



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC MISC. APP. NO. 55 OF 2013**

**JAMES NGUGI KAMOCHE.....PLAINTIFF**

**=VERSUS=**

**CHEGE KAMOCHE.....1<sup>ST</sup> DEFENDANT**

**MACHICHI KIGURU.....2<sup>ND</sup> DEFENDANT**

**KUNGU KIGURU.....3<sup>RD</sup> DEFENDANT**

**WANJIRU KIGURU.....4<sup>TH</sup> DEFENDANT**

**WANGARI THO KAMOCHE.....5<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. By a statement of claim dated 31<sup>st</sup> July 2013 the plaintiff (who sued as pauper) seeks against the defendant jointly and severally:-

*(a) An order of eviction against the defendants, their family members, heirs, servants, or agents from land parcel No. Kiambaa/Machatha/T.535 with all structures thereon.*

*(b) An order of permanent injunction against the defendants, their family members, heirs, servants, or in any manner with land Parcel No. Kiambaa/Machatha/T.535.*

*(c) Costs of this suit.*

*(d) Any other relief of the court deems just under the circumstances.*

2. Upon being served with summons to enter appearance and copies of plaint, the 1<sup>st</sup> defendant entered appearance. He also filed a statement of defence and counterclaim dated 30<sup>th</sup> May 2017.

3. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants also entered appearance of 31<sup>st</sup> May 2017, they also filed a statement of defence and counterclaim dated 31<sup>st</sup> May 2017. The 5<sup>th</sup> defendant also entered appearance and filed a statement of defence and counterclaim dated 2<sup>nd</sup> June 2017.

4. The suit proceeded by way of viva voce evidence. PW1 James Ngugi Kamoche told the court that he bought Land Parcel Number Kiambaa/Muchatha/T.535 hereinafter referred to as (“the suit property”) from Virginia Wanjiru Mugo and Dominic Ndichu Munu. He produced the transfer forms as exhibits P1 and P2 respectively. He told the court that he was issued with a title deed on 5<sup>th</sup> October 1989. He produced it as exhibit P3. He also produced the application for consent to transfer, mutation forms, the court order in HCCC 2236/1980 as exhibit P4, P5 and P6 respectively.

5. That in 2011 the defendants invaded the suit property after he was involved in an accident and was hospitalized for a long time. He reported the matter to the Chief, the District Officer and then to the police. The defendants were told to remove the boundaries but they refused. He also produced a copy of the caution and a certificate of search as exhibits P8 and P9 respectively. PW1 also produced the proceedings from HCCC 2236/1980 as exhibit P11. The award in the arbitration as exhibit P10. The proceedings in the civil suit in Kiambu as exhibit P12. Application for consent from the land control board and the consent as P exhibit 13 and P14 respectively. Transfers as exhibit P15 a and b respectively. Original copy of title deed exhibit P16, death certificate for Virginia Mugo exhibit P17 and a receipt for

payment of order by Kiambu Court exhibit P 18. He prays that the defendant be compelled to vacate the suit property.

6. DW1, Chege Kamoche, told the court that the plaintiff is his brother. He adopted his witness statement entirely. He told the court that they have all resided on their late father's ancestral land being Kiambaa/Muchatha/T.191 and now Kiambaa/Muchatha/T.535. That the suit property is a subdivision of Kiambaa/Muchatha/T.191 originally owned by his grandfather Nganga. That in 1958, the said Nyaga caused it to be registered in the name of Kungu Nganga alias Kungu Nyandia to hold in trust for his siblings who included Kamoche Nganga, the 1<sup>st</sup> defendant's father.

7. He told the court that he resides in the suit property. Further that no letters of administration have been taken in respect of the estate of the said Kungu Nganga alias Kungu Nyandia or Kamoche Nganga. That the plaintiff fraudulently caused to be transferred to his name Land Parcels Nos Kiambaa/Thimbugue/217 and Kiambaa/Muchatha/T.191. He therefore holds the suit property in trust for the beneficiaries of the estate of Kamoche Nganga. He prays that the plaintiff's suit be dismissed and his counter claim allowed.

8. DW2, Peter Ndichu Muniu told the court that the plaintiff is his cousin. He denied that his name is Dominic. He denied that he sold any land to the plaintiff. He produced his national identity card on the name of Peter Ndichu Muniu as exhibit D1.

9. DW3, Francis Muchichi Kiguru, told the court that the plaintiff is his cousin. He told the court that the claim by the plaintiff that he bought land is not true. The land is ancestral land. He prays that the plaintiff's suit be dismissed.

10. DW4, Stephen Kungu Kiguru, told the court that the plaintiff is his cousin. He told the court that the suit property is ancestral land. It is a subdivision of a land originally held by Kungu Nganga who held in trust for his siblings. He prays that the plaintiff's suit be dismissed.

11. DW5, Esther Wangare Kariuki alias Wangare Thuo Kamoche told the court she is the wife Stephen Thuo Kamoche. She said she got married to the said Thuo in 1985 and were blessed with five children. That the said Stephen Thuo Kamoche passed on in 2002. She also told the court that the plaintiff is her brother in law. She told the court that she resides on the portion belonging to her father in law Kamoche Nganga. She told the court in 2013, the plaintiff approached her for a relationship but she refused. She was later served with summons from court. She prays that the plaintiff's suit be dismissed and she be issued title deed for the portion she is occupying.

12. At the end of trial the parties tendered written submissions. It is the plaintiff's submissions that the counterclaims have not been proved and ought to be dismissed with costs. That the defendants have failed to convince the court that the transfer were done illegally and/or fraudulently. Further that Dominic Ndichu Muniu acknowledged having received the money from the plaintiff in order to satisfy the agreement made by both parties in Kiambu Civil Case No. 22 of 1987.

13. Further that the whole process of sub-division and registration of Kiambaa/Thimbugue/217 and Kiambaa/Muchatha/T.191 was a subject of HCCC 2236 of 1980 and was done with the assistance of the deputy registrar of this honorable court. That the defendants were adults of sound mind when the sub-division and transfer was done but they never raised any objection.

14. It is the 2<sup>nd</sup> – 4<sup>th</sup> defendants submissions that the suit property was carved out from Land Parcel No. Kiambaa/Muchatha/T.191. Its' subdivision and subsequent acquisition of this title was illegal as it was done without undergoing succession as the registered owner was dead at the time. The transfer by the Deputy Registrar was illegal if indeed it happened. The plaintiff alleges to have bought land from Dominic Ndichu and Virginia Wanjiru Mugo. DW3 (3<sup>rd</sup> defendant) has dismissed this.

15. The 5<sup>th</sup> defendant on her part submits that she resides on the land that is undivided and that her late husband had legitimate interest in the said land by virtue of being the son of Kamoche Nganga. The plaintiff caused a subdivision of the said land and the court did decree that the said land be sub-divided into five portions. The 5<sup>th</sup> defendant was neither aware of the said subdivision nor transfer. She has been in actual possession of the land, has remained on the land even after the death of the registered owner.

16. I have considered the pleadings, the evidence on record and the written submissions of counsel. The issues for determination are:-

**(i) Whether Land Parcel NO. Kiambaa/Muchatha/T.191 is a sub-division of Kiambaa/Muchatha/T.191.**

**(ii) Whether Land Parcel No. Kiambaa/Muchatha/T.191 was registered in the name of Kungu Nganga alias Kungu Nyandia who held it in trust for his siblings.**

**(iii) Whether succession proceedings were taken out in respect of the said parcel.**

**(iv) Whether the plaintiff holds title Kiambaa/Muchatha/T.535 in trust for the beneficiaries of the estate of Kamoche Nganga.**

**(v) Is the plaintiff entitled to the reliefs sought?**

17. The plaintiff has produced the title deed for Kiambaa/Muchatha/T.535 as exhibit P1 in his case. The same was issued on 5<sup>th</sup> October 1989. He has also produced a transfer in his favour by Dominic Ndichu on 14<sup>th</sup> July 1989. The same is signed by the Deputy Registrar High Court of Kenya Nairobi. The plaintiff claims to have bought two portions from Virginia Wanjiru Mugo and Dominic Ndichu Muniu. He said he consolidated the two plots to form the suit property and was issued with the title in 1989. DW2, Peter Ndichu Muniu denied that he sold any portion to the plaintiff. He produced a copy of his national identity card as exhibit D1. He says his names are Peter Ndichu Muniu and not Dominic as alleged by the plaintiff. The plaintiff did not adduce any evidence to controvert DW2's assertions. The plaintiff claims that Dominic Ndichu and Virginia Wanjiru Mugo sold him the land that was combined to form the suit property. DW2 has denied this. The plaintiff has also failed to call Virginia Mugo to confirm if he sold any plot to him. I have gone through the transfer forms produced by the

plaintiff. It is not in doubt that the suit property is a subdivision of Kiambaa/Muchatha/T.191 which was registered in the name of Kungu Nganga alias Kungu Nyandia which he held in trust for his siblings.

18. The plaintiff first testified on 18<sup>th</sup> May 2017 when he was cross examined by the 1<sup>st</sup> defendant (DW1) he admitted that “*the court allowed me to be the one registered for Kamoche’s land. I was to get the land until you my brothers were to refund back my costs. I am the one who got our fathers inheritance because you were supposed to refund me the costs of these cases*”.

It is clear from the above responses that the suit property was registered in the plaintiff’s name in trust for his siblings. There is no doubt that the land is ancestral land.

19. It goes without saying that the registration in the plaintiff’s name was fraudulent and illegal. The plaintiff has failed to show that he bought the suit property. The only logical conclusion is that this is ancestral land which he holds in trust for his siblings. It is interesting to note that the plaintiff’s mother is alive yet she was not registered. She is the widow of Kamoche Nganga. It is also curious to note that she has kept away from these proceedings. I find that the plaintiff cannot claim to have gotten the transfer on his favour procedurally. He cannot be allowed to benefit from an illegality.

20. In the case of **Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 [2015] eKLR** the court upheld the decision of the Environment and Land Court in a case where certain parties fraudulently acquired title to land and later sold the same to third parties. The court cancelled all titles and ordered the land to revert back to the original owner. Also in the case of **Paulina Chemutai Chirchir vs Kipyegon Arap Sang & 3 Others [2015] eKLR Munyao J** stated:-

*“It will be seen from the above that a title which has been acquired illegally, unprocedurally or through a corrupt scheme may be cancelled. The parcel No. 2870, 2817 and 2872 were acquired illegally and unprocedurally, for the reasons that land parcel no. 822 could not be subdivided and parts thereof sold, in short an order of court on before the distribution of the estate of the late Kipsang Chirchir”.*

I am guided by the above authorities.

21. It is the 1<sup>st</sup> defendant’s claim that the family has been in occupation of the suit land for over 59 years hence the plaintiff cannot claim exclusive possession. These averments have not been controverted by the plaintiff.

22. In conclusion, I find that the plaintiff has failed to prove his case on a balance of probabilities as against the defendants. I hereby dismiss his case. As he sued as a pauper I make no orders as to costs.

23. I find that the defendants have established the existence of a trust in their favour on the basis of being in actual occupation and also as a bonafide members of the family. Consequently, I allow the defendant’s counterclaim in the following terms:-

*(a) That a declaration be and is hereby issued that the plaintiff holds LR NO. Kiambaa/Muchatha/T.535 in trust for the defendants.*

*(b) That the plaintiff’s title to LR Number Kiambaa/Muchataha/T.535 be cancelled and the same do revert back to the original owners so that it is administered in accordance with the law of succession. I make no orders as to costs.*

It is so ordered.

Dated, signed and delivered in Nairobi on this 11<sup>TH</sup> day of JULY 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant