



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 12 OF 2010**

**MILKA NYAKIO KANYARI.....PLAINTIFF**

**VERSUS**

**ESTHER NYAMBURA RICHU.....1<sup>ST</sup> DEFENDANT**

**PETER NYORO KAHIGA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 13<sup>th</sup> January 2010 the plaintiff seeks judgment against the defendant for:-

*(a) A declaration that the late Wanjiru Kairu is entitled to ½ share of LR Nairobi/Block 116/205.*

*(b) Cancellation of the register for LR Nairobi/Block 116/205 and rectification of the register by the Commissioner of Land to reflect that the 2<sup>nd</sup> defendant is entitled to ½ share and the plaintiff to ½ share.*

*(c) Costs of the suit.*

2. The 1<sup>st</sup> defendant was served with copies of plaint and summons to enter appearance but neglected to enter appearance and or file defence within the prescribed period interlocutory judgment was then entered in favour of the plaintiff.

3. The 2<sup>nd</sup> defendant entered appearance on 16<sup>th</sup> February 2010 and filed a statement of defence dated 2<sup>nd</sup> March 2010 and filed in court on 4<sup>th</sup> March 2010.

4. PW2, Milka Nyakio Kanyari, the plaintiff told the court she is the administrator of the estate of the late Wanjiku Kairu. She produced the Grant of letters of administration as exhibit 1A and 1B respectively. She also produced the ownership certificate as exhibit p2. It is in the names of Wanjiku Kairu and Esther Nyambura. She adopted her witness statement dated 6<sup>th</sup> February 2012. She further told the court that there are five wooden houses on the parcel of land. Her son, Maina, who resides in the plot collects rent on her behalf. That the 2<sup>nd</sup> defendant asked her to vacate the suit plot as he had bought it from the 1<sup>st</sup> defendant. It is her case that she is claiming Wanjiru Kairu's portion. That the 1<sup>st</sup> defendant sold the entire portion without regard to her interest. She prays that the prayers in the plaint be allowed.

5. In paragraph 5 of the plaint, the particulars of fraud, by the 1<sup>st</sup> defendant are given as follows:-

*(a) Misleading the commissioner of lands to issue an allotment letter to herself instead of a joint letter.*

*(b) Fraudulently obtaining the parcel of land – Nairobi/Block 116/205 in her name alone.*

*(c) Fraudulent selling the said land in whole to the 2<sup>nd</sup> defendant instead of ½ share.*

*(d) Fraudulently executing transfer documents and a sale agreement purporting that she was the only owner of the property.*

6. Pw2, Geoffrey Kamau adopted his witness statement dated 6<sup>th</sup> February 2012. He told the court that the plaintiff is his step mother while the 1<sup>st</sup> defendant is his step sister. He told the court that they sat as a family and resolved that the suit plot be shared between the plaintiff and

the 1<sup>st</sup> defendant.

7. PW3, Joseph Maina Kanyari also adopted his witness statement dated 6<sup>th</sup> February 2012. He told the court he is the son of the plaintiff. That the 1<sup>st</sup> defendant is his cousin. He further stated that he resides on the suit plot which was bought by the 1<sup>st</sup> defendant and Wanjiru Kairu. That the plaintiff is entitled to ½ share of the said plot.

8. DW1, Peter Nyoro Kahiga, the 2<sup>nd</sup> defendant adopted his witness statement and the list of documents dated 1<sup>st</sup> July 2013. The documents were produced as exhibits D1- D4 respectively. He told the court that he bought the suit property known as Nairobi/Block 116/205 from Esther Nyambura Richu the 1<sup>st</sup> defendant. He told the court that the said Esther Nyambura showed him an allotment letter in her name. That the deceased Wanjiru Kairu had no share on the suit land. He prays that the plaintiff's suit be dismissed with costs.

9. At the end of the hearing the parties tendered written submissions.

10. It is the plaintiff's submissions that the 1<sup>st</sup> defendant fraudulently obtained an allotment letter in her name and sold the suit plot to the 2<sup>nd</sup> defendant, without knowledge and/or consent of the late Wanjiru Kairu. The certificate of lease was issued to the 2<sup>nd</sup> defendant without due regard to the estate of the late Wanjiru Kairu. She has relied on Section 26(1) (b) of the Land Registration Act, 2012 and the Case of **Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & Another, Eldoret ELC 609 B of 2012.**

11. Further that the act of the 1<sup>st</sup> defendant of selling the ½ share that was not hers and transferring interest that she had no legal right to, was fraudulent. The title was therefore tainted with fraud and the ½ share could not lawfully be passed by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant.

12. It is the 2<sup>nd</sup> defendant's submission that the plaintiff has filed the suit in her personal capacity and not as a personal representative of the deceased. The suit is therefore a nullity. The property was never a property of the deceased to be subjected to succession. Section 102 of the Registered Land Act (now repealed) provides that upon the death of a first proprietor, his interest shall vest in the name of the surviving proprietor. He has put forward the case of **KCO, ELC No. 3 of 2014 Moses Bii vs Kericho District Land Registrar & Another**. He has also relied on Section 143(1) of the Registered Land Act (Repealed) and Section 80 of the Land Act.

13. Fraud though pleaded has not been proved in this case. He has relied in Section 26(1) of the Land Registration Act, 2012 and the case of **Esther Ndegi Njiru, Jane Mugo Wanjiru vs Leonard Gatei**. There is no evidence from Roysambu Land Buying Company to support the plaintiff's case of alleged fraud committed by the 1<sup>st</sup> defendant in obtaining an allotment letter for the suit plot. The 2<sup>nd</sup> defendant is a bonafide purchaser for value without notice. He prays that his title to the suit property be protected under Section 26 of the Land Registration Act, 2012 and Article 40 of the Constitution.

14. I have considered the pleadings, the evidence on record. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

*(i) Whether the plaintiff as the administrator of the Estate of Wanjiru Kairu is entitled to ½ share of LR NO. Nairobi/Block 116/205.*

*(ii) Whether the registration of the 2<sup>nd</sup> defendant as the owner of the suit property is absolute and indefeasible and not liable to be challenged.*

*(iii) Who should bear costs of the suit?*

15. It is the plaintiff's case that she is administrator of the estate of the late Wanjiru Kairu. She produced the Grant of letters of administration as exhibit P1a and 1b. she produced the ownership certificate from New Roysambu Housing Company Limited NO. 337 in the names of Wanjiru Kairu and Nyambura Richu of P. O. Box 22765, Nairobi. There is another letter dated 25<sup>th</sup> August 2005 from Roysambu Housing Cooperative Society to the Commissioner of Lands confirming that LR No. Nairobi/Block 116/205 (Ballot No. 24) was registered in the names of Wanjiru Kairu and Nyambura Richu of P. O. Box 36 Ruiru. The letter is signed by the officials of the said society. It has the seal of the Society.

16. There is a letter of allotment dated 14<sup>th</sup> September 1992 issued to Nyambura Richu of P. O. Box 36 Ruiru. The name of Wanjiru Kairu is missing. There is no explanation for this. The letter from the Society gave two names. This letter of allotment in the name of Nyambura Richu, only has no history of how she acquired it.

17. I find that the 1<sup>st</sup> defendant did not participate in this case, she would have given an explanation for this. The 2<sup>nd</sup> defendant was not able to challenge the documents produced by the plaintiff. He did not challenge the ownership certificate which is in the names of Wanjiru Kairu and Nyambura Richu. The fact that the plaintiff has not stated that she is suing on behalf of the estate of the deceased can be cured by Article 159 (2) (d) of the constitution which implores courts to administer justice without undue regard to procedural technicalities. I find that she has demonstrated that she is entitled to ½ share of the suit property belonging to the late Wanjiru Kairu.

18. **Section 26(1)** of the Land Registration Act provides that:-

**26(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 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.

19. In the case of **Elijah Makeri Nyangw'ra vs Stephen Njuguna & Another [2013] eKLR**, Munyao J stated thus:

“ First, it needs to be appreciated that for section 26(1) (b) of the Land Registration Act to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are, that title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26(b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent purchaser is impeached so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to the 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”.

20. I am guided by the above authority. It appears the 1<sup>st</sup> defendant obtained the letter of allotment unprocedurally and without the knowledge and or consent of the late Wanjiru Kairu who was a co-lessee.

21. The 2<sup>nd</sup> defendant's claim that the suit property was owned jointly is not supported by any evidence and it cannot stand. The fact that Wanjiru Kairu was entitled to ½ share means she and the 2<sup>nd</sup> defendant were tenants in common. The 1<sup>st</sup> defendant used fraudulent means to obtain the letter of allotment in her sole name without regard to Wanjiru Kairu's interest. I find that the particulars set out in paragraphs 5 of the plaint have not been controverted. The 1<sup>st</sup> defendant neglected and/or refused to appear in this court to defend her actions.

22. I therefore find that the title held by the 2<sup>nd</sup> defendant cannot be said to be indefeasible, the actions of the 1<sup>st</sup> defendant of selling the ½ share that was not hers was fraudulent.

23. The sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant dated 10<sup>th</sup> March 1997 clause 1 states:-

***“the plot is sold with vacant possession”***

When cross examined by plaintiff's counsel, the 2<sup>nd</sup> defendant admitted that he learnt that the land belonged to a deceased woman named Wanjiru Kairu. He also admitted that there was a house on the suit property and that he has not been there for a long time. This confirms that he is not in occupation. It also confirms PW2's testimony that he (PW2) is the one residing on the suit property. He (DW1) also admitted that he has not seen the 1<sup>st</sup> defendant since the transaction. I find that the title held by the 2<sup>nd</sup> defendant is not indefeasible as the 1<sup>st</sup> defendant obtained the letters of allotment in her sole name unprocedurally.

24. In conclusion, I find that the plaintiff has proved her case against the defendant on a balance of probabilities.

25. I enter judgment in her favour as follows:-

***(a) That a declaration is hereby issued that the late Wanjiru Kairu is entitled to ½ share of LR No. Nairobi/Block 116/205.***

***(b) That an order is hereby issued for cancellation of the register for LR No. Nairobi/Block 116/205 and rectification of the register by the Commissioner of Land to reflect that the 2<sup>nd</sup> defendant is entitled to ½ share and the plaintiff to ½ share.***

***(c) The plaintiff shall have costs of the suit and interest.***

It is so ordered.

**Dated, signed and delivered in Nairobi on this 4<sup>TH</sup> day of JUNE 2020.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Gatumuta for the plaintiff

No appearance for the 2<sup>nd</sup> defendant

**Kajuju – court clerk**