



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL CASE NUMBER 148 OF 2008

LILIAN WAMBOI NJOROGE.....1ST PLAINTIFF

SAMUEL MUNDIA NJOROGE.....2ND PLAINTIFF

JAMES MURUGA NJOROGE.....3RD PLAINTIFF

FRANCIS NGUGI NJOROGE.....4TH PLAINTIFF

PETER KARIUKI NJOROGE.....5TH PLAINTIFF

DAVID MBURU NJOROGE.....6TH PLAINTIFF

VERSUS

JOHN NJUGUNA NJOROGEDEFENDANT

JUDGMENT

1. From the nature of the dispute in this case as stated in the plaint and the defence, it is evidence that the dispute between the plaintiffs and the defendants concern the title, use and occupation of the suit property **L.R. No.Nyandarua/Karati/490**.

Under the **Environment and Land Court Act, Chapter 12A**, the issues above ought to be determined in the said Court. This is a case filed in 2003. The plaintiffs case was heard before the High Court before various Judges. This court recorded proceedings of the defence evidence only.

Pursuant to practice directions issued by the Honourable the Chief Justice and gazetted as **Legal Notice Number 5178** the High Court was donated authority to hear and conclude part-heard cases before it. That is the reason that I am seized with the further hearing and determination of the suit.

2. The plaintiffs' claim as stated in their plaint dated 12th June 2003 and filed on the 18th June 2003 is that **Land Parcel No.Nyandarua /Karati/163** is their family land. The 1st plaintiff is the mother of the other four plaintiffs, and widow of one Njoroge Mbote, deceased.

3. The plaintiffs' claim is that in 1963 the deceased Njoroge Mbote was allocated the suit property at Karati Settlement Scheme by the Commissioner of Lands and that on the 26th November 1963, the said deceased obtained a loan of Kshs.7,000/= from the settlement trustee and executed a charge upon which a certificate of acceptance was issued to him on the 7th December 1963. They claim that in December 1963, the plaintiffs and the deceased, his other wife Wamaitha Njoroge and her children all moved into the land

parcel where they have lived ever since and upto the death of the late Njoroge Mbote. It is further stated that upon **Succession Cause No.15 of 1968**, the court declared the defendant as the sole heir of the suit plot. They further state that the rest of the family including the plaintiffs applied for a review order that the defendant was the sole owner which the court held that the subject plot should be divided into two equal portions to the 1st plaintiff as Plot "A" while Wamaitha's portion as Plot "B", and that the Defendant was to be registered as trustee for the plaintiffs and himself. The two portions were in September 1987 registered as **Nyandarua/Karati/489 and Nyandarua/Karati/490** and certificates of title in that respect, to the two houses. The first house with plot "B" was satisfied and no issues arose.

4. The plaintiffs complaint is that the Defendant has failed to transfer their share of the suit property No. 490 above to them. Following therefore they seek:

(a) A declaration that the Defendant holds L.R No. Nyandarua/Karati/490 for himself and in trust for the plaintiffs.

(b) In the alternative a declaration that the plaintiff have acquired title to their share L.R No. Nyandarua/Karati/490 by adverse possession.

(c) An order that the Defendant do sub divide the said property No.490 into seven(7) equal portions and effect transfer of the 6 portions to the plaintiffs.

5. The Defendant filed a defence on the 18th July 2003. He denied the plaintiffs claim and stated that the late Njoroge Mbote his father was never allocated the plot in issue, that he paid off the loan of Kshs.7,000/= and that none of the plaintiffs paid the loan and that he bound himself to pay the loan and therefore he is one entitled to the said suit property. It is his further defence that the plaintiffs never lived on the suit plot, and if they did, then they are trespassers and or licences. He admitted existence of the succession cause and orders issued thereunder save for orders issued on the 16th April 1978 where the suit plot was shared equally to the two houses of the deceased. He further denies that he holds the property in trust for the plaintiffs, but that he is legal owner of the subdivision No. 490 and terms the plaintiffs as trespassers, including his own mother.

6. In his counterclaim the defendant sought an eviction order against the plaintiff's and a mandatory order requiring the 1st plaintiff, his mother to release, restore and deliver the original Title Deed to the **Land Parcel Nyandarua/Kerati/490** to himself and a further order that the Land Registrar do cancel the Title Deed and issue a fresh one to himself. He also seeks damages for trespass and costs against all the plaintiffs.

7. Plaintiffs Evidence

The plaintiff's case was urged through four witnesses.

PW1 is the 1st Plaintiff.

It was her evidence that her late husband Njoroge Mbote divided the suit plot into two portions, **Plot No.490** for her family and **Plot No.489** to her co-wife and her family. She testified that in succession cause **No.15 of 1968** the court directed and ordered sub division of the suit property equally to the two widows, and that the Defendant who is her 4th son was registered in the trust for the plaintiffs who are his mother and brothers.

8. She testified that all the plaintiffs have lived on their portion since 1963 and that it is the defendant who has been threatening to evict them. She testified that the land was family land and does not belong to the defendant but holds it in trust for the plaintiffs and himself.

Upon cross examination, she stated that she and her late husband used to pay for the loan as the defendant was a baby and that in a family meeting, it was resolved that the defendant be registered as the

owner but on trust for herself, himself and the other sons, the plaintiffs. She denied that the defendant made any payments to the settlement trustees as he was in school, and that she, the other plaintiffs and her sons have lived on the land uninterrupted since 1963.

She told the court that she had thirteen children and her first three sons died leaving the defendant as the eldest son at the time the succession cause was filed in 1968.

9. **PW2 was James Murunga Njoroge** born in 1959. He is a son of the deceased and Lilian Wambui, deceased. It was his testimony that the defendant is his brother, that the whole family lived on the suit land since it was given to his father Njoroge Mbote in 1963.

He testified that when his father died in 1967, the Settlement Fund Trustee requested the family to nominate one person to represent the family thus the Defendant, being the 1st born of the first house was appointed, that the original Plot No.163 was then divided into two equal portions to both houses and it was only after the subdivision that the defendant registered himself fraudulently as the sole owner of the sub-division No. 490.

10. It was his further testimony that he has lived on that land since his childhood. He produced a letter dated 25th March 1968 written by the settlement officer requesting the family to appoint a legal representative. He denied that the Defendant made any payments towards the loan and that the 2nd and 5th plaintiffs had paid Kshs.15,885/40 and that his mother's house paid for their share.

Upon cross examination this witness stated that the payment receipts produced by the plaintiff may have been obtained from the Co-operative when their father died.

It was his testimony that the family lived in peace on the suit land until 2002-2003. He stated that the court 15th September 1978 ordered that the defendant be registered as trustee for his family and that the said Orders are still in place and never set aside.

11. **PW4 Josephat Murangi Kiarie** testified that he knew the defendant's father and both were allocated the land in 1963, that at that time the Defendant was about 16 years old, and that nobody who did not have an identity card could be allocated land, but after his father's death, being the eldest son was appointed to represent his father's family.

12. **PW3 is the 4th plaintiff.**

His evidence is the same as that of the other plaintiffs, but added that in an affidavit sworn by the Defendant on the 11th April 1979 and part of their documents admitted by consent as a bundle, the defendant deposed in Paragraph 2 that he was appointed a successor and trustee on behalf of his family and that is the position, and that when the defendant obtained title to the suit property, it was not shown that he was registered as trustee, which should have been registered on the title.

13. **Defendant's evidence**

DW1 was the defendant, John Njuguna Njoroge. He testified that he was born in 1943, that the suit land was given to him by the settlement land trustee and sold to him by the government in 1968 after he paid all the dues including the loan balance left behind by his father after which the charge was discharged and transferred into his name on the 28th November 1973.

He produced the Green Card showing entries on the register. It was his testimony that he did not know that the land had been allocated to his father Njoroge Mbote. He however confirmed from records that his father was allocated the land in 1963, and that the court ordered that the suit land be divided into two portions, that the suit land was so subdivided between himself and his stepbrother (Plaintiff No.2). He testified that the records did not show that he was holding the land in trust for his family.

14. He further confirmed that on the Plot No. 490 – he lived with his mother the 1st plaintiff and other two brothers upto year 2000 when the plaintiffs went to the Land dispute tribunal then to court to claim the land. He further testified that in **Nairobi HCCC No.15 of 2001 (O.S)** the court made an order that the land belonged to him solely after which this case was filed. It was his evidence that he wishes to stay on the suit land with the 1st plaintiff (his mother), but not his brothers.

15. He testified that he was over 20 years in 1963. Upon being shown his Identity Card showing that he was 16 years in 1963 he could not explain, but also confirmed that the Settlement Land Trustee was only allocating land to persons with identity cards and he confirmed he did not have any Identity card in 1963. In his evidence he further confirmed that his mother and brothers (plaintiffs) agreed that he should be trustee on behalf of the family but again denied that the court made orders that he was a trustee. He further testified that his brothers, the plaintiffs, did not have other land and that they all lived for over 50 years in the suit land.

16. He reiterated upon cross examination that the court ordered that he is trustee of his mothers house, but stated that was not correct but did not appeal against the said court order.

On the Affidavit he swore on the 14th April 1997, it was his admission that he swore the said affidavit and deposed that he was a trustee for his mother and brothers (plaintiffs).

He however stated that he did not want to give the suit plot to the plaintiffs.

Parties filed written submissions in support of their respective cases.

I have carefully considered the evidence of all the witnesses, the pleadings and submissions. I have also perused and considered the documents produced. The issues that comment to me for determination, and being re-edition of issues proposed by the parties are:

- 1. Whether suit Plot No. 163 within Karati Scheme was allocated to the late Njoroge Mbote in 1963.***
- 2. Whether the said suit plot was later in the year 1968 allocated to the Defendant and whether the subsequent registration in the defendants favour on the 16th September 1981 was lawful or fraudulently obtained.***
- 3. Whether the plaintiffs have locus standi to bring this suit against the defendant, and whether this court has jurisdiction to hear this case.***
- 4. Whether the Defendants holds the suit property in trust for the plaintiffs.***
- 5. Whether the parties are entitled to their respective reliefs stated in their pleadings.***
- 6. Costs.***

17. Analysis of Evidence and Determinations

I have studied the documents produced by both parties, the evidence and submissions.

Evidence adduced by the plaintiffs and the defendant agree that the suit plot was allocated to the late Njoroge Mbote and his entire family being the plaintiffs and the defendant lived together thereon from 1963. There is no dispute that when the allottee died in 1967 the settlement fund trustee, by its letter dated 25th March 1968 – (Plaintiffs document No. 4) requested the family to appoint a legal heir to the plot and confirmed that the deceased Njoroge Mbote was the owner of the plot.

That settles the issue as to who was the allottee of the suit plot.

18. I do not believe the Defendant's evidence that he was not aware that the plot was initially allocated to his father when he sought it to be allocated to him. The defendant in his evidence admitted that upon receipt of the letter dated 25th March 1968, the family met and appointed him to hold the land in trust for the family.

It is not in dispute that in **Succession Cause No. 15 of 1968** and in the presence of the plaintiffs and the defendant (plaintiff) the defendant was appointed the trustee of his father's suit property.

Upon cross examination, he stated:

“I have to keep this estate for the welfare of the deceased's family and all of us have to enjoy its possession --- with my younger and older brothers in common.”

Cross examined by the court, he stated:

“--- my father declared that his estate should remain the property of his children in common---”

19. In his ruling dated the 23rd January 1969, the Magistrate held that the defendant was appointed the heir and successor of the deceased's **Plot No.163 in Karati Scheme, that he reserves no right under Kikuyu custom to bar his brothers and mother from free usage of the farm.**

A certificate followed thereafter and is dated 15th November 1971, showing that the Defendant was appointed as the only heir to the suit plot. Upon review of the above order on application, the court on the 12th April 1978 ordered that:

“Plot No.163 Karati Scheme is now divided equally between both Ithaku of Wamaitha and Wambui Plot “A” and for Plot No. “B” the suit plot, heirs were listed as Njuguna for Wambui's house as heir and successor of plot No 163 “B”.

The Magistrate proceeded to state that:

“The present order amends the existing order where John Njuguna was appointed the only heir violating the Kikuyu Custom over the distribution of a deceased's estate.”

That was on the 12th April 1978. The defendant himself confirmed the above position in his evidence but then stated that the order was wrong, but did not appeal, meaning that it is the final order of the court in the succession cause as to the administration of the defendant estate.

20. This fact is not disputed and was supported by all parties in their evidence. This is further confirmed by the defendant's own affidavit he swore on the 11th April 1979 after the above orders were issued, and which he acknowledged the contents that he was a trustee for his mother and brothers (the plaintiffs).

21. The above analysis in its entirety comments to findings that:

“(I) the suit Plot No.163 the subject plot was allocated to the late Njoroge Mbote in 1963 (issue No. 1), and that the Defendant holds the suit property in trust for his family, the plaintiffs and himself (issue No. 4).”

22. The defendant in his submissions raised issue that this court has no jurisdiction to entertain the plaintiffs' suit, and that the plaintiffs have no *locus standi*. These issues were not pleaded in the defence nor were they taken up in evidence.

It is trite that an issue of jurisdiction of a court ought to be brought up at the earlier opportunity before the court. The defendant in his submissions confirmed that provisions of the **Law of Succession Act, Cap 160** do not apply as it was not enacted at the time of the death of the deceased in 1967. I have made a

finding earlier, that a certificate of succession was issued by the court in **Succession Case No. 15 of 1968** and orders issued thereof are in force, not having been a subject of an appeal.

No submission was tendered by the Defendant on the matter of jurisdiction of this court. I have, at the beginning of this judgment stated that the case before me concerns a dispute over land ownership, succession dispute and orders for cancellation of title.

The case was part heard before the enactment of the **2012 Land Act, and Environment and Land Court**.

The Honourable The Chief Justice practice directions, and Gazetted as gazetted as **Legal Notice Number 5178** authorised the High court to proceed with Land cases that are part heard. These directions clothed me with the necessary jurisdiction. I am therefore properly seized with the case.

23. In **Charles Ratemo Nyambati -vs- Jackson Ocheri & 4 Others** (2016) the court held that without a grant for the administration of a deceased's estate, a party has no *locus standi*.

In **Omari Kaburu -vs- ICDC (2007)** held that:

“--- the law is that the grant is what clothes a person with locus standi to stand in and sue on behalf of the estate of the deceased's.”

I fully subscribe to and adopt the Learned Judges holding in respect of the subject. But, I want to add that, and which I have stated above that a certificate of grant issued to the parties in **Succession Cause No.15 of 1968**, gave and clothed the plaintiffs with authority to pursue this succession claim. This was before the Law of Succession Act came into being.

24. Having come to the above findings, I now have to determine whether the Defendant's allocation and subsequent registration of the suit property in his name on the the 16th September 1981 as confirmed by an official search dated 13th October 2005 was lawfully or fraudulently obtained.

The narrative above is evident that while the defendant was, by a court order appointed as trustee for his family of the suit land, he purported to get a fresh allocation from the settlement trustee fund and proceeded to process the Title in respect of the suit plot registered in his sole name. The totality of his evidence is that he knows that he was holding the title in trust for his mother and his brothers and himself. So then, with that knowledge, it makes no sense why he would wish to deny his own mother and brothers their shares of the suit plot. His answer to that inquiry upon cross examination was candid. That he knows that he is holding the suit land in trust, but he did not want to give or share the suit property with the plaintiffs.

25. It is therefore evident that the registration of the title in his sole name to the exclusion of the plaintiffs was through a shrewd and fraudulent scheme. The narration confirms that the plaintiffs are not trespassers but heirs and beneficiaries of the defendant father's estate – See **Rajab Oudho Tabito -vs- Rukiya Nechesa Tabiro (2016) e KLR** where the court held:

“In a case of adverse possession one must be a trespassers who enter the land of another person peacefully and without permission and stays thereon for a period of 12 years without being interrupted by a notice by the registered owner to move out and vacate the hand.”

26. This is not the case in the present case. Permissive possession is not adverse to that of the title Holder. It is on record that the defendant lived in the suit land with the plaintiffs since 1963 and only after acquiring the Title to the land in 1981 did he require the plaintiffs to vacate. In any event, the dispute between the plaintiffs and the defendant started in 1968 soon after the allottee of the suit property died. To that extent, and citing the case **Rogers Mwamboje -vs- Douglas Mwamboje (2014) e KLR** the plaintiffs cannot claim to be entitled to the suit land by adverse possession. Their claim lies on a claim on trust, that I made a finding that it has been proved on a balance of probabilities.

27. The plaintiffs are not trespassers but lawful occupants as beneficiaries and heirs together with the defendant of the Estate of the deceased. I find no reason whatsoever to allow the defendants counterclaim and order eviction of the plaintiffs from the suit land for himself and in trust for the plaintiffs.

In **Kanyi -vs- Muthiora 1984 KLR 712**, the court held that under Kikuyu custom if a man had two wives and he dies without making a will his land will be shared equally by the two houses, each wife(house) and her children.

The court further held that a proprietor by first registration or any subsequent registration is not relieved by anything in **Section 28(Registered Land Act)** from any duty or obligation to which he is subject as a trustee.

28. The defendant is therefore obligated to share the suit land between himself and the plaintiffs.

Further, in the case **Gituanja -vs- Gituanja(1988) e KLR** the Court of Appeal held that registration of a person as the proprietor of land was not absolute but was subject to the overriding interests and rights of the respondents who were in possession and actual occupation of the land and the overriding interest and rights ought not be noted on the registered - See **Section 30(g) Cap 300** (now repealed)

Having made the above observations and finding issue No. 2 and 4 are settled.

29. A proprietors interest in registered land is absolute and indefeasible under **Section 23(i) of Cap 300**, and now **Section 26 of the Land Act 2012**. But if the said registration is found to have been acquired through fraud or through an illegality, such title shall be cancelled and rectified as necessary.

I have made findings that the defendant's title to the suit plot, was unlawfully and fraudulently obtained. See **Rodgers Mwambonje** case (Supra).

Section 26 (1) (b) Land Act removes protection of a title holder if it is proved to have been obtained illegally and unprocedurally through a corrupt scheme. The Section protects the genuine holders of title or entitlement to land.

In **ELC Case No.51 of 2014 (O.S) Alice Chemutai Too -vs- Nickson Kipkurui & Others (2015) e KLR** title obtained fraudulently and unprocedurally was cancelled and rectified in favour of the rightful owners.

Section 121 of the Land Act allows the Land Registrar to cancel a registered document including a title if fraud and illegality are found See also **Judicial Review No. 20 of 2012 R -vs- Land Registrar, Kakamega & Others (2013) e KLR**. Also **Esther Ndegi Njiru & Another -vs- Leonard Gatei (2014) e KLR**.

30. For the above reasons, I find that the plaintiffs have established and proved their claims against the defendant whose defence and counter-claim are devoid of merit. The counter claim is hereby dismissed with costs.

Consequently, there shall be judgment for the plaintiffs against the Defendant as prayed in the plaint, upon the following terms:

(1) A declaration is hereby issued that the Defendant holds L.R.No.Nyandarua/Karati/490 for himself and in trust for the plaintiffs in equal shares.

(2) The plaintiffs claim for adverse possession is dismissed.

(3) The defendants counterclaim is dismissed.

(4) That the Defendant is directed and ordered to sub-divide the suit land L.R

Nyandarua/Karati/490 into seven equal portions and transfer six of the portions to the plaintiffs.

(5) That costs for the subdivision and transfer be shared equally between the plaintiffs and the defendant.

(6) That the defendant shall pay costs of this suit to the plaintiffs.

Dated, Signed and Delivered this 13th Day of April 2017.

J.N. MULWA

JUDGE