



REPUBLIC OF KENYA



KENYA LAW
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**Muchiri v Mwangi & 2 others (Environment & Land Case
71 of 2016) [2022] KEELC 12647 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 12647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 71 OF 2016**

**JO OLOLA, J
MAY 12, 2022**

BETWEEN

ANASTACIA MUTHONI MUCHIRI PLAINTIFF

AND

JOHNSTONE KAMAU MWANGI 1ST DEFENDANT

ANDREW WAICHUNGO MWANGI 2ND DEFENDANT

SAMUEL MUCHEMI MBUTHIA 3RD DEFENDANT

JUDGMENT

1. By a plaint dated 21st April, 2016 and filed on an even date, the plaintiff seeks judgment against the defendants jointly and severally for: -
 - (a) A declaration that the registration of the defendants as the owners of the parcel of land known as Gatarakwa/Gatarakwa 1/176 (the suit property) was illegal, unlawful and fraudulent.
 - (b) The registration be revoked, cancelled and the land reverted to the names of Jane Wanjiru Gacheru (deceased);
 - (c) Damages for constructive trespass.
 - (d) Costs of the suit plus interest.
2. The plaintiff's case is that the suit property which was originally registered in the name of Jane Wanjiru Gacheru was fraudulently registered in the name of the defendants. The particulars of fraud urged against the defendants are: -
 - (i) Purporting to transact on land belonging to a deceased person;
 - (ii) Uttering fake documents purporting them to be genuine transfers;



- (iii) Presenting for registration fake and unlawful documents of transfer;
 - (iv) Transferring land without lawfully obtaining consent to transfer;
 - (v) Dealing unlawfully and illegally with the land.
3. It is pleaded that the owner of the suit property died in 1997 and that the defendants got registered as the proprietors of the suit property in 2014 way after the previous owner had passed on.
 4. On 28th November, 2015 the defendants filed a joint statement of defence through which they denied the allegations leveled against them and contended that the suit property was legally conveyed to them by the registered owner thereof.

Evidence

The Plaintiff's case.

5. When the matter came up for hearing, the plaintiff informed the court that the deceased person herein is her mother and that she is an administrator of her mother's estate.
6. Although her mother had not transferred the suit property to the defendants by the time she passed on and despite the original title deed being in the hands of her young sister, she conducted a search and established that the suit property is registered in the name of the defendants.
7. In cross examination, the plaintiff acknowledged that she is married and that she does not live in the suit property. She could not remember when her mother died and she had never seen the documents relied on in transferring the suit property to the defendants. She stated that she did not report the fraudulent transaction to the police but confirmed filing this suit. She stated that she was not aware that the defendants reported her to the police for putting a caution on the land.
8. She maintained that her mother never sold the suit property and to the best of her knowledge the suit property is unoccupied.
9. She stated that they filed a succession cause in respect of their mother's estate but did not inform the defendants because they are not related to them.
10. Margaret Wangechi Miriti, produced the original title deed in respect of the suit property. She stated that she is the administrator of the estate of the deceased person herein and that the title deed was given to her by her late mother. (The court noted that the original title deed in respect of the suit property is still in the name of the deceased).
11. The court heard that P.W.2 never sold the suit property and does not know where the suit property is situated; that the title deed has always been with her (P.W.2) and that nobody informed her (P.W.2) that her mother had sold land to the defendants but she is aware there is another title for the suit property.
12. further stated that she does not know that the defendants used to visit the suit property when her mother was alive and neither did the plaintiff inform her when she filed the suit herein.

The Defendants' case.

13. D.W.1 Johnstone Kamau Mwangi relied on his statement recorded on 14th March, 2018 as his evidence in chief.
14. In cross examination, he acknowledged that in his statement he has not identified the person who sold the land to them and has neither filed nor produced any sale agreement in respect of the suit property.



- He stated that he could not remember when they went to the Land Control Board but insisted that they went to the board with Jane (the seller).
15. He stated that he had no minutes from the Land Control Board Mweiga, but informed the court that they handed all their documents to their advocate and did not understand why their advocate did not file the documents in court or obtain certified copies from the Land Registrar for purposes of the suit.
 16. He stated that they purchased the land on or about 2014 from the owner but informed the court that he was not aware that the owner, Jane Wanjiru Gacheri, died in 1997. Although in his statement he has not stated when they started the transaction or who the seller was and why they registered the land in 2014, he maintained that he purchased the land legally from Jane Gacheri.
 17. In re-examination, he maintained that he bought the land from Jane Wanjiru Gacheri and that the transaction was done by their lawyer, King'ori; that all original documents were taken to the lands office by their lawyer and that the three defendants in this suit are the ones who purchased the land.
 18. At close of hearing, parties filed submissions which I have read and considered.

Submissions.

The Plaintiff's submissions.

19. In the submissions filed on behalf of the plaintiff, it is pointed out that the grant of letters of administration issued to the plaintiff on 18th February, 2015 shows that the deceased died on 7th May, 2007 while the impugned transfer was procured on 16th October, 2014 and submitted that the plaintiff demonstrated that no sale of the suit property ever took place as the purported seller died before the transfer. For the foregoing reasons, it is submitted that impugned transfer must have been procured illegally.
20. Pointing out that the original title deed was produced in court, it is mysterious how the defendants got registered without the original title.
21. Because no agreement for sale or any form of memorandum was produced by the defendants to show any sale and no signed transfers or receipts for payment or consent to transfer were produced, the plaintiff's suit is said to be direct and the evidence in respect thereof overwhelming. The defendants are said to have failed to produce any evidence capable of controverting the evidence adduced by the plaintiff.

The Defendants' submissions.

22. On behalf of the defendants, it is submitted that the plaintiff has not proved illegality or fraud. In that regard, it is contended that the plaintiff was unable to tell when her mother died and no death certificate was produced to confirm when the plaintiff's mother died. Based on the plaintiff's testimony to the effect that she had not seen any of the documents to effect transfer in their favour, it is contended that the contention by the plaintiff that there was fraud in the transfer had no basis.
23. Because the plaintiff is not the administrator of the estate of her mother, she is said to be a busy body in these proceedings. This is so despite the defendant's having acknowledged that the plaintiff has a limited grant of letters ad litem authorizing her to institute the current suit on behalf of the estate of her mother. The defendants have further contended that the suit property does not form part of the estate of the deceased in the confirmed grant held by P.W.2. Because the plaintiff neither reported the alleged fraud to police nor included the Land Registrar as a party to this suit, it is contended that fraud has not being proved to the required standard.



24. Concerning possession of the original title deed by the plaintiff, it is submitted that there is no evidence to confirm that the title was issued by the lands office or a replacement title was issued in its place.
25. Arguing that it is common practice when a title is lost or misplaced for a new one to be issued, the fact that the title was issued in the year 2014 per se is said not to be an illegality as what was required is for the registered owner to have executed a transfer.

Analysis and determination

26. A certificate of official search dated 21st March, 2014, (Pexbt 2) shows that the suit property was registered in the name of Jane Wanjiru Gaceri on 16th June, 1987.
27. A certificate of official search dated 12th February, 2016 shows that the suit property was registered in the names of the defendants on 16th October, 2014 (Pexbt 3).
28. The Plaintiff produced Limited grant of letters of administration ad litem in respect of the estate of the deceased issued to her on 18th February, 2015 vide Nyeri Chief Magistrate's Court Probate and Administration Succession Cause No.27 of 2016 authorizing her to file the suit herein.

Analysis and determination.

29. From the pleadings and the evidence adduced in this case, I find the sole issue for the court's determination to be whether the plaintiff has made up a case for being granted the orders sought.
30. With regard to that issue, upon considering the evidence adduced in this matter which shows that by the time the suit property was transferred to the defendants when its owner was deceased and there being no evidence that the transfer was sanctioned by its owner or her legal representative and there being evidence that the original title in respect of the suit property is still held by the administrator of the estate of the owner of the suit property, I entertain no doubt that the transfer in favour of the defendants was effected by fraud and as such liable to be interfered with under Section 26 as read with Section 80 of the *Land Registration Act*. The said sections of law provide as follows: -

“26. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except – (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

80.

- (1) subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) the register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”



31. In the circumstances of this case I find that the plaintiff's case has merit and it is allowed as prayed.
32. With respect to the prayer for damages for constructive trespass, cognizant of the fact that damages for trespass to land are awardable without proof of damage suffered, I assess the damages payable to the plaintiff at Kshs. 150,000/= to attract interest at court's rate from the date of delivery of this Judgment to the date of payment in full.
33. Orders accordingly.

DATED AND SIGNED AT ITEN THIS 26TH DAY OF APRIL, 2022.

L. N. WAITHAKA

JUDGE

READ, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF MAY, 2022.

J. O OLOLA

JUDGE

