



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

E.L.C CASE NO. 373 OF 2017

(FORMERLY NAIROBI ELC NO. 383 OF 2012)

MKN (suing as the next friend

of PNK Being a person of unsound mind).....PLAINTIFF

-VS-

NMN.....DEFENDANT

JUDGMENT.

Brief History

1. MKN, the current plaintiff is a son of PN and RW. P and R allegedly got married in 1977 but they separated in 1992. R left for America sometime thereafter. M avers that they went to America in 1998. R then learnt that the parcel of land Ruiru East/Block [...] which was in the name of her husband had been transferred to the defendant in year 2003 prompting her to file this suit. However, R died on 2.11.2014 after giving her testimony in court on 20.5.2014. Her son MKN obtained grant of letters of administration for the estate of R on 6.5.2015. He also became the guardian of his father PNK vide the court order of 4.12.2015 in **NAIROBI H.C. MISCELLANEOUS APPLICATION NO. 1161 of 2013.**

2. The orders sought in the plaint filed in court on 3rd July 2012, are;

- a) A declaration that the transfer of Title Number Ruiru East/Block [...] on 4th December 2003 to the defendant was illegal, null and void.**
- b) Cancellation on entry Nos. 6 & 7 on Title Number Ruiru East/Block [...] transferring the land to NMN, the defendant.**
- c) Costs of the suit.**
- d) Interest on c) above.**

3. The defendant has denied plaintiff's allegations via her defence filed on 3rd September 2018. She contends inter alia that she is the registered owner of the suit land having acquired the same from her husband and thus legally holds the title deed. Consequently, she urged the court to dismiss the plaintiff's suit with costs.

The Evidence

4. The plaintiff adopted his witness statement filed in court on 20th November 2018 as his evidence. He also produced as exhibits the documents in plaintiff's list filed on 3.7.2012 (item 1-7) as plaintiff exhibits 1-7 respectively. The documents filed on 21.11.2018 were expunged from the record by the court for being filed outside the given time lines of compliance with order 11.

5. Plaintiff's case is that his father (PNK) has been suffering from mental illness since 1994 to date and that he had been undergoing treatment at Mathari mental hospital and other various hospitals. He avers that the alleged transfer of the suit property to the defendant was null and void since his father lacked the capacity to contract by virtue of his mental capacity and that the transfer document which transferred the suit land to the defendant showed that the same were drawn by his father yet he was mentally ill and therefore could not have drawn the same. He further testified that his father had never married the defendant under customary law or any other written law and that the suit property was family land. He contends that he is now the person appointed to manage the properties of his father. He therefore urges the court to allow the prayers in the suit.

6. The defendant too adapted her witness statement filed in court on 3rd September 2018. She also produced as exhibits the documents identified as item 1 and 4 in her list dated 31.8.2018. Item 2 and 3 were expunged from the record.

7. DW1 testified that she is married to PNK since 1992 under Kikuyu customary law. She is aware that P was hospitalized at a mental facility, but avers that the mental illness was found to be a substance induced mental disorder for which he was treated and recovered. She further testified that PNK had willingly transferred the said property to her as his wife and he personally signed the transfer forms.

Submissions

8. It was submitted for the plaintiff that the transfer of the land to defendant was null and void since as of December 2003, the said PNK was mentally sick and could not enter into any contract. Further, the said transfer was fraudulently done for reasons inter alia that the transfer document produced by the defendant did not show what was the consideration for the transfer, the defendant did not produce consent from the Land Control Board, that no receipts for payment of stamp duty and rate clearance certificate were produced and that the transfer was not drawn by an advocate as is required by law.

9. On the other hand it was submitted for the defendant that no evidence was adduced to show the degree of mental disorder of PN and how it affected/impaired the patient's ability to make a binding decision. On this point, defendant has proffered the case of **John Patrick Machira vs Patrick Kahiaru Muturi Civil case No. 113 of 1999** where it was held that;

“Questioning one’s mental health is a serious thing. He who questions another’s mental wellbeing must demonstrate the basis of the question. Everybody is presumed to be of sound mind unless and until the contrary is shown on credible evidence..... ”

10. Further, defence has submitted that no fraud has been proved regarding the transfer of the suit land to the defendant. It is averred that having pleaded fraud, the onus was upon the plaintiff to prove the same. On this point, defendant has relied on the case of **R.G. Patel vs. Lalji Makanji (1957)EA314**, where it was held that;

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubts, something more than a mere balance of probabilities is required.”

Determination

11. I have carefully considered the pleadings, the evidence on record, submissions by the parties and the authorities. Essentially the court is called upon to determine whether PNK had the mental capacity to transfer the land to defendant in year 2003. Plaintiff's case is that the transfer of land effected by his father on 4th December 2003, to the defendant was null and void since his father lacked the capacity to contract by virtue of his mental incapacity.

12. It has been contended by defendant that she was given the land in her capacity as wife of P, but plaintiff states that defendant was never married to PN. I hold the opinion that this court is not the proper forum to determine whether defendant is a lawful wife of P or not in view of the fact that the jurisdiction of this court is clearly spelt out in Article 162 (2) (b) of the Constitution and section 13 of the Environment and Land Court ACT. I will therefore confine the issue for determination to the legality of the transfer of the land.

13. Pw1 stated that his father fell ill in 1993. He however admitted that he did not have a mental evaluation report to show his mental status. The defendant on the other hand at paragraph 3 of her witness statement stated that PNK was of sound mind. In cross examination however, she readily admitted that her alleged husband had mental illness and had been admitted at Mathari mental hospital for 4 months. She further stated that though she had stated in her witness statement that he had been treated and healed, she had no document to show that he had recovered.

14. I have keenly looked at the document from Maragua district hospital (Plaintiff Exhibit 6) which bears the following contents;

“RE: PNK – 60 YRS ID NO. [.....]

DIAGNOSIS: HYPOMANIA – MATHARE ADM NO: [.....]

The above named person is a known psychiatric patient still on follow-up in our mental health clinic. He has had previous admission in Mathare Mental hospital. This letter is therefore requesting to please assist his wife whose marriage certificate is No. [...] of 10th December 1977 to administer family property. The patient is not medically fit to administer the family estate. His wife is RWN ID NO. [.....]”.

15. This document confirms that PNK was a psychiatric patient on follow up treatment in both Maragua district hospital and Mathare hospital. The admission no. for Mathare hospital is given. Defendant has admitted that she did not have any documents to show that PNK had fully recovered. All these issues raise doubts as to whether the said PNK was in his right state of mind as at the time of the alleged transfer.

16. Defendant is emphatic that P is very much okay to date. This is a rather interesting angle which necessitates the extraction of defendants verbatim evidence which reads as follows;

“To date, I am still staying with my husband... Even now, P is Okay and he has no problem. He even drives with a pick up

selling onions and tomatoes. He has no problem at all”.

17. I find it not fathomable that the subject matter herein centers on PN who is alive, well and going about his daily business but defendant could not call him to confirm this averment. Defendant is aware that plaintiff has the order of guardian ad litem in respect of the estate of P. Surely this was the best opportunity for defendant to trash the document called Order of guardian ad litem. How comes she has failed to seize this opportunity? The logical conclusion to make is that P is unwell.

18. Defendant stated that she did not know if they obtained consent from the Land Control Board to transfer the land. She stated that it was her husband (P) who has these documents including receipts for payment of stamp duty. She is apparently staying with P. One wonders why then she was unable to produce these documents. Better still, why couldn't she call the husband to put this issue at rest once and for all?

19. Taking into totality all the circumstances in this case, I am inclined to find that the transfer of the suit land to plaintiff was tainted with fraud and misrepresentation.

20. **Section 26 of the Land Registration Act** provides 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, un-procedurally or through a corrupt scheme”.

21. The position that fraudulent titles cannot be allowed to stand has been affirmed in a number of cases - See **Arthi Highway Developers limited vs. West End Butchery Limited & Others Court of Appeal Nairobi Civil Appeal No. 246 of 2013 (2015) eKLR**, whereby the Environment and Land Court at Nairobi had cancelled all the titles and ordered the land to revert back to the original owner. This decision was upheld by the court of Appeal.

22. In the case of **Isaac Kipkemboi Chesire and four Others vs. Joseph Kimitei Kwambai and Others, ELC Eldoret case no. 520 of 2012**, the court had this to say regarding the management of the property of a mentally ill person;

“The law on management of an estate of a mentally ill person is enshrined in the Mental Health Act. Orders for the appointment of a person to manage the estate of any person suffering from a mental disorder are provided for under Section 26 of the Mental Health Act, which is drawn as follows:-S. 26; Order for custody, management and guardianship

(1) The court may make orders—

(a) for the management of the estate of any person suffering from mental disorder; and

(b) for the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.”

23. Thus the plaintiff is now the proper person to manage the estate of PNK. I find that plaintiff's suit succeeds and the same is allowed in the following terms;

1) A declaration is hereby issued to the effect that the transfer of Title Number Ruiru East /Block [...] on 4th December 2003 to the defendant was illegal, null and void.

2) An order is hereby issued for the Cancellation on entry Nos. 6 & 7 on Title Number Ruiru East/Block [...] transferring the land to NMN, the defendant.

3) The suit land is to revert back to the name of PNK.

4) The Deputy Registrar of this court is hereby authorized to sign all requisite documents to give effect to this Judgment.

5) Any orders of injunction or inhibition, caution or restriction that may be subsisting in respect of parcel RUIRU EAST /BLOCK [...] are hereby discharged in order to facilitate the implementation of this Judgment.

6) Each party to bear their own costs of the suit.

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

J. Kouna H/B for M/s Igecha for Defendant

C.K. Chege for Plaintiff

Plaintiff: Absent

Defendant: Absent