



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 23 OF 2018

KIMUU NJIRU (Suing as Representative of the Estate of

NJIRU KIMUU (Deceased).....PLAINTIFF

VERSUS

JAMES NJIRU KIMUU.....1ST DEFENDANT

PETER MURIITHI MAINA.....2ND DEFENDANT

NELSON KAMAU KABUGA.....3RD DEFENDANT

JOSEPH MURIITHI MUTHIKE.....4TH DEFENDANT

JULIUS MBUI MUURU.....5TH DEFENDANT

NAHASHON MURIITHI MARINGA.....6TH DEFENDANT

ROSE WANJIRU MURIITHI.....7TH DEFENDANT

LUCY WANJIRU JACKSON.....8TH DEFENDANT

THE LAND REGISTRAR, KIRINYAGA.....9TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....10TH DEFENDANT

JUDGMENT

Vide a plaint dated 16th April 2018 and amended on 11th December 2019, the plaintiff sought the following orders:-

(a) A declaration that the transfer of land parcel No. MWERUA/KABIRIRI/11/20 together with all the other subsequent transfers thereof are null and void.

(b) That the 9th defendant be ordered to cancel land parcel Numbers MWERUA/KABIRIRI/11/201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220 and 221 and revert back to land parcel No. MWERUA/KABIRIRI/11/20 in the names of the deceased NJIRU KIMUU.

(c) Costs of this suit together with interest at Court rates.

(d) Any other relief which this Honourable Court may deem fit to grant.

The plaintiff was filed simultaneously with a Notice of Motion under certificate of urgency seeking a raft of orders which upon placing before the duty Judge in Muranga ELC Court certified the same urgent and granted a temporary injunction against the defendants/respondents restraining by themselves, their agents and/or servants from selling, transferring, alienating, evicting and/or otherwise interfering with the plaintiff's right in any way on land parcel Numbers MWERUA/KABIRIRI/11/201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220 and 221 or any part thereof for 14 days from the date thereof.

On 18th May 2018, the 1st defendant filed a statement of defence. On 28th June 2019, the 8th and 9th defendants filed their joint statement of defence.

PLAINTIFF'S CASE

The plaintiff testified alone and called no witness(s). In his testimony, the plaintiff stated that he is the legal representative to the Estate of Njiru Kimuu who was the lawful and registered owner of land parcel Number MWERUA/KABIRIRI/11 and was so registered at the time of his death in the year 1972. He stated that on 13th June 2011, land parcel Number MWERUA/KABIRIRI/11 was fraudulently transferred from the deceased to the 1st defendant by registering a change of name long after the death of the registered owner. The plaintiff further stated that the suit land was registered in the year 1971 long before the 1st defendant was even born. He stated that the land parcel No. MWERUA/KABIRIRI/11 was further sub-divided into several portions and the resultant numbers are MWERUA/KABIRIRI/11/201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220 and 221 respectively. The plaintiff further contends that the aforesaid resultant parcels were registered as follows:

(a) MWERUA/KABIRIRI/11/201

(b) MWERUA/KABIRIRI/203

(c) MWERUA/KABIRIRI/204

(d) MWERUA/KABIRIRI/205

(e) MWERUA/KABIRIRI/206

(f) MWERUA/KABIRIRI/207

(g) MWERUA/KABIRIRI/208

JAMES NJIRU KIMUU

(h) MWERUA/KABIRIRI/209

(i) MWERUA/KABIRIRI/210

(j) MWERUA/KABIRIRI/211

(k) MWERUA/KABIRIRI/217

(l) MWERUA/KABIRIRI/218

(m) MWERUA/KABIRIRI/219

(n) MWERUA/KABIRIRI/220

(o) MWERUA/KABIRIRI/221

MWERUA/KABIRIRI/11/202 – PETER MURIITHI MAINA

MWERUA/KABIRIRI/11/212 – NELSON KAMAU KABUGA

MWERUA/KABIRIRI/11/213 - JOSEPH MURIITHI MUTHIKE

MWERUA/KABIRIRI/11/214 - JULIUS MBUI MUURU

MWERUA/KABIRIRI/11/215 - NAHASHON MURIITHI MURINGA

- ROSE WANJIRU MURIITHI

MWERUA/KABIRIRI/11/216 - LUCY WANJIRU JACKSON

The plaintiff further stated that he discovered the fraudulent transfers sometime on 2nd February 2018 when he conducted an official search. He further stated that despite the aforesaid fraudulent multiple transfers, none of the defendants has ever purported to take possession of the lands and that the entire parcels has remained under the control and management of the deceased family including but not limited to the plaintiff herein. The plaintiff referred to his list of documents dated 16th April 2018 which he produced as Plaintiff's Exhibits 1, 2, 3, 4 (a) (b) (c) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n)(o) (p) (q) (r) (s) (t) (u). He also referred to his further list of documents dated 13th February 2019 which he also produced as Plaintiff's Exhibit No. 5.

1ST DEFENDANT'S CASE

The 1st defendant testified and stated that he always knew that land parcel No. MWERUA/KABIRIRI/11/20 belonged to him as his father used to tell him since he was young. He stated that he knew where the land was and that the same was vacant and was being cultivated by their relatives. In the year 2004, he moved to the suit property with his father's permission who also handed to him the original title deed in the presence of his mother Margaret Muthoni and his brothers Muriuki and Muthigani. He stated that in the year 2011, he decided to sub-divide the land. He said that by then, he had been baptized as James Njiru Kimuu but the title deed and green card read Njiru Kimuu. He went for correction of name at the Lands office where he was advised that he had to get a document signed by the Chief of Kabiriri and Mutithi confirming that he was indeed the owner of the suit land which he did and also attended the Land Control Board Wanguru after which the land ownership was corrected. He said that his father gave him his original Identity Card when he was going to the Chief's office so that the Chief could identify him. He stated that his father was aware when he sub-divided the land in the year 2011 and that he did not raise any objection. The 1st defendant further stated that his father is the one who showed him where to build and even supplied him with all the building stone for the construction of his house. He stated that after he sub-divided the suit land, he sold a few portions to the 2nd to 8th defendants.

He stated that he was surprised in 2018 when his father registered restrictions on all the portions that were in his name and left out the ones in the names of the purchasers. He stated that the persons whom he sold the portions of land have built stone houses and schools. He said that he does not know any other person in their clan known as Njiru Kimuu other than himself. He produced the two items contained in the list of documents dated 17th May 2018 as Defence Exhibits 1 & 2 respectively.

DW2 was James Wachiri who testified and stated that he knows the suit land parcel No. MWERUA/KABIRIRI/11/20 which is near his land parcel No. MWERUA/KABIRIRI/11/18. He stated that he got his land from the clan as the first born son. He stated that in their clan, one could only get land registered in his name and any other parcel would be registered in the name of his son born or un-born. He said that there were errors in names during the land demarcation process. He stated that his name was erroneously indicated in the green card as Wachiri Gaciani but when he grew up, he was baptized as James Wachiri Gaciani. He then went for the correction of name at the Lands office where he was advised to get a document signed by the chief confirming that indeed he was the owner. He said that he later attended the Land Control Board and the name was corrected. He stated that he comes from the same clan with the 1st defendant and that the plaintiff's father was one Runji who had two sons namely Kimuu Runji and Murage Runji and each had his own land. He stated that in their clan, there was only one Njiru son of Ileri who used to work in Mombasa who was married to one Bertha Njeri. The wife died in 2008. The witness further stated that in their clan, there was no one by the name Njiru Kimuu other than the defendant. He stated that he used to see land parcel No. MWERUA/KABIRIRI/11/20 being cultivated by the extended family of the plaintiff until the year 2004 when the defendant came to the land and settled. He stated that the 1st defendant later sub-divided the land and sold several portions to third parties who have built permanent houses and schools.

DW3 was Wanjohi Bagaga who also testified on oath and stated that the plaintiff and the 1st defendant come from Umbui Mbari ya Marigu Clan. He stated that the plaintiff in this case is father to the 1st defendant. He stated that he knows that the plaintiff registered land parcel No. MWERUA/KABIRIRI/11/20 in the name of his son who is the 1st defendant herein James Njiru Kimuu.

DW4 was Eunice Njoki who testified and stated that her father who is also the plaintiff in this case registered land parcel No. MWERUA/KABIRIRI/11/20 in the name of her brother James Njiru Kimuu. She stated that her father is the one who gave James Njiru Kimuu the title deed for the land in question and even attended the opening ceremony blessing the house of the 1st defendant. She stated that she used to cultivate the land for many years from 1998 as she knew it as belonging to his brother Njiru Kimuu. She stated that his brother settled on the land in 2004.

PLAINTIFF'S SUBMISSIONS

The plaintiff through the firm of Ngigi Gichoya & Co. Advocates submitted that the plaintiff has satisfactorily discharged his burden of proof on a balance of probabilities as required under **Section 107, 108 and 109 of Cap. 80 Laws of Kenya**. The learned counsel also argued that the suit land was registered under the *Registered Land Act Cap. 300* (now repealed). Under the said repealed law, there is no instance where it is indicated that land could be registered in the names of an unborn person. He submitted that the Act only envisages that land could be registered in the names of an adult, a minor and a person of unsound mind as amplified in *Section 2 of the Land Registration Act*. The counsel further submitted that *Section 47 of the Registered Land Act Cap. 300* (repealed) are *pari materia* to the provisions of *Section 47 of the Land Registration Act No. 3 of 2012*. He cited *Section 26* and the following decisions:

- (1) *Arthi Highway Developers Limited Vs West End Butchery Ltd & 6 others (2015) e K.L.R.*
- (2) *Alberta Mae Gacii Vs Attorney General & 4 others.*
- (3) *Elijah Makeri Nyangwara Vs Stephen Mungai Njuguna & another (2013) e K.L.R.*

1ST DEFENDANT'S SUBMISSIONS

The 1st defendant through the firm of Ann Thungu & Co. Advocates submitted that the plaintiff has not proved his case to warrant the granting of the orders sought. She argued that the plaintiff was not able to prove who Njiru Kimuu was and if such person existed other than the 1st defendant. She submitted that in all his pleadings, the plaintiff never mentioned anywhere that Njiru Kimuu was his father but only made the allegations during his testimony that Njiru Kimuu was his father. She did not cite any authority.

ANALYSIS AND DETERMINATION

I have considered the testimony by the parties and the witnesses. I have also considered the probative value of the evidence and the applicable law. The undisputed facts in this case are that the original land parcel No. MWERUA/KABIRIRI/11/20 was first registered on 18th February 1971 in the names of Njiru Kimuu as proprietor. On 16th December 1971, the land certificate was issued. It is also not in dispute that the 1st defendant herein was born in 1975. The plaintiff who is the 1st defendant's father aged 91 years testified that the suit property belonged to his father one Njiru Kimuu (deceased) who passed on sometime in 1972 and that he has been appointed the legal representative of the Estate of his father the late Njiru Kimuu. He produced a limited grant ad litem issued under **Section 54 and the 5th Schedule P&A 47 "A"**. The 1st defendant in his testimony stated that he was the one given the land in 1971 by the "Umbui" Clan. He did not call an expert witness or at least a respected and recognized Elder of the Umbui clan who was present during the allocation of the suit land. I find the testimony by the plaintiff and the documents produced in his evidence candid, reliable and believable. The plaintiff is the father to the 1st defendant who knows well how and why the suit land was registered. He has been appointed the legal representative of the Estate of Njiru Kimuu (deceased) whom he explained is his late father who was the registered proprietor of the said land until the alleged fraud was committed. The 1st defendant was born in 1975 and the suit property was registered in the name of Njiru Kimuu in 1971. The only person who can speak about what happened in 1971 and whom this Court can believe is the plaintiff. The testimony by the 1st defendant can only be hearsay as he had not been born in 1971. I do not know of any African custom where a child is named before birth and land given even before she is born. I find the testimony by the plaintiff that the suit land parcel No. MWERUA/KABIRIRI/11/20 belonged to his father Njiru Kimuu conceivable and indeed believable. The witness called by the 1st defendant did not state the basis or source of their evidence. They were not present when the Umbui Clan were giving out the suit land. I agree with the testimony by the plaintiff that the 1st defendant took advantage of the similarity of his name and that of his grandfather to register a change of name and subsequently transferring the land into his name and thereafter sub-dividing and selling to third parties. The 1st defendant had no legal capacity to be given land in 1971 as he had not been born. **Section 47 of the Registered Land Act, Cap. 300** (repealed) which are *pari materia* to the provisions of **Section 47 of the Land Registration Act No. 3 of 2012** provides as follows:

(1) The minors name of a person under the age of eighteen years may be entered in the register to enable the minor's interest to be held in trust and shall be registered under the name of the guardian either on first registration or as a transferee or on transmission.

(2) Nothing in this section enables a person under eighteen years of age to deal with land or any interest in land by virtue of such registration, and, if the Registrar knows a child has been registered, the Registrar shall enter a restriction accordingly.

(3) If a disposition by a minor whose minority has not been disclosed to the Registrar has been registered, that disposition may not be set aside only on the grounds of minority”.

The ***Registered Land Act Cap. 300*** Laws of Kenya (repealed) did not provide for the registration of unborn children. There is therefore no custom that would allow the allocation and registration of land in the name of unborn children which was contrary to law. The evidence by the 1st defendant that he was allocated the suit land by the clan even before he was born is untenable. The actions by the 1st defendant whereby he did correction of his name to correspond with that of the registered proprietor of the suit land parcel No. MWERUA/KABIRIRI/11/20 was irregular and un-procedural which this Court cannot countenance. ***Section 26 (1) of the Land Registration Act No. 3 of 2012*** provides as follows:

(1) 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 grounds of fraud or mis-representation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.

Having held and found that the actions by the 1st defendant in applying for correction of name and transferring the suit property L.R. No. MWERUA/KABIRIRI/11/20 to himself before sub-dividing and selling to third parties was illegal, irregular and un-procedural, I now wish to refer to a decision by my brother ***Justice Sila Munyao*** in the case of ***Zacharia Wambugu Gathimu & Another Vs John Ndungu Maina (2019) e K.L.R*** where he held as follows:

“ First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, un-procedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”.

I cannot agree more with the above decision. The 1st defendant is the architect of the fraudulent activities applying for correction of name and transfer of the suit property to himself. The 1st defendant also committed high fraud when he sub-divided the suit property. The 2nd, 3rd, 4th, 5th, 6th, 7th and 8th defendants may not have been actors in the commission of the said fraudulent activities by the 1st defendant. However, their titles as purchasers for value are not protected in law since they were acquired illegally and un-procedurally. Their titles cannot therefore be said to be indefeasible in the eyes of the law. The upshot of my evaluation and analysis of the evidence is that the plaintiff’s claim has been proved to the required standard.

DISPOSITION

In the final result, I enter judgment for the plaintiff against the defendant as follows:

(1) A declaration that the transfer of land parcel No. MWERUA/KABIRIRI/11/20 and the sub-division thereof together with all subsequent transfers thereof are null and void.

(2) *The 9th defendant be and is hereby ordered to cancel land parcel Numbers MWERUA/KABIRIRI/11/201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220 and 221 and revert back to land parcel No. MWERUA/KABIRIRI/11/20 in the names of NJIRU KIMUU (deceased).*

(3) *The 1st defendant to pay the costs of this suit with interest at Court rates.*

READ, DELIVERED and SIGNED in open Court at Kerugoya this 5th day of June, 2020.

E.C. CHERONO

ELC JUDGE

In the presence of:

1. *Mr. Mwangi for Plaintiff.*
2. *Mr. Asimwe holding brief for Ann Thungu for 1st Defendant*
3. *Mr. Mbogo – Court clerk*
4. *1st Defendant James Njiru Kimuu – present*