



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 20 OF 2017

MARYANNE MWANGI GICHUKI

(suing as the legal representative of the estate of WILSON MWANGI RAMSON)....PLAINTIFF

VS

MARY NYAMBURA NJUGUNA.....1ST DEFENDANT

KARIUKI MUHOI..... 2ND DEFENDANT

ALEX MWANGI KAMAU.....3RD DEFENDANT

ANDREW GACHINGIRI NGAHU.....4TH DEFENDANT

DAVID NJARIA KAGUNDA.....5TH DEFENDANT

AND

JAMES MICHAEL CHEGE.....1ST INTERESTED PARTY

FREDRICK MAINA GATHURI.....2ND INTERESTED PARTY

JUDGEMENT

The Pleadings

1. The Plaintiff filed suit on 1/12/2003. Upon the death of the original Plaintiff on the 25/11/2018, the plaintiff was amended on the 18/7/2019. The Plaintiff is the wife of Wilson Mwangi Ramson, deceased and is suing as the legal representative of the estate of Ramson.
2. She avers that her husband purchased the suit land LOC 2/KINYONA/217 (suit land) in 1994. That in 2012 the Defendants trespassed onto the land and despite notice to vacate they have persisted in the said trespass. She sought the following orders;
 - a. A declaration that Ramson is the lawfully registered proprietor of the suit land
 - b. A declaration that the Defendants by themselves agents or their servants are trespassers
 - c. An order of eviction of the Defendants from the suit land.
 - d. A permanent order restraining the Defendants by themselves agents or their servants from entering and or remaining on the suit land
 - e. Costs of the suit.
3. The Plaintiffs claim is resisted by the Defendants through their statement of defence filed on the 7/1/2014. Terming the claim fatally defective and incompetent, the Defendants contended that the suit is resjudicata in view of HCCA No 179 of 1995; the Plaintiff has

concealed facts before the Court; that the suit is the property of Hildah Nyambura Gathuri and thus is family land; Plaintiff has no proprietary rights over the suit land.

4. On the 12/5/2016 with the leave of the Court the Interested Parties were enjoined into the suit. Vide their defence filed on the 21/3/18 they contend that they are the children of Samuel Gathuri and Hildah Nyambura Gathuri. That the suit land belonged to their grandfather namely Stephano Ndinguri and that Charles Njuguna Kamau, their uncle held the suit land in trust for them. That the land is ancestral land which they depend for their livelihood.

5. It is their case that the Plaintiff acquired the land through fraud and illegality which particulars have been pleaded in para 6 as interalia; causing and conspiring with the land registry officials the lifting of entry No 5 on the green card by misrepresenting that succession cause No 238 of 1990 had been determined; causing an unlawful entries Nos. 6, 7 and 8 to be made on the register knowing it to be unlawful; falsifying records; obtaining title without obtaining land consent as per the provisions of the Land Control Act.

6. The Interested Parties further aver that there are pending cases before the Court to wit; HCCC Succ Cause No 238 of 1990; Misc Application No 536 of 1995; Kigumo Civil case No 1197 of 2013 and HCCA 179 of 1995.

7. The Interested Parties contend that the Plaintiff is not a bonafide purchaser for value without notice and neither has she been in occupation or possession of the suit land.

8. The Interested Parties sought the following orders;

a. The Plaintiffs suit be dismissed with costs to the Interested Parties.

b. A declaration be issued that the suit land is their ancestral and family land for the benefit of their family.

c. A declaration that the title issued to the Plaintiff on the 9/3/1994 is illegal invalid fraudulent and void ab initio and the same be cancelled forthwith. That the register be rectified so that the same is rectified and registered in the name of the Interested Parties to hold in trust for themselves siblings and the 1st -3rd Defendants.

d. In the alternative and without prejudice to the foregoing a declaration that the grandchildren of Stephano Ndinguri from Samuel and Hildah Nyambura be declared to be the lawful owners of the suit land and to hold in trust for themselves and the Defendants.

e. Costs of the suit

f. Exemplary damages

The Plaintiff's case

9. PW1 – Mary Ann Mumbi Gichuki testified and stated that she is the legal representative of Wilson Mwangi Ramson having obtained letters of grant of administration on the 14/3/2018. That on the 9/3/1991 her husband purchased the suit land from Charles Njuguna Kamau, the administrator of the estate of Stephen Ndinguri who was the registered owner of the suit land on the 14/12/90.

10. That upon purchase, Hildah Nyambura, the wife of Samuel Gathuri refused to vacate the suit land leading to the filing of SRMCC No 15 of 1995 by Ramson seeking eviction of the said Hildah. Further that the Defendants too trespassed onto the suit land in 2012 and adamantly remained there to date despite notice to vacate. That they claim to have purchased the land from the late Hildah and her children.

11. That Samuel Gathuri and Charles Njuguna were sons of Stephano Ndinguri. According to the witness, Samuel was given parcel 216 and Charles got parcel 217 from their father. She however informed the Court that she did not have any evidence to support her averments. She produced PEX No 1-7 in support of her claim.

12. In cross the witness stated that though there are restrictions on the green card there is no indication that they were lodged by Hildah Nyambura. That the restrictions were lodged after her husband acquired the suit land. That from 1995 Hildah and the Interested Parties lived on parcel 216 and not 217.

13. With that the Plaintiff closed her case.

The Defendants' Case

14. DW1- Alex Mwangi Kamau adopted his witness statement dated the 19/3/2018 and informed the Court that on the 15/7/2004 he purchased 0.5 acres of land from Hildah Nyambura. He presented a sale agreement of even date in support of his averment. That though he was aware that the Plaintiff had evicted the Vendor from the suit land in 1995, he was assured by the vendor that the eviction had been overturned by the High Court and that the suit land was family land. He denied that he trespassed onto land in 2012 arguing that he was put in possession by Hildah Nyambura upon which he has since 2004 built a house and planted tea thereon. That the vendor and her husband were buried on the suit land and no objection was raised by the Plaintiff. According to him the Plaintiff has never occupied the suit land at all.

15. In cross when showed the green card for the suit land admitted that Hildah Nyambura is not the registered owner of the suit land and that he holds no title to the portion of the suit land.

16. DW2 – Samuel Kariuki Muhoi informed the Court that he bought 0.5 acres of the suit land from the 2nd Interested Party on the 11/11/2005, took possession and planted trees and Napier grass. That the Plaintiff has not occupied the suit land at all. That other than the agreement for sale, he does not wield any other documents nor title. That he was assured by Hildah and her son Fredrick that they owned the suit land following the settlement of the Court case she had with Ramson. That he bought the land notwithstanding the restrictions on the title.

17. DW3- Mary Nyambura Njuguna stated that she bought 0.5 portion of the suit land from Titus Kamau and caused the agreement of sale to be written in the name of her son Simon Karobia Njuguna. That upon purchase her son took possession and commenced construction and cultivation. That the Plaintiff has never lived on the suit land.

The Interested Parties case

18. DW4- James Michael Chege stated that he and the 2nd IP are sons of Samuel Gathuri and Hildah Nyambura. That the suit land is family land where he and his other siblings were born and bred. That the suit land was registered in the name of their grandfather in 1962, one Stephano Ndinguri. That his parents inherited the land from their grandfather. That the suit land was fraudulently sold to the Plaintiff. That he is aware that the Defendants occupy the suit land. That his two siblings and parents were buried on the suit land without any objection from the Plaintiff. That Ramson is a person known to his family as he comes from the neighbourhood.

19. According to the witness the Court in HCCA 179/1995 invalidated the title held by the Plaintiff on account that land control board consent was not obtained. Further that the Court found the transaction fraudulent because it was registered while a caution subsisted on the title. That Charles Njuguna, his uncle sold the suit land to the Plaintiff. That the said Charles also used the name Kamau and Njuguna interchangeably.

20. The witness took the Court through the 4 entries in the green card and informed the Court that the Plaintiff purchased the land while a restriction was subsisting.

21. In addition, the witness faulted the Plaintiff for failing to obtain the land control board consent in the transaction.

22. While being shown a letter from the District Officer dated the 4/8/66 , the witness stated that his uncle sought to be allocated land in Nyandarua which means he had no land in Muranga and that the suit land belonged to his father and not Charles.

23. While insisting that though the land is registered in the name of the Plaintiff the land is family land. That her mother Hildah petitioned for revocation of grant issued in the name of Charles Njuguna in Succ Cause No 238 of 1990. He maintained that his mother was given ownership of the land vide the judgement in HCCA 179 of 1995 but met her demise before she became registered as such.

24. That like the Defendants and some of his siblings he informed the Court that they live on the suit land.

25. DW5 – Beatrice Waitera Gachagua stated that she is the second born child of Hilda and Samuel Gathuri and was born and bred on the suit land. That she got married in 1971 but her marriage collapsed and returned home to the suit land where she lives currently. That her parents and 4 of her deceased siblings are buried on the suit land. That her parents too owned parcel No 216 which they settled in 1995 after they were evicted by Ramson from the suit land. That before the said eviction her family had occupied the land for over 40 years. That her parents bought parcel 216 from a neighbor namely Laban Ndirangu deceased.

26. She informed the Court that the Plaintiffs husband in collusion with her uncle Charles Njuguna fraudulently registered a transfer in favour of Ramson while a restriction subsisted on the suit land. That entry No 6 that the succession cause No 238 of 1990 was not in Court was a clear misrepresentation intended to defeat the restriction that had been lodged by her mother Hildah Nyambura. That the restriction was quickly returned on the register immediately the land is registered in the name of Ramson.

27. The witness informed the Court that she is pursuing the revocation of the grant issued to Charles Njuguna in Succ. Cause No 238 of 1990 on behalf of the estate of her mother.

28. She stated that she and her two brothers, the Interested Parties live on parcel 216 while the Defendants, being purchasers of the various portions of the suit land live on parcel 217. She admitted that the land was sold by her mother and some of her siblings.

29. DW6 – Fredrick Maina Gathuri adopted the joint witness statement dated the 20/3/2018 as his evidence in chief. That the Plaintiff acquired the land from his uncle through fraud. He stated that the Defendants are purchasers from his mother and some of his siblings. That the land belonged to his grandfather which was inherited by his father. That the suit land was sold to the Plaintiff's husband by his uncle who lived in Nakuru. That he succeeded the suit land in unclear circumstances and hence the pursuit by Hildah Nyambura to revoke the grant.

30. He stated that the suit land is both ancestral and family land left to his father. That his parents and siblings have been buried on the suit land.

31. Asked to explain his involvement in the criminal case No 1197 of 2013 he admitted that he was charged with forging documents but the charges were withdrawn by the prosecution thus was never found culpable of any crime. He admitted that he sold a portion of the land to 2nd Defendant knowing that he had no title to convey.

32. With that the Interested Parties closed their case.

33. The Plaintiff submitted that the estate of Hildah Nyambura have not demonstrated any interest in the suit land, Hildah having failed to prosecute the revocation of the grant issued in the name of Charles Njuguna despite being accommodated by the Court on several occasions. That the actions of the late Hildah and her sons in selling land to the Defendants did not create nor conveyed any interest to the Defendants who remain trespassers with no proprietary interest in the suit land. That the Defendants cannot be said to have been innocent purchasers without value despite their admission that they were represented by Counsel in the execution of the sale agreements.

34. Neither the Defendants nor the Interested Parties filed any written submissions in this matter notwithstanding being granted more time to do so by the Court.

35. It is not in dispute that the suit land was registered in the name of Stephano Ndinguri. He was the father of Samuel Gathuri, Charles Njuguna Kamau Gathuri, Serah Wangui and Susan Wanjiku. He died in 1977.

36. According to the evidence of the DW5 and DW6, Samuel Gathuri was the husband of Hildah Nyambura Gathuri. He died in 1986 and was buried in the suit land. The Interested Parties are the sons of Hildah and Samuel Gathuri Hildah died in 2012.

37. It is on record that in the 1990 Charles Njuguna succeeded his father Stephano Ndinguri by way of succession Cause No 238 of 1990 and the suit land became registered in his name on the 17/12/90 by way of transmission.

38. In 1991 Nyambura filed an application seeking to revoke the letters of grant of administration which according to DW5 the application is yet to be prosecuted. In short the grant issued to Charles Njuguna remains unchallenged set aside or appealed against. There is no evidence that Hildah was ever adjudged as the owner of the suit land.

39. On 11/7/1991 a restriction was lodged on the title – no dealings until the dispute in Court is decided. On the 18/9/93 another restriction was lodged to the effect that no dealings with the land until succession cause No 238 of 1990 has been determined. On the 9/3/94 the above restriction was removed for reason that there was no case.

40. The issues that commend themselves for determination are;

- a. Whether the Plaintiffs title has been impugned
- b. Whether the claim of trust is competent before the Court
- c. Whether the Defendants should be evicted
- d. Who meets the cost of the suit.

41. It is on record that Ramson entered into an agreement of sale with Charles Njuguna on the 3/6/1991 and Ramson became registered as owner of the suit land on the 9/3/91.

42. It is the Defendants and the Interested Parties case that the Plaintiffs title was obtained by way of fraud. The Interested Parties pleaded instances of fraud and illegality. Key in the particulars of fraud is that the Plaintiff caused the removal of a restriction on the title to pave way for the registration of his title.

43. Fraud Black's Law Dictionary defines fraud as follows;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

44. In the cases of **Ratilal Gordhanbhai Patel V. Lalji Makanji [1957] EA 314** and **Umlila Mahindra Shah v. Barclays Bank International and Anor [1979] KLR** the Courts have stated that Fraud has everything to do with one's state of mind and intentions, and not the outcome of actions and that the standard of proof for fraud is very high beyond the usual standard of balance of probabilities in civil cases approaching but below proof beyond reasonable doubt.

45. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.....”

46. Section 24 and 25 of the Land Registration Act (LRA) provides that interests conferred upon a registered owner of the property shall vest in that person the absolute ownership of the land together with rights and privileges belonging or appurtenant thereto and with all implied and express rights and privileges. Further that the rights of the proprietor whether acquired on first registration or subsequently for valuable consideration or by order of the Court shall not be defeated except as provided by the Act.

47. Indefeasibility of title as set out in section 24 and 25 of LRA can however be challenged on the basis of existing overriding interests as set out in section 28 of the LRA. These include customary trusts, rights of way, rights of compulsory acquisition, prescriptive rights, interalia.

48. Section 26 of the LRA provides two instances that a title of a proprietor may be impugned; on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally unprocedurally or through a corrupt scheme.

49. Section 76 of the LRA provides how a restriction is lodged on a title, the purpose being to prevent fraud or improper dealing. It may be for a particular period, until the occurrence of a particular event or until a further order is made. A restriction may be removed by the Land Registrar or by an order of the Court.

50. The entry No 6 on the green card is silent on how the restriction lodged and registered as No 5 was removed. Was it by the Registrar or a Court order? The Interested Parties failed to show evidence that the Plaintiff was involved in the unlawful removal of the restriction or that he acted fraudulently. The Land Registrar was not called to testify in Court to shed light on how the restriction was removed. The Court cannot impute fraud where it is not proved. The allegations of conspiracy with registry officials, misrepresentation and causing unlawful entries were not proven with respect to the registration of title in favour of the Plaintiff.

51. Trespass is defined as the unlawful entry of another person land without the consent and permission of the owner. Black's Law Dictionary 10th Edition at page 1733 defines trespass as an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant encroached his land without any justifiable reason.

52. In this case the Defendants admitted buying land from Nyambura and her sons while they knew or ought to know that the said vendors had no interest capable of being conveyed. Their allegation that they were assured that the land belonged to Nyambura does not hold water. They admitted in evidence that they do not have any document to support their occupation of the suit land. DW4-6 admitted that they sold the land to the Plaintiff with the belief that the land belonged to their mother, Nyambura. In the end the Court finds that the Defendants have not advanced a justifiable reason for their continued stay on the land. The Court will give the appropriate orders in the end.

53. In the alternative, the Interested Parties have sought orders that they be declared the lawful owners of the suit land and to hold the same in trust for themselves and the Defendants who have purchased portions of the suit land. Going by the findings of the Court as set out in the preceding paras this claim fails.

54. Have the Interested Parties pleaded and proved a claim in customary trust? In the case of **Kanyi Vs Muthiora 1984 KLR 712 CA**, the Court held that the registration of land in the name of a proprietor under the Land Registration Act did not extinguish rights under Kikuyu Customary law and neither did it relieve the proprietor of the duties or obligations as trustee. A customary trust need not be registered on the title. It is an overriding interest that subsists on the land. It binds the land.

55. Customary law trust is proved by leading evidence on the history (root) of the suit property and the relevant customary law on which the trust is founded and the claimants subscribe to. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must prove that the suit properties were ancestral clan land; that during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; that the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. See the case of **Issack Kieba M'Inanga v Isaaya Theuri M'Linturi & Anor SCOCK No 10 of 2015**.

56. In the case of **Juletabi African Adventure Limited & another v Christopher Michael Lockley [2017] eKLR 9** (supra) the Court also held that It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

57. In para 5 of the Interested Parties defence and counterclaim, the Interested Parties denied that Charles Njuguna, the administrator of the estate of their grandfather was their uncle. That said, the Interested Parties seem to have contradicted their pleadings in the trial when they claimed that Charles Njuguna was their uncle. Indeed the Interested Parties did not specifically plead trust in their statement of claim/counterclaim. This was a fatal mistake on their part.

58. In addition, I note that the Interested Parties failed to enjoin Charles Njuguna or his estate with respect to this claim. Joinder of the said previous owner was critical to afford him and or his estate the opportunity to respond to the claim. Furthermore, and as found above, the Interested Parties did not make any effort to plead and prove the existence of a trust. The claim of trust therefore fails.

59. On a balance of probabilities, the suit of the Plaintiff succeeds. I make the following orders;

a. The counterclaim of the Interested Parties fails. It is dismissed.

b. A declaration be and is hereby made that that Wilson Mwangi Ramson, deceased is the lawfully registered proprietor of the suit land.

c. A declaration that the Defendants by themselves agents or their servants are trespassers and it is hereby ordered that the Defendants do vacate the suit land within a period of 60 days from the date hereof in default eviction to ensure as per the provisions of the law.

d. A permanent order be and is hereby made restraining the Defendants by themselves agents or their servants from entering and or remaining on the suit land

e. Costs of the suit shall be in favour of the Plaintiff.

60. It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 12TH DAY OF OCTOBER 2021

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – absent

Kibet holding brief for Nabutete

Kibet holding brief for Nabutete for Interested Parties

Ms. Phyllis Mwangi – Court Assistant