



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC CASE NO. 43 OF 2013

FORMERLY CIVIL SUIT NUMBER 181 OF 2008

ELIZABETH NYAMBURA

FRANCIS KAMAU NJUGUNA(Suing as the administrator of Estate
of NJUGUNA MWAURA MBOGO.....**PLAINTIFFS**

-VERSUS-

JUMAA FARMERS CO. LTD.....1ST DEFENDANT

JERAMIAH MUTUURA KINYANJUI.....2ND DEFENDANT

RUTH WANJIRU.....3RD DEFENDANT

JONAH KIMARU.....4TH DEFENDANT

JOSPHAT MBURU.....5TH DEFENDANT

EZEKIEL KIARIE.....6TH DEFENDANT

ELIJAH MACHARIA.....7TH DEFENDANT

ENDAO COMPANY LIMITED.....8TH DEFENDANT

JUDGMENT

1. Background and pleadings

The dispute between the parties in this suit is about ownership, occupation Title and use of land known as **L.R 10581**. Ownership is claimed by the three groups, the plaintiffs on the one hand, the 1st to the 7th defendants on the other and the 8th defendant.

The suit was filed by a plaint dated 4th September 2008 and Amended on the 24th March 2009. All the defendants filed their respective statements of defence and counter-claims.

2. The case was part heard in the High Court before the promulgation of the **2010 Kenya Constitution** that established the Environment and Land Court with original and appellate jurisdiction to hear and determine all disputes relating to land title, ownership, use and occupation. See **Article 162(2)(b)** thereof.

3. Pursuant to Practice directions issued by the Hon. The Chief Justice and gazetted as **Legal Notice Number 5178** on the **24th July 2014**, the High Court was donated the authority to continue to hear and conclude part heard cases involving land disputes. That is the reason that I am seized with the further hearing and determination of this case.

4. By the Amended plaint filed on the 25th March 2009, the plaintiffs being the administrators of the Estate of one Njuguna Mwaura Mbogo, deceased sued the 1st – 7th Defendants whom they accused of trespass upon the land parcel aforementioned and cutting down trees and

bushes alleging that the said land parcel was the property of the deceased, now known as **Solai/Ndungiri Block 9** situated within Nakuru County, comprising of about 542 Acres.

The 8th defendant was sued upon an illegal ownership claim over the same suit property.

5. The plaintiffs therefore sought:

(a) A permanent injunction restraining the Defendants by themselves, their agents, servants and all persons allied to or associated with the Defendants from entering, cultivating, remaining, trespassing or in any other way dealing with LR No. 10581 Nakuru now known as Solai/Ndungiri Block 9 in any way whatsoever.

(b) Costs of the suit.

6. In their statements of defence the 1st - 7th Defendants denied the plaintiffs claim over the suit land and by a counter-claim averred that the deceased obtained registration of the suit land in his favour by a judgment and decree in **HCCC No.935 of 2001(O.S)** fraudulently and sought a declaration that the said judgment is null and void.

7. The 8th defendant on its part laid ownership claim over the suit property as a *bona fide* purchaser and too sought a declaration of ownership to the exclusion of all other parties to the suit.

8. Evidence was adduced by the parties in support of their respective interest in the suit property.

9. Plaintiff's case

The plaintiffs represented by Waiganjo Advocate called one witness **Francis Kamau Njuguna PW1**.

He produced the Grant of Letters of Administration of his father's Estate, the Late Njuguna Mwaura Mbogo issued in **H.C. Succession Cause No. 211 of 2008 (PEXt 1)**. He alluded to **Nakuru HCCC No. 935/2001 (O.S)**, a case against E.K Banks Ltd by his late father. By a court judgment issued on the 10th June 2003 and produced as PEXt 4, the suit land was vested and transferred on 30th July 2003 in the deceased names and therefore formed part of his estate. It was his testimony that no other transfer was made to any other party. It was his further testimony that no appeal has been lodged against the judgment to date.

He testified that the 1st defendant has been interfering with the suit land by cultivating thereon using its tractors and produced photographs PEXt 7-8 as evidence.

10. On the 8th Defendant's claim, this witness(PW1) testified that the company did not disturb them though they laid a claim even during the deceased's lifetime, but urged dismissal of its counter-claim as baseless.

11. Upon cross examination by the 1st - 7th defendants Advocate Mr. Githui, PW1 stated on oath that the deceased was a director and treasurer of the 8th Defendant from 1980 – 2003, and that he lived and farmed on the land, that none of the 1st defendants members cultivated the land, but some squatters on the land were each given some piece of land in 2009 by orders of the provisional Administration.

Mr. Machage Advocate for the 8th defendant cross examined PW1 too.

He stated that the deceased lived on the suit land, and was cultivating only 20 acres and the rest was free. He testified that the 8th defendant had sold part of the land which has now many permanent houses. He stated that he has a house on the land and that the 1st defendants 74 members invaded the *shamba* in 2005 but by a court order they vacated the suit land.

12. 1st to 7th Defendants Case

Jeremiah Muturi Kinyanjui testified as DW1. He is the 2nd Defendant.

His testimony was that the 1st defendant, a land buying company bought the suit land and allocated it to its members by their shares.

It was his evidence that they bought the land from Ampira Co. Ltd through Kaplan & Stratton Advocates, and that in 1978 its 300 members entered and started cultivating the suit land and that the deceased was a founding member of Jumaa Farmers Co. Ltd (1st Defendant) and its treasurer upto 2003.

Shown proceedings in **HCCC No. 935 of 2001(O.S)**, he stated that the court was misled to issue the degree for adverse possession in favour of the deceased as there were other farmers on the land and urged the court to set it aside as the deceased was only a shareholder and that he ought to have been given a portion of the land like the other members. He further stated on cross examination that the company's attempts to set aside the decree were all unsuccessful. The witness stated that the members of the company cultivated 420 Acres only but stopped cultivation when orders of court were served upon them.

13. He testified that the 8th Defendant purchased 25% of the farm and assets and that they paid Kshs.500,000/= deposit for the purchase of

the suit property that constituted 75% of the shares, and that 25% was for the 8th Defendant and therefore the land belonged to the 1st defendant at 75% and 25% to the 8th Defendant.

He confirmed that there is no appeal against the judgment in **HCCC NO. 935 of 2001**, and that all attempts to set aside the judgment were unsuccessful.

14. 8th Defendants Case

(Endao Company Limited)

Shadrack Cherogony testified as the Managing Director of the company, and a shareholder.

His testimony was that the company bought shares and the land in issue measuring 560 Acres in 1977 from E.K. Banks Ltd, (name changed to Ampira Estate (1970) Ltd. He produced the certificate of incorporation DExt 3, and DEXt 2 certificate of change of name. He testified that the company bought it in form of shares(25%) that was equivalent to Kshs.1 Million through Kaplan & Stratton Advocates by Agreement dated 23rd November 1977 (DExt. 4), and a share certificate was issued. It was his testimony that later the company bought 100% shares equivalent to Kshs.4 Million by agreement dated 10th August 1990 DExt 6. A transfer was produced as (DExt. 7) and a certificate of shares given to him, and later applied for conversions of the land from **L.R 10581 to L.R Solai/Ndungiri 9 (from Cap 160 to 300)** and conversion **Gazetted as L.N. No. 85 of 2005 of 8th July DExt 16.**

15. He produced a Land control board consent dated 20th July 2006 – DExt 17 and Greencards opened under **Endao** as **Solai/Ndungiri/9.**

He denied knowledge of the plaintiffs claim to the suit land and stated that Endao 8th Defendant is in occupation, meaning rearing cattle and farming coffee.

16. It was his testimony however that on 14th February 2002, the land was invaded by the 1st defendants farmers and the plaintiffs.

Upon cross examination, this witness stated that the deceased Njuguna Mwaura Mbogo was a squatter and lived on the farm in a hut within the farm and urged that the plaintiff's case as well as the 1st - 7th defendants counter-claim be dismissed and its counter-claim be allowed.

16 (a) The parties proceeded to file written submissions in respect of their cases cases.

17. Analysis of Evidence, Submissions and Findings

The plaintiffs claim is for an injunction against all the defendants to restrain them from interfering with their title, occupation and use of the suit property, for which the deceased held a title in his name.

The 1st - 7th Defendant evidence is to the effect that the deceased obtained the title to the suit land through fraud and sought a declaration that the Judgment that gave him vesting orders and the title to be declared null and void, as having been obtained through fraud and misrepresentation.

The 8th Defendant lays claim of ownership to the suit property as a *bona fide* purchaser and seeks a declaration of exclusive ownership of the same to the exclusion of the plaintiffs and the 1st – 7th defendants.

18. There is no dispute that the deceased, for whose estate the plaintiffs are administrators, acquired the suit property by adverse possession – vide **Nakuru HCCC No. 935 of 2001(OS)** on the 10th June 2003.

All the 1st Defendants attempted to set aside the judgment but all their applications were dismissed by the court. No appeal was ever lodged against the said judgment and decree.

This court is of concurrent jurisdiction with the court before which the judgment and decree were issued. Its decision and orders can only be subject to appeal to a higher court, the Court of Appeal. See **Jane Njeri Maina -vs- Mwanajuma Mohamed & 9 Others (2012) e KLR.**

19. All the defendants acknowledged that the deceased was a shareholder of the 1st Defendant and resided on the suit property with others for a considerable period of time and even became a treasurer of the 1st defendant.

It is submitted that the defendants having not been parties to the suit, they lack authority and *locus standi* to challenge the decision.

20. I have considered the 8th defendants claim over the suit land.

It confirmed that **LR No. 10581** was converted to **Solai/Ndungiri Block 9**, and that its attempts to set aside the decision in **HCCC No. 935/2001(O.S)** failed. It further confirmed that there was no transfer of the suit land to Endao Co. Ltd (8th Defendant) as no sale agreement or transfer were executed in favour of Endao Co. Ltd.

The plaintiffs therefore sought dismissal of the 1st – 7th and 8th defendants counter-claims.

21. I have considered submissions tendered for the 1st to 7th Defendants. It is their contention that the judgment in **HCCC No. 935 of 2001(OS)** was obtained by fraud.

Referring to **Section 47 of the Evidence Act**, it was submitted that any judicial proceedings procured through fraud exercised on the judicial tribunal remain void. It states:

“Any party to a suit or other proceedings may show that any judgment order or decree which is admissible under the provision of this act and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.”

22. **Sankar** on the Law of Evidence defines fraud as follows:

“fraud includes all acts, omissions and concealments which involves breach of legal and equitable duties, trust of confidence justly reposed and are injurious to another or by which undue and unconsentious advantage is taken by another.”

That indeed presents a very good definition of fraud.

Mr. Githui Advocate took the court through the procedure for challenging a judgment obtained through fraud, that it can be challenged through a separate action to establish that it was obtained by fraud, in which the particulars of fraud are pleaded and proved. He cited the case **Janeson -vs- Beard (1930) AC 298 and Kuwait Airways Corporation -vs- Iragi Airways Corporation (2001) IWR 429** where the above procedure was upheld.

23. Applying the above principles to the instant case, it was submitted that the deceased concealed existence of the case to the 1st-7th and 8th defendants until it was concluded and by filing the case at Nairobi instead of at Nakuru where the suit property is situated, and having chosen as defendant a non-existent company E.K. Banks. Further as a director of the company, the deceased crafted a corrupt scheme and got the property registered in his name by choosing the frailest of defendants who never knew of the existence of the suit. It was however conceded that court proceedings are sacrosanct and on that note urged that the court proceeding in **HCCC No. 935 of 2010 (O.S)** be declared invalid.

24. The 8th defendant in its chronology of events confirmed that the title to the suit land was registered in the name of E.K. Banks Ltd and was so registered when the suit **HCCC 935/2001(OS)** was filed by the deceased.

Its submissions are that it purchased shares in **Ampira Estates (1970) Ltd** and was exempted from the provisions of the LCB and transferred its shares to Endao Co. Ltd the 8th defendant including the suit land **LR 10581**, being the only asset owned by **Ampira Estates (1970) Ltd** when it sold its shares to the 8th defendant.

25. There is no quarrel as to the 8th defendants members being on the suit land, most having been former employees of the company in the Coffee farm. They continued to live on the suit land together with the deceased as both a squatter and owner. These are defendants Number 1st to the 7th. Having lived and worked on the suit land for over twelve years without interruption and peacefully, the deceased moved the court for declaration of ownership of the same suit land by adverse possession. Any of the other persons living thereon would have done the same but they did not, either by ignorance or indolence, or both.

If the judgment in favour of the deceased of adverse possession by the court was invalid as the defendants want this court to believe, the defendants had an opportunity to appeal or even apply for Review of the same upon grounds they now advance.

I have seen that the defendants tried to challenge the judgment and decree in several applications. All the defendants admit that their attempts were unsuccessful. The deceased remained the owner of the suit land up to his death.

26. The defendants have all come to court, upon being prompted by the plaintiffs suit, and by way of counter-claims, to seek that the judgment in **HCCC No. 935 of 2001(O.S)** be declared null and void, and declare each one as the rightful owner of the suit property, against the other.

I comment Mr. Githui Advocate (for the 1st to 7th defendants) for his well researched jurisprudential submissions on the circumstances that a judgment may be impeached for having been obtained through fraud.

The plaintiff approached this court for an order of injunction against the defendants who have continued to interfere with the deceased's Estate, in particular the suit land. The evidence on record is evident that a *prima facie* case with a probability of success was duly established **Giella -vs- Cassman Brown & Co. Ltd (1973) EA 358**, as the Title to the suit land remains in the deceased's names to date.

27. The deceased estate represented by the plaintiffs have proved their claim on ownership by transmission of the suit land. This ownership has not been impeached in any other suit or in any other proceedings. The judgment that pronounced the deceased as the proprietor by advance possession is intact. No reasons at all were advanced as to why no appeal was lodged against the decision when the defendants discovered what they allege to have been “fraudulent and corrupt scheme.” by the deceased through which he obtained title thereto. This court is barred from trying to or an attempt to impeach a judgment of a court of concurrent jurisdiction. See **Jane Njeri Maina** case above. Further, the Court of Appeal in **Joseph Ndirangu Waweru T/a Mooreland Mercantile Co. Ltd & Another (2015) e KLR** quoting the Courts decision in **Civil Appeal No. 90 of 2005 Stephen Mwaura Njuguna -vs- Douglas Kamau Ngoto**, and consolidated with **Civil**

appeal No. 247 of 2007, held:

“The Learned Judge had no jurisdiction to determine a matter that was decided by a fellow Judge of concurrent jurisdiction --- Such setting aside could only be by an appellate court but not by a High Court as the appellant sought.”

See also **Civil Appeal No. 79 of 2012 Peter M. Kariuki -vs- Ag (2014) e KLR.**

28. I have carefully analysed the defendants defences and counter-claims as pleaded.

The 1st - 7th defendants claim ownership of the suit property by virtue of being squatters and not trespassers. They seek that the judgment in **HCCC No. 935 of 2001 (OS)** be declared a nullity. They did not participate in the above case.

They fault the deceased for failure to disclose his fiduciary duty as director of the company, (then owner of the suit property (E.K. Banks Ltd). They seek the entry in the register in favour of the deceased to be declared null and void, and altered in their favour.

The 8th defendant laid a purchaser's claim on the suit land.

No evidence of such purchase was adequately proved. It tried to challenge the judgment but failed. The 1st- 7th defendants too failed in their attempts to challenge the judgment aforementioned.

29. I am not persuaded that the counter-claims can be adequately addressed in this case.

I have noted that the same issues of fraud and breach of trust were raised and determined in the various applications by the defendants in an attempt to set aside the judgment. It would not be appropriate for this court to open that window when a judge of concurrent jurisdiction with this court has dealt with the same and made his decision.

To move to entertain the same issues in my view would be to sit on appeal from the High Court decisions. That I shall not do as I lack the jurisdiction to do so and would be in contravention of the hierarchy of courts as set out in the **Judicature Act Cap 8**. See authorities cited above **Jane Njeri Maina, Joseph Ndirangu Waweru, Stephen Mwaura Njuguna (Supra)**.

30. My considered opinion is that the Defendants ought to file a substantive suit for purposes of impeaching the judgment in **HCC No. 935/2001(O.S)**, where the plaintiffs would have the opportunity to state their defence adequately. The plaintiff's suit herein seeks very basic orders of injunction against the defendants interference with the suit land. It is not a proper suit whereupon the plaintiffs may be called upon to call evidence and substantively address the claims of fraud and breach of trust. If that is done, the provisions of **Section 47 Evidence Act** would then come into play and would be adequately addressed.

DETERMINATION

31. Back to the plaintiffs claim for equitable orders of injunction. I have already stated that a *prima facie* case has been established (**Giella -vs- Cassman Brown**). I have come to findings and conclusions that all the defendants and their members have no proprietary rights over the suit property as the judgment in **HCCC No. 935 of 2001(O.S)** declared the deceased as the owner of the suit land and the defendants as trespassers. Their claim for advance possession and purchase respectively are but statements that can only be addressed and proved in a different suit as I have rendered.

32. In **ELC Case No. 108 of 2011(OS) Kahindi Ngala Mwangadi -vs- Mtana Lewa (2014) e KLR** the rights of a trespasser *vis-a-viz* those of a land owner were discussed. In **Civil Appeal No. 56 of 2014** between the above parties, the Court of Appeal considered the provisions of **Article 40** of the **Constitution** (right to property) to any person to acquire land under any provisions of the law. The plaintiff herein acquired the suit land under the doctrine of Adverse possession premised on the **Limitations of Actions Act Cap 22 Laws of Kenya**. He did not rob anybody. If any party felt aggrieved that party ought to have challenged the decision in an appeal.

In the same case stated above, the Hon. Ouko, JA held that:

“---in a climate of increasing awareness of human rights including the right to enjoy ones own property, it does seem draconian to the owner and a windfall for the squatter that, just because the owner has taken no steps to evict a squatter for 12 years, the owner should lose 25 hectares of land to the squatter without any compensation whatsoever.”

33. I fully agree with the above sediments but the aggrieved party must move the court. A proprietor of land is protected under the Law from individuals who have no right over the land from interference of his peaceful occupation and use of the land.

Section 26 of the Land Registration Act, 2012 gives the proprietor of land full rights to use the land to the exclusion of any other persons. The certificate of title is *prima facie* evidence that the person named as proprietor is the absolute owner – subject to encumbrances, easements, restrictions and conditions endorsed on the title – except on grounds of:

(a) - fraud, misrepresentations

(b) illegality in the acquisition of the title or through a corrupt scheme.

These are matters, subject to pleadings and proof, and I have stated, in an appropriate suit. Definately not in a suit as this one.

34. At this stage, I am unable to declare the defendants as “encumbrances” or having any recognizable title or interest in the land.

They can only be deemed to be trespassers since 2001 when title was registered in the deceased's name, squatting and annoying the plaintiffs by interference with the suit land.

The 8th defendant's members are no longer on the suit land by a court order, a fact confirmed by its witness its Managing Director.

35. By a court order issued on the 14th May 2009, 74 squatters were ordered to be allocated ½ acre each for cultivation temporarily while three members of Endao Co. Ltd (8th Defendant) were to remain on the land. These were temporary orders pending hearing and determination of the suit.

The defendants counter-claims on ownership and Title to the suit land have been found to be without merit.

Following therefore the orders issued on the 14th May 2009 and any others in favour of all the defendants must be vacated. The 74 squatters and the 3 Endao members and known to them, ought to vacate the suit property to give the plaintiffs peaceful occupation and use of the suit property.

36. The defendants' members occupation and use of the suit property no doubt is interference with the plaintiffs interest in the suit land.

The plaintiffs sought a permanent injunction to restrain all the defendants from doing any acts inconsistent with their title to the land in anyway. Upon the above evidence, it is my finding that the plaintiffs have proved their case on a balance of probability, which is the required standard of proof in a civil suit.

37. Consequently, judgment is entered for the plaintiffs against all the defendants jointly and severally as prayed in the plaint and in the following manner:

(a) The 1st to the 8th defendants are by an order of permanent injunction restrained by themselves, their agents servants and all persons allied to or associated with them from continuing in occupation, entering, cultivating, trespassing or in any other way whatsoever dealing with LR No. 10581 Nakuru, now Solai/Ndungiri Block 9.

(b) The court orders issued on the 14th May 2009 are hereby discharged and vacated.

(c) Costs of the suit shall be to the plaintiffs, and payable by all the defendants, jointly and severally.

Dated, Signed and Delivered this 21st Day of September 2017.

J.N. MULWA

JUDGE