



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 621 OF 2014**

**FRANCIS NGATIA MURIITHI (suing as the administrator  
and legal representative of the estate of MURIITHI KAMAKU  
alias MUREITHI KAMAKU (Deceased)).....PLAINTIFF**

**VERSUS**

**EDWARD MUCHEE (substituted for HARRISON KINYUA  
MURIITHI (Deceased)).....1<sup>ST</sup> DEFENDANT  
ANDERSON EDWIN.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. THE PLAINTIFF'S CASE**

1. By a plaint dated 23<sup>rd</sup> January, 2012 the Plaintiff, who filed suit as the legal representative of the estate of his late father, Muriithi Kamau (*the deceased*) sought the following reliefs against the Defendants:

- (a) A declaration that the transfer and any dealings over Title Number **Daiga/Umande Block 1/128 (Mukima)** in favour of the 1<sup>st</sup> Defendant and the subsequent transfer or any dealings from the 1<sup>st</sup> Defendant to and in favour of the 2<sup>nd</sup> Defendant are illegal, fraudulent, unlawful, irregular and void ab initio and the 2<sup>nd</sup> Defendant's remedy, if any, lies in refund of consideration paid to the 1<sup>st</sup> Defendant.
- (b) An order for the rectification of the register directing the Land Registrar Laikipia to cancel the entries of the transfers to the 1<sup>st</sup> Defendant and subsequent transfer to the 2<sup>nd</sup> Defendant over Title No. **Daiga/Umande Block 1/128 (Mukima)**.
- (c) An eviction order directing the 2<sup>nd</sup> Defendant to surrender vacant possession of the suit land to the Plaintiff and in default he be evicted therefrom.
- (d) Costs of the suit and interest.

2. The Plaintiff pleaded that at all material times, the deceased was the owner of Title No. **Daiga/Umande Block 1/128 (Mukima)** (*the suit property*) which he acquired by virtue of being a shareholder of a land buying company known as Mukima Estate Limited. It was further pleaded that the Plaintiff and the 1<sup>st</sup> Defendant were sons of the deceased but that the 1<sup>st</sup> Defendant had on 11<sup>th</sup> May, 2010 fraudulently obtained registration of the suit property solely in his name and transferred the same to the 2<sup>nd</sup> Defendant. The Plaintiff contended that the 2<sup>nd</sup> Defendant could not acquire a good title since the dealings with the suit property were fraudulent and illegal and that the 2<sup>nd</sup> Defendant had notice thereof. The Plaintiff enumerated several particulars of fraud against the 1<sup>st</sup> Defendant.

**B. THE 1<sup>ST</sup> DEFENDANT'S DEFENCE**

3. The 1<sup>st</sup> Defendant filed a statement of defence dated 23<sup>rd</sup> February, 2012 in which he denied the Plaintiff's claim in its entirety. He denied the fraud and particulars of fraud alleged against him and challenged the Plaintiff's capacity to file suit. He pleaded that at the time he sold

the suit property to the 2<sup>nd</sup> Defendant he had obtained the consent of the beneficiaries of the property and that the Plaintiff was not such a beneficiary. He consequently prayed for dismissal of the suit with costs.

### **C. THE 2<sup>ND</sup> DEFENDANT'S DEFENCE**

4. The 2<sup>nd</sup> Defendant filed a statement of defence dated 23<sup>rd</sup> February 2012 in which he denied any liability for the Plaintiff's claim. The 2<sup>nd</sup> Defendant admitted having purchased the suit property from the 1<sup>st</sup> Defendant who was the registered owner of the material time. He, however, denied knowledge of any fraud or illegality in the 1<sup>st</sup> Defendant's acquisition thereof. He further pleaded that he was an innocent purchaser for value without notice of any prior fraud hence had acquired good title. Consequently, he prayed for dismissal of the suit with costs.

### **D. THE PLAINTIFF'S REPLY**

5. The Plaintiff filed a reply dated 2<sup>nd</sup> February, 2012 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' defences. He joined issue with the Defendants on their respective defences and reiterated the contents of the plaint. He contended that the alleged consent of the beneficiaries would not confer legal capacity upon the 1<sup>st</sup> Defendant to acquire or sell the suit property in the absence of a grant under the law of succession. The Plaintiff further pleaded that the 2<sup>nd</sup> Defendant's remedy lay in a refund of the purchase price.

### **E. THE SUMMARY OF EVIDENCE AT THE TRIAL**

#### **(a) The Plaintiff's Evidence**

6. The Plaintiff's evidence was that the suit property originally belonged to the deceased and that it was still his at the time of his death in 1985. He stated that the 1<sup>st</sup> Defendant fraudulently obtained registration of the suit property in 2010 without undertaking succession proceedings under the **Law of Succession Act (Cap. 160)** after which he sold and transferred it to the 2<sup>nd</sup> Defendant. The evidence of PW3, the Plaintiffs' sister, was also to the effect that the deceased was the original owner of the suit property and that the family had not undertaken succession proceedings by the time the 1<sup>st</sup> Defendant sold it to the 2<sup>nd</sup> Defendant.

#### **(b) The Defendants' Evidence**

7. It would appear that the 1<sup>st</sup> Defendant passed on during the pendency of the suit hence he did not testify at the trial. However, his daughter, Zaweria Wamuyu, was called as a defence witness. She stated that the suit property originally belonged to the deceased and that the 1<sup>st</sup> Defendant had informed her that she would share the proceeds of sale with his siblings.

8. The evidence of the 2<sup>nd</sup> Defendant was to the effect that he was simply *a bona fide* purchaser for value without notice of any prior fraud on the part of the 1<sup>st</sup> Defendant. He further testified that he had obtained the consent of the Land Control Board (LCB) for the transaction. He, too, stated that the 1<sup>st</sup> Defendant informed him that he was to share the proceeds of sale with his siblings.

### **F. DIRECTIONS ON SUBMISSIONS**

9. Upon the conclusion of the trial, the Plaintiff was granted 21 days to file and serve his written submissions whereas the Defendants were granted 21 days to do likewise. The record shows that the Plaintiff filed his submissions on 4<sup>th</sup> August, 2021 whereas the 2<sup>nd</sup> Defendant filed his on 26<sup>th</sup> August, 2021. There are no submissions on behalf of the 1<sup>st</sup> Defendant since the suit against him had abated.

### **G. THE ISSUES FOR DETERMINATION**

10. The court has considered the pleadings, evidence and documents on record. The court is of the opinion that the following issues arise for determination herein:

**(a) Whether the Plaintiff had *locus standi* to file suit.**

**(b) Whether the 1<sup>st</sup> Defendant fraudulently and unlawfully obtained registration of the suit property.**

**(c) Whether the 2<sup>nd</sup> Defendant acquired a good title to the suit property.**

**(d) Whether the Plaintiff is entitled to the reliefs sought in the plaint.**

**(e) Who shall bear costs of the suit.**

### **H. ANALYSIS AND DETERMINATION**

**(a) Whether the Plaintiff had *locus standi* to file suit**

11. In his defence, the 1<sup>st</sup> Defendant contested the Plaintiff's *locus standi* to file suit on behalf of the estate of the deceased. It was contended that the Plaintiff was not a legal representative of the deceased and that if he had such grant, then it was obtained illegally and fraudulently. The material on record shows that the Plaintiff was issued with a limited grant *ad litem* on 26<sup>th</sup> June, 2013 for the purpose of prosecuting the instant suit. There is no evidence on record to demonstrate that the said grant was issued illegally or fraudulently. There is equally no evidence to demonstrate that the grant has been set aside or revoked. Accordingly, the court finds and holds that the Plaintiff has *locus standi* to prosecute the instant suit under the law.

**(b) Whether the 1<sup>st</sup> Defendant fraudulently and unlawfully obtained registration of the suit property**

12. The court has considered the evidence and submissions on record in this issue. There is no doubt that the suit property originally belonged to the deceased. There is no dispute that the deceased died in 1985 and that the 1<sup>st</sup> Defendant obtained its registration in 2010 i.e. 25 years after his death. There is no doubt from the material on record that the family of the deceased had not undertaken succession proceedings for the purpose of distributing his estate. It is thus clear that the 1<sup>st</sup> defendant employed fraudulent and unlawful means to obtain registration of the suit property without undertaking any succession proceedings under the **Law of Succession Act (Cap. 160)**.

13. The court accepts the Plaintiff's submissions that the estate of a deceased person can only be distributed on the basis of a probate of a will or confirmed letters of administration. It cannot be distributed on the basis of the consent or mere concurrence amongst some of the beneficiaries of the estate. The court is of the opinion that the 1<sup>st</sup> Defendant was an intermeddler in the estate of the deceased hence he did not obtain a good title to the suit property. Accordingly, the court finds and holds that the 1<sup>st</sup> Defendant obtained registration of the suit property through fraudulent and unlawful means.

**(c) Whether the 2<sup>nd</sup> Defendant acquired a good title to the suit property**

14. The court has considered the evidence and submissions on record on this issue. The 2<sup>nd</sup> Defendant submitted that he was an innocent purchaser for value without notice of any defect in title hence he acquired a good title. He relied upon the case of **Mike Maina Kamau v Attorney General [2017] eKLR and Katende v Haridar & Co Ltd [2008] 2 EA 173** in support of his submissions. In the latter case, it was held, *inter alia*, that

**“... a *bona fide* purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, he must prove the following:-**

- (a) He holds a certificate of title.**
- (b) He purchased the property in good faith.**
- (c) He had no knowledge of fraud.**
- (d) The vendor had apparent valid title.**
- (e) He purchased without notice of any fraud.**
- (f) He was not party to any fraud.**

**A *bona fide* purchaser of legal estate without notice has absolute unqualified unanswerable defence against a claim of any equitable owner.”**

15. Upon consideration of the evidence on record, the court has serious doubts on the *bona fides* of the 2<sup>nd</sup> Defendant in his dealing with the suit property for at least two reasons. First, the documents he filed in court showed that the sale agreement, the consent of the LCB and the title deed issued to him bore the same date. The Land Registrar who testified in the proceedings was of the opinion that it was not possible to have all those transactions undertaken within one day. It is a matter of common knowledge and judicial notice that one has to book for consent of the LCB and that an application would be considered at the next sitting of the board. So, assuming that an application for consent was lodged on 22<sup>nd</sup> February, 2011 when the same agreement was signed, when did the Board sit to consider the application?

16. The second reason is that when the Deputy County Commissioner, Laikipia East Sub County (DW4) was summoned to produce the consent letter dated 22<sup>nd</sup> February, 2011 she was unable to vouch for the authenticity of the consent. She stated that according to their records, there was no meeting of the LCB held on 22<sup>nd</sup> February, 2011 and no minutes of such a sitting were available.

17. The court is satisfied from the material on record that no valid consent of the LCB was ever granted for the transfer which was effected to the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant must have been aware that no meeting of the LCB took place on 22<sup>nd</sup> February, 2011 when the sale agreement, transfer form and consent letter were signed and title deed issued. The court is not satisfied that he was an honest, *bona fide* purchaser for value. Accordingly, the court finds and holds that he did not obtain a good title to the suit property.

**(d) Whether the Plaintiff is entitled to the reliefs sought in the plaint**

18. The court has already found that the Plaintiff had *locus standi* to file and prosecute the suit. The court has also found that the 1<sup>st</sup>

Defendant obtained registration of the suit property through fraudulent and unlawful means. The court has further found that the 2<sup>nd</sup> Defendant was not a *bona fide* purchaser for value without notice of any defect in title and that no consent of the LCB was obtained for the transfer to him. It would, therefore, follow that the Plaintiff is entitled to the reliefs sought in the plaint.

**(e) Who shall bear costs of the suit**

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. Accordingly, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigant should not be awarded costs of the suit. Accordingly, the Plaintiff shall be awarded costs of the suit to be borne by the 2<sup>nd</sup> Defendant only.

**G. CONCLUSION AND DISPOSAL**

20. The upshot of the foregoing is that the court finds that the Plaintiff has proved his case to the required standard. Accordingly, the court makes the following orders for disposal of the suit:

**(a) A declaration be and is hereby made that the transfer and any dealings over Title Number Daiga/Umande Block 1/128 (Mukima) in favour of the 1<sup>st</sup> Defendant and the subsequent transfer or any dealings from the 1<sup>st</sup> Defendant to and in favour of the 2<sup>nd</sup> Defendant are illegal, fraudulent, unlawful, irregular and void *ab initio*.**

**(b) An order for rectification of the register is hereby made directing the Land Registrar Laikipia to cancel the entries of the transfers to the 1<sup>st</sup> Defendant and subsequent transfer to the 2<sup>nd</sup> Defendant over Title No. Daiga/Umande Block 1/128 (Mukima).**

**(c) An eviction order be and is hereby granted directing the 2<sup>nd</sup> Defendant to surrender vacant possession of the suit land to the Plaintiff and in default he be forcibly evicted therefrom.**

**(d) The Plaintiff is hereby awarded costs of the suit to be borne by the 2<sup>nd</sup> Defendant.**

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 14<sup>TH</sup> DAY OF OCTOBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

Mr. Mwangi holding brief for J.M. Mwangi for the Plaintiff

Ms. Brenda Maina holding brief for Mr. Ng'ang'a for the 2<sup>nd</sup> Defendant

No appearance for the 1<sup>st</sup> Defendant

CA- Carol

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**Y. M. ANGIMA**

**JUDGE**