



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 642 OF 2003**

**JANE NJERI WAGACHA.....1<sup>ST</sup> DEFENDANT**

**PETER KINUTHIA WAGACHA .....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JAMES KARIUKI NG'ANG'A .....RESPONDENT**

**JUDGMENT**

This appeal relates to a piece of land known as parcel No. Loc. 16/Kigori/68. The said parcel of land is said to have been registered in the name of Simon Wagacha Kinuthia who is the husband and father of the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively.

The proceedings in the lower court started with a plaint filed by James Kariuki Ng'ang'a at the Chief Magistrate's Court Thika. He is the respondent in this appeal. In the said plaint he stated that he was the administrator of the estate of his late father one Ng'ang'a Muchara who died sometime in 1965 at Maji Mazuri in Baringo District.

He was granted letters of administration under the Senior Principal Magistrates Court Succession Cause No. 318 of 2000 at Muranga. He also pleaded that the appellants herein are administrators of the estate of Simon Wangacha Kinuthia issued under Succession Cause No. 38 of 2001 at Thika. He pleaded that his late father Nganga Muchara was the registered proprietor of the land in dispute and that the later Simon Wangacha Kinuthia owned the land neighbouring the suit land.

Sometime in the year 2000 the respondent conducted a search at the land registry Thika, and discovered that the land in dispute was registered in the name of Simon Wangacha Kinuthia on 22<sup>nd</sup> August, 1988 and a title issued. It was his case that the purported transfer and registration of the land in dispute to Simon Wangacha Kinuthia was illegal and fraudulent.

He has pleaded particulars of fraud which include that Ng'ang'a Muchara having died in 1965 no proper transfer of land could be effected in 1988 except through a succession cause in respect of his estate. It is also pleaded that such a transfer could only be legally effected by a court appointed administrator of the estate of Ng'ang'a Muchara. The only succession cause filed in respect of that estate was done in year 2000 and letter of administration issued on 1<sup>st</sup> December, 2000.

Further, no genuine valid or legal transfer could have been effected without the consent of the Land Control Board as this was agricultural land.

Upon discovering the fraud, he lodged a caution against the title and reported the matter to District

Criminal Investigation Officer Thika. He also pleaded that the land in dispute was also the subject of succession cause No. 38 of 2001 at Thika and succession cause No. 1552 of 2002 at Nairobi. His claim against the two appellants was for orders to rectify the register and cancel the registration of Simon Wangacha Kinuthia as the registered owner of that land and restore the registration of his father as the proprietor. He also asked for the costs of the suit.

His claim was denied by the appellants in their joint statement of defence who stated that the respondent's father sold the land to the late Simon Wangacha Kinuthia for a consideration of Kshs. 1,328/= which was paid by instalments, the last of which was made on 11<sup>th</sup> April, 1965. There were documents in writing that proved the said transaction which they sought to produce in court.

It is also their case, upon the said purchase the 1<sup>st</sup> appellant and her husband the late Simon Wangacha Kinuthia took possession of the said piece of land and have been in continuous and uninterrupted possession and occupation. They added that, registration of land from the father of the respondent to Simon Wangacha Kinuthia was made pursuant to a transfer duly executed by both parties upon completion of the agreement for sale. Any fraud was denied and also that the Land Control Act Cap 302 was not in existence in the year 1965. Additionally, the appellants pleaded that the plaintiff's suit was statute barred pursuant to section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

The appellant's further pleaded that the filing of Succession Cause No. 38 of 2001 at Thika, and the report by the plaintiff to Thika Criminal Investigation Office to implicate the appellants over the land in dispute, were attempts by the respondent to circumvent the law on limitation to recover the land.

After a full hearing the lower court agreed with the respondent and on 2<sup>nd</sup> September, 2003 gave judgment in his favour. Aggrieved by the said judgment the appellants lodged this appeal.

In the memorandum of appeal the appellants faulted the trial court for not finding that the respondent's suit was statute barred. He was also faulted for holding that the suit was not res judicata. The trial court was also faulted for purporting to make orders which in effect reversed or overruled the decision of the High Court in succession cause No. 1552 of 2002.

Further, he was faulted for holding that the appellant's exhibit 1 -7 were inadmissible because they were carbon copies without considering the contents thereof. The transaction in issue having been concluded before the coming into effect of the Land Control Act, the court was faulted for holding that the consent of the Land Control Board was required. It was also alleged that the respondent's evidence was contradictory and inconsistent.

Both counsel for the parties have filed written submissions which I have noted. As at the time the hearing was taking place in the lower court, the land in dispute was registered in the name of Simon Wangacha Kinuthia. Some documents were produced in the cause of the trial dating back to the years 1962 – 1965. The said documents were in Kikuyu language but translated into English. They bore the names of both Simon Wangacha Kinuthia and Nganga Muchara.

It is clear from those documents that Ng'ang'a Muchara intended to, and did sell the land in dispute to Simon Wangacha Kinuthia. Those transactions were witnessed by an Advocate by the name Kihoro Cerere. Every transaction related to land, in law, must be in writing. The parties therefore complied with the law. The Law Of Contract Act Section 3 (3) confirms this position.

Prior to enactment of Act No. 21 of 1990, Section 3 (3) of the Law of Contract Act provided that no suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded or some memorandum or note thereof is in writing or is signed by the party to be charged or by some person authorised by him to sign.

Although it was not necessary for both parties to sign the memorandum aforesaid, the documents on record confirm that the late Ng'ang'a Muchara signed those documents. The Land Control Act did not

come into operation until 1967 and therefore the submission that the Land Control Board consent was not a requirement is true. The subsequent registration of the land in the name of Simon Wangacha Kinuthia was in furtherance of the said agreement executed before the coming into effect of the Land Control Act.

When the High Court confirmed the grant in favour of the appellants, in succession cause No. 1552 of 2002 and vested the land in the appellants, the only recourse available was to either move the court to revoke the grant or appeal that decision. The filing of the case in the lower court was an affront to the order of the High Court. The lower court suit was therefore misplaced.

Particulars of fraud were pleaded. But fraud is a criminal offence and proof of such an allegation must be proved beyond any reasonable ground. In the judgment however, the learned trial magistrate said as follows,

**“in the absence of any explanation from the defendant as to how she obtained registration to the land, then the court is not wrong to assume as the plaintiff alleges that it was obtained fraudulently.”**

With respect, an assumption is not proof of any fraud. The registration of the land in dispute in the name of Simon Wangacha kinuthia cannot be faulted. The suit in the lower court by the respondent should have been dismissed. Going by the evidence adduced in the lower court, this appeal is allowed by setting aside the judgment of the lower court in its entirety. The appellants shall have the costs of the suit in the lower court and in this appeal.

***Dated, signed and delivered at Nairobi this 7<sup>th</sup> Day of December, 2016.***

**A. MBOGHOLI MSAGHA**

**JUDGE**