



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC SUIT NO. 448 OF 2012

ESTHER MUTHONI WANYOIKE

(suing as Administrator of STANLEY KARIUKI NJAU).....**PLAINTIFF**

-VERSUS-

CATHERINE MUTHANJI KARIUKI.....DEFENDANT

JUDGMENT

Background

1. The Plaintiff, Esther Muthoni Wanyoike initially brought this suit in her personal capacity by way of a Plaint dated 26th July 2012. She later amended the Plaint in 2021. Through the said amendment, the Plaintiff changed her capacity to that of a Legal Administrator of the Estate of Stanley Kariuki Njau - Deceased. In her amended plaint, she prays for amongst other orders:

- i. A declaration that the transfer of L.R No. Githunguri/Kimathi/248 measuring 7.028 Ha (hereinafter the suit property) from Stanley Kariuki Njau to the Defendant was illegal ab initio.**
- ii. A revocation of the transfer of L.R No. Githunguri/Kimathi/248 and for the land to revert to Stanley Kariuki Njau Estate.**
- iii. Cancellation of all transactions/dealings made by the Defendant on L.R No. Githunguri/Kimathi/248.**

2. The case was defended. The Defendant, in her amended statement of Defence averred that she was the second wife of the late Stanley Njau Kariuki, who lawfully transferred the suit property to her, long before he died. The Plaintiff's mother, Monica Wanjiru, who was the 1st wife of the deceased, had even instituted legal proceedings against the Defendant but failed. The Defendant therefore termed the Plaintiff's claim against her as bad in law and prayed for its dismissal with costs.

3. The case proceeded to hearing with each party testifying in their respective cases.

The Plaintiff's case.

4. The Plaintiff's case was that the suit property was the matrimonial home of her late father, Stanley Kariuki Njau and late mother, Monica Wanjiru Kariuki. The Defendant, Catherine Muthanji Kariuki is her step-mother and the 2nd wife of the late Stanley Kariuki Njau.

5. Stanley Kariuki Njau passed on, on 20/7/2005 while Monica Wanjiru Kariuki passed on, on 7/11/2008.

6. Stanley Kariuki Njau was the registered proprietor of the suit property, until the 15th September 1994, when he transferred the title to the Defendant. By that time, the late Stanley Kariuki Njau was living with the Defendant as his lawful wife having separated with his first wife. They have separated in 1976.

7. The Plaintiff's contention is that the transfer of the title to the suit property was irregular. The transfer, she confirmed was done by her father to the Defendant. She stated that it was illegal.

8. The Plaintiff confirmed that her mother had attempted to challenge the transfer of the title to the Defendant on two occasions but failed. A decision by the Githunguri Land Disputes Tribunal was nullified by the High Court on the basis that the Tribunal had no jurisdiction to handle such kind of a matter. Her mother later filed High Court Civil Case 613/2003 (O.S) but that same abated before it could be concluded.

9. Finally the Plaintiff claimed that she was not aware that her father had another land at Longonot which he had left behind for her mother's side of the family.

The Defendant's case.

10. The Defendant's case was that her late husband, Stanley Kariuki Njau transferred the suit property to her after obtaining the consent of the Land Control Board at Githunguri. It was her testimony that her late husband also gave 25 acres of land to her co-wife. The land given to her co-wife is at Longonot.

11. The Defendant claimed that her co-wife had wanted a portion of the suit property and that was the reason why she had filed a case, HCCC 615/2003(OS) against her and her late husband. Her late husband however, made the decision of transferring the suit property to the Defendant.

12. The case, HCCC 615 of 2003(OS) abated upon the death of both her husband and her co-wife.

13. The Defendant's case was that the late Stanley Kariuki Njau gifted her the suit property in his lifetime and the claim against her by the Plaintiff was baseless. She got married to her late husband in 1963, and they formalized the marriage in 1980.

Court's Directions

14. Upon conclusion of the hearing of this case, the court directed parties to file written submissions. Both parties complied and filed their respective submissions.

Issues for Determination.

15. Having read the pleadings filed in this case, the recorded testimonies of the parties and the submissions, the court is of the opinion that the issues for determination in this matter are:-

a. Whether the Plaintiff's suit is incompetent and bad in law.

b. Whether the Estate of Stanley Kariuki Njau can lawfully challenge the transfer of the suit property done by Stanley Kariuki Njau during his lifetime.

c. Whether the transfer of the title L.R No. Githunguri/Kimathi/248 from Stanley Kariuki Njau to the Defendant was fraudulent and unlawful.

d. Whether the Plaintiff is entitled to the orders sought.

Analysis and Determination

A. Whether the Plaintiff's suit is incompetent and bad in law.

16. The Plaintiff in this suit, Esther Muthoni Wanyoike is a daughter of the late Stanley Njau Kariuki. She originally filed this suit in her own personal capacity claiming a beneficial interest in the suit property as a dependant of her father's Estate.

17. By way of an amendment of the Plaint, sometimes in the year 2021, over ten (10) years after filing her suit, the Plaintiff changed her capacity to that of a legal administrator of the estate of the deceased Stanley Kariuki Njau. This was after she obtained a limited grant ad litem issued by the Senior Principal Magistrates' court at Githunguri. What the amendment meant in essence was that the Estate of the deceased Stanley Kariuki Njau, took over the case of Esther Muthoni Wanyoike.

18. The Defendant does not seem to have objected to this irregular amendment of the Plaint. In my view, this is not an amendment that should have been allowed.

19. The Supreme Court of India, in the case of Usha Balashaheb Swami & others Vs. Kiran Appaso Swami & others AIR 2007 Supreme Court, 1663 held that,

“The general Principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of the claim applies to amendments to Plaint.”

20. The same position applies in this country. In Elijah Kipng'eno Arap Bii Vs. Kenya Commercial Bank Ltd (2013) eKLR, the court reinstated the position in the following terms:

“... that as a general rule, however late, the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new cause or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action”.

21. Though Order 8 Rule 3(4) provides that an amendment may be allowed to alter the capacity in which a party sues, there is a rider to the effect that, **“if the capacity in which the party will sue is one in which at the date of filing the *Plaint* or the counter claim, he could have sued”**.

22. That was not so in this case. When the Plaintiff filed this suit on 26th July 2012, she did not have the capacity to sue as an administrator of the Estate of Stanley Kariuki Njau. She only acquired this capacity on 4th March 2021 when she was issued a limited grant ad litem.

23. The amendment therefore was irregular and with no basis in law. The Plaintiff’s suit is premised on the amended *Plaint*. It is therefore incompetent and bad in law. For that reason, I would strike out this suit. I will nonetheless proceed to determine the other issues.

B. Whether the Estate of Stanley Kariuki Njau can lawfully challenge the transfer of the suit property done by Stanley Kariuki Njau when he was alive.

24. It is not in dispute that the suit property L.R No. Githunguri/ Kimathi/248 was transferred to the Defendant by the late Stanley Kariuki Njau in 1994 during his lifetime. This was eleven (11) years before his death.

25. The Plaintiff in the amended *Plaint* at paragraph 9 in no uncertain terms states that, *“in 1994, the Plaintiff discovered that their father had transferred all that property to the Defendant together with all developments made therein without informing or consulting anyone”*.

26. The Defendant on her part in her statement of defence at paragraph 2, while denying that the Plaintiff was a beneficiary of the suit property categorically avers that the suit property was lawfully transferred to her by her deceased husband long before he died. Essentially it was a gift inter vivos and does not form part of the estate of the deceased.

27. From the pleadings as well as the evidence adduced in court by the parties, it is also clear that the 1st wife of the deceased Stanley Kariuki Njau had made two (2) unsuccessful attempts to challenge the transfer of the suit property to the Defendant.

28. The first attempt was at the Land Disputes’ Tribunal at Githunguri. The Tribunal’s decision was however overturned by the High Court in Nairobi High Court Misc. Civil Application No. 298 of 2001.

29. The second attempt was in 2003 when the 1st wife of the deceased instituted Nairobi High Court Civil Case 615 of 2003 (OS) against the late Stanley Kariuki Njau and the Defendant in this case, Catherine Muthanji Kariuki. This suit abated upon the death of Stanley Kariuki Njau, who died in 20/7/2005. The first wife Monica Wanjiru Kariuki passed on thereafter on 7/11/2008.

30. What is the legal position on gifts *inter vivos*?

31. Justice Mumbi Ngugi J, (as she then was) in the *Re Estate of **Chepkwony Arap Rotich (2018) eKLR*** in answering the above question quoted with approval the decision of Nyamweya J in *Re Estate of the late **Gideon Mauthi Nzioka - deceased (2015) eKLR***.

32. Justice Nyamweya in the above cited case specified that there are two types of gifts in law - gifts *inter vivos* and gifts *mortis causa*.

33. Gifts *inter vivos* must be complete for them to be valid.

“For a gift *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of declaration of trust by the donor, or by way of resulting trusts or the presumptions of (trust). Gifts of land must be by way of registered transfer, or if the land is not registered, it must be in writing or by a declaration of trust in writing”.

34. In this case, the gift of land, the suit property herein was actualized by a transfer by the deceased Stanley Kariuki Njau to the Defendant in 1994. The Defendant in cross examination by the Plaintiff’s Advocate confirmed that it was the deceased who personally went to the Lands office and transferred the suit property to her. He brought her the title in her name.

35. The Plaintiff at paragraph 5 of the amended *Plaint* affirms that the late Stanley Kariuki Njau acquired the suit property, title number Githunguri/Kimathi/248, legitimately.

36. Justice Mabeya in the case of ***Paul Kathuni Gichunge vs Victor Polycarp Ntwiga & 2 others (2016) eKLR***, held that a person can deal with his property as he wills during his lifetime. *“Any one aggrieved on how his/her parent has dealt with his property should question the parent during his/her lifetime. He/she cannot wait until such a person dies to raise issues of discrimination or unfairness. Such issues can only validly be raised in cases of a will since wills are kept secret until the testator passes on. However, bequests that are given as gifts *inter vivos* are openly so given and in my view whoever is dissatisfied therewith is at liberty to question the same before the demise of the giftor”*.

37. In this case, my finding is that the late Stanley Kariuki Njau gifted the Defendant, Catherine Muthanji Kariuki the suit property being land known as Githunguri/Kimathi /248 during his lifetime. He completed the gifting by transferring and registering the Land in the name of the Defendant. The Defendant has been in possession of the suit property ever after.

38. In accordance with the law as stated above the gifting, transfer and registration of the suit property in the name of the Defendant, Catherine Muthanji Kariuki was valid and lawful. The plaintiff has no basis whatsoever in law for challenging the same.

C. Whether the transfer of the title L.R No. Githunguri/ Kimathi/248 from Stanley Kariuki Njau to the Defendant was fraudulent and unlawful.

39. The Plaintiff in her amended Plaint alleges fraudulent and illegal transfer of the title to the suit property to the Defendant. At paragraph 18 of the amended plaint, the plaintiff particularizes the alleged fraud as follows:

- a. Transferring the matrimonial property to herself without consent from the dependants.**
- b. Subdividing the said land despite existence of two caveats placed on the land.**
- c. Charging they said land despite existence of two caveats placed on the land.**

40. As I had pointed out earlier, the plaintiff at paragraph 9 of her amended Plaint in no uncertain terms states that “*in 1994 the plaintiff discovered that their fathers had transferred all that property to the defendants together with all the developments ...*” This statement alone negates her allegations that the Defendant fraudulently and illegally transferred the suit property to herself.

41. The Defendant in her testimony before the court stated that the deceased had called her and the first wife (the Plaintiff’s mother), before the District Officer (DO), Githunguri to share out his properties to them. The first wife however, did not show up.

42. The deceased had two parcels of land, the suit property, which he gave out to the defendant and the Longonot land which he gave to the family of the first wife. Although the Plaintiff denied knowledge of the Longonot land, she attached a copy of the search of the title of that land in her list of documents and produced it as one of her exhibits.

43. The Defendant further stated that her deceased husband obtained the consent to transfer the suit property and thereafter transferred the same title to her.

44. It is a well settled principle of the law that where a party alleges fraud, he/she must strictly prove the same. ‘Fraudulent conduct must be distinctly alleged and distinctly proved’, per Tunoi J (as he was) in **Vijay Morjaria vs Nansingh Madhusingh Darbar & another (2000) eKLR**. ‘It is not allowable to leave fraud to be inferred from the acts’.

45. The Court of Appeal in **Kinyanjui Vs George Kamau (2015) eKLR** while restating the above position added that, ‘the burden of proof lies on he who alleges the fraud’. The standard of proof on allegations of fraud is obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities.

46. In this case, the plaintiff merely invited the court to infer fraud from the facts. My finding is that the plaintiff has not proved any fraud on the part of the Defendant.

D. Whether the Plaintiff is entitled to the orders sought.

47. Going by the above findings, the court cannot therefore grant the orders sought by the Plaintiff. The Defendant’s title which was transferred to her in 1994 was registered under the provisions of the Registered Land Act (RLA), Cap 300 Laws of Kenya (now repealed). Section 143, of the RLA only allowed the rectification of the register either by cancellation or amendment where a court was satisfied that the registration was obtained, made or omitted by fraud or mistake. The Plaintiff has not proved that the registration of the Defendant as the proprietor of the suit property was obtained either by fraud or mistake.

48. Accordingly, the Court’s finding is that the Plaintiff has not proved her case on a balance of probabilities. The suit is hereby dismissed with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MARCH, 2022

M.D MWANGI

JUDGE

In the Virtual Presence of:-

Mr. Bariki h/b for Mr. Kirimi for the Plaintiff

Mr. Njau for the Defendant

Court Assistant: Hilda

M.D MWANGI

JUDGE