



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO. 916 OF 2004

KURIA WAITATHU KANGANGIRA.....PLAINTIFF

VERSUS

1. PATRICK KIARIE MUKURIA..... 1ST DEFENDANT

2. MICHAEL NYOIKE MUKURIA..... 2ND DEFENDANT

3. MOSES KUNGU MUKURIA..... 3RD DEFENDANT

4. STEPHEN MBUCHO MUKURIA..... 4TH DEFENDANT

5. SIMON GITAU MUKURIA..... 5TH DEFENDANT

6. JOHN NJUGUNA MUKURIA..... 6TH DEFENDANT

7. PETER NG'ANG'A MUKURIA..... 7TH DEFENDANT

8. PAUL GICHUHI MUKURIA..... 8TH DEFENDANT

9. JOHN NJOROGE MUKURIA..... 9TH DEFENDANT

JUDGMENT

The Plaintiff is an old man who claims to have been born in 1905 although his Identity Card produced in evidence before this Court shows that he was born in 1919. He has filed this suit, by way of an Originating Summons, against his nine sons by his second wife Teresia Wanjiru seeking the following orders.

1. That the division and subsequent transfers carried out on his land known as

Kiganjo/Nembu/1727, Kiganjo/Nembu/1728,

Kiganjo/Nembu/1729, Kiganjo/Nembu/1730,

Kiganjo/Nembu/1743, Kiganjo/Nembu/174 4

and all other sub divisions and subsequent

transfers be cancelled/omitted and the Plaintiff be granted the original title to his Property known as Kiganjo/Nembu/553 AND a further order to the District Land Registrar, Thika to cancel the said subdivisions and to give the Plaintiff the title to the land known as Kiganjo/Nembu/553

2. That the Respondents their agents, servants and/or employees be restrained by this Honourable Court from selling, subdividing wasting, damaging alienating and/or in any other way interfering with the suit premises known as Kiganjo/Nembu/553 and all subsequent subdivisions and transfer registered as Numbers Kiganjo/Nembu/1726, 1727,1728,1729, 1730, 1743 and 1744 and all other subsequent subdivisions and transfers thereof

3. A declaration that all subdivisions carried out on the Plaintiffs land known as Kiganjo/Nembu/553 were obtained fraudulently and/or by mistake and in the alternative a declaration that the Defendants are registered as proprietors of the said parcels of land and all subdivisions and subsequent subdivisions arising from Kiganjo/Nembu/553 as trustees for the benefit of the Plaintiff, Andrew Ng'ang'a Mukuria, Mary Wanjiru Mukuria, Margaret NjambiMukuria, Irene Wambui Mukuria and Lucy Nyokabi

Mukuria and a further order to have the said subdivisions cancelled and the property divided equally between the Plaintiff and the said beneficiaries.

4. Costs and interest (sic) of the suit.

The Originating Summons is based on four grounds, namely, that

- (i) The subdivisions to the suit land were carried out fraudulently
- (ii) The Plaintiff is now a trespasser in his own land
- (iii) The Plaintiff cannot bury his wife on the parcel of land owing to a court order
- (iv) In the interest of justice the subdivisions ought to be revoked .

The Plaintiff has sworn a supporting affidavit comprising of 25 paragraphs in which he depones that he is married to two wives (one of whom has recently died) and both of them bore him children. He also depones that his son Patrick Kiarie Mukuria (the 1st Defendant) took advantage of him whilst the Plaintiff was an alcoholic and talked him into subdividing his land parcel Kiganjo/Nembu/553, measuring 11.1 hectares, and sharing it out to all his children to avoid squabbles when he died. According to the Plaintiff, the idea was to have the plot subdivided into 21 equal portions and share it out to his 19 children, 2 wives and the Plaintiff.

The Plaintiff claims that he gave his title documents to the first Defendant to assist in the subdivisions but instead of causing the land to be subdivided into 21 parcels, he fraudulently transferred the whole land to himself and his own brothers (his mother's sons) without the Plaintiff's consent or authority despite the fact that he had informed the Plaintiff that the Registrar had refused to register the subdivisions. The Plaintiff has deponed also that he trusted his son Patrick and had no reason not to believe him. He further says that the 1st Defendant retained the titles to the land and that it was only on 9th June 2004, as he and his son by his first wife (Andrew) were preparing to bury the said first wife Hannah Wamaitha who had died on 2nd June 2004 that the Plaintiff came to learn of the fraudulent transfers. The said Andrew Ng'ang'a Mukuria, not a party to this suit, intended to bury his mother on the Plaintiff's land but was served with a Court order obtained by five of the Defendants in CMCC Thika No. 690 of 2004 restraining him from so burying her on parcel No. Kiganjo/Nembu/1743. The 2nd to the 6th Defendants are the Plaintiffs in that suit. The body of the said Hannah Wamaitha was returned to the Kigumo Health Centre and has remained there since.

The Plaintiff is represented by Mr. Kivuva and Mr. Waweru. The Defendants are in person, the advocate who initially appeared for them Mr. Wakahu having been disqualified by the Court on the grounds that he had previously acted for both the Plaintiff and the 1st Defendant in a suit relating to the land in question.

On 14th October 2004 parties consented to the matter being heard and determined on both oral and affidavit evidence and that the Plaintiff and the 1st Defendant be the ones to testify. The Defendants were given time to appoint an alternative Counsel but did not do so. They did agree in Court however that the 1st Defendant could testify on behalf of all of them and cross-examine the Plaintiff.

The Plaintiff was eloquent throughout his testimony despite an obvious hearing problem. He however departed from the prayers in his Originating Summons wherein he has sought a declaration that the land held by the Defendants is so held in trust for the children of the deceased first wife and that the property should be shared among them, in addition to himself. In his testimony he told the Court that his

desire and intention, once the Defendants titles are cancelled is to have the land divided into two equal portions and each be given to either of his two houses. Questioned by the Court, he further added that he had one daughter, Wanjiru also known as Muringa whom he would wish to bequeath land as well. The 1st and 6th Defendants cross-examined the Plaintiff and put it to him that he voluntarily and in the presence of elders subdivided the land in question and gave the various subdivisions to his ten sons comprising of the nine Defendants and Andrew Ng'ang'a Mukuria, which he denied. The Defendants also put it to the Plaintiff that the said subdivisions were issues in a previous suit in which he gave evidence to the effect that he voluntarily gave them land but this too he denied. The Plaintiff went further to specifically state that he was not concerned about any other suit in Kiambu or elsewhere or any other matters which, in his opinion were not related to this suit. The Defendants did not adduce any evidence as the 1st Defendant refused to testify citing threats and caution from his eight brothers not to testify. The Court had no option but to close the defence case and invite oral submissions. Mr. Kivuva summarized the Plaintiffs case, submitted that the Plaintiff had proven his case and prayed that the 1st Defendant be personally condemned to pay costs of this suit, the mortuary expenses "if only to pass a message to the children in this country to learn respect for their parents." Counsel submitted that the 1st Defendant was instrumental in defrauding the Plaintiff and also in the filing of CMCC. Thika No.690 of 2004 in which the order stopping the Plaintiff's wife's burial was obtained. The 1st Defendant denied this in his final submission, a position which is borne out by the pleadings therein which clearly show he is not a party to that suit.

The parties hereto having agreed on both oral and affidavit evidence the Court has considered the Replying affidavit of the 1st Defendant of 12th October 2004 sworn on his own behalf and on behalf of all other Defendants. Curiously enough, the said affidavit was not challenged in any way by the Plaintiff and Counsel only referred to it in passing at the final submissions when he urged the Court to ignore the same, on the ground that the Defendant had not backed it with oral evidence. I do not agree with Counsel that an affidavit, being in the real sense a sworn statement need be backed with additional oral evidence. On the contrary I consider the Replying affidavit herein highly material in that it provides very crucial evidence relevant to these proceedings which Counsel wished buried, and which the Plaintiff clearly refused to disclose or truthfully testify on when cross examined thereon.

The Plaintiff has told this Court that the present suit was precipitated by the refusal by the Defendants to have Andrew Ng'ang'a bury his mother Hannah Wamaitha Mukuria on plot No. L.R. No. KIGANJO/NEMBU/1743 as per annexure "KWK2" of his affidavit of 25th August 2004. Although not very legible "KWK2" partly reads as follows:

"IT IS HEREBY ORDERED THAT:

- (a) That the respondent herein by himself or his agents and/or servants be restrained from burying the mortal remains of his

mother HANNAH WAMAITHA MUKURIA (an)

L.R. NO. KIGANJ O/NEMBU/1743."

Paragraph 18 of the Replying Affidavit however states that the said Andrew Ng'ang'a had intended to bury his deceased mother on Kiganjo/Nembu/1744 which is jointly owned by the Plaintiffs in CMCC No. 690 of 2004. The 1st Defendant in paragraph 19 and 20 of the Replying Affidavit states that the Defendants herein have no objection to the remains of Hannah Wamaitha being buried on plot No. 1743 which they state, and which is proved by the Plaintiff's annexure 'KWK 3' and the Defendants PKM III to belong to the Plaintiff. PMK III is a copy of official search obtained on 4th October 2004 which shows the Plaintiff herein as the absolute owner of KIGANJO/NEMBU/1743 and which proves that the Plaintiff herein is not telling the truth when he alleges that the Defendants have rendered him a trespasser on his own land without even a place to be buried. The proceedings annexed to the Defendant's Replying Affidavit, being RMCC GATUNDU No. 56 of 1991 and which the Plaintiff deliberately avoided in cross examination do confirm at pages 26, 27 and 29 that the Plaintiff did in fact voluntarily give land parcel No. KIGANJO/NEMBU/1744 to the 2nd to 6th Defendants and the rest of the main parcel number KIGANJO/NEMBU/553 to other of his 10 sons. In the said suit, wherein his deceased wife

and mother of the Defendant in CMCC No.690 of 2004 had sued the Plaintiff and the 1st Defendant for 2 acres of L.R. No. KIGANJO/NEMBU/553, the Plaintiff in his defence stated that: -

“The original number is KIGANJO/NEMBU/553. This land no longer exists.”

at page 23 of the same proceedings, the Plaintiff testified that

“The Plaintiff (deceased) raised the issue of the two acres from my land KIGANJO/NEMBU/553 only recently. I subdivided the land among my ten sons. Each got approximately one acre.”

It seems from the said proceedings that the deceased was actually after two acres of land for the benefit of her own son, the Defendant in CMCC No. 690 of 2004 as seen from the Plaintiff’s testimony in RMCC 51 of 1991 where he says:

“I am ready and willing to give one acre to the Plaintiff’s son just like the others. But I cannot give him two acres I will give the Plaintiff (deceased wife) land which is in my name.”

What is not clear is why the Defendants say the burial of Hannah Wamaitha which they restrained, was planned for KIGANJO/NEMBU/1744. The order they obtained reads 1743. Whatever the case, it seems that the deceased’s son, Andrew Ng’ang’a, in supporting these proceedings, is championing, albeit from the background, his mother’s earlier attempts to have him acquire more land than the rest of his brothers (step brothers). It is quite obvious that if the land in question was to be subdivided into two equal halves, one for each household, he would get a lion’s share. It seems to me that it is the said Andrew Ng’ang’a, not the 1st Defendant who is bent on taking advantage of his father’s advanced age to the extent of misleading him into filing this action with the hope that his bequests inter vivos would be reversed to his own benefit. It is unfortunate that in the presence of such overwhelming evidence against the contention of fraud in the registration of the challenged titles, Counsel for the Plaintiff would insist on filing and arguing this case on matters which are clearly res judicata. From the evidence on record, I find that the Plaintiff did voluntarily give the Defendants their portions of land he now claims from them. I also find that he does own L.R. NO. KIGANJO/NEMBU/1743 on which he can bury his wife Hannah Wamaitha. This being the case the Defendants have not made him a trespasser. I further find that he has not made out any case as against the Defendants whom he gave land voluntarily, which means that their titles are indefeasible, having not been acquired through fraud as alleged. I find that the Plaintiffs suit against the Defendants is baseless and must fail. Except for finding as I have that the body of Hannah Wamaitha Mukuria may be buried on parcel No. KIGANJO/NEMBU/1743, I leave the burial dispute to be determined in the Court where it was filed since the same is not part of the Originating Summons but separate proceedings altogether. In view of the circumstances of this case and the Plaintiffs bereavement and poor health I shall make no order as to costs.

Consequently, this suit is dismissed with no order as to costs.

Dated and Delivered at Nairobi this 2 nd day of December 2004.

M.G. Mugo

Ag. Judge

In the presence of

Kivuva & Waweru present for the Plaintiff

Defendants 1 -9 in person