



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA NO. 19 OF 2018

JOYCE WANGUI MUHIA..... APPELLANT

VS

EDITOR WANJIKU MUHIA.....1ST RESPONDENT

MARY NJERI KIRUNDI.....2ND RESPONDENT

JUDGMENT

1. This Appeal relates to the decision of Hon. J J Masiga Resident Magistrate, Muranga in Civil Case No. 278 of 2011 delivered on 4/5/15.
2. In the lower Court the Plaintiffs by a plaint dated 10/14/11 sought judgement against the Appellant for the following orders;
 - a. A declaration that the Plaintiffs are the lawful owners of the land Parcel No MITUMBIRI/WEMPA/BLOCK2/106 and the Defendant be restrained from interfering with the Plaintiffs quiet occupation possession and enjoyment of the said land
 - b. Costs of the suit.
3. The 1st Plaintiff averred she was a member No 6 of Methi & Swani Farmers Cooperative Society Limited (society) and a holder of a share certificate No 006 and entitled to plot No 2849 measuring 0.5 acres. In 2009 she sold half share of the land to the 2nd Defendant at the consideration of Kshs 250,000/-, paid in full. In 2010 she transferred 0.25 acres to the 2nd Plaintiff and obtained a title from the Lands office in the joint names of the Plaintiffs. The 2nd Plaintiff took possession and commenced construction of her residence but was interfered with by the Defendant's complaints which led to stoppage of the said construction. They aver that the 2nd Plaintiff is a purchaser for value without notice. They urged the Court to restrain the Defendant from interfering with their quiet possession of the suit land.
4. The Defendant denied the Plaintiffs claim and averred that she is the step mother of the 1st Plaintiff. That the suit land belonged to her husband, Muiruri Ngenga and contended that the transfer and registration of the suit land in the names of the Plaintiffs is a forgery and intended to deny her rightful share of her husband's estate. She sought the dismissal of the suit and pleaded fraud in her counterclaim and sought the following orders;
 - a. A declaration that the Plaintiffs are not the rightful owners of the suit land and in the alternative the Court direct the Plaintiffs to offer vacant possession to the aforesaid parcel to the Defendant and they be restrained from interfering with such possession occupation and enjoyment of the said land
 - b. Costs of the suit
5. Having heard and determined the suit the Learned Magistrate dismissed the counterclaim on account of want of locus standi and declared that the Plaintiffs are still the registered owners of the suit land and remain so until such a time that the title will be cancelled. He entered judgement for the Plaintiffs against the Defendant as prayed in the plaint.
6. Aggrieved by the said judgement the Appellant (Defendant) filed this suit and 16 grounds of Appeal. The Appellant sought the following orders;
 - a. The Appeal be allowed and the judgement and orders/decreed issued on the 4/5/15 be set aside and substituted by an order dismissing the Plaintiff's suit against the Defendant.
 - b. That in the alternative the Court do substitute the judgement of the lower Court as the Court may deem fit

c. Costs of the Appeal be provided for.

7. Parties elected to file written submissions which I have read and considered.

8. This is a first Appeal. In it, this Court is permitted to evaluate the evidence and the pleadings of the lower Court including the conclusions and matters of evidence and the decision taken by the lower Court.

9. Having evaluated the lengthy grounds of Appeal, I have taken the liberty to list the following issues for determination;

a. Whether the counterclaim of the Appellant was competently before the Court.

b. Whether the Respondents are entitled to declaratory orders sought.

c. What orders should the Court grant.

d. Costs of the Appeal.

10. The background of this matter is that the 1st Plaintiff is the daughter of Muiruri Ngenga. According to the death certificate on record the said Muiruri died on the 18/10/1998. It is also not in dispute that the estate of the said Muiruri has not been succeeded.

11. The Defendant filed a Counterclaim and averred that she is the 2nd wife of Muiruri Ngenga and the owner of the suit land. It is clear that the Appellant is brought this suit (counterclaim) on behalf of the estate of Muiruri Ngenga. At the trial she stated as follows;

“I want the land of the deceased. I am here to protect the deceased’s estate. I do not have letters of administration. Nobody has filed any succession cause.

12. It is trite that a deceased person can only be represented by a person who is duly authorized to do so on behalf of the estate. It is only a person who has been issued with letters of administration who has the legal capacity to represent a deceased person. The powers of the legal representative are set out in Section 82 of the law of Succession Act.

13. By her own admission it is clear that the Appellant does not possess the authority or locus standi to represent the estate of Muiruri Ngenga. I find that the Learned Magistrate made the correct decision in dismissing the counterclaim.

14. Having dismissed the counterclaim, I now turn to the Plaintiffs claim vis a vis the evidence adduced at the hearing. In the plaint the Plaintiffs sought a singular prayer which is a declaration that they are the lawful owners of the suit land.

15. Section 13 (7) of the Environment and Land Court Act empowers this Court to make any orders and grant relief as the Court deems fit including declaratory orders.

16. Section 26 of the Land Registration Act directs Courts to take a certificate of title as prima facie evidence that the person named is the proprietor of the land and is the absolute and indefeasible owner subject to restrictions and conditions permitted by law. Title under this section can be impeached on two instances; on ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally procedurally or through a corrupt scheme.

17. The 1st Respondent led evidence that Muiruri Ngenga was the registered owner of the shares vide certificate No 006 at the society which entitled him to Plot No 2849 measuring 0.5 acres. She averred that she sold 0.25 acres of the land to the 2nd Respondent in 2009. It was her evidence that she caused the said share certificate and the receipts to be altered and her name and that of the 2nd Respondent were replaced with that of the original owner. Subsequently, she caused the land to be registered in the joint names of the Respondents.

18. It was the evidence of the 1st Plaintiff that her father died on the 17/10/94 and that the Appellant was his 2nd wife and had about 8 children with him. That in or about 2009 she caused the share certificate and the receipts in the name of her father to be deleted and replaced with her name and that of the 2nd Respondent. Thereafter she transferred half share of the land to the 2nd Respondent and obtained a title in the year 2010 in their joint names.

19. In the absence of transfers of shares and the land inter vivos by Muiruri Ngenga to the Plaintiffs, the irresistible conclusion is that the shares and transfers were carried out without taking out letters of grant of representation in the estate of the Muiruri Ngenga who died in 1994.

20. Section 45 of the succession Act provides as follows;

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration”.

21. It therefore follows that any act concerning the property which comprises of the estate of a deceased person by a person who has not obtained representation amounts to intermeddling with the estate.

22. In the case of **Re Estate of M’Ngarithi M’Muriti [2017]eKLR** as guided by the observation of the Court in; **Benson Mutuma Muriungi Vs C.E.O Kenya Police Sacco & Another [2016] eKLR** the Court defined what would constitute intermeddling as follows:-

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law of grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the Court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) or protection of the estate against any person.”

23. The Respondents did not offer any explanations for the alterations of the receipts and the share certificate by deleting the name of Muiruri Ngenga and replacing with that of the Respondents. The 1st Respondent stated in her evidence that the management of the society had knowledge that the father wanted the suit land transferred to her. Evidence of such knowledge was not adduced and even if it was available in order for this evidence to be legally sound would be in form of a transfer duly executed by the deceased in his lifetime.

24. The suit was heard by the learned magistrate who pronounced himself on the matter on 18/10/18 entered judgement in favour of the Respondent against the appellants. The case against the 2nd Defendant was dismissed for want of proof.

25. The 2nd Respondent averred that it was a purchaser for value without notice however according to the evidence led in Court she purchased the property knowing that it was a property of a deceased person and the 1st Plaintiff did not obtain any letters of grant of representation.

26. It is the finding of the Court that the Respondents acquired the suit land illegally that is to say contrary to the law of succession. Their act of dealing with the suit land is intermeddling with the property of the accused person without obtaining letters of grant of administration.

27. Section 80 of the Land Registration Act empowers the Court to cancel title where the registered proprietors are party to the illegality just like in this case. I am satisfied that the suit land is such a title impeachable under section 26(1) (b).

28. Final orders;

a. The Appeal succeeds and the judgment of the lower Court be and is hereby set aside in its entirety.

b. It is hereby declared that the suit land belongs to the late Muiruri Ngenga.

c. The title in the name of the Respondents be and is hereby cancelled and all the attend entries are cancelled reverting the title to Muiruri Ngenga, deceased.

d. The Counterclaim is dismissed.

e. The Deputy Registrar of this Court is directed to execute all the relevant documents to effectuate the said orders where appropriate.

f. The costs of the suit in the lower Court and the Appeal shall be borne by the Respondents.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANGA THIS 27TH FEBRUARY 2020

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Ms Wangari HB for Bwonwonga for the Appellant

1st & 2nd Respondent – Absent

Irene and Njeri, Court Assistants