



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**ELC NO. 974 OF 2003**

**ALICE NJERI KANYONYI.....PLAINTIFF**

**VERSUS**

**PAUL NJENGA REMMY (Suing on behalf of the**

**Estate of Terezhiah John Njenga (Deceased).....1<sup>ST</sup> DEFENDANT**

**THE REGISTRAR OF LANDS, KAJIADO DISTRICT.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff's case as presented in the amended Complaint dated **14<sup>th</sup> May 2014** is that at all material times **John Njenga** (*hereinafter the deceased*) was the registered owner of **Parcel No. Ngong/Ngong/646** (*hereinafter the suit property*) and upon his demise in **1968**, he had two wives and several children. The 1<sup>st</sup> wife **Mary Wanjiku Njenga** (deceased) had 6 children, namely **Peter Gacheru** (deceased); **Joseph Njunguna Njenga** (deceased); **Simon Ng'ethe Njenga**; **Alice Njeri Njenga**; **Margaret Wanjiru**; and **Ann Wairimu** and the 2<sup>nd</sup> wife **Terezhiah John Njenga** (deceased) had 3 children namely: **Paul Njenga Remmy**; **Elizabeth Muthoni Njenga** (deceased); and **Mary Wambui Njenga**. After the demise of their father, the Plaintiff and her brother **Peter Gacheru** (deceased) were granted letters of administration to administer the deceased's estate which included the suit property.

However, the 2<sup>nd</sup> Defendant, upon false misrepresentation and non-disclosure of material facts by the 1<sup>st</sup> Defendant, irregularly registered **Terezhiah John Njenga** (deceased) as the proprietor of the suit property. The Plaintiff outlined the particulars of fraud by the 1<sup>st</sup> Defendant as misleading the 2<sup>nd</sup> Defendant that the 2<sup>nd</sup> wife was the administrator of the estate of the deceased; transferring the suit property without letters of administration; failing to notify the 2<sup>nd</sup> Defendant of the existence of the Plaintiff's family and their beneficial interest in the suit property thereby disinheriting them of their rightful share of the estate of their deceased father.

On the foregoing, the Plaintiff prayed for Judgment to be entered against the Defendant and for orders that:

- a. ***An order that the 2<sup>nd</sup> Defendant to rectify the registration and register the Plaintiff as proprietor of the Parcel No. Ngong/Ngong/646 as administrator of the estate of John Njenga (Deceased).***

- b. *An order that the 2<sup>nd</sup> Defendant to remove the caution imposed on Parcel No. Ngong/Ngong/646 by the 1<sup>st</sup> Defendant's sister (now deceased).*
- c. *A declaration that Terezhiah John Njenga having inherited land Parcel No. Ngong/Ngong/646 from the John Njenga (Deceased) holds the land in trust for herself and the whole family of John Njenga.*
- d. *Determination of the said trust in such a way that Land Parcel No. Ngong/Ngong/646 comprising of 6 acres is shared equally among all the surviving children of the deceased and that the Plaintiff be registered to hold in trust on behalf of the members of the 1<sup>st</sup> house while the Defendant be registered to hold in trust on behalf of the members of the 2<sup>nd</sup> house.*
- e. *Costs of the suit and interest at court rates.*
- f. *Any other or further relief the Court may deem fit and just to grant.*

The 1<sup>st</sup> Defendant filed a Defence and counterclaim dated **28<sup>th</sup> May 2014**, wherein he averred that the letters of administration granted to the Plaintiff was issued unprocedurally, irregularly, and fraudulently as the Plaintiff failed to include his family in the succession cause as beneficiaries of the deceased's estate. The 1<sup>st</sup> Defendant averred that at the time of the deceased's demise, he was married to **Terezhiah John Njenga** with 3 children and were residing on the suit property. Further, that his late mother was registered as the proprietor of the suit property in **1981** and a certificate of title issued in the same year.

In the counterclaim, it was averred that the Plaintiff's claim for the suit property was time barred in view of the fact that **22 years** had lapsed as at the time the claim was made in **2003**. The 1<sup>st</sup> Defendant reiterated that the Plaintiff concealed material facts in obtaining letters of administration **High Court Succession Cause No. 31 of 2002**. He, thus, prayed for Judgment against the Plaintiff and for orders that:

- a. *An order that the 2<sup>nd</sup> Defendant rectifies the registration and registers the 1<sup>st</sup> Defendant as proprietor of the Parcel No. Ngong/Ngong/646 as the administrator of the estate of Terezhiah John Njenga.*
- b. *The Court does declare and order that Parcel No. Ngong/Ngong/646 was lawfully registered in the name of Terezhiah John Njenga.*
- c. *A permanent injunction to stop the Plaintiffs from interfering and/or dealing with Parcel No. Ngong/Ngong/646 which vests in the 1<sup>st</sup> Defendant as the administrator of the estate of Terezhiah John Njenga.*
- d. *Costs of the suit and interests thereof.*
- e. *Any other order that the Court deems just and fit to grant.*

The Plaintiff (PW1) swore a witness statement on **30<sup>th</sup> October 2013** which was adopted as her evidence in chief. The Plaintiff's evidence is that her family lived together until **1966** when the deceased married a 2<sup>nd</sup> wife and relocated to Ngong' in Kajiado District. Their mother did not move with the deceased as she was employed at **St. Mary's Loreto Convent Church** as they attended **Riruta HGM Primary School**. However, the deceased still supported them meeting their finances to cater for their basic necessities. Upon their father's demise in **1968** and the death of the 2<sup>nd</sup> wife in **1993**, their family approached the 1<sup>st</sup> Defendant's family with a view of petitioning for letters of administration and distribution of the deceased estate which request on both occasions was declined.

Subsequently in the year **2001**, they got some information that the Defendant wanted to dispose of a piece of land and they learnt that the 2<sup>nd</sup> wife had fraudulently transferred the suit property to herself without

their knowledge and consent. Efforts to resolve the matter before the local chiefs failed leading to the institution of the suit. PW1 stated further that since the 1<sup>st</sup> Defendant's family had declined to jointly petition for letters of administration, she and her brother **Peter Gacheru** (deceased) petitioned vide **Succession Cause No. 3114 of 2002** which was granted on **4<sup>th</sup> March 2002** when after they instituted the instant suit. PW1 contended that their intention was to be registered as trustees for both families.

On cross-examination, PW1 testified that her parents separated but were not divorced and that her family did not know of her father's demise until he had been buried. She admitted that **34 years** had lapsed before they petitioned for letters of administration and that they were not aware that the 1<sup>st</sup> Defendant's mother had petitioned for letters of administration in Kajiado. PW1 reiterated that DW1's family declined to be joined in the succession cause and they were thus forced to petition for the letters of administration on their own.

**Peter Waweru Kiragu** (PW2) swore a witness statement on **21<sup>st</sup> February 2014** which was adopted as his evidence in chief. His evidence is that he and the deceased are first cousins and therefore an uncle to the Plaintiff. The deceased worked in Industrial Area but hailed from Gikambura village where he inherited **3 ½ acres** of land. The deceased married a 2<sup>nd</sup> wife in early **1960's**. Upon his retirement in **1965**, he sold the parcel of land in **Gikambura** and moved with the 2<sup>nd</sup> wife to Ngong' where he purchased the suit property. Soon after he relocated to Ngong' he died in **1968** and was buried in the suit property. It was PW2's evidence that though he had no knowledge of deceased having paid dowry for the 2<sup>nd</sup> wife, he considered the deceased as a polygamist with two wives thus entitled to share the suit property according to the Kikuyu customs.

The 1<sup>st</sup> Defendant (DW1) swore a witness statement on **4<sup>th</sup> August 2014** which was adopted as evidence in chief. DW1 stated that his family has lived on the suit property, caused development thereon including 2 houses. It was his evidence that his mother obtained letters of administration in **Kajiado Law Courts** after his father's demise and upon the demise of his mother in **1993** he petitioned and obtained letters of administration in **Githunguri SRM Succession Cause No. 77 of 2000**. The grant was published in the Kenya Gazette, which the Plaintiff did not object to. He also stated that since his father's demise in **1968**, the Plaintiff had never laid claim over the suit property nor objected to his mother's registration as proprietor thereof. DW1 testified that his father had one wife and that he did not know the Plaintiff's family prior to the suit.

On cross-examination, DW1 testified that his father died when he was **5 years old** and he therefore would not know whether he had another wife and children. Moreover, his mother did not tell him of the existence of another family. He also did not know that his father came from Gikambura as he was born in Bahati in Nairobi before they moved to the suit property. DW1 stated that soon after his mother's demise, her house burnt down and as a result they lost all documents that were in her possession.

**Muchori Ng'ang'a Githuku** (DW2) swore a witness statement on **4<sup>th</sup> August 2014**. Therein DW2 stated that he is a brother to **Tereziah John Njenga** and an uncle to DW1. It was his evidence that the deceased married his sister in **1945** and that he did not have any other family. With respect to the suit property, he stated that the couple purchased the same through a loan advanced to them by his parents which they repaid. DW2 further stated that the deceased and two of the deceased's children were buried on the property upon their demise.

On cross-examination, DW2 stated that he comes from Githunguri and he therefore did not know the deceased's extended family or where they lived. Additionally, that he did not see them at his funeral. He met the deceased in Bahati before he moved to Ngong and thus could not know if he left another family in Gikumbura.

The suit was further canvassed by way of written submissions. On behalf of the Plaintiff, counsel submitted that the Plaintiff's evidence that the deceased had two families was not rebutted by the Defence and her family was thus a beneficiary to the estate. It was submitted that the Defence had failed to prove the claim that **Teresiah John Njenga** was the administrator of the deceased's estate leading to the

transfer and registration of the suit property in her name. The Defence had failed to avail certified copies of the petition and/or grant of letters of administration from **Kajiado Law Courts** or a copy of the Kenya Gazette from Government Printers to prove the existence of a succession cause in the matter of the deceased's estate by their mother. Counsel for the Plaintiff further submitted that it was suspect that the 1<sup>st</sup> Defendant filed succession cause in **Githunguri Law Courts** despite the net asset involved situated in **Ngong'** within **Kajiado District**.

For the Defendant, counsel submitted that it was an admitted fact that **Teresia John Njenga** was a wife of the deceased and as such was entitled to petition for letters of administration to his estate. The grant of the said letters gave her the authority to administer the suit property in a manner beneficial to her and her children. Consequently, the transfer and registration of the suit property in her name was not fraudulent as alleged. Counsel also submitted that there was no explanation offered by the Plaintiff on why it took over 34 years after the demise of their father to institute a succession cause. It was submitted that the Plaintiff's claim was ill motivated with the intention to deny the 1<sup>st</sup> Defendant's family their rights in the suit property.

This suit was instituted by the Plaintiff on **18<sup>th</sup> September 2003** as the administrator of the estate of the deceased. The Court on satisfying itself that service had been properly effected on the Defendants and there being no defence filed, entered Judgment on **15<sup>th</sup> January 2007** after matter proceeded for formal proof. The Court (Kubo J.) allowed the prayers in the Plaint to the effect that the register was rectified and the Plaintiffs were registered as proprietors of the suit property as the administrators of the estate. However, the 1<sup>st</sup> Defendant filed an application dated **20<sup>th</sup> May 2010** and sought orders, inter-alia, to be allowed to defend the suit. This application was argued by both parties a ruling delivered on **27<sup>th</sup> July 2012**. In the said ruling, the Court (Ougo J.) set aside the Judgment and vacated all consequential orders entered, and further allowed the 1<sup>st</sup> Defendant to defend the suit. The Plaintiff thereafter obtained an order to amend her pleadings, hence the amended Plaint.

From the summary of the pleadings outlined above, there are some common facts. **John Njenga** was the registered proprietor of the suit property until **1981** when the same was transferred and registered in the name of **Teresiah John Njenga**. PW1 produced a copy of the Green Card (P.Ex.2) for the suit property which shows the registrations in the proprietorship section. The dispute is over the inheritance of the suit property. According to PW1, her father was polygamous with two houses, both of which are entitled to inherit from the property in accordance with the Kikuyu Customs. DW1 on the other hand disputes the existence of the first family stating that their initiating a succession cause and the instant suit over **30 years** after the death of the deceased is suspect and their intention is merely to deny the second their rights over the property.

From further perusal of the supporting documents, it is apparent that both parties separately petitioned for letters of administration in respect of the estate of the deceased. PW1 produced a copy of Grant of Letters of Administration issued in **Nairobi H.C. Succession Cause No. 3114 of 2002** on **4<sup>th</sup> March 2003** (P.Ex.6) and **Kenya Gazette Vol. CV-No. 10** dated **31<sup>st</sup> January 2003**(P.Ex.7) showing that she and her brother, Peter Gacheru (deceased), had petitioned to be administrators of the deceased's estate. DW1 on his part testified that their mother was the administrator of the deceased's estate which resulted to her registration as the proprietor of the suit property in **1981**. Consequently, upon her demise, her children petitioned and obtained a Confirmation of Grant in respect to her estate which included the suit property. DW1 produced a copy of the Certificate of Confirmation of Grant (D. Ex. 1[b]) from the **SRM Court, Githunguri Succession Cause No. 77 of 2000**.

Both parties ask of this Court to direct the 2<sup>nd</sup> Defendant to rectify the register and have them registered as proprietors of the suit property being the administrators' of the estate of **John Njenga**. Notably, none of the parties has sought for the revocation of the grant of representation, in the case of the Plaintiff, and the Confirmed Grant in favor of the Defendant under **Section 76 of the Law of Succession Act**. Consequently, there are two Court orders that are yet to be challenged and therefore still in force. The question arising is whether, in view of the subsistence of the unchallenged Succession Cause orders, this Court can grant the orders sought in by both parties in the Plaint and Counter-claim, respectively.

This Court is established under the **Environment and Land Court Act**, and **Section 13** thereof spells out its jurisdiction. The Court has original and appellate jurisdiction to hear and determine all disputes in accordance with **Article 162(2) (b) of the Constitution** which essentially is adjudicate over disputes relating to the environment and the use and occupation of, and title to, land. However, the dispute herein is in regards to the beneficiaries and their entitlement to the net assets of the deceased's estate. This dispute, in my considered view, is within the purview of the Family Division of the High Court which also has the jurisdiction to revoke a grant of representation, whether or not confirmed. It is the said Court, which has the jurisdiction to interrogate whether the deceased was a polygamist and consequently, the distribution of the said estate in accordance with its findings. Granting the orders sought in the Plaintiff or Counter-claim, whichever way, will amount to this Court effectively revoking the grant of one of the parties, which in my view, will interfere with the process of a court of concurrent jurisdiction.

On the foregoing, I decline to find in favour of either party. However, this Court has a constitutional mandate to administer justice. In that regard, and by virtue of the powers granted to this Court under **Section 68 of the Land Registration Act**, I enter an order inhibition restraining any registrations on the suit property. This order is made in a bid to afford the parties an avenue to effectually determine the issues of beneficiaries and distribution of the estate of the deceased in the family Court.

Consequently, the Court orders as follows:-

1. ***An order of inhibition is hereby entered against title to the suit property known as Ngong/Ngong/646 pending the adjudication of the dispute between the parties in the Family Division of the High Court, Nairobi.***
2. ***The Plaintiff is ordered to serve this order upon the 2<sup>nd</sup> Defendant who is directed to register the same in the appropriate register.***
3. ***The matter herein be mentioned within a period of twelve months of the date herein to determine the progress made by either party.***
4. ***This being a dispute between family members, I order that each party bears their own costs.***

It is so ordered.

Dated, signed and delivered this **9<sup>th</sup>** day of **October** **2015**

28 days Right of Appeal.

**L.GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the 1<sup>st</sup> Defendant

.....For the 2<sup>nd</sup> Defendant

..... Court Clerk

**L. GACHERU**

**JUDGE**