



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 252 OF 2017

(FORMERLY NRB HCCC 416 OF 2008)

HANNAH WANJIKU NGIGIPLAINTIFF

VERSUS

MICHAEL NGIGI NYANJUI.....1ST DEFENDANT

TERESIA NYANDETO NGIGI2ND DEFENDANT

JUDGMENT

By a Plaint dated **18th August 2008**, the Plaintiff herein has sought for Judgment against the Defendants jointly and severally for:-

- a) An order for the cancellation of the transfer of Title Number Ndarugu/Karatu/106, in favour of the 2nd Defendant.***
- b) An order for the transfer of Title Number Ndarugu/ Karatu/106, in favour of the Plaintiff.***
- c) Costs of this suit.***
- d) Any other or such further relief this Honourable Court may deem just and expedient in the circumstances of this suit.***

In her statement of Claim, the Plaintiff averred that she was married to the 1st Defendant when the 2nd Defendant started cohabiting with the 1st Defendant in or about the year **1981**. That during the subsistence of the marriage between the Plaintiff and the 1st Defendant, they jointly acquired among other properties the suit property currently valued at **Kshs. 670,000/=**. That the Plaintiff has been in possession and has extensively developed it. That the Plaintiff and the 1st Defendant **divorced** vide a **Decree** given in **Divorce Cause No. 22 of 1998**.

Further that on **23rd April 1999**, the Plaintiff filed Civil Suit No. **854 of 1999(O.S)**, in which it was decreed that the suit property amongst others be shared equally between the Plaintiff and the 1st Defendant and the High Court ordered the Deputy Registrar to sign transfer forms in respect of the suit property in her favour. That in **January 2008**, when she presented the transfer forms, to the District Land Registrar, she learnt that the suit property was illegally transferred to the 2nd Defendant by the 1st Defendant, without her knowledge and the intention was to defeat her rights over the suit property.

She particularized fraud as; the secret transfer of the suit property to the 2nd Defendant with the knowledge that the suit property is jointly owned; accepting the transfer by the 2nd Defendant with the knowledge that the same is jointly owned and there was a suit pending between the two.

That she has been unable to transfer the suit property into her name despite the Court having ordered so and she has therefore suffered loss and damage.

The suit is contested and the Defendants filed a Defence dated **6th October 2008**, and denied all the allegations made in the Plaint. They averred that the suit property is in possession of both the Plaintiff and the Defendants children and any developments on the suit property has been carried on by the 1st Defendant solely. That the Defendants are unaware of the **Divorce Cause** as the Plaintiff never served any **notice** and are further unaware of any Originating Summons (OS) and orders given. That the suit property was transferred on or about the year **2000** and in good faith as both the Plaintiff and the 2nd Defendant have children with the 1st Defendant and the interests of each child must be secured. That as a result of the ex parte orders, the Plaintiff transferred to herself two other properties.

That the Plaintiff has only one child, whereas the 2nd Defendant has nine children and it would be inequitable for the properties of the 1st Defendant to be divided equally between the Plaintiff and the 1st Defendant. That the Plaintiff has come to Court in bad faith and without full disclosure and therefore not entitled to the orders sought. The Court was urged to dismiss the suit.

The matter proceeded by way of viva voce evidence wherein the Plaintiff testified for herself and closed her case while the 2nd Defendant gave evidence for herself and called two witnesses and closed her case.

PLAINTIFF'S CASE

PW 1, Hannah Wanjiku Ngigi adopted her witness statement dated **26th January 2012**. She produced her list of documents as Exhibit 1 and the supplementary list of documents as Exhibit 2. That she bought the suit property with her husband and the 2nd Defendant had not been married then. That she filed a case in Nairobi and the Court decided that the land was hers and **Nyandeto sneaked** her name on the title. That her husband died 3 years ago and the 2nd Defendant was her **Co-wife**. She denied selling any land and that she lives on the suit property. That the Defendants did not appeal against the Court's ruling and she only got land Parcel No. **106**, which is one acre and the 2nd Defendant has 4 acres. That the 2nd Defendant has never planted any tea bushes on the suit property. She urged the Court to confirm the Judgment of the High Court.

2ND DEFENDANT'S CASE

DW1 Teresia Nyandeto Ngigi testified that she got married to **Micheal Ngigi** in **1973** and the Plaintiff is her Co wife. She adopted her witness statement dated **1st November 2019**, as part of her evidence. It was her evidence that the Plaintiff lives on the suit property and she uses the land as their husband left it for them. That the Plaintiff had another land, but she sold it. That there were no divorce proceedings between **Hannah** and her husband. That she ought to have $\frac{1}{2}$ of the suit property.

That when she got married, her husband was already living with the Plaintiff and the suit property had already been acquired by **Hannah and Michael**. That she found them living on the land she stays on. That the family had planted tea bushes on **L.R No. 328**, and the Plaintiff moved out and left her on **1530** and left her with the tea bushes. That the Plaintiff does not pick tea in **328**, as the children pick tea there and only picks tea in **106**. That her husband distributed the other parcels of land to the children. That there is no home in **L.R 106**, but only a caretaker. That she has never heard of any divorce proceedings and she did not know when the land was changed to her name.

DW2 Jeremiah Nyanjui Ngigi testified that **Teresiah** is his mother and she has 9 children and the Plaintiff has only one son. He adopted his witness statement as his evidence. That his father owned **L.R 106**, and he asked him to build his house on the said property, after he got married. That the land is **2.4 acres** and his father subdivided it into two equal portions. That the Plaintiff had another land, which she sold. That upon the death of his father, the land was to be subdivided equally amongst **Hannah** and **Teresiah**.

That he is **43 years** old and the land had been bought by the time he was born. That he picks tea on the suit land, but he does not live on it.

DW3 Mary Waithira Kuria adopted his witness statement as his evidence in Court. That his brother **Ngigi** had two wives. That the Deceased shared the suit land between **Hannah** and **Teresia**. That **Hannah** had another land and she sold it. That when the 1st Defendant died, the family met and agreed that the land should be shared equally. That he was not aware of any divorce proceedings. That it was necessary to divide the land as the two wives were quarrelling.

Thereafter, the parties filed written submissions which the Court has carefully read and considered. The Court has further read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and finds that the issue for determination is ***whether the Plaintiff is entitled to the orders sought.***

The Plaintiff has sought for the cancellation of the title of **L.R Ndarugu/Karatu/106**, held by the 2nd Defendant and further for the transfer of the same to her name. It is not in doubt that the suit property is registered in the name of the 2nd Defendant and that the same was registered on **3rd December 2001**. It is important that the Court notes that though the 1st Defendant is since deceased, the pleadings were never amended to reflect the same. The Plaintiff claims cancellation and registration of the title to the suit property in her favour.

The provisions of **Section 27 & 28 of the Registered Land Act (Repealed)** as repeated in **Section 26 of the Land registration Act 2012**, are to the effect that the registration of a person as the registered owner confers to them absolute proprietorship. However, the same can be impeached if it were found that the said Registration was acquired irregularly or through fraud.

The Plaintiff testified that she had undertaken divorce proceedings in which the Court granted her Divorce and the matrimonial properties was divided. This Court has seen a Court order dated **7th November 2003**, in **Divorce Cause No. 22 of 1998**, in which the Court granted the Plaintiff divorce from the 1st Defendant. The Court has further seen a Decree dated **30th November 2004**, in **HCCC No. 854 of 1999**, in which the Court ordered that the suit property was one of the properties that was jointly owned by the Plaintiff and the 1st Defendant and ordered the transfer of half of same to the Plaintiff. In the case of **Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR** the Court held that;

“A court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with....”

Though the Defendants had contested the said Court orders, there is no evidence produced to show that the said orders are not genuine and in

the absence of any evidence, the Court finds and holds that the suit property was to be shared equally amongst the Plaintiff and the 1st Defendant as there is a Court order to that effect and the same must be complied with.

As there is a clear, Court order ordering for the distribution of the suit property in equal measure between the Plaintiff and the 1st Defendant, and the Plaintiff having divorced the 1st Defendant, as per the succession laws, the Plaintiff only claim her half and in case of other claim against his Estate. Therefore, the Court finds and holds that the Plaintiff has proved her case, in that she is entitled to ½ of the suit property.

The Court has seen the Court Order dated **2nd July 2007**. It is not in doubt that the same was to give effect to the Decree dated **24th June 2004**, and therefore the transfer was in so far as the same was to reflect that the Plaintiff was to get a half of the suit property. Having found that the Plaintiff is entitled to a half share of the suit property, it is therefore not in doubt that to be able to effect the same, it is necessary that the Court order for rectification of the register by cancelling the title held by the 2nd Defendant. As per the provision of **Section 80 of the Land Registration Act**.

The 2nd Defendant claims to be entitled to ½ share of the suit property as per their family meeting. However, as per the subsisting Court order, which was never set aside, the 1st Defendant is the person entitled to the said ½ share and the 2nd Defendant can claim through his Estate for the proper order.

The Plaintiff has also sought for costs of the suit. **Section 27 of the Civil Procedure Act** gives the Court the discretion to grant costs. Though it is trite that costs usually follow the events, under special circumstances the Court can order otherwise. In this case, the Plaintiff has been awarded ½ share of the suit property, which the Defendants were ready and willing to grant her as per their Defence. The Court finds that in this instant case each party should bear its own costs of the suit.

The Upshot of the above, is that the Court finds and holds that the Plaintiff has proved that she is entitled to a half of the suit property. Consequently the Court makes the following orders:-

- a) *An order be and is hereby made for the cancellation of the transfer of Title Number Ndarugu/Karatu/106 in favour of the 2nd Defendant.*
- b) *An order be and is hereby made for the transfer of ½ of Title Number Ndarugu/ Karatu/106 in favour of the Plaintiff.*
- c) *An order be and is hereby made for the transfer of ½ of Title Number Ndarugu/ Karatu/106 in favour of the Estate of Michael Ngigi Nyanjui.*
- d) *That the Deputy Registrar of this Court to sign Transfer forms to effect transfer if the 2nd Defendant declines to do so.*
- e) *Each party to bear their own costs of the suit.*

It is so ordered.

Dated, signed and Delivered at Thika this 26th day of July 2021.

L. GACHERU

JUDGE

26/7/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Amuga for the Plaintiff

No appearance for the 1st Defendant

Mr. Muriuki for the 2nd Defendants

L. GACHERU

JUDGE

26/7/2021