



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 660 OF 2011 (OS)

IN THE MATTER OF THE LAND PARCEL NUMBER LOC.2/MAKOMBOKI/416

PRICILLA WAMBUI KAMAU.....PLAINTIFF

VERSUS

MARGARET WAMBUI KAMAU.....DEFENDANT

JUDGEMENT

1. This is the originating summons dated 23rd November 2011 brought under Section 159 of the Registered land Act and order 37 rule 8 of the Civil Procedure Rules, 2010.

2. LET MARGARET WAMBUI KAMAU of P. O. Box 251 Thika enter appearance within 15 days after service of this summons which is issued on the application of Pricilla Wambui Kamau who claims beneficial interest to the parcel of land known as Land Title No Loc.2/Makomboki/416 (“**suit property**”) for the determination of the following questions:-

(i) Whether the decree dated 12th March 2001 issued by the magistrate court at Thika in Civil Suit No. 154 of 2001 ordering the transfer of land Title Nos Loc 2/Makomboki/416 (suit property) to the defendant was obtained through fraud, misrepresentation and non-disclosure of material facts.

(ii) Whether the transfer registered in Land Title No. Loc.2/Makomboki 416 (“suit property”) in favour of the defendant pursuant to the aforementioned court order should be revoked and the title deed issued therefrom cancelled.

(iii) Costs of this application be provided for.

3. The originating summons is supported by the affidavit of Priscila Wambui Kamau, the plaintiff/applicant herein sworn on the 23rd November 2011. In the said affidavit Wambui Kamau avers that she and the defendant are wives of one Samuel Kamau Karuthui having gotten married to him under Agikuyu customary law. That the suit property was registered in the name of Samuel Kamau Karuthui who inherited it from his father. That she resides on the suit property together with her children. In 1999, the said Samuel Kamau Karuthui became ill and started suffering memory lapses. He has been undergoing treatment since then. In February 2001 the defendant filed civil case No. 154 of 2001 where she claimed Samuel Kamau Karuthui had agreed to transfer the suit property to her in consideration of her redeeming a loan due from the defendant to Agricultural Finance Cooperation in the sum of Kshs.53,700/-. That the defendant fraudulently obtained a statement of admission from the said Samuel Kamau Karuthui, who was mentally ill and unable to make any independent decision. He was made to affix his left hand thumb print to authenticate the admission as his own. Being a retired teacher he would append his own signature if he was normal and healthy. As a result of the fraudulent admission the magistrate court at Thika issued a decree ordering the transfer of the said property from Samuel Kamau Karuthui to the defendant. She has also filed a further affidavit sworn on the 5th January 2012. She has also filed a further affidavit sworn on the 5th January 2012.

4. Upon being served, the defendant entered appearance through the firm of M/S Macharia & Co. advocates on 20th December 2011. She has also sworn a replying affidavit on the 19th December 2011. She states that the plaintiff had deserted the matrimonial home and had separated from the said Samuel Kamau Karuthui until 1994 when she came back to the matrimonial home. That since the plaintiff came back she has been residing on Land Parcel No. Loc. 2/Makomboki/1297. That their husband has transferred Loc 4/Mairi/902 to the plaintiff. That during the pendency of Civil Case 154 of 2001 before the Chief Magistrate’s Court Thika, the said Samuel Kamau Karuthui was of sound mind and participated in all the proceedings. The decree in Civil Suit 15e of 2001 was therefore not obtained fraudulently. The defendant has also sworn a further affidavit on 5th March 2012 reiterating that she is the one who repaid the loan owed to Agricultural Finance Cooperation.

5. On the 25th June 2019 the court with the consent of the parties directed that the originating summons be canvassed by way of written

submissions. On the 30th January 2020, the plaintiff filed her written submissions. Mr. Bundotich who was holding brief for Mrs. Esonga for the defendant sought more time as Mrs Esonga was indisposed. The court gave the defendant more time to file her submissions and reserved the matter for judgment on 21st May 2020. By the time of writing this judgment, the defendant's submissions are still not on record. I will however endeavour to rely on the replying affidavit and the further affidavits together with the annexures thereto.

The Plaintiff's Submissions

6. They are dated 6th August 2019. They outline three issues for determination.

(a) Was the decree issued in the magistrate court at Thika Civil Suit NO. 154 of 2001 obtained through fraud, misrepresentation and non-disclosure of material facts?

(b) If the decree was obtained through fraud, misrepresentation and non disclosure of material facts, should the order be revoked and the title deed issued therefrom be cancelled?

7. The defendant failed to disclose to the court in Civil Suit NO. 154 of 2001 that Samaul Kamau Karuthui was suffering from mental dementia as evidenced by the medical report by Dr. Ranganathan dated 1st October 2003, and a further medical report from Maragua District Hospital dated 5th May 2010. Samuel Kamau Karuthui could not have thumb printed as he was literate. He would have signed the document himself. During a clan meeting held on 24th June 2000 the family stated it was not aware of the suit and the agreement to transfer land from Samuel Kamau to Margaret Wambui and therefore resolved to have the same transaction reversed and the land to be subdivided between the plaintiff and the defendant. Loc 2 Makamboki/1297 is owned by Eutyclus Mwangi Karanja, a neighbor to the family. The defendant has demonstrated to this court how she can be economical with the truth. It follows that she hid crucial information to the court in Thika Civil Suit No. 154 of 2001.

8. The plaintiff has demonstrated that the defendant used fraudulent means to have the statement of admission by Samuel Kamau signed be admitted by the Thika Court. The defendant failed to disclose the mental health status of Samuel Kamau. She prays that the order transferring the said property to the defendant be revoked and the same be subdivided in equal portions between the plaintiff and the defendant. She has put forward the case of **Alice Chemutai Soi vs Nickson Korir & Another [2015] eKLR**.

9. I have considered the originating summons, the affidavits in support and the annexures. I have also considered the affidavit in response and the annexures, the written submissions filed on behalf of the plaintiff and the authorities cited. The issue for determination is whether the decree issued in the magistrate's court at Thika in Civil Suit NO. 154 of 2001 was obtained through fraud, misrepresentation and non disclosure of material facts. If so whether the order ought to be revoked and the title deed issued therefrom be cancelled.

10. The plaintiff's case is based on the claim that Samuel Kamau Karuthui suffers from senile dementia hence he could not have endorsed the statement of admission in Civil Suit 154 of 2001. That the loan owed to Agricultural Finance Corporation was paid by Samuel Kamau Karuthui as confirmed by the receipts availed by Agricultural Finance Corporation through a covering letter dated 11th October 2013. It appears the plaintiff seems to be stating that she is acting on the best interests of Samuel Kamau Karuthui. The medical report by Dr. Ranganathan is dated 1st October 2003. In his opinion Samuel Kamau Karuthui suffers from Senile dementia and is not capable of making independent decisions. There is another medical report from Maragua District Hospital dated 5th May 2010 confirming the above opinion. It should be noted that these reports are made after the decree in civil suit No. 154 of 2001 had been issued. There is no medical report to confirm the said Samuel Kamau Karuthui's mental status prior to 2001. There are witness statements by Rosemary Wanjiru Mwangi, Francis Gachunga Gakunya and James Kamau Karuthui. They seem to suggest that the said Samuel Kamau's mental problem started in 1999. However I find that they are not experts in the field of psychiatry and their opinions will remain just that; mere opinions. In any case they were not put on the stand so that their belief could be tested by cross examination. There is therefore no evidence to confirm that the said Samuel Kamau was not of sound mind as at the year 2001.

11. Assuming that he was indeed of unsound mind, then the provisions of order 32 of the Civil Procedure Rules would be invoked. **Order 32 rule 15** of the Civil Procedure Rules, 2010 provides that:-

"The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not adjudged are found by the court or inquiry, by reasons of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued".

The best approach by the plaintiff would have been to be appointed as a *guardian ad litem* so that she could represent the interests of Samuel Kamau Karuthui.

12. In High Court **Civil Appeal No. 478 of 2004** H. M. Okwengu J (as she then was) in her judgment dated 16th April 2010, observed that:-

"The application dated 29th January 2004 was therefore misconceived and an abuse of the civil process. Further the appellant's main reason for seeking to be enjoined as a party and to have the consent order set aside was that Karuthui was sick and under a disability. Assuming that to have been the case, the correct approach was to first have a guardian ad litem appointed to represent the interest of Karuthui under order XXXI Rule 4, 5 and 15 of the Civil Procedure Rules. In other words the appellant could not purport to be acting in the best interest of Karuthui without first being appointed a guardian ad litem...."

13. I note that this judgment was delivered in 2010. The plaintiff herein has all along been represented by counsel. There is no indication whether the said judgment was appealed against. If not, then the same still stands.

14. There is also no indication as to whether the plaintiff took up the Honourable Judge's advice and sought to be appointed as guardian ad litem to represent the interests of Samuel Kamau Karuthui. It appears she did not. Instead filed this summons. By 2011 the said Samuel Karuthui was still alive.

15. In my view the issues herein were canvassed in the plaintiff's previous applications. This matter is therefore res judicata.

16. I find that the plaintiff herein has failed to demonstrate that the decree issued in Civil Suit No. 154 of 2001 in Chief Magistrate's Court Thika not obtained by fraud, misrepresentation or non disclosure of material facts. I therefore decline to revoke the orders arising therefrom and hence decline to order cancellation of the title deed.

17. It is now a fact that Samuel Karuthui has since passed on. The plaintiff may therefore try her luck in the succession proceedings if they haven't been commenced already.

18. All in all, I find that the plaintiff has failed to prove her case on a balance of probabilities as against the defendant. The suit is hereby dismissed. I note that the parties herein are co-wives and widows of Samuel Kamau Karuthui. I order each party to bear own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 11TH day of JUNE 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff

No appearance for the defendants

Kajuju – court clerk