



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 114 OF 2002

CHARITY NYAGUTHII GITOI)

JULIUS MAINA GITOI)

JAMES MWANGI GITOI)

CHARLES NDERITU GITOI).....PLAINTIFFS

VERSUS

CHRISTOPHER MUCHOMBA WARUI).....DEFENDANTS

NDERITU JULIUS)

JUDGEMENT

When this case was first filed there were four Plaintiffs. By the time the suit came for hearing the first plaintiff had died and was substituted to be represented by the 4th Plaintiff. According to the Plaintiff's claim is that after the death of their father they filed a succession in respect of property **IRIA-INI/KIAGUTHU/141**. (Hereinafter called the suit property). On confirmation that property was subdivided in equal portions amongst the beneficiaries which resulted in parcels No. 752 to 756. They alleged that the 1st and 2nd Defendants by means of fraud, had parcels No. 752 to 755 transferred into their names. The Defendants in their defence deny the claim.

The evidence of the Plaintiff began by the testimony of Charles Nderitu Gitoi. He is the person who represents himself and the estate of Charity Nyaguthii Gitoi, his deceased mother. In his evidence he said that the suit property was in their deceased father's name and after they sought a grant and on confirmation of that grant that property was divided into five portions. The persons that were to inherit the five portions were:

Charity Nyaguthii Gitoi - deceased

Julius Maina Gitoi

Charles Nderitu Gitoi

Jackson Kiania Gitoi

James Mwangi Gitoi

According to the confirmed grant each of them was to get 0.274 hectares. They were however, prevented from immediately getting their portions of land because there was a registered caution on the suit property which had been placed by Samuel Mugo Ngari. Later that caution was fraudulently removed and to prove that he produced the Green Card showing the removal. He stated that the property was eventually subdivided to the five portions and the main title was closed. He stated that the caution, the closure of the title and the sub division of the five portions was done all on one day, 16th December 1996. That neither he nor his deceased mother consented nor were they involved in the sub division. The sub divisions that resulted from that transaction indicated parcel No. 752 and 753 were registered in the name of the 2nd Defendant. 754 and 755 were registered in the name of the 1st Defendant. 756 was registered in the name of the Plaintiff's brother namely Jackson Kiania Gitoi. The witness said that those sub divisions were fraudulently carried out except for the one of James Mwangi Gitoi. He said that he and his co-plaintiffs were not involved in the transaction. Peter Samuel Mugo complained to the Registrar about the removal of the caution registered by himself. He did this by means of two letters dated 28th November 1996 and 18th April 1997. The matter was also reported to the C.I.D. to investigate the transaction. That the police later indicated that no further action was going to be undertaken by them in respect of that transaction. On going to the Survey office this witness found that the sub divisions had not been registered. He finally

prayed that the resultant titles from the suit property be cancelled and be rectified so that the same can be sub divided and the sub divisions be registered in the plaintiff's names. This he said was because the transfers that had been carried out had benefited persons who were not beneficiaries to the estate. On being cross examined he said that parcel No. 756 was rightly registered in his brother's name namely Jackson Kiania Gitoi. He therefore said that they did not seek rectification in respect of that title. He confirmed the copy of the register showed that the suit property was transferred to Julius Maina Gitoi pursuant to RL7. The witness was taken through the certified copy of the register which indicated that all respective parcels were then registered in the names of the Plaintiffs. He, however, said that the same register showed that on 16th December 1991 they were transferred to the Defendants. In the case of the registration of parcel No. 754 he said that it showed that the transfer consideration was Ksh.100,000/=. He did, however, question how a consent was obtained for that transaction. He denied selling his property to the 1st Defendant. On being shown a sale agreement dated 11th December 1996 he said that he was seeing it for the first time. He denied signing it and he drew the attention of the court to the sale price which was reflected as Ksh.200,000/= whereas the Green Card showed the amount of Ksh.100,000/=. He again emphasized that he had not sold the property to the 1st Defendant.

P.W.2 James Mwangi Gitoi confirmed that the grant on being confirmed by the court, he consulted the 1st Defendant as a family friend seeking to be shown how sub division is carried out. Together they went to the chief of Iria-ini location but the chief refused to sign documents in the absence of the other family members. The 1st Defendant then introduced him to a land surveyor and a man he referred to as Mwangi who he described as an agent. He was then informed that the matter would be referred to an advocate for the preparation of documentation. In his presence the agent forged a National Identity Card of Peter Samuel Ngari who had registered a caution against the suit property. The forgery was carried out at the 1st Defendant's shop in Karatina. Thereafter they went to the Lands Office and presented a letter purportedly written by the cautioner seeking to remove the caution. He witnessed the 1st Defendant giving the agent Ksh.10,000/= which money he was to use to pay officers at the lands office. Once the caution was removed they returned to Karatina to arrange the sub division. In the meanwhile, however, the person who had registered the caution reported the matter to the police and he, together with the 1st Defendant were arrested. They were placed in the same cell and with the persuasion of the 1st Defendant he agreed to deny the allegations to the police. They were thereafter released and proceeded to complete the sub division. At one time the 1st Defendant advised him to move residence to avoid arrest. They went to an advocate's office by the name of Maina Karingithi who prepared a sale agreement for himself in respect of his parcel land No. 755 and an agreement in respect of the property of his brother Charles Nderitu Gitoi being parcel No. 754. He signed the sale agreement but in respect of his brother's agreement the agent impersonated his brother Charles Nderitu Gitoi and signed the agreement. He confirmed that he did not go before the land board to obtain a consent. He confirmed that also the registration of parcels were registered as per the confirmed grant after the caution was removed. It was thereafter that the transfers were made to the 1st and 2nd Defendants. He informed the court that he lied to the police on being asked about the removal of the caution and he confirmed that he was a party to the forgery of documents that were used in the transaction. He however, said that he was not lying to the court in giving his evidence. It should be noted that he said he did not state that he did not sell his parcel of land namely parcel No. 755 to the 1st Defendant.

P.W.3 was an official from the lands office. She gave details of the procedure that is followed once a grant is confirmed in a succession cause. Once the grant is confirmed an official search is carried out and that search is attached to an application or consent from the land board. It is thereafter once consent is given that transfer can be effected in accordance with the confirmed grant. The official confirmed that the suit property title was closed on partitioning of different parcels from No. 752 to 756. The official also confirmed that the caution was removed from the suit property. That registration was effected to each parcel in accordance with the confirmed grant. The witness confirmed that a consent of the land board cannot be given where a caution is in existence on a title. On being shown by defence a minute of the Mathira control board, the witness confirmed that consent was granted.

Jackson Kiania Gitoi in his evidence said that he never appeared before the Mathira land control board. He said that he did not sign the mutation form and that in respect of his parcel of land No. 756 which was registered in his name, the title was given to him by the 1st Defendant through his sister after making payment to the 1st Defendant of Ksh.27,000/=. He also confirmed to the court that he still has in his possession the original title of his suit property.

The defence case was started with the testimony of the 1st Defendant. He said that both James Mwangi Gitoi and Charles Nderitu Gitoi agreed to sell their property and signed the sale agreement in the offices of Maina Karingithi advocate. After signing the agreements they signed the transfer of the parcel of land Nos. 755 and 754. The two went to the land board and obtained consent to transfer those two parcels and in this regard he produced in evidence the two consents. After obtaining consent they went to him for the process of sub division to be completed. The mutations were signed by the Plaintiffs. He denied giving Jackson Kiania Gitoi his title.

The 2nd Defendant said that he bought the land from the Plaintiffs for Ksh.200,000/=. The fact that the Green Card reflects Ksh.100,000/= he attributed it to a mistake. The transfer was signed by the Plaintiffs but at the time of giving evidence, he said that he had forgotten them at home. He also confirmed making payments to the lands office but that those receipts he had forgotten to bring them to the court. He said that he was arrested by police over the issues relating to this transaction but was later released when the police found that there was nothing wrong with the transaction.

D.W.3 was Maina Karingithi advocate. He produced the two sale agreements which he said were signed by James Mwangi Gitoi and Charles Nderitu Gitoi. He stated that at the time of preparation of those agreements the parties had obtained consent to transfer. He denied that the agent Mwangi impersonated Charles Nderitu Mwangi. He said that Mwangi was well known to him. But he identified the Plaintiffs by means of their National Identity Cards.

That is the summary of the evidence adduced before the court. Before delving further into this judgment, I confirm that I have looked at the defence exhibit No. 9 and 10, that is, the sale agreement allegedly signed by Charles Nderitu Gitoi and James Mwangi Gitoi in respect of their parcels of land. When the Defendants initially wanted to exhibit in evidence those two agreements the Plaintiff's counsel objected on the basis that the two had not been stamped in accordance with the Stamp Duty Act. That objection was upheld. Defence counsel sought time to have the documents stamped. The court granted him that time and when the same were being produced later in evidence by Maina Karingithi advocate, the said witness stated that the agreements had been stamped with the stamp duty paid. Plaintiff's counsel did not raise objection and the documents were passed on to the court clerk for the same to be marked as exhibit. Now when I sit to consider this judgment I have, as expected of me, examined those documents. Now looking at the two agreements I note that they bear hand written note stating SD

200/=; P/SD Ksh.2,200/=. At the bottom of that is written total Ksh.2,400/=. There is no stamp to show that the duty was paid. Section 5 of the Stamp Duty Act indicates the documents that require stamp duty to be paid. That section refers to the schedule of the Act and looking at the schedule, it is clear that **an agreement for sale of land does require to have stamp duty paid**. Section 8(1) provides how such instruments are to be written and stamped as an indication that stamp duty has been paid. That section provides: -

“Every instrument written upon stamped material shall be written in such manner, and every instrument partly or wholly written before being stamped shall be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material.”

As can clearly be seen by this section, the document as I have described it in this judgment did not have a stamp as required by that section. I therefore make a finding that the two agreements for sale do not have a stamp indicating that a stamp duty was paid. In making that finding I find that under Section 19(1) and (2) provides that this court in the case of unstamped instrument cannot act upon them. That section provides as follows:

(1) “Subject to the provisions of subsection (3) of this section and to the provisions of sections 20 and 21, no instrument chargeable with stamp duty shall be received in evidence in any proceedings whatsoever, except –

(a) in criminal proceedings; and

(b) in civil proceedings by a collector to recover stamp duty;

unless it is duly stamped.

(2) No instrument chargeable with stamp duty shall be filed, enrolled; registered or acted upon by any person unless its duly stamped”

The two sale agreements being defence exhibit No. 9 and 10 will not be acted upon for failing to having stamp duty stamp on them. In other words the court will proceed to disregard those agreements in this judgment. The other issue that the court would wish to deal with is the Defendant’s argument that the Plaintiff having pleaded fraud that it was their responsibility to prove it. My response to that argument is that in this case the burden of proof shifted to Defendants. The Plaintiffs have pleaded and have given evidence in support that the carrying out of the transactions was fraudulently done by the Defendants and was done without their participation. The fraud they claim is that firstly a caution was removed from the suit property. In respect of that allegation the party who was aggrieved by the said removal was the person who registered the caution. That person was not a party to this action and the Plaintiffs cannot be heard to advance his claim. However the Plaintiffs did claim that the obtaining of a consent and the transfer of the various portion of land was without their participation. They therefore allege that consent obtained and the subsequent transfers were done fraudulently. The Plaintiffs having pleaded that and adduced evidence on the same and bearing in mind that issue was not vigorously defended by the Defendants, other than that the 1st Defendant did say that the Plaintiffs obtained the consent themselves, I am of the view that the burden of proving that the consent was obtained overboard shifted to the defendants. The Defendants had an obligation to show to the court that the consent that resulted in the transfer in their favour was legally obtained. See Section 107 of the Evidence Act. Indeed the whole transaction does raise a query in the court’s mind since many things were done within one day. The court found P.W.2, the corroborator of the acts of fraud, to be a credible witness. He admitted lying before but stated that he was not lying before the court. On his part he did not deny having received a consideration for his parcel of land. Having re-examined the evidence I do find that the Plaintiffs have proved their case in respect of the parcels of land of Charles Nderitu Gitoi and the parcel of land relating to his late mother. The 2nd Plaintiff did not give evidence and his case remains unproved. The parcel of land that relate to him will remain as it is in view of the position that he took.

The court therefore finds in respect of the issue whether the transfer of parcels of land No. 754 originally in the name of Charles Nderitu Gitoi and 752 originally in the name of Charity Nyaguthii Gitoi deceased that the transfer in respect of those parcels were fraudulently transacted by the Defendants. Having made that finding the next issue that the court needs to consider is what orders ought to be granted in respect of those two parcels of land. In my judgment the correct orders that ought to be given are to cancel the transfers in respect of those two parcels of land and to order rectification of the register to reflect the original owners. Therefore the judgment of this court is as follows:

1. The court does hereby declare the transfer of parcel No. IRIA-INI/KIAGUTHU/752 IN FAVOUR of the 2nd Defendant is hereby declared to be null and void and the court does hereby order the rectification of the register of that parcel of land to reflect the name of CHARITY NYAGUTHII GITOI - deceased.

2. The court does hereby declare that the transfer of parcel No. IRIA INI /KIAGUTHU/754 in respect of the 1st Defendant to be null and void, and the court does hereby order the rectification of the register of that parcel of land to reflect the name of Charles Nderitu Gitoi.

3. The cases in respect of James Mwangi Gitoi and Julius Maina Gitoi are hereby dismissed with costs to the Defendants.

4. The court grants costs in this suit to the estate of Charity Nyaguthii Gitoi and to Charles Nderitu Gitoi which shall be paid by the 1st and 2nd defendants.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 7th Day of December 2007

BY: MARY KASANGO

JUDGE