



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**LAND AND ENVIRONMENTAL LAW DIVISION**

**CIVIL SUIT NO. 5304 OF 1992**

**EKILA NDUTA**

**NGANGA.....1<sup>ST</sup> PLAINTIFF**

**PATRICIAH WANJA**

**GUGU.....2<sup>ND</sup> PLAINTIFF**

**MARY NYAMBURA**

**KAIRU.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**MUHOHO NGUKU.....1<sup>ST</sup>**

**DEFENDANT**

**RUTH NYANGARIKA THUO (Sued as the administrator and/or**

**personal representative of**

**JOSEPH THUO KOIBUTHA (Deceased).....2<sup>ND</sup>**

**DEFENDANT**

**J U D G M E N T**

1. Ekila Nduta Nganga, Patriciah Wanja Gugu and Mary Nyambura Kairu (hereinafter referred to as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively), are sisters. They are all daughters of Margaret Wanjiru Gugu, who is now deceased. The plaintiffs have brought this suit against their only brother Muhoho Nguku and Ruth Nyangarika Thuo who was substituted as the administrator and or personal representative of Joseph Thuo Koibutha – deceased.

2. The suit relates to land parcel No.Chania/Mataara/439 which was registered in the name of Margaret Wanjiru Gugu, the plaintiffs' mother. The plaintiffs contended that the 1<sup>st</sup> defendant has illegally subdivided the suit property into two parcels Chania/Mataara/1659 and Chania/Mataara/1660 pursuant to an order of declaration of trust made by a magistrate's court without jurisdiction. The 1<sup>st</sup> defendant retained land parcel Chania/Mataara/1659 and sold Chania/Mataara/1660 to the 2<sup>nd</sup> defendant. The plaintiffs maintain that they are the rightful heirs in respect to Chania/Mataara/439 as their mother left a will bequeathing the land to the 3 plaintiffs and excluding the 1<sup>st</sup> defendant.
3. The plaintiffs therefore prayed for a declaration of trust against the defendant in the plaintiffs' favour in respect of land parcel No.Chania/Mataara/439 and also an order rescinding the sub-divisions. The plaintiffs also sought a permanent injunction to issue restraining the defendants from selling, offering for sale, disposing, mortgaging, charging or parting with the title to the suit property.
4. The 1<sup>st</sup> defendant, although duly served neither entered appearance nor filed a defence. The 2<sup>nd</sup> defendant filed a statement of defence in which she denied being a personal representative or administrator of the Estate of the late Joseph Thuo Koibutha. The 2<sup>nd</sup> defendant further denied that sub-divisions Chania/Mataara/1659 and 1660 were illegally done or that the Magistrate's Court lacked jurisdiction. She contended that the plaintiff's suit was fatally defective and raised no cause of action against the 2<sup>nd</sup> defendant as the disputed parcel of land does not belong to the late Joseph Thuo Koibutha. The 2<sup>nd</sup> defendant denied that the plaintiffs were entitled to inherit Chania/Mataara/1660 or that they were entitled to a declaration of trust in their favour. The 2<sup>nd</sup> defendant maintained that she was wrongly enjoined in the suit.
5. During the hearing of the plaintiffs' case, the 3 plaintiffs and one Pauline Njeri who is also their sister all testified. Briefly their evidence was as follows: Land parcel No.Chania/Mataara/439 belonged to their paternal grandfather. He transferred the land to the plaintiffs' father Gugu Muchiri. Later Gugu Muchiri transferred the land to the plaintiffs' mother as Gugu Muchiri was sick. Gugu Muchiri decided to transfer the land to his wife rather than 1<sup>st</sup> defendant who was his son because he feared the 1<sup>st</sup> defendant would sell the land. The 1<sup>st</sup> defendant later sued the plaintiffs' mother at Thika Court and the court ordered that the land should be given to the 1<sup>st</sup> defendant. Shortly thereafter the plaintiffs' mother died. That was in the year 1982. The 1<sup>st</sup> defendant then had the land subdivided into two parcels i.e. Chania/Mataara/1659 & 1660.
6. The 1<sup>st</sup> plaintiff who by this time was the only person residing on the land ran away when she saw surveyors in the company of police officers. Subsequently, her house which was on the land was demolished. The plaintiffs filed a succession cause in respect of their mother's estate. However, the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant's husband to whom 1<sup>st</sup> defendant had transferred Channia/Mataara/1660 objected and the succession cause is still pending. The 1<sup>st</sup> defendant subsequently sold Chania/Mataara/1650 to one Kungu Kirira. The plaintiffs maintained that the sub-divisions were done illegally and that the original land ought to have been distributed in accordance with their mother's will.
7. Two witnesses testified in support of the defence of 2<sup>nd</sup> defendant. These were the 2<sup>nd</sup> defendant and her brother Francis Maina Ndirangu. Their evidence was briefly as follows: The 2<sup>nd</sup> defendant's husband bought Chania/Mataara/1660 from the 1<sup>st</sup> defendant. The land was charged to Family Finance Bank. The 2<sup>nd</sup> defendant's husband was however unable to service the loan. The Bank therefore put up the property for sale. The 2<sup>nd</sup> defendant sought help from her family. One of her brothers Francis Maina Ndirangu (DW1) attended the auction sale and bid for the property and was declared the highest bidder at Kshs.420,000/=. He paid 20% of the purchase price and was given 30 days to pay the balance. He later paid the balance through his advocate and was given the memorandum of sale. Three months later the 2<sup>nd</sup> defendant's husband died. Francis Maina Ndirangu therefore instructed the advocate to have the land

transferred to the name of 2<sup>nd</sup> defendant. Thereafter the 2<sup>nd</sup> defendant obtained the Land Control Board Consent for the transfer.

8. Each party's counsel filed written submissions urging the court to find in favour of his client. For the plaintiffs it was submitted that there was contradiction and inconsistencies between the evidence of the two defence witnesses. It was submitted that there was in fact no auction sale. It was argued that there was a conspiracy between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant to disinherit the plaintiffs. It was submitted that 2<sup>nd</sup> defendant's husband knew and was an active participant of the fraudulent subdivision and transfer and was also a beneficiary of the fraudulent acts.

9. The court was urged to apply the *nemo dat quod non habet* principal. It was contended that there was no dispute that 1<sup>st</sup> defendant unlawfully and illegally acquired title to Chania/Mataara/439 and subdivided it. It was maintained that since the 1<sup>st</sup> defendant did not have a clean title to the land all subsequent owners and or charges could not have a better title than the one 1<sup>st</sup> defendant had. It was therefore submitted that the 2<sup>nd</sup> defendant holds an invalid title on the illegality and fraud by the 1<sup>st</sup> defendant. It was argued that 2<sup>nd</sup> defendant did not take the suit property in good faith and for value without notice. It was therefore maintained that the defendants hold their titles in trust for the plaintiffs.

10. For the 2<sup>nd</sup> defendant, it was submitted that the plaintiff was bound by its pleadings in particular paragraph 6 & 7 where she averred, that the original title Chania/Mataara/439 was after the death of Margaret Wanjiru Gugu subdivided and that the subdivision was done pursuant to an order of the court. It was maintained that the plaintiffs did not prove that the court which issued the order of subdivision did not have jurisdiction.

11. Further in paragraph 9 of the amended plaint, it was alleged that the right to inherit the sold property was pursuant to the terms of the will being proved in the High Court. It was submitted that the plaintiffs' suit was an abuse of the court process as issues of succession should be dealt with in the succession cause. It was submitted that no trust was established nor was Kungu Kirira made a party to the proceedings. It was submitted that the process of sale and subsequent registration in favour of Ruth Nyangarika could not be challenged through the current suit. The court was urged to dismiss the plaintiffs' suit.

12. I have carefully considered the pleadings, the evidence adduced, the submissions and the authorities cited. It is evident that land parcel Chania/Mataara/439 was actually registered in the name of Margaret Wanjiru Gugu. It is also clear that, that parcel of land was subdivided into two parcels Chania/Mataara/1659 and 1660, and that the subdivision was done by 1<sup>st</sup> defendant following an order in a suit which he had filed against Margaret Wanjiru Gugu in the Thika Court. Although the plaintiffs disputed the legality of the court order maintaining that the court did not have jurisdiction to declare a trust, neither the order nor copies of the proceedings or judgment were availed to the court. Moreover, the plaintiffs have not in any way substantiated their allegation that the Thika Court acted without jurisdiction. Moreover, even assuming that the court did act without jurisdiction, the court order could only be challenged through the appropriate channel. There is no evidence of any such attempt. Thus, the plaintiffs failed to prove that the 1<sup>st</sup> defendant illegally subdivided Chania/Mataara/439.

13. Secondly, the plaintiffs claimed that Chania/Mataara/439 belonged to their mother, and that they were claiming the property as beneficiaries of their mother's will. Therefore, it was imperative that the plaintiffs establish that the property formed part of their mother's estate and that they were the lawful beneficiaries. This could only be done through a succession cause. The plaintiffs' evidence was that

although a succession cause was filed, the same has not been resolved as the 1<sup>st</sup> defendant filed an objection. Therefore, the question as to whether the property forms part of the estate of plaintiffs' mother has not been resolved.

14. Further although the plaintiffs testified that one of the subdivisions Chania/Mataara/1659 is now registered in the name of Kungu Kirira to whom 1<sup>st</sup> defendant sold the land, Kungu Kirira was not made a party to the suit. The court cannot therefore make orders which are prejudicial to Kungu Kirira without his being heard.

15. As regards the issue of "*nemo dat quod non habet*", the same could only arise if it was established that 1<sup>st</sup> defendant did not have a proper title to the suit property. This, the plaintiffs failed to prove. To the contrary plaintiffs' pleadings and evidence was that the subdivision was done pursuant to a court order.

16. For all the aforesaid reasons, I find that the plaintiffs have failed to prove their claim. Their suit must therefore fail. It is accordingly dismissed. In the circumstances of this case, I do not find it appropriate to award any costs.

Those shall be the orders of this court.

**Dated and delivered this 18<sup>th</sup> day of February, 2011**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -  
Nyoro H/B for Chege for the plaintiffs  
Gatimu for the 2<sup>nd</sup> defendant  
Kosgei - Court clerk