



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 14 OF 2014

SIMON MUNENE MBUGUGIA

Substituted Party for JOYCE WAGICHUGU MBUGUGIA.....PLAINTIFF

VERSUS

SUSAN WAKANYEI MUROGO)

ROBERT MAINA MUROGO)

SAMMY MUNENE MUROGO)DEFENDANTS

EPHRAIM KINYUA MUROGO)

JACKSON KARIUKI MUROGO)

ANTHONY NJAU MUROGO)

JUDGMENT

This case, as will become clear in the course of this judgment, has a very curious history.

By an amended plaint dated 3rd March 2000 and filed in Kerugoya SRMCC No. 144 of 1999 and which was later transferred to this Court, the original plaintiff JOYCE WAGICHUGU MBUGUGIA (now deceased) and substituted with her son SIMON MUNENE MBUGUGIA sued her sister SUSAN WAKANYIE MUROGO and her five sons (2nd to 6th defendants) seeking the following orders:-

- a. *The determination of trust*
- b. *An order for consolidation of land parcels No. MUTIRA/KATHARE/774, 775, 776, 777 and 778 into a single unit and subsequent transfer of half (1/2) share out of the consolidated single unit to the plaintiff*
- c. *Costs of the suit*
- d. *Interest on (c) above at Court rates*
- e. *Any other relief the Court deems fit to grant to meet the ends of justice.*

The record shows that only SUSAN WAKANYIE MUROGO who was the 1st defendant filed a defence but the 2nd to 6th defendants did not enter appearance nor file any defence and on 5th June 2000 the plaintiff applied for interlocutory judgment to be entered against them. The plaintiff's case against the

defendants was that at all material time, the parcel of land No. MUTIRA/KATHARE/21 was registered in the names of their later father NGONDI GATONGU and later passed to their late mother BETHA WANJIKU NGONDI. Later, the parties sub-divided the parcel of land No. MUTIRA/KATHARE/21 into MUTIRA/KATHARE/534 and 535 and it was agreed that MUTIRA/KATHARE/534 would be registered in the 1st defendant's names to hold in trust for herself and the plaintiff while MUTIRA/KATHARE/535 was sold to a third party in order to finance proceedings in Kerugoya SRMCC No. 27 of 1985. However, fraudulently and in disregard of the said trust, the 1st defendant sub-divided MUTIRA/KATHARE/534 into six portions namely MUTIRA/KATHARE/774 to 779 which she then transferred by way of a gift to the 2nd to 6th defendants while one portion MUTIRA/KATHARE/779 was sold to a third party. It was the plaintiff's case that the 2nd to 6th defendants all had knowledge of her claim to the parcel of land MUTIRA/KATHARE/534 and the resultant sub-divisions (herein the suit land). The case was heard by J.N. Onyiego Senior Resident Magistrate who found for the plaintiff and entered judgment as prayed for in her plaint and a decree dated 12th March 2004 was drawn granting the plaintiff the reliefs sought as indicated at the start of this judgment. The 1st defendant being aggrieved by that judgment filed High Court Civil Appeal No. 13 of 2004 at Embu but in as judgment delivered on 2nd October 2007 the late Khaminwa J. dismissed the appeal with no orders as to costs. There is nothing to show that an appeal was preferred against the judgment of Khaminwa J and therefore that judgment remains valid and binding in as far as it resolved the dispute between the plaintiff and 1st defendant.

Meanwhile, on 23rd October 2008, the 2nd to 6th defendants filed an application seeking to set aside the interlocutory judgment entered against them and allow them leave to file their defence out of time. That application was allowed by S.N. Mbungi Ag. Principal Magistrate in a ruling delivered on 9th January 2009. An appeal against that ruling was dismissed by Muchelule J. in High Court of Kenya at Embu Civil Appeal No. 12 of 2009 on 16th December 2011.

Having obtained leave to file defence out of time, the 2nd to 6th defendants filed a joint defence in which they pleaded, inter alia, that parcel of land No. MUTIRA/KATHARE/21 which was in the names of their grandmother was hijacked and registered in the names of one MICHAEL KIBUGI NGUGI and that it was only the 1st defendant who financed the litigation to have the land revert into the names of the 1st defendant and that in fact the plaintiff did not contribute any money but even testified as a witness for 1st defendant and said she had no claim over the land. The 2nd to 6th defendants also pleaded that the 1st defendant was never registered as owner of the land MUTIRA/KATHARE/21 in trust for the plaintiff. The 2nd to 6th defendants also pleaded that the land MUTIRA/KATHARE/21 was later sub-divided into MUTIRA/KATHARE/534 and 535 and they denied any fraud in the said sub-divisions which later resulted in MUTIRA/KATHARE/534 being sub-divided giving rise to the suit land that was given to them. It was also their pleading that the suit was time barred.

The suit came up for hearing before me on 3rd March 2015 when SIMON MUNENE MBUGUGIA (the substituted plaintiff) testified that the original plaintiff JOYCE WAGICHUGU MBUGUGIA (deceased) was his mother and sister to the 1st defendant who is the mother to the 2nd to 6th defendants. He testified that their grandfather NGONDI GATONGU was the registered owner of the parcel of land No. MUTIRA/KATHARE/21 but it was later sub-divided into MUTIRA/KATHARE/534 which was registered in the names of the 1st defendant to hold in trust for herself and the plaintiff while MUTIRA/KATHARE/535 was registered in the names of their grandmother BETHA WANJIKU NGONDI. However, the 1st defendant refused to share MUTIRA/KATHARE/534 with JOYCE WAGICHUGU MBUGUGIA and instead sub-divided it into several portions (the suit land) which she gave to her sons the 2nd to 6th defendants. He produced various documents in support of his case – see Plaintiff's Exhibit 1 to 24.

Plaintiff called as his witness NGUGI GACHOKI (PW2) whose evidence was that the original land subject of this suit was given to the parties' grandfather (NGONDI GATONGU) by the clan before being registered in their grandfather's names. It was later discovered that one MARKO KIBUGI had tried to take over the land and so the 1st defendant filed Embu Resident Magistrate Civil Case No. 27 of 1985 to

recover the land on behalf of her grandmother BERTHA WANJIKU NGONDI and in order to finance that litigation, a portion of the land was sold to one KATHIGO. It was his evidence therefore that the suit land should be shared equally between the plaintiff and 1st defendant as had been decided by the panel of elders – see Plaintiff’s Exhibits 3, 4 and 5.

One behalf of the 2nd to 6th defendants, the 3rd defendant SAMMY MUNENE MUROGO testified that the 1st defendant was his mother and the other defendants his brothers while the plaintiff (as substituted) is his cousin. He stated that the parcel of land No. MUTIRA/KATHARE/21 was originally registered in the names of their grandfather NGONDI GATONGU before passing to his wife BERTHA WANJIKU and sometime in 1975 it was discovered that one MARKO KIBUGI HEZEKIAH NGIGE had registered himself as owner of the land and so BERTHA WANJIKU filed a case against him at Embu Court which case was later taken over by SUSAN the 1st defendant and plaintiff was her witness. The land was subsequently registered in the names of the 1st defendant who later sub-divided it and gave the subdivisions to the 2nd to 6th defendants and that nothing was done fraudulently. It was only in 1999 that the plaintiff started laying a claim to the land. He added that the 1st defendant did not hold the land in trust for the plaintiff but got it by suing MARKO KIBUGI. He produced various exhibits marked as Defence Exhibits 1 to 8. He called as witnesses his brothers ROBERT MAINA MUROGO (2nd defendant) and EPHRAHIM KINYUA MUROGO (4th defendant) who supported his evidence. He also called another brother ANTHONY MUROGO who said he has not been sued but who testified that he is the registered proprietor of MUTIRA/KATHARE/777 given to him by his mother. The amended plaint herein however shows that he has been sued as the 6th defendant ANTHONY NJAU MUROGO and infact the certificate of search in respect of MUTIRA/KATHARE/777 is in his names. The defendants also called as their witness STEPHEN MUTHIKE MACHARIA (DW5) whose evidence was that the parcel of land No. MUTIRA/KATHARE/21 belonged to the late NGONDI and later to BERTHA his wife but at some stage, it was discovered that one MARKO had tried to take it over and so BERTHA filed a case against him which was taken over by the 1st defendant after BERTHA become un-well. It was the 1st defendant who pursued the case. The witness denied that the 1st defendant was holding the land in trust.

At the end of the trial, submissions were file by both Mr. Kahiga for the plaintiff and Ms Thungu for the 2nd to 6th defendants.

I have considered the oral evidence of the parties together with the documentary evidence and submissions by counsels.

As stated earlier, the case against the 1st defendant SUSAN WAKANYEI MUROGO was previously heard by J.N. Onyiego Senior Resident Magistrate who entered judgment for the plaintiff against the 1st defendant and the decree referred to earlier on in this judgment was issued on 12th March 2014. An appeal against that judgment was dismissed with no orders as to costs by the late Khaminwa J. in Embu High Court Civil Appeal No. 13 of 2004 on 2nd October 2007. No appeal was preferred against that judgment to the Court of Appeal. That judgment therefore conclusively settled the issues of trust as between the plaintiff and the 1st defendant. The case before me therefore only relates to the plaintiff and the 2nd to 6th defendants and it cannot be true, as Ms Thungu has submitted, that the plaintiff is seeking a declaration against a deceased person and that this Court cannot make a judgment against a deceased person. The truth is that the claim against the 1st defendant was determined by Khaminwa J. on 2nd October 2007 when she up-held the trial Court’s judgment in favour of the plaintiff. This Court cannot revisit the case against the 1st defendant as to do so would amount to sitting on appeal against the decision of another Judge. This Court can only interrogate the plaintiff’s case against the 2nd to 6th defendants who were allowed to file their defence out of time which they did on 14th January 2009 some thirteen (13) months after the judgment against the 1st defendant had been confirmed upon appeal to the High Court.

What then is the defence of the 2nd to 6th defendants in response to the plaintiff’s claim against them? The plaintiff’s claim against them is captured in paragraph eight (8) of the amended plaint where she

pleads as follows:-

“8: That the 1st defendant later conspired with the rest of the defendants and secretly and fraudulently transferred by way of gift land parcels No. 774 to 777 while we were busy casing in Baricho D.O’s Tribunal Case No. 11 of 1998 which I had instituted against the 1st defendant when she refused to honour the agreement”

In the same paragraph, the plaintiff particularized the fraudulent acts of the defendants which are that on 25th May 1999, the 1st defendant with the full knowledge of the plaintiff’s claim to the parcel of land No. MUTIRA/KATHARE/534, she caused the resultant sub-division No. MUTIRA/KATHARE/774 to 778 to be registered in the names of the 2nd to 6th defendants who also had knowledge of the plaintiff’s interest on the said suit land.

The 2nd to 6th defendants in their defence denied any knowledge of fraudulent dealings in the suit land although they conceded that their mother the (1st defendant) indeed sub-divided the suit land among them. In paragraph nine (9) of their defence, they pleaded as follows:-

“The 2nd - 6th defendants deny any fraud and avers that the plaintiff has no cause of action against them”

Fraud is a serious allegation which must be specifically pleaded and the facts thereof set out. The standard of proof required is higher than that required in ordinary civil cases but certainly not beyond a reasonable doubt as in Criminal Cases – *NDOLO VS NDOLO 2008 1 K.L.R (G & F) 742* and also *VIJAY MORJARIA VS MADHUSING DARBAR & ANOTHER. C.A. CIVIL APPEAL NO. 106 of 2000. (2000) e K.L.R.*

No doubt the particulars of fraud were specifically pleaded as indicated above. The onus was on the plaintiff to prove them and on the evidence before me, I am satisfied that there was proof of those allegations of fraud. It is clear from the pleadings that the fraudulent transfers of the suit land to the 2nd to 6th defendants were all done on 25th May 1999 as per the green cards produced as Plaintiff’s Exhibits 12 to 16. However, as far back as March and October 1998, a dispute between the plaintiff and the 1st defendant had been referred to the elders with regard to the same land subject to this suit and the elders made a finding on 1st October 1998 that the land be divided equally between the two. Of course that ruling could not pass any interest in land to any of the parties but its relevance is that it did demonstrate that there was a subsisting dispute between the plaintiff and 1st defendant – see Plaintiff’s Exhibits 3, 4 and 5. That notwithstanding, the Green Card for parcel No. MUTIRA/KATHARE/534 (Plaintiff’s Exhibit 2) shows that that parcel of land had been registered in the names of the 1st defendant as at 15th October 1998. Clearly, that is evidence of a fraudulent dealing. When the 3rd defendant SAMMY MUNENE MUGO was cross-examined about the dispute between the 1st defendant and the plaintiff that was heard by the elders in 1998, he said he knew nothing about it. He however admitted that he was aware about the case in Embu Court adding that he even contributed towards the lawyer’s fees. It is the finding of this Court that the 2nd to 6th defendants were well aware about the dispute involving the land subject of this suit yet they actively participated in transferring portions thereof to themselves. The record is also clear that the original plaint in this case was filed by the plaintiff against the 1st defendant on 1st July 1999. The 1st defendant in cross-examination by Mr. Kahigah acknowledged that he was aware about the filing of this suit in 1999. He said:-

“This case was filed in 1999 by JOYCE against my mother. By that time, the land MUTIRA/KATHARE/534 had not yet been sub-divided into the portions 774 to 779.”

He however denied that the transfer of the suit lands into his names and the names of the other defendants was done hurriedly to defeat this case. This Court is however satisfied from the evidence herein that all

the defendants, knowing very well that there was a dispute between the plaintiff and 1st defendant before the elders where some orders regarding the land had been made, proceeded to transfer the suit land into their names. That is clear evidence of fraud and the 2nd to 6th defendants had knowledge of the same. It is my finding therefore, that the allegations of fraud against the defendants have been proved as required in law. The plaintiff is therefore entitled to the orders as sought in the amended plaint herein.

As indicated earlier, the issue regarding trust as between the plaintiff and 1st defendant had earlier been determined by other Courts and cannot be revisited at this stage. In any case there has been laid before me sufficient evidence to establish the existence of a trust in as far as the land subject of this suit is concerned. It is well established that the registration of land in one's names does not take away the responsibilities bestowed upon the registered proprietor as trustee of such property – **MUKANGU VS MBUI C.A CIVIL APPEAL NO. 28 of 2000 NYERI**. The 2nd to 6th defendants also raised the defence that this suit is statute barred. However, **Section 20(1) of the Limitations of Actions Act** provides as follows:-

“None of the periods of Limitation prescribed by this Act apply in an action by a beneficiary under a trust, which is an action –

- a. ***In respect of fraud or fraudulent breach of trust to which the trustee was a party or privy or***
- b. ***to recover from the trustee trust property or the proceeds thereof in possession of the trustee or previously received by the trustee and converted to his own use”.***

It is clear from the case of **STEPHENS & SIX OTHERS VS STEPHENS & ANOTHER 1987 K.L.R 125** that no plea of limitation would be available to a trustee who fraudulently defaults in his fiduciary duty and that is precisely what the 1st defendant did in this case with the full knowledge of the 2nd to 6th defendants. In any case, the registration of the suit land into the names of the 2nd to 6th defendants was only done in 1999 and this suit was filed in 2000 soon after that fraudulent registration was done. Clearly, the issue of limitation is misplaced and must be rejected.

Ultimately therefore and after considering all the evidence in this case, I find that the plaintiff has also proved his case against the 2nd to 6th defendants and I enter judgment for him as prayed in the amended plaint dated 3rd March 2000. As the parties are family, I order that each shall meet their own costs.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

COURT: Explanatory note on delay:

This judgment was due on 10th June 2015 but I was bereaved and out of the country until 7th July 2015 when I resumed duties and thereafter proceeded on vacation until 16th September, 2015.

The delay is however regretted.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

18/9/2015

Before

B.N. Olao – Judge

Gichia – CC

Ms Kiragu for Kahiga for Plaintiff – present

Ms Thungu for Defendant – absent

COURT: Judgment delivered this 18th day of September, 2015 in open Court

Ms Kiragu for Kahiga for Plaintiff present

Ms Thungu for Defendant – absent

Right of appeal explained.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015