



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. CASE NO. 224 OF 2014

(FORMERLY KERUGOYA ELC 820 OF 2014)

MERCY NJERI NYAGA.....1ST PLAINTIFF

SAMWEL MUNYI NYAGA.....2ND PLAINTIFF

(Suing as Legal Representatives of the Estate of NYAGA MUNYI.....(DECEASED))

VERSUS

ERASTUS NJUE GITANGUTHI.....1ST DEFENDANT

JUSTUS GATUMUTA.....2ND DEFENDANT

THE PRESBYTERIAN FOUNDATION.....3RD DEFENDANT

JUDGEMENT

A. Introduction

1. By a plaint dated 3rd December 2013, the 1st and 2nd Plaintiffs sought the following reliefs against the Defendants:

- a) *A declaration that the transfer and registration of L.R. No. Ngandori/Kiriari/3208, 3209 and 3210 in the name of the 3rd Defendant is null and void the same be cancelled and the land to revert back to Nyaga Munyi the original owner and that the 3rd Defendant be permanently restricted from undertaking activities/development on the said parcels of the land. (sic)*
- b) *Cost of this suit.*
- c) *Any other relief the honourable court may deem fit and just to grant.*

B. The Plaintiffs' case

2. The Plaintiffs pleaded that they were suing as legal representatives of the estate of their late father Nyaga Munyi (hereafter the deceased) who was the registered proprietor of Title No. Ngandori/Kiriari/2500 (hereafter *parcel 2500*) which was later sub-divided into Ngandori/Kiriari/3208, 3209 and 3210 (collectively the *suit properties*).

3. It was further pleaded that parcel Nos. 3209 and 3210 were fraudulently transferred to the 1st and 2nd Defendants on 11th March 1996 without due process and after the death of the deceased. It was also pleaded that although *parcel No. 3208* was transferred to the 1st and 2nd Defendants during the lifetime of the deceased, due process was not.

4. The Plaintiffs contended that the transfer of the suit properties to the 1st and 2nd Defendants was fraudulent. They listed the following three (3) particulars of fraud against all the Defendants in paragraph 7 of the plaint:

- a) *Secretly dealing with suit lands above mentioned and transferring them to the 3rd Defendant without the consent of the Plaintiffs' family or involving them as the bona fide beneficiaries of the suit lands by virtue of birth and rights accruing from*

their parentage. (sic)

b) Secretly colluding to defraud the Plaintiffs their birth rights by registering their land in the name of 3rd Defendant who is a stranger and not a beneficiary of the suit land. (sic)

c) Dealing with the suit property which is a family land without the express permission or consent of family members. (sic)

5. The Plaintiffs finally contended that as a result of the Defendants' said actions they had lost their inheritance; that they had been rendered landless; and that their constitutional rights had been violated. The plaint indicated that the 1st and 2nd Defendants had subsequently transferred the suit properties to the 3rd Defendant which had taken possession.

C. The Defendants' case

6. The Defendants filed a written statement of defence dated 1st February 2014 denying the Plaintiffs' claim in its entirety. The Defendants denied the fraud and particulars of fraud alleged against them. They contended that all the suit properties were transferred by the deceased prior to his death. The Defendants further contended that due process was followed in the acquisition of the suit properties and that the 1st and 2nd Defendants had also lawfully transferred the same to the 3rd Defendant.

7. In further defence, the Defendants contended that the Plaintiffs' suit was statute-barred under the **Limitation of Actions Act (Cap. 22)** hence they intended to raise a preliminary objection to that effect before the hearing of the main suit. Consequently, the Defendants asked the court to dismiss the Plaintiffs' suit with costs.

D. The summary of evidence at the trial

8. When the suit came up for trial, the Plaintiffs testified on their own behalf and called one more witness in support of their case. The 1st Plaintiff adopted her witness statement dated 27th April 2016 as her sworn testimony. She asserted that the suit properties were fraudulently transferred to the 1st & 2nd Defendants because none of the family members were consulted at the material time. She stated that her mother was alive but she was not consulted.

9. The 2nd Plaintiff testified that he was aggrieved because the Defendants had built a church on his late father's land. He stated that he did not know how the Defendants acquired the suit properties and that he was not aware if the deceased had sold the suit properties to the 1st and 2nd Defendants prior to his death. He, however, conceded that he was about 2 years old at the time the impugned transactions took place.

10. The 3rd Plaintiffs' witness was Alice Nguru Munyi who testified as PW3. She adopted her witness statement dated 27th April 2016 as her sworn testimony. She stated that the deceased was evicted by the Defendants from the suit properties during his lifetime. She further stated that she was not aware how the suit properties were transferred to the 1st and 2nd Defendants and that she was not aware if the deceased had ever sold the suit properties. She further stated that the deceased was not in a 'perfect' mental condition and that his condition would worsen upon taking alcohol.

11. The 1st and 2nd Defendants testified on their own behalf and on behalf of the 3rd Defendant. Their evidence reiterated the contents of their defence and maintained that they had followed due process in the acquisition of the suit properties from the deceased. They produced the relevant sale agreements, written acknowledgements by the deceased of receipt of the purchase price and the copies of the official documents which facilitated the transfers. They stated that all the transactions were conducted through their advocates office.

12. The 1st and 2nd Defendants denied any fraud in the said transactions and asserted that they dealt with the deceased personally and that he signed the relevant transaction forms during his lifetime even though some of the documents were registered after his death. They stated that the consent of the Land Control Board was obtained for the transactions. They further stated that the deceased was paid the entire purchase price and that he even refunded a previous purchaser Kshs. 71,000/- from the proceeds of sale.

E. The issues for determination

13. The parties did not file an agreed statement of issues. The Defendants filed a statement containing eight (8) issues whereas there is no indication of the Plaintiffs having filed any statement of issues. In the absence of a common statement of issues the court is obliged to frame the issues for determination in accordance with the law. Under **Order 15 Rule 2** of the **Civil Procedure Rules** the court may frame issues from the following:

- a) The allegations contained in the pleadings.*
- b) The contents of documents produced by the parties.*
- c) The statements made on oath by or on behalf of the parties.*

14. The court has considered the pleadings, documents and the evidence on record in this matter. The court is of the opinion that the following four (4) main issues arise for determination in this suit:

- a) Whether the Title Nos. Ngandori/Kiriari/3208, 3209 & 3210 (the suit properties) were fraudulently transferred to the*

Defendants.

- b) *Whether due process was followed in the transfer of the suit properties to the Defendants as purchasers for value.*
- c) *Whether the Plaintiffs' suit is time barred under the Limitation of Actions Act (Cap. 22).*
- d) *Who shall bear the costs of the suit.*

F. Analysis and determinations

15. The 1st issue was raised by the Plaintiffs in their plaint and it forms the foundation of their claim. The court has considered the particulars of fraud pleaded in paragraph 7 of the plaint against the oral and documentary evidence on record. The gist of the Plaintiffs' case is that the Defendants secretly colluded amongst themselves to deal with the suit properties without the *knowledge* and *consent* of the concerned family members. There were no allegations in the plaint to the effect that the deceased's signature was forged; that the consent of the Land Control Board was never obtained; that the deceased was mentally unsound at the time of the alleged sale transactions; or that the deceased never in fact entered into any sale agreements with the 1st and 2nd Defendants.

16. It has been held that allegations of fraud are serious allegation to make against someone. They must not only be pleaded with particularity but also proved strictly. In the case of **Vijay Morjaria V Nansing M. Darbar & Another [2000] eKLR**, Tunoi J.A. (as he then was) held as follows regarding proof of fraud:

“It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

17. The court has noted that the particulars of fraud against the Defendants were not drawn with any measures of precision. Apart from the allegation that the transfers were undertaken without the knowledge or consent of the family members of the deceased there is really nothing in the plaint to describe with particularity how the alleged fraud was perpetrated or executed. The mere lack of knowledge or consent of family members may not necessarily be indicative of fraud if the registered owner sanctioned such transfer.

18. The court is also aware that the standard of proof of fraud is higher than on a balance of probabilities. The court can do no better than quote from the judgement of Majanja J in the case of **Evans Otieno Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR** where he held, *inter alia*, that:

“In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd Vs Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary civil case”.

19. So, what is the evidence on record to demonstrate the alleged fraud on the part of the Defendants? First, the Plaintiffs asserted that the deceased was mentally unsound hence incapable of entering into legal agreements for the sale of the suit properties. Second, it was asserted that the deceased's signatures on all the transaction documents were forged. Third, it was asserted that there was no evidence that the consent of the Land Control Board was obtained for the transactions. Fourth, it was claimed that the Plaintiffs and other family members were not aware that the deceased had ever sold the suit properties to the Defendants.

20. The court has noted that the Plaintiffs' evidence at the trial was substantially at variance with their pleadings in this matter. Apart from their evidence that they and other family members were not aware of the sale of the suit properties by the deceased, the rest of the evidence is not anchored in the pleadings. The court does not accept the view taken by the Plaintiffs that simply because they were not consulted by the deceased on the sale of the suit properties then the transactions must have been fraudulent.

21. The court is aware that parties are bound by their pleadings and they are not entitled to expand the sphere of controversy through their evidence if the matters sought to be proved were not properly pleaded. In the case of **Galaxy Paints Co. Ltd Vs Falcon Guards Ltd [2000] 2 EA 358** it was held *inter alia*, that:

“It is trite law, and provisions of Order XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings and, unless pleadings are amended in accordance with provisions of the Civil Procedure Rules, the trial court by dint of the provisions of Order XX Rule 4 of the aforesaid rules may only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for the court's determination.”

In Gandy Vs Caspair [1956] EACA 139, it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute clearly amounts to an error on the face of the record...”

22. A court of law should not, therefore, allow any evidence to be led to prove an unpleaded issue and it should not base its decision upon unpleaded particulars of fraud unless it appears from the conduct of the parties that they have left such issues to the decision of the court. Consequently, the Plaintiffs herein shall not be permitted to prove any matters or particulars of fraud which were not contained in their pleadings.

23. The above notwithstanding, the court is far from satisfied that the additional particulars of fraud were proved to the required standard. There was no medical evidence to demonstrate that the deceased was suffering from mental infirmity of such nature or intensity as to make it impossible for him to enter into a valid sale agreement with the 1st and 2nd Defendants. There was no credible evidence to demonstrate the alleged forgery of the signature of the deceased. No document examiner or other expert was called to shed light on this issue. None of the plaintiffs' witnesses ever testified that they were familiar with the signature or thumbprint of the deceased and that the marks appearing in the various transaction documents were not his. It was not demonstrated that the consent letters of the Land Control Board which were produced on behalf of the Defendants were forgeries.

24. There was no evidence tendered by the Plaintiffs to demonstrate that the suit properties were sold and transferred without the knowledge or consent of the deceased. It was the knowledge and consent of the deceased which was required in 1994 and 1995 when the suit properties were apparently sold. The consent of other family members such as spouses, children and other relatives was not required as a matter of law. It is also noteworthy that the deceased was removed or evicted from the suit properties by the Defendants during his lifetime but there is no indication of the deceased having protested or taken any action such as reporting the matter to law enforcement agencies, the local administration, or even filing suit to assert his property rights.

25. In the premises, the court finds that the Plaintiffs have failed to prove any fraud against the Defendants. The Plaintiffs not only failed to plead all the necessary particulars of fraud as required by law but they also failed to strictly prove the allegations of fraud which were contained in the plaint. Accordingly, the 1st issue is answered in the negative.

26. The 2nd issue is whether due process was followed in the transfer of the suit properties to the Defendants. The material on record indicates that the suit properties were first transferred to the 1st and 2nd Defendants who afterwards transferred them to the 3rd Defendant. The court has considered the entire evidence on record and the submissions of the parties on this issue. The 1st and 2nd Defendants' evidence indicated that the 3 sale agreements for the suit properties were all made between 1994 and 1995 whilst the deceased was alive. The transfer forms were also executed and the consent of the Land Control Board granted during the lifetime of the deceased. The payment of the purchase price was also made during his lifetime.

27. The evidence on record also reveals that the Defendants took possession of the suit properties during the lifetime of the deceased. The only thing which appears to have taken place after the demise of the deceased is the registration of the transfer form for parcel No. 3210 which took place on 11th March 2016. As indicated before, the Plaintiffs have failed to demonstrate that the relevant transfer form was a forgery. There is nothing inherently irregular or illegal about lodging such a transfer form where it was genuinely executed by the deceased during his lifetime.

28. There is ample evidence on record to demonstrate that the transactions in issue were handled through an advocates' office. The court is aware that it is a common conveyancing practice for advocates to date documents on the date of presentation for registration in order to avoid penalties for late presentation. There is really nothing irregular or illegal about such dating.

29. On the basis of the evidence on record the court is satisfied on a balance of probabilities that due process was followed by the Defendants in their acquisition of the suit properties. The court is satisfied that they were acquired for valuable consideration from the deceased who does not appear to have taken legal or administrative steps to challenge the Defendants' actions during his lifetime. The 2nd issue is consequently answered in the affirmative.

30. The 3rd issue is whether the Plaintiffs' suit is time barred under the **Limitation of Actions Act (Cap. 22)**. This issue was raised by the Defendants who submitted that the Plaintiffs suit for recovery of the suit properties was barred under **Section 7** of the **Act**. The said section stipulates as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

31. The Defendants' submission was that the impugned transfers took place in 1995 and 1996 hence the Plaintiffs' cause of action must have expired latest by 2008. There is no doubt that the instant suit was filed 5th December 2013, that is, more than 17½ years after the last transfer was registered on 11th March 1996. The Plaintiffs' response was that the instant suit was based upon fraud and that time does not run for purposes of the **Limitation of Actions Act** until after discovery of the fraud. The 1st Plaintiff claimed to have discovered the alleged fraud in 2012 or thereabouts.

32. The court has fully considered the entire evidence on record on the issue of limitation. Although the 1st Plaintiff stated in her witness statement that she became aware of the Defendants' alleged fraud in 2012 there is evidence on record to demonstrate that she could, with due diligence, have discovered the alleged fraud much earlier. During her cross-examination by the Defendants' advocate, the 1st Plaintiff conceded that the 3rd Defendant put up a church facility on the suit premises in 1997. She further stated that her family did not have funds to file suit prior to 2013.

33. The court is aware that there are certain circumstances in which time does not run under the **Limitation of Actions Act** where the claimant is under ignorance of material facts or where the alleged fraud was concealed by the wrongdoer until after the expiry of the limitation period. **Section 26** of the said **Act** stipulates as follows:

“Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

(i) In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(ii) In the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.” (emphasis added)

34. The court has fully considered the material evidence on record which may have a bearing on **Section 26** of the **Act**. There is evidence on record that the Defendants took possession of the suit properties during the lifetime of the deceased in 1996. There is also evidence on record to demonstrate that the 3rd Defendant started constructing a church on the suit properties in 1997. The 1st Defendant conceded during cross examination that the 3rd Defendant put up its church on the suit properties in 1997. The court is thus of the opinion that the Plaintiffs or the personal representatives of the deceased could, with reasonable diligence, have discovered of the existence of the cause of action in 1997. The court finds and holds that time started running as from 1997 for purposes of the limitation of actions. Accordingly, by the time the instant suit was filed in 2013 more than 17 years had lapsed from the date of the accrual of the cause of action.

35. The court further finds that besides there being no evidence of fraud on the part of the Defendants there was also no evidence to demonstrate that they took any steps to conceal the alleged fraud. The 1st and 2nd Defendants appear to have evicted the deceased from the suit properties in 1995 or thereabouts. The 3rd Defendant appears to have taken possession and constructed a church building on the suit property in 1997 or thereabouts. There was no allegation that the records at the Land Registry were concealed and that the Defendants were responsible for such concealment.

36. The court also finds and holds that under the proviso to **Section 26** of the **Act** an action cannot be filed to set aside or challenge the title of a *bona fide* purchaser who purchased such property for valuable consideration and who was not privy to any fraud and had no reason to believe that such fraud had been committed. The 3rd Defendant appears to fall into such category of purchaser since no particulars of fraud were proved against it. In the circumstances, the Plaintiffs’ suit against the Defendants is not tenable in view of the clear provisions of the **Limitation of Actions Act**. The 3rd issue is, therefore, answered in the affirmative.

37. The 4th and final issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs of an action shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21)**. As such, a successful litigant should generally be awarded costs of the suit unless, for good reason, the court directs otherwise. See. **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court has considered the peculiar circumstances of this suit and the fact that the Plaintiffs were unable to file suit earlier due to penury. The court is thus of the opinion that each of the parties to the suit should bear their own costs.

G. Conclusion and disposal orders

38. The summary of the court findings and holdings on the four (4) issues for determination is as follows:

a) *There is no evidence on record to demonstrate that the suit properties were transferred to the Defendants or any one of them through fraudulent means.*

b) *There is evidence on record to demonstrate that due process was followed in the transfer of the suit properties to the Defendants upon their sale by the deceased to the 1st & 2nd Defendants.*

c) *That, in any event, the Plaintiffs’ suit is time-barred under Section 7 of the Limitation of Actions Act (Cap. 22).*

d) *Each party to the suit shall bear his own costs.*

39. The upshot of the foregoing is that the court finds and holds that the Plaintiffs have failed to prove their case against the Defendants to the required standard. Accordingly, the Plaintiffs’ suit against the 1st, 2nd and 3rd Defendants is hereby dismissed in its entirety. Each party shall bear his own costs.

40. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **20TH DAY** of **FEBRUARY, 2020**

In the presence of the 1st & 2nd Plaintiffs in person, 1st & 2nd Defendants in person and in the absence of the 3rd Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

20.02.2020