



REPUBLIC OF KENYA

High Court at Meru

Civil Suit 108 of 2010

CHARLES KIMAITA MWITHIMBU.....1ST PLAINTIFF

JANE GAUKU M'RITHARA(Suing as legal representative of

M'RITHARA M'MUTUNGA(DECEASED).....2ND PLAINTIFF

VERSUS

EDWARD MUTUA M'MWITHIGA.....DEFENDANT

J U D G M E N T

The plaintiff's Charles Kimaita and Jane Gauku M'Rithara who are legal representatives of the estate late M'Rithara M'Mutunga filed this suit against the defendant, Edward Mutua M'Mwithiga claiming the following:-

a) That the defendant be ordered to re-transfer back one acre from the suit land No.L.R. Ntima/Ntakira/1864 and Ntima/Ntakira/1965 to the plaintiff's or alternatively the defendant do compensate the plaintiffs to the present market value of the suit property.

b) General damages

c) Costs of the suit with interest

d) Any further or better relief which this honourable court may deem fit to grant .

The defendant filed defence denying the plaintiff's claim and sought the plaintiff's suit to be dismissed with costs.

Both the plaintiffs and the defendant testified and each called witnesses. That after close of the defendant's case both sides agreed to put in written submissions. The plaintiffs filed their submissions on 1st June, 2011 whereas Mr.Rimita, the learned Advocate for the defendant filed his submissions on 18th July, 2012.

The 1st plaintiff testified that the two parcels of lands in dispute belonged to their late father M'Rithara M'Muranga. That when he wanted to file succession cause he went to land office and found Parcel No.Ntima/Ntakira/ 1 was 4 acres yet his father had told him it was 6 acres. He later found that two parcels of land had been excised from the original title by Mutua, the defendant, being Ntima/Ntakira/1864 and 1965. The plaintiff produced green card in respect of land parcel No.1864 and 1965 as plaintiff exhibit

No.1. He averred that the green card did not reflect his father's identity card and as such he said he realized there was forgery hence he filed this suit. The 1st plaintiff testified that he had confirmed grant of estate of M'Rithara Mutunga which he produced as exhibit P.1. Exhibit No.5. He averred that his father was illiterate and signature appearing on the transfer form was not his. He stated his father had a green identity card. That his father left him at Magundu. During cross-examination the plaintiff stated that his identity card was recorded as Charles Kimaita Mwithimbu and that he is son of M'Rithara M'Mutunga and his mother is PW2 Nyoroka. The plaintiff testified that he was born in 1949 and in 1979 he was 30 years old. He testified that his father died on 31-7-1979. That he became aware that the defendant had encroached on his father's land in 1985 when his mother told him. He averred that they had a case before Chief and the defendant refused to leave their land claiming he had purchased the land. The plaintiff testified that he had heard of Meme and knew Geoffrey. He testified Geoffrey could not have been in the Land Control Board in 1979 but now he is in the Board.

PW2 Nyoro M'Ritha on her part testified that Charles Kimaita(PW1) is her son. She testified that when she got married her husband had land at Magundu, then he went to Mpuri. That she joined him at Mpuri when lands were demarcated. That her husband was called M'Rithara. That they found a house in the shamba and stayed there. That Mutua, the defendant claimed that he had purchased her husband's land. That he made the claim after death of PW2's husband. Later PW2 found that Mutua had fenced part of the land which he claimed he had purchased including even the part he had not bought. That PW2 kept quiet over defendant's actions. PW2 testified that she did not know whether the land had been sold to the defendant. During cross-examination PW2 testified that she has identity card. That she could not recall when she was born. That her original card got lost and she got a duplicate. That her husband had an original identity card but they have never found it after his death. PW2 testified that 1st plaintiff is her nephew on her husband's side. That her husband and father of 1st plaintiff were brothers. That the father of 1st plaintiff is dead and the plaintiff is the one in charge of the deceased properties. PW2 further stated that the defendant's shamba is adjacent to theirs and that there was a path between them. That the defendant encroached into the plaintiff's shamba after death of PW2's husband. That the defendant has built on the suit land and planted trees and crops. PW2 denied attending Land Control Board when consent to transfer land to the defendant was granted.

PW3, Bernard Kibiru Kamwaro, testified that he is the land Registrar Meru Land office. That Ntima/Ntakira/1864 was registered in the name of Rithara Mutunga on 6.2.1975. That on 21.5.1976 it was transferred to Edward Mutua M'Mwithiga and title issued on the same day. PW3 produced transfer document as plaintiff exhibit No.2. He testified that the last entry on parcel 1864 was an inhibition concerning this case which was entered on 23.9.2010. That parcel Ntima/Ntakira/1965 was registered in the name of Rithara Mutunga on 17/6/1976 and was transferred to Edward Mutua M'Mwithiga on 31.8.1976 and title deed issued. PW3 testified that he also had the mutation form that subdivided parcel 1865 to give rise to parcel No.1965 and 1966. PW3 produced the same as plaintiff exhibit No.3. He testified the instruction to subdivide the land were given by Rithara Mwithiga and Edward Mutua M'Mwithiga. PW3 testified that he had a letter of consent from the Council giving consent to subdivision of Plot No.1865 to 1965 and 1966. PW3 produced the consent as plaintiff's exhibit No.4.

He confirmed that the transfers in respect of both properties in this case are supported by all necessary documents. During cross-examination, PW3 testified that the lands are agricultural lands but there was a time municipality was allowed to give consent. That plot 1864 was subdivided from Ntima/Ntakira/1 and was registered in the name of Rithara Mutunga and that was the norm and that is what even happens today. He testified transfer of 1864 was prepared at the land office by the Land Registrar and that was normal. That the parties were identified by Meme J. M. Anjuri. That Ritha Mutunga was noted to be of age without identity card as per plaintiff exhibit No.2. He testified that at the time old people were not getting identity card and used to get transaction without identity card. That parcel No.1965 was subdivided from Ntima/Ntakira/1 and after subdivision it was registered in the name of Rithara Mutunga. PW3 referred to plaintiff exhibit No.4 in which it is noted Mutunga was overage without identity card. He testified the transfer was prepared and witnessed by the Land Registrar. That the two parties were identified by Geoffrey Kirimi Itania.

PW4, Jane Gauku M'Rithara, 2nd plaintiff, testified that Rithara Mutunga is her father. She concurred with evidence of the 1st plaintiff and stated that Charles Kimaita is her brother. She stated that when their father went to Mpuri they were left with 1st plaintiff at Magundu. She stated PW2 is their mother. During cross-examination PW4 confirmed 1st plaintiff is her brother.

PW4 testified that she did not know how Mutua got into the suit land. She testified that they do not know if he bought it or was given the land. She testified that during the life time of their father they did not ask him why Mutua was on the suit land. That before their father's death Mutua had built a house on the suit land. PW4 testified that she did not know the relationship between their father and Mutua.

On being re-examined PW4 testified that her father could not read or write and that when Mutua fenced further part of suit land he began to chase them and when they enquired they found he had a title deed. That PW4 was shown title deed through the Chief. That before they came to court they tried to negotiate with the defendant but he refused.

That after PW4 gave evidence court issued witness summons against Geoffrey Kirimi Itania (ID) No.53024/61 to attend court and give evidence.

PW5 Geoffrey Kirimi Itania, testified that the name on plaintiff exhibit No.4 is his but the signature was not his. He testified that he does not recall signing on Exhibit No.4. He also testified that he is familiar to Edward Mutua Mwithiga in Plaintiff Exhibit No.4. He denied having even seen document Plaintiff Exh.No.4. During cross-examination the witness gave his identity card which was No.8882610 which showed that he got it in 1979. He testified that he had another identity card prior to that date but he could not recall the previous number. He testified the signature on his identity card is not similar to plaintiff exhibit No.4. That he did not know Rithara Mutunga but he knew Edward Mutua. He stated that Plaintiff Exh.No.4 bears his full name. PW5's identity card was produced as P.Exhibit No.6.

The defendant gave evidence and called four witnesses in support of his defence. DW1, Edward Mutua M'Mwithiga testified that he came to know 1st plaintiff in 2010 but had known 2nd plaintiff for a long time. He stated he knew M'Rithara M'Mutunga, now deceased as his neighbor. That he died in 1979. He stated that he did not know whether he was related to the 1st plaintiff but the 2nd plaintiff was his daughter. The defendant testified that he bought the suit land from the deceased being 1 acre in 1975 at a purchase price of Kshs.2000/= and took possession, built a house and the parcel of land No.Ntima/Ntakira/1864 was transferred to him. That he has been living on that land to date. He testified that the land was lawfully transferred to him after consent was obtained. That the transfer form he testified was prepared by the deceased and that both the defendant and the deceased proceeded to lands office where transfer forms were prepared for them by the land Registrar. The defendant further testified the deceased before his death sold to him one (1) more acre in 1976 and transferred the same to him being Ntima/Ntakira/1965.

The defendant testified that he has on both two acres a home, with various developments, which included piped water, livestock, shade trees and he has crops thereon and has since 1975 to date been in sole occupation of his two acres which are fenced. That the defendant during the lifetime of Rithara M'Mutunga he was peacefully living on the land but in 2010 the 1st plaintiff started claiming the defendant obtained the land fraudulently.

During cross-examination the defendant testified that he bought the land Ntima/Ntakira/1864 which was excised from Ntima/Ntakira/1 at a purchase price of Kshs.2000/-. He testified that he did not have a copy of the sale agreement though they had one in writing. He testified that they attended land control board for consent and they completed all transfer documents. He stated the transfer form did not indicate the deceased's identity card and that the deceased knew how to read and write. That the deceased signed the transfer document which were left at the lands office. The defendant further testified that he did not have agreement in respect of Ntima/Ntakira/1965 as the same got lost. That in respect of transfer from of Plot no.1965 he testified the deceased thumb printed the same and his identity card was not indicated. The defendant testified that at those days people could transact a transfer without identity card. He further

stated the plaintiff's family members knew of the transaction. The defendant testified that Joseph Kirimi was a witness of the deceased. That the deceased signed the mutation forms by thumbprinting and that the sub-division of plot No.1965 was done in the presence of the deceased.

In re-examination the defendant testified that he did not know the identifying witness one Meme J. M Anjuri and that he did not know Joseph Kirimi Itania as his name was given by the deceased. DW2 George Kaumbu Mwithiga, supported the defendant's defence. He averred that he knew M'Rithara M'Mutunga had a land at Mpuri. That Rithara M'Mutunga sold 1 acre to Edward Mutua M'Mwithiga in 1975 and that in 1976 he sold one (1) more acre to the defendant. That the defendant took possession of the land parcels of lands in 1976. He built house, toilets, cattle shades and planted trees and bananas. That the defendant's family moved in that since 1976. The defendant and his family has had peaceful occupation of the land since then. That it was only in 2010 when DW2 heard the plaintiffs claiming land parcel Ntima/Ntakira/1864 and 1965 were their lands. He testified that when the defendant took possession of the purchased lands Mr. Rithara M'Mutunga was alive and the plaintiffs did not raise any claim by then. He further stated the 2nd plaintiff was by then living at her father's land before she got married and Mutua was still on the suit land. During cross-examination DW2 stated that the defendant told him he purchased the land and saw him move to the suit lands and by such time Rithara M'Mutunga had family and was living on the land with his family. He testified that Rithara died in 1979.

DW3, Monica Mukiri Mutua, corroborated the evidence of DW1 and DW2. DW3 testified that when she got married to DW1, in 1976, she found that he had bought the suit lands and had a house on the land. The parcel of lands were Ntima/Ntakira/1864 and 1965. That each land is 1 acre and the lands had been bought from Rithara M'Mutunga. That when DW3 moved to the land Rithara M'Mutunga was alive and that since DW3 moved to the land she has been in occupation and have had 4 children whilst living on the suit land. That on the land the defendant and DW3 have planted trees, have two semi-permanent houses made of timber and a permanent house, cattle shed and piped water. That the land is fenced with barbed wire with trees round. That the defendant had been in peaceful possession and occupation since 1975. That it was only in 2010 when the plaintiff's started claiming the defendant's land. During cross-examination, DW3 testified that she was only shown title deed but not sale agreement.

DW3, further testified that when she moved to the suit she found the plaintiffs' father living on the portion of land that her husband had not purchased. During re-examination, DW3 testified that her husband, DW1, bought 2 acres being part of the bigger land of Rithara M'Mutunga. That 2nd plaintiff was living on part of the bigger land after sub-division.

DW4, Leah Kinaitore Daniel, corroborated the defendant's evidence. DW4 averred that he came to know 1st plaintiff in 2010 when he started this case but that she had known 2nd plaintiff for a long time as she was staying together with her at the same area. DW4 testified that the defendant is her neighbor. That she became her neighbor when he bought land from Rithara M'Mutunga. That when defendant bought the land Rithara M'Mutunga was living on the land and he sold two acres. That the defendant started living on the land when he was young, that he married whilst on the suit land and still lives thereon. That the land defendant purchased is fenced and has trees along the fence and round the land.

That the defendant has two houses, piped water and livestock shed. That the defendant started living on the land during the lifetime of Rithara M'Mutunga. During cross-examination DW4 testified that he saw the defendant, Rithara and surveyor at the land. DW4 testified that she does not know about the selling of the land but that she saw the land having been fenced. DW4 testified she does not know when the land was fenced but according to Meru custom once land is bought the purchaser is supposed to fence it.

That Rithara M'Mutunga used to live on the land with his wife before he sold part of it. DW5, Evangeline Karai, testified that Rithara M'Mutunga was her neighbor. That the defendant bought a portion of land from Rithara M'Mutunga when he was a young man. That the defendant purchased two acres and fenced the land. That the defendant planted trees and has piped water on the land. That the defendant and his family live on the land and has never moved out. That he did not hear of any problem during the lifetime of Rithara M'Mutunga but the problem started 2 years ago. That the two acres are solely occupied by the defendant Mutua and his family. During cross-examination DW5 testified that

Rithara M'Mutunga told her he had sold the suit land to Mutua M'Mwithiga.

I have considered the pleadings, evidence adduced by both parties and their witnesses and the written submissions by the plaintiff's and by Mr. Rimita, learned Advocate for the defendant. The issues for consideration in this suit as I understand the same is as follows:-

- 1. Have the plaintiff's proved the particulars of fraud against the defendant and further were land parcel Ntima/Ntakira/1864 and 1965 proved were fraudulently transferred into the defendant's name?**
- 2. Have the plaintiffs proved that parcel No.Ntima/Ntakira/1864 and 1965 should be re-transferred back to the plaintiff's or alternatively should the defendant be ordered to compensate the plaintiffs for the said parcels of lands at market value of the suit property?.**
- 3. Are the plaintiff's entitled to general damages?**

The plaintiffs in their plaint under paragraph 8 set out the particulars of fraud that is to say, the defendant mis-represented himself to all relevant offices/authorities concerned as the deceased son and caused L.R.Ntima/Ntakira/1864 and 1965 transferred to him and that he obtained the titles to the suit lands whilst to his knowledge he knew he was not a son of the deceased. The plaintiffs further under paragraph 5 of their plaint averred that between 1975 and the year 1976 they were minors, when the defendant fraudulently caused the suit lands to be subdivided into two portions and given new numbers that is Ntima/Ntakira/1864 and 1865. The plaintiffs in their evidence and that of their witnesses, they did not mention that the defendant having presented himself as son of the deceased in causing transfer of the suit land into his name. The plaintiffs gave the particulars of fraud in their plaint but did not attempt to call any evidence in support of the alleged particulars. The particulars of the fraud have not been proved to the required standards or at all. The burden of proof of the particulars of fraud laid upon the plaintiffs who were obliged to discharge the burden of proof which they did not. The defendant informed the plaintiffs that he was a purchaser for value consideration and even showed the plaintiffs his title deed. The plaintiffs' witness, PW2, confirmed the suit land was fenced by the defendant who alleged he had bought the same. PW3 plaintiffs witness confirmed the suit lands were lawfully transferred to defendant after consent and transfer documents to subdivide and mutation forms were duly executed by the deceased in favour of the defendant. PW3 testified that the transfer in respect of both suit lands Ntima/Ntakira/1864 and 1965 were supported by all necessary documents. The plaintiffs contended that the deceased could read and write, hence the signature on one of the transfer forms was not his. The defendant on the other hand contended the deceased could not read and write. The burden of proof that the deceased could not read and write was upon the plaintiffs to prove so. That it was upon the plaintiffs to prove that the signature in form in respect of Ntima/Ntakira/1864 was not made by the deceased. They could do so by calling the Land Registrar who witnessed the execution on 6/2/1975. The plaintiffs did not call the Land Registrar who witnessed the deceased's signature. They failed to discharge that burden. On issue of there being no particulars of deceased identity card number on the transfer forms, the plaintiffs' witness, PW3, gave a plausible explanation that in olden days old people could transact land deals without identity card. The plaintiffs did not successfully challenge their witness's explanation and the same is found to be reasonable and acceptable.

In the case of **KOINANGE & 13 OTHERS – V- KOINANGE(1986), KLR 23, Amin J**, as he then was held:-

- 1. it is a well-established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud, in this case the plaintiffs, had the burden of proving it and they had to discharge that burden.**
- 2. Allegations of fraud must be strictly proved and although the standard of proof may not be as to require beyond reasonable doubt, it ought to more than on a balance of probabilities.**

Also in the case of **Mutsonga – V-Nyati(1984) KLR 425** Hon. Kneller, J, as he then was held:-

1. Allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities, and it is a question for the trial judge to answer.

In the instant case I find the plaintiffs have failed to prove their assertions that the defendant misrepresented himself as son of the deceased and caused land Ntima/Ntakira/1864 and 1965 to be registered into his name.

The allegation of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, it ought to be more than on a balance of probabilities. The plaintiffs I find have failed to discharge that burden. The evidence on record has fallen short of the required standard of proof.

The suit lands were transferred into the defendant's name during the life time of the deceased, to be particular in 1975 and 1976 when the lands were transferred into defendant's name the 1st plaintiff was about 26 years old as in 1979 when the deceased died he said he was 30 years. The 2nd plaintiff did not disclose her age.

The defendant has since 1975 been in open and notorious possession of the suit lands. He had put up fence and buildings on the suit land among other developments. The deceased did not raise any claim nor his wife(PW2) as well as the 1st plaintiff during the deceased lifetime. The neighbours gave evidence that the defendant's developments, use and occupation of the land was done openly and even the deceased informed them he had sold the land to the defendant. The defendant on being confronted by the plaintiffs and the deceased wife(PW2) he told them he had purchased the land and he had title deed to the suit lands.

Section 7 of the **Limitation of Actions Act** bars an action to recover land after the end of twelve years from the date on which the right of action accrued.

Section 7 of the Limitations of Actions Act provides:-

7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

Further even if 2nd plaintiff was under disability, when the action occurred, she did not make an application for extension of limitation period before the end of six years from the date when she ceased to be under disability.

Section 22 of the Limitation of Actions Act provides:-

22. If, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of six years from the date when the person ceases to be under a disability or dies, whichever event first occurs, notwithstanding that the prescribed period of limitation has expired:

Provided that-

(i) this section does not affect any case where the right of action first accrues to a person under disability claims;

(ii) when a right of action which has accrued to a person under a disability accrues, on the death of that person under a disability, to another person under disability, no further extension of time is allowed by reason of the disability of the second person;

(iii) an action to recover land or to recover money secured on a mortgage of land may not be brought by a person by virtue of this section after the end of thirty years from the date on which the right of action accrued to that person or to some person through whom he claims;

In the instant case the plaintiffs cause of action arose in 1975 and 1976, which is a period of 25 years to the date of filing of this suit. The plaintiffs suit was filed after a period of over 12 years and the same is time barred.

Section 80 of the Land Registration Act, 2012(No.3 of 2012) provides for rectification of registration by directing that the registration be cancelled, if it is satisfied that any registration was obtained or made by fraud or mistake, however the register shall not be rectified to affect the title of a proprietor who is in possession and who acquired the land for value consideration

Section 80 (1) and (2) of the Land Registration Act provides:-

80. (1) Subject to subsection (2), the court may order the 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 who is in possession and had acquired the land, lease or charge for valuable consideration, 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.

In the instant suit I am not satisfied the registration was obtained by fraud but through purchase. The defendant is and has since 1975 been in possession of the suit after acquiring the land for value consideration. I find the plaintiff's have failed to satisfy the conditions which would have made this court to order rectification of the register or rather order re-transfer of the suit land to the deceased estate or in the alternative order compensation be made to the plaintiffs for the said parcels of lands.

The plaintiff's in their evidence did not call any evidence in support of their claim for damages. The plaintiffs did not prove their claim that the defendant had the land fraudulently transferred to him. The plaintiffs did not suffer any damages and are not entitled to any damages.

In the circumstances of the case the plaintiffs suit is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT MERU THIS 25TH DAY OF OCTOBER, 2012.

**J. A. MAKAU
JUDGE**

Delivered in open court in presence of:

1. Charles Kimaita Mwithimbu – 1st plaintiff present
2. Jane Gauku M'Rithara- 2nd plaintiff - present
3. Mr. Mwirigi h/b for Mr. Rimita advocate for defendants - present

**J. A. MAKAU
JUDGE**