



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 464 OF 2017

ROSE WAMBUI NJUGUNA.....PLAINTIFF

VERSUS

JANE NYAMBURA KIMUCHU.....1ST DEFENDANT

AGNES WAIRIMA GATHI.....2ND DEFENDANT

ANTHONY GICHURU NJUGUNA.....3RD DEFENDANT

JUDGEMENT

1. By a plaint dated 10th July 2017 and filed in court on 12th July 2017, the plaintiff seeks judgment against the defendants jointly and severally for:-

- (i) A declaration that the suit property Plot No. 1-310 Mathare North lawfully belongs to the plaintiff, Rose Wambui Njuguna.*
- (ii) Delivery of vacant possession of the suit property by the defendants to the plaintiff within 14 days from the date of delivery of judgment.*
- (iii) The 1st defendant to pay back and refund all the monthly income collected by themselves.*
- (iv) General damages.*
- (v) Costs and*
- (vi) Interest on iii and iv above.*

2. Upon being served with copies of plaint and summons to enter appearance, the 1st defendant entered appearance through the firm of M/S S. Ogeto Ongeri & Co. Advocates on the 4th December 2017. Later on 27th June 2019 she appointed the firm of Mosongo & Co. Advocates. She also filed statement of defence dated 4th October 2019. The 2nd and 3rd defendants entered appearance through the firm of F. N. Kimani & Associates Advocates on the 16th October 2017. They also filed a statement of defence dated 2nd November 2017.

3. PW1 Rose Wambui Njuguna, the plaintiff, told the court that the 1st defendant was an employee of her co-wife, Grace Mukami now deceased. Agnes Wairima, the 2nd defendant was the 3rd wife and Antony Gichuru Njuguna is the plaintiff's step son and also Grace Mukami's son. She adopted her witness statement dated 10th July 2017 and the list of documents dated 10th July 2017. She produced the documents on the list as exhibits P1 to P15 respectively. She told the court the plot no. 1-310 Mathare North (hereinafter referred to the 'suit property') belongs to her and not her late husband Francis Peter Njuguna Rurigi. She further stated that she separated with the deceased due to domestic violence.

4. She said her marriage to the deceased was blessed with two children, namely Maureen Wairimu Njuguna and Anthony Gichuru Njuguna. She told the court that she was allocated the suit property by the Nairobi City Council. That she is the one who gave the money to the deceased Francis Njuguna to construct the houses on the said property. She said she got loans from the Nairobi City Council and she was the allottee of the plot. They also used the proceeds from the sale of houses in Kibra. That the name of the deceased appears on the plot card as she had put his name as her next of kin. She further stated that she is the one paying rates for the said plot and also the loan though she would send the deceased at times to pay on her behalf. She did not sell the suit property to the deceased. The said sale agreement was drawn by J. K. Gatuguta who had already passed on. She got a letter from the Law Society of Kenya dated 20th June 2017 confirming that the said advocate passed on, on 29th December 2004. The signature on the sale agreement is not hers as it was forged. She prays that the prayers in

the plaint be allowed.

5. DW2 Jane Nyambura Kimuchu the 1st defendant, told the court she is the wife of the late Francis P. Njuguna (deceased). She adopted her witness statement and the list of documents dated 4th October 2019. She told the court that the plot booklet bore the names of Rose Wambui and Francis P. Njuguna. That the beacon certificate and the building plans are in the name of Francis P. Njuguna. The sale agreement dated 30th July 2009 and the power of attorney are signed by Rose Wambui. She also told the court that she would collect rent from the suit property and take it to Francis P. Njuguna in his office at Kariobangi.

6. DW1, Agnes Wairima Gathii, the 2nd defendant, also adopted her witness statement dated 2nd November 2017 and the list of documents dated 2nd November 2017. She told the court that the plaintiff had a relationship with her late husband but they divorced in 1984. That the plaintiff resurfaced in 2013, when Francis P. Njuguna died. She told the court, she lived with the deceased at Umoja Kiamumbi together with four of his children. She also told the court that the 1st defendant was a caretaker in the suit property and therefore an employee of her late husband. She prays that the plaintiff's case be dismissed with costs.

7, The 3rd defendant, Antony Gichuru Njuguna adopted the 2nd defendant's evidence.

8. At the end of the hearing, parties filed written submissions.

The Plaintiff's submissions

9. The plaintiff's submissions are dated 13th November 2019. The plaintiff is the registered proprietor of Plot NO.1-310 Mathare North having acquired the same through an allotment to her and an ownership card issued to her. The plaintiff denies having made a special power of attorney or the sale agreement. She denied signing any of these documents hence the purported signatures are a forgery. She made a report of the said forgery to Ruaraka Police station which matter was recorded as OB No. 33/12/8/2014. The purported special power of attorney and sale agreements drawn and witnessed by J. K. Gatuguta advocate on 30th July 2009 are fraudulent as the said advocate died on 29th December 2004. He could not be able to draw or witness the said documents. The authorization in the letter dated 3rd August 2015 from Nairobi City County granting her authority to carry out maintenance is a confirmation that she is recognized as the owner.

10. The suit property was allocated to her by the defunct Nairobi City Council. The documents produced by the plaintiff and the defendants confirm that the plaintiff was allotted the suit property. The payments book, confirm that plaintiff has been paying the rates. The letter dated 23rd May 1984 in the 2nd and 3rd defendant's list of documents confirm it is the plaintiff who balloted and was placed in position of ownership. In a letter dated 9th July 2014 the Nairobi City County confirm that the suit parcel is registered in the name of Rose Wambui Njuguna. In the letter dated 3rd August 2015 the Nairobi City County grants the plaintiff authority to carryout painting works, floor repairs and grilling on the suit property. The county acknowledges the plaintiff as the owner. The defendants unanimously base their claim on the fact that the deceased purchased the land from the plaintiff as per the impugned special power of attorney and sale agreement dated 30th July 2009. It means the plaintiff was allotted the parcel of land and the question is the validity of the sale agreement.

11. In paragraph 21 of the plaint, the plaintiff states that the sale agreement and the purported special power of attorney are fraudulent, a misrepresentation and illegal. The said documents were drawn by J. K. Gatuguta Advocate who died on 29th December 2004 and as such the said Advocate was not available to draw or witness the said documents. The letters dated 20th June 2017 from the Law Society of Kenya confirms the said Advocate passed on, on 29th December 2004 and that he was the sole proprietor of the said firm. The documents were drawn by the individual advocate rather than the law firm. The said sale agreement is not witnessed. The sale agreement dated 30th July 2009 does not measure upto the standards of the agreement as contemplated under the provisions of Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya. The sale agreement cannot be regarded to be a valid and enforceable agreement for the disposition of an interest in land. It is the plaintiff's case that she did not sign the said agreement and power of attorney. She made a report to the police vide OB No. 33/12/8/2014. The sale agreement was obtained by fraudulent means through forgery of the plaintiff's signatures.

12. The sale agreement dated 30th July 2009 does not confer any interest on the deceased person. Paragraph 4 of the said agreement discerns that the agreement entitles a party who shall not have defaulted to sue for money together with such damages. This therefore means, if the plaintiff, has defaulted the only recourse available to the defendants is to sue for money and damages and not to claim ownership of the parcel of land. The suit property cannot belong to the deceased unless the appointed representatives of the deceased file a suit against the plaintiff according to the purported agreement.

13. The plaintiff stated that she used to give the deceased money to go and pay for the loan for the construction of the units in the suit property. This is why the documents bears the name of the deceased. The copy of the booklet for the loan request clearly shows the allottee is the plaintiff. The statement of account Number 810310 dated 18th September 2012 in the 2nd and 3rd defendants' list of documents clearly shows the plaintiff paid for the loan materials. Even assuming the housing units were constructed by the deceased, the same do not confer any legal proprietary interest in the deceased.

14. The 2nd and 3rd defendants have attached in their documents, a letter dated 20th June 1990 on which the deceased allegedly writes to the Housing Development Department stating that the ownership of the suit parcel of land should remain singly on his name. This document is a purported communication between the Housing Department and the deceased and cannot confer any legal interest to the deceased and so do the letters dated 3rd July 1987 and 29th January 1987 respectively. It is clear that the defendants have been collecting rent from the suit property. They have attached a copy of records for rent collecting clearly showing they have been receiving rent undeservingly. She prays that she be found to have proved her case on a balance of probabilities and the prayers in the plaint be allowed.

The 1st defendant's submissions

15. They are dated 27th January 2020. The special power of attorney dated 30th July 2009 ought to be presumed and authenticated in line with section 91 of the Evidence Act, and Section 4 of the Registration of Documents Act. The plaintiff conferred all her proprietary rights, interest and title to the suit property to the deceased on 30th July 2009 for valuable consideration of Kshs.500,000/- when she signed the Agreement for sale and the registered Power of Attorney dated 30th July 2009. The special power of attorney dated 30th July 2019 in particular sets out that the power of attorney is irrevocable in the part of the plaintiff as the donor. She has put forward the cases of **Agri Seedsco Limited vs Christine Baig & Another [2019] eKLR**; **CCB vs MIB & Another [2014] eKLR**.

16. The special power of attorney dated 30th July 2009 contained the words “This power of attorney is irrevocable on my part”. The consideration of Kshs.500,000 is something of value and is valid under the law. She has put forward the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**. The alleged fraudulent conduct by the plaintiff has not been proved, and therefore she should not leave fraud to be conferred by this honourable court from the facts. The special power of attorney and agreement of sale dated 30th July 2009 is regular, enforceable and continuing.

17. The deceased purchased the property from the plaintiff but the suit property was yet to be registered in the name of the deceased in line with the agreement dated 30th July 2009 as at the time of his demise. The deceased developed the structures, managed, maintained, leased, received rents and paid rent and all outgoings, entered into agreements with third parties in respect of the suit property. The court ought to take judicial notice that proof of ownership for the suit property and surrounding parcels at Mathare Valley North Site and Service Scheme up till now are the letters of allotment by the City Commission of Nairobi, Housing Development Department. The instrument used to convey interest in such land is by way of irrevocable power of attorney as tendered in evidence before this Honourable Court by the defendants. The letter of allotment bears the name, ID numbers, image and the signatures of both the plaintiff and her spouse Francis Peter Njuguna Rurigi (deceased). She has relied on Section 6(c) and 7 and 9 of the matrimonial property Act, No. 49 of 2013.

18. The suit property was acquired during the subsistence of the marriage between the plaintiff and the deceased. The beacon certificate dated 8th October 1985 for the suit property was addressed to the deceased and so are the building plans. The suit property belongs to the Estate of Francis P. Njuguna Rurigi (deceased). She prays that the court allows the 1st defendant’s prayers by dismissing the plaintiff’s suit with costs. The court is urged to issue a declaration that the registered irrevocable special power of attorney dated 30th July 2009 is continuing and cannot be cancelled. Further, a declaration that plot NO. 1-310 Mathare North lawfully belongs to the estate of Francis P. Njuguna Rurigi deceased, costs of the suit and interests.

The 2nd and 3rd Defendants’ submissions

19. They are dated and filed in court on 13th February 2020. It is not in dispute that the suit property was acquired during the subsistence of the marriage. The letter from the Housing Development Department terms of offer dated 8th March 1985 was signed by the plaintiff and the deceased. The application form to the Housing Development Department dated 26th June 1982 shows the plaintiff as the applicant but the same was also signed by the deceased. The loan application booklet to Nairobi City Commission has both photographs and signatures of the deceased and the plaintiff. The building plans dated 8th October 1985 were all procured and signed by the deceased. They have relied on Section 6(3) and 9 of the Matrimonial Property Act, No. 49 of 2013. There is material loan payment voucher dated 24th September 1986 in the name of Francis P. Njuguna which he undertook so as to develop the said plot. The suit property having been acquired and substantially developed by the deceased during the subsistence of their marriage he ought to have had matrimonial interest on the plot being the husband of the plaintiff.

20. It is trite law in evidence that he who alleges must prove his/her case. This is as per Section 107 of the Evidence Act. Fraud is a serious allegation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond unreasonable doubt. They have put forward the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**. No evidence has been adduced or tendered by the plaintiff to prove her allegations of fraud. The only thing the plaintiff did was to deny ever signing the documents or selling the said parcel of land. They have also put forth the case of **Mbuthia Macharia vs Anna Mutua Ndwiga & Another [2017] eKLR**. In the instant suit the plaintiff ought to have undertaken a forensic examination on the signatures she disapproved being hers.

21. The power of attorney and the sale agreement executed by the plaintiff dated 30th July 2009 remain valid and enforceable. The allegation that the same were attested by a dead person is utterly false and does not hold water. The law firm of J. K. Gatuguta is still registered and operational in Nairobi. The attesting parties to the sale agreement and the power of attorney is still alive and well. The same was witnessed by the individual who further went ahead to stamp on the documents. The said stamp and attesting party clearly point out to an individual not a law firm. The allegations that the said instrument does not meet the threshold of Section 3(3) of the Laws of Contract Cap 23 Laws of Kenya are utterly false. The power of attorney dated 30th July 2009 was duly registered on 28th August 2009 in accordance with Section 4 of the Registration of Documents Act, Cap 285 Laws of Kenya. There is no contradictory evidence from the plaintiff challenging the authenticity of the same. The two documents remain legally lawful and enforceable. They have relied on Section 91 of the Evidence Act.

22. The suit plot belongs to the Estate of Francis P. Njuguna Rurigi. The deceased was in possession of the original documents to the suit property. The rent collection records for the year 2011 to 2012 monies which were being handed to the deceased. This was confirmed by the 1st defendant who has been collecting rent to date. The plaintiff’s case is based on mere claims and allegations that have no power. They have put forward the case of **Susan Mumbi vs Kefala Grebedh (Nairobi HCCC No. 332 of 1993)**. They urge this court to find that the ownership of the said parcel of land belongs to the Estate of Francis P. Njuguna Rurige which ought to be enjoyed solely by his beneficiaries. They pray that the plaintiff’s suit be dismissed with costs to the defendants.

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

(i) Whether the plaintiff was allotted plot No 1 -310 Mathare North.

(ii) Whether the special power of attorney and sale agreement dated 30th July 2009 are valid and enforceable.

(iii) Has the plaintiff proved her case on a balance of probabilities?

(iv) Who should bear costs?

24. It is the plaintiff's case that she was allotted the suit property. Her signature appears on the allocation book as the allottee. She was issued with an ownership card. She proceeded to develop the suit property by constructing 16 housing units from her own savings as well as from the houses she had disposed off at Kibera. She has been paying rates to the City County regularly. It is the defendants' case that the suit property was allocated to the plaintiff and the deceased, Francis P. Njuguna Rurigi. The allotment documents which were produced by the defendants and the documents from the Nairobi City Commission Housing Development Department shows that the plaintiff was allotted the suit property. The plaintiff has relied on the letter dated 9th July 2014 from the Nairobi City County and the rates receipts that she is recognised owner of the suit property. There is also a letter dated 3rd August 2015 from the Nairobi City County asking the plaintiff to maintain the suit property. The records held by the Nairobi City County bear the name of the plaintiff. The plaintiff has explained that the photograph of the deceased appears because she had put him as her next of kin. She also told the court the money for the construction of the houses came from her savings. She also told the court that she disposed the houses in Kibera; that the same documents are in the name of deceased because he would make payments on her behalf. This explains why the beacon certificate and the building plans are in the name of the deceased. The deceased may have undertaken the actual construction of the housing units but it is the plaintiff who provided the resources. The defendants have not controverted these averments by the plaintiff. It is not in doubt therefore that it is the plaintiff who was allotted the suit property.

25. In paragraph 21 of the plaint, the plaintiff gives the particulars of fraud, misrepresentation and illegalities as follows:-

(a) Utilizing a purported special power of attorney appointing Francis Njuguna Rurigi as her attorney to deal with her property in Nairobi knowing that she had never at any one time made a special power of attorney.

(b) Utilizing a purported sale agreement of Plot NO. 1-310 Mathare North purporting that she had sold the aforesaid parcel to the deceased knowing she had never at any one time sold her land to the deceased or entered into any agreement over the sale of my property.

(c) Utilizing the plaintiff's signatures in the aforesaid documents knowing that they were not the plaintiff's acts but forgeries which matter was reported to the police vide OB 33/12/8/2014.

(d) Causing the documents being the purported special power of attorney and sell agreement all dated the 30th July 2009 purportedly drawn and witnessed by an advocate by the name of J. K. Gatuguta who died on the 29th December 2004 knowing that he could not be available to draw or witness the said documents.

(e) Discreetly and in a clandestine manner filing for succession without involving the plaintiff in order to hide from the plaintiff and the court their fraudulent and illegal activities of depriving her of ownership of the property.

26. The plaintiff denies that she sold the suit property to the deceased. The defendants rely on the power of attorney and sale agreement dated 30th July 2009. The plaintiff has disputed the signatures of the two documents. She told the court they were forgeries. She made a report to Ruaraka Police Station vide OB No. 33/12/8/2014. The complaint was that her signatures had been forged. The said documents were drawn by an advocate by the name J. K. Gatuguta. The plaintiff produced a letter from Law Society of Kenya confirming that from their records, the said advocate passed on, on 29th December 2004. The said advocate had declared himself to be sole proprietor of the said firm. The letter is dated 20th June 2017.

27. It is clear from the above that the said Advocate could not have drawn the said documents. It is the 2nd, and 3rd defendant's case that the said Advocate is alive and well. Nothing could have been easier than for them to avail, the said advocate to confirm that he is the one who prepared the documents. The letter from the Law Society of Kenya is dated 20th July 2017. The defendants have no other letter from the Law Society of Kenya to show that the firm is operational in Nairobi or in any part of the country. In the absence of any letter to the contrary, I find that the letter dated 20th June 2017 is undisputed. This means the sale Agreement and the power of attorney dated 30th July 2009 were drawn or witnessed by someone who had passed on by then.

28. **Section 3(3)** of the Laws of Contract Act Cap 23 Laws of Kenya provides that:-

No suit shall be brought upon a contract for the disposition of an interest in land unless:-

(a) the contract upon which the suit is founded:-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;

29. It is clear that, the said J. K. Gatuguta advocate could not have witnessed the said documents as he had passed on. The said sale

agreement and the power of attorney cannot be said to be valid hence not enforceable. I find that the plaintiff has demonstrated that she did not sign on the said documents. It therefore means that the sale agreement was obtained by fraudulent means including through forgery of the plaintiff's signature.

30. The documents relied on by the defendants are communication between the Nairobi City Commission Housing Department and the deceased. I find that they cannot confer any legal interest to him. I find that he took advantage of his relationship with the plaintiff to have some documents come out in his name. I find that the evidence on record confirm that the plaintiff was allotted the suit property hence she is the owner. I find that she has proved her case on a balance of probabilities as against the defendants. The defendants confirm that they are the ones collecting rent from the suit property. I find that the plaintiff is entitled to the rental income as this is her plot and not the deceased's.

31. All in all I find that the plaintiff's case was not rebutted. The suit property being Plot NO. 1-310 Mathare North does not belong to the Estate of the deceased Francis Peter Njuguna Rugiri but to the plaintiff. The court was not guided on the quantum of general damages to be awarded. I do not award any.

32. Accordingly, I enter judgment in favour of the plaintiff as against the defendants jointly and severally as follows:-

(a) That a declaration is hereby issued that the suit property being Plot NO. 1-310 Mathare North lawfully belongs to the plaintiff Rose Wambui Njuguna.

(b) That an order is hereby issued against the defendants to deliver to the plaintiff vacant possession of the suit property being Plot NO. 1-310 Mathare North within thirty (30) days from the date of this judgment.

(c) That the 1st defendant is hereby ordered to payback and refund all monthly income collected within sixty (60) days from the date of this Judgment.

(d) That costs of the suit and interest are awarded to the plaintiff.

It is so ordered.

Dated, signed and delivered in Nairobi on this 4TH day of JUNE 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd and 3rd Defendants

Kajuju - Court Assistant