



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ENVIRONMENT AND LAND CASE NO.167 OF 2016

JOSPHAT MWANGI KAMUNGE 1ST PLAINTIFF

PETER MURIMI MURIUKI 2ND PLAINTIFF

VERSUS

SUSAN WANGECI NJIRANI DEFENDANT

JUDGEMENT

The undisputed facts in this dispute are that until 18th July 2014 when land parcel No. KIINE/KIBINGOTI/NGUGUINE/2958 (herein the suit land), was transferred to **SUSAN WANGECI NJIRAINI** (the defendant), it had been registered jointly in the names of **JOSPHAT MWANGI KAMUNGE** (1st Plaintiff), **PETER MURIMI MURIUKI** (2nd Plaintiff) and their eight other siblings who are not parties herein.

The suit land previously belonged to their late father **JOHN KAMUNGE** before they acquired it through Succession. However, the Plaintiffs discovered that in July 2014, the suit land had been fraudulently transferred to the defendant by their siblings without their knowledge. They therefore filed this suit on 23rd September 2014 seeking the following main remedies:

- 1. A declaration that the transfer of land parcel NO. KIINE/KIBINGOTI/NGUGUINE/2958 was illegal, irregular null and void and thus the registration of the defendant should be cancelled and revert back to the names of the plaintiffs and the registered owners.***
- 2. Costs and interest.***

The particulars of fraud on the part of the defendant were pleaded in paragraph four (4) of the plaint as follows;

- a. Transferring land parcel No. KIINE/KIBINGOTI/NGUGUINE/2958 without the knowledge of the plaintiffs.***
- b. Forging the plaintiffs' signatures***
- c. Misrepresenting the Ndia Land Control Board that the plaintiffs had the knowledge of the sale which was not the case.***
- d. Undertaking a sale of land without getting into an agreement as (sic) registered owners.***
- e. Fraudulently lifting a caution lodged on the said land by one MARGARET NJERI MAINA without proper due process.***
- f. Having the Land Control Board issue consent without the physical appearance of all registered owners.***
- g. Altering forged documents at the Land Registrar Kirinyaga County.***
- h. Altering the Ndia Land Control Board without the Plaintiffs knowing that they were jointly registered as owners.***

In her defence, the defendant denied all the particulars of fraud and put the plaintiffs to strict proof thereof. She added that by a sale agreement dated 17th July 2014, she purchased the suit land from the Plaintiffs and their brothers at a consideration of Ksh.1,500,000 which was acknowledged and all the statutory formalities were adhered to before the suit land was transferred to her. She pleaded that this suit is actuated by malice and is a mere afterthought which should be dismissed with costs.

The 1st Plaintiff testified in support of the Plaintiffs case and stated that he, the 2nd Plaintiff and their siblings became the joint registered proprietors of the suit land on 8th May 2008 following the death of their father **JOHN KAMUNGE** who was the previous owner. He produced a copy of the Green Card (Plaintiffs Exhibit 1). He added that he and the 2nd Plaintiff were not partner to the sale agreement entered into on 17th July 2014 between the defendant and their siblings over the suit land and when they discovered that the same had been transferred to the defendant, they reported to the police and the District Officer and their brothers were charged in Criminal Case No.147 of 2017 with the offence of altering false documents. A copy of the charge sheet was produced as evidence – Plaintiffs Exhibit 2. They therefore filed this case.

The defendant told the Court that on 17th July 2014 she entered into a sale agreement with the Plaintiffs brothers for the purchase of the suit land at a consideration of Kshs.1,500,000. That the agreement (Defence Exhibit 1) was drawn by Mr. NDANA ADVOCATE after consent of the Land Control Board had been obtained on 16th January 2014 (Defence Exhibit 2). She was then issued with the title deed and took possession of the suit land free from any encumbrances and has been growing coffee thereon to date. The defendant therefore asked that this suit be dismissed with costs.

JUSTUS MAINA KAMUNGE (DW2) who is a brother to the Plaintiffs testified in support of the defendants. He confirmed that the suit land was previously registered in the joint names of himself, the Plaintiffs and their other siblings and that on 3rd May 2009 and 24th October 2010, they held meetings and agreed to sell the suit land for Kshs.1,500,000. Copies of the meeting, minutes were produced (Defence Exhibits 1 and 2). They therefore entered into a sale agreement with the defendant (Defence Exhibit 3) on 17th July 2014 after the caution that had been placed by their sister on the suit land had been removed by a Court order in **KERUGOYA PMCC No.185 of 2013** (Defence Exhibit 4). They then obtained the necessary consent (Defence Exhibit 7) and the proceeds of the sale were deposited in an account at the Equity Bank Karatina Branch. He added that the Plaintiffs were involved in the transaction and even attended the Land Control Board and are also entitled to a share of the purchase price. He told the Court that the transaction was therefore procedural and the suit should be dismissed.

Submissions were filed both by Mr. MAINA KAGIO ADVOCATE for the Plaintiffs and Mr. NGUGI GICHOYA ADVOCATE for the defendant.

I have considered the evidence by both parties and the submissions by Counsel.

As I have stated at the start of this judgement, it is not in dispute that the suit land was at all material time registered in the joint names of the Plaintiffs and their eight other siblings including **JUSTUS MAINA KAMUNGE** (DW2) and was sold to the defendant via an agreement dated 17th July 2014. It is this Plaintiff's case however that they were not involved in the transaction nor attend the Land Control Board. The defendant's case is that the sale agreement was procedural and in that regard she had been supported by the Plaintiff's brother **JUSTUS MAINA KAMUNGE(DW2)** who has testified that the Plaintiffs were parties to the transaction and even attended the Land Control Board when the consent for transfer was granted. The only issue for this Court's determination is whether the defendant obtained a good title to the suit land.

Although the suit land was registered in the joint names of the Plaintiffs and their other siblings including **JUSTUS MAINA KAMUNGE** (DW2), the register does not indicate whether their ownership was a joint tenancy or a tenancy in common. Following the amendments in 2016 to the Land Registration Act, Section 91(2) now reads as follows:

“Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.”

When the defendant purchased the land in July 2017, the applicable Law was the new Land Registration Act of 2012 and the subsequent amendments thereto. Section 91(6) of the new Land Registration Act 2012 provides as follows:

“No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld”. Emphasis added.

It is clear therefore that no proper transfer of the suit land could be made to the defendant by the Plaintiffs' siblings without the consent of the Plaintiffs in this case. This is because where land is held in common, each proprietor has a separate share except that the said shares are un-divided and held together with those of the other proprietors as one whole. The plaintiffs have pleaded fraud on the part of the defendant and specifically that the other proprietors to the suit land who are the plaintiffs' siblings including **JUSTUS MAINA KAMUNGE** (DW2) sold the suit land without their knowledge or consent (see paragraph 4 of the plaint). Counsel for the defendant Mr. NGIGI GICHOYA has submitted however that the plaintiffs have only pleaded fraud but have not proved it and my decision in the case of **NDEGE KABIBI KIMANGA & ANOTHER V KARINGA GACHIANI & OTHERS KERUGOYA ELC No.220 of 2013** has been cited in which I quoted the case of **R.G. PATEL V LALJI MAKANJI 1957 E.A. 314** where the Court of Appeal held that allegations of fraud must be pleaded and proved on a standard which is more than a mere balance of probabilities. Counsel has added therefore that since the Plaintiffs were involved in the family meetings where a decision to transfer the suit land to the defendant was arrived at, then they must have consented to the said transfer. Counsel for the Plaintiffs Mr. MAINA KAGIO has however submitted that the transfer was illegal because the Plaintiffs were not involved.

It is not in doubt that the Plaintiffs and their siblings were involved in several meetings where a decision to sell the suit land was discussed and agreed. I have looked at the minutes of the two meetings held on 3rd May 2009 and 24th January 2010 and I notice that the 2nd Plaintiff was absent on both occasions although the 1st Plaintiff was present. Indeed, in cross examination by Mr. NGUGI GICHOYA, he admitted that he was present when the decision to sell the suit land was made by the family.

I make a finding of fact that whereas the 1st Plaintiff was present when the decision to sell the suit land was made, the 2nd Plaintiff was not present and cannot therefore be said to have given his consent to the transaction by which the suit land was transferred to the defendant. However, the Plaintiffs were not parties to the agreement dated 17th July 2017 by which the suit land was transferred to the defendant thus rendering the said transaction illegal. This is because, Section 3(3) of the Law of Contract Act as amended in June 2003 requires that a contract for the disposition of an interest in land should meet the following requirements:

a. Be in writing

b. Be signed by all parties thereto and each signature be attested by a witness who is present when the contract is signed.

The agreement dated 17th July 2014 is self-explanatory and it is clear that the Plaintiffs were not parties to the same. The defendant conceded as much in cross examination by Mr. MAINA KAGIO where she said:

“It is true that I knew that land was jointly owned by ten(10) brothers but the agreement was only signed by seven(7) of them. It is true that the two Plaintiffs were not present when the sale agreement was signed”.

The defendant further goes on to state that;

“It is true that the two Plaintiffs have not signed the application for consent. I negotiated the price with seven (7) of the brothers. The two Plaintiffs were not there but I was told they had agreed.”

The only process through which the defendant would have acquired a proper title to the suit land was via an agreement signed by all the ten (10) proprietors of the suit land as mandated on Section 3(3) of the Law of Contract Act. Since only seven (7) proprietors signed it, the sale agreement dated 17th July 2017 was null and void and could not transfer any interest to the defendant who, by her own admission, knew that the Plaintiffs were also co-proprietors of the land that she was purchasing yet she did not ensure that they were parties to the sale agreement which means that she was involved in the fraud. The Plaintiffs have clearly proved fraud on the part of the defendant to the required standard as set out in the case of **PATEL V MAKANJI** (Supra). The minutes of the meetings held on 3rd May 2009 and 24th October 2010 are only evidence that there was an intention by some of the co-proprietors of the suit land (the 2nd Plaintiff was not in the meetings) to sell it. However, as is now clear, those meetings only resulted in a recommendation to dispose off the suit land but the disposal could only be valid if the agreement dated 17th July 2014 had been signed by all the co-proprietors which was not the case. The defendant cannot therefore be correct when she alleges that she obtained a good title to the suit land and that all the legal formalities were followed. In the circumstances, the Plaintiffs have proved their case as against the defendant in that the transfer of the suit land to the defendant was fraudulent since the Plaintiffs were not partners to the sale agreement dated 17th July 2014 yet they were co-workers of the property subject thereto. The Plaintiffs are therefore entitled to the orders sought in their plaint filed herein on 23rd September 2014.

Ultimately therefore, judgement is entered for the Plaintiffs against the defendant in the following terms:

1. A declaration is issued that the transfer of land parcel No. KKINE/KIBINGUTI/NGUGUINE/2958 to the defendant was illegal irregular null and void and that the registration of the defendant be cancelled and the said land to revert to the names of the Plaintiffs and the other registered owners.

2. The defendant will meet the Plaintiff's costs and interest thereon.

BOAZ N. OLAO

ELC BUNGOMA

18TH JUNE 2018

Judgement dated and signed at BUNGOMA this 18th day of June 2018. To be delivered at KERUGOYA on notice.

BOAZ N. OLAO

ELC BUNGOMA

18TH JUNE 2018