



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC SUIT NO. 875 OF 2017

MARTHA WANJIKU MWAI.....PLAINTIFF

VERSUS

GLADWELL WAIRIMU NJAGA.....DEFENDANT

JUDGMENT

By an Amended Complaint dated 26th January 2018, the Plaintiff herein brought this suit against the Defendant seeking for the following orders;

- a. A Declaration that Title Deed issued to the Defendant on 5th April 2016, for LR. No. Tinganga/Anmer/Block 1 (Mugumo Nyakinyua) 960, was unlawfully and unprocedurally issued to Gladwell Wairimu Njaga.
- b. A declaration that, LR. No. Tinganga/Anmer/Block 1(Mugumo, Nyakinyua)960 is owned absolutely by Martha Wanjiku Mwai.
- c. An order be issued rectifying the land Register of LR. No. Tinganga/Anmer/Block 1(Mugumo Nyakinyua)960 by directing the registration and the issuance of the Title Deed to the Defendant for the said land to be cancelled.
- d. An order do issue directing that the Title Deed to the aforesaid LR. No. Tinganga/Anmer/Block 1(Mugumo Nyakinyua)960 be issued in favour of Martha Wanjiku Mwai.
- e. An order do issue to Gladwell Wairimu Njaga to vacate and surrender possession of LR. No. Tinganga/Anmer/Block 1(Mugumo Nyakinyua)960 to the Plaintiff Martha Wanjiku Mwai.
- f. A permanent injunction do issue against the Defendant, her employees and/or servants and anybody claiming title or authority from her, prohibiting her from selling, occupying, charging, leasing or in any other manner with dealing with LR. No. Tinganga/Anmer/Block 1(Mugumo Nyakinyua)960.
- g. General Damages for trespass.
- h. Costs of the suit
- i. Interest on (g) and (h) at Court rates.

In her statement of claim, the Plaintiff averred that she is the lawful holder of share certificate No. 344, issued by **Mugumo Nyakinyua Kiambaa Company Limited**, a land buying company which was the owner of a huge parcel of land situate at **Mugumo Estate**, at Gitamaiyu Village, which title it held in trust for its members. She averred that she was entitled to **3 parcels of land**, having held **30 shares**, in the aforesaid Company. That she was issued with 3 title deeds emanating from share certificate No. 344, and that the same were for LR. No. **Tinganga/Anmer/Block 1(Mugumo Nyakinyua)74**, LR. No. **Tinganga/Anmer/Block 1(Mugumo Nyakinyua)960** and LR. No. **Tinganga/Anmer/Block 1(Mugumo Nyakinyua)726**. However, the title to the suit property was issued to the Defendant contrary to her wishes. She further contended that the issuance of the title of the suit property to the Defendant was **illegal, unlawful** and **fraudulent**.

She particularized the **illegality** and **fraud** on the part of the Defendant as; issuing title without her consent, transacting without any form of consideration and without any written agreement, without proof of documentation by the Defendant and failing to involve her in the execution of any instruments. Further that the Defendant acquired title to the suit property in an illegal manner and has without her consent illegally occupied the suit property and she is hence a trespasser. She also contended that despite her efforts to have the Defendant **re-**

transfer the suit property to her, the Defendant has ignored the said demands.

The suit is contested and the Defendant herein filed her Statement of Defence dated **12th February 2018**, and denied all the allegations made in the amended Plaintiff and averred that the title deed was issued to her in the presence of the Plaintiff. That the transfer had been initiated by the Plaintiff. That she gave the suit land to her daughter who has built a permanent storied house worth several millions shillings. That the above was done with the Plaintiff's knowledge and she cannot deny lack of knowledge at this juncture. It was her contention that there was no act of illegality or fraud on her part as all relevant documents of transfer were duly signed by the Plaintiff. That the Plaintiff appeared before the relevant authorities during the process without any coercion. It was her further contention that this suit is an afterthought as the Plaintiff had knowledge of all the ongoing.

The matter proceeded by way of viva voce evidence, wherein the Plaintiff gave evidence for herself and called one more witness. The Defendant on her part gave evidence for herself and called no witness.

PLAINTIFF'S CASE

PW1 Martha Wanjiku Mwai, the Plaintiff herein adopted her witness statement and produced her list of documents as **Exhibit 1**. She further produced the two original title deeds for **LR. No. Tinganga/Anmer/Block 1(Mugumo Nyakinyua)726 and 74** and original receipts as **exhibit 2**. It was her testimony that she was to have three titles, but that one was taken by **Gladwell Njaga**. She also testified that she did not know about the said agreement and that she has never been paid any money for the suit land. It was her further testimony that she had only allowed the Defendant to cultivate her land but denied transferring the land to her. Further that the defendant is her cousin. It was her evidence that she did not know how **Gladwell, the Defendant** herein got her title deed. She further denied filing a criminal case against the Defendant. She further testified that she did not have the ballot for the suit property and that it was the one used for registration of title. She denied giving the Defendant the ballot and also stated that she did not know how she got registered as the owner of the suit land. She further confirmed that the Defendant had built a permanent house on the suit land which was built in a month and that was the reason she came to Court. She also denied any exchange of the properties.

PW2 Alice Wairigia Hinga, adopted her statement as evidence in Court and also denied transferring the suit property to the Defendant. She further denied signing the sale agreement in issue. It was her testimony that the signature on the sale agreement is a forgery. She further testified that she did not agree to give her land to the Defendant who is her aunt as the suit property was not hers. She argued that if she had given the Defendant the said land, then she could not have bought it as that was a contradiction. It was her further evidence that she bought plot **No. 1236**, jointly with her **Aunt**, the Defendant herein having invited her to complete the buying of the land. Further that they started building a permanent house and that she lives in the area and was farming **L.R 960**, and had only asked her aunt(**the Defendant**) to farm on the suit land after she started building her land. Further that the Defendant is entitled to a portion of plot **No. 1236** and not the suit land as the suit land is a bigger portion than **1236**.

She acknowledged that she was willing to give the Defendant half a portion of **plot No.1236** as the Defendant had paid **Kshs. 175,000** for half of **plot 1236** .however, there were no records to support that evidence as they had transacted as friends. It was her further testimony that her Aunt (Defendant) occupied **plot no. 960**, with her knowledge and that the **ballot 960**, is the original. However that ballot was not hers. . She denied having any agreement with the defendant to remain in **plot No.1236**, and that herself would take **plot No. 960**. It was her evidence that the Defendant put up a house on the suit property while this suit was already filed in Court.

DEFENCE CASE

DW1 Gladwell Wairimu Njaga, adopted her witness statement in Court as part of her evidence. She further produced the original title document as **exhibit 1**, share certificate **exhibit 2**, an agreement dated **30th May 2004** between .Wanjiku and herself as **exhibit 3**, Ballot paper **exhibit 4**, Receipt payment to Mugumo Nyakinyua **exhibit 5**, reply to demand **exhibit 6**, supplementary list of document **exhibit 7**. She further testified **Alice Hinga**, the Plaintiff's daughter and herself bought shares worth **Kshs. 350,000/=** and each one of them paid **Kshs, 175,000/=** for the three plots. However, only one was availed to them, being **plot No. 1236**. It was her evidence that **Alice**, then built on the whole plot and allowed her to use **plot No. 960**, with the consent of the Plaintiff in **1999**. Also testified that in the year **2004**, when they realized that there was no any other plot, they went to the land buying Company and the Plaintiff transferred the plot to her and surrendered the ballot paper upon which she later obtained title for the suit property. It was her further testimony that the Plaintiff was present when she got the title deed and that their relationship was good thus there was no written agreement.

Further that she then gave her daughter the suit land to build and informed the Plaintiff and that the title deed came out when they were constructing on the plot. She also testified that the Plaintiff lives near her and she saw all that was the going on the plot. She also confirmed that she signed the agreement and that the signature in the agreement is that of **Alice Hinga**. She further testified that they were with the plaintiff when they went to Mugumo offices and they were guided on how to write the agreement. She also confirmed that she is the one who wrote the agreement and that she called **Alice**, who asked her to write her name and that she did not sign the sale agreement and her son also did not sign but that she wrote her name. She denied forging the Plaintiff's signature that appears in the agreement and she confirmed that it looked like the other signatures. Further that she did not pay any moneys to the Plaintiff for the plot. She acknowledged that in her defence she stated that the Plaintiff signed all the documents, however she is the one who signed all the documents apart from the agreement. She testified that she is the duly registered owner of the suit property and that the structure is not illegal though she did not have approved plans. She also testified that the construction was done in the course of obtaining the titles though the letter introduced her as the owner of the plot. It was her testimony that the suit plot was given to her by **Alice Wairigia, Pw2**, as a compensation though she did not have evidence to confirm that her mother gave her the authority to give out the plot. She acknowledged that she did not show the process through which she acquired the certificate of title.

It was her further testimony that she did everything informally and that **Mugumo land buying Company** had asked for a formal document and that is why she drew the sale agreement. Further the said land buying Company operated by cancelling the name that was on the register and the Plaintiff was not required to sign anything apart from the sale agreement. It was her further testimony that the Plaintiff surrendered the original ballot to her.

After the close of viva voce evidence, parties filed their written submissions which this Court has carefully read and considered.

Having considered the available evidence and the submissions thereto, the Court finds the issues for determination are as follow:

1. Whether the Defendant's title is valid

2. Whether the plaintiff is entitled to the orders sought

3. Who should bear the Costs of this suit

1. Whether the Defendant's title is valid

It is not in doubt that the suit property was initially allocated to the Plaintiff and that the Plaintiff had the ballot for the said suit property and though not registered as the owner of the suit property, she was the owner of the same with all the rights and privileges that appertained to it and therefore the suit land could not be allocated to anyone. It is the Defendant's case that the Plaintiff agreed to sell the suit property to her after the Defendant and the Plaintiff's daughter bought a property together. However, **PW2** who is the Plaintiff daughter built on the suit property and thereafter gave the defendant the suit property as compensation for **Plot No. 1236**, which they had bought together.

The Defendants case hinges on two issues, that is the sale agreement dated **30th May 2004**, that allegedly indicated that the Plaintiff had sold the suit property to her and therefore allowed the land buying Company to transfer the suit property to her, Further, the Defendant's case is hinged upon the issue that **PW2**, the Plaintiff's daughter had transferred the suit property to her as compensation for **plot No 1236**.

Section 3(3) of the Contract Act which is replicated in section **38 of the Land Act 2012**, provides the forms in which an agreement for sale of land should take.

As to whether there is any way that the said **Alice Wairiga Hinga, Pw2**, could give the suit land to the Defendant as compensation for **L.R 1236**, which they jointly bought, this Court finds and holds that that is not possible as a person is not in a position to transfer title which she does not have. The fact that the said **Alice, Pw2**, did not have any interest over the suit property meant that she did not have any privileges and rights over the said land, Therefore, the said **Alice**, could not transfer the suit property to anyone, let alone the Defendant herein.

The second line of Defence that has been advanced by the Defendant is that the Plaintiff transferred the suit land to her and that the two even entered into an agreement. **Further that the same was reduced into writing and signed by all the parties. Section 3 (3) of the Contract Act provides that;**

“3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

The Court has carefully perused the said sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. On the face of it, the said agreement has met the requirements of **Section 3(3)** of the **Contract Act**. However, in her evidence the Defendant acknowledged that **PW2**, and the other witness **Martin .T. Njaga**, her son in law did not sign the said agreement and that she signed it on their behalf. The requirements for a contract to be valid would require that the signatures of the parties to the agreement be attested by two witnesses and that they be present.

The fact that the witnesses' signatures are not genuine therefore, mean that the said sale agreement was never attested to and is discredited. Consequently the Court finds the said agreement to be **null and void** and thus **not enforceable**. See the case of **Daudi Ledama Morintat ... Vs... Mary Christine Karie & 2 others [2017] eKLR** where the Court held that;

“In the case of Silverbird Kenya Limited –vs- Junction Ltd & 3 Others [2013] eKLR which came before me sitting at a different court station (Milimani Environment and Land Court, Nairobi) an application had been made by the 1st defendant to strike out the plaintiff's suit on the ground that the lease on which it was anchored had not been signed in contravention of Section 3(3) of the Law of Act. In the suit, I stated inter alia:-

“...In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in

my view does not satisfy the requirements of Section 3(3) of the Law of Contract Act to be the foundation of the plaintiff's claim against the defendants. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does in fact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya."

"The said agreement having not been in writing contravened Section 3(3) of the Law of Contract Act and cannot be relied upon to sustain the present suit by the plaintiff. The contract is unenforceable as it related to a disposition of an interest in land and such a contract has to have been in writing and signed by the parties to it and witnessed as required under Section 3(3) of the Law of Contract Act."

The basis upon which the suit land was transferred to the Defendant is the sale agreement which the Court has already held and found that was invalid. While this Court takes cognizance of the fact that there may have been a consensus on the issue because why else would the defendant be having the ballot of the suit land while she was only given the land to cultivate it. Further. It was the evidence of the witnesses was that they did not live far away from the suit land and thus a building such as the one constructed in the suit property, could not have been built unnoticed. Nevertheless the law provides for certain conditions to be met before a suit property is transferred and one of them being that the agreement should be in writing and attested by two witnesses who must be present. The sale agreement being relied on by the Defendant falls short of this requirement and therefore everything that is processed based on it is invalid. When the foundation upon which you build your house crumbles, then most definitely your house will fall. See the case of Daudi Ledama Morintat ...Vs... Mary Christine Karie & 2 others(supra) where the Court held that;

"Possession by the plaintiff of the suit property was pursuant to the impugned agreement for sale and cannot give the plaintiff right of ownership and neither can it be relied upon to found a cause of action."

Therefore, the Court finds and holds that the Title held by the Defendant is not valid and she cannot not obtain ownership on the basis of an impugned sale agreement.

2. Whether the Plaintiff is entitled to the orders ought

Section 26(1) of the Land Registration Act provides:-

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

The Above provision of the Law provides for instances in which a certificate held by a proprietor is impeachable. In this instant case, the Court has already held and found that the title held by the Defendant is not valid as the proper and laid down procedure for acquisition and or transfer was not followed. It thus falls that under section 26(1) (b) of the Land Registration Act, and therefore the Plaintiff's prayers seeking to have the Defendant's title a declared a nullity and thus cancelled is merited. It then follows that the logical thing would be to have the land revert back to the Plaintiff and thus, she be declared the owner of the suit property,

Section 80 of the Land Registration Act, also gives the Court the powers to cancel title to land where the same was acquired unprocedurally. Section 80(1) provides;

"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."

Having held and found that the title is invalid, this Court further finds and holds the prayers sought by the plaintiff are merited.

On General Damages to trespass, the Plaintiff in her evidence acknowledged that she had given the Defendant permission to enter the land and cultivate it. Trespass is the act of unauthorized and unjustifiable entry upon the land in another's possession. Being that the Defendant had leave to enter the land, this Court finds and holds that the same is unjustifiable and it therefore declined

3. Who should Bear the costs of this suit

Section 27 of the Civil Procedure Act gives the Court the discretion on whether or not to grant costs of the suit. However, it is trite that costs always follow the event unless there are special circumstances not to grant the costs. It would seem in this instant case that the parties were close relatives and had a relationship that led to a misunderstanding. Taking the above circumstances into account, the court orders each party to bear its own costs.

Having now carefully considered the pleadings herein, the testimony of the witnesses, the exhibits produced in court and the written submissions, the Court finds that the Plaintiff has partially proved her case on the required standard of balance of probabilities. Consequently the court enters Judgement for the Plaintiff against the Defendant in terms of prayers **no a, b, c, d, e and f** of the Amended Plaint dated

26th January 2018 ,with each party to bearing her own costs.

It is so ordered.

Dated, signed and Delivered at Thika this 12th day of March 2020.

L. GACHERU

JUDGE

12.3.2020

In the presence of

Mr. Gachoka for Ngugi Waithaka for the Defendant

Ms. Kimani holding brief for Mr. Wahome for the Plaintiff

Lucy - Court Assistant.

L. GACHERU

JUDGE

12.3.2020