



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 154 OF 2017

ALICE WARUGURU MBUI.....1ST PLAINTIFF

MARY MUTHONI MBUI.....2ND PLAINTIFF

VERSES

ELIJAH MITHAMO MBUI.....DEFENDANT

JUDGMENT

INTRODUCTION

By a paint dated 9th November 2017, the Plaintiff is seeking the following orders;

- (a) A declaration that the registration of Mbogo Mbui as the proprietor of land parcel No. KABARE/NYANGATI/440 was illegal null and void.**
- (b) A declaration that all subsequent dealings were equally fraudulent, null and void.**
- (c) Costs of this suit.**

The defendant filed a statement of defence on 9th January, 2018 denying the plaintiffs' claim and all particulars of fraud. Thereafter, the parties filed their compliance documents pursuant to orders 3, 7 and 11 of the civil procedure rules. The case was confirmed as ripe for hearing during a pre-trial direction and the same was set down for hearing.

PLAINTIFF'S CASE

Both plaintiffs testified. Alice Waruguru Mbui was the first to testify and referred to her witness statement dated 9th November, 2017 which she adopted in her testimony. In her evidence, the first plaintiff stated that their father was one Mbui Mbogo (deceased) who died in 1963. Her siblings are Lydia Wanjira born in 1952, Mary Muthoni born in 1956, Elijah Mithamo born 1960 and herself born in 1963. The first plaintiff contends that their late father was the registered proprietor of land parcel No. KABARE/NYANGATI/440. That sometime in the year 1972, their fathers' land was subdivided into two during the creation of Embu-Makutano road. Since their father's land was affected by the creation of the said road, his brother was compensated through the aid of the Area Assistant Chief and fraudulently got his name registered in the land as MBOGO MBUI. The first plaintiff further stated that she lived in the suit land and raised her 3 children. In 2004 or thereabouts, her brother started to threaten her with eviction from the suit land. She reported to the Administration but never got any assistance. Eventually, she was evicted from the family land. That she filed an Arbitration case at Wan'guru Court being Arbitration Case No.25 of 2004 and on 13/09/2004, she lodged a caution on the suit land but the same was removed in unclear circumstances. The 1st plaintiff further stated that on 07/06/2006, the defendant changed his name as appearing in the title from MBOGO MBUI to MITHAMO ELIJAH MBUI and on 12/06/2006, he sub-divided the land into two being KABARE/NYANGATI/1061 and 1062. She further contends that all these acts were fraudulent as was aimed at disinheritting them. She submitted that the defendant has subsequently sub-divided the land further and sold to strangers and his children. He now wants this court to have all the entries made from 26/06/1972 revoked/annulled so that the same reverts to the names of their late father and all the children of the late MBUI MBOGO can file succession.

Mary Muthoni Mbui who is the 2nd plaintiff testified as PW2. In her testimony, she is the second born daughter to the late MBUI MBOGO born in 1956 and that their late father was the registered owner of land parcel No. KABARE/NYANGATI/440. She further stated that in 1972, the Embu-Makutano Road was designated and it cut through their land. That through fraudulent means, the defendant who by then was a minor in collusion with their late mother Janet Wangigi Mbui were paid compensation without their knowledge and soon thereafter changed his name to Elijah Mithamo Mbui to conceal facts. That they learnt these acts of fraud and attempted to challenge but their efforts

were not successful.

DEFENDANT'S CASE

The defendant alone testified and stated that previously he was called by the name

Mbogo Mbui. He confirmed that the defendants are his sisters and that all are married. He was referred his statement recorded on 08/01/2018 which he adopted in his evidence. In brief, the defendant stated that their father (deceased) was known as Mbui Mbogo who was the registered owner of land parcel No. KABARE/NYANGATI/440 measuring approximately 4.9 Ha. or 12.5 acres. That their father died in 1963 and a succession cause was later filed and that he was made successor of the land by way of transmission. Thereafter he was registered as proprietor of the suit land on 26/06/1972. That he is the only son and named after his paternal grandfather as Mbogo Mbui and later caused the title to be corrected to read Mithamo Elijah Mbui sometimes on 7/6/2006, and on 3/6/2010, he sub-divided the land into two portions being KABARE/NYANGATI/1061 and 1062, with further sub-division done on land parcel number KABARE/NYANGATI/1061 into five new portions of sub-divisions being KABARE/NYANGATI/5344, 5345, 5346, 5347 and 5348. Thereafter, he transferred those new portions to other persons who are not parties in this suit. That his registration on land parcels No. KABARE/NYANGATI/440 on 26/6/1973 was through a succession cause and therefore proper valid and legal. In the same vein, the defendant stated that there was no fraud committed in the change of name from Mbogo Mbui to Mithamo Elijah Mbui since both are his names, albeit the official one is Mithamo Elijah MBUI.

PLAINTIFFS' SUBMISSIONS

The plaintiff through the firm of Nduku Njuki & Company Advocates submitted that they have proved in their evidence that entry no. 2 in the register on 26th day of June 1972 was fraudulent in that the defendant by then was a minor aged about 12 years known by the name Mbogo Mbui is purported to have taken out succession proceeding but the cause number and the year is not indicated. The plaintiffs also submitted that the defendant did not supply copies of the proceedings or the grant to show that he acquired the suit property by transmission. They argued that the defendant did not discharge his duty placed on him by section 112 of the Evidence Act which provides that he who alleges must prove. The plaintiffs further submitted that the defendant may have been baptized to Elijah but his explanation that he changed his name when he went to a different school after failing his Certificate of Primary Education Examination (K.C.P.E) does not hold any water. They cited the following cases: (1) *Samuel Odhiambo Oludhe & 2 Others Vs Jubilee Jumbo Hardware Ltd, ELC No.417 of 2015 (Kisumu) (UR)* (2) *Alice Chemtai Too Vs The attorney General & 2 Others, ELC No.51 of 2014 (Kericho) (U.R).*

DEFENDANT'S SUBMISSIONS

The defendant through the firm of Maina Kagio & Company Advocates submitted that fraud is a tort and under *Section 4(2) of the Limitation of Actions Act*, such an action cannot be brought after three years. The defendant further submitted that, where an action is based on fraud of the defendants or their agents *under Section 26(a) of the same Act*, the period of limitation does not begin to run until the plaintiff has discovered the fraud. He stated that the impugned registration in the name of the defendant was done on 26/06/1972 and that by their admission, it is clear that as at October, 2004, they were aware of the said registration, hence the reason for the reference to the land Disputes tribunal. The defendant also contend that the plaintiffs lack locus standi in that they are seeking cancellation of his title and all resultant titles and to have the property revert to the name of their father, the late Mbui Mbogo. He submitted that the plaintiffs are litigating on behalf of the estate of Mbui Mbogo without letters of administration. In conclusion, the defendant submitted that he sub-divided the suit land further and sold some parcels to persons who are not parties to this suit and that any orders issued against them would be prejudicial and a violation to their right to own property and not to be condemned unheard.

ANALYSIS AND DECISION

I have looked at the pleadings and the evidence adduced by the parties I have also considered the submissions and the law. The plaintiffs' claim is for a declaration that the registration of the defendant as proprietor of land parcel No. KABARE/NYANGATI/440 was fraudulent null and void. It is trite law that a title as an instrument of ownership is jealously protected and provides only two instances it can be challenged under **Section 26 of the Land Registration Act No. 3 of 2012** as follows;

“(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except;

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.

The plaintiffs contend that the suit property is a clan/family land which was registered in the name of their late father Mbui Mbogo. The plaintiffs further argued that in the year 1972 or thereabouts the defendant who was a minor in collusion with their late mother JANET WANGIGI MBUI caused the land to be registered in the name of the defendant and were paid compensation without the knowledge of the rest of the family members. The green card produced for the suit land parcel No. KABARE/ NYANGATI/440 show that the land was registered in favour of MBUI MBOGO on 6/6/1958 during the land adjudication and demarcation. This court therefore takes judicial notice that the suit land is a clan land. It can also be shown that the suit land was changed from the name of MBUI MBOGO to MBOGO MBUI on 26/6/1972. The defendant in his testimony stated that he acquired the suit land through transmission after filing a succession cause. However, he did not produce proceedings and judgment in the purported succession cause. The court's observation is buttressed by the Arbitration proceedings in Wang'uru Arbitration cause No. 25/2004 where the plaintiffs had lodged a complaint against the defendant in respect of the very same parcel of land and the tribunal agreed with them but the judgment was only reversed on review due to procedural technicalities.

I am satisfied that the defendant committed acts of fraud when he caused the original land parcel No. KABARE/NYANGATI/440 to be transferred from the original registered owner MBUI MBOGO TO MBOGO MBUI and thereafter changing his name to facilitate the fraudulent acts.

Since I have found that the defendant committed acts of fraud by causing his name MBOGO MBUI to be registered in place of their father MBUI MBOGO, I also find that the sub-division and subsequent transfer to any third parties as illegal

null and void. My understanding of the provisions of *Section 26(1) (b) of the Land Registration Act No. 3 of 2012* is to protect and safeguard the title of a proprietor from unscrupulous fraudsters. Where the court is satisfied that the defendant has committed fraudulent activities on the title, it can issue orders of restoring the title to its original holder without regard to any beneficiary(ies) of the fraud. That is the scenario obtaining in this case.

CONCLUSION

In view of the matters aforesaid, I find that the plaintiffs have proved their case to the required standard. I therefore enter judgment as follows;

- 1. A declaration that the registration of MBOGO MBUI as the proprietor of land parcel No. KABARE/NYANGATI/440 was fraudulent, illegal, null and void.**
- 2. A declaration that all subsequent dealings from 26/6/1972 were equally fraudulent, illegal, null and void and of no legal effect.**
- 3. The Land Registrar, Kirinyaga County is hereby directed to rectify the register by reverting the suit land in the name of original proprietor MBUI MBOGO.**
- 4. Since the defendant has been found culpable for fraud which is a serious crime, I order costs to be borne by him.**

Judgment READ, DELIVERED in open Court at Kerugoya and SIGNED this 12th day of November, 2021.

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HON. E. C. CHERONO

ELC JUDGE

In the presence of:-

(1) Ms Wanjiru holding brief for Nduku Njuki

(2) Wambui holding brief for Maina Kagio

(3) Kabuta, Court clerk.