



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO.46 OF 2016

IN THE MATTER OF THE ESTATE OF HANNAH WANJIKU NJOGU (DECEASED)

ROBINSON MWAURA NJOGU.....APPLICANT

-VERSUS-

FRANCIS MURIITHI KIBICHO.....RESPONDENT

JUDGMENT

PLEADINGS:

The deceased **Hannah Wanjiku Njogu** died on the 18th February 2007. According to the petition filed on 18th January 2016, the deceased was survived by **Grace Ngonyo Kamau** (Daughter), **Robinson Mwaura Njogu** (Son) (Applicant) and **Jane Nyahinya** (Daughter). The Applicant petitioned and was issued with the grant of letters administration intestate on 16th June 2016.

The Applicant filed summons and an application dated 24th June 2016 and 10th August 2016 respectively seeking restraining orders against the Respondent or his agents against respondent, trading as Karen Hilltop Gardens be ordered to stop any further dealings on land parcel number **Dagoretti/Mutuini/1070/1285/1198/1199 and 1186**. He sought orders that **OCS** Karen Police Station to preserve the suit property until hearing and determination of the application and distribution of the estate of deceased in the Succession Cause. The Applicant sought orders that the Land Registrar be ordered not to effect any transaction in the above parcels.

The application was supported by the Applicant's affidavit dated 10th August 2016. It was his case that he was the administrator of the deceased's estate which was interfered with by the Respondent, trading as Karen Hilltop Gardens. It was his case that the Respondent had proceeded to fraudulently acquire title deed **No. Dagoretti/ Mutuini/1285**. In the process the Applicant's home was demolished and that his illegal activities on the deceased's estate had resulted in exhuming graves of the deceased's parents, siblings and relatives who were buried on the suit property.

On 16th August 2016, the Court granted interim orders preserving the suit properties under **Section 45 LSA**, ongoing construction and developments were halted and **OCS** Karen Police Station were to supervise the Court orders.

The application was opposed by the Respondent's affidavit dated 7th September 2016. It was his case that the applications by the applicants were frivolous, vexatious, malicious and an abuse of the court process. He stated that he was the registered owner of the land referred to in the applications being **Dagoretti/Mutuini/1285** and had the right to enjoy quiet possession. It was further his case that the applicant and his siblings sold the suit property to him and as such the applicant was estopped from denying his title over the land. It was his case that after completion of the sale including payment of agreed consideration the land was duly and procedurally transferred to him at the lands registry. He sought for the vacation of the existing interim orders as the applicant had not established a *prima facie* case and had not demonstrated prejudice he stood to suffer.

HEARING

The matter proceeded for oral hearing on 21st March 2018, parties thereafter filed their submissions.

PW1 Edwin Munoko Wafula Land Registrar Nairobi Land Registry confirmed that the documents of the land dispute in question were housed in **Kiambu Land Registry**.

PW2 Isaac Njeru Land Registrar Kiambu Land Registry testified as follows;

- a) Original title **Dagoretti/Mutuini/1070** was registered in the name of Grace Ngonyo Kimanji after subdivision on 31st May 2012 new titles were **Dagoretti/Mutuini 1186 & 1187**.
- b) On 24/7/2012 **Dagoretti/Mutuini 1186** was subdivided into 2 parts **Dagoretti/Mutuini 1198 & 1199**
- c) On 9/8/2012 **Dagoretti/Mutuini 1198** was transferred to the Defendant /Respondent, Francis Muriithi Kibicho Kamiti.
- d) On 29/5/2014 **Dagoretti/Mutuini 1198** was combined with **1199, 1069,1152 & 1253** to create new parcel and Number **Dagoretti/Mutuini 1285**.
- e) **Dagoretti/Mutuini 1199** was owned by Grace Nguyo Kimani as of 24/7/2012 and on 2/1/2013 was transferred to Francis Muriithi Kibicho Kamiti.
- f) On 29/5/2014 **Dagoretti/Mutuini 1199** was combined with 1069, 1198, 1252 & 1253 to create **Dagoretti/Mutuini 1285**.
- g) Original title was **Dagoretti/Mutuini 1056** which after subdivision resulted in **Dagoretti/Mutuini 1070** which was subdivided into **Dagoretti/Mutuini 1186 & 1187**.
- h) **On 31/5/2012 Dagoretti/Mutuini 1187** was registered in the name of Evanson Kinyanjui,
- i) **On 25/3/2013** Evanson Kinyanjui subdivided the parcel into 5 portions **Dagoretti/Mutuini 1224, 1225,1226, 1227 & 1228**. The parcel 1225 was transferred to Hudson Wanaina Muhia. All other parcels were Evanson Kinyanjui's title. The Land Registrar could not produce transfer forms as the Lands Office was in the process of digitalization.
- j) **Dagoretti/Mutuini/1069** was registered in the name of Grace Nginyo Kimanji as at 9/1/2008. There was confirmed grant from **Succession Cause 461 of 1989** of 7th November 2008.
- k) On 22nd July 2010 **Dagoretti/Mutuini/1069** was transferred to Francis Muriithi Kibicho Kamiti. The Parcel was combined with Parcels **1198,1199, 1252 & 1253** to create Land Parcel **Dagoretti/Mutuini/1285**
- l) On 30th July 2014 **Dagoretti/Mutuini/1285** was transferred to **Hiltop Gardens Limited**

The Land Registrar confirmed these facts by production of the relevant Greencards as exhibits in Court. He stated that the transfers and transmissions are prepared by advocates; the Land Board Consents are presented with transfer to Lands Office.

PW3 Grace Ngonyo Kimanji testified that her grandfather Mugo Gatheru owned the suit property. He had 2 wives 1st wife was Ngonyo who had 3 children namely; Mwaura Gatheru (witnesses father) Njogu Musa and Evanson Kinyanjui. The 2nd wife Wambui had George Njoroge, Margaret Wanjiru and Hannah Ngina.

Her grandfather died in 1965, her father left her the land to hold as her parents only child. The suit property was divided into 2 between the children of each of their grandfather's wives.

PW2's Uncle Njogu Musa married Hannah Wanjiku the deceased's whose estate is the subject of the dispute. They are parents of the Applicants. After the land was divided into 2 parts for each house of the 2 wives of her grandfather she left each family to their portion. She did not know what happened. She admitted that she filed **Succession Cause 471 of 1989** and after the grant was confirmed each house took their portion.

PW4 Grace Ngonjo Kamau testified that she was called by William Njoroge and was informed that their land was being sold. She informed her sister Jane Wanjiku and asked William Njoroge to arrange a meeting with the buyer. They were 7 siblings of the deceased herein and 3 were the only ones alive, her sister and the Applicant. She learnt that on the land, the land was subdivided after sale by **PW3**, there was demolition of houses, the graves were razed down. **PW3** sold their portion of the land without a title and they were not called to the Land Board to give consent. They had also not filed Succession Cause for their parents' estate.

When she met the buyer, the Respondent she was paid for her portion of the land and her sister. She admitted in cross -examination that she received money for a portion of the land that she did not identify.

PW4 Robinson Mwaura Njogu Applicant testified that pursuant to their late mother's death (Hannah Wanjiku Njogu) on 18th February 2007, her share of the suit property from the estate of Musa Gatheru Kirikiri their grandfather was not bequeathed to them.

He complained that there were 3 certificates of confirmation of grants namely;

- a) Estate of Mwaura Gatheru (son to Musa Gatheru Kirikiri and father of PW2) grant issued to Grace Ngonyo Confirmed on 17th June 1998 that Grace Ngonyo was bequeathed **Dagoretti/Mutuini/471** whole.

b) The confirmed grant was amended on 17th May 2006 of the estate of Musa Gatheru Kirikiri (Applicant's Grandfather original owner of the land) to read **Dagoretti/Mutuini/471 0.84** ha to be registered in Grace Ngonyo's name and in trust for Hannah Wanjiku & Earnest Kinyanjui. The other ½ was to be registered in the name of George Njoroge Nganga **0.84Ha** to hold in trust for himself and Margaret Wanjiru Nganga & Rosemary Ngina Nganga.

c) Further amendment on 7th November 2008 of certificate of confirmed grant of the estate of Musa Gatheru Kirikiri was now as follows; Grace Ngonyo **Dagoretti/Mutuini/1069** – whole Hannah Wanjiku & Evanson Kinyanjui **Dagoretti/ Mutuini/1070** Equal shares.

The Applicant contests the subdivision of **Dagoretti/ Mutuini/471** to **Dagoretti/Mutuini/1069/1070** yet they were not consulted nor consent obtained from Land Board. The Applicant also contests what happened to his mother's share of the land as they have not obtained confirmed grant in **Succession Cause 46/2016**. He also annexed copy of title **Dagoretti/Mutuini1070** in the name of **Grace Ngonyo Kimanji ID/5182679** registered on her own behalf and as trustee for **Hannah Wanjiku & Evanson Kinyanjui**.

The title was surrendered on 18th July 2008 and a new title was issued in the names of Evanson Kinyanjui & Grace Ngonyo Kimanji on 24th February 2009 and a new title was issued **Dagoretti/Mutuini/1069**. There is a letter of Consent from Kikuyu Land Board which shows Evanson Kinyanjui, Reuben Mwaura Njogu (he is Robinson and he was not present) Moses Nganga, Humphrey Kamau Njogu, Grace Ngonyo, Kamau Jane Wanjiku Kamau summoned by Grace Ngonjo Kimanji. This is not true as he stated Moses died in 2007 and Humphrey in 2009 and could not have been present to give consent. He did not also give consent. He was not there and he challenged that Kikuyu Land Board confirm this fact by attendance or records. Despite summons issued by the Court on 20th December 2018, there was no response.

The Applicant stated that there are 2 Green cards of **Dagoretti/Mutuini/1069** one of 22nd July 2010 and another of 29/5/2014 that reads that the title is closed on combination of new numbers **1285, 1198,1257,1253 & 1199**.

The Applicant pursued this matter at the Chief's office and the D.Os office to no avail. PW3 had subdivision done and land sold without knowledge and/or consents from other beneficiaries.

On the Sale Agreement of 10th December 2012 which he is alleged to have signed, the Applicant stated that it was forged; secondly, the title deed was processed on 24th July 2012 for **Dagoretti/ Mutuini1199** before its Sale Agreement of 10th December 2012 which he is alleged to have signed.

The suit property was subdivided and sold, the family members did not meet first and agree on what was to be sold, and no valid consents were obtained from Land Board. He admitted that he met the Respondent and agreed and received **Ksh 200,000/-** to file Succession Cause for his late mother's estate. He filed **Succession Cause 461/2016**. He did not receive any other money and they had not agreed on the sale price. He claimed his ID card was used to pay someone else Ksh 3m and not him.

DW1 Nancy Wanjiku Nganga testified that she is widow of the Applicant's brother Moses Nganga Njogu who died in 2009. She stated that after her mother in law died her children took over the land. The Applicant wanted to sell the whole portion alone depriving his sisters and late brothers widows and children. They fell out. On learning that the sale was ongoing she contacted William Njoroge who arranged meeting with Respondent. They met him and Ksh 200,000/- was paid to the Applicant, Ksh 200,000/- to herself and Ksh 200,000/- to children of Humphrey Kamau. They signed Sale Agreement where the **1/4 acre** was sold for **Ksh 3.3 m**. the balance was paid to each of them in instalments until the whole amount was paid. This is confirmed by Agreement of 21st January 2013 and 8th February 2013. Each of the 3 parties received **Ksh 1.1m**. From there the family members tried to seek support to have the Respondent pay more money as it was not enough and she refused.

DW2 David Waweru Mukuria stated as grandson of Hannah Wanjiku, son of Humphrey Kamau Njogu he was called by **PW2** and met the Respondent and was paid Ksh 200,000/- which he distributed to siblings equally. He has not received any more money as promised.

DW3 Francis Muriithi Kibicho the Respondent testified that he knew the deceased as a neighbour. In 2009, **PW2** approached him to sell him the land and he saw certificate of confirmed grant and she sold him **Dagoretti/Mutuini/1069**. Later the Applicant came with William Njoroge and in October 2010 sold him 1/2 of **Dagoretti/Mutuini /1070**. He sold him the land at **Ksh 2m**. He paid him Ksh 230,000/- and Signed Agreement **Exhibit 10**

After 2 weeks, Grace Nginyo Kamau and Jane Wanjiku Nyahinya approached him on sale of Land and demanded similar share as was paid to Applicant. He gave them money to subdivide and process title.

They sold him **Dagoretti/Mutuini** at **Ksh 3m**.

Nancy Wanjiku Nganga approached him and demanded similar amount which he paid them. He paid Humphrey's children Ksh 200,000/- .The Applicant received Ksh 15,000/- as he had pressing problem.

On 9/2/2013 The Applicant was paid Ksh 85,000/-

On 25/3/2013 The applicant collected Ksh 50,000/-

On 18/4/2013 The Applicant collected Ksh. 200,000/-

On 30/5/2013 The Applicant collected Ksh.20,000/-

On 6/12/2013 The Applicant collected Ksh 70,000/- through Grace Nginyo Kamau to help him on a matter at Police Station.

On 24/11/2013 the said Grace brought a note written by Applicant and he sought money. He gave Ksh 30,000/-

On 24/2/2014 he paid the Applicant Ksh 130,000/-

He paid the Applicant a total of Ksh 1001,000/- the balance of Ksh 60,000/- was withheld for processing the title.

The Respondent's testimony was corroborated by William Njoroge **DW4** Bethuel Muhenja **DW3** Applicant's nephew stated that the Applicant had trespassed on their portion of the land and after many years of litigation, their portion for Evanson Kinyanjui was left to them.

SUBMISSIONS

It was the applicant's submissions that Grace Ngonyo Kimanji was registered as owner and trustee for the late Hannah Wanjiku Njogu and Evanson Kinyanjui in title **No. Dagoretti/Mutuini/1070** which was later subdivided into two parcels being **Dagoretti/Mutuini/1186** and **1187**. That before succession proceedings for the estate of the deceased could be instituted, title no. **Dagoretti/Mutuini/1186** was further subdivided into two parcels namely **Dagoretti/Mutuini/1198** and **1199** whose titles were issued in the name of Grace Ngonyo Kimani before later being transferred illegally/unprocedurally to the respondent. He further submitted that during trial, Grace Ngonyo Kimanji denied signing any transfer documents in favour of the respondent or attending land control board and that the alleged land board consent was a forgery/fraud. She prayed for the cancellation of subdivision of title No. **Dagoretti/Mutuini/1186** into titles No. **Dagoretti/Mutuini/1198** and **1199** and the registration of the same in the name of the respondent and the title reverted to Grace Ngonyo Kimanji.

The respondent submitted that the property did not form part of the deceased's estate herein as the property had not been transferred in her name prior to her death and that the property was still part of the estate of the late Musa Gatheru, that was subject to another suit. He submitted the district land registrar Kiambu testified that **Dagoretti/Mutuini/1285** belonged to the respondent which was derived by consolidating numbers **Dagoretti/Mutuini/1069, 1198, 1199, 1252** and **1253** and that all the registrations for the said titles were legally applied for and legally implemented by his office. He further testified that the parcels were made possible by Grace Ngonyo Kimanji. It was his submission that the applicant was physically present during the board meeting. The respondent further submitted that the court's jurisdiction was only limited to dealing with cases on testate succession and administration of the deceased's estate and that the matter ought to be determined by the environment and land court. The respondent submitted that he had presented to this court numerous sale agreements between himself and the applicants and other beneficiaries with regard to the parcels of land. He sought for compensation for the loss incurred as a result of the injunctive orders against the said property.

DETERMINATION

I have read through the pleadings herein and considered the evidence tendered. The issue for determination is whether the Respondent legally acquired title **No. Dagoretti/Mutuini/1198** and **1199** from Grace Ngonyo Kimani?

It was the applicant's case that the suit property was acquired illegally and his signatures on the alleged sale agreements were forged and that the process of transfer was not legal and regular.

The Applicant claims in his supporting affidavit as beneficiaries of Hannah Wanjiku, they had no idea why and how Grace Kimanji transferred these parcels to 3rd Parties without consulting them.

Clearly, the Applicant's claim is against the administrators of on the respondent as shown by the Further amendment on 7th November 2008 of certificate of confirmed grant of the estate of Musa Gatheru Kirikiri was now as follows; Grace Ngonyo **Dagoretti/Mutuini/1069** – whole Hannah Wanjiku & Evanson Kinyanjui **Dagoretti/Mutuini/1070** Equal shares. If The Applicant had an issue with the distribution of their mother's share from their grandfather's estate he ought to have filed summons for revocation of grant and pursued his beneficial interest from their mother's estate. As it is the claim cannot hold against the Respondent.

This Court notes with concern the process of obtaining the 3 certificates of confirmation over 2 different estates; the one of Musa Gatheru Kirikiri and the other of Mwaura Gatheru over the same suit property is/was irregular. Secondly, the process of transfer of beneficial interest to proprietary interest is also questionable to the extent that the Land Consent from Kikuyu Land Board was by parties some of whom were deceased at the time. The whole responsibility lies with administrators of the estate.

When **PW2 Grace Ngonyo Kimanji** was recalled she claimed that the distribution of the estate of Musa Kirikiri was done as follows; the 2 acres were divided in 3 parts as follows;

Hannah Wanjiku- less than an acre ½ acre-17 points

Grace Kimanji- less than an acre ½ acre -17 points

Evanson Kinyanjui –less than an acre ½ acre-17 points

However, no document was produced to confirm this position or any evidence of who was present at the time of the said distribution.

On the other hand it is on record that much as the Applicant claims his beneficial interest from the Respondent, he had not pursued the same from administrators, instead he acquiesced his right to demand the beneficial interest by entering into sale of land transaction with the Respondent. The Applicant received funds from the Respondent as evidenced **PW2 DW1 & DW4** and there are documents produced to confirm this position. If he had not obtained his portion/beneficial interest from the administrators of the suit property share of their late mother, what was he negotiating about and receiving money for from the Respondent?

The Respondent argued that he was legally registered as the proprietor over the suit property and there was no evidence to the contrary that was placed before the court. The respondent outlined in detail the meetings held with each of the beneficiaries and funds paid towards purchase of each of the parcels held in the deceased's estate. He summarized the sale as follows;

Robinson Mwaura was paid Ksh 1,040,000/ including Ksh 60,000/- withheld for processing of title;

Kamau's sons Ksh 1,040,000/- and Nancy Wanjiku Ksh 1,040,000/- totalling to Ksh 3.3m. The witnesses confirmed receipt of part of the funds and denied receiving the total amount.

If the transaction of sale by beneficiaries of the estate of Musa Gatheru Kirikiri (deceased) to the Respondent was/is not valid or regular or legal then the matter ought to be canvassed before the **Land & Environment Court** and settle the payments if any.

DISPOSITION

- 1. It is trite law, whosoever alleges must prove, burden in any civil action lied with the person who alleges (see section 107 of the Evidence Act) In this case the applicant which they failed to do and his claim is vitiated by meetings with Respondent and receipt of funds;**
- 2. The respondent has tendered evidence proving that he legally acquired the parcel, in the circumstance I find that the application lacks merit and consequently dismiss it;**
- 3. The interim injunction orders are vacated;**
- 4. Each party shall bear its own cost.**

DATED, SIGNED and DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2019.

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF;

ROBINSON MWAURA NJOGU FOR APPLICANT

FRANCIS MURIITHI KIBICHO FOR RESPONDENT

GRACE - COURT ASSISTAN