



**Guthiga v Guthiga (Environment & Land Case 002 of 2022)
[2024] KEELC 7163 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7163 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 002 OF 2022**

**JO OLOLA, J
OCTOBER 31, 2024**

BETWEEN

DAVID KIMUKWA S GUTHIGA PLAINTIFF

AND

LILY WACHUKA GUTHIGA DEFENDANT

JUDGMENT

Background

1. By a Plaint dated 9th February 2022, David Kimukwa S. Guthiga (the Plaintiff) prays for the following:-
 - a). A declaration by this Honourable Court that the Plaintiff is the rightful owner of 1.643 Ha out of land parcel number Iriaini.Kairia/109;
 - b). A declaration that the Defendant is illegally occupying and using the Plaintiff's parcel of land;
 - c). An order for the eviction of the Defendant from the Plaintiff's parcel of land;
 - d). An order for the OCS Karatina Police Station to enforce this order and provide security during the said eviction;
 - e). Costs of this suit plus interest at court rates from the date of Judgment till payment in full;
 - f). Any other relief that this Honourable Court may deem fit and meet to grant.
2. Those prayers arise from the Plaintiff's contention that at all times material to this suit, the Plaintiff was the registered proprietor of 1.643 Ha out of LR. No. Iriaini/Kairia/109 (the suit property). The Plaintiff accuses the Defendant of continuing to be in occupation of the suit property illegally and without any colour of right.



3. But in her Statement of Defence dated 25th March 2022 as filed herein on 17th May 2022, Lily Wachuka Guthiga (the Defendant) denies the Plaintiff's claim that he is the registered proprietor of the suit property. The Defendant avers that the said registration which was pursuant to transmission is the subject of active litigation in Nyeri High Court Succession Cause No. 841 of 2015 and is therefore not absolute or indefeasible.
4. It is further the Defendant's case that her occupation of the suit land has been on the basis that she is the widow of the predecessor in title of the suit property and has been lawfully based on customs and tradition.
5. The Defendant further asserts that this suit is res judicata and sub-judice Karatina PMELC No. 11 of 2022. It is the Defendant's case that the suit herein is meant to harass and intimidate her and to deplete her resources so that she can be an easy target of unlawful eviction.

The Plaintiff's Case

6. The Plaintiff testified as the sole witness in his case. Testifying as PW1, he told the court that the land parcel No. 109 Iriani/Kairia previously belonged to her mother and that the Defendant had wrongfully occupied the land. PW1 told the court that the title for the suit property is registered in the names of his two brothers and himself and that the Defendant occupies his portion which is 4 acres by measurement.
7. On cross- examination, PW1 told the court that he does not know when the Defendant entered the land and that he had heard that the Defendant entered the land when PW1 was in High School. PW1 further told the court that when his father died, his mother and the Defendant filed a Succession Cause and it was decided that the land be subdivided. In 1982, PW1's mother appealed that decision and a determination was thereafter made that the entire parcel of land belonged to PW1's mother.

The Defence Case.

8. The Defendant equally testified as sole witness in her case. Testifying as DW1, she told the court that she was married and started living on the land in 1953. DW1 told the court the land was left for her by the husband Stanley Guthiga (now deceased) and that she has continued to occupy the same together with her 12 children and grandchildren. DW1 further told the court that the Plaintiff had sued his sons regarding the suit property in Karatina and that his case was dismissed.
9. DW1 testified that the Plaintiff has built his house on the side of his mother's parcel of land following a subdivision which was done by a Government Surveyor. DW1 told the court that after the death of her husband on 15th August 1965, the suit property had remained in her name. Thereafter the same was transferred to the names of herself and her co-wife who is the Plaintiff's mother after they went to court in Karatina.
10. On cross- examination, DW1 told the court she was married as the second wife under Kikuyu Customary Law. She told the court she found the first wife on the suit land and that the title was later irregularly transferred and registered in the name of the Plaintiff and his two brothers. DW1 further testified that she occupies about 3.5 acres of the land similar to that of her co-wife.

Analysis and Determination

11. I have carefully perused and considered the pleadings filed herein by the parties, their testimonies as well as the evidence adduced at the trial. I have similarly perused and considered the rival submissions placed before the court by the Learned Advocates representing the parties herein.



12. The Plaintiff herein has asked the court to declare that he is the rightful owner of 1.643 Ha comprised in the land parcel number Iriaini/Kairia/109. The Plaintiff equally urges the court to declare that the Defendant is illegally occupying the said parcel of land and that she should be evicted therefrom.
13. It is the Plaintiff's case that he is the registered proprietor of the suit parcel of land. He accuses the Defendant of continuing to occupy the suit property illegally and without any colour of right.
14. The Defendant does not deny being in occupation of the suit property. It is her case that she is in possession of and occupies the suit property as a matter of right the same having been left for her by her husband Stanley Guthiga who passed away in 1965. She accuses the Plaintiff of wrongfully and irregularly obtaining registration of the suit property in his name and that of his two brothers.
15. In support of his case, the Plaintiff told the court that the disputed parcel of land previously belonged to his mother Selipha Nduta Guthiga who passed away in the year 2012. He told the court the property is jointly registered in his name and that of his brothers and that the Defendant occupies the 4 acres portion of the land that belongs to himself.
16. On her part, the Defendant testified that she has lived on the land since 1953 when she was married. She told the court that she was the second wife of the late Stanley Guthiga and that as at the time of her husband's death in the year 1965, he had sub-divided the suit property into two distinct portions each measuring about 3.5 acres. It was the Defendant's case that the Plaintiff's mother who was the first wife was left on one portion of the land while she was left on the portion now being claimed by the Plaintiff.
17. From the material placed before this court, it was evident that this is a matter that had been the subject of litigation for decades. It was also clear to me that the Defendant had occupied the suit property for decades, long before the Plaintiff came to be registered as the proprietor of the suit property.
18. Asked during cross-examination when the Defendant entered the suit property, the 86 year old Plaintiff responded as follows:

“I know the Defendant. She entered the land along time ago. I do not know when she entered. My mother would have known when.

I am 86 years old. I heard the Defendant came to the land when I was in High School. I do not know the circumstances under which she came to the land.”

19. That being the case, and assuming the Plaintiff was in High School when he was about 20-25 years old, it would mean that by the time he brought this suit, the Defendant had been occupying the land for about 60 years. That indeed lends credence to the Defendant's contention that she first entered the suit land in the year 1953.
20. While the Plaintiff asserted in court that he did not know the circumstances under which the Defendant entered the suit property, it was clear to me that he was being very economical with the truth. From his own recorded Statement dated 9th February 2022 and filed herein on 15th February 2022, the Plaintiff states in the relevant paragraphs as follows:

“That I am the Plaintiff and a son to one Selipha Nduta Guthiga alias Zelipha Nduta. My mother was married to one Stanley Guthiga Kimukwa (deceased) on 20th January, 1934 where they continued to live as husband and wife until the death of her husband on 13/8/1965. At the time of death, Stanley Guthiga Kimukwa was the registered owner of ALL that parcel of land known as Iriaini/Kairia /109 measuring 2.47Ha. After the death of her husband, Selipha Nduta Guthiga petitioned for Letters of Administration



for her deceased husband's estate vide in the District Magistrate Court at Karatina in Succession Cause No. 113 of 1977. The Defendant herein objected to the said Letters of Administration where she claimed to be a wife of the deceased. The matter was referred to the clan who held that the Defendant was a wife to the deceased and that they were to share the parcel of land equally.”

21. Arising from the foregoing, it was apparent to me that the Plaintiff and his now deceased mother were aware of the circumstances under which the Defendant came to be on a portion of the suit land. It was further evident that by instituting this suit, the Plaintiff was trying to achieve what his mother had failed to do some 40 years earlier.
22. From the evidence adduced by the Plaintiff herein, it was clear that some 10 years after the death of Stanley Guthiga Kimukwa, the Plaintiff's mother instituted Karatina PMCC No. 113 of 1977 with a view to obtain a Certificate of Succession as they were known then. The Defendant was the objector in that cause. That dispute was referred to a panel of elders who returned the verdict that both the subjects were the wives of the late Stanley Guthiga Kimukwa.
23. The Plaintiff's mother was aggrieved by the said decision. According to her, she had been married to Stanley at a Christian Wedding that was solemnized on 20th January 1934 and Stanley was therefore incapable of entering into any other marriage under Kikuyu Customary Law as contended by the Defendant herein. On those grounds, the Plaintiff's mother filed Nyeri Resident Magistrate's Civil Appeal Case No. 13 of 1981 against the Defendant herein.
24. Having heard the arguments and in a Judgment delivered on 11th November 1982, the Honourable T.T.M Aswani, SRM delivered himself in the relevant portion as follows:

“..... the authorities cited to me show that the deceased could not have married again under customary law. Although I do not agree with those authorities as the matter of inheritance touched on customary law, I feel that the Respondent or her children could have been entitled to inheritance if she proved that she was a wife of (the) deceased within Kikuyu Customary Law. As I am obliged to obey the decisions of the High Court I will allow the Appeal, set aside the Judgment of the DM III at Karatina and order that the land be succeeded by the sons of the deceased through his legal wife Zelipha Nduta who shall have her life interest recorded on the register..”
25. From the material placed before the court, it would appear that the Defendant herein was equally aggrieved with that finding and she therefore instituted Nyeri High Court Civil Appeal No. 30 of 1982. It was however not clear what became of the said Appeal.
26. What was clear was that the decision delivered on 11th November 1982 was never acted on by the parties and both the Plaintiff's mother and the Defendant herein continued to occupy and use what they considered their respective portions of the land. Some 30 years later, Zelipha Nduta (the Plaintiff's mother) passed away on 12th January 2012.
27. Following his mother's death, the Plaintiff instituted Nyeri High Court Succession Cause No. 841 of 2015 laying claim to the suit property. He was thereafter issued with a Confirmed Grant on 11th June 2018. On 18th July 2019 the suit property was registered in the names of the Plaintiff and his two brothers- Ephantus Macharia Guthiga and Harold Fundi Guthiga by way of transmission.
28. From the material placed before the court, it was evident that following the initial Judgment of the Panel of Elders, the suit property was on 14th August 1978 registered in the joint names of the Plaintiff's mother and that of the Defendant herein. It was not clear to me how the Plaintiff had managed



to remove the Defendant's name from the title. Asked in cross-examination about the process, the Plaintiff conceded that the Defendant was not in the picture when he filed the Succession Cause and that the Defendant had since filed summons seeking the revocation of the Grant. That matter remains alive and pending before the High Court.

29. In the circumstances herein, I was not persuaded that the suit property was at all times material registered in the name of the Plaintiff and that the Defendant was illegally and wrongfully occupying the same. While the Plaintiff purported that the reason he did not need his brothers' consent to pursue the matter was because the Defendant occupies the portion belonging to the Plaintiff, it was clear from the Plaintiff's own testimony that the Defendant had been on that part of land from the time the Plaintiff was in High School. It was not clear to me how the Plaintiff came to the conclusion that the portion of land occupied by the Defendant was his own.
30. Even assuming as the Plaintiff asserts that the orders delivered on 11th November 1982 which solely put the suit property in his mother's hands remains unchallenged, it was clear that his mother had failed to execute the decree for a period of 30 years. I did not think it was open for the Plaintiff in the circumstances to claim the property in the manner he has done herein. To grant him the parcel of land occupied by the Defendant when the original proprietor of the land had authorized her entity therein more than 60 years earlier would be unjust and inequitable. It was clear to me that if the Plaintiff had informed the Succession Court of the presence of the Defendant on a large portion of the suit property, the court would not have granted the orders leading to the transmission of the property without hearing from the Defendant.
31. It follows that I am not persuaded that the Plaintiff is entitled to the orders sought herein. Accordingly this suit is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 31ST DAY OF OCTOBER, 2024.

In the presence of:

Ms. Wangechi for the Plaintiff.

Mr. Nderi for the Defendant.

Court Assistant: Kendi

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J. O. OLOLA

JUDGE

