



Karungu (Suing as administrator of the Estate of John Ngige Karungu - Deceased) v Masira & another (Environment & Land Case 540 of 2016) [2023] KEELC 19984 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19984 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 540 OF 2016
FM NJOROGE, J
SEPTEMBER 22, 2023**

BETWEEN

PENINAH INYANJE KARUNGU (SUING AS ADMINISTRATOR OF THE ESTATE OF JOHN NGIGE KARUNGU - DECEASED) PLAINTIFF

AND

CHRIS MASIRA 1ST DEFENDANT

MARY WANJIRU KINYANJUI 2ND DEFENDANT

JUDGMENT

1. The orders sought in the present case by the plaintiff are as follows:
 - a. A declaration that any purported sale and/or transfer of Title No. Shawa/Gicheha Block 4/228 or a portion thereof by the 2nd defendant to the 1st defendant is null and void.
 - b. A declaration that any dealing in respect of Title No. Shawa/Gicheha Block 4/228 or a portion thereof after the date of John Ngige Karungu's death i.e. 18th March 2013 without the plaintiff's involvement is null and void.
 - c. A permanent injunction restraining the defendants, their agents/servants and employees from trespassing, entering, invading, developing, occupying, interfering with, carrying out any demolition, construction or any transaction whatsoever on Title No. Shawa/Gicheha Block 4/228 or on any buildings thereon.
 - d. An order evicting the 1st defendant, his agents/servants and employees from Title No. Shawa/Gicheha Block 4/228 and any buildings thereon.
 - e. The OCS Menengai Police Station do ensure compliance with orders (b) and (c) above.



- f. An order directing the defendants to restore Title No. Shawa/Gicheha Block 4/228 and any buildings thereon to their status before the 2nd defendant's unlawful possession.
 - g. Damages for trespass on Title No. Shawa/Gicheha Block 4/228 and destruction of any buildings thereon.
 - h. Interest on f above.
 - i. Costs of the suit.
2. In the body of the plaint the plaintiff avers that she is widow to John Ngigi Karungu who wrote a will in respect of which she was issued a grant of probate which was later on confirmed to her. She states that plot number Shawa Gicheha Block 4/228 (hereinafter also referred to as "Plot No 228" or "parcel No 228") was co-owned by her late husband, her son Tom and the 2nd defendant. Her son also met his demise. The 2nd defendant however fraudulently transferred the suit land to her name and purported to sell the same to the 1st defendant who demolished the developments thereon and began putting up his own hence the present suit.

Defence of the 1st Defendant

3. The 1st defendant filed a defence stating that he is a bona fide purchaser of a portion of the suit land and that the proceeds of the sale to him were applied to the defrayment of an outstanding bank loan in respect of the suit property.

Defence of the 2nd Defendant

4. The 2nd defendant filed a defence denying the claim of fraud in acquiring the title to the suit land. She stated that she is a daughter-in-law to the plaintiff and administrator of the Estate of her late husband, Tom, the plaintiff's son; that she has constructed a school on the suit land from which she ekes out a living; that she legally became the owner of the suit land after the demise of both John and his son Tom. she also avers that she filed a succession cause which was not opposed by the plaintiff. She admits to having sold 1 acre out of the suit land to the 1st defendant.

Evidence of the Parties

5. The evidence of the plaintiff closely followed the contents of the plaint. She stated that she is the executor of the will of her deceased husband and that she had obtained a certificate of confirmation thereof. She admitted that the 2nd defendant was married to her son Tom and was therefore her daughter-in-law. parcel no 228 was originally owned by her late husband John. Tom and his wife were unemployed. The title to the plot was registered in the name of John, Tom and the 2nd defendant. John constructed the school on the land. John, Tom and the 2nd defendant ran the school. None of them lived on the plot. According to the will the plaintiff was to co-own the plot together with Tom and the 2nd defendant. John's share of the income from the school, was also to be paid to the plaintiff. However, upon conducting a search at the land registry she discovered that the 2nd defendant had without involving the plaintiff and without her knowledge, had the land registered in her name to hold in trust for herself and her children, yet she had known of the plaintiff's application for a grant of probate and issuance of grant to her late husband's estate. The plaintiff knew of the matter when the 1st defendant renovated two classrooms and converted them into his dwelling. The 2nd plaintiff had also charged the land to a microfinance company without the plaintiff's knowledge. The 1st defendant is still in occupation of the portion that was sold to him. upon cross-examination she stated that under the will, she and Tom were bequeathed plot no 229; that she intended to give the 2nd defendant a portion



thereof; she understood the will to mean that she ought to be included in the ownership of plot no 228, but no accounts have been taken in respect of the school to determine her share of the income therefrom. She maintained that the suit land was only availed to Tom and his wife, the 2nd defendant to enable them run a business otherwise it remained family property.

Evidence of the 1st Defendant

6. DW1 was the 1st defendant. His evidence is that he conducted a search at the lands office; that he entered into a written land sale agreement with the 1st defendant for a 1-acre portion of the suit land; that there was no indication of any claim by the plaintiff and her interests were not registered anywhere; that the proceeds of the sale to him were used to pay an outstanding loan secured by title to the suit land; that the entire parcel would have been disposed of by the lender had the 1st defendant not stepped in to save the day; that he was purchasing the land and some structures thereon; that the documents he saw showed that the 2nd defendant owned the school on the land; he took possession within 6 months of purchase. He however failed to produce receipts for the payment of the consideration and is not certain when he paid for the land. He lives on the property now. He denied the claim of trespass.

Evidence of the 2nd Defendant

7. DW2 gave evidence on 29/3/2023. Her evidence is that the plaintiff is her mother-in-law; that the suit land is registered in her name and those of her two daughters; that in or around the year 2007, she and her late husband approached her father-in-law seeking land and he demarcated 5 acres for them to develop as they wished and so they gradually built the school on the land and had it registered in the couple's name in the year 2010; a title to the piece of land was required in order to register the school; since her husband was struggling with alcoholism, her father-in-law included his own name in the title in order to protect DW2's interest. Her father-in-law did not want to be part of the business. Her father-in-law died in 2013 and her husband in 2014. She and her cousin became the administrators to his estate. The suit land was included in the confirmation of grant and it was not challenged. DW2 knows of no other property given to the deceased by his father. The suit land also did not feature in the succession cause filed by the plaintiff. DW1 claimed that the plaintiff knew that the suit land belonged to her and her husband. She admitted that the will left by her father-in-law stated that she and the plaintiff were to share profits from the school. No individual share had been registered in respect of each co-owner and so as the surviving owner, she had the land registered in her name to secure it for her daughters but she later sold one acre of it to the 1st defendant and gave him possession. She had committed no fraud. Upon cross-examination, she maintained that the will gave the plaintiff a share of the income but not the land. However, the school made only losses and she had to sell the one acre to salvage the rest of the land from being disposed of by the bank.
8. Upon cross-examination by Ms Mugweru, she stated that she had no objection to the plaintiff taking a share of the profits if any. She admitted to not having involved John in the charging of the suit land.

Submissions

9. The plaintiff and the 2nd defendant filed submissions. I have perused through the court file and found no submissions filed for the 1st defendant at the time of preparation of this judgment.

Determination

10. The issues for determination in the present suit are as follows:



- a. Whether the suit land was owned jointly or in common between John Ngige Karungu, Tom Karungu and the 2nd defendant;
- b. Whether the transfer of the suit land to the 2nd defendant's name was fraudulent;
- c. Whether the 1st defendant's title ought to be cancelled;
- d. Who ought to bear costs of these proceedings?

a. Whether the suit land was owned jointly or in common between John Ngige Karungu, Tom Karungu and the 2nd defendant;

11. There is no dispute that the 2nd defendant is a widow to the son of the plaintiff and therefore a daughter-in-law to the plaintiff, or that the suit land was a subdivision of the title held by her father-in-law, the plaintiff's husband, now deceased. There is also no dispute that the suit land was originally registered in the name of the 2nd defendant, Tom and John without any defined share being assigned to each, or that it has been now registered in the name of the 2nd defendant and that she has disposed of and parted with possession of a portion thereof to the 1st defendant who is now in possession of one acre. It is also admitted that John left a will by which the plaintiff was entitled to John's share of income from the school built on the premises.
12. In the light of the 2nd defendant's claim that the land devolved to her after the demise of her co-proprietors, the question that arises is whether the land was ever jointly owned by the three persons so registered as owners to enable the 2nd defendant be entitled to the ownership of the entire parcel after the demise of the other two co-proprietors.
13. I have considered the 2nd defendant's case. She relies on the case of *Mukazitoni Josephine V Attorney General* [2015] eKLR and *Isabel Chelangat Vs Samuel Tiro Rotich & 5 Others* [2012] eKLR, *In Re Estate of Joseph Kangari Muhu* [2015] eKLR and *Estate of Hebron Amunze Ayuka* [2016] eKLR for her argument. She states that she and her late husband asked the plaintiff's husband for land on which to build a school; that Section 101 (1) of the *Registered Land Act* which was applicable then provided that an instrument in favour of two or more persons and the registration giving effect to it shall show whether those persons are joint proprietors or proprietors in common and where they are proprietors in common the share of each proprietor. She avers that the title never showed the share of each proprietor in the first place and that this implies joint proprietorship. The 2nd defendant also distinguish [2015] eKLR relied on by the plaintiff by pointing out that the case involved 4 brothers who each occupied a defined share of the land and so the facts of that case being dissimilar to the present case, the reasoning of Munyao J could not apply in the present instance.
14. The further basis of the claim of joint proprietorship is based on the evidence of the plaintiff as follows:

“The plot was jointly registered in the name of my son my husband and the 2nd defendant.”
15. I have no evidence before me that the plaintiff is an expert well versed in law so as to understand the distinction between joint proprietorship and ownership in common so as to hold that statement as her admission of joint ownership in the present case and so I will not accord that evidence the ordinary meaning it would have in law.
16. The title in the names of three proprietors was issued on 4/12/2009 when the *Registered Land Act* was in force. According to Section 102 of the *Registered Land Act* (now repealed), upon the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly. On the other hand, under Section 103 of the *RLA* (repealed) where any land, lease or charge



is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate. Under that Section, in the case of a proprietorship in common, no proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld. There is no question that no consent was obtained by the 2nd defendant to deal with the suit land as in her opinion she was properly entitled under joint proprietorship to the exclusion of the plaintiff.

17. The plaintiff's husband, John died on 18/3/2013 and her son Tom on 3/8/2014. The Land Registration Act, Act No. 3 of 2012 (which repealed the RLA) came into effect on 2/5/2012 before the demise of both father and son. The LRA is therefore applicable in the present dispute. Section 91 (8) of the LRA provides as follows:

“On and after the effective date, except with leave of a court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common.”

18. The further claim by the 2nd defendant was that her father in law included his name in the title so as to protect her interest since her husband was an alcoholic, and he could coerce her into selling the land. Though there is an admission that Tom was an alcoholic and the only threat to the suit land and business, I also find that if there was an intention by the plaintiff's husband to surrender all interest in the suit land, he was in control of the transfer process and there was no bar to the registration of the land in the name of the supposedly more trustworthy 2nd defendant, which did not happen. That the custody of the suit title was given to the 2nd defendant was also relied on but I find that custody of title by only one among several registered owners named in the document is not evidence of joint proprietorship or at all. The fact that only sharing of profits alone, and the fact that no sharing of land was mentioned was also emphatically relied on by the 2nd defendant to support the claim that the land had been jointly owned; in any event, she stated, the school had never made any profits. Lastly, the 2nd defendant averred that the suit land was never included in the plaintiff's succession cause in respect of her late husband's estate.
19. It is decipherable from the bequest to the plaintiff of the share of profits from the school that the plaintiff's husband never let go completely of the profits arising from the use of the suit land as a school. It is also telling that he retained his name in the title to the suit land. Having that in mind, the conclusion that he had given up all his interest in the land cannot be correct. In fact, the retention of his name in the title and his bequest of income to his wife indicate that he was still interested in the land even after it was registered the name of three persons. The very fact that the bequest to his wife entails receipt and distribution of some income to her after his demise presupposes that his estate would still have an interest in the land as a co-owner. In that case it was his recognition that the registered proprietors owned the land in common rather than as joint proprietors that made him bequeath his share of the income to his wife.
20. If the plaintiff's husband had been minded to let go of the suit land completely he would not have caused his name to be included among the proprietors in the register. Only the names of the 2nd defendant and her husband would have appeared.
21. The facts of the present case and the provisions of Section 91(8) of the Land Registration Act rule out any joint proprietorship of the land but lean towards ownership in common. Out of the foregoing



this court arrives at the conclusion that the suit land was not jointly owned. The 2nd defendant and her husband as well as the plaintiff's husband were owners in common of the suit land.

b. Whether the transfer of the suit land to the 2nd defendant's name was fraudulent;

22. Fraud has been specifically pleaded by the plaintiff against the 2nd defendant. The question that arises is whether it has been proved. It is stated that the 2nd defendant fraudulently concealed the facts on the transfer of the suit property and disinherited the beneficiaries of the co-owners by causing herself to be illegally registered as the only proprietor of the suit property by uttering false documents to achieve the registration. With reference to The Black's Law dictionary "Fraud" is defined as follows in:

"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

23. At a glance the 2nd defendant's title may appear legal in that the process of succession was followed. However, the process was deficient in that though the land was owned in common with the plaintiff's husband, the 2nd defendant never obtained any grant that would enable her to administer over his share. Considering that she was aware of the deceased's will and the bequest of the share of income to the plaintiff, as well as the fact that the suit land was a subdivision of a bigger parcel that had been owned by the deceased, it is apparent to this court that she had the intent of taking the entire land and disinheriting the plaintiff. In this court's view she ought to have involved the plaintiff in her dealings with the land so that the latter could benefit from her late husband's share. The 2nd defendant had at the hearing admitted to not having involved John in the charging of the suit land to a financial institution. She had dealt with the suit land as though it was her own even before the demise of John which was wrong. I consider her actions fraudulent and so the title issued in her name is invalid and incapable of being defended under Section 26 of the [Land Registration Act](#).

c. Whether the 1st defendant's title ought to be cancelled;

24. The evidence of the 1st defendant that he conducted a search and found that the title to the suit land was registered in the name of the 2nd defendant and was not encumbered was not controverted by the plaintiff. Drawing from the Court of Appeal case [Mohamed v Duba & another](#) (Civil Appeal 83 of 2019) [2022] KECA 442 (KLR) (18 March 2022) (Judgment) [Black's Law Dictionary](#), a bona fide purchaser for value without notice is:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

25. The Court of Appeal in the Mohamed case (supra) cited [Katende V. Haridar & Company Limited](#) [2008] 2 EA 173 which lays down the rule that for a litigant to successfully rely on the doctrine of bona fide purchaser without notice he must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;



- e. the vendors had apparent valid title;
 - f. he purchased without notice of any fraud;
 - g. he was not party to any fraud.
26. In the present case the 1st defendant holds no title deed. If he indeed conducted a search in respect of the suit land, then the green card must have given him a clue that the land previously belonged to three persons before it was registered in the name of the 2nd defendant. The certificate of confirmation of grant obtained by the 2nd defendant was solely in respect of the estate of her deceased husband and she did not have a certificate of confirmation of grant in respect of her father-in-law's estate. Diligence ought to have compelled his inquiry from the 2nd defendant as to who had taken out the grant in respect of her father-in-law's estate and how she came to own the title alone to his or her exclusion. Thereafter proper legal advice would have set out to him the position that this court has set out as above in the first issue addressed, to wit, that the registration of the 2nd defendant as the owner ignored the rights of her father-in-law to the land and was therefore fraudulent. I can not consider a mere search to be sufficient due diligence and good faith where the land was not obtained by purchase, where it was obtained by confirmation of grant in respect of Tom and without any on behalf of the estate of John. The foregoing suffices to enable a conclusion that the 1st defendant gains no succour from the doctrine of bona fide purchaser for value without notice.

d. Who ought to bear costs of these proceedings?

27. The acts and omissions of the 1st and 2nd defendants occasioned the present litigation and having failed to establish their respective claims to the suit land on a balance of probabilities, they must therefore bear the costs of the present suit.

Conclusion

28. The upshot of the foregoing is that the plaintiff has proved her claim against the 1st and the 2nd defendants to the required legal standard and I hereby enter judgment in her favour and I issue the following final orders:
- a. A declaration is hereby issued declaring that the purported sale of a portion of Shawa/Gicheha Block 4/228 by the 2nd defendant to the 1st defendant is null and void;
 - b. A declaration is hereby issued declaring that any dealing in respect of Shawa/Gicheha Block 4/228 by the 2nd defendant after the date of demise of John Ngige Karungu that is 18/03/2013 without the plaintiff's involvement is null and void;
 - c. A permanent injunction is hereby issued restraining the 2nd defendant from in any manner disposing of Shawa/Gicheha Block 4/228 without the involvement of the plaintiff;
 - d. The 1st defendant shall remove himself from the suit land that is Shawa/Gicheha Block 4/228 and in default be forcibly evicted therefrom at the plaintiff's instance;
 - e. The Land Registrar Nakuru shall restore the title to Shawa/Gicheha Block 4/228 to its former status before the same was registered in the name of the 2nd defendant by cancelling the title issued in the name of the 2nd defendant and re-registering it in the names of Mary Wanjiru Kinyanjui, Tom Kamau Karungu and John Ngige Karungu;
 - f. Damages are declined for none have been proved by the plaintiff;



g. The costs of the present suit shall be borne by the 1st and 2nd defendants jointly and severally.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

