



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 84 OF 2018

NDEI KAMAU..... PLAINTIFF

VERSUS

TWELVE NINETY TWO LIMITED1ST DEFENDANT

JANET MUTHEU KARUGA 2ND DEFENDANT

LEAH WANGINA KAMONI 3RD DEFENDANT

DUNCAN KAMANDE GATHEE 4TH DEFENDANT

LAND REGISTRAR KIAMBU COUNTY 5TH DEFENDANT

DELTA HOMES LIMITED 6TH DEFENDANT

JUDGMENT

By an Amended Plaint dated **19th June 2018**, the Plaintiff herein sought for Judgement against the Defendants herein jointly and severally for the following orders:-

1. An Injunction restraining the Defendants whether by themselves, agents and or servants from developing, charging, selling or in any other way dealing with parcels of land known as Dagoreti/Thogoto/2349, Dagoreti/ Thogoto/2350, Dagoreti/Thogoto/2351, Dagoreti/Thogoto/ 2352, Dagoreti/ Thogoto/4195, Dagoreti/ Thogoto/4196, Dagoreti/ Thogoto/4197,Dagoreti/ Thogoto/4198 or any other parcel of land emanating from the subdivisions of Original number Dagoreti/ Thogoto/73.

2. That Title Numbers Dagoreti/ Thogoto/2349, Dagoreti/ Thogoto/2350, Dagoreti/Thogoto/2351, Dagoreti/Thogoto /2352, Dagoreti/Thogoto/4195, Dagoreti/Thogoto/4196, Dagoreti/Thogoto/4197, Dagoreti/Thogoto/4198 or any other parcel of land emanating from the subdivisions of Original number Dagoreti/ Thogoto/73 be cancelled and the land to revert to the name of the Plaintiff and other rightful owners.

The Plaintiff averred that he is the grandson of **Edward Munyua Chungu**, who passed away on **25th October 1973**. That his late grandfather had 5 children and the Plaintiff is the son of one of the said sons; **Joseph Kamau Munyua**. That during his lifetime **Edward Munyua**, bequeathed **L.R 73** to his 4 children save for one **David Munyua**, who was given a separate land known as **L.R T.45**. That the said **David Munyua** and the 2nd Defendant's husband secretly filed a **Succession Cause No. 160 of 1995**, wherein he stated that he was entitled to inherit **L.R 73**, and he got the grant and disposed off the land. That the 4th Defendant had sold and transferred **L.R 4195 & 4196** to the 6th Defendant, in contravention of the Court order.

That when they learnt of the ongoing, they filed the necessary objections and the matter was referred to the **Land Disputes Tribunal (LDT)** vide case **No. 22 of 2010 at Kikuyu**, and the tribunal gave its award in the Plaintiffs favour. That the award was adopted by the Court and read in open Court and, it has never been challenged, but **David Munyua** was never in attendance. That **David Munyua**, subdivided the land and sold the same. That **L.R 2349, 2350, 2351 and 2352**, are registered in the 1st Defendant's name. Further **L.R 4195 & 4196**, are registered in the 4th Defendant' name, **4197** in the name of **Leah Wangina Kamoni** and **4198** in the name of **Janet Mutheu Karuga**.

That the Plaintiff placed cautions on the said properties, but that they were removed in an unclear circumstances, by the 5th Defendant. That on **25th September 2017**, unknown people flattened the developments on the said property. That the Defendants bought land which had

been fraudulently obtained and as such the person who sold to them, did not have a clean title.

The suit is contested as the 1st Defendant filed a Defence and Counter Claim dated **9th April 2019**, and denied all the allegations made in the Plaintiff. That the issue of ownership is **Res Judicata**, having been determined in **Kiambu Succession Cause No. 160 of 1995**, and the grant was lawfully issued and as it was never challenged and it remains valid. That the **Land Disputes Tribunal in Kikuyu**, did not have jurisdiction to entertain the matter. Further that **David Munyua** had the right to subdivide the land, being the beneficiary as per the Certificate of Confirmation of grant.

That it entered into a sale agreement on **27th February 2008**, with **David Munyua**, after conducting due diligence for purchase of **L.R 2351 and 2352**. That it is a purchaser for value and therefore suit against it is misconceived. That **L.R 2349, 2350, 2351, 2352** were sold in vacant possession and that it is the registered owner and the Plaintiff has brought the suit with malice.

In its Counter Claim, the 1st Defendant sought for orders that;

- a) A Declaration that the 1st defendant as the registered proprietor of land parcels nos Dagoreti/ Thogoto/2349, Dagoreti/Thogoto/2350, Dagoreti/ Thogoto/2351, Dagoreti/ Thogoto/2352, is the legal and beneficial owner of the said parcel of land.*
- b) Order compelling Land Registrar to remove restrictions against Title numbers Dagoreti/ Thogoto/2349, Dagoreti/ Thogoto/ 2350, Dagoreti/ Thogoto/2351, Dagoreti/ Thogoto/2352.*
- c) Order compelling Land Registrar to cautions by the Plaintiff against Title numbers Dagoreti/ Thogoto/ 2349, Dagoreti/Thogoto/2350, Dagoreti/Thogoto/ 2351, Dagoreti/ Thogoto/2352.*
- d) Mesne profits in respect of the said parcels of land Title numbers Dagoreti/ Thogoto/2349, Dagoreti/ Thogoto/ 2350, Dagoreti/ Thogoto/2351, Dagoreti/ Thogoto/2352.*
- e) Costs of the suit and Counter Claim.*
- f) Any other Relief the Court deems fit.*

The 5th Defendant filed its Defence dated **27th March 2018**, and denied all the allegations made in the Plaintiff and denied that the Plaintiff is entitled to the orders sought. It urged the Court to dismiss the suit with costs.

The 2nd Defendant filed her statement of Defence dated **17th August 2018**, the 3rd Defendant on **20th August 2018**, and the 4th Defendant on **17th August 2018**, in which they all denied the allegations made in the Plaintiff and averred that the suit lacked merit.

The 6th Defendant filed its Statement of Defence on **18th July 2018** and denied the allegations made in the Amended Plaintiff and further averred that there is no evidence that the grant obtained by **David Munyua**, was obtained fraudulently or that it was opposed. That the suit properties belonged to it as at **25th September 2017**. That at the time it was purchasing the suit properties from **Duncan Gatheo** it had carried out due diligence and satisfied itself that the vendor had a good title and when title was transferred to it, it was done independently and through a normal transfer. That it is a bonafide purchaser and that the Plaintiff has offended the rules of pleadings.

That as the absolute owner it has greatly been prejudiced and undergone losses as result of the injunction. The Court was therefore urged to dismiss the suit.

The matter proceeded by way of viva voce evidence wherein both the Plaintiff and the Defendants gave evidence.

PLAINTIFF'S CASE

PW1 Ndei Kamau testified that **Joseph Kamau Munyua** was his father who died in **1987**, while his grandfather **Edward Munyua** died in **1973**. He adopted his witness statement as part of his evidence in Court and produced his list of documents as Exhibits 1 to 3. That **L.R Dagoretti /Thogoto/73**, belonged to **Edward Munyua** and it was to be divided amongst his children. That the land had been subdivided before the title deed was issued and **David Munyua Karanja** obtained title to the land. That he went to the **Kikuyu Land Disputes Tribunal**. That he placed cautions on the land. He urged the court to cancel the resultant title deeds and revert the land to the original title.

That the late **Edward Munyua Chungu** had 5 children and he has sued on behalf of **Joseph Kamau Munyua** and **Francis Munyua**. That he had no will. That there is a Certificate of Confirmation of Grant of the Estate of **Edward Munyua**, but he was not aware if the land was distributed by the Court. That they learnt that the land had been subdivided and other titles issued and the grant was confirmed on **8th January 2007**. That **Succession Cause had been finalized and they filed an LDT case. Further that they did not file an objection in the Succession Cause.**

That the Kikuyu Court issued a Decree on **6th December 2013**, and the D.O gave them the documents to place the restrictions. That when his grandfather died, he was 10 years old and his grandfather distributed the land to his children. That the land was distributed in the Succession Cause and the beneficiaries are stated. Further that his father was not aware of the Succession Cause and they did not file any objection as they did not know about it.

That they found beacons on the land and the same had been sold and the transfer was done in **2008** . That his father died while they still lived on the suit land.

That the cautions were removed by the Land Registrar under unclear circumstances. That he conducted the searches before he came to court and that he placed the cautions after the parcels of land had been registered. That he did not issue any notice to the Land Registrar that he intended to sue him. That he did not have a Grant over his grandfather's estate. That after the Succession Cause, they were left out of the distribution.

PW2 Kenneth Ndirangu Njoroge, adopted his witness statement dated **24th September 2018**, as part of his evidence, and averred that the Plaintiff is his neighbor. That he did not know about the distribution of the land. That he was told that the Plaintiff's father was given the land by the grandfather.

PW3 Peter Wangendo Muiruri, adopted his witness statement dated **24th September 2018**. That he had leased a portion of the suit property and he did not have the title number. That he was allowed by **Edward Ndei** to cultivate the land. That the Plaintiff's father allowed him to use his land.

PW4 John Thindu Mungai, adopted his witness statement dated **24th September 2018** as his evidence in Court . That **Edward Munyua** was his neighbor, but he did not know that his land was distributed.

DEFENCE CASE

DW1 Godfrey Kamau Gitundu adopted his witness statement as his evidence in Court . He produced his list of documents filed on **9th April 2019** as exhibit 1 and a further list of documents dated **12th February 2019** as Exhibit 2. That he filed a Counter Claim against the Plaintiff . He urged the Court to order the removal of the cautions and that they be declared the owners of the plots that they bought.

That he is the Director of the 1st Defendant and he bought the suit property, but there was no official valuation done and he would have sold the property at the same price. That he attended the Land Control Board, and he was present during the meeting, but there was no objection and the objection was only from someone who wanted his money refunded . That the land is plain and there are no graves. That when they purchased the property, the Plaintiff was aware and he did not oppose the sale and they paid the entire purchase price and complied with all requirements of the law.

4TH DEFENDANT'S CASE

DW2 Duncan Kamande Gatheo adopted his witness statement as part of his evidence. He produced his list of documents as Exhibits. That he bought the land from **David Munyua**, who passed on before transferring the land to him. That they went with the 2nd Defendant who is his wife and she admitted that she knew he had bought the suit property. That he funded the Succession Cause and he was listed as a beneficiary and the Court gave him the land . That he went to the Land Control Board and got a consent and he sold the land to **Delta Homes**, and he went through the right procedures. He urged the Court to remove the cautions. That he bought the land and he is not sure if valuation was done. That there were hedges subdividing the land and an injunction was given 7 months after the transfer. That there was no objection in the Succession Cause and he followed all the procedures for the transfer. That he sold the land before the Court order was issued on **12th March 2018**, and he sold the land on **30th March 2017**.

6TH DEFENDANT'S CASE

DW3 Edward Kariuki Njeru, testified that he is Director at **Delta Homes** and a developer. He adopted his witness statement as part of his evidence. That they purchased the suit property on **16th March 2018**, and they were served with the Court orders after the purchase. That they wanted to develop houses, and they got a **Consent Order** and refunded the money and they went through losses. He urged the Court to dismiss the suit with costs. That the agreement is dated **30th March 2017**, and they got the title on **16th March 2018**. That they got the title when there was a Court orders. He denied that the sale agreement was backdated and that the Certificate of title was processed by the Ministry of lands.

After close of viva voce evidence, parties filed written submissions which the Court has carefully read and considered. The Court has also carefully read and considered the pleadings by the parties, the evidence adduced and the relevant provisions of law and render itself as follows:-

The Plaintiff is seeking for the cancellation of the titles that were a resultant subdivisions from **L.R 73**, which initially belonged to his grandfather and that the same revert to his name and those of other beneficiaries of his grandfather's Estate. It is the Plaintiff's contention that one **David Munyua**, who was his Uncle and the Defendant fraudulently caused the registration of **L.R 73**, in his favour and therefore excluded other beneficiaries who are also entitled to the suit property, while also benefitting whilst he was not entitled to benefit from the same.

It is not in doubt that the said **David Munyua** filed **Succession Cause No. 160 of 1995**. It is further not in doubt that the said Succession Cause which had been filed in Kiambu Law Courts distributed the said estate and granted to the said **David Munyua** 1.7 acres of the said property. It is further not in doubt that the said confirmation of the grant dated **8th January 2007**, has never been revoked and or set aside.

The Jurisdiction of the Environment & Land court is to be found under Article **162 of the Constitution and Section 13 of the Environment & land Court Act** and this Court is mandated to hear and determine issues relating to land use and occupation.

The Plaintiff is aggrieved with the manner in which the distribution of his late grandfather estate was done and it is in his contention that the said distribution left out some beneficiaries. The Plaintiff has relied upon Decree that was adopted on **17th December 2010**, after an award of the elders which award and subsequent Decree are to the effect that the registration of **David Munyua** ought to be cancelled.

It is only the Succession Cause that can determine the distribution of a Deceased's Estate and no other court. In the case of **Re Estate of Alice Mumbua Mutua (deceased) (2017) eKLR**, the Court held that;

“The Law of Succession Act, and the Rules made there under, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

27. Disputes of course do arise in the process. The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the Law of Succession Act and the Probate and Administration Rules. Such have to be resolved through the structures created by the Civil Procedure Act and Rules, which have elaborate rules on suits by and against executors and administrators.

28. The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3), which provides as follows –

‘Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under ... the Civil Procedure Rules ...’

29. Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil court, the decree or order is then made available to the probate court for implementation. In the meantime the property in question is removed from the distribution table. The presumption is that such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate court would in most cases be functus officio so far as the property in question is concerned. The primary mandate of the probate court is distribution of the estate and once an order is made distributing the estate, the court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate court. The interventions by that court are limited to what I have stated above.”

From the above, it is not in doubt that this Court cannot determine the persons with the beneficial Interests over the estate of the late **Edward Munyua**. As already stated above “ **The provisions of the Law of Succession Act and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants**” This Court therefore sitting as an **ELC Court** cannot determine whether or not the said **David Munyua**, was the only person entitled to the property or what percentage and how the distribution can and cannot be undertaken.

This Court says so as there is valid confirmation of grant which grant gives the said **David Munyua**, interest over the said property to the tune of 1.7 acres. Without the revocation and or annulling of the said grant as it stands, the said **David Munyua** was therefore the legitimate owner of the suit property and he held all the rights and interests over the same. While dispute of ownership between the Plaintiff and the other Defendants can be solved in this Court, the dispute between him and **David Munyua** cannot be solved in this Court, and as the said **David Munyua** was the owner of the said property as per the grant produced in evidence, the subdivisions and subsequent sale to the third parties was therefore legitimate. Though the Plaintiff contends that the Confirmation of grant is not genuine, he has not provided any evidence to support the said claim. Further, the Court has seen the gazette notice with the Succession Cause number and has no reason to doubt the same.

Having held that **David Munyua** held valid title, and the fact that the Defendants having produced various sale agreements to show that they bought the suit properties and are the registered owners, the Court finds no reason to impeach their titles to the suit property. Therefore, this Court finds and holds that the Plaintiff has failed to prove his claim on the required standard of balance of probabilities and thus the said claim is dismissed.

In its Counter Claim, the 1st Defendant had sought for the removal of the restrictions and Cautions. Having held that they are lawful owners, the Court finds that the same is merited and the same is allowed. However, the prayers for mesne profits are not merited as these are special damages that must be specifically pleaded and proved.

The Upshot of the foregoing is that the Amended Plaint dated **19th June 2018**, is found not merited and the same is dismissed entirely. However, 1st Defendant's Counter Claim is allowed in terms of prayers **a, b** and **c** only. Each party to bear its own costs of the proceedings.

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

M/s Kores holding brief for Mr. Muthuri for the Plaintiff

M/s Muchangi holding brief for M/s Wamaitha for the 1st Defendant

Mr. Onkangi holding brief for Mr. Waweru for the 2nd, 3rd, and 4th Defendants

M/s Ndundu for the 5th Defendant

M/s Kamau holding brief for Mr. Mukiri for the 6th Defendant

L. GACHERU

JUDGE

15/7/2021