



Case Number:	Environment and Land Case 425 of 2017 (Formerly Nakuru Civil Suit 155 of 2008)
Date Delivered:	13 Oct 2020
Case Class:	Civil
Court:	Environment and Land Court at Nyahururu
Case Action:	Judgment
Judge:	Mary Clausina Oundo
Citation:	Hannah Wangari Kamau v Mary Mugure Kamau [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Laikipia
Docket Number:	-
History Docket Number:	-
Case Outcome:	Suit awarded
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYAHURURU**

**ELC NO 425 OF 2017**

**(FORMERLY NAKURU CIVIL SUIT No. 155 OF 2008)**

**HANNAH WANGARI KAMAU.....PLAINTIFF**

**VERSUS**

**MARY MUGURE KAMAU.....DEFENDANT**

**JUDGEMENT**

1. This matter was initially filed vide a Plaint dated the 7<sup>th</sup> August 2008, the Plaintiff herein sought for the following orders;
  - i. That the Defendant Mary Mugure Kamau holds title No. Nyandarua/Lesirko/137 in trust for herself and her family and that of the Plaintiff in equal shares.
  - ii. That the Defendant be the directed to execute all the necessary documents to vest half share of the land Reference No. Nyandarua/Lesirko/137 to the Plaintiff and failure whereof the Deputy Registrar of this honorable Court be authorized to execute the same.
  - iii. That costs of the suit be borne by the Defendant.
  - iv. Any other or further relief this Court may deem fit and just to grant.
2. In response, the Defendants herein filed their statement of defence on the 4<sup>th</sup> September 2008.
3. Subsequently on the 7<sup>th</sup> April 2017 the matter was transferred to the Nyahururu Environment and Land Court and the Defendant amended her Defence on the 2<sup>nd</sup> February 2019 wherein she denied the allegations contained in the Plaintiff's Plaint stating that some of the issues raised therein could only be litigated in a Succession Cause. That the suit was misplaced and should be struck out with costs. In her counter claim, the Defendant sought for;
  - i. A declaration that she was the sole and absolute proprietor of L.R Nyandarua/Lesirko/137
  - ii. An order for the Plaintiff to vacate any portion of land and she is occupying and possessing in No. Nyandarua/Lesirko/137
  - iii. Any other or further relief that the Court may deem fit and just to grant.
4. Despite leave having been granted to the Plaintiff to file and serve their response to the amended defence and Counterclaim, there was no compliance and instead Counsel confirmed compliance with the provisions of Order 11 of the Civil Procedure Rules and sought for the matter to proceed for hearing.

**The Plaintiff's case**

5. The Plaintiff testified as PW 1 to the effect that she lived on parcel No. 137 Lesiriko which measured 36 acres. That the

registered proprietor was Kamau Nduru who died in 1984 and whom we shall refer to as the 'deceased' for ease of reference. That the deceased had two wives, the 1<sup>st</sup> wife being Mugure Kamau the Defendant herein, while she was the 2<sup>nd</sup> wife, having been married in the year 1977 through the Kikuyu Customary Marriage. That at the time, the Defendant lived in Kitale while she lived on the suit land No. 137.

6. That through the marriage, they had been blessed with 5 children, one who was now deceased and buried on the suit land. That at the time the deceased died in the year 1984, she was in occupation of the suit land and further that he had been buried beside their child.

7. That in the year 1988, the Defendant had returned with her family wherein she had started demolishing her (Plaintiff's) house demanding that she vacates the land. That was when and why she had decided to file the present case.

8. The Plaintiff sought for orders that the suit land be sub-divided into two and for the return of the properties the Defendant had catered away from the deceased's house, so that they could also be divided amongst them. She also sought for cost of the suit.

9. On cross-examination, the Plaintiff testified that she did not know when the deceased got parcel No. 137, but that at the time she got married to him in the year 1977, he already had the land and that she knew the deceased had another wife. That his 3<sup>rd</sup> wife known as Hannah Njoki had left after the death of the deceased.

10. Her evidence was that only one elder from the village had witnessed her Kikuyu customary marriage because the deceased was an only child with no uncles and aunties. That indeed the Defendant and her children used to visit her wherein after the deceased's death, she (Defendant) had attended the funeral with the children and had gone back to Kitale. She also confirmed that there had not been any squatters on the deceased's land.

11. On re-examination, she reiterated her evidence to the effect that she did not know the deceased's 3<sup>rd</sup> wife who had left a long time ago and further that she also did not know whether the deceased had informed the 1<sup>st</sup> wife about their marriage, but that she had participated in the deceased's funeral and burial as his wife.

12. The second Plaintiff witness Gunjo Ng'ang'a Karere testified as PW 2 to the effect that he came to know the Plaintiff through the deceased with whom they had lived together for many years including the years they had been together in Karagoini detention in the year 1962. That after they left detention in 1965, they had been allocated land in Lesirko Scheme.

13. He confirmed that the deceased's 1<sup>st</sup> wife was known as Mary Mugure and that the couple used to live in Kitale. His testimony was that after they had been allocated the land, Mary had stayed on the land for about 2 years before going back to Kitale and only returned upon the death of the deceased.

14. His evidence was that the deceased had married his 2<sup>nd</sup> wife who had one child, in 1967 and that he had been a witness to the wedding. That at the time, the Defendant was in Kitale. That although the Defendant had her house on the suit land, the deceased and the Plaintiff had also lived thereon and had been blessed with 5 children but one had passed away. That when the deceased also passed away, he had been buried on the suit land where the Plaintiff was already in occupation and had always been in occupation.

15. It was his testimony that after the death of the deceased in 1984, the 1<sup>st</sup> wife, the Defendant herein had left Kitale and had also taken possession and occupation of the suit land.

16. When cross-examined, the witness testified that according to Kikuyu custom, it was not a must for the deceased to have informed his first wife that he wanted to marry a second wife. That he had only seen the 2<sup>nd</sup> wife being brought to the land. That he had participated in the dowry taking of the 2<sup>nd</sup> wife (Plaintiff) but did not know if members of the 1<sup>st</sup> wife had were involved. That he was one of surviving people who had gone to the Plaintiff's home as the others had passed away.

17. He also confirmed not having seen any of the deceased's brothers, sisters, uncles and aunties despite having stayed with him from the year 1950, and that the deceased had just taken some men from the village to accompany him to the Plaintiff's home.

18. He also testified that the suit land was allocated to the deceased by the Settlement Fund Trustee in 1965 by which time the deceased had already married the Defendant with whom they were together with in the detention. That it was not true that the

deceased and the Defendant had purchased the land but rather it had been the deceased and the Plaintiff who had paid the loan to the Settlement Fund Trustee because they had been the ones who had stayed on the land for long.

19. His testimony further was that the deceased's burial arrangement had been made by the villagers and the church and that the Defendant had only appeared at the burial after she had been informed about the death by the deceased's son.

20. He also confirmed that the deceased did not allow squatters to live on his land.

21. Joseph Gatehi Wathai who testified as PW3 testified that he had been a Chief from the year 1977 to 1986 and that he knew the Plaintiff as a wife to his friend the deceased, a person who used to give him pastures to graze his animals.

22. That when he was a Chief, he knew the people in his location and that the deceased used to live with the Plaintiff as husband and wife although he also knew that the deceased had another wife living in Kitale.

23. That he had only seen the deceased's 1<sup>st</sup> wife during the deceased's burial in 1984 and that the deceased was buried on the suit land where the Plaintiff was also in attendance. That at the time he retired, the Plaintiff was still living on the suit land. He sought that the Court ensures that the parties live in harmony.

24. During his cross examination, he confirmed that the deceased had two wives and that he did not know whether there had been a Plaintiff filed in Court by the Defendant. He denied having been involved when the deceased was marrying the Plaintiff but confirmed that the land was allocated by the Settlement Fund Trustee and issued to the deceased at which time he, (deceased) was with his 1<sup>st</sup> wife. That at the time he came to know the deceased, he had found him with the 2<sup>nd</sup> wife, the Plaintiff. He asked the Court to acknowledge the Plaintiff as the deceased's wife and for the land to be split into two between the Plaintiff and Defendant, who were both the deceased's wives.

25. He also confirmed that at the moment, although both parties lived on the suit land, their stay was not harmonious.

26. The Plaintiff thus closed their case.

#### **Defendant's case.**

27. The Defendant, Mary Mugure testified as DW 1 to the effect that she was 80 years old, lived in Lesirko and that she was the only wife to the deceased. That after the deceased had been allotted the suit land, out of the kindness of his heart, he had given part of it to a school and the other part to people who wanted a place to live. (Court notes that the witness is sometimes incoherent).

28. That the Plaintiff had been one of the people who had requested for a place to live, wherein the deceased had allowed her to stay on the suit land. That at the time, the Plaintiff had one child. That she had taken possession of a portion of the land and had lived therein with her child.

29. That she had not come into possession of the land as a wife but as a person who had been given a place to live. The Defendant confirmed that there had also been another woman was called Njoki who had also been given a place to stay on the land. Her testimony was that many people had lived on the land, land which she had offset its loan with Settlement Fund Trustee.

30. She testified that at the time she had filed Nyahururu Succession Cause No. 36 of 1989 as per the certificate of confirmation which she produced as DF Exhibit 1, the Plaintiff was still in occupation of the land. That thereafter, she had been issued with a title to the land, which she also produced as Df exhibit 2(a). She also produced a search certificate as Df exh 2(b) confirming that she was the registered proprietor to the suit land.

31. Her testimony was that many other people for example Njoki and the Plaintiff had been given a place to live by the deceased after which they had left save for the Plaintiff who remained.

32. On cross-examination, the Defendant testified that before the deceased was allocated the suit land, they used to live in Kitale wherein after the allocation, deceased had gone to fetch her from Kitale. Her evidence was that at the time, the land was allocated to

elderly women and that a person who was not married could not get land.

33. She however could not remember for how long she had occupied the land but reiterated that the deceased had given land to the Plaintiff to live on and that he had not married her.

34. She also testified that during the deceased's funeral, the Plaintiff was not there and that after the deceased's death, she had been the only one living on the suit land. That although the Plaintiff had children, she did not know if they were the deceased's children.

35. She also could not remember when she had gone back to the suit land, but that she had embarked on removing the Plaintiff about 30 years ago after the death of the deceased. She confirmed that both the deceased and the Plaintiff's child were buried on the suit land.

36. When examined by the Court, she confirmed that her marriage to the deceased was through the traditional Kikuyu Customary marriage.

37. Upon the closure of the defence case and whilst awaiting the filing of written submissions, the Court was informed of the demise of the Defendant and asked to arrest the judgment pending the substitution of the Defendant with her legal representative.

**Plaintiff's submission.**

38. The Plaintiff framed their issues for determination as follows;

- i. Whether the Court had jurisdiction to hear and determine this matter.
- ii. Whether the Plaintiff was entitled to any relief.

39. On the first issue for determination, the Plaintiff submitted that the case had been filed way back in the year 1994 wherein the jurisdiction at the time fell squarely within the High Court at Nakuru. That subsequently the matter was transferred to the Environment and Land Court in 2017 and pursuant to the provisions of Section 13 of the Environment and Land Court Act, the Court now had jurisdiction to hear and determine the suit.

40. On the second issue for determination, it was the Plaintiffs submission that the Defendant had no capacity to evict her without the consent of the beneficiaries of the estate of the deceased and the permission by the Court as she was a trustee of the beneficiaries of the estate of the deceased.

41. The Plaintiff relied on the High Court case in **Kiarie vs Kinuthia** (sic) to submit that what was essential in this matter was the nature of the holding of the land and intention of the parties. That if the said holding was for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they were in possession or actual occupation of the land.

42. That some of the elements that would qualify a claimant as a trustee would be;

- a. Whether the land in question was, before registration, family clan, or group land
- b. The claimant belongs to such family, clan or group
- c. The relationship of the claimant to such family Clan or group is not so remote or tenuous as to make his/her claim idle or adventurous,
- d. The claimant could have been entitled to be registered as the owner or other beneficiary of the land but for some intervening circumstances and

e. The claim is directed against the registered proprietor who is a member of the family, clan or group.

43. The Plaintiff submitted that the Defendant was in utter breach of the Plaintiff's right to own and acquire property and that the Court had the jurisdiction to ensure that the Plaintiff had their own share of the said property. That given the long complicated history of this matter, it was in the best interest of justice that the orders sought be granted and a judgment delivered against the Defendant who continued to negligently and without any color of right interfere with the Plaintiff's right to own property.

**Defendant's submission.**

44. The Defendant's submission was that the Plaintiff's case was based on the fact that parties had been married to the deceased one Kamau Nduru Mwangi the allottee of the suit land and that after the death of the said deceased, the Defendant had petitioned for his estate wherein the suit land had been transmitted to her. Her contention was therefore that having been married to the deceased in 1977 and having remained on the suit land with their children, that the registration of the Defendant as the proprietor of the suit land was only as a trustee for the benefit of her family and that of the Plaintiff in equal shares. That the said trust should therefore be defined and declared.

45. The Defendant's submission was that their defence was therefore in opposition of the Plaintiff's claim. That their counter-claim was against the Plaintiff who had sought for a declaration that she was the sole and absolute proprietor of the suit land. That the defendant thus sought for eviction orders to issue against the Plaintiff.

46. It was her submission that the suit land had been allocated to the deceased who was her husband and after his death, the same had been transferred to her through transmission in a Succession Cause which had not been objected to by the Plaintiff because she had no relationship with the deceased. That further, the Plaintiff did not file a defence to the counterclaim and as such the said counterclaim stood uncontroverted.

47. The Defendant submitted that the Plaintiff's claim which was based on trust was fatally defective and bad in law. That pursuant to the provisions of Order 37 Rule 1 of the Civil Procedure Rules, a claim based on trust ought to have been filed in an originating summons and not in a plaint as was in the instance case. Reliance was placed on the holding in the case of **Kilatan Alomai vs Emmanuel Pkiach [2010] eKLR**.

48. The Defendant's main contention was that the Plaintiff was not married to the deceased. That further, from the evidence of PW 3 who had been the area chief at the time and for a long time, that there had been confirmation that before a Succession Cause could be filed, it was mandatory for a chief's letter to be annexed and as such, the implication had been that before the Defendant filed the Plaintiff to the estate of the deceased, the chief's letter must have been filed which letter had excluded the Plaintiff as a dependency of the deceased. That further, the evidence adduced by the Plaintiff's witnesses who had agitated for the recognition of the Plaintiff as a wife to the deceased was the kind of evidence that was applicable in succession pleadings and not in the instant suit.

49. The Defendant relied on the decided case in the **Nancy Wanjiku vs Gorge Njoroge & 3 Others [2017] eKLR** to submit that in her entire evidence the Plaintiff had not stated that the deceased had held half of the suit land in trust for her and neither had she challenged the process of transferring by transmission the suit land to the Defendant during the Succession Cause. That the certificate of confirmation produced as evidence in Court did not create any trust over the suit land for which trust ought to have been in place before such registration.

50. That since the Plaintiff did not prove in the right forum that she had been a wife to the deceased, it was the Defendant's submission that her entry onto the suit land was as a licensee caused by the deceased's generosity. Reliance was placed on the decided case in **Kaitiki & Another (Both suing as the administrators of the estate of the late Robinson Kinuthia Muriakiara) vs John Kamau Muchai & 3 Others (sic)**. The Defendant's submission thereof was that the Plaintiff did not have any cause of action against her and that her suit therefor should be dismissed with costs.

51. That in support of the counter claim, the Defendant had demonstrated that she had acquired the suit land through a Succession Cause that had not been challenged. That after the certificate of confirmation had been issued, it had been executed wherein she had been registered as the owner of the suit land.

52. That the Plaintiff having entered into the suit land as a licensee and despite having been asked to vacate the same, was adamant

thereby resulting into filing the present suit wherein she based her pleadings on trust. That the Defendant was entitled to the orders sought in the counterclaim wherein judgment ought to be entered in her favour with costs as prayed.

**Determination.**

53. I have carefully considered the Plaintiff's claim against Defendant, the Defendant's counterclaim against the Plaintiff, the evidence, submissions as well as the applicable law and the authorities herein cited. I find the matters arising for determination thereto as being;

i. Whether the Defendant Mary Mugure Kamau holds title No. Nyandarua/Lesirko/137 in trust for herself and her family and that of the Plaintiff in equal shares.

ii. Whether the Defendant in her Counterclaim, is the sole and absolute proprietor of L.R Nyandarua/Lesirko/137

iii. Who will bear the costs of the suit"

54. This is a case where the Plaintiff's claim against the Defendant is that since they were both married to the Deceased who was the proprietor of the suit land, that they each held equal shares to the said land and because the Defendant was registered as its proprietor, after the deceased's death, to hold the same in trust for herself, her family, the Plaintiff and her family, in equal shares.

55. The Defendant's counterclaim against the Plaintiff on the other hand is that she was not married to the deceased but came into occupation of the suit land as a licensee and whose license had expired upon the death of the deceased and for which reason she (Plaintiff) ought to vacate from the suit land henceforth since the Defendant was the absolute proprietor therein.

56. Indeed there was consensus by both parties that the suit land was registered in the name of the Defendant through transmission after its original proprietor, passed away.

57. It is also not in dispute that prior to the deceased's death the Defendant used to live in Kitale and only came to the land after the passing away of the deceased. The Plaintiff on the other hand lived and continues to live on the suit land

58. Lastly it is also not in dispute that the suit land herein was registered to the Defendant through transmission pursuant to Nyahururu Succession Cause No. 36 of 1989 to which the Plaintiff was not a beneficiary.

59. What is disputed however is how the Plaintiff came into occupation of the suit land because whereas the Plaintiff claims that she came into occupation as the deceased's wife where she even bore him children, one who was buried on the suit land, the Defendant on the other claims that she was the only wife to the deceased.

60. On the first issue as to whether the Defendant Mary Mugure Kamau holds title No. Nyandarua/Lesirko/137 in trust for herself and her family and that of the Plaintiff in equal shares, I find that the provisions of Section 25 of the Land Registration Act do not relieve a proprietor of any duty or obligation to which she is subject to as a trustee.

61. The overriding interests alluded to in Section 25 are set out in Section 28 of the Land Registration Act which provides as follows :-

*Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—*

a. *spousal rights over matrimonial property;*

b. *trusts including customary trusts ;*

c. *rights of way, rights of water and profits subsisting at the time of first registration under this Act;*

- d. *natural rights of light, air, water and support;*
- e. *rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;*
- f. *leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;*
- g. *charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;*
- h. *rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;*
- i. *electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and*
- j. *any other rights provided under any written law.*

62. It will be noted that trusts are among the overriding interests provided for in Section 28 above, and for which a proprietor holds land subject to, as provided in Section 25 above. A trust is essentially a situation in which one person holds property on behalf of, or for the benefit of another. Trusts are of different types and can be created in a variety of ways (See for example **Hansbury & Maudsley, Modern Equity, 10 Edition, Chapter 4**)

63. The nature of the trust that the Plaintiff was alluding has not been disclosed either in her pleadings or evidence. She merely pleaded that since she was the deceased's wife having married him under the Kikuyu customary law that the Defendant held the suit land in trust for her and her children.

64. No evidence was led by the Plaintiff of any customary law that applied to the parties herein which infused a trust between the parties to enable the Court delve into whether a customary trust exists, and if so, the rights given under that custom as is provided for under section 28(b) of the Land Registration Act.

65. The Supreme Court of Kenya, while faulting the decisions in **Obiero v. Opiyo**, and **Esiroyo v. Esiroyo**; held as following in the case in **Isaac M'inanga Kiebia** (Supra)

*Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the Court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor.*

*Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in **Kiarie v. Kinuthia**, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:.....*

*.....We also declare that, rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore reverses the age old pronouncements to the contrary in **Obiero v. Opiyo** and **Esiroyo v. Esiroyo**. Once it is concluded, that such rights subsist, a Court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.*

*In the foregoing premises, it follows that we agree with the Court of Appeal's assertion that "to prove a trust in land; one need not be in actual physical possession and occupation of the land." A customary trust falls within the ambit of the proviso to Section 28 of the Registered Land Act, while the rights of a person in possession or actual occupation, are overriding interests and fall within the ambit of Section 30(g) of the Registered Land Act.*

*.....It is now clear that customary trusts, as well as all other trusts, are overriding interests. These trusts, being overriding interests, are not required to be noted in the register. However, by retaining the proviso to Section 28 of the Registered Land Act (now repealed), in Section 25 of the Land Registration Act, it can be logically assumed that certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor in terms noted on the register. The rights of a person in possession or actual occupation of land, as previously envisaged under Section 30 (g) of the Registered Land Act, have now been subsumed in the "customary trusts" under Section 25 (b) of the Land Registration Act. Thus under the latter Section, a person can prove the existence of a specific category of a customary trust, one of which can arise, although not exclusively, from the fact of rightful possession or actual occupation of the land*

66. I find that the Plaintiff herein has not established a valid claim to the suit property based on customary trust that subsisted at the time of first registration which trust was rooted in customary law and which trust is binding upon the Defendant herein being the registered proprietor of the said suit land.

67. On the second issue raised in the Defendant's counterclaim that she was the sole and absolute proprietor of L.R Nyandarua/Lesirko/137, I find that the suit land having been registered to the Defendant on the 24<sup>th</sup> June 1996, was thus governed by the repealed **Registered Land Act, Cap 300 which then** constituted the Defendant as an absolute proprietor and conferred on her all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act

68. The current land regime is set out in the Land Registration Act, Act No. 3 of 2012, and the Land Act, Act No. 6 of 2012.

69. The rights of a proprietor are set out in Section 26 of the Land Registration Act, which provides as follows:-

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

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.*

70. From the above provision of the law, it is clear that the Defendant herein having been registered as the proprietor of the suit land through transmission, she became the absolute and indefeasible owner of the said property and her registration/ title could only be challenged as provided by Section 26(1)(a) & (b) of the Land Registration Act 2012.

71. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

72. In the instance case, none of the two scenarios have been pleaded. No evidence to the effect that the Defendant had obtained registration of the suit property through *fraud* or *misrepresentation*. Further there had been no evidence that the Plaintiff had raised any objection in the Nyahururu Succession Cause No. 36 of 1989 *wherein a confirmation of grant* had been issued to the Defendant and the Defendant had been granted the suit property absolutely.

73. There was also no evidence from the confirmed grant that the Plaintiff had been listed as a beneficiary of the said estate and neither had she objected to the said confirmation of grant dated the 5<sup>th</sup> June 1990 which has not been revoked to date and which resulted into the Defendant being registered as the sole proprietor of the suit property through transmission.

74. Having found that there was no trust established for the Plaintiff herein, my holding is that the administration of the estate of deceased was concluded in Nyahururu Succession Cause No.36 of 1989 where his estate was inherited by the Defendant herein and any challenge in the distribution of the suit land could only be done in that succession Cause.

75. The end result is that I find in favour of the Defendant in her counterclaim and proceed to dismiss the Plaintiff's suit with the following orders;

- i. A declaration is hereby issued that the Defendant is the sole and absolute proprietor of L.R Nyandarua/Lesirko/137
- ii. The Plaintiff and members of her family do forthwith vacate any portion of land that she is occupying and possessing in No. Nyandarua/Lesirko/137 within 90 days upon delivery of this judgment and if they fail to so vacate, an order of eviction be issued against them.
- iii. Cost of the suit is awarded to the Defendant.

**Dated and delivered at Nyahururu this 13<sup>th</sup> day of October 2020.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**



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