



**REPUBLIC OF KENYA**

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

**ELC NO. 23 OF 2014**

**DAVID KAMUNYA KINGORI.....1<sup>ST</sup> PLAINTIFF**

**MARGARET WANJIRU KINGORI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**WAMBUI NDERITU.....1<sup>ST</sup> DEFENDANT**

**MARY NYAGUTHII KINGORI.....2<sup>ND</sup> DEFENDANT**

**GRACE MUKAMI KIAMA.....3<sup>RD</sup> DEFENDANT**

**JANE WANGUI KAIRU.....4<sup>TH</sup> DEFENDANT**

**ELINA MUTHONI GACHERU.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs' claim in this suit is contained in an amended plaint dated **21/1/2016** and filed in court on **25/1/2016** which seeks judgment against the defendants jointly and severally for:-

**(a) A declaration that the defendants are registered as proprietors of the land comprised in Title Nos. BUNGOMA/KIMININI/2122, 2123, 2124, 2125 and 2126 in trust for themselves and which trust should now terminate.**

**(b) The registration of parcel Nos. BUNGOMA/KIMININI/2122-2126 be cancelled and the register rectified so that the said land do revert to Title No. BUNGOMA/KIMININI/753 and which should be shared among all the children of the late JOHN MWANGI KINGORI GATHIRIMU and RUTH NYOKABI KINGORI.**

**(c) An order for the preservation of the land parcel Nos. BUNGOMA/KIMININI/2122 - 2126 while pending the hearing and determination of this suit.**

**(d) Costs.**

**(e) Interest**

**(f) Any other relief that this honourable court may deems fit to grant.**

**THE AMENDED PLAINT**

2. In the amended plaint, the plaintiff claimed that all the parties herein plus one deceased *Wangechi Muchemi* were children of *Kingori Gathirimu* and *Ruth Nyokabi Kingori* who was his second wife. Both parents are now deceased. Kingori and a son of the first wife bought plot no 352 **Kiminini settlement scheme** which was registered in the name of that son. The second family was settled on the said land while the first house was settled on Kingori's ancestral land in Nyeri. Following a tussle, **plot No 352** was then subdivided into two and Kingori's share was renamed **Bungoma/Kiminini/753** (hereinafter also called "**Plot No. 753**") measuring **13.5 acres**; he registered it in the name of his second wife as a gift. The plaintiffs aver that **plot No. 753** is family land meant for all the children of Kingori and that their mother therefore held it in trust for all the children of the deceased. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are said to have moved out of the suit land after they became married. The 2<sup>nd</sup> defendant is said to have resided on the suit land at all times while utilizing **3 acres** thereof while Kingori's widow utilized **10 acres**. However upon the widow's death the **10 acres** were utilized by the 1<sup>st</sup> defendant while the 2<sup>nd</sup> defendant

retained use of **3 acres**; after their mother's demise it also became apparent to the plaintiffs that the land had been subdivided into plots numbers Title Nos. **BUNGOMA/KIMININI/2122, 2123, 2124, 2125 and 2126**, with plot No. **2126** measuring **1.2 acres** and the rest **1.1 acres** which parcels were transferred to the defendants to hold one parcel each. The plaintiffs claim that that subdivision and transfer disinherited them of the family property which they allege was contrary to the wishes of their late father. They aver that the defendants were registered as owners of the said land as trustees and that the trust should now be determined and the subdivisions cancelled so that the land reverts to its previous identity for the purpose of its being shared among all the children of the deceased. They state that it is inconceivable that the mother to the parties intended to disinherit them.

### THE 1<sup>ST</sup>, 3<sup>RD</sup>, 4<sup>TH</sup> AND 5<sup>TH</sup> DEFENDANTS' DEFENCE

3. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants filed their amended statement of defence dated **25/2/2016** on **7/3/2016** and denied the claim. They stated that their mother had subdivided the land after informing all her children and no objection was raised during her lifetime regarding that subdivision and that the 1<sup>st</sup> plaintiff had been settled by their father on a **10 acre** portion of land in Nyahururu. They further averred that as the parties were all content with the subdivision and distribution done by their mother there was no succession cause filed in respect of their mother's estate. They maintain that their mother was within her legal rights to act as she did with regard to the suit land. They aver they were registered as owners of the subdivisions absolutely and deny that they hold the title in trust for all the children of Kingori.

### THE 2<sup>ND</sup> DEFENDANT'S ADMISSION

4. The 2<sup>nd</sup> defendant threw in her lot with the plaintiffs and therefore she never opposed the suit. She filed an admission on **17/3/2014**, concurring with the plaintiff that the titles issued to the defendants should be cancelled and the land be reverted to her late mother's estate for equitable distribution to the beneficiaries.

### EVIDENCE OF THE PARTIES

#### Plaintiffs' Evidence

5. **PW1**, the 1<sup>st</sup> plaintiff, **David Kamunya Kingori** testified on **7/3/2019** and adopted his written witness statement dated **5/2/2014**.

6. At the hearing **PW1**, averred that the 2<sup>nd</sup> Plaintiff had given him authority to plead on her behalf and the court indeed confirmed that the original of the said authority was filed with the plaintiff.

7. **PW1's** evidence conformed to the contents of the plaintiff. He maintained that his father had the land registered in his mother's name because it was still family land. He stated that the 2<sup>nd</sup> defendant was not married and she was given **3 acres** of the land. He averred that there are no boundaries to sub plots within the main parcel land, and he did not have any means of knowing that the land was subdivided when his mother was alive, and even for some time after her demise. He stated that he had never discussed subdivision of the land with his mother. His mother died on **31/1/2013**. He then went and farmed on the land the same year after her death but the defendants appeared and re-ploughed the land. Thereafter he obtained information about the subdivision of the main parcel into several parcels. He averred that his mother was deceased by the time the register was opened for the subdivisions, and therefore she could not have transferred the land to any person by then. He produced a green card that showed that the register for parcel No. **753** was closed on **24/5/2013**, and the respective registers for all the resultant subdivisions showing that they were opened on the same date, **24/5/2013**. He testified further that his advocate had obtained a copy of the consent to *subdivide* which was dated **17/12/2009**. He also produced a copy of a mutation dated **17/12/2009** but on the face of it lodged for registration and registered on **24/5/2013**. He stated that his father had no land elsewhere save the Nyeri ancestral land which was left to the first wife. He said it was his father's intention that all his children should benefit from the suit land. He stated that at the time of the hearing the defendants were leasing out all the land save the **3 acres** that the 2<sup>nd</sup> defendant is utilizing, to third parties. He denied that his parents gave him the land that he holds in Nyahururu.

8. Upon cross-examination he stated that he purchased the Nyahururu land with his own money in **1987**. He also asserted that he had urged his father that the land be registered in his mother's name to hold in trust for the family. According to him all those family members who did not get land from the subdivision should be awarded land. He testified that his mother was about **100** years old. He denied knowledge of any transfer signed by their mother in favour of the defendants.

9. At the end of the plaintiff's evidence the 2<sup>nd</sup> defendant was asked to cross-examine the plaintiff but she stated that her position is that she too would like orders issued as prayed in the plaintiff, and therefore declined the opportunity.

10. The plaintiffs then closed their case.

#### The Defendants' Evidence

11. **DW1, Jane Wangui Kairu**, the 4<sup>th</sup> defendant, testified on **10/3/2020**, on her behalf and on behalf of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. Her evidence is that there were **8** children in the family but now there are **6**, some having died; that they were brought up on the suit land; that her father transferred the suit land to her mother and said that it was reserved for the female children in the family; that her father had also bought every son in each family, including the 1<sup>st</sup> plaintiff, a parcel of land and a wife; that the 1<sup>st</sup> plaintiff and the other sons were bought land at Mairo-Inya in Nyahururu; that the girls in the first house live on their mother's land in Nyeri; that her mother subdivided the land in **2009** and the 1<sup>st</sup> plaintiff declined to attend to witness the subdivision despite invitation; that all the proper steps were followed by her mother; that she went to the chief's office and the land control board and said that if each person wanted title they would have to pay for the same; according to **DW1**, her mother had signed every document needed for the distribution; that after her mother's burial the 1<sup>st</sup> plaintiff assaulted the female members in the family and said there was no land there for girls; that they reported to the police and got an OB number;

that the female members of the family united and pursued their titles but the 2<sup>nd</sup> defendant never joined in the exercise; that the 2<sup>nd</sup> plaintiff declined to be given land and stated that she had assumed Ugandan nationality; that her father had other land but her half-brother from the first house sold it and that no succession proceedings were taken out in respect of her mother's estate.

12. Upon cross-examination **DW1** admitted that she got married in **1976** and settled on her husband's land in Nyandarua; that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants also got married; that her father gave the 2<sup>nd</sup> defendant **3.5 acres** on which to work after she returned from her matrimonial home but her mother reduced it to **2.5 acres** upon subdivision. She also admitted that no title to any of the subdivisions was issued during her mother's lifetime. She stated that she was sent by her mother to call all the others presumably for the purpose of the subdivision but the 1<sup>st</sup> plaintiff declined to attend. She testified that her mother then took the female members of the family, including the 2<sup>nd</sup> defendant, to the land control board and signed all relevant documents. However when specifically asked about them, she could not produce the transfers that her mother had allegedly signed. She admitted that she first used the land after her mother's death in **2013**. She maintained her position that her father had distributed his assets before his demise and that the female children in the first house had inherited the ancestral land in Nyeri and there was no complaint emanating from that family.

13. **DW2, Mary Nyaguthii Kingori**, the 2<sup>nd</sup> defendant testified on **10/3/2020**. Her evidence is that the land has never been subdivided on the ground; that her father stated that he had left the land to their mother to distribute to her children; that after her mother's death, she was surprised when she learnt that the land had been subdivided; that there had been no family meeting for the purpose of subdivision; that she lives on the land and yet she did not witness any physical process of subdivision of the land taking place; and that after her mother died the 1<sup>st</sup> plaintiff farmed on the land in **2013** and **2014** and in the second year the 1<sup>st</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants took possession of the land by use of force saying that they had title deeds. Later on they came with a group of persons and destroyed her house; subsequently they cut down the trees and the bananas. She only returned to the land later. Upon cross-examination by Mr Wambura, she denied that she had ever been married and averred that she had stayed in the same compound as her father. She stated that she still uses a portion of what was shown her by her father save that it has now been reduced to **2.5 acres**.

14. The 2<sup>nd</sup> defendant then closed her case.

15. None of the parties filed any submissions in this matter. I have considered the pleadings and the evidence adduced in this case.

## **DETERMINATION**

### **The Issues and Determination**

16. The issues which arise for determination in this suit are as follows:

- (a) Whether Kingori Gathirimu transferred the suit land to Ruth Nyokabi Kingori to hold in trust for all members of his family.*
- (b) Whether the subdivision of parcel No. 753 and transfer of the subtitles to the defendants was fraudulent.*
- (c) Whether the titles to the subdivisions should be cancelled and the land be reverted to its original status for distribution to the beneficiaries of the estate of Ruth Nyokabi Kingori.*
- (d) Who should bear the costs of this suit?*

17. The above issues are discussed as hereunder.

**(a) Whether Kingori Gathirimu transferred the suit land to Ruth Nyokabi Kingori to hold in trust for all members of his family.**

18. Kingori Gathirimu had two wives. He had a tussle with the son of the first wife over the parent parcel that bore the suit land upon subdivision. That tussle ended up before the court. When Kingori secured parcel **No. 753** in his favour he had it registered in the name of his second wife. The very fact that he had had a land tussle with a member of the first house is an indicator that the registration in his second wife's name was probably meant to fend off any claims by the first house after his demise. At the hearing, the 1<sup>st</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants failed to produce evidence that Kingori Gathirimu express his wish to be that the suit land was reserved only for the female children in the family. They have also failed to produce evidence that Kingori Gathirimu bought a wife and land for their brother so as to exclude him from the distribution of the suit land in the event of the demise of their parents. The 1<sup>st</sup> plaintiff has also failed to prove that he purchased the land he occupies at Mairo-Inya in Nyahururu. **Section 109** of the **Evidence Act** provides as follows:

#### **“109. Proof of particular fact**

**The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

19. The provisions of **Section 108** of the **Evidence Act** reads as follows:

#### **“108. Incidence of burden**

**The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”**

20. In this case it was incumbent on the 1<sup>st</sup> 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants to prove that their father expressly reserved the land for the female children of the family and that the 1<sup>st</sup> plaintiff had been issued with alternative land in Nyahururu by his father so as to rule out his partaking of an inheritance in the suit land. The defendants would be the parties to fail if no evidence were adduced in respect of the fact. Besides, **Section 27** of the **Land Registration Act** provides as follows:

**“27. Transfer without valuable consideration**

**(1) A proprietor who has acquired land, a lease or a charge by transfer without valuable consideration holds it subject to-**

**(a) any unregistered rights or interests subject to which the transferor held it;**

**(b). .....**”

21. The transfer of the suit land herein was from a husband to a wife and they were aware that they had children. It must be presumed that prior to the transfer the husband had held the land in trust for his family which was settled thereon. The transferee should, given the provision of **Section 27** of the **Land Registration Act**, be deemed to have continued holding the land in trust for that family also as she had not obtained the land in a purchase transaction where consideration was paid. Finally, both Kingori and his wife died intestate.

22. Therefore, in the absence of any concrete evidence to the contrary, this court finds that Kingori transferred the suit land to his wife to hold on behalf of the entire family and not only on behalf of their female children.

***(b) Whether the subdivision of parcel No. 753 and transfer of the subtitles to the defendants was fraudulent.***

23. The register of the original parcel **No. 753** was not closed during the lifetime of the registered owner (that is, the mother to the parties herein) but after her demise. The registers of the subdivisions of parcel **No. 753** were also opened after her death. The only documents that appear to bear a date prior to the date of her demise are the application for consent to subdivide, the consent to subdivide and the mutation form. They all bear the date **17/12/2009** on their face. However those documents do not have anything on their face to indicate to whom the plots were to be transferred. Normally, a mutation leads to creation of subdivisions which are subsequently registered in the proprietor's name for dealing; the mutation was lodged for registration on **24/5/2013**; by this date the registered owner was long deceased. She could not have personally lodged it. The same remained unregistered for a long time. In the circumstances this court can not tell whether the deceased wished to have that particular mutation registered. There is no document produced as evidence of authorization by the deceased to the defendants to lodge the mutation form for registration. There is no evidence adduced by the defendants to show that she gave them the task of seeking titles to the various subdivisions in their respective names. The fact remains that as at the time of her demise with as he or she wishes. The registered owner left a whole undivided parcel and absent a written will her true intention can not be gauged by this court.

24. This court's task would have been easier had the all the defendants been physically settled by their mother on the subdivisions allegedly created by the deceased out of the suit land by the time of her demise as that settlement may have corroborated the allegation that she gave them their respective portions. However only one, the 2<sup>nd</sup> defendant was settled thereon, and she has denounced the subdivision of the land and its registration in the defendants' names.

25. Proof that the deceased executed transfers to the defendants could have been provided by way of producing the actual executed documents of transfer of land that were registered in favour of some of the defendants. None were produced. That kind of evidence could not therefore be tested by the ordinary means used in civil proceedings as it was not presented. In this court's view failure to produce a transfer duly executed by their mother considerably diminished the value and weight of the defendants' testimony that their mother had executed *all* documents requisite for the effectuation of transfer of the portions of the suit land to them.

26. In the circumstances this court finds that there is no proof from the defendants that their mother executed the transfers in their favour regarding subdivisions of land parcel **No. 753**.

27. On the other hand the plaintiff has presented evidence that the mutation and the transfers were registered long after the deceased had died and that she could not have possibly have had a hand in their registration. Lack of the registered proprietor's knowledge and participation in the registration of transfers that divested her estate of ownership of the suit land is sufficient evidence of fraud and illegality on the part of the defendants in this suit.

28. This court has noted from documents produced that the deceased was believed to have been born in **1912** and died in **2013**. She was therefore about a hundred and one years old. That is quite an advanced age. It has also not been shown that she was in full possession of her faculties by **2009** when the mutation is said to have been made. The 1<sup>st</sup> plaintiff alleges that she was not of good health during her last years, but no evidence he produced at the hearing, not even the obituary confirmed that. That notwithstanding this court finds that she was not involved in the registration of the mutation and the transfer of the subdivisions of parcel **No. 753** to the defendants.

29. In this court's view, the plaintiff has established that the subdivision and transfers were fraudulent.

***(c) Whether the titles to the subdivisions should be cancelled and the land be reverted to its original status for distribution to the beneficiaries of the estate of Ruth Nyokabi Kingori.***

30. **Section 26** of the **Land registration Act** provides as follows:

**“26. Certificate of title to be held as conclusive evidence of proprietorship**

**(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.”**

31. In view of the plaintiffs having proved the fraudulent and illegal registration of the mutation and the creation of new parcels out of the main title to the suit land and their disinheritance by the defendants, the plaintiffs are entitled to orders of cancellation of the subdivision of the land.

32. Section 24 of the **Land Registration Act** provides as follows:

**“24. Interest conferred by registration**

**Subject to this Act-**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ...**

33. Section 25 of the **Land Registration Act** provides as follows:

**“25. Rights of a proprietor**

**(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”**

34. Section 45 of the **Law Of Succession Act Cap 160** provides as follows:

**“45. No intermeddling with property of deceased person**

**(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

**(2) Any person who contravenes the provisions of this section shall-**

**(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**

**(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”**

35. From the provisions of **Section 24** it is clear that the rights of the deceased's estate were protected by law even after her demise in **2013** and the defendants had no standing to interfere with the suit land unless they obtained letters of administration to the deceased's estate which they never did.

36. From **Section 25** it is apparent that the registration of the defendants as proprietors does not absolve them from any duties they owe the plaintiffs as trustees.

37. As there is no will demonstrated to exist in respect of the estate, the defendants' failure to obtain a grant of letters of administration prior to the subdivision of the land rendered them to be intermeddlers in the eyes of **Section 45** of the **Law of Succession Act Cap 160**.

38. Under the **Law of Succession Act Cap 160** the estate of a deceased person can not and should not be distributed unless there is a confirmed grant which there was not in the instant case of the subdivision.

39. In the light of the foregoing, the subdivision of the suit land and transfer to the defendants was illegal and the resultant should be cancelled so that the land reverts back to its former status for distribution among the beneficiaries of the estate of Ruth Nyokabi Kingori, deceased.

***(d) Who should bear the costs of this suit?***

40. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants premeditated the events leading to the illegal registration of portions of the suit land in their respective names. They would ordinarily be condemned to costs of this suit. However all the parties herein are members of one family and relations are already strained due to this suit. **Article 45 (1)** of the **Constitution** provides that the family is the natural and fundamental unit of society and the necessary basis of social order and shall enjoy the recognition and protection of the State. Families are the building block of the nation and it is important to preserve cohesion in them in order to have a stable nation. In this court's consideration an award of costs to or against any of the parties is recipe for protracted familial strife. For the foregoing reasons I order that each party shall bear their own costs of the suit.

**CONCLUSION**

***(e) What orders should issue?***

41. Consequently I find that the plaintiffs have proved their claim against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants, and that the 2<sup>nd</sup> defendant effectively admitted the plaintiff's claim entirely with the cat that she was not involved in the illegal activities of the rest of the defendants which prompted this suit. In the circumstances I enter judgment in the plaintiffs' favour against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants and I issue the following final orders:

**(a) A declaration that the defendants are registered as proprietors of the land comprised in Title Nos. BUNGOMA/KIMININI/2122, 2123, 2124, 2125 and 2126 in trust for themselves and in trust for the plaintiffs which trust is hereby terminated forthwith.**

**(b) The registration of parcel Nos. BUNGOMA/KIMININI/2122, 2123, 2124, 2125 and 2126 in the defendants' respective names is hereby cancelled and the land register shall be rectified so that the said land parcels do revert back to Title No. BUNGOMA/KIMININI/753 which shall be shared among all the beneficiaries of the estate of late RUTH NYOKABI KINGORI.**

**(c) Each party shall bear their own costs of this suit.**

Dated, signed and delivered at Nairobi via electronic mail on this 26<sup>th</sup> day of August, 2020.

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**