



MWN & another (Suing as the legal representative of the estate of the late SMW & Another) v TNK (Being sued on her own behalf and as the mother and next friend of ISW (Minor)) (Environment & Land Case 361 of 2016) [2022] KEELC 12642 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12642 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 361 OF 2016**

**JM MUTUNGI, J
SEPTEMBER 27, 2022**

BETWEEN

**MWN & ANOTHER PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
SMW & ANOTHER**

AND

**TNK DEFENDANT
BEING SUED ON HER OWN BEHALF AND AS THE MOTHER AND NEXT
FRIEND OF ISW (MINOR)**

JUDGMENT

1. The plaintiff instituted the instant suit by way of a plaint dated September 5, 2016 which was amended on June 10, 2019. The 1st plaintiff and the 2nd plaintiff are mother and daughter respectively. The 1st plaintiff vide the plaint claimed, she was the widow of one SMW (deceased) who was the owner of various properties at the time of his death. The plaintiffs claimed that the defendant fraudulently and illegally caused land parcel Kiambogo/Kiambogo Block x/xxxxx (Mwariki), Kiambogo/Kiambogo Block x/xxxxx (Mwariki) and Miti Mingi/Mbaruk Block x/xxxx (Kiungururia) to be transferred to her name from the name of the deceased.
2. By the amended plaint the plaintiff prayed for judgment against the defendant for:-
 - (a) Declaration that the transfer of title number Kiambogo/KiambogoBlock x/xxxxx (Mwariki),Kiambogo/KimabogoBlock x/xxxxx (Mwariki) and Miti Mingi/Mbaruk Block x/xxxx (Kiungururia) areas as a result of forgery and hence null and void ab initio.



- (b) A mandatory order compelling the Nakuru District Land Registrar to cancel and or rectify title no Kiambogo/Kiambogo Block x/xxxxx (Mwariki) and Kiambogo/Kiambogo Block x/xxxxx (Mwariki) and the same be reverted in the name of Simon Muraya Wacira (deceased).
 - (c) A mandatory order compelling the Naivasha Land Registrar to cancel and or rectify Title No Kiambogo/Kiambogo Block x/xxxx (Kiungururia) and the same be reverted in the name of SMW (deceased).
 - (d) A permanent order of injunction against the defendant restraining her either in person, employees, agents and or servants from selling, transferring, charging, occupying and or dealing in any manner with properties known as Kiambogo/Kiambogo Block x/xxxxx (Mwariki), Kiambogo/Kiambogo Block x/xxxxx (Mwariki) and Miti Mingi/Mbaruk Block x/xxxx (Kiungururia).
 - (e) General damages.
3. The defendant filed a statement of defence dated June 29, 2018. She denied the allegations of fraud and averred that the deceased transferred the suit properties to her name during his lifetime. She averred that the deceased transferred some of the properties to her name to hold in trust for the minor children she had with the deceased.

The plaintiffs case.

4. The suit was part heard before Munyao, J before whom the 1st plaintiff testified as the sole witness in support of the plaintiffs case. It was the 1st plaintiff's evidence that she was the wife of SMW (now deceased) who died on January 23, 2016. She testified that she got married to the deceased in 1990 under the Kikuyu customary law and that the 2nd plaintiff ANM was their daughter born on July 2, 1992. It was the 1st plaintiff's evidence that during her husband's lifetime they among other properties acquired land parcels Kiambogo/Kiambogo Block x/xxxx (Mwariki) in 2014; Kiambogo/Kimabogo Block x/xxxxx (Mwariki) in 2013; and Miti Mingi /Mbaruk Block x/xxxx (Kiunguria) in 2019 (hereafter referred to as 'the suit properties'). She testified that TNK the defendant herein was a mistress of her late husband and that she immediately after her husband's death without any reference to her fraudulently caused the said suit properties to be transferred and registered in her name. She stated the defendant was registered as a trustee for one ASW (minor) in respect of parcel Miti Mingi/ Mbaruk Block x/xxxx (Kiungururia). The 1st plaintiff further testified the defendant had taken her late husband's motor vehicle KCB xxx W which she sold and kept the sale proceeds.
5. The 1st plaintiff further in her evidence affirmed that the defendant was residing on the Miti Mingi/ Mbaruk Block x/xxxx land where she stated she and her husband had constructed a matrimonial home. She stated that she and her late husband had family differences in 2012 which resulted in them living separately. She affirmed further that her late husband had constructed 15 Market stalls at the Ravine Bus stage and that with the assistance of elders the defendant agreed to share the stalls and she holds 7 stalls while the defendant holds 8 stalls which they both rent out. The 1st plaintiff in her evidence stated that as at the time of her husband's death they were still married and were not divorced. She in the premises stated her husband would have consulted her and/or informed her if he wished to transfer any of the properties owned by him. She maintained she had not given any consent to any of the transfers effected to the defendant.
6. The plaintiff testified that the suit properties were registered in her late husband's name and that he had not transferred the properties to the defendant before his death. She stated her husband died on January 23, 2016 yet the defendant was registered as owner of the Kiambogo land parcels on February



- 15, 2016 and the Mbaruk parcel on March 7, 2016. The 1st plaintiff stated she had not seen any transfer executed by her late husband in favour of the defendant and neither had any letter of consent to transfer from the land control board been availed.
7. The 1st plaintiff in her evidence further explained that the differences she had with her late husband were the subject of discussion with the local administration and the assistant chief had issued letters which the parties exhibited dated August 3, 2015 and March 9, 2016 respectively. The assistant chief affirmed vide the letters that the 1st plaintiff and the defendant were co wives both having been married to the deceased under kikuyu customary law. The 1st plaintiff denied that she had threatened her late husband maintaining that they only had minor differences which she stated were normal in any relationship. She further indicated that although they had not filed any succession cause, she had taken out a limited grant (ad litem) which she had been exhibited. It is the plaintiffs prayer that the suit properties be reverted to the deceased name to enable them to take out succession proceedings for the deceased estate. The plaintiffs relied on the bundle of documents they had exhibited and the same were admitted in evidence as PEX1-8 as listed.
 8. On cross examination by Nyagaka advocate for the defendant, the plaintiff stated the differences they had in 2012 were resolved and that prior to her husband's death they were living together in Langalanga in a rented house. She however admitted they were separated between 2012 and 2015 but that they were still meeting together. The witness affirmed her husband acquired land parcels Kiambogo/Kiambogo Block x/ xxxxx and xxxxx in 2013 and 2014 respectively. She stated before she separated with her husband they were residing at her mother in law's place at Engashura where they had a matrimonial home. The witness stated her husband was imprisoned on a criminal matter in January 2012 and was released in June 2012 and that it was after his release they had differences and she left the matrimonial home and rented a house in Langalanga. She however said they resolved their differences by December of 2012 and resumed cohabitation though they were living separately.
 9. The plaintiff in further cross examination acknowledged she had a case over the Nakuru market stalls in Nakuru CMCC No 381 of 2016 where she and the defendant entered a consent on the basis that they were co-wives of the deceased. The plaintiff denied that the deceased had executed any transfers in favour of the defendant in respect of the suit properties before he died. She stated that after discovering the defendant had transferred the suit properties to her name she made a report to the CID to investigate but no report had been released. She reiterated that they have not been in a position to file succession because the defendant had unlawfully transferred some of the land titles to her name.

The defendants case.

10. TNK, the defendant testified as DW1 and called her mother in law NWW who testified as DW2. It was the defendant's evidence that she married SMW (deceased) in 2008 and had 3 children with him. She testified the deceased had married the plaintiff but they had separated. The defendant stated she and her late husband had acquired 2 plots, at pipeline area (Kaimbogo) and had a matrimonial home at Mbaruk (Greenstead area).
11. It was her further evidence that before her husband died, he transferred the 2 pipeline plots to her name and Mbaruk plot to her name to hold in trust for their minor son. She further affirmed that she and the plaintiff shared out the market stalls their late husband had put up in Nakuru. She stated her late husband died on January 22, 2016 and was buried on February 4, 2016. She stated the titles were issued in her name on February 15, 2016.



12. On cross examination by Chege advocate for the plaintiffs, the defendant stated that her husband brought her some forms which she signed but stated she did not attend before the land control board and that she was only called to collect the titles from the lands office.
13. DW2 NWW in her evidence adopted the contents of her witness stated dated June 29, 2018. She confirmed that both the 1st plaintiff and the defendant were married to his deceased son. She testified that when her son married the defendant as the 2nd wife, the plaintiff who was the 1st wife started giving her son problems and threatening him. She stated she advised her son to transfer his properties to the defendant, as he had indicated he wished to stay with the defendant and not the 1st plaintiff. DW2 admitted that the 1st plaintiff and the deceased had marital issues which prompted the involvement of the family members and the local administration.
14. Given the nature of the evidence adduced by the plaintiffs and the defence, the court felt there was need to obtain evidence from the land registrar as the custodian of the land records. The court on October 19, 2021 suo moto made an order in following terms:-

' The Land Registrar, Nakuru to be summoned to attend court to produce records of land parcels:-

- i. Kaimbogo/Kiambogo Block x/xxxx (Mwariki).
- ii. Kaimbogo/Kiambogo Block x/xxxxx (Mwariki).
- iii. Miti Mingi/Mbaruk Block x/xxxx (Kiungururia)

The documents to be availed to include any correspondences, copies of transfers application and letter of consent and receipt of any payments'.

15. Raymond Gitonga (DW3) Nakuru land registrar attended court in response to the summons. He produced in evidence the abstract of title (greencards) for the two Kiambogo parcels of land. The abstract of title for the Mbaruk parcel was not available as it was held by the Naivasha land registry. The plaintiff had tendered these same documents in evidence. The abstract showed the defendant was issued title to the 2 plots on February 15, 2016 and the plaintiff has on March 23, 2016 registered a restriction against the two titles.
16. In regard to land parcel Kiambogo/Kiambogo Block x/xxxxx Simon Muraya Wachira (deceased) was registered on December 18, 2014 while in regard to land parcel Kiambogo/Kiambogo Block x/xxxxx he was registered on July 8, 2013. The land registrar in his evidence stated that an application for the registration of a transfer would ordinarily be accompanied by an executed transfer, land board consent to transfer, stamp duty payment receipt and the old title for cancellation. The land registrar stated that in the parcel files for the two properties he only found the original titles in the name of the deceased and that he did not find any other documents. He could not offer any explanation as to why the other documents were not in the parcel files.
17. The parties following conclusion of the trial filed their closing written submissions. The plaintiffs submissions were filed on May 10, 2022 while the defendant's submissions were filed on April 20, 2022. I have reviewed the pleadings and the evidence adduced by the parties and have considered the submissions by the parties. The following issues arise for determination.
 - i. Whether the suit properties were lawfully and procedurally transferred and registered in the defendant's name?



- ii. Whether the suit properties form part of the assets of the estate of the late SWM and if so whether the registration of the defendant as the owner thereof ought to be cancelled?
 - iii. What reliefs should the court grant?
18. In the present matter there is no dispute that the deceased, SMW, who was husband to both the 1st plaintiff and the defendant was the registered owner of the suit properties before they were transferred to the defendant. The primary issue is how and at what time the same were transferred to the defendant. The deceased died on January 22, 2016 yet one set of the properties (Kiambogo) were transferred to the defendant on February 15, 2016 while the other property (Miti mingi) was transferred to the defendant on March 7, 2016. Had the deceased executed the transfers before he died and had the consent to transfer from the land control board been obtained before he died? If the transfer had not been executed by the deceased before he died and if no consent had been obtained before his death, there could be no valid transfers of the suit properties because a dead person cannot sign a transfer or procure consent of the land control board. The plaintiff's assertion was that the deceased had not executed any transfers before he died in favour of the defendant in respect of the suit properties.
19. The defendant did not in evidence produce any copy of the transfers that the deceased had allegedly executed and neither did she produce any copy of the application to the land control board and/or any letter of consent. No evidence of payment of stamp duty or registration fees was adduced. In view of the fact that the plaintiff has pleaded that the deceased had not transferred the suit properties to the defendant during his lifetime, it was incumbent upon the defendant to prove that indeed the deceased had transferred the properties to her during his lifetime particularly because the transfers are recorded to have been effected after the deceased death.
20. The land registrar who gave evidence stated the land registry did not hold any documents to support the registration of the defendant as the owner of the suit properties. He explained that the documents that would ordinarily accompany a transfer during registration would be a duly executed instrument of transfer, the consent of the land control board, stamp duty payment receipts and registration fees. He stated the parcel file did not have a copy of the transfer and/or the other documents. How then is the court to ascertain if there was a transfer and/or when it was made? In normal circumstances a transfer is drawn in duplicate or triplicate and the consent application and the consent letter are equally required to be in triplicate. Each of the parties to the transaction is expected to have a copy of the documents. In the circumstances of this case the court cannot tell when the transfer was drawn and/or whether any consent for transfer was given.
21. Under section 26 (I) of the [Land Registration Act](#), 2012 a title that is shown and/or proved to have been unprocedurally obtained may be challenged. Thus the fact that one holds a registered title does not of itself make the title absolute and indefeasible. How such title was obtained is of crucial significance particularly where the title is challenged. Section 26 (I) of the [Land Registration Act](#), 2012 provides as follows :-
26. Certificate of title to be held as conclusive evidence of proprietorship.
 - (1) 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 the 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.
22. Given that the defendant had notice that the titles she held in respect of the suit properties were under challenge, she had the burden of proving how she acquired the titles. There must have been someone who drew the transfers and/or attested them. Such person was not called to testify. If the land board consent was obtained there must have been a board meeting at which the application was considered and minutes of such meeting were made and would have been produced in evidence to illustrate when the consent was given.
23. As was observed by the Court of Appeal in the case of *Munyu Maina -vs- Hiram Gathirua Maina (2013 eKLR)* where a title is under challenge, it is not sufficient to merely waive the title and seek refuge on the doctrine of sanctity of title. One must establish the root of such title. The court in the case held:-
- ' We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register'.
24. In the instant case the uncontested issue is that both the plaintiff and the defendant were wives of the deceased. The deceased was equally registered as owner of the disputed suit properties which the plaintiff claim forms part of his estate and ought to await succession proceedings to be distributed. Though the abstract of title shows the defendant was registered as owner of parcels xxxxx and xxxxx (Kiambogo) on February 15, 2016 and parcel xxxx (Miti mingi) on March 7, 2016 there is no evidence to show how the transfers were effected. I do not think it is enough for the defendant to state that the deceased had transferred the properties before he died without exhibiting the instrument of transfer and the land board consent sanctioning such transfer. On the evidence I am not satisfied that the suit properties were validly and lawfully transferred to the defendant. The dead cannot rise from their graves to execute documents unless it is demonstrated through evidence that indeed the deceased had executed a valid transfer before he died. I hold the registration of defendant as the owner of the suit properties was unprocedural and therefore null and void.
25. Having come to the conclusion that the defendant was not validly registered as the owner of the suit properties, it follows that I must order that the titles held in the names of the defendants in regard to land parcels Kiambogo/Kiambogo Block x/xxxxx (Mwariki) and Kiambogo/Kiambogo Block x/xxxxx (Mwariki) and Miti Mingi/Mbaruk Block x/xxxx (Kiungururia) be cancelled and reverted to the name of SMW (deceased) to form part of the estate assets. I direct that the plaintiff and the defendant combine on the basis that they are the co-wives of SMW (deceased) to apply for letters of administration of his estate to enable them to appropriately distribute the estate. The land registrar Nakuru and Naivasha respectively and where applicable are ordered and directed to cancel the registration of TNK as the owner of land parcels Kiambogo/Kiambogo Block x/xxxxx (Mwariki), Kiambogo/Kiambogo Block x/xxxxx (Mwariki) and Miti Mingi/Mbaruk Block x/xxxx (Kiugururia) (registered to IW (Minor). The titles should be reverted to the name of SMW (deceased).
26. The parties shall bear their own costs of the suit.



**JUDGMENT DATED SINGED AND DELIVERED VIRTUALLY AT NAKURU THIS 27TH DAY
OF SEPTEMBER 2022.**

J M MUTUNGI

JUDGE

