



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CAUSE NO. 31 OF 2015

ANASTASIA NTAKIRA (suing as the legal representative of the estate of

M' KWIRIGA MWAMBA (Deceased).....PLAINTIFF

VERSUS

CHRISTOPHER M'MWARI ANTHONY.....1ST DEFENDANT

FESTUS. K. KATHENDU.....2ND DEFENDANT

DAVID GITUMA.....3RD DEFENDANT

HON. ATTORNEY GENERAL.....4TH DEFENDANT

JOEL MURIUKI MUGAMBI.....5TH DEFENDANT

JUDGMENT

1. Plaintiff is the daughter and legal representative of the estate of **M'Kwiriga Mwamba**, while the 1st and 3rd defendants are brothers of the deceased **M'Kwiriga Mwamba**. The deceased owned two parcels of land namely **Nkuene/Ngonyi/208 and Nkuene/Ngonyi/236** of which he was issued with the title deeds on **19.10.1988**. It is averred by the plaintiff that the suit parcels were alienated by 1st defendant when the owner of the land had already passed on.
2. The plaintiff instituted the suit through a plaint dated 28th April 2015 and amended on 17th June 2016. She sought a declaration that the **Land Parcel No. Nkuene/Ngonyi/208 and 236** belonged to the estate of the late **M'Kwiriga Mwamba**, that the subsequent division to **Land Parcels Nos. Nkuene/Ngonyi/1019, 1020 and 1021** was illegal, and that the court be pleased to authorize the Land Registrar Meru to cancel/revoke and rectify the titles and order them to revert back in to the names of the Late **M'Kwiriga Mwamba** to enable the administrator share the estate of the deceased to the beneficiaries.
3. She averred that the deceased **M'Kwiriga Mwamba** is the registered owner of the Land parcel No. **Nkuene/Ngonyi/208** measuring 0.8ha and **Nkuene/Ngonyi 236** measuring 2.988ha respectively.
4. That the late **M'Kwiriga Mwamba** died on **28th January 1990** and the plaintiff filed **High Court Succession Cause No. 93 of 2002** to which she was issued with a grant on 26th April 2010, where the land parcels No. **Nkuene/Ngonyi/208 and 236** were transmitted to the beneficiaries. That the plaintiff moved to Meru Lands office with a view of distributing the estate of the deceased as per the confirmed grant only to be informed that the land parcels were registered in the name of the 1st defendant in the year 2001.
5. That the 1st Defendant fraudulently transferred Land parcel No. **Nkuene/Ngonyi/208** into his names on 20/2/2001 and later on 23/8/2001 transferred the land to the 2nd Defendant. That the 1st Defendant fraudulently subdivided **land parcel No. Nkuene/Ngonyi/236** into three pieces on 14/6/2001 namely **L.R.No. Nkuene/Ngonyi/1019, 1020 and 1021** and transferred **L.r.No.Nkuene/Ngonyi/1019** into his names on 22/6 /2001, **L.r.No.Nkuene/Ngonyi/1020** to the 3rd defendant and then both parcels **1019 and 1020** were transferred to the 5th Defendant, while **L.r. No. Nkuene/Ngonyi/1021** was left in the name of the deceased.
6. The plaintiff avers that all the transfers were done illegally since they were done while no succession cause had been filed nor were the family members informed and/or involved. She further pleaded that the 1st defendant used fictitious claims i.e. **Misc Application No. 48 of 2000 and Misc Application No. 159 of 2001** to defraud the estate of the deceased. That all efforts to search for the claims have borne no fruits and she believed that the same were fictitious.

7. The 2nd Defendant (**Festus**) is a purchaser. He filed his statement of defence on 6/2/2017 denying the averments in the plaint, while stating that he purchased **L.r.Nkuene/Ngonyi/208** from the 1st Defendant on 23/8/2001 and has been in exclusive occupation of the same since then.
8. The 1st and 3rd defendants (the brothers of deceased) filed a preliminary objection on 17th June 2015 stating that this matter is res judicata to **Ldt No. 36 of 2000 (Christopher M' Mwari & David Gituma vs M' Kwiriga M' Mwamba)** which concerned the same subject matter and was between the parties through whom they claimed/defended the suit herein. In their statement of defence filed on 6/2/2017, they stated that the deceased was registered to hold **L.R. Nos. Nkuene/Ngonyi/208 and 236** in trust of himself (deceased) and the two brothers. That the 1st Defendant did not subdivide **L.r. Nos. Nkuene/Ngonyi/236** into three parcels fraudulently, but the same was done pursuant to a court process. They have cited the case **Meru Chief Magistrate Court Ldt 36 of 2000** which mandated the executive officer to sign all the relevant documents pursuant to the subdivision of the suit parcels and that the plaintiff must have been aware of these transactions before filing the succession cause in the year 2003.
9. The matter proceeded for hearing on mutual dates where witnesses for both the plaintiff and the defendants testified.
10. **Pw1 Anastacia Ntarika** testified that she is a daughter of the deceased and the legal representative of his estate. She presented the original titles for the suit premises, which were acknowledged by the court and the copies were marked as pexh 2a and 2b, which are item no. 2 in the plaintiff's list of documents dated 28.4.2015. It was also her testimony that the cases relied upon by the defendants were commenced after the demise of the deceased herein and specifically in the year 2001 and 2003. That as the legal representative of the estate of the deceased, she was not involved in the aforesaid cases cited by the Defendants. She further told the court that as a family, they reside in parcel No. 236. That Festus Kathendu took over parcel no. 208 and he has been in occupation of the same to date.
11. She further stated that Joel Muriuki, Christopher M' Mwari Anthony and David Gituma are the ones on Parcel No. 236. She averred that parcel 236 was subdivided into 3 where by Joel Muriuki took over parcels 2019 and 2020, while the other parcel was given to her father.
12. She produced the search records and copies of green cards of the properties as **Pexh 3a, 3b, Pexh 4a and 4b**. She also produced the demand letter as **Pexh 5** while the receipts are **Pexh 6**.
13. In cross-examination she stated that they acquired the suit premises in the years between 1963-1969 and they have been residing thereon ever since. She reiterated that they stay in Parcel No. 1021 which is a subdivision of parcel No. 236. Joel Muriuki stays in Parcel No 1019 and 1020. That Joel Muriuki entered the land in the year 2003 and has been there since then. That her mother died in the year 2007. That in 1999 when the area chief allegedly called a meeting her mother was still alive. That in the year 2005 her mother had raised charges against David Gituma and Christopher at the C.I.D offices but they were later on released. She stated that she only became aware of the transfers in the suit properties after finalizing the succession cause and was not aware of the transfer to the 1st and 5th Defendants on 2/1/2002. She could not ascertain whether she sought leave of the court in filing the suit given the lapse of time i.e. 15 years since 2001. She conceded that Joel had planted trees in the suit premises but reiterated that the defendant colluded in fraudulently obtaining the titles.
14. In re-examination she reiterated that she only filed the suit upon finding out from the lands registry that the suit properties had been transferred to the defendants. That in item 3 and 4 of the defendants' list of documents, it is David Gituma and Christopher M' Mwari who sold the land parcels of land to Joel. She also informed the court that they have never been chased away from the suit premises and that no one has ever filed succession cause in respect of their father.
15. **Dw1 Joel Muriuki Mugambi** the 5th defendant is a purchaser. He adopted his statement of 21.2.2017 as his evidence. He also produced the documents in his list filed on 22.2.2017 as exhibits 1-4. He stated that he bought Parcel No. 1019 from Christopher, while he bought parcel No. 1020 from David Gituma. That at the time they (1st and 3rd defendants) were the registered owners of the suit premises. That he conducted due diligence before buying the properties by first visiting the suit premises and also conducting a search from the land s office. That the land sale agreements were done before an advocate at M/s M.M. Koiga & Co. advocates near the lands office.
16. He started to utilize the land in the year 2002 to date and he has planted coffee and blue gum trees on the land. Thus he has been on the land for seventeen years and has been harvesting coffee ever since and equally has a workers house on the land. He further stated that when he was buying the land, no one complained until year 2016. He conceded that at the time he was buying the land, he saw the grave of the father to the plaintiff on the land but there is no other grave. That he was made aware of a dispute that pitted Gituma, his brother and mother to the plaintiff but he was informed that the case was concluded. He also told the court that he found the mother to the plaintiff when he bought the land and there have not been any disagreement between them. That the plaintiff is the one who cuts his trees without his permission.
17. The 5th Defendant passed on during the pendency of these proceedings, but after he had testified. He was substituted with **Charles Mwenda**.
18. A map (**Dexh 5**) was produced with the consent of the other parties, but in support of the case for the 5th defendant.
19. **DW2 Christopher M' Mwari** is the 1st defendant. He adopted his statement of 14.2.2017 as his evidence. He also produced the documents in the same list as 1st-3rd defendant's exhibit 1-10. He also produced a lone document in the list dated 28.2.2017 as their exhibit 11. He testified that the deceased was his brother who held the family land in trust for them. That he had previously sued his brother in an LDT case of which the family of the plaintiff was represented by an advocate known as Mrs. Ndorongo, they won the case and were given the land.
20. The plaintiff's father had even moved to the High court seeking orders of inhibition of the suit land, but the application as dismissed. They were later charged with the offence of conspiring to effect unlawful purpose which charges were in relation to the suit properties. He contends that even when Mwamba (his brother) was dying, they still had a case with him.

21. DW2 further stated that he later on sold the land to Kathendu Justus (2nd Defendant) and Joel Muriuki (5th Defendant). That it is only after the court issued a court order that he presented the same to the lands office and was issued with the titles to the suit properties. That he would sell the land in the same year and was fully paid. He confirms that his brother, Gituma sold his share of the land to Joel (DW1).

22. **DW3 David Gituma** corroborated the statement of DW2. It was his testimony that on 7/7/1999 when they went to the elders, their brother (the deceased) already had title as he had been given the land by their father. That it is the wife of the deceased who signed the consent forms. That they got the land from the court in **LDT NO. 36 OF 2000 and Case No. 159 of 2001**, pitting them and the deceased, and that he sold his land to Joel (Dw1).

23. On 17.1.2018, the court gave directions with the consent of the parties for the scene to be visited by Executive Officer of the court, who was to file a report capturing the boundaries and developments on the land. The report was duly filed on 5.3.2018. It shows that all the advocates of the parties were present during the scene visit, and so was the plaintiff and 3rd defendant. The report further shows that there is a fence separating parcel number 1021 from the parcels 1019 and 1020. Plaintiff occupies parcel 1021, while 5th defendant occupies parcel 1019 and 1021.

24. On 28/11/2019 the Court directed the parties to file written submissions before 27.2.2020. I have only seen the submissions of the plaintiff and those of 5th defendant. The plaintiff submitted that the suit premises in the hands of the 5th Defendant were initially obtained by the 1st and 3rd Defendants fraudulently and that titles emanating from an illegality cannot be bestowed upon a third party. On this point, she cited the case of **Elijah Makeri Nyang'wara v Stephen Mungai Njuguna & Another [2013] eKLR**.

25. It was further submitted that the 1st to 3rd Defendants did not have proper titles since the same were void in two aspects i.e. the district land tribunal did not have the mandate to handle land registered under the Registered Land Act and the fact that the deceased was dead at the time of the proceedings. On this point, the cases of **George Wainaina Chege vs Samson Njuguna Wakaya [2017] eKLR** and **Sarah Kobilu Chebii & Another v David K. Chesang [2019] eKLR** were cited.

26. It was also submitted that the suit herein was not time barred since plaintiff only realized the fraud after completion of the succession cause. That fraud cases starts from the point of knowledge of the alleged fraud or illegality. On this point, she cited the case of **Stephen Onyango Achola & Another vs Edward Hongo Sule & Another [2004] eKLR**.

27. The 5th defendant submitted that the suit herein is time barred under **Section 7 of the Limitation of Actions Act**. That he exercised due diligence before buying the land and that the plaintiff had not shown that the 5th defendant had any knowledge of omission, fraud or mistake, or that he contributed to such fraud. It was also submitted that the 5th defendant has been in absolute occupation of his land for the last 18 years. He relied on the case of **Job Muriithi Waweru v Patrick Mbatia [2008] eKLR**.

Analysis and Determination

28. I have considered the pleadings, the evidence of the parties herein and the submissions thereof. I do find that the issues for determination herein are; **whether the suit herein is time barred; whether the suit premises were acquired fraudulently by the Defendants; and whether the plaintiff warrants the orders sought.**

Whether the suit herein is time barred

29. **Section 7 of the Limitation of Actions Act** provides as follows:

'An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.'

30. **Section 26 of the Limitation of Actions Act** provides:

"Where, in the case of an action for which a period of limitation is prescribed, either:

(a) the action is based upon the fraud of the defendant or his agent, or of any person 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"

31. In **Edward Moonge Lengusuranga v James Lanaiyara & another [2019] eKLR** the Court held as follows;

".....If we decide to tabulate the limitation time from the period when the 1st Defendant was put into possession of the suit land, to when the suit was filed, the time sums up to nineteen years. On the other hand if we tabulate the limitation from the time the suit land changed title, we would be looking at 14 years, either way the Plaintiff's case would be statutorily time barred.

43. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the Limitation of Actions Act. It

follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred....”

32. In the instant suit, the change of titles as well as the occupation of the suit parcels by 2nd and 5th defendants occurred in years 2001-2002 which is a period of 13-14 years up to the time this suit was filed on 28th April 2015. The suit is therefore time barred unless fraud is proved.

33. The plaintiff alleges fraud on the part of the defendants and that she realized the fraud after she sought to transfer the suit premises in accordance with the confirmation of grant issued for the estate of their father. She attached a certificate of confirmation of grant dated 26/4/2010.

34. The defendants on the other hand allege that the suit herein relates to recovery of land, hence the same ought to be brought within the span of 12 years as enshrined in Section 7 of the Limitation of Actions Act.

35. There are tell-tale signs to indicate that plaintiff was aware that the land had been alienated before year 2010 (when she got the grant). The first point to consider is in the respect of occupation of the suit parcels. In her evidence in chief, plaintiff had this to say in respect of parcel 208;

“Festus Kathendu took land parcel no.208 and he subdivided it. He took the whole parcel. He stays on the land. We don’t stay on that land”.

While on cross examination by Mr. Mutegi, counsel for the 1st- 3rd defendants, plaintiff had stated as follows;

“For Nkuene/Ngonyi/208, it is in name of Festus Kathendu. He has been there since a time I cannot recall well”.

36. The foregoing is a clear indication that plaintiff was aware of the occupation of the **parcel 208** by the 2nd defendant from the time Festus took over the land which was year 2001.

37. As for parcel no. 236, the plaintiff had even claimed during cross examination by Mr. Riungu that she only came to know 5th defendant in court. However, in the same cross examination proceedings, she stated that;

“I learnt that 5th defendant was occupying portions of our land in the year 2003”.

38. Thus even as plaintiff was filing the succession cause, she was aware that the land in question was occupied by persons who were not her family members and who became her direct neighbors from those yester-years.

39. The second point to consider is the scene visit exercise. The same revealed that plaintiff has been in occupation of the land parcel number 1021 while 5th defendant was in occupation of parcels 2019 and 2020. The parcels are separated by a fence. The coffee belonging to the 5th defendant was planted in year 2001-2002 save for one coffee plant at the boundary which had been planted by plaintiff’s father along with the coffee inside parcel 2021. This report confirms that indeed 5th defendant had taken over his parcel in year 2002.

40. Thirdly, it has emerged that the takeover of the suit parcels by the defendants was not a peaceful or clandestine affair. When 1st defendant embarked on subdividing the land parcel no.236, he sought a court order (see his exhibit 10) for the officer commanding Nkubu police station to provide the applicants (read 1st defendant) with security.

41. The issue of police involvement did not stop there. The document marked as Defence exhibit 11 for 1st -3rd defendants is a bond and bail document where Gituma had been charged with the offence of conspiracy to effect an unlawful purpose. This was in year 2005. This is in line with plaintiff’s own evidence that her mother had raised charges against 1st & 3rd defendants in year 2005 at the C.I.D offices.

42. It follows that the dispute was acrimonious and in the open, hence plaintiff cannot feign ignorance of the same.

43. Finally, the court has taken into account that plaintiff filed the succession cause in year 2002 of which she obtained the limited grant on 23.10.2002. It is inconceivable that plaintiff’s succession case was filed just after the suit properties had been transferred to 1st defendant in year 2001, but plaintiff remained in the dark regarding the registration of the said land until the time she acquired the confirmed grant. After all it has emerged that 2nd defendant and 5th defendants had already bought the parcels from 1st and 3rd defendant before the filing of the succession cause.

44. From the foregoing analysis, I have no doubts that plaintiff was aware that the suit parcels had been taken over by 1st defendant who alienated the land thereafter. What is apparent is that the plaintiff was buoyed by the acquisition of the confirmed grant and the fact that she still had the original titles of the suit parcels indicating that the land was in her father’s name. I conclude that this suit filed on 11/5/2015 is time barred.

Whether the suit premises were acquired fraudulently by the Defendants

45. I have no doubts that the suit parcels L.r. No. Nkene/Nkonyi/208 and L.r. No. Nkuene/Ngonyi/236 were both registered in the name of **M’ Kwiriga s/o Mwamba** (the deceased herein) in the year 1988. There is no dispute on this point. The plaintiff avers that her father was

dead when the titles were transferred to defendants and she availed a death certificate indicating that deceased passed on, on 28th January 1990. The proceedings before the Land District Tribunal have not been availed by any of the parties and the court cannot know when the said proceedings were commenced.

46. However, defence exhibit 3 (ruling in L.D.T 36 of 2000) and 4 (ruling in High Court misc. Application no.16 of 2001) clearly indicate that there was a tribunal award which was read in court on 30.6.2000 and adopted as a judgment of the court on 9.1.2001. In those two documents, the family of the plaintiff wanted to appeal against the award from Land Tribunal of which an application to appeal before the Eastern Provincial Appeals Committee is captured as defence exhibit 7.

47. On 23rd April 2001 the magistrate's court directed the executive officer to sign all documents on behalf of the defendants (named as **M'Kwiriga Mwamba** and **M'Irura Mwamba**) in respect of the tribunal award. And on 13.3.2001, the 1st defendant obtained a court order to have police security at the time of excising parcel no. **Nkuene/Ngonyi/236**.

48. In **Misc. Application No. 16 of 2001 M' Irura M' Mwamba versus Christopher M' Mwari & Davit Gituma** the applicants had sought an order of inhibition against subdivision of **Land Parcel No. Nkuene/Ngonyi/236** until the determination of the appeal. It was held that the appeal before the Provincial Appeal Committee could proceed without an order from the court.

49. The summation of the proceedings relating to the two cases pitting the 1st and 3rd defendants on one hand and the family of the deceased on the other hand clearly show that the latter were aware of the aforementioned proceedings. This is corroborated by the fact that the 1st and 3rd defendants had a dispute with the mother of the plaintiff of which the two defendants were apparently charged in court.

50. The green cards of the two properties (208 and 236) also shows that titles were issued to the 1st, 2nd and 3rd Defendants after the determination of the court cases.

51. What emerges from this analysis is that the alienation of the suit parcels by the 1st defendant and the eventual transfer of the land to the other defendants was a court sanctioned process. This coupled by the occupation of the 2nd and 5th defendants in the suit properties clearly shows that plaintiff's family were equally aware of these court processes.

52. The plaintiff contends that the court in **Ldt No. 36 of 2000** did not have jurisdiction to handle the case and she has relied on the two cases; **George Wainaina Chege vs Samson Njuguna Wakaya [2017] eKLR** and **Sarah Kobilu Chebii & Another v David K. Chesang [2019] eKLR**. However, the two cited cases are distinguishable from this case in that in both the cited cases, the applicants were actually challenging the decision of the tribunal by way of an appeal. The present suit is neither an appeal nor a Judicial Review proceeding where the court would be mandated to examine the legality of the tribunal award. The plaintiff cannot therefore claim that the tribunal had no jurisdiction or that the proceedings were fictitious.

53. In Misc. Application No. 16 of 2001 the same stated that the deceased had explored his appeal in the Provincial Appeals Committee. The determination of the Provincial appeals committee has not been cited by the plaintiff and or defendant hence the court cannot determine whether the tribunal's jurisdiction was ousted.

54. In **GALAXY PAINTS COMPANY LTD v FALCON GUARDS LTD [2000] eKLR** the court held as follows;

"It is trite law, and the provisions of O.XIV of the Civil Procedure Rules, are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination.

55. In **Gandy v. Caspair [1956] EACA 139** it was held that;

"Unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record...."

56. It is trite law in evidence that he who asserts must prove his case. **Section 107 of evidence Act** succinctly states:

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

57. Having found that the suit premises herein were transferred to the Defendants through a court process, I conclude that the plaintiff has not proved the element of fraud on the part of the 1st and 3rd Defendants. The 1st and 3rd Defendants admitted to have sold the land to the 2nd and 5th Defendants, hence the latter lawfully acquired the suit parcels.

Whether the plaintiff warrants the orders sought.

58. The plaintiff has not proved her case on a balance of probabilities. I therefore find that the suit herein lacks merits and the same is therefore dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JULY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the parties/advocates on notice. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE