



**Muturi v Wandere & another (Environment & Land Case
14 of 2020) [2022] KEELC 2318 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 14 OF 2020
JO OLOLA, J
JUNE 30, 2022
FORMERLY NAIROBI HCCC NO. 403 OF 2005 (OS**

BETWEEN

DAVID SYMON MUTURI PLAINTIFF

AND

KEN ISAAC MURAGURI WANDERE 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

JUDGMENT

Background

1. This suit was initially filed at the High Court at Nairobi as HCCC No. 403 of 2005. It was transferred to this Court on 24th February, 2020 before being given its current number.
2. By his Complaint dated 8th April, 2005 as filed on 11th April 2005, David Symon Muturi suing as the Personal Representative of the late Mwangi Wandurua (the Plaintiff) sought judgment against the two Defendants jointly and severally for:
 - (a) A declaration that L.R No. Chinga/Kagongo/957 is owned by Mwangi Wandurua (Deceased);
 - (b) An order for the 1st Defendant to surrender the second title deed unlawfully issued to him for cancellation;
 - (c) Rectification of the Register/Record kept by the District Land Registrar, Nyeri by removing the name of the 1st Defendant;



- (d) An injunction restraining the 1st Defendant, his agent or servants (from) entering the said land and/or disposing it off and/or building or doing any cultivation thereon until the hearing and determination of this suit;
 - (e) Costs of this suit; and
 - (f) Any other or further order that the Court deems fit to grant.
3. Those prayers arose from the Plaintiff's contention that on or about 19th January 1995, the said Mwangi Wandurua was registered as the proprietor of the suit property situated in Othaya, Nyeri. The said Mwangi Wandurua later passed on a month after the issuance of the title on 19th February, 1995.
 4. The Plaintiff avers that on or about 2nd February 1995, the suit property was unlawfully and fraudulently transferred to the 1st Defendant with a title deed issued in his name. The Plaintiff asserts that the issuance of the second title was as a result of fraud committed by the two Defendants herein and hence the orders sought in the suit.
 5. By an order issued herein on 8th December 2005, it was directed that the 1st Defendant Ken Isaac Muraguri Wandere be served by way of substituted service. Despite such service by advertisement in a newspaper, the 1st Defendant neither entered appearance nor did he file a response to the Plaintiff's claim. Following an application dated 19th September, 2006 by the Plaintiff, an interlocutory judgment was entered against the 1st Defendant on 5th October, 2006.
 6. While the Honourable the Attorney General (the 2nd Defendant) entered appearance and filed a Statement of Defence on 22nd June 2007, they did not participate at the hearing hereof.

The Plaintiff's Case

7. The Plaintiff testified as the sole witness as the trial herein. Testifying as PW1, the Plaintiff told the Court that he is the eldest son and the personal representative of the late Mwangi Wandurua. PW1 told the Court that sometime in 1995, his father decided to sub-divide his land Chinga/Kagongo/249 into 3 portions to transfer the same to his sons. The resultant parcels Chinga/Kagongo/959 was transferred to the Plaintiff while Chinga/Kagongo/958 went to his brother Peter Mwangi Ritho. The third portion – Chinga/Kagongo/957 was to be transferred to his other brother Humphrey Wandere Mwangi but Humphrey did not process his title due to ill health. Humphrey later died on 22nd May, 1998.
8. PW1 further testified that on 23rd June, 1998, he went to the Nyeri Land Registry to find out the position regarding his deceased brother's land. It was then he discovered that the land in question was on 2nd February, 1995 registered in the name of the 1st Defendant.
9. PW1 told the Court that the 1st Defendant's mother was the wife of his brother the late Humphrey Wandere Mwangi but the 1st Defendant was born before his mother got married to the Plaintiff's brother. PW1 told the Court that when the 1st Defendant's mother Faith Wangechi passed away too, the 1st Defendant left to go and live with the mother's parents. PW1 told the Court it was unclear to him how the 1st Defendant got registered as the proprietor of the land without going through the Land Control Board and how as a minor, he was issued with a title deed for the land.



Analysis And Determination

10. I have carefully perused and considered the pleadings filed herein, the sole testimony of the Plaintiff and the evidence adduced at the trial. I have similarly perused and considered the submissions placed before me by the Plaintiff's Learned Counsel. Both Defendants failed to take part in the proceedings herein.
11. The Plaintiff has sued the Defendants in his capacity as the legal representative of the estate of his father the late Mwangi Wandurua. According to the Plaintiff the suit property Chinga/Kagongo/957 situated in Othaya, Nyeri County was registered in the name of his deceased father on 19th January, 1995.
12. The Plaintiff told the Court that prior to his father's death on 19th February 1995, he had decided to sub-divide his land parcel number Chinga/Kagongo/249 into three portions for purposes of transfer to his three sons being the Plaintiff himself together with his brothers Peter Mwangi Ritho and Humphrey Wandere Mwangi.

Accordingly the old man caused his original parcel of land to be sub-divided into parcel numbers Chinga/Kagongo/957, 958 and 959.

The Plaintiff told the Court that while himself and his brother Peter were able to process their respective title deeds for their parcels of land being parcel Nos. Chinga/Kagongo/959 and 958 respectively, their brother Humphrey Wandere Mwangi did not process his title deed due to ill health.
14. The Plaintiff told the Court that his brother subsequently passed away on 22nd May 1998. A month after his brother's death the Plaintiff visited the Land Registry at Nyeri seeking to register a caution on the land as a beneficiary. He was however unable to register the caution and it was then he learnt that the land parcel No. Chinga/Kagongo/957 had on 2nd February, 1995 been registered in the name of the 1st Defendant.
15. The Plaintiff accused the 1st Defendant of procuring the said registration through fraud and collusion with the Land Registry officials who are sued herein through the Honourable the Attorney General (the 2nd Defendant).
16. The 1st Defendant did not make any appearance herein and the suit proceeded as an undefended suit after the Honourable the Attorney General who had entered appearance and filed a defence also failed to turn up on the date scheduled for hearing.
17. From the material placed before me however I was unable to find any basis for the grant of the orders sought herein by the Plaintiff. This suit was instituted by the Plaintiff in his capacity as the legal representative of his father – Simon Mwangi Wandurua. From the Certificate of Death produced by the Plaintiff, his father passed away on 19th February, 1995 at the prime age of 81 years.
18. From the Plaintiffs' own testimony, his father had prior to his death sub-divided his land parcel number Chinga/Kagongo/249 into three parcels which he transferred to his three sons. The Plaintiff's brother Humphrey was given parcel number Chinga/Kagongo/957 as a result of the sub-division. While the Plaintiff and his brother Peter were able to transfer their portions into their names Humphrey was unable to transfer parcel number 957 into his name due to ill-health.
19. It was clear from the Certificate of Death produced by the Plaintiff that Humphrey was married to the 1st Defendant's mother and that he outlived their father by three years before his death on 22nd May, 1998. According to the Plaintiff, the 1st Defendant was the son of his brother Humphrey's wife but was not the biological son of his brother.



20. It was telling that the Plaintiff had not taken out letters of administration for the estate of his brother to whom land parcel number 957 had by his own admission been transferred by his father. While he told the Court that Humphrey's wife Faith Wangechi also died, there was no evidence of when she died and whether it was before or after Humphrey's death. Similarly while the Plaintiff asserts that his brother's "only" daughter Yvone Wanjiru died after her mother's death, there was no evidence provided of the same.
21. In his written statement before the Court, the Plaintiff doubted how the 1st Defendant who was apparently a minor at the time of registration was issued with a title deed without going through the Land Control Board. That statement appeared to me to be contradictory as at paragraph 2 of the same statement the Plaintiff had asserted that his own father obtained the consent of the Board for the transfers and all that remained was for the sons to process their title deeds.
22. And while it was true that a perusal of the Certificate of Search produced by the Plaintiff shows that the 1st Defendant was registered as a minor, that on its own would not be evidence of fraud as the registration of an underage person is clearly allowed under Section 47 of Land Registration Act, No. 3 of 2012.
23. Arising from the foregoing, it was clear to me that the Plaintiff had failed to prove any entitlement to the suit land despite this suit being undefended. The same is dismissed with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 30TH DAY OF JUNE, 2022.

In the presence of:

Mr. Nderi for the Plaintiff

No appearance for the Defendants

Court assistant – Kendi

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J. O. Olola

JUDGE

