



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC SUIT NO. 130 OF 2017

(FORMERLY NAIROBI ELC NO.495 OF 2012)

JOSEPH NJUGUNA MWAI.....1ST PLAINTIFF

PIUS MBUGUA ITIBI.....2ND PLAINTIFF

RICHARD NJENGA ITIBI.....3RD PLAINTIFF

(All Suing for and as legal Representatives of the estate

of ITIBI NGOTHO CHEGE)

-VS-

SAMUEL ITIBI KIMANI.....1ST DEFENDANT

THE DISTRICT LAND REGISTRAR, THIKA.....2ND DEFENDANT

JUDGMENT

Back ground

1. These proceedings were instituted by the filing of a Plaint dated 9th August 2012 in Nairobi High Court Civil Suit No. 495 of 2012, Richard Njenga Itibi (Suing for and as Guardian of Itibi Ngotho Chege) versus Samuel Itibi Kimani and the District Land Registrar, Thika. The matter was transferred to Thika ELC on 9/2/2017 and was registered as ELC 130 OF 2017. Due to the demise of Itibi Ngotho Chege on 19.2.2017, the plaintiff sought to substitute the deceased, vide Application dated 15th February 2018, where the same was allowed and an Amended plaint was filed on 26th April 2018 wherein Joseph Njuguna Mwai and Pius Mbugua itibi joined Richard Njenga Itibi as plaintiffs.

2. The three plaintiffs are brothers and Children of Itibi Ngotho Chege. The 1st defendant is son of Elizabeth Nyakianda Kimani and Stephen Kimani Kahunyo. Elizabeth Nyakinda is a sister to the plaintiffs as she is a daughter of Itibi Ngotho Chege (Deceased). In short, plaintiffs are uncles of the 1st defendant.

3. At the heart of the dispute is land parcel no. RUIRU/KIU BLOCK 6/ 1302 (Suit land) which is currently registered in the name of the 1st defendant. The land was transferred to 1st defendant from Itibi Ngotho Chege during the latter's lifetime.

4. The plaintiffs have prayed for the following Orders;

1) A declaration that the suit premises L.r. No. Ruiru Kiu Block 6/1302 was fraudulently transferred to the 1st Defendant at no consideration which rightfully belongs to the Plaintiffs as bona fide purchasers for value and the said land should revert to the estate of deceased (ITIBI NGOTHO CHEGE).

2) A mandatory Order directing the 2nd Defendant, his agents and or servants to cancel the current title and re-issue the title in the previous names of the Plaintiff, ITIBI NGOTHO CHEGE

3) The 1st Defendant to pay costs of this suit.

5. The plaintiffs aver that at the time of the transfer of the suit land, their father, Itibi Ngotho Chege was mentally incapacitated and was

incapable of enforcing the transfer, that the transfer was done without paying any consideration, that immediate family members were not informed and that this issue was fraudulently concealed at the Land Control Board.

6. The 1st Defendant filed his defence on 30th October 2012 wherein he denied the plaintiff's averment and stated that the suit premises belonged to his father, Stephen Kimani Kahunyo, later gifted to Itibi Ngotho Chege and later reverted back to him after his mother, Elizabeth Nyakianda, gifted it to him.

7. The 2nd Defendant also filed a Defence on 23rd November 2012 denying the allegations made by the Plaintiff.

Evidence

8. **Pw1, Richard Njenga Itibi**, adopted his two statements dated 9.8.2012 and 23.10.2014 respectively as his evidence. His testimony is that he is a son of Itibi Ngotho Chege (deceased). He contends that his father was incapacitated and Psychotic and was admitted to hospital for this ailment between 27.11.2001 to 6.12.2001 (10days). He also averred that the family was engaged in family meetings whenever their father sought to transfer his properties and that he was equally present during the Land Control Board Consents. He averred that it was during the family meetings that his father would thumb print on the necessary transfer documents.

9. PW1 produced as exhibits the bundle of documents filed on 9th August 2012 (item i-10) as follows; **P-exhibit 1 Search for title No. Ruiru Kiu Block 6/1302, P-exhibit 2 Demand letter dated 9.11.2011, P-exhibit 3 Sub-division scheme approval and Draft valuation Roll, Pexh.4 letter dated 7.11.2011, P-exhibit 5 Application for Official Search, P-exhibit 6 Chiefs letter dated 4/.11.2011 to the Land Registrar, P-exhibit 7 Discharge Summary from Mariakani Cottage Hospital, P-exhibit 8 Authority to sue, P-exhibit 9 Photograph confirming development of suit premises, P-exhibit 10 Court Order of Misc. Case No. 195 of 2012.**

10. PW1 further stated that Elizabeth, his sister and mother to the 1st Defendant, was never given the suit land by his father, nor did she give this land to her son. He stated that he was not present in the meeting that allegedly transferred the properties to the mother of the 1st Defendant. He denied that Stephen Kahunyo bought the land and gifted it to his father and disclaimed the documents that averred the same when he was showed the same by the Defendants advocate.

11. **Pw2, Joseph Njuguna Mwai** is another son of Itibi Ngotho Chege. He adopted his statement filed on 10.8.2012 as his evidence, which is more or less like that of PW1. He added that he assisted his father in obtaining his plot documents from Ting'ang'a Land Buying Company, paid local authority their pre-requisite fees and took the leases issued by the Company to Ardhi House.

12. He also stated that he was the secretary in the family meeting held in the year 2000 when the father sought to subdivide his land. He further stated that his sisters Esther and Wambui were not given any land, but all boys were given land and only one girl was given land. He admitted that the 1st Defendant got the land almost the same time as they got theirs but averred that due procedure was not adhered to. He also stated that their parents used to utilise the suit premises and that there are rental and residential houses on the land.

13. **Dw1 Samuel Itibi Kimani** relied on his statement filed on 26.11.2013 as his evidence. He testified that the suit land was transferred to him by his grandfather, Itibi Ngotho Chege, in the presence of his grandmother, and that the process was similar to the one where Itibi Ngotho Chege transferred other parcels of land to his children including the plaintiffs. In support of his case, DW1 produced the documents in his list filed on 30.10.2012 as exhibits. These are; **D-Exhibit 1 Certificate of ownership from Githurai Ting'ang'a Company Limited. D-Exhibit 2 Receipt from Githurai Ting'ang'a Company Limited dated 20th June 1995, D-exhibit 3 Title for lease for Ruiru/ Kiu Block 6/1302 dated 10th August 2009. Green Cards for L.R. No. Kiambaa/Kanunga/2064, 2065, 2066, 2067, 2068 and 2070**

14. **Dw2 Stephen Kimani Kahunyo** adopted as evidence, his statement dated 29.10.2012. He avers that Itibi Ngotho Chege was his father in law, while 1st defendant is his son. DW2 stated that he is the one who bought the suit land from Githunguri Tinganga Company limited through share certificate processes and he then gifted this plot to his father in law. He also constructed premises for his parents in law whom he relocated from Kanunga to the suit land. His father in law wanted to give the land to DW2's wife Elizabeth Nyakianda Kimani, but she declined hence the land was given to their son, 1st defendant.

15. **Dw3 Elizabeth Nyakianda Kimani** adopted as her evidence, the statement dated 29.10.2012. She averred that she is a daughter to the deceased, sister to the Plaintiffs, mother to the 1st Defendant and wife to DW2. Her testimony is more or less similar to that of her son and her husband (DW1 &2). She added that her father was not ill when he gave the land to 1st defendant.

16. **Dw4 Raphael Gitau Kiiro** adopted as his evidence the statement dated 29.10.2012. His testimony is that he knew Stephen Kimani (DW2) as they were shareholders in Githurai Tinganga Company. He was present when Dw2 gave his father-in-law, Itibi Ngotho Chege, the suit land in the presence of DW3 and Itibi Ngotho Chege's wife.

Submissions

17. Both Parties in their submissions basically restated the evidence on record. The plaintiff also relied on the cited authority of; **Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others (2015) eKLR.**

Analysis and Determination

18. From the analysis of the evidence highlighted above I frame the Issues for determination as follows;

a. *Whether Itibi Ngotho Chege (deceased) had capacity to effect transfer of the suit premises.*

b. *Whether the 1st Defendant is the legitimate and registered proprietor of the suit premises.*

(i) Whether Ibiti Ngocho Cege (deceased) had capacity to effect transfer of the suit premises.

19. The plaintiff has relied on the medical records of Itibi Ngotho Chege prior to his demise to buttress the point that the deceased did not have the mental capacity to conduct the transfer. As per the Discharge Summary from Mariakani Cottage Hospital (exh7) dated 27.11.2001 the deceased had episodes of depression, low mood, insomnia and forgetfulness. The medical report from Sinai Hospital dated 9.08.2012 also stated that the deceased suffered from senile dementia. Pw1 averred that the deceased was at one time admitted at Mathare Hospital but they did not produce any medical records to that effect. In Misc. Civ. Application No. 195 of 2012, (exhibit 10), Richard Njenga Itibi did obtain the order on 10th July 2012 to be a guardian ad litem on behalf of Itibi Ngotho Chege.

20. The Defendants have denied these averments and stated that the deceased was of sound mind when he effected the transfers. In particular Dw3 the daughter of the deceased confirmed that in the year 2009 when the transfer was effected, the deceased was of sound mind.

21. In **In the Matter of K N G [2017] eKLR** the court, while making an analysis of mental capacity stated as follows;

“.....As it is incumbent upon the Court to conduct an inquiry into the mental capacity, the Court can only do so on the evidence placed before it. Mental Capacity in this sense means cognitive functioning. It is not intellectual judgment.....”

22. In **A M A A vs F S S [2018] eKLR** the Court found that the appellant did not have capacity to give instructions to an advocate to institute the proceedings in the suit since he had not recovered from depression.

23. It behoves the person who alleges that another is of unsound mind to prove such allegations-see **Grace Wanjiru Munyinyi & Another Vs Gedion Waweru Githunguri & 5 Others (2011) eKLR**. The same position was taken in **Nancy Wanjiku Mwaura v George Njoroge & 3 others [2017] eKLR** where the court also referred to the case of **Patrick Muchiri Vs Patrick Kahiaru HCCC 113 of 1999**, where it was held that:-

“It is a very serious thing to say of, and concerning a person, that such person is a person of unsound mind or suffers mental disorder. The law presumes that every person is mentally sound, unless and until he is proved mentally disordered. And, even where one person is shown to be of unsound mind always bear in mind that the degrees of mental disorder are widely variable, and incompetence to do any legal act or inability to protect one’s own interests, must not be inferred from a mere name assigned to the malady from which a person may be suffering”.

24. No evidence has been led as to the mental status of the deceased in the year 2009. The discharge summary from Mariakani Hospital is dated 6.12.2001. It doesn’t state that deceased was of unsound mind and totally incapacitated.

25. The Plaintiffs have admitted that their father was able to transfer the parcels of land known as Kiambaa/Kanunga/2064, 2065, 2066, 2067, 2068 and 2070 to their names almost during the same time as when the transfer of the suit premises was done.

26. I find it necessary to give a verbatim account of PW 1, Richard Njenga’s testimony on this point;

“I got a title deed on 29.6.2009. My father had owned this Land before he gave it to us. The title given to 1st defendant was given on 10.8.2009 by my father. So only a short period had passed in between. When father gave us the land 40 days prior to giving his grandson the land, I had no problem...!”

27. How comes that plaintiffs’ father was not incapacitated when he was transferring land to plaintiffs, but he had no such capacity when he gave land to 1st defendant. I find no iota of evidence to indicate that Itibi Ngotho Chege was incapacitated in 2009 when he caused the transfer of the suit land to 1st defendant.

(ii) Whether the 1st Defendant is the legitimate and registered proprietor of the suit premises.

28. The green cards of the properties in Kiambaa/Kanunga show that the same have equal measurements (0.717 ha) and that the same were subdivisions done on 25.3.2009 arising from original parcel was no.266. The resultant titles were issued in the years 2009, 2010 and 2011. All these titles were issued in the names of the sons and daughters of the deceased.

29. The 1st defendant is alleged to have been granted Ruiru/Kiu Block 6/1302 (measuring 0.1140Ha) on 10th August 2009 which property belonged to his mother, the daughter of the deceased.

30. This presents a picture where deceased wished and did transfer his properties for the benefit of his children and a grandchild. The evidence reveals that Itibi Ngotho was not only mentally capacitated to transfer his property during his life time, but he was an organized man. He perhaps fore saw potential disputes that would arise upon his demise and he sought methods of diffusing such disputes by transferring his properties during his life time. He was right.

31. The defence has given a plausible account of how Dw2 bought the suit property for his father in law and he even relocated the parents in law from Kanunga to Githurai. This buttresses defence arguments that Itibi Ngotho Chege had wanted to give the suit land to his daughter,

who declined and he ended up giving the land to his daughter's son (1st defendant). This is also corroborated by the fact that it is them (daughter & son-in-law of Itibi Ngotho Chege) who developed the property by building rental and residential houses, a fact not controverted by the plaintiffs.

32. The plaintiffs have feebly attempted to advance a claim that the suit land was family land. Nothing can be further from the truth. During cross examination, PW1 stated that his father did not hold the suit land as a trustee. He also stated that it is his father who had bought the suit land and on this point, he had stated thus;

“I did not assist my father financially to get this land (suit land)...”

33. However, PW2, has stated that they (him and PW1) assisted their father to get documents from the land buying companies, paid local authority fees and took leases issued by the land buying company to Ardhi house. Isn't this what children are supposed to do, to help their parents with general errands?

34. The validity of the title has also not been challenged. The same makes it indefeasible unless elements of fraud, mistake and/or misrepresentation are proved.

35. Section 26 of the Land Registration Act Provides;

“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.

36. **Section 28 of the Registered Land Act (Repealed)** provided that;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever,”

37. Whereas the plaintiffs allege that the deceased only transferred his properties after consultation with the family members they did not present any minutes confirming the meeting was held in the year 2000. Further, nowhere under the Land Control Act cap 302 Laws of Kenya is it provided that plaintiffs ought to have been consulted or ought to have given their consent in the alienation of the suit land. Dw3 also confirmed that they were with the wife of the deceased when they visited the land control board and this fact was not controverted.

38. A parcel of land may also be transferrable as a gift and to this end consideration does not need to be determined. Even plaintiffs did not pay any consideration for the properties they got from their father.

39. What is clear is that the transfer of the suit land from Itibi Ngotho Chege to 1st defendant was a gift *inter vivos*. In **Re Estate of late Gedion Manthi Nzioka 2015 eKLR**, the court had this to say regarding gift *inter vivos*;

“For gifts *inter vivos*, the requirements of law are that the said gift may be granted by deed, an instrument in writing or by delivery, by way of a declaration of trust by the donor, or by way of resulting trusts..... Gifts of land must be by way of registered transfer, or if the land is not registered it must be in writing or by a declaration of trust in writing. Gifts *inter vivos* must be complete for the same to be valid....”

40. In **Halsbury laws of England 4th Edition volume 20(1)**, it is stated that ;

“... If a gift is to be valid the donor must have done everything which according to the nature of the property comprised in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do.”

41. I find that Itibi Ngotho Chege gifted the suit land during his lifetime in 2009, he had capacity to gift and the transaction was finalized when 1st defendant became the registered owner of the suit land.

42. I also find that the Plaintiffs have not demonstrated that there was fraud in the aforementioned transfer of the suit land as alleged. In the case of **John Ndungu Muriithi vs Gideon Karegwa Ndungu and five Others, civil case No. 94 of 2004 Nakuru, Musinga J** (as he then was) was dealing with a case where sons of the plaintiff were forcing their father to distribute to them his land. The Judge stated thus;

“In my view, the plaintiff is free to deal with his property in whatever manner that he chooses during his lifetime and cannot be compelled by law or by the defendants or otherwise to give any part thereof to anybody...”

43. Likewise, Itibi Ngotho was at liberty to give his land to 1st defendant during his lifetime, and was not obliged to give the same to his sons as the plaintiffs would want this court to believe. The upshot of my findings are that Plaintiffs have not proved on a balance of probabilities that the 1st Defendant herein fraudulently obtained the land L.R. Ruiru Kiu block 6/1302 and I therefore find that 1st Defendant is the legitimate and registered proprietor of the suit premises.

Conclusion:

44. Plaintiffs' case is hereby dismissed. As to costs, I would ordinarily direct parties to take care of their own costs when it comes to family disputes. However, the plaintiffs have displayed unmitigated greed and have failed to appreciate that their father had done so much for them to avoid wrangles in respect of his properties. In the circumstances, plaintiffs are condemned to pay costs of this suit to 1st defendant.

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

F.N. Kimani for 1st Defendant

M/s Vundi H/B for Mr. Mandala for Plaintiff

M/s Nduru for Attorney General

1st Plaintiff: Present

2nd & 3rd Plaintiff: Absent

Defendant: Present