



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 770 OF 2013

MARY WAGICI KIARIE *Suing as the administrator and legal personal*

***Representative of the estate of* LIVINGSTONE KIARIE.....PLAINTIFF**

=VERSUS=

SAMSON MUIRURI GAITHINGU ALIAS

NOAH MUIRURI SAMSON AND ANOTHER.....DEFENDANTS

JUDGEMENT

Background

1. The Plaintiff, Mary Wagici Kiarie is the Administrator of the estate of Livingstone Kiarie Deceased. She filed this case sometimes in 2013 suing one Samson Muiruri Gathingu Alias Noah Muiruri Samson and Olive Wachuka Kimani as the 1st and 2nd Defendants respectively. The Plaintiff's prayers are;

a) A declaration that the subdivision of Karai/Gikambura/820 is unlawful, null and void; and

b) A Declaration that the sale and transfer of Karai/Gikambura/3432 by the 1st Defendant to the 2nd Defendant is irregular, unlawful, null and void;

c) A declaration that the Plaintiff is the bona fide and proprietor of land parcel Karai/Gikambura/3432.

d) In the Alternative to prayer © the Plaintiff prays for compensation by both Defendants, of the sum equivalent to the value of Karai/Gikambura/3432 i.e. 0.498Ha.

e) Costs of the suit.

f) Interest on (a), (b), (c) & (d) above.

2. The basis of the Plaintiff's claim was that the 1st Defendant fraudulently subdivided parcel number Karai/Gikambura/820 into 2 Parcels being Karai/Gikambura/831 & Karai/Gikambura/832 and sold both parcels to the 2nd Defendant. The Plaintiff alleges that the said subdivision and transfer of the two parcels of land to the 2nd Defendant was in contravention of orders of the High Court in Nairobi Succession Cause No.1701 of 1999 as the 1st Defendant was not the authorized signatory. The Plaintiff also accuses the 1st Defendant of disposing off her beneficial interest without her consent and knowledge.

3. As against the 2nd Defendant, the Plaintiff accused her of colluding with the 1st Defendant even when she knew or ought to have known that the Plaintiff was the beneficial owner of land parcel Karai/Gikambura/3432.

4. On 6th May 2015, the Advocate for the Plaintiff informed the court about the passing on of the 1st Defendant. On 29/8/2018, over 3 years after the demise of the 1st Defendant, the plaintiff informed the court that she intended to substitute the 1st Defendant and prayed for time. On 29/10/2020, when the matter was slated for hearing, the Plaintiff applied to adjourn the case on the basis that she was making arrangements to substitute the 1st Defendant. This did not happen.

5. Eventually the matter proceeded to hearing on 22/9/2021. The Plaintiff did not substitute the 1st Defendant. The 2nd Defendant's advocate informed the Court that the suit by the Plaintiff as against the 1st Defendant had abated and marked as such.

6. The 2nd Defendant on her part filed both a statement of defence and a counter-claim. The 2nd Defendant in response to the Plaintiff's claim averred that she was a bona fide purchaser for value without notice. She stated that she bought the land, the subject matter of this suit after conducting due diligence and for value. The land, she further states was sold with vacant possession and free from any encumbrances. She bought the land after conducting an official search and satisfying herself that the 1st Defendant was the duly registered owner of the land.

7. In her counter-claim the 2nd Defendant avers that she followed the due process in respect of the sale and transfer of the land. The 1st defendant even obtained the consent from the Land Control Board at Kikuyu as required under the Land Control Act. She therefore prays for the dismissal of the Plaintiff's suit and judgement against the Plaintiff for orders: -

a) A declaration that the 2nd Defendant as the registered proprietor of land parcel Karai/Gikambura/3432 is the legal and beneficial owner of the said parcel.

b) Vacant possession of the said land parcel number Karai/Gikambura /3432 be delivered to the 2nd Defendant.

c) Mesne profits in respect of the said land parcel number Karai/Gikambura /3432.

d) Costs of the suit and counter claim.

e) Any other relief the court deems fit.

8. The Plaintiff did not file a statement of defence to the 2nd Defendant's counter-claim.

9. The case was eventually heard in open court on 22/9/2021 with each of the parties testifying as witnesses in their own respective cases.

The Plaintiffs' case.

10. Mary Wagici Kiarie, the Plaintiff herein adopted her witness statement dated 1st July 2013 as her evidence in chief. Her testimony was that land parcel Karai/Gikambura /820 was originally owned by her father in law by the name of Samson Gaithingu –deceased. He had 2 wives by the names Elizabeth Wanjiku & Grace Njoki. On his demise, his dependants agreed that each household was to get half a share of his land.

11. The share of the household of Elizabeth Wanjiku was subsequently to be shared equally by Noah Muiruri Samson, Peter Kinuthia Ngegi and Livingstone Kiarie (deceased and the Plaintiff's husband). However, the plaintiff claims that the 1st Defendant fraudulently subdivided and transferred the land to himself and later on to the 2nd Defendant. The Plaintiff stated that she had been farming on land parcel Karai/Gikambura /820 since 1987.

12. Though the Plaintiff had filed a plaintiff's list of documents, she did not produce them in evidence during the hearing.

13. On cross –examination by the advocate for the 2nd Defendant, the Plaintiff agreed that the 2nd Defendant has built a home on the land parcel Karai/Gikambura /3432 and that she resides on that land. The plaintiff stated that she didn't have any document(s) to support her allegation that the 1st Defendant (now deceased) was prohibited from executing papers/documents to subdivide the land. She further confirmed that the 1st defendant as a dependant and son of the household of Elizabeth Wanjiku was entitled to a share of his father's land.

The 2nd Defendant's case.

14. The 2nd Defendant, Olive Mwihaki Kimani testified in her case, adopting her witness statement dated 15th May 2020 as her evidence in chief. Her testimony was that she is the registered proprietor of land parcel Karai/Gikambura /3432 measuring 0.0498 hectares. She purchased the land from the 1st defendant (now deceased) for Kshs. 1,050,000/=. After the land Control Board at Kikuyu issued a consent to transfer the land, it was transferred to her. She stated that she was a bona fide purchaser for value without notice. She accuses the Plaintiff of malice and misrepresentation of facts. The transfer from the 1st defendant to herself was without any defects as the title was clean and unfettered. She had carried out due diligence before purchasing the land and satisfied herself that the 1st defendant's title was clean. She denies infringing any rights of the Plaintiff. She prays that the plaintiff's suit against herself be dismissed with costs and her counter claim be allowed as prayed with costs. She produced in evidence the documents listed in her list of documents to corroborate her testimony. The documents were marked as 'DE 1-5' in the order in which they appear on the 2nd Defendants list of documents.

15. The Plaintiff did not cross-examine the 2nd Defendant.

Courts Directions.

16. Upon the close of the hearing, the Court directed both parties to file written submissions. Both parties have complied and filed their respective submissions.

The Plaintiff's submissions.

17. The plaintiff's submission was that the 2nd Defendant is not an innocent purchaser for value. She submits that the 2nd Defendant colluded with the 1st Defendant (deceased) to dispossess her, her share of the land.
18. The Plaintiff's case is that the suit was filed when the 1st Defendant was alive, but that he never filed a defence to the Plaintiff's case. His family did not file a petition for letters of administration and the suit by the plaintiff against the 1st defendant therefore abated. The plaintiff urges the court to enter judgement against the deceased 1st Defendant in default of appearance and defence.
19. The Plaintiff further submitted that the High Court in Succession Cause No. 1701/1999 had issued an order directing the Deputy Registrar to execute documents. So, the plaintiff's contention is that the 1st Defendant was barred from executing the documents as he did.
20. The Plaintiff summarized her submissions with citations from the case of **Rajesh Pranjivan Chasasama Vs Sailesh Pranjivan Chudasama (2014) eKLR** & that of **Lawrence Mukiri Vs Attorney General & 4 others (2013) eKLR** on the issue of a bona fide purchaser for value. The Plaintiff's conclusion was that, had the 2nd Defendant conducted due diligence, she would have known how the property was to be shared by the heirs and that the Deputy Registrar was the only person who would have transferred the land to her.
21. I find some interesting statement by the Plaintiff at the 3rd last paragraph of her submissions. She states that, since the suit against the 1st Defendant had abated, the implication was that the Plaintiff had won the case against him/his estate. The Plaintiff therefore prays that the courts enter judgement in her favour and dismiss the counter claim by the 2nd Defendant.

The 2nd Defendant's submissions.

22. In her submissions, the 2nd Defendant points out a number of issues which he listed as follows:-
- a) *That the Plaintiff did not adduce any evidence regarding the size of the land parcel Karai/Gikambura /820.*
 - b) *The Plaintiff did not adduce evidence as to who shared 5/6th of the parcel of land Karai/Gikambura /820 (her claim being that she is entitled to 1/6th of the land.)*
 - c) *No evidence was adduced to the effect that the 1st Defendant signed documents to facilitate subdivision of land parcel Karai/Gikambura /820 alone.*
 - d) *No evidence was adduced to support the allegation that the Deputy Registrar was supposed to execute documents to facilitate subdivision of land parcel Karai/Gikambura /820.*

The conclusion by the 2nd Defendant was that the Plaintiff merely made allegations without proof.

23. The 2nd Defendant emphasizes that it was not in contention that the 1st Defendant was one of the beneficiaries of land parcel Karai/Gikambura /820. That the Plaintiff did not adduce any evidence to prove that the parcel of land Karai/Gikambura /3432 sold by the 1st Defendant to the 2nd Defendant, was not that specific rightful share of the 1st Defendant from land parcel Karai/Gikambura /820.
24. In regard to the Plaintiff's allegations of fraud against the 2nd Defendant, the 2nd Defendant's submissions was that the plaintiff had not proved any fraud against her. The 2nd Defendant relied on the case of **Vijay Morara Vs Nansingh Madhusingh Darbar & Another (2000) eKLR**, where Tunoi J, stated that fraudulent conduct must not only be distinctively alleged but must also be distinctively proved.
25. The standard of proof of fraud; the 2nd Defendant stated, is higher than in ordinary civil cases. The 2nd Defendant relied on the Court of Appeal Decision in **Kuria Kiaries & 2 Others Vs Sammy Magera (2018) eKLR** which quoted with approval the case of **Kinyanjui Kamau Vs George Kamau (2015) eKLR**. The 2nd Defendant invited the court to find that the Plaintiff did not adduce evidence to prove the alleged fraud.
26. Finally, the 2nd Defendant's submissions were to the effect that she is a bona fide purchaser for value without notice. The 2nd Defendant also relied on the case cited by the Plaintiff being the case of **Lawrence Mukiri Vs Attorney General & 4 others (2013) eKLR**.
27. The 2nd Defendant reiterates that she has the title to the suit property and by virtue of section 26 of the Land Registration Act, she is the registered and absolute proprietor of the suit property. In this aspect the 2nd Defendant relied on 2 cases namely, **Sangale Ole Langas Vs Stephen Mishish & Another (2018) eKLR**, and **Ahmed Ibrahim Suleiman & Another Vs Noor Khamisi & Another (2013) eKLR**.
28. The 2nd Defendant therefore prays for the dismissal of the plaintiff's case against her with costs. She further prays that her counter claim be allowed as prayed.

Issues for Determination.

29. The court is of the view that the issues for determination in this case are the following;

- a) *What is the implication of the abatement of the suit by the plaintiff as against the 1st Defendant?*
- b) *Whether the Plaintiff has established a valid claim over Karai/Gikambura /3432.*
- c) *Whether the 2nd Defendant is a bona fide purchaser for value without notice of land parcel Karai/Gikambura /3432.*
- d) *Whether the 2nd Defendant is entitled to the orders sought in the counter claim.*
- e) *Who should bear the costs of this suit and counter-claim?*

Analysis and Determination.

A. What is the implication of the abatement of the suit by the Plaintiff against the 1st Defendant?

30. As I had already pointed out, the Plaintiff in her submissions states that since her case against the 1st Defendant abated, it means that she had won the case against the 1st Defendant. The 2nd Defendant did not submit on the issue of the abatement of the Plaintiff's suit as against the 1st Defendant.

31. Abatement of a suit means that the suit is extinguished; it is no more. The Black's Law Dictionary, 11th Edition defines abatement as *'the defeat of a pending action for a reason unrelated to the merits of the claim'*. So, when the suit by the Plaintiff against the 1st Defendant abated, it meant that the suit and the claim against the 1st Defendant were extinguished or defeated for a reason unrelated to the merits of the Plaintiff's case. This to my understanding had very serious ramifications on the suit by the plaintiff as against the 1st defendant and consequently on the 2nd Defendant as well. The only nexus between the Plaintiff and the 2nd Defendant was the 1st Defendant. This is something that should have worried the plaintiff greatly. The Plaintiff in her submissions attempted to shift the blame on the estate and family of the 1st Defendant instead, for failing to take out letters of administration and not substituting the 1st Defendant. In her opinion, it meant that she had won the case against him (1st defendant) and his estate.

32. The Plaintiff's suit is premised on allegations of fraud against the 1st and 2nd Defendants. The 2nd Defendant in her submissions cited the case of **Vijay Morjaria Vs Nansingh Madhusingh Darbar & Another (2000) eKLR** on the responsibility of the Plaintiff to prove fraud.

33. Justice Tunoi (as he then was) in the above case emphasized that

"...it is settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and, it is not allowable to leave fraud to be inferred from the facts".

34. The same observation was made in **Koinange & 13 Others Vs Charles Karuga Koinange (1986) eKLR**. The Court referred to the case of **RATILAL PATEL MAKANYI (1957) EA 314** where the Court had pronounced itself as follows:-

"When fraud is alleged by the plaintiffs, the onus is on the Plaintiffs to discharge the burden of proof. 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 balance of probabilities is required".

35. The Implication of the abatement of the suit by the Plaintiff against the 1st Defendant is that the suit was extinguished. The Plaintiff lost the opportunity to prove her allegations of fraud as against the 1st Defendant. Meaning that, without any evidence adduced the prayers sought against the 1st Defendant cannot be granted. This applies to prayers 1 and 2 in the plaint.

36. Under prayers number 1, the Plaintiff sought a declaration that the subdivision of Karai/Gikambura/820 (***by the 1st defendant***) was irregular, unlawful, null and void. Her basis was that the subdivision was occasioned by the 1st Defendant albeit; fraudulently. Do I need to say more? This can only be treated as a mere allegation since it wasn't proved.

37. Prayer number 2 by the plaintiff was for a declaration that the sale and transfer of parcel of land Karai/Gikambura/3432 by the 1st Defendant to the 2nd Defendant was irregular, unlawful, null and void. This prayer too must fail for want of proof.

(B). Whether the plaintiff has established a valid claim over land parcel Karai/ Gikambura/3432

38. The title to the parcel of land Karai/Gikambura/3432 is registered in the name of the 2nd Defendant Olive Wachuka Kimani. The Plaintiff prays for a declaration that she is the bona fide proprietor of the land parcel Karai/Gikambura/3432. Yet she hasn't prayed for cancellation of the title.

39. As I had already pointed out, the only nexus between the Plaintiff and the 2nd Defendant was the 1st Defendant. The Plaintiff accused the 1st defendant of disposing off her beneficial interest (i.e. land parcel Karai/Gikambura/3432) without her consent and converting the proceeds thereof to his own use.

40. All the allegations against the 1st Defendant as already noted earlier have not been proved. This finding alone is enough to dispose off the plaintiff's claim over the parcel of land Karai/Gikambura /3432.

41. The Court also agrees with the submissions of the 2nd Defendant that the Plaintiff has not explained what made her specifically pick on the 2nd Defendant's parcel of Land Karai/Gikambura/3432 and no other. The original parcel of land Karai/Gikambura/820 was at first divided into 2 portions which were to be shared out between 2 households. The 1st Defendant was a member of one of the households and the Plaintiff confirmed that he too was entitled to a share of the land. No evidence was adduced to the effect that Karai/Gikambura/3432 was not that rightful share of the 1st Defendant. Section 107 Of the Evidence Act is categorical that, 'Whoever desires any Court to give judgement as to any liability dependent on the existence of facts which he asserts must prove that those facts exists.' Simply put; "*He who alleges must prove*".

42. Finally , the Plaintiff did not establish the basis for her claim over Karai/Gikambura/3432. I say so because the Plaintiff did not produce any document to prove and corroborate her oral testimony . Not even a certificate of affirmation of grant to confirm that she was indeed the administrator of the estate of Livingstone Kiarie . no evidence too was given to show that Livingstone Kiarie had any valid claim over parcel of land Karai/Gikambura/3432.

43. The Courts finding therefore is that the Plaintiff has not established a valid claim over the land parcel no. Karai/Gikambura/3432. Her prayer for a declaration that she is the bona fide proprietor of Karai/Gikambura/3432 fails. The alternative prayer for compensation also fails for the same reason.

c. Whether the 2nd Defendant is a bona fide purchaser for value without notice of land parcel Karai/Gikambura /3432.

44. It was the 2nd Defendant's testimony that she is the duly registered proprietor of the parcel of land Karai/Gikambura/3432 measuring 0.0498 ha. She purchased the same for Kshs.1,050,000/= from the 1st Defendant after conducting a search and satisfying herself that the title to the land was clean. The land was transferred to her after the kikuyu land control board issued a consent to transfer. She denies any wrong doing on her part. She produced documents marked 'DE 1-5' to back up her testimony. She prayed for the dismissal of the plaintiff's claim against her, terming it as malicious and a misrepresentation of facts. The 2nd Defendant further informed the court that she has built her home on the parcel of Land Karai/Gikambura/3432 and that is where she lives.

45. Both parties in their submissions cited the case of **Lawrence Mukiri Vs Attorney General & 4 others (2013) eKLR.**

46. In the above case, lady justice Mary Gitumbi cited with approval the case of **Katende Vs Haridar & Company Limited (2008) 2EA 173** where the Uganda Court of Appeal expressed itself as follows;-

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

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner".

47. Just for purposes of setting the record straight, the Court of Appeal in the case of **Mwangi James Njehia –vs- Janetta Wanjiku Mwangi & ano (2021) eKLR**, reviewed the above cited case of Katende at condition (d) and did away with the word 'Apparent' to read '**The vendor had valid title**'. Katende case is still a good authority but without the word apparent at clause (d).

48. The Plaintiff in her submissions expressed an opinion that if the 2nd defendant had conducted due diligence, she would have known how the property was to be shared by the heirs and that the deputy registrar was the only person who would have transferred the land to her. The Court agrees with the submissions of the 2nd Defendant that the Plaintiff merely made allegations without proof.

49. The 2nd Defendant in her submissions reiterated her position that she committed no fraud. The Plaintiff did not proof any action of fraud attributable to the 2nd Defendant. She therefore prays for a declaration that she is the legal and beneficial owner of the land parcel number Karai/Gikambura/3432 in accordance with the provisions of section 26 of the Land Registration Act.

50. I am convinced by the 2nd Defendant's submissions that the plaintiff has not proved any fraud against her. The 2nd Defendant stated that she conducted a search of the land. There were no restrictions on the title at the time of purchasing the land. The title to the land

exhibited also shows that the 1st Defendant was the sole registered proprietor of the land at the time of the purchase. A consent to transfer the land was sought from the Kikuyu land Control Board. No one protested to the sale. The 2nd Defendant took possession of the land without any hindrances and went ahead to build a home where she has been living. The 2nd Defendant did all that a diligent purchaser of a property would do.

51. Accordingly, guided by the above cited cases, I find that the 2nd Defendant has proved that she was a bona fide purchaser for value without notice of parcel number Karai/Gikambura/3432.

D. Whether the 2nd Defendant is entitled to the orders sought in the counter claim.

52. The 2nd Defendant in her counter claim prayed for 4 main orders: -

i. A Declaration that being the registered proprietor of land parcel Karai/Gikambura/3432, the 2nd Defendant is the legal beneficial owner of the said parcel of land.

ii. Vacant possession of the said land.

iii. Mesne profits.

iv. Costs of the suit and the counter claim.

53. Having already made a finding that the 2nd Defendant is a bona fide purchaser for value without notice, the court grants her the prayer for a declaration that being the registered proprietor of land parcel Karai/Gikambura/3432, the 2nd Defendant is the legal beneficial owner of the said parcel of land.

54. In regard to the other prayers (ii), & (iii) the Court's finding is that the 2nd Defendant has not adduced any evidence to warrant the granting of the same. The 2nd Defendant's testimony is that she resides in the land parcel Karai/Gikambura/3432 where she has built her home. She is and has been in possession.

55. Mesne profits on the other hand can only be granted to a person who has been deprived off her land. Section 2 of the Civil Procedure Act, Cap 21 Laws of Kenya defines Mesne profits as follows:-

“Mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.

56. Nothing was placed before the Court upon which an order of mesne profits could be made.

E. Who shall bear the costs of the suit and the counter-claim?

53. The final issue that this Court must now determine is who is to bear the costs of his suit and the counter-claim. Costs follows the cause. The Court's finding is that the Plaintiff has not proved her case against the 2nd Defendant on a balance of probabilities and the Plaintiff's case is hereby dismissed with costs to the 2nd Defendant. In regard to the Counter-claim by the 2nd Defendant against the Plaintiff, the Court's finding is that the 2nd Defendant's counter claim is allowed in terms of prayer 1 only. The Plaintiff shall also bear the costs of the counter-claim.

CONCLUSION

57. In conclusion, the Court makes the following orders:-

i. That the Plaintiff's case against the 2nd Defendant is hereby dismissed with costs to the 2nd Defendant.

ii. That the Counter-claim by the 2nd Defendant against the Plaintiff is allowed in terms of Prayer 1 thereof with costs to the 2nd Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Ms.Nechesa for the Plaintiff

Mr Gachura for the Defendants

Court Assistant: Hilda

M.D. MWANGI

JUDGE