



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C CASE NO. 293 OF 2014

**IBRAHIM MURIITHI MUTUGI (Suing as the
Administrator and legal representative of the Estate
of MUTUGI NGURI KIMBIRI (deceased).....PLAINTIFF**

VERSUS

MARGARET WANGECHI KAROKI.....1ST DEFENDANT

ANDREW WACHIRA MUNENE.....2ND DEFENDANT

AND

JAMES PETER MAINA.....1ST INTERESTED PARTY

JUSTUS IRUNGU MUTUGI.....2ND INTERESTED PARTY

JUDGMENT

Vide a plaint dated 12th March 2019 and Amended on 27th march 2019, the plaint is seeking the following orders:-

- (a) A declaration that MWERUA/KAGIO/522 belongs to MUTUGI NGURI KIMBIRU, the deceased and registration of MWERUA/KAGIO/714 & 715 was fraudulent and the said titles so registered be revoked.**
- (b) That the Land Registrar Kirinyaga do amend the green card to restore Registration of land parcel NO. MWERUA/KAGIO/522 in favour of the plaintiff.**
- (c) The Honourable Court be pleased to issue a permanent injunction restraining the defendants herein either by themselves, their agents, invitees, workmen and/or servants from entering and/ or interfering with land parcel NO. MWERUA/KAGIO/522**
- (d) Costs of this suit.**

The Defendants denied the plaintiff's claim and filed their respective statement of defense dated 06/04/2019 and 27/06/2019 respectively. The 1st interested party filed a statement of defence and counter-claim on 03/07/2019 and on 03/10/2019, the plaintiff filed reply to defense and counter-claim.

The 2nd interested party on the other hand filed an affidavit in support of the plaintiff's claim sworn on 29/10/2019.

PLAINTIFF'S CASE

The plaintiff testified on 15/10/2019 (PW1) and stated on oath that at all material time relevant to this suit, the deceased was the registered proprietor of land parcel No. MWERUA/KAGIO/522 measuring approximately 6.1 Ha who died on 22/05 2004. The plaintiff further stated that the deceased was survived by a widow and six children who are the beneficiaries of his estate. The plaintiff also stated that as beneficiaries of the Estate of MUTUGI NGURI KIMBIRU (deceased), they were willing to commence succession proceedings and he even applied for a certificate of official search from the Land registry but to his surprise, the land parcel No. MWERUA/KAGIO/522 had been closed on sub-division and new numbers created and registered in the names of Margaret Wangechi Karoki (1st defendant) and John Munene

Andrea (deceased). The new numbers are MWERUA/KAGIO/714 and 715 respectively. The plaintiff also stated that his father (deceased) had never sold and/or transferred the suit property in favour of the defendants as the family was not aware of any such transaction.

1ST DEFENDANT'S CASE

The 1st Defendant stated that she purchased the suit property land parcel No. MWERUA/KAGIO/522 from MUTUGI NGURI KIMBIRU (deceased) in May, 1973 and the same was subsequently transferred in her favour the same year. The 1st defendant also referred to an application for consent, a letter of consent, and an extract of green card for the suit property dated 21/05/1973 which she produced as exhibits in this case. The 1st defendant also referred her witness statement dated 05/11/2020 which she adopted in her testimony.

2ND DEFENDANT'S CASE

The 2nd defendant stated that in the year 1972, his father, John Munene showed him land parcel No. MWERUA/KAGIO/715 which he bought from MUTUGI NGURI and from then to date, his family has been utilizing the land without any interference. He stated that his father John Munene died in 2005. That in June 2015, he saw strangers inspecting their land and that of Margaret Wangechi Karoki and suspected that they were purchasers. He informed Margaret Wangechi and on

carrying out investigations, they discovered that this suit had been filed and the plaintiff had obtained interlocutory judgment. The said judgment was wrongful as his father, John Munene had died.

1ST INTERESTED PARTY'S CASE

The 1st interested party stated that he purchased land parcel No. MWERUA/KAGIO/522 measuring approximately 6.1 Ha. from the plaintiff. However, the plaintiff in flagrant breach of the said agreement refused, failed and/or neglected to transfer the suit land and/or refund the consideration paid plus interest thereof. He sought judgment in terms of the counter-claim. He referred to his list of documents dated 02/07/2019 which he produced as exhibits No. 1, 2 & 3. The 1st interested party also referred to his further list of documents dated 01/03/2019 which he produced as exhibits No. 4, 5 & 6 respectively.

2ND INTERESTED PARTY'S CASE

Though the 2nd interested party was joined as an interested party, he only filed an affidavit sworn on 29/10/2018.

SUBMISSIONS BY THE PLAINTIFF

The plaintiff through the firm of F.K. OMENYA & COMPANY ADVOCATES submitted that in the absence of a land sale Agreement, this Honourable Court cannot ascertain whether there was a sale in the first place; who were the parties; what were the terms; the consideration, if any, and whether it was paid in full. He submitted that in the absence of production of the title deeds or even copies of land parcel No. MWERUA/KAGIO/714 & 715 and without invoking *Section 33 of the Land Registration Act, 2012* since 1973, it is difficult to ascertain the genuineness of the alleged land sale and/or the interest of the defendants with certainty. He cited *Section 26 and 80 of the Land Registration Act, No.3 of 2012*. He did not refer to any authority.

1ST DEFENDANT'S SUBMISSIONS

The first defendant through the firm of WAIGANJO GICHUKI & COMPANY ADVOCATES submitted that the 1st defendant acquired title to land parcel No. MWERUA/KAGIO/714 in 1973 or thereabouts. He referred to the green card produced as Exhibit No. 1 which indicates that the original land parcel No. MWERUA/KAGIO/522 was closed on 14th April, 1972 on sub-division into Nos. MWERUA/KAGIO/714 & 715. He also submitted that from the exhibits produced, it is clear that her application for consent of the Land Control Board was made on 21/05/1973. The 1st defendant further argued that when the 1st defendant bought land parcel No. MWERUA/ KAGIO/714 in May 1973, parcel No. MWERUA/KAGIO/522 had ceased to exist since the same had been closed on sub-division. The 1st defendant also submitted that the plaintiff did not bother to report the alleged fraud or forgery to the Police for investigations. He did not refer to any cases.

1ST INTERESTED PARTY'S SUBMISSIONS

The 1st interested party through the firm of NGIGI GICHOYA & COMPANY ADVOCATES submitted that the law on burden of proof in civil matters lies on he who alleges. He cited *Sections 107, 108, 109, 110, & 112 of the Evidence Act, Cap. 80 Laws of Kenya*. The learned Counsel referred to the case of *Selina Mecca Wekesa Vs Kennedy Ellam Wekesa & 7 Others (2014) e K.L.R.* where the following cases were cited with approval; *Koinange & 13 Others Vs Koinange (1968) KLR 23*, *R.G Patel Vs Lalji Makandi (1967) E. A.* The 1st interested party also cited *Section 3 of the Law of Evidence*.

LEGAL ANALYSIS AND DETERMINATION

I have considered the pleadings by the parties, exhibit produced and the submissions. I have equally considered the applicable law. From the plaint Amended on 27/03/2019, the plaintiff is seeking cancellation of the defendants' title to land parcel Nos. MWERUA/KAGIO/714 & 715 on grounds of fraud. From the pleadings, the following distil as issues for determination;

- (a) Whether the plaintiff has proved the commission of fraud by the defendants in the acquisition of land parcel nos.

MWERUA/KAGIO/714 & 715?

(b) Whether the title to the said land parcel Nos MWERUA/KAGIO/714 & 715 is liable to be cancelled?

(c) Whether the 1st interested party has proved his counter-claim for either a transfer of title No. MWERUA/KAGIO/522 and/or alternatively refund of the consideration paid to the plaintiff plus interest?

(d) Who will bear the costs of this suit?

WHETHER THE PLAINTIFF HAS PROVED THE COMMISSION OF FRAUD BY THE DEFENDANTS IN THE ACQUISITION OF LAND PARCEL NO. MWERUA/KAGIO/714 & 715

Fraud is a serious matter and any person wishing the court to consider the same in his favour must prove the allegations to the required standard. The standard of proof in cases of fraud is higher than 'a balance of probabilities' but slightly lower than 'beyond reasonable doubt'. In the case of *Koinange & 13 Others Vs Koinange (1968) KLR 23*, Amin J. held as follows;

'It is well established rule of evidence that whatsoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud in this case the plaintiffs had the burden of proving it and had to discharge that burden.'

Again in the case of *R.G. Patel Vs Lalji Makandi (1967) E.A.*, the court of Appeal held:-

'Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt something more than a mere balance of probabilities is required.'

The 1st defendant in this case testified that Title to land parcel No. MWERUA/KAGIO/714 was acquired by his father when the original title was closed on 14/04/1972 on sub-division into land parcels No. 714 & 715. From the 1st defendant's exhibits No. 1, 2, and 3, it is clear that her application for consent of the Land Control Board was made on 21/05/1973. She stated that she went into occupation of the disputed land immediately after they bought and have been in possession to date. The 2nd defendant also testified that his father bought the suit land parcel No. MWERUA/KAGIO/715 in the year 1972 when he was 13 years of age. Since then, they have lived on the same. The two parcels of land No. MWERUA/ KAGIO/714 & 715 are registered in the names of the defendants in this case. The title of a proprietor of land is protected in our law and gives only two exceptions where a title of a proprietor can be challenged. Section 26 of the Land Registration Act, No. 3 of 2012 provides as follows:-

'(1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon 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, unprocedurally, or through a corrupt scheme.'

The plaintiff in this case has not shown any iota of evidence that the defendants or their representatives in title acquired the same fraudulently. The plaintiff appears to question the documents used to effect the suit properties in favour of the defendants, e.g. the Land Control Board consent, the mutation forms and sale agreement. It is the Land Registrar who is usually presented with all statutory documents for registration. The plaintiff did not request the Land Registrar to be supplied with the aforementioned documents or join her as a party or even summon her as a witness in this case. Worse still, the plaintiff did not report any allegations of fraud to the Police for investigations. It is also curious observation that the defendants have been registered as proprietors of the suit properties from the year 1973 and have used the same openly but the plaintiff did not raise any question. It is further significant to note that even after the original owner Mutugi Nguri (deceased) who sold the suit properties died in 2004, it took the plaintiff more than ten years to realize that 'his land' was under occupation by a 'stranger'. These are some serious questions this court grappled in determining whether fraud was indeed committed. The only answer is in the negative.

WHETHER THE TITLE TO THE SAID LAND PARCEL NO. MWERUA/KAGIO/714 & 715 ARE LIABLE TO BE CANCELLED

Having found and held that the plaintiff has not proved that the defendants committed any fraudulent act in the transfer of the suit properties and that the title to the two properties are indefeasible, I also find that the said titles are protected in law. The plaintiff's claim for cancellation therefore fails.

WHETHER THE 1ST INTERESTED PARTY HAS PROVED HIS COUNTER-CLAIM FOR EITHER TRANSFER OF TITLE NO. MWERUA/KAGIO/522 AND/OR ALTERNATIVELY REFUND OF THE CONSIDERATION PAID TO THE PLAINTIFF PLUS INTEREST.

From the green card for land parcel No. MWERU/ KAGIO/522 produced by the plaintiff and marked P-exhibit 1, it clearly shows that the title was closed on 14/04/1972 on sub-division into land parcels No. MWERUA/KAGIO/714 & 715. It is further shown from the documents produced by the 1st defendant and marked D-exhibit No. 1, 2 & 3 that, she applied for consent from the Land Control Board which was granted before the suit land was transferred in her favour. When the plaintiff purported to sale to the 1st interested party land parcel No.

MWERUA/KAGIO/522 on 6th July 2016, he knew or ought to have known that the same was none existent. Having received money for the sale that never existed, the plaintiff must therefore refund the consideration plus interest as prayed.

CONCLUSION

For all the reasons I have stated herein above, I now enter judgment in the following terms;

(a) The plaintiffs suit fails and is hereby dismissed with costs

(b) The plaintiff to refund the 1st interested party the consideration paid plus interest and costs at court rate as prayed in the counter-claim.

JUDGMENT READ, DELIVERED IN OPEN COURT AT KERUGOYA AND SIGNED THIS 12TH DAY OF NOVEMBER, 2021.

.....

HON. E. C. CHERONO

E.L.C. JUDGE

In the presence of:

1. Mr. Omenya – present
2. Mr. Waiganjo for 1st Defendant
3. 2nd Defendant – present
4. Ms Waweru Wanjiru holding brief for Mr. Ngigi for 1st Interested party
5. 2nd Interested party/Advocate – absent
6. Kabuta, Court Assistant – present.