



Irungu (Suing as the Legal Representative of Peninah Muthoni Cimba) v Maina (Environment & Land Case 51 of 2018) [2023] KEELC 21435 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21435 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 51 OF 2018
JM MUTUNGI, J
NOVEMBER 10, 2023**

BETWEEN

**ANTONY CIMBA IRUNGU (SUING AS THE LEGAL REPRESENTATIVE OF
PENINAH MUTHONI CIMBA) PLAINTIFF**

AND

JOSEPH GITHINJI MAINA DEFENDANT

JUDGMENT

1. The Plaintiff commenced the present suit by way of a Plaint dated 28th August 2018 seeking for orders that:
 1. Nullification of the transfer of LR Kiine/Rukanga/2011 and 2012 and declaration that the suit land belongs to the plaintiff and or heir accordingly.
 2. Cost of the suit.
2. The plaint is predicated upon the grounds that the Plaintiff is the legal representative of the estate of Peninah Muthoni Cimba (deceased) vide the Limited Grant of Letters of Administration ad Colligenda Bona issued on 23/08/2018, who was the initial registered owner of LR No. Kiine/Rukanga/979.
3. It is the Plaintiff's case that Peninah Muthoni Cimba (deceased) was his grandmother and was the initial owner of LR Kiine/Rukanga/979 (suit land) as evidenced by two green cards of the LR Kiine/Rukanga/2011 and 2012 exhibited in the Plaintiff's bundle of documents filed herein. The Plaintiff claims that on or about 22/01/2018 the Defendant illegally and fraudulently transferred land parcels Kiine/Rukanga/2011 and 2012 to his name without the consent of the registered and legal owner and/or her Personal Legal Representative. The Plaintiff further alleges that as a result of the Defendant's actions he has suffered immensely and claims general damages.



4. Despite the fact that the Defendant was served, he did not appear and/or file any statement of defence or any written submissions, and consequently the suit was undefended. The matter was fixed for hearing on 5.07.2023 and upon being satisfied that the Defendant was served, the Court permitted the Plaintiff to proceed with the hearing of the suit *ex parte*.

Evidence of the Plaintiff

5. The Plaintiff testified as the sole witness in support of his case. The Plaintiff, PW1 in his evidence adopted his witness statement and relied on the bundle of documents exhibited and filed together with the Plaintiff. He testified that his Grandmother was the registered owner of the original suit land Parcel Kiine/Rukanga/979 which was subdivided to create land parcels Kiine/Rukanga/2011 and 2012 which as per the abstracts of title were registered in her name on 10/9/1993.

The Plaintiff claimed that despite the fact that his grandmother had died in the year 2002, the Defendant fraudulently caused the two parcels of land to be transferred to his name on 22/1/2018 allegedly for the consideration of Kshs 150,000/- as evidenced in the abstract of title. The Plaintiff prayed that the titles be cancelled and the land reverted to the deceased estate.

Submissions, Analysis and Determination

6. Following the close of the trial, the Plaintiff filed written submissions. The Plaintiff in his submissions asserted that he was the grandson and the legal representative of M/s Peninah Muthoni Cimba (deceased). He submitted that as per to the green card that he had produced, the deceased was the legal and registered owner of LR No. Kiine/Rukanga/2011 and 2012 which were subdivisions from land parcel Kiine/Rukanga/979. The Plaintiff submitted the transfer in favour of the Defendant on 22/1/2018 nearly Sixteen years after the registered owner had died could only have been procured fraudulently. The Plaintiff submitted that upon discovering the fraudulent action on the part of the Defendant he had a restriction placed on the suit property and instituted the present proceedings to recover the land.
7. I have considered the Plaintiff, the evidence adduced by the Plaintiff and his submissions and the singular issue for determination in this suit is whether the Plaintiff has proved the suit properties Kiine/Rukanga/2011 and 2012 were fraudulently transferred to the Defendant and if so whether the titles registered in the Defendant's name ought to be cancelled.
8. From the evidence on record and the documents produced by the plaintiff, it is evident that LR No. Kiine/Rukanga/979 belonged to the deceased grandmother and was subdivided to create land parcels Kiine/Rukanga/2011 and 2012 which as per the abstracts of title (green cards) were both registered in the name of the deceased on 10/9/1993.
9. The deceased (Peninah Muthoni Cimba) as per the copy of the death certificate exhibited, died on 17/5/2002 and the Plaintiff only obtained a Limited Grant of Letters of Administration of her estate on 23rd August 2018 for the purpose of filing the instant suit and to do such other things as was necessary for the preservation of the deceased estate.
10. The Defendant did not appear and never filed any defence to rebut the Plaintiff's averments and/or explain how he got to be registered as the owner of the suit properties in 2018 after 16 years from the date of the death of Peninah Muthoni Cimba (deceased) who was the registered owner. The Plaintiff's evidence was not challenged and was not controverted. The abstracts of title for land parcels 2011 and 2012 show the Defendant was registered as owner on 22/1/2018 and titles issued on the same date. The properties are each shown to have been transferred for a consideration of Kshs 150,000/-. Who was paid the consideration and when? Who signed the transfer if any and when? These questions are



pertinent since there is clear evidence that Peninah Muthoni Cimba who was the registered owner had died on 17/5/2002 and she certainly would not have raised from the grave to receive the money and execute the transfers. There is no evidence that any succession proceedings in regard to the deceased estate had been undertaken so that the Defendant could have dealt with the appointed administrator of the deceased estate to carry out the transaction.

11. The *Law of Succession Act*, Cap 160 Laws of Kenya Section 45 makes it clear that only a duly authorised person pursuant to the provisions of the *Act*, has authority to deal with a deceased estate otherwise any other person would be intermeddling.

Section 45 of the *Act* provides as follows:-

1. Except so far as expressly authorized by this *Act*, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 2. Any person who contravenes the provisions of this section shall-
 - a. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - b. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.
12. Having considered the evidence before me as well as the exhibits produced, it clearly emerges that the defendant is in breach of Section 45 of the *Law of Succession Act*. I therefore find that the said registration in the name of the defendant was null and void as the estate of the deceased can only have been dealt with under the *law of succession Act* and not otherwise. In essence therefore, the deceased Peninah Muthoni Cimba was the proprietor of land parcels Kiine/Rukanga/976(subdivided to Kiine/Rukanga/2011 & 2012) in her lifetime, I find that it devolved to her estate after her death. In my view, the Defendant's actions to transfer and register the suit land in his name could only have been procured fraudulently and/or unprocedurally as there is no demonstration that due process was followed.
13. The provisions of Section 26 of the *Land Registration Act*, Act No.3 of 2012 provide as follows:
- 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.
14. Pursuant to the above legal provision the title of a registered proprietor maybe challenged on the ground that it was fraudulently acquired and/or that the title was acquired illegally or unprocedurally. On the basis of the evidence adduced and in the absence of any evidence from the Defendant, there cannot be any question that the titles held by the Defendant were fraudulently and unprocedurally



acquired. Given that the deceased is shown to have been the registered owner of land parcels Kiine/Rukanga/2011 and 2012 as at 17/5/2002 when she died, the said parcels of land devolved to her estate and could only have been transferred out by way of transmission after succession proceedings on behalf of the estate was undertaken for an administrator for the estate to be appointed. When the two parcels of land were transferred to the Defendant on 22/1/2018 no Administrator had been appointed for the deceased estate. The inescapable conclusion is that the transfer was not effected by the registered owner and could only have been effected unprocedurally and therefore illegally.

15. Under Section 80 of the *Land Registration Act*, 2012 the Court has power to order the rectification of the register by ordering the cancellation or amendments of any registration if satisfied such registration was obtained, made or omitted by fraud or mistake. In the present case I have no doubt that the Defendant knew the registered owner was deceased and must have fraudulently and/or unprocedurally caused the transfer and registration of the titles in his name to be made.
16. The Defendant was served with the pleadings in this matter and hearing notice and he chose not to appear and/or file a defence. The evidence by the Plaintiff was not challenged and the Court has no reason to disbelieve the Plaintiff on his evidence. I find that on a balance of probability the Plaintiff has proved his case. I accordingly enter Judgment in favour of the Plaintiff on the following terms:-
 1. The titles in respect of land parcels Kiine/Rukanga/2011 and 2012 registered in the name of Joseph Githinji Maina, the Defendant herein, are ordered to be cancelled forthwith.
 2. That the Land Registrar Kirinyaga is ordered to restore the name of Peninah Muthoni Cimba (deceased) as the owner of land parcels Kiine/Rukanga/2011 and 2012 until appropriate succession proceedings for the deceased estate is undertaken.
 3. The Plaintiff is awarded the costs of the suit.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 10TH DAY OF NOVEMBER 2023.

J. M. MUTUNGI

ELC - JUDGE

