



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELC NO. 210 OF 2017**

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

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

**VERSUS**

**DWK (suing Through her son and guardian J KK).....DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs are mother and daughter respectively and the Legal Administrators of the estate of the late KKK, who was their husband and father respectively.
2. They aver that the said KKK held a Title registered on the 17/9/1990 in parcel No RUIRU EAST/JUJA EAST BLOCKx/xxx (suit land).
3. The Plaintiffs case is that the Defendant has unlawfully, illegally and fraudulently acquired Title to the same parcel of land creating duplication of Titles at the Lands office and thereby preventing the Plaintiffs from registering the transmission of Title as per the confirmation of grant that they hold in the estate of Kenneth KK.
4. That the acts of the Defendant have occasioned them loss, damage and deprived them of their quiet, use and peaceful possession of the land.
5. The Plaintiffs have urged the following orders;
  - a. A permanent injunction to the Defendant preventing her from interfering with land parcel RUIRU EAST/JUJA EAST BLOCKx/xxxx and to order that the Land Registrar Thika to cancel the Defendants name from the Title and issue the Title in the name of the 1<sup>st</sup> Plaintiff.
  - b. Costs of the suit.
6. On the 24/2/17 the Court granted interim orders restraining the Defendant from interfering selling and transferring the suit land pending the hearing and determination of the suit.
7. Vide orders of the Court issued on the 2/3/16 in HCCC MISC No 560 of 2015 DWK was adjudged to be a person suffering from a mental illness under section 26 of the Mental Health Act cap 258 Laws of Kenya. Consequently, JKK was appointed a guardian and manager with respect to the said DWK and her properties respectively. Hence the suit was prosecuted by the said JKK as a guardian of the Defendant.
8. The Defendant denied the claim of the Plaintiffs vide its statement of defense and counterclaim filed on the 24/5/2018.
9. The Defendant contends that D is the registered proprietor of RUIRU EAST/JUJA EAST BLOCKx/xxxx (the suit land). That the Plaintiffs are strangers to the suit land as they hold no recognizable interest. In his counterclaim he sought the following orders;
  - a. Dismiss the Plaintiffs suit with costs to the Defendant.
  - b. A declaration that the Defendant is the legal rightful and bonafide owner of all that piece of land known as RUIRU EAST/JUJA EAST BLOCKx/xxxx.

c. A permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs their agents and servants from claiming trespassing cultivating and in any way interfering with the Defendants quiet possession of RUIRU EAST/JUJA EAST BLOCKx/xxxx

d. Cost of the suit.

10. In their reply to defense and defense to the counterclaim the Plaintiffs reiterated the averments in the plaint and denied the contents of the counterclaim.

11. At the hearing PW1 – CNR testified and relied on her witness statement dated the 6/11/18 together with the list of documents filed on the 24/2/17 marked PEX No 1-7.

12. She stated that she is the wife of KKK who died in February 2012 and the mother of 3 children, the 2<sup>nd</sup> Plaintiff being one of them. That the suit land was registered in the name of KKK on the 17/9/1990. That after the burial of her husband she discovered in 2013 that the original Title of the suit land registered in her husband's name was lost and proceeded to file a report with the police vide Police abstract No OB23/17/8/016. That the investigations are still ongoing.

13. Though the witness claimed the husband acquired the suit land from Juja Farms Limited, she did not produce any documents to support the acquisition.

14. Further she stated that her husband's names were KKK and or KKK. That both sets of names belonged to her husband.

15. That none of the Plaintiffs occupy the suit land.

16. PW2 – ENK testified and relied on her witness statement dated the 5/11/18. By and large reiterated the evidence of PW1.

17. PW3- Robert Mugendi Mbuba stated that he is the Land Registrar No 327 stationed at Ruiru Land Registry. He produced documents in the parcel and Title file which were marked as PEX No 8-13.

18. He informed the Court that the suit land has two registered owners as per the Kalamazoo binder (register) in the name of KKK dated the 17/9/1990 and DWK dated the 25/11/1999.

19. The members register for Juja Farms Limited indicates that the suit land was allocated to KK of Post Office Box Number xxxxx Nairobi, ID No 486xxxx/xx and the share certificate number is disclosed as No 1360.

20. He explained that the duplication of Titles is a common problem in the registration area of Juja/Ruiru. He stated that an owner of land had to submit the following documents before being registered at the Lands office; ballot and clearance certificate from the land buying company, share certificate, name must tally with the names in the membership register and the original ID of the claimant. That in this case the land buying company invited Karanja Kinyua in 1990 to their offices to complete registration process of the land.

21. DW1- JKK relied on his witness statement dated the 5/11/18 and the list of documents dated the 5/11/18 and 24/5/18 and marked as DEX 1-9.

22. He stated that he filed the suit as the duly appointed guardian of D vide orders of the Court issued on the 2/3/16 in HCCC MISC No 560 of 2015.

23. That his father namely KK alias EKK died in 1988. That in 1985 he took him and his brother RN in the Company of PM and PN(deceased) to show them the suit land. That his father acquired shares in Juja Farms Limited in 1976 and was allocated two plots by Juja Farms Limited; the suit land and RUIRU/RUIRU EAST BLOCK x/T.xxx. That his father died before the Titles were issued and he held share certificate No xxxx in Juja Farms Limited.

24. That D was issued with a Title in 1999 based on the share certificate in the name of his father. That he did not possess the original Title registered in the name of D.

25. That neither the Plaintiffs nor the Defendant occupy the suit land.

26. He stated that though he was aware that the suit land had earlier been registered in the name of the Plaintiffs husband who was his relative, the suit land belongs to D.

27. DW2- PMW testified and stated that D is his Aunt. That he accompanied Evanson Karanja Kinyua to the land in early 1980s to fix the beacons of the suit land. That D' Husband acquired the land from Juja Farms in 1976. That he does not know the Plaintiffs. That he is aware that Juja Farms Limited was dissolved upon the completion of distribution of the land to its members. That the suit land is currently vacant.

28. DW3- RNK testified and stated that he is the 3<sup>rd</sup> born son of KK and reiterated the evidenced of DW1 and DW2. That upon the death of his father EKK in 1988 the suit land devolved to his mother D.

29. The Plaintiffs in their brief submissions stated that the 1<sup>st</sup> Plaintiff being the wife of KKK is the rightful owner of the suit land. That the suit land was their matrimonial home. That the Plaintiffs are the legal Representatives/Administrators of the estate of KKK.

30. The Defendant submitted that the Plaintiffs produced a grant in the name of KKK while the Title claimed is in the name of KKK and therefore it is doubtful if the Plaintiffs are the legal representatives of KKK. That there is no evidence disclosed to confirm that two sets of names belong to one and the same person.

31. As to whether the Plaintiffs have established fraud on the part of the Defendant, the Defendant submitted that the allegations of fraud were not proven and remain mere accusations.

32. As to who between the parties is the rightful owner of the suit land, the Defendant urged the Court to make a finding in favour of the Defendant on the following grounds; the share certificate No xxxx, the ID No 486xxx/xx in the name of Karanja Kinyua all show that the suit land belongs to the Defendant.

33. That save for the Plaintiffs stating that they acquired the land from Juja Farms Limited, they have not proved by documents that they are the owners of the suit land.

34. Having read and considered the Pleadings, the evidence adduced at the trial, the written submissions and precedent and all the materials placed before me, the issues that commend themselves for determination are; Whether the Plaintiffs have pleaded and proved fraud and illegality on the part of the Defendant; Who between KKK, EKK and KK owns the suit land; what orders should the Court grant; who meets the costs of the suit.

35. This is a case of a parcel of land being registered in the names of two different persons. There are two competing interests over the same parcel of land and it is the duty of the Court based on the evidence received on trial to determine who of the two parties is the valid owner of the suit land. Ordinarily, this is a case that can be resolved through documentary evidence. The fact of ownership and registration of a Title is question of documentation.

36. It is not in dispute that the suit land is the same and is being claimed by both parties. It is also not in dispute that the suit land is unoccupied by either party.

37. The Plaintiffs case is that the suit land belongs to KKK or KKK, their husband and father respectively. That her husband acquired the suit land from Juja Farms Limited. In response to the Defendants counsel during cross examination she stated as follows;

“I have no documents to support the acquisition of the suit land from Juja Farms Limited.”

38. PW2 informed the Court that she is not aware how her father acquired the Title to the suit land.

39. The Plaintiff urged the Court that KKK and KKK are names of the same person. The copy of Title produced by PW1 reads KKK (ID /037xxxx/xx) while the certificate of confirmation of grant dated the 21/3/2016 is in the name of KKK. The Plaintiffs' Counsel on record despite obtaining the leave of the Court to file a copy of the ID failed to do so and therefore denied the Court the opportunity to review the same.

40. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

41. In this case the Plaintiffs failed to provide evidence that shows that the two sets of names belong to one and the same person and or the two sets of names belong to KK. This would have been through a duly registered change of name or a deed poll. It is the finding of the Court that it is doubtful if KKK and KKK refer to KK at all.

42. Have the Plaintiffs proven fraud and illegality on the part of the Defendant? **Black's Law Dictionary, 9<sup>th</sup> Edition** defines fraud as thus;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

43. Fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. The Court cannot infer fraud from the Pleadings. It must be pleaded in a particularized manner and proven by leading evidence.

44. In the case of **Koinange & 13 others vs Koinange [1968] KLR 23** the Court of Appeal held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities.

45. Impeachment of a Title is provided for in law. The law as set out in Section 26 of the Land Registration Act in particular mandates all Courts to take a certificate of Title issued to a proprietor by the Land Registrar as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to easements restrictions and conditions endorsed on the Title. The section provides two instances in which a Title may be impugned; on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme.

46. Under para 4 of the Plaintiff the Plaintiffs averred the Defendant has illegally, unlawfully and fraudulently registered herself as proprietor of the suit land depriving them of Title in the suit land.

47. Order 2 Rule 10 (1) (a) and (2) of the Civil Procedure Rules provides that every pleadings must contain the necessary particulars of any claim, defense or other matter including interalia particulars of misrepresentation, fraud, breach of trust, willful default and undue influence. The importance of this provision cannot be gainsaid- it is to notify the Defendant of the nature of the case that he has to controvert.

48. In this case there are no particulars of fraud, and illegality set out in the Plaintiff against the Defendant. In cross, PW1 informed the Court that she is not aware that the Defendant has a Title to the suit land. That notwithstanding I have anxiously examined the evidence and it is clear that the Plaintiffs failed to prove fraud and or illegality on the part of the Defendant. The Court cannot infer any fraud and or illegality in the absence of evidence in the circumstances

49. In conclusion it is the finding of the Court that the Plaintiffs claim was not proven and it fails. I will make the necessary orders in the end.

50. I shall now turn to the counterclaim of the Defendant. The Defendant claims to be the wife of KK also known as EKK. It is her case that the said EKK acquired the Title from Juja Farms Limited in the 1970s and was issued with a certificate of shares No xxxx and allocated the suit land. It is her case that he died in 1988 and obtained a confirmation of grant on the 13/6/1997 where the land devolved to her absolutely as a tenant for life. That pursuant to the said grant she got registered as owner of the land in 1999. The Defendant could not explain why there are entries in 2004 showing Damaris as the registered owner of the suit land if indeed she had been registered as such in 1999. PW4, the Land Registrar could not explain the anomaly but to say that it is a question of duplication of Title and beseeched the Court to determine the rightful owner of the land.

51. PW4 led evidence and explained in detail what a land ballottee/allotee is required to produce before he gets registered as owner at the Lands office; a share certificate showing the number of shares held in the land buying company; original ID which should tally with the membership register; membership register; letter of clearance from the land buying Company; payment of necessary outgoings and a verified ballot. He stated that the register of land buying companies are maintained at the District Commissioners office where the land buying company has been liquidated or dissolved.

52. DW1 produced a member's register marked DEX 2 which shows that Plot No xxxx (old no xxxx) was allocated to Karanja Kinyua of Post Office Box No xxxx ID No 486xxxx/xx. The document is certified by Assistant Chief Kalimoni, Thika. PW4 also produced the same membership register which he certified on the 3/9/2020 as a certified true copy. The register was therefore produced by both parties and therefore is uncontroverted.

53. PW4 also produced a letter dated the 28/6/1990 authored by Dr E N Ngugi, Chairman of Juja Farms Limited addressed to KK, certificate no xxxx which stated in part;

“ .....(2) If you have not already signed for your two Title deeds both agricultural and residential you are requested to do so as a matter of urgency also.

(3) company office will be open from 8 am from Monday to Saturday to 3 pm.

(4) make sure you bring your original ID share certificate and ballot cards. It is mandatory to do this before the last deadline on 31/8/1990.”

54. There is no evidence that the said KK responded to this call.

55. DW1 produced a share certificate No xxxx dated the 26/9/1977 in the name of KK of one share held in Juja Farms (1976) Limited. This share certificate agrees with the shares held in the membership register. The name on the share certificate reads Karanja Kinyua too.

56. The Defendant has argued that KK and EKK is one and the same person. DWI produced a grant of letters of administration intestate dated the 4/2/1997 issued to the Public Trustee and certificate of confirmation of grant issued on the 13/6/1997. Both documents refer to EKK and not Karanja K. According to the documents, the said EKK died on the 5/4/1988. The Defendant's case is premised on the certificate of confirmation of grant aforesaid. That EKK was her husband and on his death the suit land devolved to her.

57. I have anxiously reviewed the said certificate of confirmation of grant which states as follows;

“ SCHEDULE

The identification and shares of all persons beneficially entitled to inherit the state of the deceased have been ascertained and determined as follows;

To DWK widow for the deceased (EKK) as a tenant for life and thereafter to the following children of the deceased in equal shares; PN, JKK, RNK and GMK.” (emphasis).

58. The details of the suit land nor the shares in Juja Farm Limited are not included in the certificate of grant. The suit land is not disclosed in the grant. There is therefore no evidence to link the suit land to the estate of EKK. The Defendant did not produce any documents executed by the Public Trustee in the estate of KK to D through RL xx and x. I have checked the documents presented by the Land Registrar and the same are missing. The question is how did D get registered as owner of land balloted and allotted to KK without these documents if indeed

her husband was KK. This remains unanswered. The green card bearing the name of D does not indicate that she was registered on succession of the estate of KK. It is silent.

59. It is the finding of the Court that in the absence of cogent evidence to the contrary, there is no nexus between EKK and KK.

60. Back to the Title held by KKK, I note that the transfer document between the Government of Kenya and the said K is not executed by the transferor. It is blank and incomplete and is doubtful if any interest was conveyed to the said K by such a document. I hold not.

61. I have already held that there is no nexus between KKK alias KKK and KK, the allottee of the suit land. The Plaintiffs failed to give an account of the Title in the name of Kenneth and it is the view of the Court that the Title has no root and cannot be left to stand.

62. In conclusion neither the Plaintiffs nor the Defendant have demonstrated any registrable interest in the land balloted and allotted to Karanja Kinyua ID No 486xxxx/xx. Neither parties have proven Title in the suit land. Where a person's Title is under attack, he must of necessity give an account on how he acquired the same. In the case of **Munyu Maina –Vs- Hiram Gathiha Maina, Civil Appeal No.239 of 2009**, where the Appeal Court held that: -

“We have stated that when a registered proprietor root of Title is challenged, it is not sufficient to dangle the instrument of Title as proof of ownership. It is that instrument of Title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the Title to 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.”

63. It is unfortunate that both have tangled Titles in front of the Court but without evidence on how they acquired them.

64. Going by the mandate of the Court as granted by section 26 and 80 of the Land Registration Act, I now proceed to cancel the Titles in the name of KKK and DWK and order the Land Registrar to register the suit land in the name of Karanja Kinyua.

65. The said suit land should be protected by the Land Registrar's restriction until the said KK claims the Title or the duly appointed legal representatives does so.

66. In the end I make the following orders;

a. The Plaintiffs suit is dismissed

b. The counterclaim is dismissed.

c. The Titles in the name of KKK and DWK be and are hereby cancelled.

d. The Title of the suit land be and is hereby registered in the name of Karanja Kinyua ID No 486xxxx/xx.

e. A restriction be and is hereby ordered to be registered on the land until the said KK collects the Title in person and upon identification or the Legal representative does so.

f. Both parties have lost their cases, I order that each meets their costs of the suit.

67. **It is so ordered.**

**DATED, SIGNED AND DELIVERED AT THIKA THIS 21<sup>ST</sup> DAY OF JANUARY 2021**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

1<sup>st</sup> Plaintiff: Present in person

2<sup>nd</sup> Plaintiff: Present in Person. Advocate is absent.

Lucy: Court Assistant.