



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 547 OF 2017

SUENE NKURRUNA.....PLAINTIFF

VERSUS

GEORGE KIGO NDUNGU.....1ST DEFENDANT

THIKA LAND REGISTRAR.....2ND DEFENDANT

JUDGMENT

By a Plaint dated 12th May 2017, the Plaintiff sought for Judgement against the Defendants jointly and severally for the following orders:-

a) That the Land Registrar do rectify the register in respect of Title reference No.Kiambu/ Munyu /2603, Kiambu/ Munyu /3379, Kiambu/ Munyu /3380 and Kiambu/ Munyu /3381, by cancelling all of them and by reinstating the original Title Reference No.Kiambu/Munyu /1469.

b) That Upon prayer (a) being granted, the said land Title Reference No. Kiambu/ Munyu /1469, be registered in the name of the Plaintiff herein.

In his statement of Claim, the Plaintiff averred that he is the administrator of the estate of his deceased Mother, one **Nyagutume Njau**, who was the original owner of **L.R 110**. That in **Thika Succession Cause No. 449 of 2003**, and by a Certificate of Confirmation of Grant issued on **8th June 2005**, the Court directed that **L.R 110**, be shared amongst **Christopher Njoroge Njau, Bernard Waweru Kironji**, and the Plaintiff with each getting **3 acres, ½ acre and 6.7 acres** respectively. That the land was surveyed and mutation forms drawn and new number allocated as per the subdivisions with the Plaintiff allocated **L.R 1469**.

That the Plaintiff trusted his son, the 1st Defendant to pursue his title deed, but the 1st Defendant fraudulently caused the **L.R 1469**, to be registered in his name, without the Plaintiff's consent and the title deed issued on **30th January 2012**. He particularized fraud as transferring the land without his consent and forging/ presenting transfer documents in respect of **L.R 1469**, to the 2nd Defendant purporting to have been signed by the Plaintiff.

Further that sometime in **July 2012**, the 1st Defendant subdivided the fraudulently acquired land into two portions **L.R 2603** and **2604**, both registered in his name. That in **December 2013**, he further subdivided **L.R 2604**, into three Portions namely **L.R 3379, 3380** and **3381**, registered in his name. That the Plaintiff has learnt that the 1st Defendant is trying to sell the resultant subdivisions to cover up his fraud and hence the filing of the suit.

The suit is contested and the 1st Defendant filed a statement of Defence dated **19th March 2019**, and denied all the allegations made in the Plaint. He averred that the Plaintiff willingly transferred the suit property to him without undue pressure and further attended the **Land Control Board for Consent**, which was granted on **5th December 2014**. Further, that the Plaintiff agreed to have the suit property sub divided and sold and the Plaintiff was given a share of the funds for the sale. That the Plaintiff turned tables when the other siblings demanded their share from him and he began the process of selling the land, again, hence double disposition, which the 1st Defendant declined. Further, that the Plaintiff brought a Criminal case against the 1st Defendant which case was withdrawn as the investigation revealed no fraud was committed. That the suit land having been subdivided and disposed off to members of the public, they do not bear his name and the suit and the orders sought are ambiguous and cannot be enforced or implemented.

The matter proceeded by way of viva voce evidence wherein the Plaintiff testified for himself and the 1st Defendant also testified for himself. Though duly served with Summons to Enter Appearance, the 2nd Defendant did not Enter Appearance nor file defence. Therefore it failed to participate in the proceedings.

PLAINTIFF'S CASE

PW1 Seune Nkurruna, adopted his witness statement dated **12th May 2017**, and testified that **L.R Kiambu Munyu/110**, belonged to his biological mother **Nyagatume Njau**. That when she died, he took possession of the suit property and he filed a **Succession Cause**. He produced his list of documents in evidence as exhibits 1 to 9 and further testified that the title deed for **L.R Kiambu/Munyu/1469**, is in the name of **George**, though it was supposed to be in his name. Further that **L.R 2604**, is in **George's name** and a transfer document shows that the land was to be registered in his name. He denied giving the said **George** title to transfer into his name, and further testified that he took his title and subdivided the land fraudulently.

That he has other children and could not give the land to **George** only. He urged the Court to cancel the title deeds. He further testified that **George** is his third born son, and the others are girls. That as per the Certificate of Confirmation of Grant, he was to inherit **6.7 acres** and he sold ½ acre to **Kironji** and his sister did not inherit any land. That when the Succession was finalized, the land was registered in his name. That his land is **L.R 1469**, and that they did not go to the **Land Control Board** with **Kigo** to transfer the land. That he has filed a criminal case against **Kigo**, but was not aware how it was finalized as he has never been called to give evidence. He denied giving the land to his son, who in turn gave it to **George Kigo**.

Further that the land has been subdivided and the subdivisions are in the names of people he did not know and he did not know who sold the land to them and that they are not parties to the suit. He further denied receiving any purchase price. That he lives on the suit land and the purchasers are not on the Suitland. That the recipient of **L.R 3381**, is **Peter Thiaru Mwaura** but she did not sell the land to him. That **Kigo** was not a beneficiary of her Mother's Estate.

DEFENCE CASE

DW1 George Kigo Ndungu, adopted his witness statement dated **19th March 2019**, as his evidence and testified that the Plaintiff is his father. That he owned **L.R 110**, and he had a land case with his sister **Wanjiku**, as she wanted a share from the suit land. That his father refused to give his Aunt any piece of land and he registered the land in the 1st Defendant's name. That he sold ½ acre to **Waweru**, 3 acres to **Christopher Njoroge Njau** and remained with **6.8 acres**, known as **L.R 1469**. That when he was sued by his Aunt, his father changed the suit property in his name. That they went to the **Land Control Board**, on **15th December 2011**, and he was issued with a title deed on **30th January 2012**.

That his father wanted them to sell the suit property so that the registration numbers can change, and they sold a portion to a group of people and **3 acres** remained in his name. That the same are to be shared amongst him and his sisters. That when they sold the land, they involved his sisters. That he was charged at **Thika Law Courts**, with stealing and he was acquitted. He produced his list of documents as his exhibits in Court. He further produced the list of documents dated **8th July 2019** as Exhibit 2.

That his sisters placed the caution on the suit property and admitted that they had allowed the land to be registered in his name from their father's. That his father and sisters are utilizing the remaining piece of land. He urged the Court to direct the suit land be subdivided amongst his sisters as he holds it on their behalf.

That they agreed to register the land in his name as per the Affidavit due to his father's ill health, though he was not sick when his sisters swore the said Affidavit. That he was not to obtain any land from the Succession, and he got the title registered in his name after their father consented. That his father asked him to sell a portion of the land to another party and the money was deposited into his father's account, though he opened the account for his father who utilized the money. That he has sold the land to three people and his father negotiated with the buyers and he went to the Land Control Board with them.

The parties thereafter filed written submissions, which the court has carefully read and considered. The Court has also read and considered the pleadings, 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***.

It is not in doubt that the suit property originally originated from **L.R 110**, which property was owned by the Plaintiff's mother. It is further not in doubt that the larger suit property was further subdivided into **three portions** and the Plaintiff as per the Confirmation of Grant was entitled to **6.5 acres**, which acres were to be held in **L.R 1469**. Both parties further agree that the suit property was to be registered in the Plaintiff's name. However, the bone of contention lies where the Plaintiff claims that while he trusted his son, the 1st Defendant herein to follow up on the issue of the title deed, the 1st Defendant fraudulently registered the same in his name without the Plaintiff's consent.

However, it is the 1st Defendant's contention that he had the authority of the Plaintiff to have the suit property registered in his name and further have the same sold to other third parties and what had remained is that which ought to be shared between the families. The Court notes that though the parties made accusations and counter accusations of fraud, by the 1st Defendant and payment of the funds by the 1st Defendant to the Plaintiff's account, no party has produced any tangible evidence for the Court to authoritatively find whether or not there was fraud by the 1st Defendant.

This Court will therefore make its findings based on the material placed before it to determine whether or not there was fraud. **In Black's Law Dictionary 9th Edition, Fraud has been defined as:-**

"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment..."

In the same text, fraudulent act has been defined as:-

"Conduct involving bad faith, dishonesty, and lack of integrity or moral turpitude."

The 1st Defendant contends that he had the consent of the Plaintiff to registered the suit property in his name. The 1st Defendant has produced in evidence a letter of consent from the Land Control Board, dated **15th December 2011**, addressed to the Plaintiff granting him consent to transfer. Though the Plaintiff has denied giving the 1st Defendant consent, the said document has not been rebutted nor has it been proved to be fake. Further the 1st Defendant has also produced in evidence an Affidavit sworn on **26th November 2013**, by one **Sarah Njoki, Emily Mukami and Margaret Muthoni Ndungu**, who are the 1st Defendant sisters. In their affidavit in support of lodging a caution, they averred that the family agreed that the suit property be registered in their brother's name on behalf of the family lending credence to the contention by the 1st Defendant that it was agreed that he be registered as the owner of the suit property. Again the said Affidavit has not been rebutted.

Further, though the Court acknowledges that the acquittal of the 1st Defendant in the Criminal case does not necessarily bind this Court, the same is a persuasion to this Court bearing in mind that no other evidence has been adduce to affirm the fraud. The Court finds and holds that there was no **fraud** nor misrepresentation in the registration of the 1st Defendant as the owner of the suit property and consequently the said registration was proper.

The Plaintiff had sought for rectification of the register. It has been acknowledged that after subdivision of **L.R 1469**, the same was sold to other third parties and the 1st Defendant has produced in evidence a transfer form evidencing the said transfer. As the Court has already held that the 1st Defendant held a good title, it therefore follows that his transfers to the third parties was thus valid and therefore the same cannot be cancelled. **Section 26 of the Land Registration Act** provides for instances where title to a property can be impeached. In this instant, the Court has held that the title by the 1st Defendant was not acquired by fraud and thus the subsequent titles by third parties cannot be impeached.

The Court finds and holds that the orders for rectification of the register is not valid and further prayer to have **L.R 1469**, registered in the name of the Plaintiff is not also valid. The Plaintiff is seeking to have the property registered in his name, and it is the Court's considered view that the remaining title held by the 1st Defendant can be registered in the Plaintiff's name, if the parties would follow due process as the 1st Defendant holds the said property in trust for the family and the Plaintiff being the original owner, can therefore be registered as the owner if the Court is moved appropriately.

The Upshot of the foregoing is that the Court finds that the Plaintiff has not proved his case on the required standard of balance of probabilities. Consequently, the Court finds his claim is not merited and the suit herein is dismissed entirely. The parties are family members, and to be specific, father and son, and therefore, the Court orders each party to bear his own costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 15TH DAY OF JULY 2021.

L. GACHERU

JUDGE

15/7/2021

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

No appearance for the Plaintiff

Mr. Warutere for the 1st Defendant

No appearance for the 2nd Defendant

L. GACHERU

JUDGE

15/7/2021