



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO 25 OF 2017

JAMES GATHITU MWAURA.....1ST PLAINTIFF

LUCY WANJIRU MUTURI.....2ND PLAINTIFF

VS

PETER NJOROGE MWANGI

Alias NJOROGE MWANGI.....1ST DEFENDANT

DISTRICT LAND REGISTRAR, MURANGA.....2ND DEFENDANT

JUDGMENT

1. The Plaintiffs filed suit against the Defendants seeking the following orders;

- a. An order be issued for the cancellation of the title No LOC2/KANGARI/323 (suit land) as issued to the 1st Defendant on the 8/3/1994 and the name of the 1st Defendant be deleted from the land parcel records by cancellation of entry No 2 in the proprietorship section in the land parcel records.
- b. The 2nd Defendant be ordered to register and give effect to the Court orders issued in Muranga Succession cause No 215 of 1989 and be allowed to dispense with the production of the old titles as held by the 1st Defendant.
- c. The Plaintiffs be awarded costs of the suit.

2. The Plaintiffs aver that in 1962, the suit land was registered in the name of Chege Muturi who died in 1975. That they are the son and daughter in law to the said original owner and though they filed a Succession Cause No 215 of 1989 and obtained a certificate of confirmation of grant as dependents of the deceased, they discovered in 2014 that the inclusion of the 1st Defendant as a joint owner was done illegally and fraudulently by the two Defendants.

3. The Plaintiffs pleaded the particulars of fraud under para 8 of the plaint as follows;

- a. Illegal and criminal connivance between the Defendants to have the 1st Defendant's name included in the land parcel records as a joint owner thereof.
- b. The Defendants must have forged documents to facilitate the transfer of land owned by a deceased person.
- c. No succession cause was ever issued on the estate of the deceased, Chege Muturi, to facilitate and necessitate any transfer by way of transmission.
- d. The transfer and issuance of title deed was done illegally and behind the backs of the two Defendants as beneficiaries.
- e. The first Defendant remains a stranger to the estate of the deceased and is neither a beneficiary nor a Defendant of the estate of the deceased, Chege Muturi.

4. The 1st Defendant denied the Plaintiffs claims and stated that the estate of the late Chege Muturi devolved to the 1st Plaintiff, Francis Njoroge Muturi and Edward Muturi as per the confirmed grant on 11/7/1991. He contends that the said Edward Muturi sold 2 acres (his

entitlement) of the suit land to his father, Mwangi Gichingiri following the confirmation of the grant aforesaid, a fact known to the Plaintiffs as the 2nd Plaintiff witnessed some of the agreements for sale. That at the request of his father, his name was included in the main title for the whole land to cater for the interest and title in respect to the 2 acres. That Edward Muturi pointed out the 2 acres of the suit land to his father which he (the 1st Defendant) took possession.

5. Further the 1st Defendant accused the Plaintiffs of misrepresentation *inter alia* by failing to disclose to the Court when they sought substitution of the grant in 2014 that Edward Muturi, one of the beneficiaries of the estate of the late Chege Muturi had sold his share of the 2 acres of land to Mwangi Gichingiri, the 1st Defendant's father.

6. He denied having acquired the suit land illegally and fraudulently.

7. The 2nd Defendant whilst resisting the Plaintiffs' claim denied the claim and the particulars of fraud and sought to put the Plaintiffs into strictest of proof. That all it did in registering the title accorded to the law.

8. At the trial PW1 – James Gathitu Mwaura informed the Court that he is the son of the late Chege Muturi and that the 2nd Plaintiff is his sister in law being the wife of the late Edward Muturi Chege. That the late Chege Muturi had two children; the 1st Plaintiff and Edward Muturi. The deceased too owned two parcels of land; Nyandarua/Karati/294 and the suit land. He relied on his joint statement filed on the 28/1/15 and further witness statement filed on the 30/7/18. He stated that they instituted Succ Cause No 215 of 1989- Muranga and obtained a certificate of confirmation of grant on 4/5/94 in relation to the estate of Chege Muturi. That pursuant to the said succession cause, the lands of the deceased were distributed as follows;

a. NYANDARUA/KARATI/294

1st Plaintiff– 12 acres

Edward Muturi – 10 acres

b. LOC 2 /KANGARI/323

1st Plaintiff - 1.0 acres

Edward Muturi - 2.0 acres

Francis Njoroge Muturi - 3.0 acres (purchaser/creditor of the estate of Chege Muturi)

9. He informed the Court that Edward Muturi died in 2012 and the 2nd Plaintiff obtained orders in the succession cause aforesaid to be substituted in his place in 2014. That in 2015 he learned that a title deed had been issued in 1994 in the name of the 1st Plaintiff, Francis Njoroge Muturi and the 1st Defendant. He stated that it is not possible for Edward Muturi who died in 2012 to have transferred the suit land that he neither held any interest in nor grant of administration in the said estate.

10. The witness produced documents in evidence which were marked as PEX 1-12. Further he informed the Court in cross examination that Francis Njoroge Muturi was a purchaser having been sold one acre by his father, Chege Muturi. That he lives in Nyandarua since 1950s and would sometimes visit the suit land. He stated that he neither knew the 1st Defendant nor his father Mwangi Gichingiri. That he did not know if the said Mwangi Gichingiri bought 2 acres from Edward Muturi. He was unaware if the 1st Defendant had planted trees and nappier on the portion of the suit land. He stated that he last visited the suit land in 2018 and that there are trees planted by his father that he would visit and sell. He informed the Court that Francis Njoroge has planted tea on his portion of the suit land. That he learnt in 1997 that the title to the suit land was issued in 1994. He was aware that vide the grant issued on 11/7/91 and dated 4/5/94 Edward Muturi was given 2 acres of land. That the land has not been subdivided on the ground and that they are in possession of the whole suit land. That his father did not sell any land to the 1st Defendant.

11. Further the witness informed the Court that the title issued in 1994 was fraudulent because his father died in 1975 and could not have sold land to the 1st Defendant or his father. That the only Succession Cause is 215/89, Muranga. That he has no dispute in respect to the 3 acres held by Francis Njoroge Muturi, who is now deceased and his wife lives on the portion of the suit land. That he has planted trees on his one acre while the 2 acres is occupied by the 2nd Plaintiff. That the 1st Defendant does not live on the suit land.

12. PW2 – Lucy Wanjiru Muturi stated that she comes from Njabini where she resides with her family since 1979. That she visited the suit land last in 2018. That she is the widow of Edward Muturi, deceased and the sister in law of the 1st Plaintiff. That Edward Muturi died in 2012. She stated that she has trees on the land which she harvests for sale. That her husband did not sell the land to the 1st Defendant because by then it had no title. She denied any knowledge of any sale of land to the 1st Defendant by her husband. That she applied and obtained substitution of the grant in place of her husband's name in 2014. She stated that her father in law did not sell land to the 1st Defendant because by 1994 he had passed away. She closed her evidence by stating that she does not know how the title was registered in the name of the 1st Defendant in the absence of a transfer and or Land Control Board consent.

13. DW1- Njoroge Mwangi stated that his late father Mwangi Gichingiri purchased 2 acres out of the suit land from Edward Muturi through various agreements resting on the formal one executed in 2000. That his father caused the 2 acres to be registered in his name. That upto his death in 2012, Edward Muturi had no claim against his father who died in 2014.

14. At the trial he informed the Court that the original title is in his custody. That he has been in possession and occupation of the land since 1994 planting trees and nappier grass to date. That the Plaintiffs live in Nyandarua. He stated that the 1st Plaintiff sold his one acre to Francis Njoroge which land is being utilized by the wife of the said Njoroge. He confirmed that Chege Muturi did not sell the land to him. That it is his father who purchased the land (2 acres) from Edward Muturi, the son of Chege Muturi. He produced several agreements in support of the purchase. That he attended the Land Control Board in Kigumo with his father and Edward Muturi. That it is on his father's instructions that his name was registered as owner of the suit land.

15. DW2 – John Muturi Mwangi stated that he is the son of Mwangi Gachingiri who purchased land from Edward Muturi. That he witnessed on 25/1/1996 the payment of Kshs 100,000/- paid by his father to Edward Muturi towards the purchase of the portion of 2 acres of the suit land. That he was sent by his father to take money to Edward Muturi who lived in Nyandarua. That it is his father who requested the said Edward Muturi to register the 2 acres in the name of Njoroge Mwangi, the 1st Defendant.

16. He informed the Court that the Plaintiffs live in Nyandarua and the land is being occupied by the 1st Defendant (2 acres). That he knows the whole land measures 6 acres and the 1st Defendant is in possession of 2 acres where he has planted nappier grass and trees. He stated that he was not present during the registration of the title. That though he witnessed the previous agreements he was not present when the agreement of 2000 was executed.

17. DW3 – Alice Gisemba, the Land Registrar stated that the suit land was registered in the name of Chege Muturi in 1962. In 1994 it became registered in the names of James Gathitu Mwaura, Francis Njoroge and Njoroge Mwangi. That entries Nos 456 were cancelled as they were registered in error/fraud. That the nature of the title ownership is not stated. It was her opinion that the title issued was in 1994. That she could not trace the transfer forms, the Land Control Board consent in respect to entry No 2 on the register. She confirmed that according to the register the registered owner of the suit land are James Gathitu Mwaura, Francis Njoroge Muturi and Njoroge Mwangi

18. The 2nd Defendant did not adduce any evidence at all. The Land Registrar testified pursuant to witness summons issued by the Court.

19. Parties filed written submissions which I have read and considered.

20. The 1st Defendant abandoned his claim based on adverse possession as contained in the counterclaim vide its written submissions dated the 15/11/19. Therefore the only issue for my determination is whether the Plaintiffs have proved fraud on the part of the Defendants.

21. The background of the suit is that the suit land belonged to Chege Muturi as shown on entry No 1 in the title dated 22/5/1962. On the 8/3/1994 the land was registered in the names of Francis Njoroge Muturi, James Gathitu Mwaura and Njoroge Mwaura.

22. It is the Plaintiffs case that the 1st Defendant became registered owner of the suit land through connivance and fraud committed jointly by the Defendants. They argue that Chege Muturi died in 1975 and there is no way he could have transferred the suit land to the 1st Defendant on the 8/3/1994. That by then the estate of Chege Muturi had not been succeeded. That neither could Edward Muturi, the son of Chege Muturi transfer a good title to the 1st Defendant without a confirmed grant. It is their case that the grant vide succ cause no 215/89 was only confirmed on the 4/5/94 and therefore neither Chege Muturi (who died in 1975) nor Edward Muturi could not have transferred the title to the 1st Defendant. That after the death of Edward Muturi in 2012, the 2nd Plaintiff was substituted vide grant issued on the 5/5/2014 in his place.

23. The 1st Defendant on the other hand denied the fraud and led evidence that Edward Muturi sold 2 acres of land to his father Mwangi Gichingiri in 1990s and produced a number of agreements culminating into the formal agreement of sale in the year 2000. That on the instructions of Mwangi Gichingiri the title was registered in the name of the 1st Defendant as a joint owner with the 1st Plaintiff and Francis Njoroge Muturi.

24. The key issue is whether the Plaintiffs have proved fraud. Fraud is defined in Black's Law Dictionary, 9th Edition defines fraud as;

“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”.

25. In the case of **Ndolo vs Ndolo (2008) 1 KLR (G & F) 742** the Court stated that:

“..... it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”.....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

26. 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. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:**

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308**).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (**see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (**Davy V Garrett (1878) 7 ch.D. 473 at 489**). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

27. I have perused the evidence on record as adduced by the parties. As per the death certificate on record Chege died on the 19/8/75. The grant of letters of administration in the estate of Chege Muturi was issued on the 17/5/1990 to Francis Njoroge Muturi, James Gathitu Mwaura and Edward Muturi as legal representatives and administrators of his estate.

28. On the 11/7/1991 the grant issued to Francis Njoroge Muturi, James Gathitu Mwangi and Edward Muturi in the estate of Chege Muturi was confirmed. The certificate of confirmation was issued on the 4/5/1994. According to the confirmed grant the suit land measuring 6 acres was devolved to James Gathitu Mwaura – 1.0 acres; Edward Muturi – 2 acres and Francis Njoroge Muturi – 3 acres.

29. The 1st Defendant led evidence to support the acquisition of 2 acres by his father by adducing a number of payment details for the land in kikuyu language along with the translations in English in which he averred that Edward Muturi sold 2 acres to his father. The payments culminated in an agreement of sale dated the 3/2/2000 which captured the agreement of the parties. In the said agreement Edward Muturi sold 2 acres of land comprised in the suit land to Mwangi Gichingiri for the sum of Kshs 200,000/- which amount was acknowledged as fully paid. The parties agreed to another 150,000/- being goodwill which was to be paid in installments by April 2000. Under Para 4 and 5 of the said agreement it is stated that the seller had pointed out the physical location of the 2 acres on the ground and put the purchaser in possession. Para 5 states that the 2 acres is already transferred to the Purchaser. The agreement is witnessed by a J G Waweru Advocate.

30. These agreements have not been successfully challenged by the Plaintiffs. Both Plaintiffs led evidence that they were not aware that the land was sold to the 1st Defendant s father by Edward Muturi. That they were not present during the sale nor execution of the agreements. It is to be noted that the 2nd Plaintiff is indicated as a witness to one of the payments made on 30/12/1996.

31. From the foregoing it is the view of the Court that Edward Muturi having been issued with a confirmed grant on the 11/7/1991 had the legal capacity to dispose of the 2 acres that devolved to him vide succession cause No 215/89. It is not true therefore that he had no capacity to sell the land. By the time he is selling the land to Gachingiri, Edward Muturi is in possession of a beneficial interest and title capable of conveying to Gachingiri.

32. DW2 led evidence that he witnessed the agreements in respect to payments and at times was sent by Gachingiri to pay Edward Muturi as he lived in Nyandarua. This evidence is supported by the agreements running through 1992 – 1999 where he indicated as a witness.

33. PW1 led evidence that he did not know that Edward sold 2 acres to Gachingiri. The Court finds this evidence to be misleading because the 1st Plaintiff was a joint administrator of the estate of the late Chege Muturi together with Edward Muturi and Francis Njoroge Muturi. As it goes he is the co-owner of the suit land with the 1st Defendant and Francis Njoroge Muturi who is said to be deceased.

34. Following the death of Edward Muturi in 2012 the 2nd Plaintiff obtained a grant where the name of Edward Muturi was substituted with that of the 2nd Plaintiff. Given that Edward sold his portion of the suit land in 2000 during his lifetime, it is clear that the interest of the said Muturi was divested and he retained no interest in the title. The Court observed that both Edward Muturi and Mwangi Gachingiri died in 2012 and 2014 respectively and the transactions took place in their lifetimes and no question was raised then.

35. The Plaintiffs have confirmed that Francis Njoroge was equally a purchaser from the suit land having bought 3 acres from Chege Muturi. They led evidence that they have no problem with the 3 acres in the possession of Njoroge’s wife. The interest of the 1st Defendant originated from a purchaser’s right and if the interest of Njoroge is being recognized why challenge that of the 1st Defendant’s father.

36. It is the finding of the Court that the 1st Defendant became registered pursuant to an agreement of sale between Edward Muturi and his father Mwangi Gachingiri. The Plaintiffs failed to proof that the agreements were forged to facilitate the registration of the land in the name of the 1st Defendant. As explained the said Edward Muturi was an administrator and beneficiary of the 2 acres and therefore was vested with the capacity to sell and transfer the land to the 1st Defendant and a title issued in the joint names of the three co-owners, one of whom is the 1st Plaintiff. There was no evidence of illegality that was adduced by the Plaintiffs. The 1st Defendant has not claimed to be a beneficiary of the estate of the late Chege but a beneficial holder of a purchaser’s right.

37. In the end the Court has come to the conclusion that the Plaintiffs have failed to establish their case and the suit fails. The costs are payable to the 1st Defendant by the Plaintiffs.

38. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG’A THIS DAY OF 30TH DAY OF JANUARY 2020.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Kirubi for the 1st & 2nd Plaintiffs

Gichuki HB for Uvyu for the 1st Defendant

2nd Defendant – Absent

Irene and Njeri, Court Assistants