought for various prayers, thus;

- a. *That the Registration of the Defendant as the proprietor /owner of LR No. Kiganjo/Mundoro/983, since 6th April 1977 be cancelled and the Plaintiff's name be registered thereon the title.*
- b. *That Kiambu District Land Registrar be ordered to cancel /delete from the register LR title No.Kiganjo/Mundoro/983 and the name Kuria Gataiyu be replaced on the title with the name of Teresia Wangui Kabaiku.*
- c. *That the Defendant do pay the costs of this suit .*
- d. *Any other and/or further reliefs /orders as the Court may deem fit and just to grant.*

The Plaintiff alleged in the Plaint that on or about **6th April 1977**, the Defendant fraudulently got registered as the proprietor of **LR No. Kiganjo/Mundoro/983**. The Plaintiff particularized the fraud perpetuated by the Defendant among them being that the Defendant occasioned the registration of the land on **6th April 1997** after the death of the Plaintiff's husband on the **16th October 1975**, and forcefully chased the Plaintiff away from her husband's land on or about late **1976**, and he later forcefully acquired the land. Further that he acquired the land of the Plaintiff's husband without following the law of succession after chasing away the Plaintiff and her children. Also acquiring the said land illegally without any color of right or justification.

Plaintiff further alleged that, she is the one who was entitled to petition for succession of her husband's land after his death but the Defendant fraudulently and illegally did so. It was her contention that the title **LR No. Kiganjo/Mundoro/983**, by the Defendant should be cancelled and the same be registered in the name of the Plaintiff.

The Defendant, **Kuria Gataiyu** filed his statement of Defence dated **20th March 2013**, and denied the entire allegations levelled against him by the Plaintiff. He however, admitted that he is the lawful registered proprietor of **LR No.Kiganjo/Mundoro/983** but he denied that the said registration was

fraudulent and did put the Plaintiff to strict proof thereof. He also denied all the particulars of fraud attributed to him and he specifically denied that the registration in his favour was forceful and that he chased the Plaintiff from the suitland in 1976 or any other time or forcefully acquired the said land. He also denied that he acquired the said land without following the law of succession after chasing the Plaintiff and her children away.

Further, the Defendant denied that the Plaintiff is entitled to petition for succession of the late **Kiarie Mbugua's Estate** and did put the Plaintiff to strict proof thereof. The Defendant further denied the jurisdiction of this Court and claimed that the matter herein lies with the **Family Division**, as it is a succession matter and therefore the Plaintiff's claim is totally defective. Defendant therefore prayed for the dismissal of the Plaintiff's suit against him with costs.

The matter proceeded for hearing and Plaintiff gave evidence for herself and called four more witnesses. In her testimony the Plaintiff averred that she got married to one **Kiarie Mbugua**, under Kikuyu customary marriage on **5th January 1967** and were blessed with three children. However, her husband died on or about **16th October, 1975** and was buried on the suit land. It was her further testimony that during the subsistence of her marriage to the late **Kiarie Mbugua**, they lived on the land now occupied by the Defendant (suit land). Further, that after the burial of her husband, she went to do business at Juja and decided to do distant farming. She however went back to the land in **April 1987** and she found that the Defendant had built a house on the said land and when she questioned him, he chased her away with a panga. She carried out some inquiries and discovered that Defendant had transferred the land to his name way back on **6th April 1977**. That she reported the transfer of the land to the chief in the year 2004 and when the Defendant was summoned he failed to honour the summons. The Defendant however, filed a Judicial Review Application No. 41 of 2009 at the High Court. She urged the Court to cancel the land title **No. Kiganjo/Mundoro/983** which is in the name of the Defendant, **Kuria Gatayu** and the same should be registered in her name. It was her evidence that the suitland belonged to her late husband, **Kiarie Mbugua**. She produced exhibits to support her case. She further testified that her husband died in **October 1975** as per the Death certificate that she produced as exhibit. She however, did not file a Succession cause and also did not know how the Defendant got registered as the owner of the suitland. She also admitted that she obtained the Death Certificate of her late husband in the year 2005. She further admitted that the Green Card for the suitland shows that the land was registered in the name of the Defendant in 1977 and that after she left for Juja, she never used to visit the land until 1987. Plaintiff also testified that one of her children, **Alice Nyambura** died in 1978 and she buried her at Thika cemetery but no one denied her from burying the child at the suitland.

PW2: Fredrick Chege Karanja testified that he is known to **Teresia Kibaiku**, the Plaintiff herein. He further testified that he lives in **Mundoro area** and he knew **Teresia** (Plaintiff) since she was young and before she was married. Further, that **Teresia** got married at Ndundu by **Ndung'u Kuria alias Kiarie Mbugua**. After her marriage, she bore three children **with Kiarie Mbugua**. However, the said **Kiarie Mbugua** later died and was buried at Ndundu in his land which is the suitland. The said land is now being utilized by the Defendant (Gatayu) and he obtained the same fraudulently since Kiarie Mbugua was a married man with children.

PW3 : Luciah Wairimu Ndung'u told the Court that she is a sister to **Teresia Kibaiku**, the Plaintiff herein. She testified that the Plaintiff was married to **Ndung'u Kuria alias Kiarie Mbugua**. Further that the couple lived together for 10 years and then the said **Kiarie Mbugua** died. It was her testimony that the Couple had three children before **Kiarie Mbugua** died. She also testified that after the burial of **Kiarie Mbugua**, her sister who is the plaintiff herein stayed on the land for about one year but thereafter went to live in Juja to carry out business. Further, that she used to carry on with farming. However the Defendant later build on the suit land after demolishing the Plaintiff's house and when the Plaintiff went to check on the farm, the Defendant chased her away.

PW4: Jane Wairimu Kibati, testified that she is the first born of the Plaintiff and her late father **Kiarie Mbugua** who died in **1975** when she was about 7 years old. She also testified that they left Ndundu for Juja with her mother after the death of her father. It was her evidenced that her mother went to do business in Juja. She also told the Court that her father was buried on the suitland where the

Defendant occupies after having it registered to his name.

PW5: Peter Ndungu Wanjohi, told the Court that he is from Ndundu in Gatundu. He further told the Court that he knew **Ndung'u Kiarie** who later changed his name to **Kiarie Mbugua**. That he knew him, since 1958 when he came back from the Rift Valley. He further testified that **Ndungu Kiarie** married **Wanjiku** in 1966 and later in 1967, he married the Plaintiff herein **Teresia Wangui Kibaiku**. Further that **Kiarie Mbugua** paid dowry to **Teresia's** parents and PW5 was present as friend of **Kiarie Mbugua** and agemate. Further, that **Kiarie Mbugua** died on 1975 and was buried on the land that is now occupied by the Defendant. It was his testimony that **Kiarie Mbugua** and the Plaintiff had three children. Further that the Defendant started to occupy the land after the Plaintiff left to Gatundu to do business. He further testified that the land belongs to the Plaintiff and her children as the land was owned by **Kiarie Mbugua**. He therefore testified that ownership of land by Gataiyu is fraudulent.

On his part, Defendant **Kuria Gataiyu** gave evidence for himself and called three witnesses. He testified that he lives in Ndundu and he is the lawful proprietor of land Reference **No. Kiganjo/Mundoro/983**, having been issued with the title document in 1977. It was his testimony that he has lived on the suit land since birth as the land originally belonged to his grandfather – **Kuria Gataiyu**. Further that **LR Kiganjo/Mundoro/983** was transferred to him by transmission on **6th April 1977**. That he has lived on the suitland since then. However, in April 2009, he was summoned by the Land Dispute Tribunal after the Plaintiff herein lodged a claim over his parcel of land. The Defendant thereafter filed a Judicial Review application and the Tribunal was stayed from proceeding with the dispute. He denied that he ever chased the Plaintiff with a panga. To him, the Plaintiff is a stranger and has no basis of demanding what lawfully belongs to the Defendant. It was his testimony that the Land was lawfully transferred to him after due process of transfer by transmission. It was also his testimony that during the period of the land consolidation and demarcation, their grandfather's land was registered under the name of **Kiarie Mbugua** who was his uncle. He further testified that he was born out of wedlock by his mother **Milka Wanjiru** and when she got married, he was left behind with his grandparents as per their wishes. However, his grandmother died in 1970 and his uncle **Kiarie Mbugua** lived in Elburgon then. The Defendant was therefore the one taking care of his grandmother. It was his further testimony that his uncle had no family and was not married since none of them attended the burial of his grandmother nor his uncle. After the burial of his grandmother, his uncle see After the death of **Kiarie Mbugua**, the Defendant filed a succession cause at Gatundu law Court and the suitland was transferred to the Defendant by transmission and thereafter he was issued with the title documents on **6th April 1977**. He further testified that he had continued to live on the suitland with his family undisturbed. However in April, 2009, he was summoned by the Gatundu Land Dispute Tribunal where the Plaintiff had lodged a claim over his land. Upon receiving the said summons, he was advised to file a Judicial Review application which he did and the tribunal was stayed from proceedings with the dispute over the said land. The Defendant also denied ever chasing the Plaintiff with a panga and he averred that the Plaintiff is a stranger to him and has no basis demanding what lawfully belongs to him. He urged the Court to dismiss the Plaintiff's case. He called two other witnesses.

DW1: Jacinta Wanjiku Kimani, told the Court that she comes from **Ndundu** and knows the Defendant **Kuria Gataiyu**, since he was a child. It was her testimony that Kuria used to stay with his grandmother called **Wairimu Kuria**, and his uncle **Kiarie Mbugua**. She testified that she did not know the Plaintiff herein and that **Kiarie Mbugua** was never married. Further that after the death of **Wairimu Kuria** in 1970, the Defendant remained with his uncle **Kiarie Mbugua** on the said parcel of land until 1975 when the said **Kiarie Mbugua** died. Defendant was therefore the only survivor of the late Kiarie Mbugua as Kiarie Mbugua, did not have a wife or any children. She further testified that during the burial of **Kiarie Mbugua**, the Plaintiff and her children were not present as none of them were introduced. Therefore the parcel of land was bequeathed to the Defendant who had lived on the said land for the entire of his life. It was her evidence that the Defendant was entitled to ownership of the disputed land as he was the only survivor and beneficiary of the late **Kiarie Mbugua**.

DW2: Samuel Gichuhi testified that the Defendant is his cousin and that he was living with their grandmother **Wairimu Kuria** and their uncle **Kiarie Mbugua** who are both deceased. Further, that they lived in Ndundu in the disputed land and both were buried in the said land. He further testified that his

uncle **Kiarie Mbugua** was not married and he had no wife or children. It was his testimony that the Defendant had lived on the said parcel of land since his childhood and had developed the said land by planting tea plants and other crops. He was therefore entitled to inherit the said land. He also testified that during the burial of their uncle, no children or wife were introduced and they never appeared during the long illness of the said **Kiarie Mbugua**. He therefore testified that it was a surprise to learn that the Plaintiff was claiming ownership of the suit land which lawfully belongs to the Defendant.

That was the evidence that was placed before this Court. The Court is therefore required to consider the available evidence and exhibits and then come up with its determination.

In trying to arrive at my determination, I will take into account that he who alleges must prove. This position is supported by the provisions of Section **107 (of the Evidence Act)** which provides as follows. ..

“(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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The Plaintiff herein is the one who had alleged, she therefore had the onus of calling evidence and proving her case on a balance of probability.

The parties herein agreed on the statement of issues as filed by the Plaintiff’s Advocate on **12th April 2013**. These issues are:-

- i. **Whether the registration of the Defendant as owner of LR No. Kiganjo/Mundoro/983 was fraudulent.**
- ii. **Whether the Defendant obtained the land after following the due succession process after death of Kiarie Mbugua or at all.**
- iii. **Whether it is now necessary to petition for the Estate of the late Kiarie Mbugua when LR No.Kiganjo /Mundoro/ 983 is now registered in the name of the Defendant.**
- iv. **Whether acquisition of the land by the Defendant was illegal, fraudulent and the title ought to be cancelled by this Court.**
- v. **Whether the suit ought to be filed as a succession petition and not a land matter in the Environment and Land Court.**
- vi. **Whether the Plaintiff’s claim is fatally defective and should be struck out or dismissed.**
- vii. **Who should pay for the costs of this suit?**

From the available evidence, there is no doubt that the suitland **Kiganjo/Mundoro /983**, is registered in the name of the Defendant herein, **Kuria Gataiyu**. The same was registered in his name on 6th April, 1977 and the consideration was succession, as per the exhibits produced in Court. There is also no doubt that initially the suitland had been registered in the name of **Kiarie Mbugua** on **19th April 1967**. It was also not disputed that the said **Kiarie Mbugua** was a maternal uncle to the Defendant herein. However, the said **Kiarie Mbugua** died in **1975** as evidenced from the certificate of death produced as exhibit by both parties. The certificate of death produced by the Plaintiff was issued on **31st March 2005** whereas the one produced by the Defendant was issued on **6th January 1976**, the deceased having died on **16th October, 1975**.

However, what is in dispute is whether the Defendant herein lived with the said **Kiarie Mbugua** and single handedly took care of him during his sickness and whether the Plaintiff herein was a wife to the deceased and had three issues of their marriage.

The witness who gave evidence in support of each of the parties herein were all from **Ndundu** or **Mundoro** area where the parties come from. They allegedly knew the parties since time in memorial but they each gave evidence supporting the party that brought them to Court. Their evidence was either admission or denial of facts alleged by either of the party in this case.

As I had stated earlier, the Plaintiff is the one who has alleged and it was her duty to call evidence and prove her allegations on the required standard.

The Plaintiff alleged that she was married to the late **Kiarie Mbugua** with whom they had three children. Her evidence was supported by her witnesses and particularly **PW4, Jane Wairimu Kibati** she indeed testified that she is a daughter of the Plaintiff and the late **Kiarie Mbugua** who died in the year **1975**. Plaintiff also alleged that after the death of her husband, **Kiarie Mbugua**, she moved to Juja with her children to run a business. It was her testimony that she went back to the farm in 1987 wherein she found that the Defendant had demolished her house and constructed his house on the land left behind by her late husband. She also alleged that the Defendant chased her with a panga and he did not allow her to use the land. She also admitted in cross examination that one of her daughter **Alice Nyambura Kiarie** died at the age of 5 years but she was buried in Thika Cemetery and not in the suitland. She confirmed that no one prevented her from burying her young daughter in the suitland. It was also her admission that one of her son Paul Kabaiku was given land by her biological father at Mundoro.

On the other hand, the Defendant and his witnesses testified that the late **Kiarie Mbugua** was never married and that during his burial, the Plaintiff and her children never appeared and they also did not take care of him during his long period of sickness. So from the above testimony was the Plaintiff married to **Kiarie Mbugua** or not?.

The Plaintiff in her evidence alleged that she got married to the late **Kiarie Mbugua** in 1967. **PW2 Peter Ndungu Wanjohi** also told the Court that he accompanied the late **Kiarie Mbugua** as a friend and agemate to pay dowry for the Plaintiff. However, there was no evidence from any elder who allegedly participated in dowry payment for the Plaintiff since the family of late **Kiarie Mbugua** led by the Defendant denied that **Kiarie Mbugua** was never married.

The Plaintiff also alleged that after the death of her husband, she left for Juja to carry on business. If she was indeed a wife, why did she not take the Death Certificate immediately after the death of her husband? It is evident that she obtained the Death Certificate in the year 2005 whereas the Defendant obtained the Death Certificate in the year 1976. The Defendant allegedly filed for a succession petition. If Plaintiff was indeed a wife of the late **Kiarie Mbugua**, why did she not file a Succession Petition, before moving to Juja township?. In her testimony, the Plaintiff alleged that she went back to Ndundu in the year 1987, and found that the Defendant had demolished her house and he chased her with a panga.. However, there was no evidence that she ever reported such incident to the police if it indeed happened. Again, she alleged that one of her daughter **Alice Nyambura** died while she was aged 5 years and she buried her in Thika Cemetery. If indeed she lived in Ndundu before she left for Juja, why did she not bury her daughter with the alleged **Kiarie Mbugua** in the suitland?. There are many gaps which were left unfilled. For the above reasons, the Court finds that it is doubtful whether the plaintiff was indeed married to the late **Kiarie Mbugua** and lived with him and the alleged three children of their marriage at the suitland.

Having now found that it is doubtful whether the plaintiff was ever married to the late **Kiarie Mbugua**, I will proceed to determine the other issues.

The first issue is whether the Registration of the Defendant as the owner of **LR No. Kiganjo/Mundoro /983**, was fraudulent. There is no doubt that the Defendant is the registered proprietor of the suitland, as the same was registered in his name on 6th April 1977. As provided by Section **26(1) of the Land Registration Act**, he is the prima facie owner of the suitland. However such ownership can be

challenged if the certificate was obtained through fraud or misrepresentation. Section 26 of land Registration Act reads as follows:-

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as the 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 the proprietor shall not be subject to challenge except”.

- i. ***On the grounds of fraud, or misrepresentation to which the person is proved to be a party of***
- ii. ***Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

The Plaintiff has alleged that the Defendant obtained the said registration through fraudulent acts. It is evident that the Defendant obtained registration through succession. The late ***Kiarie Mbugua*** died in **1975** before the Succession Act; Cap 160 Laws of Kenya came into effect. The Plaintiff never filed any Succession Petition. There is no evidence that the Defendant obtained Orders in the Succession Petition through fraud. There was also no evidence from the Lands Office that indeed the Defendant fraudulently obtained the said registration.

The Court finds that no evidence has been tendered of any fraud perpetrated by the Defendant. The Defendant is the registered proprietor of the suit land. That is prima facie evidence that he is the absolute and indefeasible owner. The Court therefore finds that the said registration was not fraudulent.

The next question is whether the Defendant obtained the land after following the due succession process after the Death of ***Kiarie Mbugua*** or at all?.

The plaintiff is the one who has alleged and so she must prove. The late ***Kiarie Mbugua*** died in **1975** before Succession ***Act Cap 160*** Laws of Kenya, came into effect. So prior to that, what was the process in existence for Succession matter?. The plaintiff ought to have pointed out the due process then and how the Defendant failed to follow it. As it is now, the Defendant herein got registered as a proprietor of the suitland through Succession. Without evidence to the contrary, the court finds that the Defendant obtained the land after following the due Succession process.

The other issue is whether it is now necessary to petition for the estate of the late ***Kiarie Mbugua*** since the land is registered in the name of the Defendant.

It is evident that the late ***Kiarie Mbugua*** died in **1975**. The Defendant obtained a Death Certificate and petitioned to have the land in issue registered in his name. The Plaintiff on her part did not obtain the Death Certificate until the year 2005. Even after she was allegedly chased from the suit land in 1987, she did not complain or file a suit to protect her interest. She has not explained the reasons for failure to file for succession petition.

This is a Court of equity and it is a well-known maxim of equity that “ ***Equity aids the vigilant but not the indolent***”. It is evident that the suit land is now in the name of the Defendant and there is no need of the plaintiff filing for a Succession Cause, now, 38 years after the estate was wound up.

The Defendant herein acquired the suitland after the death of his uncle ***Kiarie Mbugua*** . No evidence that Plaintiff applied to file a succession petition and she was denied the right to inherit her ‘***husband’s land***’. There is no evidence that the Defendant obtained the said registration fraudulently and that he was not entitled to inherit from his uncle. The Court finds that the said acquisition by the Defendant was not illegal or fraudulently and I find no reason to order for the cancellation of the title to the suitland.

The Court has substantively dealt with this matter and I do hold that since it is dealing with title to

land it is therefore a land matter and this Court has jurisdiction to deal with the same as provided by **Section 13(1)** of the *Environment and Land Act 2011* which reads as follows:-

“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

Having now found that the Plaintiff has failed to prove her case on a balance of probability, and having found that the Defendant had been in quiet possession of the suitland since 1977 and was dragged to Court by the Plaintiff after a period of more than **30 years**, the Court finds that the plaintiff should be condemned to pay costs of the suit.

Consequently, the Court finds that the plaintiff’s claim against the Defendant herein has **no merit**.

The same is hereby dismissed entirely with costs to the Defendant. Costs shall be borne by the Plaintiff.

It is so ordered.

Dated, Signed and delivered this **27th day of March 2015**

28 days Right of Appeal.

L. GACHERU

JUDGE

Court:

Judgement read in open Court in the presence of

Mr Olonde holding brief Wambugu Kariuki for the Plaintiff

Mr Gatumuta for the Defendant

Hilda: Court Clerk

L. GACHERU

JUDGE

Court:

Judgement read in open Court in the presence of the above counsels and the parties.

28 days Right of Appeal.

L. GACHERU

JUDGE

27/3/2015