



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 90 OF 2014

JACINTA WAIRIMU MUBARI.....PLAINTIFF

VERSUS

JACKSON KARUA.....DEFENDANT

COUNTY GOVERNMENT OF KIRINYAGA.....INTERESTED PARTY

JUDGMENT

Background

By a plaint dated 20th March, 2014, the plaintiff sought judgment against the defendant for the following orders:-

(a) A permanent injunction do issue restraining the defendants, their agents, servants, employees or anybody claiming through him from entering, occupying, constructing, working on and/or in any way interfering with the plaintiff's land parcel KABARE/NYANGATI/3159.

(b) The costs of the suit be awarded to the plaintiff.

(c) Any other further relief that the Honourable Court may deem fit to grant.

The suit was filed contemporaneously with a Notice of Motion dated the same date seeking for injunctive reliefs pending the hearing and determination of the main suit. In a statement of defence dated 16th April 2014, the defendant denied the plaintiff's claim and in the alternative, the defendant averred that he was the lawful owner of the suit property parcel Number KABARE/NYANGATI/3159.

By a Chamber Summons dated 25th April 2014, the County Government of Kirinyaga sought to be enjoined as an interested party and on 15th September 2014, the County Government of Kirinyaga filed their statement of defence and counter-claim to the suit herein. On the same date, they also filed their list of documents.

Plaintiff's summary of Facts

The plaintiff testified on oath and stated that she is the registered owner of the suit property Number KABARE/NYANGATI/3159. She stated that the title was issued to her on 24th December 1996. She produced a copy as Plaintiff's Exhibit No. 1. She said that she is in possession of the land since she obtained title. She stated that around 13th March 2014, she instructed her counsel to issue a notice to the defendant who had entered into her land and started digging trenches for a foundation without permission.

When he did not stop the trespass, she filed this suit and obtained a temporary injunction restraining the defendant by himself and his agents, servants and/or employees from trespassing into her land. She denied that the defendant took possession of her land in 1978. She was shown a bundle of rates payment receipts of 14/3/2014 where the defendant paid occupational permit on 14/3/2014 for Ksh. 4,000/=. She was also shown a receipt dated 16/5/2011 issued by Municipal Council of Kirinyaga for pointing beacons on plot Number 13 Jua Kali which she said is not the subject matter of the suit land.

She stated that to the best of her knowledge, the grant in respect of Succession Cause No. 83/1985 has never been challenged. She stated the interested party's claim that the original land on Embu Succession Cause No. 83/85 KABARE/NYANGATI/23 which was in the name of Nyamu Ngari had been acquired compulsorily by the Kirinyaga County Government and the deceased had been compensated with land parcel No. KIRINYAGA/MARURUMO/180 is not true. She referred to the interested party's document No. 1 and stated that the same relate to a meeting held on December 1976 where it was resolved that the Commissioner of Land be requested to compulsorily acquire some land. She referred to a list of land and owners among them was Nyamu Ngari (deceased) who was supposed to be compensated by land parcel

Number KIRINYAGA/MARURUMO/180. She referred to the interested party's document No. (7) which is a green card for land No. KIRINYAGA/MARURUMO/180 and stated that the first entry was made on 9/5/1985. She stated that the first registered proprietor is Nyamu Ngari and that by the time the resolution was made, Nyamu Ngari was the registered proprietor and that the interested party's claim of compensation is not true. She stated that KABARE/NYANGATI/23 was originally 15 acres and her portion of that land is 2 acres.

Defendant summary of Facts

The Defendant also testified alone and stated that the land he is occupying was given to him by Kirinyaga County Council. He was referred to his statement dated 16th April 2014 and urged the Court to adopt the same in his evidence. He recalled that sometime in the year 1976 or thereabouts, Kirinyaga County Council resolved to acquire land for expansion of various townships within Kirinyaga County including Kutus town. He stated that one of the properties acquired was land parcel No. KABARE/NYANGATI/23 which was formerly registered in the name of Nyamu Ngari who, to the best of his knowledge, was duly compensated by an allocation of Marurumo Adjudication Section 180 vide Minutes by the Kirinyaga County Council of 30th December 1976. The defendant further stated that successive clerks of the Council of Kirinyaga and later Municipal Council of Kutus failed to register the acquired land in the name of the Council. He stated that one Munyi Ruita, a former clerk of the Kirinyaga County Council in cahoots with others including the plaintiff caused the same to be registered in their names and/or their relatives.

The defendant also stated that he is aware that the plaintiff was privy of the illegal transactions as she worked in the firm of Rugaita & Company Advocates where she was representing the County Council of Kirinyaga. He also testified that he was allocated plot No. 13 Kutus which is part of the original title No. KABARE/NYANGATI/23 the subject matter of this suit and that he has occupied the same continuously since the late eighties and paid Rates to the Council as demanded over the years. He stated that he has developed the property extensively and that this suit should be dismissed and the interlocutory injunction orders be lifted. He said that he has lived on the land since 1980 and put a fence in 1988. He stated that his plot is measuring 40 x 80 and that his neighbours have constructed their plots which are small plots. He stated that he usually passes the plot and nothing happens. He said he had put a foundation and concrete on the plot.

Interested Party's Case

The Interested party called five (5) witnesses as follows:-

1. LEONARD GATENGI NYAGA (DW1)

The first witness called by the interested party was Leonard Gatengi Nyaga who stated that he is one of the allottees of land by Kirinyaga County Council at Kutus Jua Kali area being Plot No. 10. He said that he is paying rates to the County Government of Kirinyaga who is the interested party herein. He stated that the defendant in this case, Jackson Karua was also allocated a plot by the interested party herein. He said that the defendant's plot is two plots away from his plot. He stated that he has built a garage on his plot and trading in the name and style of Mutegi Welding Garage. He said that he has built a house on the plot where he lives. He said that their plots were subdivided from land parcel No. KABARE/NYANGATI/23 which belonged to Nyamu Ngari. He stated that several other people were also allocated the same land and have developed their respective plots and are living therein. He gave the names of some of the other allottees as Mama Njeri Gathuri, Kirimi and Kebira. He pays rates to the County Government of Kirinyaga and has receipts for the payments.

(2) FRANCIS MWANGI (DW2)

The second witness called by the interested party was Francis Mwangi who stated that he is one of the allottees in land parcel No. KABARE/NYANGATI/23 which originally belonged to Nyamu Ngari. He said that he was allocated plot No. 51 Kutus Jua kali. He said that he bought the plot from one Charity Gakuyu Musa who had been allocated the same by the County Council of Kirinyaga. The witness stated that he has been paying rates after the plot was transferred to him. His neighbour is Jackson Karua who is the defendant herein. He stated that his neighbours are different allottees of the same land who have developed their respective plots and are living therein. He stated that he bought his plot in the year 2004 and constructed a house where he leased out to a tenant who pays him rent. He said that there are several plot allottees neighbouring Jackson Karua such as Zippora Wanjiru, Jackson Kirimi and Wilkister Wanjiru.

3. ZIPPORAH WANJIRU MBOGO (DW3)

The 3rd witness was Zipporah Mbogo who stated that she is the owner of Kutus Jua kali Plot No. 96 which she bought from one Wilson Mbugi Mwaniki who had been allocated the same by the defunct Kirinyaga

County Council. After buying the plot, she erected a house on the plot and is currently living therein with her family. Before buying the plot, she inquired from the County Council of Kirinyaga who confirmed that the same was owned by the said Wilson Mbugi Mwaniki. She then applied to the County Council of Kirinyaga for approval of transfer of the same to her name on 9th September 2009. Ever since the plot was transferred in her name, she has dutifully been paying rates yearly and enjoyed quiet use and possession of the property. Sometimes in the year 2008, the plaintiff herein filed a suit against her and one Kagua Kigera in the High Court at Embu alleging that they had trespassed on her property. The case is still pending hearing and determination. She stated that her neighbours are other plot owners namely Francis Mwangi, Julius Kinyua, Leonard Kategi, Jackson Kirimi and the defendant herein.

4. STEPHEN WAMBUGU (DW4)

The 4th witness was Stephen Wambugu who works for the County Government of Kirinyaga as a surveyor since 2013. He said that his duties entail beaconing. He is also a member of the Dispute Resolution Committee. He also deals with issues relating to boundaries or any other related issues falling under the County Government. Concerning the land

in dispute being KABARE/NYANGATI/23, he stated that the same was acquired by the Kirinyaga County Council from one Nyumu Ngari for purposes of expansion of Kutus town. After the acquisition, Mr. Nyumu Ngari was compensated with land parcel No. Marurumo Adjudication Section 180. The witness further stated that according to the record in their office, immediately after acquiring the land, the County Council of Kirinyaga sub-divided the land into several plots of "40 x 80" feet and thereafter allocated to members of the public including the defendant in this case. He stated that there is no individual allocated who is occupying a plot more than "40 x 80" in Kutus Jua kali area. The witness said that the defendant occupies one plot measuring "40 x 80" and that he has put a foundation on his plot. He stated that what is visible in that area commonly known as "Kutus Jua kali" are neighbours who have put up permanent houses with others who have fenced their plots with barbed wire and poles. The plots are developed and that it is not possible to identify one person with one acre of a plot. He stated that Mr Jackson Karua (defendant) has not encroached any other plot from his plot where he has put a foundation. He said that Mr. Jackson Karua (defendant) has an allotment letter and pays rates annually and he even sought and obtained approval from the County Government of Kirinyaga for development of his plot. He stated that after the original owner of land parcel No. KABARE/NYANGATI/23 was compensated, he moved from the land to Marurumo/180. He stated that all allottees of the numerous plots in Kutus Jua kali who were allocated land sub-divided from parcel No. KABARE/NYANGATI/23 have either physically settled and residents on their respective plots or have constructed and developed on the same and rented out to tenants who pay them rent on monthly basis. In conclusion, the witness stated that it is not possible that one person would be owning one or more than one acre plots in that area.

5. ANNITA OMULLO (DW5)

The 5th and last witness was Annita Omullo who is the County Land Registrar, Kerugoya. She stated that her duties include the registration of documents, attending boundary disputes etc. She said that the suit property land parcel No. KABARE/NYANGATI/3159 was registered on 6/12/1996. According to the records maintained in her office, there is no previous registration as the first registered owner is Jacinta Wairimu Mubari. From the green card she produced in evidence, the witness stated that the original number was KABARE/NYANGATI/23 which was registered on 6/6/58. It was registered in the name of Nyamu Ngari. On 7/4/78, a restriction was entered by the Land Registrar in Entry No. 2. On 14/4/94, there was a caution in favour of Kerugoya/Kutus Municipality claiming Adverse Possession as Entry No. 3. On 28/6/96 (Entry No. 4) entries No. 2 and 3 were lifted by a Court order in Succession Cause No. 83 of 1995 (Entry No. 5). The succession was registered in favour of Esther Micere and Jacinta Wambeti as Administrators. Entry No. 6 are the beneficiaries who are Esther Micere Muma indicated 5 ½ acres, Jacinta Wairimu Mubari – 2 acres, Stephen R.G.G Munyi 2 acres, Peter Mbogo Nyamu 1 ¾ acres, David Karimi Nyamu 1 ¾ acres, Paul Martin Nyamu 1 ¾ acres. Entry No. 7 on 6/12/96, the parcel was closed on partition. New numbers 3155, 3156, 3157, 3158, 3159 and 3160. The subject matter of this case is parcel No. 3159.

Undisputed Facts

From the evidence adduced by the witnesses, the following facts are undisputed:-

- (1) The original land parcel Number KABARE/NYANGATI/23 was registered on 6/6/58.
- (2) The land referred to under paragraph (1) above was registered in favour of one Nyamu Ngari.
- (3) On 7/4/78, a restriction was entered by the Land Registrar in Entry No. 2.
- (4) On 14/4/94, there was a caution in favour of Kerugoya/Kutus Municipality claiming Adverse possession as Entry No. 3.
- (5) On 28/6/96 (Entry No. 4), Entries No. 2 & 3 were lifted by a Court order in Succession Cause No. 83 of 1995 (Entry No. 5).
- (6) The succession was registered in favour of Esther Micere and Jacinta Wambeti as Administrators.
- (7) Entry No. 6 are the beneficiaries who are:-
 - (a) Esther Micere Muma indicated - 5 1/2 acres
 - (b) Jacinta Wairimu Mubari - 2 acres
 - (c) Stephen R.G.G. Munyi - 2 acres
 - (d) Peter Mbogo Nyamu - 1 3/4 acres
 - (e) David Karimi Nyamu - 1 3/4 acres
 - (f) Paul Martin Nyamu - 1 3/4 acres
- (8) Entry No. 7 on 6/12/96, the parcel was closed on partition. New numbers 3155, 3156, 3157, 3158, 3159 and 3160.
- (9) The plaintiff is the registered proprietor of land parcel No. KABARE/NYANGATI/3159.

Legal Analysis and Decision

I have analysed and evaluated the evidence adduced by the witnesses. I have also considered the pleadings by the parties. Upon careful

consideration of the pleadings and the evidence adduced, the issues for determination are as follows:-

- (1) Whether the Plaintiff's title Number KABARE/NYANGATI/3159 was acquired illegally, un-procedurally or through a corrupt scheme and therefore liable to be impeached?**
- (2) Whether the plaintiff has proved her claim to the required standard and therefore entitled to the orders sought?**
- (3) What appropriate orders to grant?**
- (4) Who will bear the costs of this suit?**

1. Whether the Plaintiff's title number KABARE/NYANGATI/3159 was acquired illegally, un-procedurally or through a corrupt scheme and therefore liable to be impeached?

It is not in dispute that the plaintiff is the registered owner of the suit property land parcel Number KABARE/NYANGATI/3159. The defendant and the interested party in their pleadings and evidence challenged the manner in which the plaintiff acquired the suit property. At paragraph 6, 7, 8, 9, 10 and 11 of the statement of defence and counter-claim, the interested party averred as follows:-

- “(6). That in the year 1976, the defunct Kirinyaga County Council resolved to acquire certain parcels of land among them the subject matter property for purposes of extending Kerugoya, Kutus, Wanguru, Kianyaga, Sagana and Kagio Townships.*
- (7) That the County Council acquired the suit property the previous proprietor, one Nyamu Ngari.*
- (8) The said Nyamu Ngari was compensated for his piece of land with Marurumo Adjudication 180, which was duly registered in his name.*
- (9) That documents relating to ownership of the suit property were not registered in the County Council's name necessitating officials of the Council lodge a caution restricting dealings in the property.*
- (10) That the property in Succession Cause 83 of 1995 Embu, wherein heirs of the Estate of Nyumu Ngari; together with others including the plaintiff, Esther Micere Nyamu, Jacinta Wambeti Nyamu, Jacinta Wairimu Mubari, Stephen Munyi(a former clerk to the defunct County Council) Peter Mbugo Nyamu, David Karimi Nyamu and Paul Muriithi Nyamu unlawfully included the suit property as part of his estate, fully aware that it no longer belonged to the said Nyamu Ngari.*
- (11) That the Court in Succession Cause 83/95, which the County Council was not made a party to, removed the caution, rendering the property vulnerable to all sorts of fraudulent dealings, such as perpetrated by the plaintiff”.*

The plaintiff in her reply to defence and defence to the counter-claim by the interested party raised serious indictment which she did not plead specifically to those allegations or even call witnesses to shed light on the same. Where the ownership of a title has been challenged, it is not enough for the owner to dangle the very title as proof of ownership. Minute No. 40/76 of Kirinyaga County Council meeting held on 30th December 1976 which were produced by the interested party indicated that land parcel No. KABARE/NYANGATI/23 was one of the parcels of land approved by the Council for compulsory acquisition towards the expansion of Kerugoya, Wanguru, Kianyaga, Sagana, Kutus and Kagio townships.

The interested party also produced minutes of the defunct Kerugoya/Kutus Town Council, Town Planning Works and Housing Committee meeting held on 15th February 1990 at 10.25 a.m. where they recommended that the plot owners who had been allocated plots in Kutus Jua Kali area which include the subject matter of this case be issued with allotment letters and be required to pay Council rates and rent as by law required. That formed the basis of the allotment letters issued to the numerous persons shown in a list also annexed to the Report of the sub-committee meeting held on 15th February 1990 and produced in evidence as Interested party Exhibit No. 5. The defendant is also listed as one of the allottees of the said plots. The interested party has also produced a green card in respect of the original land parcel No. KABARE/NYANGATI/23. Entry No. 2 is a restriction indicating that no dealings on the property except under the order of the Chief Land Registrar or Court. The restriction was done on 7.4.78. The 2nd entry was also a caution placed in favour of Kerugoya/Kutus Municipal Council on 14/4/94 claiming Adverse Possession. By a stroke of a pen, the two entries were removed on 28/6/96 vide a Court order in Succession Cause No. 83/95. There was no notice given to the cautioner as required in law.

Section 73 of the Land Registration Act No. 3 of 2012 makes provisions for the removal or withdrawal of a caution. This Section provides as follows:-

- 73 (1) A caution may be withdrawn by the cautioner or removed by; order of the Court or, subject to sub-section (2), by order of the Registrar.*
- (2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.*
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.*
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within*

the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.

(5) After the expiry of thirty days from the date of the

registration of a transfer by a chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.

(6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under Section 74 shall not be affected by the cancellation”.

It is clear from the provisions of the law that cautions/restrictions may be removed in three ways, to wit:-

(a) By withdrawal of the same by the cautioner

(b) By removal by order of the Court and

(c) By removal by order of the Registrar.

The green card produced by the interested party for land parcel No. KABARE/NYANGATI/23 indicates that the restrictions placed on 7/4/78 and 14/4/94 were removed initially without due process. The cautioners did not remove the caution/restriction and neither did the Land Registrar nor a Court order used to remove the same. The manner in which the cautions and/or restrictions were removed was tainted with irregularity and illegality as the due process was not followed.

The interested party has also produced minutes of a meeting by the defunct County Council of Kirinyaga held on 30th December 1976 at 10.00 a.m. in which the then Town Clerk informed the members that he had prepared a list of parcels of land to be compulsorily acquired for the extension of Kutus township among other towns. One of the parcels included the suit land Number KABARE/NYANGATI/23. The interested party averred in her defence and counter-claim that documents relating to ownership of the suit property were not surrendered and registered in the County Council's names necessitating officials of the Council lodge a caution restricting dealings in the property. Considering the manner in which the cautions and/or restrictions placed on the suit property were removed without notifying the cautioner, this Honourable Court cannot fail to detect some mischief and conspiracy in play. The list of beneficiaries of the Estate of Nyamu Ngari as can be seen from Succession Cause No. 83/95 (Embu) include the former Clerk to the County Council of Kirinyaga one Stephen Munyi who was give two (2) acres from land parcel No. KABARE/NYANGATI/23. The said Stephen Munyi is not a family member of the said Nyamu Ngari (deceased) and the only logical conclusion to be made is that his inclusion as a beneficiary is a conspiracy to unlawfully dispossess the interested party, its predecessor and its allottees particularly the defendant herein from the suit property. It can also be discerned from those actions that by taking out succession proceedings in Successions Cause No. 33 of 1995 (Embu) the plaintiff fraudulently and intentionally mislead the Succession Court in removing the caution and the restriction which protected the interested party's predecessor, the County Council of Kirinyaga in the suit property with a view to dispossessing her of the property. I have also observed from the evidence adduced by the interested party and the defendant that after the County Council of Kirinyaga resolved to acquire the suit land parcel number KABARE/NYANGATI/23 with the owner Nyamu Ngari (deceased) which they subsequently agreed to exchange with another land parcel No. KIRINYAGA/MARURUMO/180 (Adjudication Section, 180), the interested party's predecessor, the County Council of Kirinyaga took possession of the entire land measuring 10.2 Ha. And sub-divided the same into small plots measuring approximately “40 x 80”. The interested party's predecessor also allocated the numerous plots out of the original land parcel No. KABARE/NYANGATI/23 to members of the public for purposes of expanding Kutus town. The individuals who were allocated plots continued paying rent and rates to the County Council of Kirinyaga and later to the interested party. The defendant and witnesses who testified on behalf of the interested party herein also produced receipts for payment of those rates and rents.

The defendant also produced receipts for approval of building plans from the interested party as well as beacon certificates. These are clear evidence that the defunct County Council of Kirinyaga got the original suit land parcel No. KABARE/NYANGATI/23 through compulsory acquisition not for her own benefit but for purpose of settling members of the public towards the expansion of Kutus Township. This is a clear case where this Honourable Court presumes the existence of constructive trust between the original registered owner of suit property and the County Council of Kirinyaga. The law on trust was put into perspective in the case of **Twalib Hatayan Twalib Halayan & Another Vs Said Saggat Al-Heidy & Another (2015) e K.L.R** where the Court held as follows:-

“According to the Black's Law Dictionary, 9th Edition; a trust is defined as:

“The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settler) for the benefit of a third party (beneficiary) under the Trustee Act,

“..... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the Court against one who has acquired property by wrong doing It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically

arise where a person who is already a trustee takes advantage of his position for his own benefit. (See Halsbury's Laws of England supra at paragraph 1453). As earlier stated, with constructive trusts, proof of parties intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment.....

A resulting trust, is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee this trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention (see Shell's Equity 29th Edition, Sweet & Maxwell P. 175). Therefore, unlike constructive trusts where unknown intention may be left un-explored, with constructive trusts, Courts will readily look at the circumstances of the case and presume, or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase price money. Whether or not the property is registered in his name or that of another, is immaterial (see Shell's Equity at P. 177) (supra)".

From the evidence of the witnesses and applying the principles to the case before me, all indications are that a constructive trust arose as between the original registered owner Nyamu Ngari and the County Council of Kirinyaga who are the predecessor to the interested party herein. As indicated in the case above, a trust will automatically arise in favour of the person who advances the consideration. It is clear from the witnesses particularly the Land Registrar that the County Council of Kirinyaga acquired the suit property from the original owner upon exchange with land parcel No. KIRINYAGA/MARURUMO/180 which the said Nyamu Ngari got promptly registered on 9/5/75. The defunct County Council of Kirinyaga was put into possession immediately and went ahead to sub-divide to members of the public for the expansion of Kutus township.

In the case of **Peter Ndungu Njenga Vs Sophia Watiri Ndungu (2000) e K.L.R**, the Court held thus:-

"The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied".

I agree with the above decision on the circumstances leading to Court's application of the existence of a trust. The circumstances presented in this case are such that there is presumption of absolute necessity of trust. It is to be noted that when the Administrators of the Estate of Nyamu Ngari (deceased) took out succession proceedings in Succession Cause No. 83 of 1995 (Embu), the title to the suit land parcel No. KABARE/NYANGATI/23 had extinguished. The filing of the said cause in my view was null and void and amounted to nothing in as far as the suit property was concerned. The title had extinguished. The transfer of the resultant titles to the beneficiaries of his Estate including the plaintiff was null, void, bigamous and contrary to public policy.

In the case of **Macfoy Vs United Africa Co. Ltd (1961) All ER 1169, Lord Denning** observed as follows:-

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse..... But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the Court setting it aside; and the Court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains a support for all that has been under it".

I agree with the principles in the above decision which in my view is applicable to the instant case.

(2) Whether the plaintiff has proved her claim to the required standard and therefore entitled to the orders sought?

The plaintiff in his evidence has simply produced a certificate of title as proof of ownership of land. Where a title is under challenge, the proprietor of such a title is required to go an extra mile to demonstrate that the acquisition of his title is beyond any reproach.

Section 26 of the Land Registration Act No. 3 of 2012 provides as follows:-

(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".

My analysis and evaluation of the evidence leading to the acquisition of certificate of title by the plaintiff has left no doubt in my mind that the said title Number KABARE/NYANGATI/3159 which is the resultant from the main title Number KABARE/NYANGATI/23 was tainted with illegality, irregularity and fraudulently. The title is therefore liable to be impeached.

Disposition

The upshot of my analysis of the evidence and the law is that the plaintiff's claim is dismissed having not been proved to the required standard. However, the interested party's counter-claim has been proved above the balance of probabilities. Consequently, I enter judgment in the following terms:-

(1) The Plaintiff's suit is dismissed with costs.

(2) A declaration that the Plaintiff's title Number KABARE/NYANGATI/3159 and all titles issued to beneficiaries claiming ownership through the Estate of Nyamu Ngare vide Succession Cause No. 83/95 (Embu) or otherwise are null and void.

(3) A declaration that the allottees of the suit property land parcel No. KABARE/NYANGATI/23 by the now defunct Kirinyaga County Council are rightfully entitled to their respective plots.

(4) The costs of the counter-claim shall be borne by the plaintiff.

JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 11TH DAY OF JUNE, 2021.

.....

E.C. CHERONO

ELC JUDGE

In the presence of:

1. Ms Ndorongo
2. Ms Makazi holding brief for Wanjau for the Interested party
3. Kabuta – Court clerk.