



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**CIVIL CASE NO. 209 OF 2016**

**JMN (Suing as next friend to**

**KNK (A person of unsound mind) .....APPLICANT**

**VERSUS**

**JACKSON NDWIGA MURIITHI.....DEFENDANT**

**JUDGMENT**

**Background**

The plaintiff vide a plaint dated 28<sup>th</sup> November 2013 sued the defendant as next friend to one KNK who is described as a person of unsound mind. The plaintiff's claim is for an order cancelling the title deed L.R. No. NGARIAMA/KABARE/[...] which are in the joint names of the plaintiff's brother namely KNK and the defendant herein. The plaintiff is also seeking costs and interest of this suit. The case was initially instituted in Embu High Court where it was registered as HCCC No. 168/2011. The case was filed by the plaintiff's brother against the defendant. On 2<sup>nd</sup> December 2013, the present plaintiff filed another suit before the Senior Principal Magistrate Court at Gichugu against the defendant being SPMCC No. 24/2013 seeking similar orders.

On 10<sup>th</sup> September 2014, the defendant through the firm of Ikahu Nganga & Co. Advocates filed a statement of defence and counter-claim in which he seeks an order to issue authorizing the Executive officer of this Honourable Court to execute all legal documents to facilitate partition and consequent issuance of individual title deed to L.R. No. NGARIAMA/KABARE/[...] measuring 0.05 Ha and 0.20 Ha respectively and that any restriction and/or caution placed on the subject land parcel be lifted.

**PLAINTIFF'S CASE**

The plaintiff gave sworn testimony and stated that she has brought this suit on behalf of KNK who is her brother. She stated that her brother has a mental condition. She produced a treatment card from Kibugu Health Centre and a medical report from Embu Provincial General Hospital as Plaintiff's Exhibit No. 1. She further stated that the subject of this suit is a parcel of land known as L.R. No. NGARIAMA/KABARE/[...] which is registered in the name of his brother KNK measuring approximately 0.25 Ha. She stated that on or about the month of August 2010, her brother KN entered into a written sale agreement with the defendant whereby her brother agreed to sell to the defendant a portion of his land measuring one quarter (1/4) of an acre to be hived off from land parcel No. NGARIAMA./KABARE/[...] at a price of Ksh. 300,000/=. She stated that the said agreement was reduced into writing in the offices of M/S Rugaita & Co. Advocates where his brother was given a down payment of Ksh. 40,000/= leaving a balance of Ksh. 260,000/=. She further stated that on a day she could not remember, his brother was paid a further sum of Ksh. 100,000/= leaving a balance of Ksh. 160,000/= which remains unpaid to date. Thereafter, the defendant took possession of the suit land and started picking tea from the tea bushes therein. She was extremely shocked considering that her brother has never transferred any parcel of land to the defendant and no consent was sought and obtained from the Land Control Board. She stated that she later discovered that the defendant had fraudulently obtained questionable consent and became a joint owner of the suit land in very questionable circumstances. She went to the District Commissioner, Kianya where she inquired whether a consent had been issued and was told that there was no consent given by the Board. She was given a letter confirming the position which she used to lodge a caution on the suit property. She stated that the consent which the defendant used to register himself as joint owners with her brother was obtained by fraud since the Land Control Board did not issue. She stated that her brother has a mental condition whereby someone tells him something and he forgets it. She referred to the treatment notes and the medical report contained in her list of documents. She was referred her witness statement dated 29/1/2019 which she also adopted in her evidence. She also produced the documents itemized in her list of documents dated 28/11/2013 which she produced as Plaintiff's Exhibits No. 1, 2, 3, 4, 5, 6, 7 and 8 respectively. In cross-examination, the plaintiff admitted having filed four cases in various Courts.

**DEFENDANT'S CASE**

The defendant on his part also gave sworn testimony and was referred to his statement dated 28/8/2014 which he adopted in his evidence. He stated that he bought a portion of land from one KNK from L.R No. NGARIAMA/KABARE/[...] measuring 0.2 Ha. He stated that he

knew the said KNK from childhood as a person of sound mind. He bought the portion of land at a purchase price of Ksh. 300,000/=. They entered into a sale agreement in the firm of Rugaita & Co. Advocates. He stated that the plaintiff who is the vendor's sister was a witness in the sale transaction. The defendant also stated that one INN who is a son to the plaintiff was also one of the vendor's witnesses. The witness stated that on his side was one Benson Muriithi who is also a friend. The agreement was drawn by a lawyer who certified that they appeared before him and executed all the documents in his presence. He stated that he has always known the person who sold him the land in dispute as of sound mind. He stated that he paid the seller the entire purchase price and that the plaintiff was actually the witness in the sale transaction together with her children. The defendant further stated that all the legal procedures were undertaken by the parties to the transaction and that the plaintiff has at all times been aware of his possession of the subject land parcel since 2010.

#### ISSUES FOR DETERMINATION

- (1) Whether a valid and binding sale agreement was executed by the parties?***
- (2) Whether the vendor who is also the plaintiff's brother had the mental capacity to enter into the said agreement?***
- (3) What relief should be granted?***
- (4) Who shall bear the costs?***

The plaintiff in his evidence produced a sale agreement between himself and one KNK dated 22/4/2010 for the sale of a portion of land measuring 0.10 Ha. to be excised from land parcel No. NGARIAMA/KABARE/[...] measuring approximately 0.25 Ha. at a purchase price of Ksh. 150,000/=. An Addendum Agreement dated 19<sup>th</sup> October 2010 for a purchase of an additional portion of 0.1 Ha. at a consideration of Ksh. 150,000/= was also produced as Defence Exhibit No. 6. There were also numerous acknowledgement slips showing that the vendor was being paid the purchase price by instalments. He was acknowledging the payments by thumb printing which was witnessed by relatives in the presence of an advocate. It was the advocate who certified that the parties appeared before him and executed the sale transaction in his presence. It was the plaintiff who was to call the witnesses and the advocate who appeared before the parties to shed light on the mental state of the vendor. It is trite law that he who alleges must prove. The onus of proof lies squarely on the plaintiff which she failed to discharge. There was also a letter of consent dated 27/10/2010 which was used to transfer the portion sold by the vendor, KNK to the defendant and which was also produced as Defence Exhibit No. 8. The defendant also produced the application for Land Control Board consent as Defence Exhibit No. 9. These documents were not controverted as the plaintiff did not call any witness from the Land Control Board where it was issued to deny that they did not issue the same. The treatment notes from Kibugu Health Centre and the medical report from Provincial General Hospital in Embu have no evidentiary value as the makers of those documents were not called as witnesses to be cross-examined on the contents of their reports. I therefore put no emphasis on the two documents. I also find the minutes of the Land Control Board produced by the plaintiff as Plaintiff Exhibit No. 7 of no evidentiary value as the same does not indicate its origin and the authenticity thereof. The document ought to have been produced by a competent person from the Institution where it was generated who is authorized or the maker of the same. I find the same of no evidentiary value as well. It is to be noted that the plaintiff's claim is based on fraud, whose standard of proof is higher than that required in civil cases but not beyond reasonable doubt which is required in criminal cases. There is no iota of evidence linking the defendant to any fraud in the sale transaction leading to the acquisition of the title deed in their joint names with the vendor, KNK.

The upshot of my analysis and evaluation of the evidence and the applicable law leads me to find that this suit must fail and the same is hereby dismissed. However, I find that the defendant has proved his counter-claim and the same is hereby allowed. As I conclude my findings, I wish to state that the plaintiff who is the next friend to KNK has admitted filing four different cases in various Courts within the country. Some of these cases were instituted in the name of the said KNK while she instituted others in her own names. These cases include ELC No. 11 of 2012, (Kerugoya) which was later withdrawn vide a Notice of withdrawal of suit dated 27<sup>th</sup> November 2013. That suit was instituted by the plaintiff against the defendant. In SPMCCC No. 198 of 2012, (Kerugoya), the plaintiff herself instituted the suit against the defendant herein seeking almost similar orders. In case No. 168 of 2011 (Embu), the same was instituted by KNK against the defendant and the prayers sought are the same. In the cases instituted in the name of KNK, the plaintiff describes him as a male adult of sound mind working for gain. The verifying affidavit is also signed by the said KNK who describes himself as competent to swear the same and verified the correctness of the averments contained in the plaint. The verifying affidavit is sworn in the presence of advocates who have not been called as witnesses to deny that the said KNK is not a male adult of sound mind. I find that JMN who is next friend to the plaintiff is the one pushing him to institute the multiple suits on her behalf and on behalf of next friend who is her brother for reasons best known to her. She is in my view, a vexatious litigant. Having said that, I make the following orders:

- (1) The plaintiff and KNK otherwise known as next friend to the plaintiff have identifiable shares in L.R. NGARIAMA/KABARE/[...].***
- (2) The said KNK is ordered to execute all legal documents to facilitate partition and subsequent issuance of individual title deeds to L.R. No. NGARIAMA/KABARE/[...] measuring 0.05 Ha. and 0.20 Ha. respectively.***
- (3) Any caution/restriction placed on the subject land parcel be and is hereby lifted.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 7<sup>th</sup> day of February, 2020.

.....

**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

7<sup>TH</sup> FEBRUARY, 2020