



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 166 OF 2014**

**(FORMERLY EMBU HCCC NO. 115 OF 2008)**

**ANNAH MUTHONI IRERI.....PLAINTIFF**

**VERSUS**

**WILLIAM NJERU MBOGO.....DEFENDANT**

**JUDGEMENT**

**A. Introduction**

1. By a plaint dated and filed on 12<sup>th</sup> August 2008, the Plaintiff sought the following reliefs against the Defendant:

*a) A declaration that the purported registration of the Defendant William Njeru Mbogo as the proprietor of land parcel number Ngandori/Kirigi/684 on 8<sup>th</sup> August 2002, vide entry number 4 in the register for the said land and the subsequent title deed issued on the said 8<sup>th</sup> August 2002, are (sic) fraudulent, illegal, null and void.*

*b) A declaration that the Plaintiff is the lawful proprietor of land parcel number Ngandori/Kirigi/684 and that the Embu District Land Registrar do rectify the register for land parcel number Ngandori/Kirigi/684 by canceling and/or deleting the names of the Defendant William Njeru Mbogo from the proprietorship section and reinstating and/or restoring the names of the Plaintiff Annah Muthoni Ireri as the proprietor of the said land.*

*c) Costs of the suit (sic).*

2. This suit was initially heard *ex parte* in the absence of the Defendant on 15<sup>th</sup> June 2017 and judgement delivered in favour of the Plaintiff on 10<sup>th</sup> October 2017. The Defendant subsequently applied for setting aside of the *ex parte* judgement on the basis that his previous advocates, Eddie Njiru & Co. Advocates, did not notify him of the hearing date. The *ex parte* judgement was consequently set aside on 24<sup>th</sup> October 2019 and a fresh hearing ordered.

**B. The Plaintiff's case**

3. It was pleaded in the plaint that prior to 8<sup>th</sup> August 2002, the Plaintiff was the registered proprietor of *Title No. Ngandori/Kirigi/684 (the suit property)*. It was further pleaded that sometime in the year 2002, the Defendant fraudulently obtained registration of the suit property by tricking the Plaintiff into thumb printing some documents which she was informed were for a different purpose.

4. The Plaintiff further averred that the Defendant was a preacher or pastor of the Full Gospel Church of Kenya Missionaries and that she was a member of the Defendant's congregation at the material time. As a result of the said relationship, she stated that she wholly trusted the Defendant believing that he was a man of good intentions.

5. The particulars of fraud and misrepresentation alleged on the part of the Defendant were particularized in paragraph 12 of the plaint as follows:

*i. Causing land parcel number Ngandori/Kirigi/684 to be registered in his names without following the proper and lawful procedures.*

*ii. Causing the said land to be registered in the Defendant's name without any and/or any valid consent from the Land Control Board.*

iii. *Causing the said land to be registered in the Defendant's name without any and/or any valid transfer form having been executed by the Plaintiff.*

iv. *Causing and/or tricking the Plaintiff to thumb print documents for transfer of the said land.*

v. *Causing, tricking and/or misleading the Plaintiff to thumb print transfer documents by alleging that they were documents confirming that the Plaintiff had allowed the Defendant to live and/or construct a house/structure on the Plaintiff's land parcel number Ngandori/Kirigi/684.*

vi. *Taking advantage of the Plaintiff's illiteracy to deprive her of her land.*

vii. *Using falsehoods, misrepresentation and deceit to cause land parcel number Ngandori/Kirigi/684 to be registered in the Defendant's names.*

viii. *Presenting forged and/or invalid documents to the Land Registrar for purposes of the Defendant being registered as the proprietor of land parcel number Ngandori/Kirigi/684.*

ix. *Obtaining an invalid, improper and/or unlawful title to land parcel number Ngandori/Kirigi/684 by use of fraud, deceit and misrepresentation.*

### **C. The Defendant's case**

6. The Defendant entered appearance on 25<sup>th</sup> August 2008 and filed a defence on 27<sup>th</sup> August 2008 denying the Plaintiff's claim in its entirety. The Defendant pleaded four defences to the action. First, that the Plaintiff had freely and willingly transferred the suit property for consideration. Second, that the Plaintiff's suit was statute barred. Third, that the suit was *res judicata* on account of previous proceedings between the parties vide *Embu Land Disputes Tribunal Case No. 116 of 2007* and *High Court Misc. Civil application JR No. 22 of 2008*. Fourth, that the court had no jurisdiction to entertain the suit.

### **D. The Plaintiff's reply to defence**

7. In a reply to defence filed on 29<sup>th</sup> August 2008, the Plaintiff denied that she freely and willingly transferred the suit property to the Defendant and reiterated the contents of the plaint. She denied that her suit was statute barred or *res judicata*. The Plaintiff further maintained that the court had jurisdiction to hear and determine the suit.

### **E. Summary of evidence at the trial**

#### **a) The Plaintiff's evidence**

8. At the hearing hereof, the Plaintiff called two witnesses and closed her case. She was the first to testify as PW 1. She testified that she used to attend the same church with the Defendant who was a preacher at the Full Gospel Churches of Kenya at Mutunduri. It was her case that her late husband was previously registered as the owner of the suit property and that she became the owner upon his death after undertaking succession proceedings.

9. It was her evidence that sometime in 2002, the Defendant requested her to allow him to erect a temporary building on the suit property for residential purposes, which request she accepted. Later on, the Defendant informed her that the church required a document from her proving that she had allowed him to reside on the suit property and that it was free of charge. She was informed that the document had to be prepared and thumb printed at the District Officer's Office. The Plaintiff also acceded to the Defendant's said request and thumb printed some documents.

10. The Plaintiff stated that she later on discovered to her surprise that the documents were in fact transfer forms which were then used to transfer the suit property to the Defendant's name in 2002. She stated that she was illiterate and that the forms she thumb printed were not read over to her hence she did not know their contents. It was her case that she had no intention of transferring the suit property to the Defendant at all. It was also her case that she had no reason to transfer the suit property to the Defendant since she was not selling it. She, therefore, wanted to recover the suit property from the Defendant.

11. The Plaintiff's second witness was Stephen Njeru Francis Ndwiga who testified as PW 2. He stated that he knew the Plaintiff in this suit since she was married to his late uncle. He also knew the Defendant as a preacher of the Full Gospel Churches of Kenya. He confirmed that the suit property initially belonged to his uncle but was later transferred to the Plaintiff upon the demise of the former. He further testified that he came to know that the Defendant had caused the suit property to be registered in his name when the Plaintiff was being evicted.

12. It was the evidence of PW2 that the Plaintiff had no intention of selling or transferring the suit property to a third party since she could have involved other family members. He further stated that the matter was reported to the Locational Chief who advised the Plaintiff to file a case at the Land Disputes Tribunal for recovery of her land.

#### **b) The Defendant's evidence**

13. The Defendant testified on his behalf at the trial and called two more witnesses in support of his defence. He adopted his witness statement dated 26<sup>th</sup> January 2015 and produced the documents listed in his list of documents dated 26<sup>th</sup> January 2015 as exhibits D1-D5 and

the ones in his supplementary list dated 27<sup>th</sup> January 2020 as exhibits D6-D12.

14. It was the Defendant's testimony that it was the Plaintiff who approached him in 2001 with a desire to adopt him as his son since she was a childless widow. It was his testimony that the Plaintiff simply gave her the suit property as a gift after adoption. He stated that both the Plaintiff's family and his were aware of the arrangement as well as their local church at Mutunduri. The Defendant, however, denied that he was a pastor or church minister at the material time.

15. The Defendant's further evidence was that the Plaintiff was fully aware of the nature of the land transaction with respect to the suit property and that she personally attended the Land Control Board for consent to transfer the suit property. The Defendant produced certified true copies of the relevant minutes of the Land Control Board and the letter of consent for the impugned transaction.

16. The 2<sup>nd</sup> Defendant's witness was Sebastino Mugo Mbogo (DW2) who informed the court that he was a church elder at the Full Gospel Church where both the Plaintiff and the Defendant were members. It was his evidence that he was aware of the Plaintiff's desire to adopt the Defendant as a son and that it was the parties who undertook the process on their own before informing the church when they were already residing together.

17. The Defendant's 3<sup>rd</sup> witness was Njiru Wambugu who testified as DW3. He informed the court that he was the Plaintiff's brother and that he was aware that the Plaintiff had adopted the Defendant as his son and transferred the suit property to him. He testified that sometime in 2001 or 2002 the Plaintiff informed him that he had identified a young man for the purpose of adoption as her son. He further stated that to his knowledge the Plaintiff had never complained to him or any other family member that the Defendant had defrauded him of the suit property.

#### **F. Directions on submissions**

18. Upon conclusion of the hearing on 29<sup>th</sup> January 2020, the Plaintiff was given 30 days within which to file and serve her written submissions whereas the Defendant was granted 30 days upon the lapse of that period to file his. The record shows that the Defendant filed his submissions on 24<sup>th</sup> February 2020 but the Plaintiff's submissions were not on record by the time of preparation of the judgement. In the premises, the Plaintiff shall be deemed to be relying on her submissions dated 27<sup>th</sup> July 2017 filed during the earlier *ex-parte* hearing.

#### **G. The issues for determination**

19. The parties herein do not appear to have agreed on a common statement of issues for determination. The record, however, indicates that the Plaintiff filed her version of issues dated 6<sup>th</sup> January 2016 listing 15 issues for determination. The Plaintiff's counsel, however, framed only 8 issues in his written submissions dated 27<sup>th</sup> July 2017. The court is of the view that in the absence of an agreed statement, the court should frame the issues arising from the pleadings or at least verify if the issues filed properly capture the real issues in controversy in the suit.

20. The court is of the opinion that the issues in controversy in this suit may be summarized as follows:

- a) *Whether the court has jurisdiction to entertain the suit.*
- b) *Whether the transfer of the suit property and its registration in the Defendant's name was procured by fraud and/or misrepresentation.*
- c) *Whether the Plaintiff willingly and freely transferred the suit property to the Defendant for consideration.*
- d) *Whether the Plaintiff's suit is statute barred.*
- e) *Whether the Plaintiff's suit is res judicata by virtue of previous proceedings between the parties.*
- f) *Whether the Plaintiff is entitled to the reliefs sought in the plaint.*
- g) *Who shall bear the costs of the suit.*

#### **H. Analysis and determinations**

21. The court has considered the material on record on the 1<sup>st</sup> issue. The issue of the court's jurisdiction to entertain the suit was raised by the Defendant in paragraph 7 of his statement of defence. No particulars were given as to why the Defendant contended that the court had no jurisdiction to entertain the Plaintiff's suit.

22. The court has noted that the issue of jurisdiction was never canvassed by the Defendant either at the trial or in his written submissions dated 24<sup>th</sup> February 2020. It may, therefore, be concluded that the issue of jurisdiction was abandoned by the Defendant. The court's own evaluation of this issue, however, inevitably leads to the conclusion that this court is competent to entertain the suit by virtue of **Article 162 (2)(b)** of the **Constitution of Kenya** and **Section 13** of the **Environment and Land Act, 2011** since the Plaintiff's suit is a claim relating to title to land. The 1<sup>st</sup> issue is consequently answered in the affirmative.

23. The 2<sup>nd</sup> issue is whether the Defendant obtained registration of the suit property through fraud and misrepresentation. The court has considered the pleadings, documents, evidence and submissions on record on this issue. The gist of the Plaintiff's case is that she was tricked by the Defendant through some misrepresentations to transfer the suit property. She stated that she was illiterate at all material times and that the Defendant took advantage of her since she trusted him as a church minister.

24. The term fraud is defined by **Blacks Law Dictionary**, 9<sup>th</sup> Edition as follows:

**“1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases (especially when the conduct is wilful) it may be a crime – Also termed intentional fraud.**

**2. A misrepresentation made recklessly without belief in its truth to induce another person to act.**

**3. A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment.**

**4. Unconscionable dealing; especially in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain.**

**‘The use of the term fraud has been wider and less precise in the chancery than in the common-law courts. This followed necessarily from the remedies which they respectively administered. Common law gave damages for a wrong, and was compelled to define with care the wrong which furnished a cause of action. Equity refused specific performance of a contract, or set aside a transaction, or gave compensation where one party had acted unfairly by the other. Thus ‘fraud’ at common law is a false statement ...: fraud in equity has often been used as meaning unconscientious dealing – ‘although, I think, unfortunately,’ a great equity lawyer has said.’ William R. Anson, *Principles of the Law of Contract* 263 (Arthur L. Corbin ed., 3d Am. ed. 1919).’**

25. The standard of proof required in proving allegations of fraud was considered in the case of **Koinange & 13 Others V Koinange [1986] KLR 23** and the case of **Evans Otieno Nyakwara V Cleophas Bwana Ongaro [2015] eKLR**. In the latter case, Majanja J 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”.**

26. So, does the evidence on record demonstrate the allegations and particulars of fraud and misrepresentation pleaded in the plaint to the required standard? Having heard and seen the witnesses in this matter the court is inclined to believe the Defendant's evidence on how he came to be registered as proprietor of the suit property even though he was not a biological son or relative of the Plaintiff. The Plaintiff's own brother (DW3) informed the court that the Plaintiff informed her of her intention to adopt the Defendant as his son. DW3 testified that he was in good terms with the Plaintiff and that they had no conflicts or differences between them. He also informed the court that the Plaintiff had never reported to him or other family members that the Defendant had defrauded him of the suit property. There was also no evidence that the Plaintiff ever reported the alleged fraud to law enforcement agencies for investigation.

27. The court finds from the evidence on record that the Plaintiff was fully aware of the nature of her dealings and transactions with the Defendant and that the local church was informed about the matter when the two parties started residing together on the suit property. The court believes the evidence of DW2 who was a church elder at the Full Gospel Church in Mutunduri. He had known both parties for many years.

28. The court further finds from the material on record that the Defendant was not a pastor or church minister at the material time even though he would preach from time to time. The evidence on record reveals that he was a deacon who used to attend to the physical needs of the congregation as opposed to a church minister who attends to the spiritual needs of the church. Accordingly, there was no evidence of undue influence on the part of the Defendant which could have tainted the land transaction.

29. The court is also satisfied on the basis of the evidence on record that the Defendant duly attended the Land Control Board Manyatta for the purpose of obtaining consent to transfer. As the then registered proprietor of the suit property, she was the only person in a position to apply for such consent from the Land Control Board. It is unlikely that the Land Control Board would have granted such consent against her will or without being satisfied that the Plaintiff was aware of the nature of the transaction. When asked during cross-examination whether she attended the Land Control Board for consent she stated evasively she could “not remember”. The court, therefore, finds that the record of the Land Control Board is sufficient evidence that the consent was lawfully obtained.

30. For the foregoing reasons, the court is far from satisfied that the Plaintiff has demonstrated the fraud and misrepresentation alleged against the Defendant to the required standard. There was no evidence of any deceit, misrepresentation, or unconscionable dealing on the part of the Defendant. The evidence on record reveals that both parties were carrying on with their arrangements for several years between

2001 and 2006 without a complaint until the Plaintiff filed a claim before the Land Disputes Tribunal for recovery of the suit property.

31. It would further appear that the Plaintiff wanted to recover the suit property because the Defendant was allegedly harassing her on the suit property. It was alleged that the Defendant had prevented her from utilizing certain trees on the suit property. The Defendant had also allegedly prevented her from picking her coffee berries and from cultivating certain portions of the land. Whereas the Defendant was supposed to be taking good care of her during her lifetime, the Plaintiff was aggrieved because she considered that the Defendant was mistreating her instead. It would appear that the Locational Chief had to intervene so that each of the parties could have a defined portion of the suit property which they could utilize and cultivate. Regardless of the merits of those grievances they do not constitute good grounds in law for nullification of a land transfer. The 2<sup>nd</sup> issue is, therefore, answered in the negative.

32. The 3<sup>rd</sup> issue is whether the Plaintiff freely and willingly transferred the suit property to the Defendant for consideration. The court has already found and held that there is no evidence of fraud or misrepresentation on the part of the Defendant in his acquisition of the suit property. On the contrary, the evidence on record reveals that the transfer by the Plaintiff was voluntary and without undue influence. The only aspect for consideration is whether the transfer was for any consideration. It was the Defendant who pleaded that the transfer was made on account of consideration.

33. The particulars of such consideration were not, however, disclosed in the defence. It was simply pleaded that particulars thereof were within the knowledge of the Plaintiff. As it turned out at the trial, no consideration was ever given by the Defendant but the suit property was transferred to him as a gift. A gratuitous gift cannot be considered as a form of consideration in legal terms. That does not mean that a valid gift can be impeached on account of lack of consideration. The court is of the opinion that a gift of a parcel of land is valid upon compliance with the necessary registration formalities. As such, consideration is not a necessary ingredient of a valid gift. Accordingly, the court finds that the Plaintiff's transfer of the suit property to the Defendant was voluntary even though there was no consideration.

34. The 4<sup>th</sup> issue is whether the Plaintiff's suit is statute-barred. This issue was raised by the Defendant in his defence although it was not pleaded with particularity. It was not clear whether the Defendant's contention was that the suit was statute-barred under the **Limitation of Actions Act (Cap. 22)** or any other law. This issue was not canvassed by the Defendant either at the trial or in his written submissions. The court's evaluation of the material on record reveals that the suit property moved from the Plaintiff's ownership to the Defendant's ownership on or about 8<sup>th</sup> August 2002 whereas the suit was filed on 12<sup>th</sup> August 2008, that is, 6 years down the line. Consequently, the court finds and holds that there is no evidence on record to demonstrate that the Plaintiff's suit for recovery of the suit property is statute-barred under the **Limitation of Actions Act (Cap. 22)**.

35. The 5<sup>th</sup> issue is whether the instant suit is *res judicata* by virtue of previous proceedings between the parties. This issue was raised by the Defendant in his statement of defence. However, it was not pursued at the trial and the Defendant did not submit on this issue. The material on record reveals that there were previous proceedings before the *Tribunal vide LDT No. 116 of 2007* in which the Plaintiff was the successful party. However, the award of the Tribunal was apparently quashed in *Embu High Court Misc. Civil Application (JR) No. 22 of 2008* at the instance of the Defendant.

36. The court is not satisfied that the doctrine of *res judicata* would apply so as to bar the Plaintiff's suit for at least two reasons. First, the matters directly and substantially in issue in this suit were not conclusively determined in previous proceedings since the award of the Tribunal was quashed by the judicial review court. Second, in any event, the Tribunal was not a court of competent jurisdiction within the meaning of **Section 7 of the Civil Procedure Act (Cap. 21)**. Accordingly, the 5<sup>th</sup> issue is answered in the negative.

37. The 6<sup>th</sup> issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has found that the Plaintiff has failed to demonstrate that the Defendant acquired the suit property through fraud or misrepresentation. The court has also found that the Plaintiff freely and voluntarily transferred the suit property to the Defendant. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the plaint or any one of them.

38. The 7<sup>th</sup> 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 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 normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. Although the Defendant is the successful litigant in this matter, the court has taken into account the delicate relationship between the parties who were not only members of the same congregation but who also reside on the same property. The order which commends itself to the court is that each party shall bear his own costs of the suit.

#### **I. Summary of the court's determinations**

39. In summary, the court makes the following determinations on the issues for determination:

a) *This court has jurisdiction to entertain the suit under Article 162 (2) (b) of the Constitution of Kenya 2010 and Section 13 of the Environment and Land Act, 2011.*

b) *There is no evidence on record to demonstrate that the Defendant acquired the suit property through fraud and/or misrepresentation.*

c) *The Plaintiff willingly and voluntarily transferred the suit property as a gift to the Defendant hence no consideration was given by the Defendant.*

d) *The Plaintiff's suit is not statute-barred under the Limitation of Actions Act (Cap. 22).*

*e) The instant suit is not res judicata by virtue of any previous proceedings between the parties.*

*f) The Plaintiff is not entitled to the reliefs sought in the plaint or any one of them.*

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

**J. Conclusion and disposal orders**

40. The upshot of the foregoing is that the Plaintiff has failed to prove her case against the Defendant to the required legal standard. Accordingly, the court makes the following orders for disposal of the suit:

a) The Plaintiff's suit against the Defendant be and is hereby dismissed in its entirety.

b) Each party shall bear his own costs of the suit.

41. It is so adjudged.

**JUDGEMENT DATED and SIGNED in Chambers at EMBU this 14<sup>TH</sup> DAY of MAY 2020** in the absence of the parties due to the prevailing Covid-19 situation. The Judgement was transmitted to Duncan Muyodi & Co. Advocates for the Plaintiff and Defendant in person through the email addresses which they provided.

**Y.M. ANGIMA**

**JUDGE**

**14.05.2020**