



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. 46 'A' OF 2019 (OS)

PETER KIMANI MUNGAI.....PLAINTIFF

VERSUS

RAHAB WAMBUI KIMANI.....DEFENDANT

JUDGMENT

1. Before me for determination is a man-made Application by the Plaintiff herein titled as an Originating Summons, dated the 29th April 2019 and filed on the 29th April 2019 where the Plaintiff seeks for the following orders;

i. That all the transactions involving land parcel numbers Nyandarua/Olkalaou/Central/2518, 3557, 3558, 1052 and 2520 be declared as null and void as the same were conducted by the Respondent without following the law of succession as required and any title issued therein the same be cancelled forthwith.

ii. **Spent**

2. The Originating Summons was supported on the grounds that were adduced at the hearing as well as by the supporting affidavit sworn on an undated date by the Plaintiff.

3. The Defendant's man-made replying affidavit sworn on the 13th May 2019 was to the effect that she and the Plaintiff were siblings and that she was the registered proprietor of the suit lands by virtue of having acquired the same from their deceased father Moses Mungai Kiririo during his life time.

4. The matter proceeded for hearing where the Plaintiff testified that he was the first born and a sibling to the Defendant. That pursuant to the death of their father in the year 2005, he had sought to file a Succession Cause to his estate wherein the Defendant herein had hidden all the documents.

5. That summons by the Chief (Pf exh 1) to have her produce the documents which included the title deeds and the death certificates were futile and it was after the Defendant became hostile that he had reported the matter to the police.

6. That he had then carried out searches on the suit lands, from the year 2007 to 2014 (Pf exh 2) wherein he had noted that the land was still registered to his father the deceased Moses Mungai Kiririo until the year 2015 when he discovered that the Defendant had now transferred his father's land into her name (Pf exh 3) and had proceeded to sell some of it.

7. He had then proceeded to name his deceased father's parcels of land as parcel numbers 1054, 2518 and which had been subdivided in his father's life time giving rise to parcel numbers 3557 and 3558.

8. That he had carried out investigations to his father's death after the Defendant had refused to file a Succession Cause to which he had found out that it had been due to poisoning.

9. The Defendant's case on the other hand was that the suit parcels of land were registered in their late father's name. And that prior to his death, their father had distributed the same to his children where the transfer had been effected at the District Officer's office. That the Plaintiff had also been given his share of 1 ½ acre of land on parcel No 1054 in the year 1990 where he now lived, and had thereafter signed an agreement (Df exh 1) to the effect that he would leave his parent's land.

10. That the Plaintiff had not in good relationship with their parents because he used to smoke bhang and would occasionally threaten them

with a cutlass (panga) and place cautions on the land to which their father had used a lot of money to lift the same. It was her evidence that the relationship between the Plaintiff and their parents was so bad that he did not even attend their burial upon their demise. The Defendant thus sought for the assistance of the Court.

11. On cross examination, the Defendant reiterated that on the 30th June 2005, they had all been given land by their father before his death where the transfers had been effected and the Plaintiff had also witnessed the same at the District officer's office wherein he had also signed an agreement that the land would be subdivided and that the Plaintiff had also been given his share prior in the year 1990.

12. That pursuant to obtaining the transfers they had taken the consents to the Land Registrar wherein they had obtained their respective titles.

13. That parcel No. 2519 had been subdivided giving rise to parcels No 3557 and 3558. That in regard to parcel No 3557, the consent (Df exh 2) had not been signed because one their siblings, Gabriel Kuria was still a minor and therefore that land had no title.

14. That their father had given land to persons who had helped him during his life time with the effect that parcel No 3558 had been given to their cousin Keroro's wife and that she(Defendant) had been given parcel No 2518 measuring 1.35 hectares and parcel No 1052. Her evidence was that when she was given this land, their mother who had her land in Rimuruti was still alive.

15. That in a Will produced as df Exh 3 (a) and (b) written by their father and dated the 25th February 1994, their father had stated how stubborn the Plaintiff had been and the threats he had issued him. The Defendant also testified that she also had the original letters their father wrote giving them the land.

16. The Defendant laid blame on the Plaintiff for the death of their parents stating that he had poisoned their father. She was categorical that the Plaintiff's land was No. 1054 and that she did not have title to it.

17. The Court, upon considering the evidence adduced so far by the parties was of the opinion that it needed further evidence from the Land Registrar on the status of parcels of land No Nyandarua/Olkalaou/Central/2518, 3557, 3558, 1054 and 2520 as well as from the Mrs. Kinyua from the District officer's office.

18. The Land Registrar who had been called upon by the Court to assist the court submitted the green cards to parcels No. Nyandarua/Olkalaou/Central/2518, 3557, 3558, 1054 and 2520 testified that title to land parcel number 3557 could still not be traced but that he had the original green card to parcels number 2519 which was subdivided to give rise to parcel number 3557 and 3538 as well as the mutation that was certified by the district surveyor, which he submitted to the court.

19. On the other hand Mrs. Kinyua who had also been summoned by the Court testified to the effect that she had been a member to the Olkalou Land Board for 17 years since her retirement as a teacher in the year 2000 wherein she represented persons who were not in employment. That she could not remember the facts in relation to the case and had no documents as she had not been informed through the summons what the matter was about.

20. Both parties having closed their cases, filed their respective submissions as follows.

Plaintiff's submissions.

21. The Plaintiff's submission was to the effect that after the death of his father his sister, the Defendant herein transferred their father's property into her name and that of her children in the year 2014, as per the official searches herein adduced as evidence, without going through the Succession Cause and without involving family members.

22. The Plaintiffs further submission was to the effect that the Defendant was only allocated land parcel number Nyandarua/Olkalaou/Central/1052 and therefore the titles to land parcels number Nyandarua/Olkalaou/Central/2518, 3557, 3558 and 2520 which were subsequently registered in her name should be canceled and reverted to their father Moses Mungai Kiriro's name.

Defendant's submission

23. The Defendant's submission on the other hand was that pursuant to the filing of the Plaintiff's Originating Summons seeking amongst other orders for injunctive orders against her and the subsequent hearing of the matter thereafter, the Plaintiff did not produce any witness or documents to support his claim and that the documents herein produced were fraudulently obtained.

24. That the Plaintiff failed to disclose material facts in evidence to the effect that prior to the death of their parents, there had been numerous family meetings in which the Plaintiff's violent behavior had been discussed and that their deceased father had written a Will distributing all his properties, to which the Plaintiff was also given his share of land which he had disposed to interested buyers at his will and was now bent on disposing of the rest of the land. That further there had been a Succession Cause No 272/14 filed at the High Court to which the Plaintiff had not disclosed its outcome.

25. That the Plaintiff should not benefit from the deceased's estate as the same had been distributed and shared pursuant to the deceased's wishes and that the Plaintiff was bent at disrupting the said distribution upon his release from jail where he had served a jail term of five years for a criminal offence. The Defendant sought for the Plaintiff's suit to be dismissed and for the cautions lodged on the suit lands by the Plaintiff to be lifted.

Determination.

26. I have considered this matter where tempers rose occasionally and which was filed and prosecuted in person by the parties who were siblings, with a lot of anxiety. This suit was commenced by way of an Originating Summons filed on 29th April 2019. The Plaintiff holds a Limited Grant of Letters of Administration ad litem granted by the High Court in Probate and Administration Cause No. 27 of 2018 authorizing him to sue on behalf of the estate of Moses Mungai Kiriro (deceased) who died on 21st October 2005. So far, no grant of Letters of Administration has been issued in respect of the said estate, but this estate has purportedly already been distributed. The deceased was the first registered proprietor of the land parcel Nyandarua/Olkalaou/Central/2518, 3557, 3558, 1054 and 2520 (the suit property), having procured registration under the Registered Land Act (CAP 300) (repealed by the Land Registration Act, 2012).

27. On subsequent dates after the death of Moses Mungai Kiriro (deceased) Racheal Wanjiku Kiriko was registered as proprietor of parcel No Nyandarua/Olkalaou/Central/3558 on the 8th December 2015 and issued with a title deed, on the 16th December 2014 one Joyce Nyambura Kimani was registered as proprietor of parcel No. Nyandarua/Olkalaou/Central/2520 wherein she too had been issued with a title deed. On the 1st December 2014 both the Defendant and Lucy Muthoni Kimani had been registered as proprietors of parcel No Nyandarua/Olkalaou/Central/2518 and issued with a title deed. To all these parcels of land, the Plaintiff had placed Cautions.

28. What clearly comes out from the pleadings, the evidence herein and the submissions is that the Plaintiff is challenging the registration of their deceased father's estate into the Defendant and other persons (his siblings) names and wants a rectification of the register so that the title reflects the name of the deceased as proprietor in order that the estate may commence succession proceedings.

29. On the other hand the Defendant is categorical that their father died testate and that his estate was distributed in accordance to a Will executed prior to his death.

30. What therefore comes out clearly for determination is whether the Defendant's title should be impeached or not.

31. I note that the deceased herein died on the 21st October 2005. It has not been shown how the Respondent and the others who are not party to the proceedings got themselves registered as proprietors of the suit properties more than 9 years after the death of the previous registered owner. No succession proceedings have ever been conducted and/or concluded in respect of the estate of the deceased and no Will has been adduced as evidence to support the Defendants claim that the Deceased died testate and that his estate had been distributed.

32. All that the Defendant produced and referred to as a 'Will' were lamentations of the deceased on the behavior of the Plaintiff which in my humble view did not comprise a Will which is a legal instrument that permits the testator to make decisions on how his estate will be managed and distributed after his death. As it stands now, the estate of the deceased has not been distributed and therefore I shall not belabor on the fact that the title of the Defendant and the parties registered as proprietors of the deceased's estates herein captioned were improperly acquired.

33. **My brother Justice Sila Munyao in Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** stated, and I agree fully that:

It does not need space science to bring one to the conclusion that the 1st Respondent must have acquired registration of the suit property by way of fraud. He obviously could not have perpetrated the fraud on his own and he must have colluded with corrupt and morally deficient fellows in the land registry.

34. Section 26 of the Land Registration Act is explicit to the effect that :-

(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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

35. It will be seen from the above provision that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme.

36. The titles of the Defendant and the subsequent proprietors herein are clearly impeachable by dint of the provisions of Section 26 (1) (b) and cannot be allowed to stand and must be cancelled. To this effect the Court finds in a favour of the Plaintiff's case and direct as follows:

37. That the titles to Nyandarua/Olkalaou/Central/2518, 3557, 3558, and 2520 were improperly procured, are null and void and the same should be cancelled and reverted to the proprietorship of Moses Mungai Kiririo.

38. Since the matter is between family members, there shall be no orders as to costs.

Dated and Delivered at Nakuru this 13th day of January 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE