



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 9 OF 2011 (OS)**

**MARY WAMBUI KIMUHU.....PLAINTIFF**

**VERSUS**

**GABRIEL KIMUHU WAHINYA.....1<sup>ST</sup> DEFENDANT**

**RUTH THEDESIA NGOBI.....2<sup>ND</sup> DEFENDANT**

**KIRAGU MUTHOROKI KING'ORI.....3<sup>RD</sup> DEFENFANT**

**RULING**

1. The Originating Summons herein dated 8<sup>th</sup> March 2011 seeks answers to several questions relating to the LR No. 330/681, namely -
  - a. Whether LR No. 330/681 was registered in the name of Richard Moses Ngobi, now deceased, (and herein after referred to as the deceased) was the property of the 1<sup>st</sup> defendant;
  - b. Whether the said property was transferred to the deceased by the 1<sup>st</sup> defendant fraudulently and through collusion;
  - c. What was the effect of the said transfer to the plaintiff's claim;
  - d. Whether the court has jurisdiction to cancel the title and to rectify the same and have the said property registered in the name of the 1<sup>st</sup> defendant;
  - e. Whether the plaintiff is entitled to a half-share of the said property as the wife of the 1<sup>st</sup> defendant;
  - f. Whether, upon registration of the said property in the name of the 1<sup>st</sup> defendant, the plaintiff holds the said property in trust for the plaintiff;
  - g. Whether the court will be pleased to order that the said property be sold and the proceeds of sale shared equally between the plaintiff and the 1<sup>st</sup> defendant;
  - h. Whether the estate of the deceased is entitled to a share in the property, and if so, to what extent; and
  - i. What orders should the court make on costs.

2. The plaintiff gives a background to the matter in her affidavit sworn in support of the originating summons. She had filed a suit sometime after August 1991, being HCCC No. 4413 of 1991 (OS), against her husband, the 1<sup>st</sup> defendant herein, for division of matrimonial property. Among the assets that she was seeking an order on was the property the subject of the instant suit. On 22<sup>nd</sup> April 1992, an injunctive order was made in that suit against the 1<sup>st</sup> defendant with regard to the said property, requiring him to give vacant possession thereof to the plaintiff herein and restraining him from interfering with her occupation and enjoyment of the subject property. The said order was subsequently registered at the lands office on 29<sup>th</sup> April 1992. On 22<sup>nd</sup> June 1997, the deceased sued the 1<sup>st</sup> defendant in HCCC No. 3355 of 1992 (OS), seeking various orders relating to the property the subject of the instant suit. The most critical of these orders being specific performance of an agreement executed as between the deceased and the 1<sup>st</sup> defendant over the subject property, vacant possession thereof, liberty to lodge transfer documents thereon at the lands office and deposit of the balance of the purchase price in court. the suit in HCCC No. 3355 of 1992 (OS) was compromised by consent of the parties vide a consent recorded in court on 21<sup>st</sup> July 1992, pursuant to which the said property was to be transferred to the deceased. her case is that the said transfer was intended to defeat her claim in HCCC No. 4413 of 1991

(OS), and the conduct of the deceased and the 1<sup>st</sup> defendant amounted to stealing a match. She pleads that the said transfer was tainted by fraud and ought to be cancelled. She avers that the court granted her leave to commence the instant suit.

3. The 2<sup>nd</sup> defendant has responded to the instant suit through her affidavit sworn on 5<sup>th</sup> April 2011. She and the 3<sup>rd</sup> defendant are the administrators of the estate of the deceased, who died intestate in 2006. She avers that the deceased bought the subject property from the 1<sup>st</sup> defendant on 30<sup>th</sup> July 1992, and he was a *bona fide* purchaser for value without notice. He was subsequently registered as sole owner thereof. She mentions that the 1<sup>st</sup> defendant and the deceased sued each other in HCCC Nos. 3355 of 1992 (OS) and 1144 of 2005 for specific performance and for balance of the purchase price, which suits were allegedly compromised on 21<sup>st</sup> July 1992. She concedes that the plaintiff herein had filed a suit in HCCC No. 4413 of 1991 (OS), for division of matrimonial property, which property included the subject of these proceedings. She avers that the registration of the deceased as owner of the suit property is conclusive evidence of his proprietorship thereof. He further avers that no proof has been provided or particularized that the deceased committed any fraud, and that the plaintiff has failed in the onus of discharge of proof of fraud to the required standard. She further states that the said property never was matrimonial property to warrant its division as between the plaintiff and her. She further avers that all suits against the deceased, and including HCCC No. 4413 of 1991 (OS), had abated following the deceased's demise following the failure by those affected to comply with Order 24 of the Civil Procedure Rules. She asserts that following the said abatement, the plaintiff has become a trespasser on the subject property. She avers to have spent colossal sums of money developing the property, and the occupation of them by the plaintiff has hindered their maintenance and renovation. She further asserts that the said property belongs to the estate of the deceased and the act of the plaintiff obtaining orders thereon and of occupying the same amounted to intermeddling with the estate. .

4. I have carefully perused through the record before me, looking for the reply to the application filed by the 1<sup>st</sup> defendant and I have been unable to find it. I have though seen his affidavit sworn on 25<sup>th</sup> June 2012, in support of his application of even date, which suggests that he did file a replying affidavit. I shall proceed determine the matter on the basis of the affidavits that are in the record before me. In his affidavit sworn on 25<sup>th</sup> June 2012, he refers to the contents of his replying affidavit, the one that I have not been able to find on the record. He says that he sold the said property to put it beyond the reach of the plaintiff, which is to say to defeat her claim in HCCC No. 4413 of 1991 (OS). He accuses the deceased advocate of having taken advantage of him and of amending the sale agreement with him. He states that he has his own claim against the estate of the deceased.

5. The affidavit of 25<sup>th</sup> June 2012 prompted the 2<sup>nd</sup> defendant to swear a further affidavit on 28<sup>th</sup> February 2017, filed in court on even date. She makes reference to the other suits between the parties, and says that she has had access to the affidavits that the 1<sup>st</sup> defendant filed in those suits. She avers that the 1<sup>st</sup> defendant was consistent in all the affidavits that he swore and filed in court during the deceased's death, but he appears to have changed his position after the deceased's demise. She points to a possible collusion between the plaintiff herein and the 1<sup>st</sup> defendant. She avers that the 1<sup>st</sup> defendant is abusing court process by filing affidavits which state conflicting facts. She points at the affidavit sworn on 15<sup>th</sup> July 1992 in HCCC No. 4413 of 1991 (OS) where the 1<sup>st</sup> defendant is said to have had given reasons for selling the suit property, to settle growing debts. He is said have had stated in that affidavit that the said property was matrimonial property from which the plaintiff could claim. He is said to have had sworn another affidavit on 29<sup>th</sup> October 1992, where he said that the suit property was not their matrimonial home, pointing out that the matrimonial home was on Ngenda/Karuri/T96. He also averred in that affidavit that he sold the property to redeem other assets that were subject to charges. She states that his affidavit of 22<sup>nd</sup> February 1993 mentioned a different purchase price from that stated in that sworn on 3<sup>rd</sup> June 2009, after the deceased's demise. She avers further that in his affidavit of 22<sup>nd</sup> February 1993, that he confirmed that the sale transaction had been concluded and that the property had been duly transferred to the deceased. She pleads that this is essentially a land dispute which ought not to be before the family court. She avers that there are allegations of fraud against the deceased, which allegations go into the validity of the title, which matter falls squarely within the jurisdiction of the Environment and Land Court. She asserts that the property herein having been sold, the plaintiff and the 1<sup>st</sup> respondent ought to have filed suit at the said court.

6. The 1<sup>st</sup> defendant then swore a further affidavit on 29<sup>th</sup> March 2017, which was filed in court on even date, where he makes allegations against the deceased. He states that the deceased advocate is the one who drafted the sale agreement in respect of the property and he had opportunity to manipulate it. He alleges that the sale price was indicated as Kshs. 3, 000, 000.00 instead of the correct figure of Kshs. 4, 700, 000.00 allegedly on the advice of the deceased so as to have the advantage of a reduction on the stamp duty payable. He accuses the deceased of drafting affidavits which favoured him and of getting him to sign the affidavits without reading them as he trusted him. He claims that the deceased took advantage of him as his advocate to deceive him and to deprive the plaintiff of the property. He says that the transfer of the property happened while there was an existing court order and a caveat. He says that he has not crafted any afterthoughts to defeat the cause of justice.

7. The parties agreed to have the matter disposed of by way of written submissions. I acceded to that and directed them to file and exchange written submissions, which they did. I initially reserved the matter for ruling on 29<sup>th</sup> July 2017.

8. However, when I began to study the file, that is to say the pleadings, the affidavits on record and the written submissions filed by the parties, I established that there were matters pending in court, or even probably resolved, which had a bearing on the matter, and which I needed to peruse before I began to write my ruling. I directed the Deputy Registrar to call for the said files, being HCCC No. 4413 of 1991 (OS) (now HCC No. 6B of 2002), HCCC No. 3355 of 1992 (OS) and HCSC No. 2661 of 2006. HCCC No. 4413 of 1991 (OS) (now HCC No. 6B of 2002) and HCSC No. 2661 of 2006 were made available, but the court file in HCCC No. 3355 of 1992 (OS) was not, it was said to be unavailable. When it became clear to me that the file in HCCC No. 3355 of 1992 (OS) was taking too long to trace, I caused the matter to be mentioned on 15<sup>th</sup> April, 2018 with notice to the parties so that I could allocate the matter a date for ruling.

9. I have taken time to peruse the said files so as to assess the status of the suits in each one of them. The suit in HCCC No. 4413 of 1991 (OS), as recited above, was initiated by the plaintiff against the 1<sup>st</sup> defendant. It is a suit for division of matrimonial property, wherein the plaintiff has placed before court some twenty-nine (29) assets in respect of which she sought various declarations – that they had been acquired during coverture with the joint efforts of the two parties to the suit and that therefore the assets were owned equally, and the court ought to make an order that those registered in the name of the 1<sup>st</sup> defendant were so held by him in trust for her. The said assets include the

property the subject of this suit, LR No. 330/681. The matter was last in court on 24<sup>th</sup> February 2004, when Kamau J stood it over generally pending resolution of the validity of sale of LR No. 330/681 or in alternative consent on settlement. The deceased was enjoined to the said proceedings at some stage, as a 2<sup>nd</sup> defendant/interested party. The deceased even obtained orders on 31<sup>st</sup> October 1994 against the plaintiff herein with respect to LR No. 330/681. There is appending application, dated 6<sup>th</sup> August 2007, by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein, seeking to be enjoined in that suit as interested parties to substitute the deceased. The said suit became HCCC No 6B of 2002 after it was transferred to the Family Division.

10. The cause in HCSC No. 2661 of 2006 relates to the estate of the deceased. Following his demise on 23<sup>rd</sup> April 2006, representation to his estate was sought by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein, and was granted to them on 29<sup>th</sup> January 2007 in intestacy. LR No. 330/681 was listed as one of the assets of the estate of the deceased. The plaintiff herein sought revocation of that grant by her summons dated 26<sup>th</sup> July 2007, where she raised the issue of the ownership of the suit property, and brought to the attention of the court the pendency of HCCC No. 4413 of 1991 (OS) and HCCC No. 3355 of 1992. The matter was resolved by consent of the parties on 22<sup>nd</sup> February 2011, to remove LR No. 330/681 from the list of the assets to be administered by the administrators of the estate and to allow the administrators deal with the undisputed assets. The grant of 29<sup>th</sup> January 2007 was confirmed on 24<sup>th</sup> May 2011, the estate of the deceased was distributed, excluding LR No. 330/681. A certificate in those terms issued on even date.

11. From what I have set out above, there is no doubt in my mind that the matter is a lot more complicated and convoluted than when one looks at it purely from the pleadings in the instant suit.

12. One thing that stands out is that there are pending suits on the division of LR No. 330/681 as between the plaintiff and the 1<sup>st</sup> defendant. In all the suits the estate of the deceased is in one way or the other a party. It is not clear to me why it became necessary for the plaintiff herein to file the instant suit while the suit in HCCC No. 4413 of 1991 (OS) was still pending. The instant suit touches on a property which is also in issue in HCCC No. 4413 of 1991 (OS) and the parties hereto are virtually the same parties in HCCC No. 4413 of 1991 (OS). The new issues raised herein, if at all, could have been conveniently raised in HCCC No. 4413 of 1991 (OS). To the extent that the issues raised in the earlier suit are similar to the issues raised herein, and the parties in the earlier suit are the same as the parties hereto, litigating in the same capacities, the instant cause, being the latter in time, is therefore *sub judice* in terms of section 7 of the Civil Procedure Act, Cap 21, Laws of Kenya. It should not be entertained so long as the other suit is still pending. It was no doubt filed in abuse of the court process, and that abuse has been continued with the pendency of the earlier suit. The plaintiff should have elected between this suit and the earlier one. If she desired to proceed under the instant one then she should have discontinued the earlier one. It would be against law and policy relating to administration of justice to have two suits on the same subject-matter and between the same parties pending.

13. The other issue is on jurisdiction. The disputed property is claimed in this suit as matrimonial property, yet in the same proceedings the plaintiff has brought in parties who are not her spouses, and in respect of whom the question of division of matrimonial property should not arise. They are brought in because the asset the plaintiff seeks division of is registered under the name of the deceased person whose estate they administer. She claims that that property does not belong to the estate and belongs to the 1<sup>st</sup> defendant. She challenges the sale of the property to the deceased by the 1<sup>st</sup> defendant, and alleges fraud as between the deceased and the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant appears to have been vouching for the validity of that sale transaction during the lifetime of the deceased, but he has now changed tune, he now appears to be alleging fraud on the part of the deceased to deprive the plaintiff of her property.

14. As it is, the said property is in the name of the deceased, and the plaintiff and the 1<sup>st</sup> defendant appear to stake a claim to it. It follows that there is a dispute as to ownership, and therefore title to the said property. The Constitution of Kenya has granted jurisdiction over such matters to the Environment and Land Court. The constitutional provisions on this are categorical that the High Court shall have no jurisdiction whatsoever on that subject.

15. The instant matter is framed as a suit for division of matrimonial property. However, the property sought to be distributed does not belong to the 1<sup>st</sup> defendant as it is registered in the name of the deceased. The plaintiff seeks, in the same suit, to have the High Court determine ownership of the said asset by examining the validity of the sale transaction thereon between the deceased and the 1<sup>st</sup> defendant. The High Court does have jurisdiction with regard to division of matrimonial property, but it does not have any jurisdiction to delve into issues of ownership of or title to property as between one of the spouse in the division of matrimonial property suit and a third party. Ideally, the spouse ought to litigate over that at the Environment and Land Court and once they obtain a favourable decree come back to the family court to have the property divided between them as spouses. That is precisely what happened in HCSC No. 2661 of 2006, the suit property was removed from the schedule of the assets of the estate. Should the relevant court find that the property belonged to the deceased then the administrators shall thereafter place that decree before the probate court for the distribution of the suit property.

16. I am conscious of the fact that I had made orders on 30<sup>th</sup> April 2015, granting an application dated 25<sup>th</sup> June 2012, allowing the parties hereto to litigate on the question of ownership or title to the subject property, so that the issue of ownership of the property and its division could be disposed of in one sitting. I am now wiser, having carefully considered the very clear provisions of Article 162(2) (5) of the Constitution. I am now clear that as Judge of the High Court of Kenya I have not jurisdiction to make determinations on ownership of or title to property.

17. As stated above severally, the case against the estate of the deceased with respect to the subject property is that the deceased acquired the same by fraud, exercised by him solely or with the 1<sup>st</sup> defendant. Fraud borders on criminality. The burden of proving it is higher than that in ordinary civil cases, on a balance of probability. For that reason in civil matters where the same is alleged the rules of procedure require that specific particulars of fraud ought to be given. That the particular charges or allegations or acts of fraud must be listed. This mirrors the practice in criminal procedure where the particulars of the charge must be given and a charge not supported by particulars becomes defective and cannot sustain a charge.

18. I raise this issue, not so much because the allegation of fraud has not been particularized. Indeed, I must state that the plaintiff has not set out in any coherent way the acts of fraud that the deceased carried out so as to have the property registered in his name, and therefore the pleadings as they stand cannot possibly form a firm basis for prosecuting the estate in a civil matter for fraud. More importantly, the parties

herein agreed to have the matter disposed of by way of written submissions. I should repeat that fraud borders on criminality. I doubt whether a case founded on fraud allegations can be properly disposed of by way of written submissions. The standard of proof is no doubt so high as not to permit for that mode of disposal.

19. In the end the orders that I am moved to make are as follows: -

- a. That as I have found that the suit herein is *sub judice* and elements of it touch on matters outside the jurisdiction of this court, I shall hereby dismiss the same;
- b. That I shall direct the plaintiff herein to pursue her claim for division of matrimonial property through HCCC No. 4413 of 1991 (OS)(now HCC No. 6B of 2002) which is still pending;
- c. That on the question of title to LR No. 330/681 the plaintiff herein is counselled to bring appropriate proceedings against the estate of the deceased, Richard Moses Ngobi,, at the Environment and Land Court;
- d. That the 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall have the costs of these proceedings; and
- e. That any party who shall be aggrieved by the orders that I have made herein shall be at liberty to move the Court of Appeal appropriately.

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>TH</sup> DAY OF JULY, 2018.**

**W. MUSYOKA**

**JUDGE**