



Nyambura (Suing ad-litem on behalf of the Estate of Moses Njoroge Nyongo - Deceased) v Kabogo (Environment & Land Case E131 of 2021) [2023] KEELC 20705 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20705 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E131 OF 2021
JG KEMEI, J
OCTOBER 12, 2023**

BETWEEN

JANE NYAMBURA (SUING AD-LITEM ON BEHALF OF THE ESTATE OF MOSES NJOROGE NYONGO - DECEASED) PLAINTIFF

AND

SIMON NDEGWA KABOGO DEFENDANT

JUDGMENT

1. The plaintiff filed suit as the administratrix of the estate of Moses Njoroge Nyongo, deceased seeking the following orders:-
 - a. That there be a conservatory order restraining the Defendant by themselves or any other person acting on their behalf from altering or rectifying land registration records, taking possession, using, alienating or in any other manner interfering with the suit property suit property IR No. 48246/1 – LR No. 7418/4/3 Ruiru.
 - b. A declaration that the Decree of MCLE/48/2019 compelling the transfer of suit property suit property IR No. 48246/1 – LR No. 7418/4/3 Ruiru and registration of the same in the name of the defendant was irregular, unlawful, flawed and therefore null and void ab initio.
 - c. An order for rectification of the registration of the defendant from the title of suit property IR No. 48246/1 – LR No. 7418/4/3 Ruiru and the said title to be in the name of Hannah Wanjiru Nyongo, holding on behalf and in trust of the first family of the Estate of Stephen Nyongo Mutinda (Deceased).
 - d. General damages.
 - e. Mesne profits.



- f. Costs of the suit plus interest thereon at court rates.
 - g. Any other relief that this honourable court may deem fit and just to grant.
2. She avers that she is one of the beneficiaries of the estate. That the defendant is engaged in fraud by claiming ownership of the suit land. That the land is held in trust by one Hannah Wanjiru Nyongo on behalf of the first family of the estate of Stephen Nyongo Mutinda, Deceased. That the alleged sale and transfer of the land to the defendant is fraudulent, null and void.
 3. The defendant resisted the plaintiff's case and filed defence and counterclaim on 14/12/2021.
 4. The defendant contends that he bought ½ acre from the plaintiff's husband to be excised from LR. No. 2418/4/3. That the land belonged to Stephen Nyongo Mutinda, Deceased. Further that the Plaintiff and the Defendant jointly sold the land to him whereupon he took possession in 2009 subdivided and sold to third parties. That the Plaintiff's husband became the beneficiary of parcels 7418/76, 76, 78 and 79. That the Court declined to have the Plaintiff enjoined in 2009 because she was not an administrator of the estate of Nyongo. That the registration of the properties were ordered by a competent court for which no appeal has been filed hence the issue of transfer and ownership of the land is res judicata.
 5. In his counterclaim the Defendant sought the orders as follows:-
 - a. That an order of eviction be issued as against the defendant, by herself, relatives, children, assignees or anybody else claiming through her demolition all the structures erected in land parcels IR 193408 LR 7418/76, IR 193409 LR 7418/77, IR 193410 LR 7418/78 and IR 193411 LR 7418/79.
 - b. Costs and interests of the counterclaim.
 6. That the plaintiff has trespassed on to the land which constitutes fraud because she and her husband sold the land to the defendant in 2009 by feigning ignorance of the same.

The evidence of the parties

7. The plaintiff led evidence in person as PW1. She relied on her witness statement dated 11/11/2021 as her evidence in chief. In support of her claim she produced documents marked as PEX No. 1-4 on pages 57 -67 of the trial bundle.
8. She stated that she is the wife of Moses Nyongo who died in 2016. She showed the court a picture of a house on page 66 – 67 of trial bundle and informed the court that it is her house and that her husband is buried on the land.
9. In cross the witness informed the court that she learned of the case in MCLC 48 of 2019 Ruiru from her mother in law. She informed the court that though the defendant obtained orders in his favour in the Ruiru Case she does not agree with the verdict of the court. That she has not filed any appeal in the case.
10. Further the witness stated that her case is based on fraud perpetuated by the defendant. Shown the agreement on pages 10 – 11 of her trial bundle, she stated that the purported signature against her name is a forgery. That she has not filed any complaint in respect to the said alleged forgery. That she learned about the transaction in 2011 through her mother in law. Further she informed the court that she has not presented any forensic report to prove the claim of forgery against the defendant.
11. On the question of proof that the pictures on pages 65 – 67 are on the suit land, she stated that the court can visit the site to confirm that it is her house and is situated on the suit land.



12. She contended that the defendant transacted with the wrong administrator, Hannah Wanjiru Nyongo instead of Monica Murugi Nyongo who is the administrator of the estate of Stephen Nyongo Mutinda.
13. That the court in the Ruiru case ordered Monica to execute the transfer in default the Executive Officer of the court was ordered to do so in her stead.
14. Further she informed the court that she filed an Appeal against the decision in MCLE 48 of 2019 but the same was dismissed.
15. In addition she informed the court that she was not a party to the MCLE 48 of 2019.
16. She informed the court in re-examination that the ID No. 6837799 is not hers. That in 2019 her mother in law, Monica Murugi unsuccessfully sought to enjoin her to the suit but the application was dismissed.
17. Simon Ndegwa Kabogo led evidence on his own behalf and relied on his witness statement dated 3/12/2021 as his evidence in chief. He produced documents marked as PEX No. 1- 14 appearing on pages 10 – 62 of his trial bundle.
18. In cross the witness stated that he bought the suit land from the plaintiff and her husband Moses Nyongo deceased in 2005. That the initial agreement was for 2 acres but reduced to ½ acre. The agreement is dated 17/1/2009. The ID 6037799 was used for Moses Nyongo but there was no ID disclosed against the name of the Plaintiff. He stated that the plaintiff did not give her ID number. That the plaintiff was present when the agreement was executed. That the agreement was drafted by Messrs Kago & Co. Advocates. In addition the witness stated that Moses Nyongo received the money in the presence of the Plaintiff. That he paid the purchase price in instalments totaling Kshs. 1.4m.
19. That the 3rd agreement on pages 16 – 17 of the trial bundle was between the defendant and Moses Nyongo and the Plaintiff through the execution part, the name of the Plaintiff was not included.
20. That at the time of purchase, the land had not been subdivided formally but Moses had been allotted his share of the land.
21. He informed the court that he knows the Nyongo's family well as he lives in the neighbourhood. That he does not live on the land.
22. That the land was subdivided. That the 3 wives of Nyongo were appointed administrators of his estate. That Moses and the plaintiff held no title for the land at the time of the purchase. The land was in the name of the deceased father. That Moses had the authority to sell the land to him. That the plaintiff was present.
23. With that parties closed their cases and elected to file written submissions.
24. It was submitted by the plaintiff that the defendant is not a bonafide owner of the land. That he irregularly and or unlawfully caused the lands to be registered in his name through forgery of the agreement of sale in court. That the property is under Succession and the acts of the defendant amount to intermeddling contrary to section 45 of the *Law of Succession Act*.
25. Further that the defendant has failed to prove that the plaintiff and her husband sold the land to him. That the defendant failed to present the witnesses to the agreement is further testament to the inability to prove the sale. See section 25 of the *Land Registration Act*.



26. The plaintiff relied on the cases of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & anor.* [2013]eKLR; *Kipkepe Limited v Peterson Ondieki Tai* [2016]eKLR to advance the point that the defendant has failed to prove that he acquired a good title.
27. Relying in the case of *Naomi Jelimo Katam v Ruth Kiplagat* [2012]eKLR the Plaintiff submitted that she has an interest in the suit property as a beneficiary of the estate of Moses Nyongo. That her consent was not obtained before the land was sold to the Defendant. Moses was a beneficiary of the estate - See grant issued in 2016.
28. That the Plaintiff and her children are beneficiaries of the estate of Moses Nyongo.
29. Relying on the cases stated here: *Daniel Mule Musau & Philip Muilu Musau (Suing as legal administrator's Ad Litem of the Estate of Musau Muilu Mwova – Deceased) v Titus Ndambuki* [2019]eKLR and *Eliud Njoroge Gachiri v. Stephen Kamau Ng'ang'a* (2018)eKLR the plaintiff urged the court to cancel / revoke the title in the name of the defendant.
30. Whether the declaratory / and or injunctive orders should be granted; the plaintiff answered in the affirmative on the ground that the plaintiff is the authorized administratrix of the estate of Moses Nyongo.
31. The defendant filed written submissions dated 29/8/2023 through the firm of Kanyi Kiruchi & Co. Advocates.
32. Who between the plaintiff and the defendant is the owner of the parcels? It was submitted that the defendant is the registered owner of the suit land. That he acquired the land lawfully. That the administrators of the estates, family members consented and signed the transfer forms to confirm. That by that time, one of the administrators Hannah Wanjiru Nyongo the mother in law of the deceased had passed on and Samuel Kagicha Nyongo substituted her to represent the 1st wife's family. That the Plaintiff participated in the application in MCLE 48 of 2019 in seeking joinder of the Plaintiff, which application was dismissed. That the Court ordered the execution of the assent transferring the land to the Defendant. With respect to the allegation of fraud the Defendant submitted that the Plaintiff failed to produce any forensic report against the allegations levelled against Defendant.

Analysis and determination

33. The key issues for determination:-
 - a. Whether the Plaintiff has proved fraud;
 - b. Whether the Plaintiff should be evicted;
 - c. Costs.
34. The Plaintiff's case is that she is the wife and widow of Moses Njoroge Nyongo deceased who was one of the beneficiaries of the estate of his father Stephen Nyongo Mutinda, deceased. It is her case that her husband did not sell land to the defendant, she did not participate in the transaction; her consent was not obtained; deceased did not express intention to sell land to the defendant; the defendant intermeddled with the estate of Moses Njoroge Nyongo; the suit was held in trust by Hannah Nyongo on behalf of the estate of Stephen Nyongo Mutinda; sale was without the knowledge and consent of the administrators; deceased left behind dependants being herself and two children; she did not execute the sale agreement; the signatures on the sale agreement are forgeries. She urged the court to cancel the title on grounds of fraud and forgery and register it in her name.



35. The defendant on the other hand denied the claim of the plaintiff and contended that he initially purchased 2 acres to be excised from Parcel 7418/4/3, the portion distributed to Moses Njoroge Nyongo in 2009. That later the land was reduced to ½ acre. That the Plaintiff executed the agreement of sale. The subdivision was done in full knowledge, consent and full view of the Plaintiff and her husband who even disposed off some portions to third parties who live on the land. Further that the estate of Stephen Nyongo had been administered in 1987 and his 3 wives appointed administrators of the estate to represent his 3 houses. That the assent/transfer was prepared and executed by 2 out of 3 administrators forcing him to file suit MCLE No. 48 of 2019 where the Plaintiff sought for joinder to the suit but the application was dismissed. The defendant avers that the land was lawfully transferred to him and urged the court to order the eviction of the Plaintiff from the suit land.
36. It is trite that where a party bases her case on fraud, she must plead and prove fraud in line with the standard of proof which is below that required in Criminal Cases but higher than that in Civil Cases.
37. Section 26(1) of *Land Registration Act* provides 2 ways in which a title may be impeached;
- (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.
38. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000]eKLR the Court stated as follows:-
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
39. In this case though the plaintiff based her case on fraud/forgery she did not plead the circumstances of fraud/forgery. Further the Plaintiff averred that the agreement of sale of 2009 is a forgery however she failed to produce any expert forensic report to back up the allegation. In the absence of any evidence to support forgery, the court holds that the plaintiff failed to prove fraud/forgery and that the plaintiff executed the agreement with her late husband.
40. On the claim of intermeddling of the suit land the court finds that the estate of the plaintiff's father in law was administered and distributed in 1987 and ended in 2006. Moses Njoroge Nyongo, was a beneficiary for the 1st house – Hannah Wanjiru Nyongo.
41. I have perused the Agreement of Sale dated 17/1/2009 executed by both the plaintiff and Moses Njoroge Nyongo, the acknowledgement of payments, the agreement dated 15/9/2014 between the vendor and the Defendant authorizing him to subdivide the suit land. I have also perused the copy of the Death Certificate dated 7/7/2020 and the clear inference from the said document is that the defendant purchased the land from Moses Nyongo in his lifetime having passed away in 2016. That the only thing that remained was the transfer of the land. Further the administrators of the estate signed off the land to the defendant. The court finds no evidence of intermeddling in this case.
42. The title of the defendant having not been tainted or impeached the court finds that the defendant holds a valid title.



43. Having held as I have, the occupation of the plaintiff on any part of the land is without any lawful justification and the same amounts to trespass. I shall make the necessary order in the end.
44. Final orders:-
- a. The plaintiff's case fails. It is dismissed.
 - b. The counterclaim of the defendant succeeds. It is allowed as prayed.
 - c. Cost of the suit and counterclaim shall be borne by the plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 12TH DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of

Plaintiff – Absent – date taken in Court in the presence of Counsel

Kanyi for Defendant

Court Assistants – Phyllis & Lilian

