



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 12 OF 2018

GABRIEL ANUNDA ONGERA

Suing as legal Administrator of the estate of

SIMEON ONGERA MOGAKA.....PLAINTIFF

VERSUS

WILLIAM ONGECHI ONGERA.....1ST DEFENDANT

THE LAND REGISTRAR

NYAMIRA COUNTY.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

CORRIGENDA JUDGMENT

Throughout the Judgment delivered on 13th March 2020, the suit property is erroneously described as land parcel number **North Mugirango/Ikonge/576**.

The correct position is that the suit property is known as land parcel number **North Mugirango/Ikonge/567** as reflected in the pleadings.

Accordingly, the Judgment dated 13th March 2020 aforesaid is hereby corrected pursuant to an application dated 21.8.2020 brought by the Plaintiff under section 99 of the Civil Procedure Act to reflect the correct parcel number which is land parcel number **North Mugirango/Ikonge/567**.

DATED, SIGNED AND DELIVERED AT KISII THIS 12TH DAY OF APRIL 2021.

J. M. ONYANGO

JUDGE

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO 12 OF 2018

GABRIEL ONUNDA ONGERA

(Suing as a legal Administrator of the Estate of

SIMEON ONGERA MOGAKA (deceased).....PLAINTIFF

VERSUS

WILLIAM NYANGECHI ONGERA.....1ST DEFENDANT

THE LAND REGISTRAR, NYAMIRA COUNTY.....2ND DEFENDANT

HON. ATTORNEY GENERAL.....3RD DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff instituted this suit against the Defendants on 11th April 2018. The Plaintiff alleges that Simeon Ongera Mogaka alias Ongera Mogaka (*the deceased*) was the registered proprietor of LR No. North Mugirango/Ikongwe/576 (suit property). The deceased died in 1994 and a grant of letters of administration in respect of his estate was taken out in 2017. The Plaintiff claims that after the death of the deceased the 1st Defendant in collusion with the 2nd Defendant fraudulently caused the suit property to be transferred from the deceased to the 1st Defendant before taking out a grant of letters of administration in respect of the deceased's estate.

2. The plaintiff now seeks the following reliefs:

- i. *A Declaration that the transaction and/or entry entered and/or endorsed in the Register of L.R No. North Mugirango/Ikongwe/576 on the 15th day of January 2015, prior to and/or before the issuance of Grant of Letters of Administration of the Estate of the Deceased, was unlawful, illegal and void.*
- ii. *An order cancelling and/or nullifying the name of the 1st Defendant as the registered proprietor of LR No. North Mugirango/Ikongwe/576 and restoration of the name of Ongera Mogaka, the deceased on the Register.*
- iii. *A Permanent Injunction restraining the 1st Defendant either by itself, agents, servants and/or anyone claiming under the 1st Defendant from transferring, alienating, selling, charging, leasing, sub-dividing, interfering with and/or in any other manner dealing with the suit property, that is, LR No North Mugirango/Ikongwe/576 and/or any portion(s) thereof.*
- iv. *Costs of this suit be borne by the Defendants.*
- v. *Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.*

3. The Defendants despite being served with summons to enter appearance, neither entered appearance nor filed their defence. The suit therefore proceeded ex-parte.

4. Gabriel Onunda Ongera (PW1) testified that he resides on land parcel Number North Mugirango/Ikongwe/ 567 which was registered in the name of his father, Simeon Ongera Mogaka (deceased). He told the court that the 1st Defendant is his younger brother. He testified that on 4th April 2017 he went to the Lands registry in Nyamira and conducted a search and found that the suit property was registered in the name of the 1st Defendant. He then proceeded to lodge a caution on the said title. The Plaintiff adopted his witness statement as his evidence in chief.

ISSUES FOR DETERMINATION

5. The main issues for determination by the court are:

- i. Whether the Plaintiff has established that the registration in favour of the 1st Defendant was obtained by fraud.
- ii. Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

6. The Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau [2015] eKLR* expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying 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.”

7. The particulars of fraud committed by the 1st Defendant are particularized under paragraph 10 of the plaint. The Plaintiff produced, the certificate of death, indicating that the deceased died on 22nd May 1994. According to the green card, the property was registered in the name

of the deceased until 15th January 2015 when the ownership status changed and an entry was made in the register to reflect that the 1st Defendant was the proprietor. It is this registration in favour of the 1st Defendant that the Plaintiff challenges as he claims that it was fraudulent and amounted to intermeddling with the deceased's estate. Section 45 of the Law of Succession Act of the makes it unlawful to intermeddle with the property of a deceased person and the offence is punishable by a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or both. Section 45 (1) of the Law of Succession Act provides that:

“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”.

8. Considering the evidence tendered by the Plaintiff, which evidence was not controverted by the Defendant, the transfer and registration in favour of the 1st Defendant was not lawful. I say so because the deceased having died in 1994 and letters of administration relating to his estate having been taken out in 2017, there could not have been any lawful transfer relating to the suit property between 1994 and 2017. The actions of the 1st Defendant in causing the property to be registered under his name were therefore fraudulent.

9. I now turn to the question as to whether the Plaintiff is entitled to the reliefs sought. Section 80 of the Land Registration Act provides as follows;

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake.

(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

10. Having considered the evidence by the plaintiff, which is unchallenged, I am satisfied that the 1st defendant had not obtained a grant in relation to the deceased's estate when he caused the suit property to be registered in his favour. However, there was no evidence presented by the plaintiff showing 2nd defendant's involvement in the fraud committed by the 1st defendant. Since the plaintiff has proved his case against the 1st defendant, he is also entitled to a permanent injunction.

11. The upshot is that the Plaintiff has proved his case on a balance of probabilities. Consequently, I enter judgment for the Plaintiff and make the following final orders:

a) A declaration is hereby issued that the transaction and/or entry made and/or endorsed in the Register of LR No. North Mugirango/Ikongge/576 on the 15th day of January 2015, prior to and/or before the issuance of Grant of Letters of Administration of the Estate of Ongera Mogaka (Deceased), was unlawful, illegal and void.

b) The title in the name of William Nyangechi, 1st Defendant herein is hereby cancelled and I direct that his name be removed from the register as proprietor of L.R No. North Mugirango/Ikongge/576. I further direct that Ongera Mogaka be reinstated as the registered proprietor of LR No. North Mugirango/Ikongge/576.

c) A permanent injunction is hereby issued restraining the 1st Defendant either by itself, agents, servants and/or anyone claiming under him from transferring, alienating, selling, charging, leasing, sub-dividing, interfering with and/or in any other manner dealing with the suit property, that is, LR No North Mugirango/Ikongge/576 and/or any portion(s) thereof.

d) The costs of this suit shall be borne by the 1st Defendant.

Dated, signed and delivered at Kisii this 13th day of March 2020.

J.M. ONYANGO

JUDGE