



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 941 OF 2012

ISAAC MWAURA WAWERU.....PLAINTIFF

=VERSUS=

PETER KARUGA.....1ST DEFENDANT

WANJIRU MBECHA.....2ND DEFENDANT

PENINAH NJOKI.....3RD DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendants on 4th December, 2012. The Plaintiff averred that he was at all material times the registered owner of all that parcel of land known as Limuru/Ngecha/T.197 (hereinafter referred to as “the suit property”) and that in early 2012, the defendants entered the suit property without his consent and started erecting structures thereon and also cultivating the same. The plaintiff averred that the defendants had defied his numerous requests to remove the structures they had put up on the property and to vacate the same. The plaintiff sought judgment against the defendants for an order of eviction of the defendants from the suit property and the exhumation of the bodies that they had interred on the property.

The plaintiff’s suit was defended by the 3rd defendant who filed a defence and counter-claim against the plaintiff on 4th February, 2013. The 3rd defendant denied that the plaintiff was the registered proprietor of the suit property. The 3rd defendant averred that the suit property formed part of the estate of the late Njoroge Kirugu, deceased (hereinafter referred to as “the deceased”) which was the subject of Kiambu Principal Magistrate’s Court (PMC) Succession Cause No. 219 of 1987, Nairobi High Court Civil Appeal (HCA) No. 12 of 1989 and Nairobi High Court (HC) Succession Cause No. 2666 of 2011.

The 3rd defendant averred that the late Njoroge Kirugu (deceased) was the biological father of the 3rd defendant and the plaintiff’s father one, Ibrahim Njoroge who was also deceased (hereinafter referred to only as “the plaintiff’s father”). The 3rd defendant averred that she had been occupying and cultivating the suit property for several years. The 3rd defendant averred that in Kiambu PMC Succession Cause No. 219 of 1987 (hereinafter referred to only as “the Kiambu Succession case”), a decision was made in favour of the plaintiff’s father in relation to the estate of the deceased which decision the 3rd defendant appealed to the High Court in Nairobi HCA No. 12 of 1989 (hereinafter referred to only as “the High Court Appeal”). The 3rd defendant averred that in the said appeal, an order was made on 7th May, 1993 restraining on the plaintiff’s father who was the respondent in the appeal from dealing and/or disposing of the suit property and two (2) other parcels of land that formed part of the estate of the deceased.

The 3rd defendant averred that if the suit property was registered in the name of the plaintiff as the owner of thereof as claimed in the plaint then such registration was procured illegally and fraudulently in that the alleged registration was effected contrary to an existing court order and while there was a succession dispute touching on the suit property. The 3rd defendant averred further that in transferring the suit property to his name, the plaintiff had disinherited the other beneficiaries of the estate of the deceased who had genuine claims over the suit property.

The 3rd defendant sought judgment against the plaintiff in her counter-claim for;

- (i) An injunction restraining the plaintiff from interfering with the 3rd defendant’s quiet possession and enjoyment of the suit property.
- (ii) A declaration that the registration of the suit property in the name of the plaintiff as the owner thereof was illegal and/or irregular.
- (iii) Cancellation of the registration of the plaintiff as the proprietor of the suit property.

From the record, the plaintiff did not file a reply to defence and defence to the 3rd defendant's counter claim. On 27th April, 2017, the suit was fixed for hearing on 24th May, 2017. On 24th May, 2017, only the 3rd defendant's advocate appeared in court and sought another hearing date which request was rejected by the court which proceeded to dismiss the plaintiff's suit and the 3rd defendant's counter-claim for non-attendance. Subsequently, the 3rd defendant made an application for the reinstatement of her counter-claim for hearing on merit which application was allowed on 26th July, 2018. The plaintiff's suit however remained dismissed.

The suit was thereafter listed for the hearing of the 3rd defendant's counter-claim on 2nd July, 2019. The plaintiff and his advocates did not turn up for the hearing despite the fact that the hearing date was given in court in the presence of the advocates for both parties. The 3rd defendant gave evidence and closed her case. The 3rd defendant's advocate did not make closing submissions. He relied entirely on the evidence on record. In her evidence, the 3rd defendant adopted as part of her evidence in chief her witness statement filed in court on 4th February, 2013. The 3rd defendant also produced as exhibits in support of her claim the documents that were attached to her list of documents and supplementary list of documents filed in court on 4th February, 2013 and 23rd March, 2016 respectively.

In her witness statement, the 3rd defendant stated that the suit property and two (2) other parcels of land namely, Limuru Ngecha/T.196 and Ngecha/Mbari-Ya-Igi/14 belonged to her late father Njoroge Kirugu (deceased) who died on 8th November, 1963. She stated that the deceased had two (2) wives and ten (10) children. She stated that the plaintiff's father, Ibrahim Waweru Njoroge who was one of the deceased's children died on 28th October, 2009. The 3rd defendant stated that her uncle one, Kariuki Kirugu and she filed a petition for grant of letters of administration in respect of the estate her deceased father, Njoroge Kirugu at Kiambu Principal Magistrate's Court namely, Kiambu PMC Succession Case No. 219 of 1987 (Kiambu Succession Cause). She stated that the plaintiff's father who was still alive filed an objection to a grant being issued to them in the said succession cause. She stated that in a ruling that was made on 3rd May, 1988 in the said Kiambu Succession Cause, grant of letters of administration in respect of the estate of their deceased father was issued to the plaintiff's father, Ibrahim Waweru Njoroge.

The 3rd defendant stated that she and her uncle aforesaid were aggrieved with the said decision and filed an appeal against the same in the High Court of Kenya at Nairobi namely, Civil Appeal No. 12 of 1989 (the High Court Appeal) in which an order was made on 7th May, 1993 restraining the plaintiff's father from disposing of or interfering with the suit property and two (2) other parcels of land that formed part of the estate of the deceased. The 3rd defendant stated that the said High Court Appeal was compromised on 22nd February, 1995 by the parties who agreed to have the Kiambu Succession Cause heard fully and for that purpose, an order was made for the transfer of the High Court Appeal file to Kiambu Principal Magistrate's Court. The 3rd defendant stated that it took some time for the appeal file to be transferred to Kiambu Law Court and her efforts to have the Kiambu Succession Cause heard had not borne fruit by the time the plaintiff's father died on 28th October, 2009.

The 3rd defendant stated that after the death of the plaintiff's father who was the administrator of their deceased father's estate, she made an application in the Kiambu Succession Cause to be substituted as administrator of the deceased's estate in place of the plaintiff's father which application was allowed on 5th July, 2010 and an amended grant of letter of administration issued to her accordingly. The 3rd defendant stated that when her advocates perused the Kiambu Succession Cause file on 29th September, 2011, they discovered that the plaintiff's father had secretly applied for confirmation of a grant that was issued to him in respect of the estate of their deceased father and managed to obtain confirmation of the said grant on 31st January, 1989.

The 3rd defendant stated that following that confirmation, the plaintiff's father transferred all the properties that were registered in the name of their deceased father including the suit property to his name. The 3rd defendant stated that her advocates also discovered that following the death of the plaintiff's father, the plaintiff applied for a grant of letters of administration in respect of his estate in Kiambu SPM Succession Cause No. 122 of 2010 and was issued with a grant which was subsequently confirmed on 15th July, 2011. The 3rd defendant stated that following that confirmation, the plaintiff caused all the three (3) parcels of land which hitherto formed part of the estate of the 3rd defendant's deceased father who was the plaintiff's grandfather, Njoroge Kirugu which included the suit property to be transferred to his name.

The 3rd defendant stated that she moved to the High Court in Nairobi High Court Succession Cause No. 2666 of 2011 (Nairobi Succession Cause) and obtained an order revoking the confirmation of grant of letters of administration that was issued to the plaintiff's father in respect of the estate of their deceased father, Njoroge Kirugu. In a ruling that was delivered on 6th November, 2014 in the said succession Cause, the court also revoked all transactions that were carried out following that confirmation; in particular, the registration of any parcel of land that formed part of the estate of the deceased, Njoroge Kirugu in the name of the plaintiff's father and any other subsequent registration. She stated that the court ordered all such transactions to be cancelled and the parcels of land concerned reverted to the name of the deceased, Njoroge Kirugu. The 3rd defendant stated that the suit property was illegally registered in the name of the plaintiff. The 3rd defendant urged the court to dismiss the plaintiff's claim and allow her counter-claim.

I have considered the evidence tendered by the 3rd defendant in her defence and in support of her counter-claim. I am in agreement with the 3rd defendant that the plaintiff's claim against her has no merit and that she is entitled to the reliefs sought in her counter-claim. It was not disputed that the suit property was initially registered in the name of Njoroge Kirugu (deceased) who was the 3rd defendant's father and the plaintiff's grandfather. It was also not disputed that the suit property formed part of the deceased's estate and that the same was to be distributed in accordance with the law of succession upon the death of the deceased. It was also not disputed that the plaintiff acquired the suit property from the estate of his deceased father, Ibrahim Waweru Njoroge who had also acquired the same from the estate of the deceased, Njoroge Kirugu. It was also not disputed that the process through which the plaintiff's father, Ibrahim Waweru Njoroge acquired the suit property was challenged by the 3rd defendant in Nairobi High Court Succession Cause No. 2666 of 2011. It was also not disputed that in a judgment that was delivered in the said Succession Cause No. 2666 of 2011 on 5th March, 2015, the court revoked the certificate of confirmation of grant in respect of the estate of the deceased, Njoroge Kirugu that was issued to the plaintiff's father on 31st January, 1989 pursuant to which the plaintiff's father transferred the suit property to his name. The court also revoked all subsequent transactions involving

among others, the suit property which included the subsequent transfer of the suit property to the plaintiff therein. The court ordered that the suit property be reverted to the name of the deceased, Njoroge Kirugu. A copy of the said judgment was produced by the 3rd defendant in evidence as defence exhibit 2. There is no evidence that the said judgment was varied or set aside. In the said judgment, the court declared the process through which the plaintiff acquired the suit property illegal and cancelled the plaintiff's title over the suit property. Since the plaintiff has no valid title over the suit property, the plaintiff cannot maintain an action for trespass against the 3rd defendant. The plaintiff's claim against the defendants has no merit.

On the other hand, the 3rd defendant has proved that she is the administrator and a beneficiary of the estate of Njoroge Kirugu, deceased in whose name the suit property is registered pursuant to the said judgment of the High Court. The 3rd defendant is in the circumstances entitled to an injunction to restrain the plaintiff from interfering with her enjoyment and possession of the suit property. The 3rd defendant is also entitled to a declaration that the registration of the suit property in the name of the plaintiff was illegal. I am of the view however that the prayer for cancellation of the registration of the suit property in the name of the plaintiff is superfluous because the High Court had already granted the order in the succession cause aforesaid.

In conclusion, I find no merit in the plaintiff's claim against the defendants. The same is dismissed with costs to the 3rd defendant. On the other hand, I find the 3rd defendant's counter-claim proved on a balance of probabilities. I therefore enter judgment for the 3rd defendant against the plaintiff in terms of prayers (c) and (d) of the defence and counter-claim dated 31st January, 2013. The 3rd defendant shall also have the costs of the counter-claim.

Dated and delivered at Nairobi this 30th Day of January, 2020

S. OKONG'O

JUDGE

Judgment read in open court in the presence of

N/A for the plaintiff

Ms. Too for the 3rd defendant

C. Nyokabi-Court Assistant