



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 127 OF 2013**

**FAITH WAMBUI KUTHUA.....PLAINTIFF**

**VERSUS**

**ANTHONY MUNYAGIA KIGUNDU.....DEFENDANT**

**JUDGMENT**

**BACKGROUND**

The plaintiff Faith Wambui Kuthua instituted this suit by a plaint filed in Embu (Formally HCCC No. 60/2012) dated 17<sup>th</sup> April 2012 seeking an order that the defendant do transfer a 1/3 of land parcel No. MUTIRA KIRUNDA/1448 to the plaintiff. The plaintiff also sought an alternative order that the defendant be ordered to produce and give the plaintiff the Petition and Grant in HCSC No. 1025 of 1980 at Nairobi. On 30<sup>th</sup> May 2012, the defendant filed his statement of defence to the plaintiff's claim.

**PLAINTIFF'S CASE**

The plaintiff testified as PW1 and stated that the defendant is her brother and that they are both children of the late Kigunda Kamichi who died in the year 1978 and who at the time of his death was the registered owner of land parcel No. MUTIRA/KIRUNDA/79 measuring 4.9 acres. The plaintiff further stated that in the year 2004 or thereabouts, she filed Succession Cause No. 144 of 2004 for the Estate of his late father and that during the hearing, his brother the defendant herein asserted that he had filed and obtained a grant in High Court Succession Cause No. 1052 of 1980 (Nairobi). She also stated that the Court therefore struck out her Succession Cause No. 144 of 2004 on grounds that there cannot be two successions for one Estate. The plaintiff further testified that she proceeded to file an application for revocation of Succession Cause No. 1052 of 1980 (Nairobi) but efforts to trace the Court file were fruitless. She stated that she even wrote letters to the Court but without success. She stated that she wrote to the defendant to avail copies of the proceedings and grant in Succession Cause No. 1052 of 1980 (Nairobi) but he has refused to supply the same forcing him to file this suit. She testified that they are three beneficiaries of the Estate of their late father being the defendant, their sister Teresia Wanjiru (PW2) and herself. She therefore sought for a declaration that she is entitled to a third of land parcel No. MUTIRA/KIRUNDA/1448 now registered in the name of the defendant and a raft of other orders.

PW2 was Teresia Wanjiru who is the plaintiff's sister and sister to the defendant. She was shown her statement. She stated that as siblings, they are entitled to the Estate of their father. She stated that it was suspect how their brother Anthony Munyagia Kigunda filed Succession Cause No. 1052 of 1980 (Nairobi) and had himself registered as proprietor of land parcel No. MUTIRA/KIRUNDA/79 measuring approximately 4.9 acres. The witness further testified and stated that a copy of the green card of the suit property has no succession cause number but only indicated that succession was conducted and later land certificate issued in the name of the defendant without their involvement yet they were entitled to a share as beneficiaries of their late father's land.

**DEFENCE CASE**

The defendant Anthony Munyagia Kigunda testified and stated that the plaintiff and Teresia Wanjiru (PW1 and PW2) are his sisters and that after the demise of their father, he filed succession cause in respect of his father's Estate where ultimately the suit land was transmitted to him. The defendant also stated that the plaintiff has filed a number of suits which were dismissed by the Court. The defendant called Silas Kimeu (DW2) who is an Executive officer in charge of Nyeri ELC Registry. The witness produced case file No. 186 of 1994 (O.S) Nyeri where the suit was dismissed for want of prosecution under Order 17 Rule 2 CPR on 31<sup>st</sup> May 2017.

**SUBMISSIONS BY THE PLAINTIFF**

The plaintiff through the firm of Keli & Mwaura Associates submitted that the suit herein is not res-judicata as alleged by the defence. She submitted that in Civil Suit No. 186 of 1994 (O.S) Nyeri High Court, the Court dismissed the same on technicality and was not heard on merit on grounds that there was Civil Suit No. 262 of 1999 in the CM's Court, Kerugoya which had been heard and determined. She further

submitted that in Civil Case No. 262 of 1999 at the Senior Resident Magistrate's Court (Kerugoya), the Honourable magistrate dismissed the case on technicality that the plaintiff ought to have challenged the succession cause filed by the defendant. The learned counsel also submitted that when the plaintiff filed the succession cause in Kerugoya being Succession Cause No. 144 of 2004 as reflected in the plaintiff's list of documents Item No. 3 dated 17/4/2012 and filed in Court on 18/4/2012, the proceedings of 14<sup>th</sup> July 2006 before Hon. Onyiego, counsel for the defendant informed the Court that the defendant was registered as the owner of the land vide Succession Cause held in Nairobi. He submitted that the defendant was directed to furnish the Court with prove of the alleged cause. The learned counsel further submitted that on 25<sup>th</sup> August 2006, the Court struck out the Petition on the basis that the Estate had been distributed pursuant to Succession Cause No. 1052 of 1980 at Nairobi where the Petitioner was advised to pursue a civil remedy. He submitted that that was a clear prove that the registration of the defendant as the absolute owner was fraudulent. When the plaintiff discovered fraud in the year 2011 after she was informed that the purported succession cause in Nairobi was a hoax and non-existent. The learned counsel cited the following cases:

- (1) *Kiratu Kariuki Ngandu Vs Muriuki Muriu (2015) e K.L.R.*
- (2) *Mateo Guthua Ngurukie Vs Attorney General & 5 others HCCC No. 206 of 1999 (Nyeri) (U.R).*
- (3) *Kenya Railways Vs Namusu Enterprises Ltd & 3 others (2013) e K.L.R.*
- (4) *Magu Musa Vs Samuel Kagundu Muchira & 3 others (2017) e K.L.R.*
- (5) *Enock Kirao Muhanji Vs Hamid Abdalla Mbarak (2013) e K.L.R.*

#### DEFENDANT'S SUBMISSIONS

The defendant through the firm of Wanjiru Wambugu submitted on three issues as follows:

**(a) The claim of fraud is time barred hence the suit is incompetent**

The counsel for the defendant submitted that the plaintiff based her claim purely on fraud and not any other claim. She submitted that from the green card produced by the plaintiff as Plaintiff's Exhibit No. 3, the defendant got registered on 29<sup>th</sup> October 1980 and that a claim based on fraud is only three (3) years. She further stated that the plaintiff has all along known that the defendant is the registered proprietor.

**(b) Res-judicata**

The counsel for the defendant also submitted that case file No. 186 of 1995 had been fully determined after the suit was struck out for being Res-judicata. The learned counsel also submitted that the plaintiff filed yet another case being 262/1993 which she submitted was heard and determined.

**(c) Particulars of fraud not proved**

The defendant through his counsel submitted that the plaintiff did not prove the particulars of fraud as particularized in the plaint. She submitted that the standard of proof in a claim based on fraud is higher than that required in civil case and not beyond reasonable doubt as required in criminal cases. The learned counsel submitted that fraud must be distinctly proved and should not be left to the Court to infer the same. She cited the case of *Nancy Khoyut Vs Expert Credit Limited C.A No. 133 of 2006 (Nairobi) (U.R)*. In conclusion, the defendant through his counsel submitted that loss of file is not itself fraud as the plaintiff has not demonstrated that the defendant had a hand in the disappearance of the same. She submitted that entry No. 3 of the green card produced by the plaintiff indicates that the defendant got registered in 1980 upon a succession cause. She further submitted that issues of citation cannot be raised as by then the *Succession Act* that provides for issuance of citation was not in place.

**(d) Undisputed facts**

- (1) *It is uncontroverted that the suit property land parcel No. MUTIRA/KIRUNDA/79 was initially owned by Kigundu Kimichi (deceased)*
- (2) *It is also not in dispute that the plaintiff and the defendant are among the three children of the said Kigundu Kimichi.*
- (3) *The third child of the late Kigundu Kimichi was Teresia Wanjiru.*
- (4) *The three siblings who are children of the late Kigundu Kimichi (deceased) are entitled to a share of his Estate under the Succession Act.*

#### ANALYSIS AND DECISION

I have considered the evidence adduced by the parties and their witnesses. I have also considered the pleadings, the submissions by counsels and the applicable law. Upon perusal of these materials, I find the following issues arise for determination:-

- (1) Whether the plaintiff's title to the suit land was obtained lawfully and legally?**

(2) Whether a determination of the existence of a resulting trust can be implied?

(3) Whether this suit is Res-judicata?

(4) Whether this suit is time barred?

(5) Who will bear the costs?

(1) Whether the plaintiff's title to the suit land was obtained lawfully and legally?

The *Black's Law Dictionary* defines fraud thus:

**“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the other party, or to cause an inconvenience or loss to the other. Fraud in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or injurious to another, or by which an undue and unconscientiously advantage is taken of another”.**

**Section 26 of the Land Registered Act** provides that a certificate of title is a prima facie evidence that the person named therein is the absolute and indefeasible owner of the land and the certificate of title cannot be challenged except on ground of fraud in which the owner is proved to be a party. The title of such person can also be challenged on grounds that it was acquired un-procedurally, illegally or through a corrupt scheme.

The issue of fraud was succinctly put in the case of *Esther Ndegi Njiru & Another Vs Leonard Gatei (2014) e K.L.R* where it was held as follows:

**“.....The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.**

The plaintiff in paragraph 6 of the plaint dated 17<sup>th</sup> April 2012 accused the defendant of secretly and fraudulently filing Succession Cause No. 1052 of 1980 at Nairobi and causing himself to be registered as the sole proprietor of the suit property and thereafter sub-dividing the land into four portions. She set out the following particulars of fraud:-

- (a) Failing to disclose that there were other beneficiaries to the Estate of the late Kigundu Kamichi.
- (b) Failing to cite to the other beneficiaries.
- (c) Proceeding alone in pursuit of the succession cause.
- (d) The H.C.C.S 1052 of 1980 Court file cannot be traced.

**Order 2 Rule 4 CPR** deals with pleading where fraud has been raised and it provides as follows:

**“(1) A party shall in any pleading sub-sequent to a plaint plead specifically any matter, for example performance, release, payment, fraud inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality:**

- (a) Which he alleges makes any claim or defence of the opposite party not maintainable;**
- (b) Which, if not specifically pleaded, might take the opposite party by surprise; or**
- (c) Which raises issues not arising out of the preceding pleading.**

**(2) Without prejudice to sub-rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient”.**

The defendant did not plead specifically to the plaintiff's claim and the particulars of fraud. Instead, the defendant made general denial and reference to previous decisions in other different Courts which he did not produce the respective files or certified copies thereof. The one single question the plaintiff is asking in this case is whether the defendant filed a succession cause and whether he was issued with a grant which he used to transmit the suit property L.R. No. MUTIRA/KIGUNDA/79 into his name. If the answer is in the affirmative, why he filed the succession cause without disclosing that there are other beneficiaries to the Estate of their late father Kigundu Kamichi (deceased)? The other question bordering on fraud is why the defendant filed the purported succession cause No. 1052/1980 in Nairobi and not in a Court nearest to where the suit land is situated? These hard questions were not pleaded specifically by the defendant in answer to the plaintiff's claim. The defendant did not provide any answer how he acquired the suit property nor did he provide a grant or any other prove of registration of the suit property in his name. On the other hand, the plaintiff has demonstrated the undisputed facts that the suit land parcel

No. MUTIRA/KIRUNDA/79 belonged to her late father Kigundu Kamichi (deceased) and that she is the daughter to the said Kigundu Kamichi and therefore entitled to a share of his Estate as a beneficiary. I find that the plaintiff has proved on the required standard that the defendant obtained the registration of the suit property land parcel No. MUTIRA/KIRUNDA/79 illegally, unlawfully, fraudulently and through procedural irregularity.

## (2) Whether a determination of the existence of a resulting trust can be implied?

The question for determination is whether from the facts and materials presented by the plaintiff and the defendant, a trust can be construed to have been created? In the case of *Twalib Hatayan & Another Vs Said Saggah Ahmed Al-Heidy & others (2015) e K.L.R.*, the Court made the following observations:

*“According to the Black’s Law Dictionary, 9<sup>th</sup> Edition; trust is defined as:*

*“(1) The right enforceable in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settler) for the benefit of a third party (beneficiary)”. Under the Trustee Act, “.....the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property ....”*

*In the absence of an express trust, we have trusts created by operation of the law. These fall within the categories; Constructive and resulting trusts. Given that the two are closely inter-linked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the Court against one who has acquired by wrong doing. (See Black’s Law Dictionary) (supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as to demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury’s Laws of England (supra) at paragraph 1453). As earlier stated, with constructive trust, proof of parties intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settler. Imposition of a constructive trust is thus meant to guard against unjust enrichment .....*

*A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black’s Law Dictionary) (supra). This trust may arise either upon the un-expressed but presumed intentions of the settlor or upon his informally intention. (see Shell’s Equity) where unknown intentions may be left un-explored, with the resulting trust, Courts will readily look at the circumstances of the case and presume or infer resulting trust will automatically arise in favour of the person who advances the purchase price. Whether or not the property is registered in his name or that of another, is immaterial (see Shell’s Equity at Paragraph 177) (supra)”.*

Turning to the instant case, I am satisfied that a resulting trust was created in favour of the plaintiff.

## (3) Whether this suit is Res-judicata?

In order to determine whether the issue of Res-judicata arises, it is important to make reference to the applicable law. Under **Section 7 of the Civil Procedure Act**, the law provides as follows:

*“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claims, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court”.*

The defendant stated that the issues in dispute in the current suit were raised in the former suits being O.S. No. 186/1994, LDT No. 44/2000 and LDT Appeals Committee No. 196/2000. In respect to High Court Civil Case No. 186/1994 (Nyeri), the matter was dismissed by **Justice Ngaah** on 31/5/2017 for want of prosecution under **Order 17 Rule 2 (1) CPR**. A dismissal of a suit for want of prosecution is a procedural technicality and cannot qualify to be considered as having been heard and determined. The other cases referred to by the defendant were not produced in his defence. The original Court files were not produced and no certified copies of the proceedings and decree were availed showing how the issues were heard and determined. I therefore find that this suit is not Res-judicata.

## (4) Whether the suit is statute barred?

The defendant also raised the issue that from the green card contained in the plaintiff’s list of documents, he was registered as proprietor of the suit land on 29/10/1980. He stated that a claim based on fraud is only three years. The applicable law in cases of fraud is **Section 26 of the Limitation of Actions Act** which provides as follows:

*“Where in the case of an action for which a period of limitation is presumed, either:-*

*(a) The action is based upon the fraud of the defendant or his agent, or of any persons 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”.*

The plaintiff stated that she realized the fraud when he filed a succession cause for the Estate of his father in 2012 and ever since then, she has been in search of justice but her efforts has not been successful since the cases she has filed has been dismissed or struck out on procedural technicality.

**(5) Who shall bear the costs?**

In normal circumstances, costs usually follow the event. However, costs may also be a discretionally power which must be exercised judicially.

**CONCLUSION**

In view of my analysis above, I am satisfied that the plaintiff has proved her claim on the required standard and enter judgment for the plaintiff against the defendant as follows:

***(1) A declaration that the defendant is holding land parcel No. MUTIRA/KIRUNDA/1448 being a sub-division of land parcel No. MUTIRA/KIRUNDA/79 in trust for himself and the plaintiff.***

***(2) The Land Registrar Kirinyaga County to sub-divide the suit land parcel No. MUTIRA/KIRUNDA/1448 and thereafter transfer one third (1/3) of the land to the plaintiff.***

***(3) The plaintiff and the defendant are siblings. In order to promote cohesion and co-existence between the two, I order each party to bear her own costs of the suit.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 19<sup>th</sup> day of June 2020.

**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:*

1. Mr. Okwaro holding brief for Wanjiru Wambugu
2. Plaintiff/Advocate – absent
3. Mbogo, Court clerk - absent