



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**CIVIL APPEAL 128 OF 2002**

**ESTHER NJOKI RURIGI ..... APPELLANT**

**AND**

**PATRICK GATHENYA ..... RESPONDENT**

**JUDGMENT OF THE COURT**

This is an appeal from the judgment and decree of the superior court in H.C.C.C. No. 504 of 1989 (O.S) wherein the appellant's suit was dismissed with costs. The appellant Esther Njoki Rurigi is the administratrix of the Estate of Rurigi Njoroge Njeri – her husband who died in 1967. The couple was living in Kiserian, Ngong in Kajiado District. Her deceased husband was the registered proprietor of land title No. Kiambaa/Kanunga/499“A” in Kiambu District under the Registered Land Act (RLA) since 24th May, 1958, (suit land). In 1987 the appellant filed a petition for grant of letters of administration to the estate of her deceased husband in High Court Probate and Administration Cause No.192 of 1987. She was granted the letters of administration, which were later confirmed. Thereafter she was registered as proprietor of the suit land by transmission and issued with a Title Deed on 20th January, 1989. When she went to the suit land, however, she found that the respondent was in possession and had built a permanent house thereon. She deposed in the affidavit supporting the Originating Summons that she informed the respondent of the illegal occupation but the respondent abused her.

This precipitated the institution of the aforesaid suit in which the appellant sought the following reliefs:

- “1. A declaration that the defendant is illegally occupying land parcel No. Kiambaa/Kanunga/499A.
2. That the defendant is trespassing in the said parcel and doing acts of waste e.g. building a permanent structure.
3. That the defendant be evicted from the said parcel of land forthwith.
4. That the defendant do pay damages and costs to be assessed by the Court.”

The respondent's case in the superior court was briefly as follows. In 1977 he bought land title No. Kiambaa/Kanunga/499“B”, which is adjacent to the suit land from William Kimando Kangara, and was registered as proprietor on 16th March, 1977. The seller was occupying the land with his relatives and after they vacated the land, the respondent discovered that although he had bought land title No. Kiambaa/Kanunga/499“B” he was physically occupying land title No. Kiambaa/Kanunga/499“A” while one Joseph Kariuki Njoroge Rurigi and his relatives were in possession of land title No. Kiambaa/Kanunga/ 499“B”.

The respondent talked to them and confirmed that they wanted to continue staying where they were as they had buried their relatives there. The respondent reported his findings to the Land Registrar, Kiambu District who summoned the occupants of land title No. Kiambaa/Kanunga/499“B”. Peter Rurigi Njoroge and his relatives saw the Land Registrar. They informed the Land Registrar that Rurigi Njeri, the registered proprietor of land title Kiambaa/Kanunga/499“A” was deceased but that he was registered as trustee. They resolved that the respondent was to stay on the land he was occupying (Kiambaa/Kanunga/499“A”) while they would in turn stay on the land they were occupying (Kiambaa/Kanunga/499“B”). To give effect to that agreement the Land Registrar on 15th April, 1982 wrote to the Director of Surveys as follows:-

“RE: KIAMBAA/KANUNGA/499“B” & 499“A”

The occupation of the above parcels is such that the parties who are registered against 499“A” actually occupy 499“B”.

I have interviewed the parties occupying the two portions and they were agreeable to a rectification of the registers. The only problem is that the registered proprietor of 499“A” is deceased.

He is however, registered only as a trustee since he is the eldest son in the family. To solve the problem please interchange these two parcels on sheet No. 12 to correspond with their physical occupation.

Thereafter let me have a copy of the amended R.I.M (Registry Index Map).

Edith W. Gachomba (Mrs) LAND REGISTRAR, KIAMBU”.

The judgment of the superior court shows that the Director of Surveys interchanged the two parcels on the map and notified the Land Registrar Kiambu of that fact. It is after the map was changed that the respondent built a permanent house on the suit land. The respondent contended that after the map was changed he no longer occupies land title No. Kiambaa/Kanunga/499“A” but land title No. Kiambaa/Kanunga/499“B”.

In dismissing the appellant’s suit, the learned trial judge said in part: “In view of the foregoing what can be said about the defendant’s occupation of plot Kiambaa/Kanunga/ 499“A”? The defendant has explained how he lawfully bought the plot as 499“B” only to find that he was on 499“A”. Those who should have been on 499“A” were on 499“B”. The matter was reported to the District Land Registrar who carried out a correction or rectification so that each party would remain where it (sic) was on the ground. Hence the defendant is on this plot as a bona fide purchaser as the rectification as regards occupation on the ground was carried out by the Land Registrar. The plaintiff on the other hand has come up with a title based on a succession case which case was conducted without the knowledge of the members of the family of the deceased. I would of course say nothing about the succession case but in view of the evidence adduced in the case it cannot be said that the defendant is illegally occupying this piece of land Kiambaa/Kanunga/499“A”.

There are seven grounds of appeal against the decision of the superior court the main grounds being grounds Nos. 2, 3 and 4 thus:

“2. The learned trial judge in the superior court erred in fact when he failed to realize and hold that the respondents occupation of the land title number Kiambaa/Kanunga/499“A” was without the consent of the registered owner thereof, the appellant herein or her deceased husband.

3. The learned judge in the superior court misdirected himself and erred in fact and in law when he failed to realize and hold that the rectification or correction of the occupation and registration position on land Title Numbers Kiambaa/Kanunga/499“A” and Kiambaa/ Kanunga/ 499“B” by the District Land Registrar was carried out without the knowledge and/or consent of the lawfully registered owner of land Title Number Kiambaa/Kanunga/499“A” and was thus wrongful and unlawful and null and void.

4. The learned trial judge in the superior court erred in fact and in law and misdirected himself when he failed to hold that the occupants of land Title Number Kiambaa/Kanunga/499“B” who were not the registered owners of the land Title Number Kiambaa/Kanunga/499“A” did not have any lawful authority or power to transact in the said land and their actions in that regard were wrongful, unlawful and ineffectual”.

Mr. Akhaabi, the learned counsel for the appellant submitted in the superior court, as he did in this Court, that, the exchange of land title No. Kiambaa/Kanunga/499“A” with Kiambaa/Kanunga/499“B” which was done without the consent of the appellant was unlawful and null and void ab initio and did not confer the respondent a right to occupy the appellant’s land. The respondent on the other hand contends that the exchange was lawful as it was done by the Land Registrar with consent of the relatives of the husband of the appellant and the beneficiaries of the land who were physically occupying land title No. Kiambaa/Kanunga/499“B”.

There was no dispute that Rurigi Njoroge Njeri, the deceased husband of the appellant was the registered owner of land title No. Kiambaa/Kanunga/499“A” and upon his death the appellant was registered as proprietor of the land on 20th January, 1989 by transmission. The rights of the deceased or the appellant to the suit land is governed by Section 28 of the R.L.A. which provides in part:

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in the Act and shall be held by the proprietor, together with all privileges and appurtenances belonging there to, free from other interests and claim whatsoever ...”.

The proviso to that section however, provides that Section 28 of the R.L.A. does not relieve a proprietor from any duty or obligations to which he is subject as a trustee. Thus, the rights of the proprietor of land which includes the rights to possession has a statutory protection and can only be defeated in the manner provided by the statute (that is R.L.A.).

Although the Land Registrar in the letter dated 15th April, 1982 stated that the parties were agreeable to the rectification of the registers, she appreciated that there was a problem because the registered proprietor of 499“A” was deceased. The Land Registrar had power under Section 142 (1) (b) of the R.L.A. to rectify a register with the consent of all persons interested. That section provides:

“142. (1) The Registrar may rectify the register or any instrument presented for registration in the following cases –

(a) .....

(b) In any case and at any time with the consent of all persons interested.

(c) .....”.

If it was possible to rectify the register under that section, the problem of the physical occupation of two parcels of land could have been resolved by merely registering the respondent as proprietor of land parcel No. 499“A” and the deceased or the appellant as proprietor of parcel No. 499“B”. Alternatively, in our view, the problem could have been resolved by a formal exchange of the parcels by respective parties through corresponding formal transfer.

However, the letter dated 15th April, 1982 and the evidence show that the Land Registrar did not resolve the problem through the machinery of the rectification of respective parcel registers or through mutual transfer by parties. To surmount the problem, the Land Registrar requested the Director of Surveys to amend the Registry Index Map (R.I.M.) to correspond with the physical possession. The effect of that amendment of R.I.M. is as drastic as the rectification of the registers or exchange of the parcels because it had the effect of interchanging the two parcels of land on the ground. That is to say that the land represented on the ground by parcel No. 499“A” was given to the respondent while the respondent’s land

represented on the ground by parcel No. 499“B” was given to the appellant.

We cannot find any provision in the R.L.A. which sanctions the amendment of R.I.M. in the manner suggested by the Land Registrar and without the consent of the registered proprietor of one parcel or of his legal representative. The registry maps, can, however, be amended and new editions prepared in the circumstances specified in Section 19. As an example, section 19 (1) of R.L.A. provides:

“Where the Registrar is maintaining the registry map, or in any case he may, require the Director of Surveys to, correct the line or position of any boundary shown on the registry map with the agreement of every person shown by the register to be affected by the correction, but no such correction shall be effected except on the instructions of the Registrar in writing in the prescribed form, to be known as a mutation form, and the mutation form shall be filed”.

That is the only relevant provision in the R.L.A. But, as can be discerned from the words of the section, the section only authorizes the correction of the line or position of a boundary. Moreover that correction can only be done with the consent of every person affected by the correction and only when the Land Registrar has authorized the correction in a mutation form.

The present case is not about the correction of a line of a boundary or the position of the boundary. It is about the change of ownership of two distinct parcels of land. There is a further problem. The Land Registrar stated in the letter dated 15th April, 1982 that the person registered as proprietor of 499“A” was only registered as a trustee since he was the eldest son in the family.

It is true that Peter Rurigi Njoroge, a step brother to the appellant’s husband gave evidence at the trial to the effect that the appellant’s husband was registered as a trustee. It is also true that the suit land is occupied by relatives of appellant’s husband and that the appellant and her husband have never used the land. The appellant denied in her evidence in the superior court that her husband was registered as a trustee.

There was no dispute before the Land Registrar concerning the ownership of 499“A”. The appellant was not given an opportunity to be heard on the issue of trust. The dispute in the superior court was not between the appellant and the relatives of her deceased husband about the ownership of 499“A”. There is no evidence that the relatives of the appellant’s husband have instituted proceedings against the appellant to recover 499“A”. In the circumstances, we have no difficulty in finding that the Land Registrar had no jurisdiction to pronounce on the issue of trust.

From the foregoing, it is correct to say that it was not conclusively established before the Land Registrar or in the superior court that the appellant’s husband was registered as proprietor of the suit land as a trustee and that Peter Rurigi Njoroge and his relatives with whom the respondent negotiated and who appeared before Land Registrar are the beneficiaries of the land. Indeed, the issue of trust and the beneficiaries of the trust has not yet been brought to court for adjudication. Furthermore, even if it was proved that Peter Rurigi Njoroge and his relatives who occupy the suit land are truly the beneficiaries, (which was not done), that fact alone would not clothe them with authority to deal with the suit land. They would have had capacity to give consent before the Land Registrar or negotiate with the respondent for the exchange of the two parcels of land only if they had first been appointed as legal representatives of the deceased registered owner. As Peter Rurigi Njoroge and his relatives had not been appointed as legal representatives of the deceased proprietor they had no capacity to deal with the suit land. It follows that any agreement reached between them and the Land Registrar and also with the respondent on the exchange of two parcels of land is null and void and of no legal effect.

The trial judge concluded that the respondent was not illegally occupying the suit land because the “Rectification as regards occupation on the ground was carried out by the Land Registrar”. That, with respect, is a misdirection as what the Land Registrar authorized the Director of Surveys to do and what the Director of Surveys did is illegal, and a nullity for two reasons. First, the statute (R.L.A.) did not sanction the amendment of R.I.M. in the circumstances of this case, and, secondly, the relatives of the deceased proprietor had no legal capacity to deal with the land or authorize the amendment of R.I.M. This

appeal, no doubt, is abundantly meritorious.

The suit was instituted by Originating Summons. The appellant filed an affidavit to support the originating summons. The respondent similarly filed a replying affidavit. The suit was heard by viva voce evidence and the respondent called three witnesses. Exhibits were produced at the trial. The suit proceeded as if it had been begun by filing a plaint. That is authorized by rule 10 (1) of order XXXVI of the Civil Procedure Rules. Moreover, no issue arose in the superior court as regards the procedure adopted in the trial and none has arisen in this appeal.

We have made a finding that the amendment of the RIM resulting in the exchange of the two parcels was illegal and a nullity. That being the case the appellant was entitled to the reliefs Nos. 1 and 3 of the Originating Summons. The appellant also claimed damages for trespass. This is not, however, a suitable case for the award of damages because it is the illegal action of the Land Registrar which has largely contributed to the problem. Similarly, this is not a suitable case for the award of the costs of the suit to the appellant because if it was not for the illegal action of the Land Registrar this suit, perhaps, would not have been filed. Lastly, this is a suitable case for making a consequential order concerning the illegal amendment of the respective Registry Index Maps to obviate unnecessary disputes and litigation.

We are not without sympathy for the respondent for the situation he is enmeshed in. However, equity follows the law and we have to apply the law as it is without any adulteration.

For the reasons that we have given above, we allow the appeal with no order as to costs. The judgment of the superior court given on 25th February, 2000 dismissing the appellant's suit with costs is set aside. In substitution, judgment is entered for the appellant in terms of prayers No. 1 and 3 of the Originating Summons dated 3rd February, 1999 with no order as to costs in the superior court.

Consequently, the illegal amendments of the R.I.M. for parcel Nos. Kiambaa/Kanunga/449“A” and 499“B” pursuant to the letter of the District Land Registrar, Kiambu dated 15th April, 1982 and the Director of Survey's letter dated 19th April, 1982 are cancelled. The respondent do give vacant possession of the suit land to the appellant within 6 (six) months from the date hereof and in default eviction order do issue. Those are the orders of the Court.

**Dated and delivered at Nairobi this 29th day of April, 2005.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**W. S. DEVERELL**

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**AG. JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR**