REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 289 of 1990

DOMINIC KAMATA NJOGO

JOHN GITHIORI

ANNA NYAMBURA

S D W (A minor suing by next friend and brother

DOMINIC KAMATA NJOGO ……..…..……...…… PLAINTIFFS

VERSUS

S W.....……..……...…… 1ST DEFENDANT

WAMBUI MWAGO WAKABA …….....…..…….. 2ND DEFENDANT

PAULINE NJERI BENSON .....…….…...…… 3RD DEFENDANT

JUDGMENT

1. BACKGROUND

Sometimes in late 1974, one Pauline Njeri Githiori (hereinafter "**Pauline**"), applied to the National Housing Corporation ("**NHC**") for allocation of a house in NHC's housing project, known as the Thika Mortgage Housing Scheme.

She was successful. NHC wrote to her on 3rd October, 1974 approving her application, and allocating to her House No. A38 on L.R. No. 4953/1175/90 (hereinafter "**the suit property**").

It is that property that is at the centre of dispute in this rather old and protracted litigation.

NHC invited her to apply for financing from HFCK for upto 90% of the purchase price, which was then indicated to be Kenyan Pounds 4,500. By its letter dated 10th October, 1974, HFCK also invited her to apply for financing. When doing so, she decided to have her "husband", one John Mwago Wakaba (hereinafter "**Mwago**") join her as a co-applicant. The application was accepted, finance was made available, and eventually, on 5th May, 1995 title was issued to Pauline and Mwago as "**joint tenants**." Meanwhile, on 27th March, 1975 they had taken possession, and commenced living there, together with the children of Pauline, from a previous husband or man.

Pauline and Mwago had one child of their own, S D W (hereinafter "**David**"), who was born on 9th October, 1974. He too, like other children, lived on the suit property, with his parents. Mwago, a polygamous man, had two other wives, who lived elsewhere.

Pauline died on 24th May, 1975, while Mwago died on 3rd June, 1976. When Mwago died, he left behind a huge estate, worth several million shillings, and including some twenty six motor vehicles, twenty land parcels, shares in various public companies and cash. All these properties were inherited by his other wives, and children. The only issue before this Court relates to the suit property – this one house that David and his other siblings claim to be theirs, while one of the "other" wives also has a claim on the same. David, on the other hand, wants nothing else from his father's estate – just the suit property where he has lived for almost all his life, and which belonged to his parents. Ordinarily, that would have been a simple proposition, except for the fact that unknown to him, the suit property was sold by his step mother to a third party, the Third Defendant in this suit, Pauline Njeri Benson (hereinafter "**Njeri**") who claims to be "**the innocent purchaser for value",** and in whose name presently the title is registered.

So, that brings us to this litigation. On 27th January, 1990, the four children of Pauline, three brothers and one sister, brought this suit to

recover the suit property. Of these four Plaintiffs, the first three are all children of Pauline from a different man, while the fourth, David, is the child of Pauline and Mwago, and who, being an infant at the time the suit was filed, was represented by the First Plaintiff, as next friend and brother. Of course, David is now an adult, and represents himself. They brought this suit against three Defendants, the first two of whom are son and mother respectively, while the third, Njeri, is the current owner of the suit property. The Second Defendant (hereinafter "**Wambui**") is one of the other two wives of Mwago, while the First Defendant (hereinafter "**Simon**") is Wambui's son.

The Plaintiffs seek the following Orders:

"a) A declaration that the Transfer of the parcel of land known as L.R. No. 4953/1175/90 Thika by the 1st and 2nd defendant to the 3rd defendant was wrongful and therefore void.

b) A further declaration that the aforesaid parcel of land belongs to the Plaintiffs and the 1st and 2nd defendants and that the parcel be registered in all their joint names.

c) Without prejudice to the above prayers and in the alternative a declaration that the plaintiff have become the legal owners of L.R. No. 4953/1175/90 by way of adverse possession."

However, prayer (b) was abandoned at trial, leaving for determination only prayers (a) and (c), and of course, costs and interest.

2. PLEADINGS

In their Plaint, the Plaintiffs say that the suit property was the matrimonial home of their parents; that they had lived on it from the time of its acquisition in 1974, and are still in occupation of the same; that David was a child born out of the union between Pauline and Mwago; that upon the death of their parents, the suit property was beneficially owned by them, and held by the defendants in trust for them; and finally, in the alternative, they were entitled to ownership of the suit property by way of adverse possession, having had occupation of the same for over 12 years, and accordingly the same was not available for distribution or sale.

Paragraphs 11 and 12 of the Plaint specifically plead and invoke the doctrine of "**trust**". This is what is pleaded:

"11. The first three Plaintiffs being the children of the late Pauline and the fourth Plaintiff being the child of both Pauline and the late Wakaba shall contend that the Parcel of land known as L.R. 4953/1175/90 after its distribution to the 1st and 2nd defendants was held by the said defendants in trust for all of them.

12. On or about the 12th day of December, 1989 the 1st and 2nd Defendants have wrongfully breached the aforesaid trust and did on that date transfer the said parcel of land to the 3rd Defendant who knowingly acquired the said property with the full knowledge that the said property was being held in trust by the 1st and 2nd defendants for the Plaintiffs and the said transfer was adverse to the interest of the Plaintiffs and they have therefore suffered damages."

In a defence filed on 1st December, 2004 the first two Defendants denied the claims of the Plaintiffs, and pleaded as follows in paragraph 5 of the Defence:

"5. The first and second Defendants aver that the land in question was registered in the joint names of John Mwago Wakaba and Pauline Njeri Mwago as joint tenants and upon the death of Pauline Njeri Mwago in 1974 the property vested in the name of John Mwago Wakaba by transmission. The said property was not registered as "owner in common".

The Third Defendant, on the other hand, pleaded in her Defence and Counterclaim that she was the lawful owner of the suit property having acquired it from the First and Second Defendants. She counter-claimed for arrears of rent and mesne profits.

3. ISSUES

The main issue before this Court is whether the Plaintiffs or any of them were the beneficial owners of the suit property, by way of a resulting trust, and if so, whether the Third Defendant had acquired good title to the same by way of purchase. Alternatively, did the Plaintiffs acquire title, through prescriptive rights, by way of adverse possession?

4. EVIDENCE

The Plaintiffs called four witnesses: David (PW1); Dominic Kamata Njogo, the First Plaintiff (PW2); William Mwogogo Malogo, of the office of the Public Trustee (PW3); and John Mwangi Chege, a private investigator (PW4).

The Defendants called two witnesses: Wambui (DW1) and Benson Wilfred Kinyanjui Muigai (hereinafter "**Benson**"), the husband of the Third Defendant (DW2).

In his evidence before this Court, David (PW1) testified that he was the only son of Pauline and Mwago. He produced his birth certificate, and combined with the evidence of PW2, PW3 and PW4, I am satisfied that he was the only son of Pauline and Mwago. There is no evidence produced by the Defendants to controvert the Plaintiff's evidence. They simply "deny" the fact in their Defence, although strangely, in an affidavit sworn by the Second Defendant on 5th January, 1990, she stated:

"That it is true Simon David Wakaba the minor herein was an issue out of union between the late Pauline Njeri and my deceased husband"

In paragraph 4 she deponed

"That when my late husband died, he was living in the suit premises with the minor while the minor's other brothers lived with their uncle".

David testified that he was born in Thika; that he was only two when his parents passed away; and that he grew up on the suit property. He knew nothing about the issue of the Grant or Letters of Administration of his father's estate. No one contacted him or his family, until one day in 1990 when Benson came knocking at his door to announce that he was the legal owner of the suit property, and asking him to vacate the same. That is when the family came to the Court, and initially obtained an injunction barring the Third Defendant from taking possession.

The Plaintiffs' second witness, Dominic Kamata Njogo (hereinafter "**Dominic**"), elder brother of David, testified that his family, including David, all lived in the suit property "which was my mother's house", he said. He produced the letter of allotment issued to his mother by NHC, and testified that the suit property was owned jointly by his mother and Mwago, who lived there as husband and wife. In 1989, Benson came home demanding rent. He was shocked when that happened. He knew of no other owner. He said he knew Benson – his children were their friends, they lived in the same estate, and regularly visited each other. He emphasised that Benson and his family were their family friends, and all along knew of their right to ownership of the suit property. Here is what he said:

"The Third Defendant lives in the same Estate; is a family friend and knew of our case. He cannot deny that. He never even came to ask why we were living in the same house."

He was led by Counsel through the various transactions noted on the title, and confirmed that he and his brothers were never consulted before the suit property was transferred, first to the Public Trustee, thereafter to the First and Second Defendants, and eventually to the Third Defendant. He reiterated David's testimony that all they were interested in was the suit property, "**nothing else in Mwago's vast estate totaling Shs.60 million."** "**I want my mother's house returned to my brother,"** he concluded.

The Plaintiffs' third witness, William Mwagogo Malogo, an officer with the Public Trustee, produced the Administration file No. 333 of 1976 relating to the Estate of Mwago. Recounting how the Public Trustee was appointed to Administer Mwago's estate on 24th July, 1978, this witness explained how the distribution was done, and how eventually, on 17th March, 2004 the estate was handed over to Wambui, who had then obtained Grant of Letters of Administration of Mwago's estate. He confirmed that the Certificate of Death of Pauline (who died in 1975) was registered on the title (Entry No. 4) on 10th August, 1989 – some 14 years later. On the same day, that is on 10th August, 1989 the Grant of Letters of Administration of the estate of Mwago were registered, and within three months, the suit property was transferred to the first two Defendants, and who, in a record three weeks transferred the same to the Third Defendant.

The witness testified that from correspondence on his file, the Public Trustee was aware that there was a dispute involving part of the Estate, which by 1989 had not been resolved. This is what he said under oath:

"In my view it is not clear how transfer (of the suit property) was effected before the Estate had been crystallised. It should not have been done. I do not know what was the rush in transferring the suit land."

In cross-examination, PW3 did indeed admit that David's name appeared as a "beneficiary" in the list provided by the DC, but could not tell why David's interest was neglected. The witness also confirmed that there were no liabilities of the Estate to warrant the sale of the suit property, in complete contradiction to Wambui's testimony (we will come to that later) who said the suit property was sold "to pay off debts". The witness concluded by stating that David's interest "appears not to have been taken into account."

Finally, PW4, John Mwangi Chege, a private investigator, who gathered useful information on the background relating to the suit property, and who produced a report (PEX.2), testified that although the suit property was acquired for only Shs.350,000/=, it was mortgaged to Equity Bank for Shs.2 million. Among his many conclusions outlined on pages 6 and 7 of PEX 2, he found that David's interest as a beneficiary in the Estate of Mwago had been completely ignored.

Giving evidence on behalf of the First and Second Defendants, Wambui testified that she and one Miriam Wangui were the two widows of Mwago. The latter died in 1986. She testified that she did not know David, although this is contrary to what she swore in her affidavit of 5th January, 1990. She said that David was not on the list of beneficiaries prepared by the DO, although she knew that David's brother had made claims to the DO's office. She claimed that upon Mwago's death, the estate was worth only 2.3 million, while the liabilities amounted to Shs.2.6 million – a grossly inaccurate statement. She testified that there was no inhibition or caveat registered against the suit property, which is why she sold and transferred the same to the Third Defendant for Shs.350,000/=. She said that that was the fair market value of the property at that time. She came to know of the suit property from the Public Trustee, and did not know who lived there; nor did she try to find out. Nonetheless, she proceeded to sell the property to the Third Defendant, offering "immediate vacant possession". However, she was unable to give vacant possession because "the people who lived there refused to vacate it." However, Benson told her that he would evict the people; that he lived in the same estate and knew them.

In response to questions raised by this Court as to why the suit property was sold so quickly after transfer to her; why it was not advertised for sale; and why a valuation was not done, Wambui appeared hazy, confused and simply said that the estate needed to pay debts, and the suit property was the only one available for sale to pay off the debts.

The last witness, on behalf of the Defendants, was Benson, the husband of the Third Defendant. The Third Defendant, who purchased the suit property from the first two Defendants, chose not to appear before this Court, and gave Benson the Power of Attorney to appear, and give evidence on her behalf.

Benson told this Court that his wife purchased the suit property from Wambui for Shs.350,000/= in 1989. He said that he knew Mwago and his family. He made an offer, it was accepted, and he knew of no one else claiming the property. It had a clear title. He testified that he agreed to take over the property even with people in occupation and told Wambui that he would deal with the tenants. When his wife became the owner, he made claims for rent, and produced a schedule (DEX.4) outlining the total rent owed by the Plaintiffs. As of February, 2007 his claim for rent stands at Shs.4,559,000/= which he counter-claims from the Plaintiffs. He testified that he also lives in the same estate, having bought a similar property there in 1989 for Shs.450,000/=.

Under cross-examination by Mr. Kibatia, Counsel for the Plaintiffs, Benson admitted that he knew about the suit property but did not know who actually lived there. He said he did not know Pauline, and neither did his wife, although he had never asked his wife if she knew Pauline. Here is an extract of his testimony:

"I did not ask my wife if she knew Pauline, but I know she did not know her. This house is within walking distance to mine of 10 minutes or less than 100m. I knew late Mwago and his deceased wife. I bought my property in that estate for Shs.450,000/=. It is further than where I stay.

Q: How do you explain that the price went down to Shs.350,000/= in six months?

A: It was a willing buyer/willing seller deal. I made that offer and it was accepted. I have borrowed Shs.2.5M. on suit property. Bank valued it for Shs.3.5M. Bank wanted to see property and did so."

5. FINDINGS OF FACTS

Based on the evidence presented before this Court, I find the facts to be as follows:

I find that all the facts outlined at the beginning of this Judgment, under the heading "Background", are facts proven before this Court either through oral testimony, or documents. I will summarise those facts, and outline here additional finding of facts, which form the basis of my Judgment in this case.

In a nutshell, I have found that the suit property was owned by Pauline and Mwago as "joint tenants", having initially been allocated to Pauline by NHC. It was financed by HFCK by way of a mortgage to "Mr. & Mrs. Wakaba", that is Pauline and Mwago, who represented themselves as "husband and wife", and who also lived in the suit property as husband and wife, with their only child David, and with other children of Pauline from a different person.

Pauline died on 24th May, 1975, and on her death, the suit property reverted to Mwago, who also died a year later, on 3rd August, 1976, living behind one son, David, the only son of the union between Pauline and Mwago. David and Pauline's other children continued living in the suit property. When Mwago died, he had a vast estate, totaling some Shs.50 million in properties, motor vehicles and shares in public companies.

Upon the death of Mwago, the Public Trustee took over the administration of the estate, following a grant of the letters of administration made to it by the High Court of Kenya

C No. 184 of 1976.

The Public Trustee distributed most of the estate to Mwago's other two widows and beneficiaries, completely excluding David. We do not know why. His name had simply not featured as a beneficiary despite some correspondence with the office of Public Trustee regarding his claim. PW3, Mr. Malogo, of the office of the Public Trustee, admitted clearly that David's interest had not been taken into account. I accept his entire testimony as being accurate and credible, especially the fact that the suit property should not have been transferred until the dispute relating to it had been resolved. I accept his evidence that it was done in a rush, and that there were no debts that needed to be paid to warrant its quick sale. I find that the sale was indeed "quick", and was not done in good faith, when suddenly Wambui found an opportunity to dispose the same in 1989. Although Pauline had died in 1975, the Certificate of her death was not registered against the suit property until some 14 years later, on 10th August, 1989. Then, on the same day, the Grant of Letters of Administration of Mwago's estate were registered, and within three months the suit property was transferred to Wambui, who, in a record three weeks transferred the same to Njeri, the current owner.

This whole transaction is suspect, and clearly done in bad faith, to deny David the right to the suit property. Neither Wambui, nor Njeri acted-in good faith. I say so because Wambui knew that there were people living in the suit property; that one of those "people" was Mwago's son David; that she deliberately and hurriedly sold the suit property to Njeri, at a price that was grossly undervalued, and without obtaining a valuation report. She told this Court that she did so to pay off some of the debts of the Estate. There were no such debts. She did not specify which debts, and PW3 confirmed there were no such debts. I, therefore, conclude that she acted in bad faith. I also find that she was not a credible witness.

Equally, I find that Njeri, the Third Defendant, and her husband, Benson, acted in bad faith. I say so because Benson knew that Pauline and Mwago lived in the suit property. I accept PW1 and PW2's evidence that Benson's children and their children were friends and visited each other. Benson himself confirmed that he lived in the same estate and "knew about the house." Secondly, he admitted buying his own house in the same estate at Shs.450,000/=, so why would he pay a mere Shs.350,000/= for the suit property unless he was in collusion with

Wambui? Thirdly, why would he agree to purchase the suit property "with people" in them when his contract specifically required Wambui to give him "vacant possession." Of course, it was too good a deal to pass. And then finally, if the market value of the suit property was Shs.350,000/= only, how was he able to mortgage it for a loan of Shs.2 million? Clearly, he and Wambui were in collusion – Wambui was ready to take whatever money she got from this sale; and Benson was prepared to accept whatever risk for a deal that was too good to pass. **In my view, he was definitely NOT "an innocent purchaser for value," and I so find.**

6. THE LAW

Based on the pleadings before this Court, the issue is whether the suit property was held, both by the Public Trustee, and the first two Defendants "in trust" for the Plaintiffs, or for one of the Plaintiff, David. Alternatively, did the Plaintiffs acquire title, through prescriptive rights, by way of adverse possession?

The suit property was owned by Pauline and Mwago as joint tenants. Accordingly, when Pauline died, her interest merged with that of Mwago, who then became the absolute owner. It formed part of Mwago's estate. Under Section 102 of the Succession Act, Cap. 160 the rights of the parties holding property jointly are set out as follows:

"***where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently***

a) …….

b) On the death of a joint proprietor, his interest shall vest in the surviving proprietor."

Section 38, Succession Act, Cap. 160 provides that

"***Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall subject to the Provisions of Section 41 and 42 devolve upon the surviving child, if there be only one, or equally divided among the surviving children."***

David was, therefore, entitled to a share of the entire estate of Mwago, and certainly to the suit property, which was the matrimonial home of his parents. In accordance with Section 41, Law of Succession Act, Cap. 21 the suit property was deemed to have been held in trust for David, the only child of the union of Pauline and Mwago.

The land registration systems in this country fully recognize the existence of "trust" in respect of registered land, even if it is a first registration; and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer documents. (See ***Limuli v. Marko Sabayi*** (1979) KLR 251.

In ***Francis Munene Paul v. Milka Wanoe*** (1982-88) 1 KAR 42 the Court of Appeal stated as follows:

"***The Resident Magistrate considered sections 27, 28 and 30 of the Registered Land Act and concluded that the rights of a registered proprietor could not be defeated except by interests shown on the register by overriding interests detailed in s 30. In this he was wrong. He failed to note that s 28 is subject to a proviso. Thus:***

'28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever. Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.' (emphasis added).

Furthermore, s 126(1) of the Registered Land Act provides:

'126(1). A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words 'as trustee', but the Registrar shall not enter particulars of any trust in the register…..

(3) Where the proprietor of land, a lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trust……'

In Gatimu Kinguru v Muya Gathangi [1976] KLR 253, Madan J (as he then was) held that the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust as the provisions of s 126(1) of the Registered Land Act as to the reference to the capacity as trustee in the instrument of acquisition are not mandatory but merely permissive. That decision has been followed and in my respectful opinion it is correct."

Could the Public Trustee pass a good title to the first two Defendants, and could they in turn pass a good title to the Third Defendant?

I agree with the submissions of the Plaintiff's Counsel that it is trite law that one cannot pass a better title than the one he has. The suit property was beneficially owned by David, and was not available for distribution to anyone else. Similarly, the First and Second Defendants had no capacity to transfer the same to the Third Defendant who, as I have found, was not an innocent purchaser for value. This was the position held by the Court in the case of ***Wilfred Kiiura Mwangi versus Harrison Mwangi Gacheche and Another*** (2005) e K.L.R.

(www.kenyalaw.org) where honourable Justice D. Musinga held that where two parties enter into a contract for sale of land without involving the defacto owner, and further where it is in full knowledge of both that the defacto owner is in full occupation, and furthermore where the defacto owner never consented to the sale, then such a sale is fraudulent and unenforceable under the law.

This is what he noted:

"***Having done so, did he have capacity to disinherit the second defendant and her children by deciding to sell the suit premises to the plaintiff? In my view, he did not have such capacity. It was not disputed that when the first defendant applied for consent to sell the suit premises in 1994, he went to the Nderagwa Land Control Board with one of his other wives, but not the second defendant who was in occupation of the property sought to be sold and indeed the de facto owner of the same. He did not disclose to the Land Control Board that the property was occupied by the second defendant and her eight children. The plaintiff was also aware of that fact but he did not disclose the same to the members of the said Land Control Board.***

I believe the Land Control Board would not have given its consent for the proposed transaction if the truth had been made known to it. The sale agreement between the plaintiff and the first defendant was thus fraudulent, as both parties knew that the second defendant and her children were the ones in occupation of the land and had not consented to its sale."

Those principles apply to the case before me. All the three Defendants acted in bad faith, and were in collusion for their respective gains, to deprive David his rights over the suit property.

7. CONCLUSION

I, therefore, hold that the suit property was beneficially owned by David; that it was held in trust for him; that it was not available for transfer or sale to anyone else; and that he is fully entitled to the re-transfer of the same, without any financial encumbrances. In view of my findings here based on "trust", the question of adverse possession does not arise. There will, therefore, be Judgment for David, the Fourth Plaintiff, in terms of declaration (a) in the prayers sought in the Plaint. I hereby Order the Third Defendant to immediately transfer the suit property to David, free of all financial encumbrances. The Fourth Plaintiff will also have costs of the suit to be paid by all the three Defendants. I reject the Third Defendant's Counter-claim and the same is dismissed with costs to the Fourth Plaintiff. Those are the Orders of this Court.

Dated and delivered at Nairobi this 19th day of June, 2007.

ALNASHIR VISRAM

JUDGE