



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 465 OF 2013**

**JOHN MURIITHI KIRAGU.....1<sup>ST</sup> PLAINTIFF**

**GRACE KIRAGU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MARY NYAMBURA JONAH.....1<sup>ST</sup> DEFENDANT**

**COUNTY COUNCIL OF KIRINYAGA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

By their amended plaint dated 23<sup>rd</sup> July 2009, the plaintiffs prayed for judgment against the defendants jointly and severally for the following orders:-

- a. *A declaration that the intended subdivisions by the defendants of L.R No. MWERUA/KAGIO/212/48 previously Plot No. 48 Kagio Market is un-lawful.*
- b. *A declaration that the purported sale agreement between the late JANE WANGECHI KIRAGU and the 1<sup>st</sup> defendant and any transactions between the two based on the purported sale agreement are void for all purposes.*
- c. *A permanent injunction do issue to restrain the defendants whether by themselves, their servants, agents, assignees, transferees, allottees or others whomsoever from claiming ownership, trespassing, entering, subdividing or in any manner interfering with L.R No. MWERUA/KAGIO/212/48 previously Plot No. 48 Kagio Market.*
- d. *An order that accounts of all arrears of rent be taken and the 1<sup>st</sup> defendant to pay all such arrears found due together with interest thereon at Court rates.*
- e. *Costs of this suit and interest thereon at Court rates.*

The claim was based on the pleadings that the 1<sup>st</sup> plaintiff is son of the late KIRAGU STEPHEN who is the registered proprietor of all that parcel of land known as L.R. NO.

MWERUA/KAGIO/212/48 measuring 0.613 hectares while the 2<sup>nd</sup> plaintiff GRACE KIRAGU is the administrator of the Estate of the said KIRAGU STEPHEN. That upon the death of the said KIRAGU STEPHEN, his wife JANE WANGECHI KIRAGU was issued with letters of administration over his Estate in P & A Cause No. 1156 of 1998 on 2<sup>nd</sup> June 1998 which was confirmed on 19<sup>th</sup> May 2000 and when JANE WANGECHI KIRAGU died on 25<sup>th</sup> March 2007, the 2<sup>nd</sup> plaintiff was appointed as the administrator of the Estate of KIRAGU STEPHEN in substitution of the said JANE WANGECHI KIRAGU pursuant to orders made in P & A Cause No. 1156 of 1998 on 29<sup>th</sup> March 2009. The said JANE WANGECHI KIRAGU gave a power of attorney to the 1<sup>st</sup> plaintiff through which he brings this

suit. It is the plaintiff's pleading that while the said JANE WANGECHI KIRAGU was ailing and without the knowledge and/or consent of the plaintiff or any of the children of deceased, she purportedly entered into a sale agreement for the sale of a portion of the suit premises herein to the defendant. The plaintiffs aver that the purported sale did not become known to him or any of the deceased's children and that it was not until the death of JANE WANGECHI KIRAGU that the 1<sup>st</sup> defendant started making claims to the property and it was then that the plaintiffs established the purported sale agreement that was entered into fraudulently and was therefore invalid in law. Particulars of the said fraud are provided in paragraph 8 of the plaint as follows:-

- a. ***The purported sale agreement was entered into without the knowledge of the plaintiff or any of the children of KIRAGU STEPHEN.***
- b. ***The vendor – JANE WANGECHI KIRAGU or widow of the registered proprietor only held a life interest in the suit property pursuant to Sections 35 (b) and 37 of the Law of Succession Act and she therefore did not have the necessary legal capacity to sell the property.***
- c. ***The purported sale agreement and the intended transfer of the demised portion did not get the sanction of the Land Control Board in accordance with the provisions of Section 6 of the Land Control Act Cap 302.***
- d. ***The purported vendor was not the registered proprietor of the suit property and could therefore not purport to dispose of the same.***

The plaintiffs further plead that in recognition of the 1<sup>st</sup> defendant's entitlement of a refund of any money she may have paid to JANE WANGECHI KIRAGU on the void transaction, they instructed their lawyer to write to the 1<sup>st</sup> defendant on 27<sup>th</sup> April 2007 notifying her that they did not intend to proceed with the sale transaction and that any money paid would be refunded to her upon proof of such payment but that notwithstanding, the 1<sup>st</sup> defendant has continued to persist in carving out a portion of the suit premises in collusion with the 2<sup>nd</sup> defendant as evidenced by a letter dated 22<sup>nd</sup> November 2007 in which the 2<sup>nd</sup> defendant indicated that its surveyor would sub-divide the suit premises. It is the plaintiff's case that the said letter is illegal.

The plaintiffs further plead that the 1<sup>st</sup> defendant entered the suit premise as a tenant and has neglected to pay rent to the Estate of KIRAGU STEPHEN full account of which would be tendered in evidence at the trial.

In her defence, the 1<sup>st</sup> defendant while admitting that JANE WANGECHI KIRAGU was issued with letters of administration in respect of the Estate of KIRAGU STEPHEN denied that the said JANE WANGECHI KIRAGU sold a portion of the suit premises without the consent of the plaintiffs as pleaded in paragraph 7 of the plaint or that the plaintiffs did not know about the agreement between JANE WANGECHI KIRAGU and the 1<sup>st</sup> defendant or that the same was entered into irregularly or fraudulently. The 1<sup>st</sup> defendant pleaded that she is in fact a co-partner in the suit premises and the only issue pending is the partitioning of the same.

On its part, the 2<sup>nd</sup> defendant pleaded that the late JANE WANGECHI KIRAGU had the capacity to sell the disputed plot which she co-owned with the 1<sup>st</sup> defendant and further, that it was shown the sale agreement relating to the dispute plot which satisfied all the requirements necessary to transfer the same and the 1<sup>st</sup> plaintiff cannot feign ignorance of the transaction as he participated in the same. The 2<sup>nd</sup> defendant further pleaded that the ***Land Control Act*** cannot be relied upon because the lease issued in favour of the late KIRAGU STEPHEN expired long before the transaction of the disputed plot. Like the 1<sup>st</sup> defendant therefore, the 2<sup>nd</sup> defendant similarly sought the dismissal of the suit with costs.

The hearing commenced before me on 10<sup>th</sup> July 2014. Only the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant testified in the case.

In his testimony, the 1<sup>st</sup> plaintiff testified that the 2<sup>nd</sup> plaintiff who is his sister is the administratrix of the Estate of their late father KIRAGU STEPHEN who died in May 1997 and a grant of

letters of administration with respect to his Estate was initially issued to their late mother JANE WANGECHI KIRAGU in Succession Cause No. 1156 of 1998 and when she died in March 2007 the same was rectified in March 2009 and the 2<sup>nd</sup> plaintiff appointed as administratrix in place of their mother and that among his late father's properties was the parcel No. MWERUA/KAGIO/212/48 which was registered in the name of his late father and his partner one JAMES KAMANDA. On the property there is a shop and two bars one of which is run by the 1<sup>st</sup> defendant who came in as a tenant after their father died but during their late mother's life time and was paying rent. He also added that the property was changed to Barclays Bank of Kenya which charge has never been discharged.

He told the Court that what prompted him to file this suit was a letter dated 27<sup>th</sup> November 2007 from the County Council of Kirinyaga (2<sup>nd</sup> defendant) to the effect that its surveyors would

be sub-dividing the said property and that although the said letter refers to Plot No. 48 it actually meant the property L.R No. MWERUA/KAGIO/212/48. He denied any knowledge about the agreement dated 28<sup>th</sup> July 2006 by which his late mother sold a portion of property No. MWERUA/KAGIO/148 to the 1<sup>st</sup> defendant adding that neither he nor any of his siblings were aware about that transaction or gave their consent. He insisted that his late mother never signed any transfer document in favour of the 1<sup>st</sup> defendant and that the property subject of this suit is still in the names of his late father and his partner. He insisted that the subject matter of this suit is the property known as L.R No. MWERUA/KAGIO/212/48. He produced a list of his documentary evidence marked 1 to 11.

The 1<sup>st</sup> defendant testified that she bought a plot known as No. 48 Kagio from the plaintiffs' mother and that the 1<sup>st</sup> plaintiff was among the witnesses to the transaction and the purchase price was Ksh. 500,000/=. The agreement was dated 28<sup>th</sup> July 2006. The transaction was approved by the 2<sup>nd</sup> defendant and she went into possession and carries on business therein as it was a developed plot. Therefore when she later received a letter from the plaintiff's advocate offering a refund of the purchase price, she declined. She added that she only occupies a portion of Plot No. 48 while the plaintiffs occupy the other portion. She said she does not know about the property known as L.R No. MWERUA/KAGIO/212/48. She also produced her list of documentary evidence marked as defence Exhibits 1 to 7.

The 2<sup>nd</sup> defendant did not lead any evidence.

Submissions were filed by both Mr. Kingara advocate for the plaintiffs and Mr. Magee advocate for the 1<sup>st</sup> defendant. Mr. Maina advocate for the 2<sup>nd</sup> defendant did not file any submissions.

I have considered both the oral and documentary evidence adduced by the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant as well as the submission by counsels.

As is clear from paragraph 13 of the plaintiff's amended pleadings, the remedies being sought herein are with respect to the parcel of land known as "**L.R No. MWERUA/KAGIO/212/48 previously Plot No. 48 Kagio Market**". It is therefore the plaintiff's pleading that the property described as L.R No. MWERUA/KAGIO/212/48 and Plot No. 48 Kagio Market are in fact one and the same property. However, from the grant of letters of administration in respect of the Estate of the plaintiff's late father KIRAGU STEPHEN KABUITO issued to the plaintiff's late mother JANE WANGECHI KIRAGU in HIGH COURT OF KENYA AT NAIROBI SUCCESSION CAUSE NO. 1156 of 1998 on 2<sup>nd</sup> June 1998 and confirmed on 19<sup>th</sup> May 2000, the schedule of properties is listed as follows:-

1. L.R NO. MWERUA/KAGIO/212/48
2. L.R NO. MUTIRA/KAGUYU/537
3. L.R NO. MWERUA/KABIRIRI/437
  
4. L.R NO. MWERUA/KABIRIRI/519
5. L.R NO.MWERUA/KABIRIRI/517
6. Plot No. 43, NGURUBANI MARKET

7. Plot No. 48 KAGIO MARKET
8. Plot No. 2 KANDONGU
9. Plot No. 185 SAGANA TOWNSHIP
10. UN-SURVEYED B C R PLOT NO. 1 MAKUTANO MARKET

It is therefore clear that the Estate of KIRAGU STEPHEN KABUITO comprised of both L.R No. MWERUA/KAGIO/212/48 and also Plot No. 48 Kagio Market. The two properties could not therefore refer

to one and the same property. Indeed the 1<sup>st</sup> plaintiff confirmed this while under cross-examination by Mr. Magee advocate in the following words:-

***“I can see from the grant at page 6 of my documents it refers to both Plot No. MWERUA/KAGIO/212/48 and also Plot No. 48 Kagio Market”.***

And when he was further cross-examined by Mr. Maina, he said:-

***“I can see the sale agreement dated 28.7.2006 in which my mother was selling a portion 20 ft by 120 ft in Plot No. MWERUA/KAGIO/48. So what was being sold was Plot No. 48 and not L.R No. MWERUA/KAGIO/212/48. I was a witness to the sale agreement so I cannot say I was not aware”***

Earlier in his evidence in chief, the 1<sup>st</sup> plaintiff denied any knowledge of that agreement. He said:-

***“Before that agreement was entered into, none of us was consulted. I only came to know about it around 2006 when my mother was sick. I can see my name on the agreement as a witness. I was witnessing it because my sister Grace was willing to refund the money”***

The agreement entered into between the plaintiff's mother JANE WANGECHI KIRAGU and the 1<sup>st</sup> defendant on 28<sup>th</sup> July 2006 identifies the property being sold as follows:-

***“A portion of 20 ft X 120 ft in Plot No. MWERUA/KAGIO/48”***

The agreement goes further to provide in paragraph 4 thereof that it ***“is sold with all the development thereon i.e. including the house structure”***. The agreement was witnessed by the 1<sup>st</sup> plaintiff and one Eliud Mwangi Kariuki both of who signed it. The 1<sup>st</sup> defendant testified that after the agreement was approved by the 2<sup>nd</sup> defendant, she went into possession and runs a business in a portion of the plot while the plaintiffs occupy the other portion. All that remains is the sub-division of the same and it was the letter from the 2<sup>nd</sup> defendant addressed to the family of JANE WANGECHI KIRAGU and dated 22<sup>nd</sup> November 2007 that provoked this suit. The letter itself reads as follows:-

***“RE: PLOT NO. 48 KAGIO MARKET***

***This is to inform you that the County Surveyor will be on the ground on 6<sup>th</sup> December 2007 at 10.a.m. for the purpose of sub-dividing the above mentioned plot. Both parties are advised to avail themselves since the exercise will continue in the absence of either party”***

Similarly when the plaintiff's advocate J.K. KIBICHO addressed the 1<sup>st</sup> defendant on 27<sup>th</sup> April 2007 on the instruction of the plaintiff's family, he stated as follows:-

***“RE: SALE AGREEMENT OF PLOT NO. 48 KAGIO MARKET***

***We act for Grace Gakonyo Kiragu the administratrix of the Estate of the late Kiragu Stephen Kabuita (deceased). We are instructed that you entered in a sale agreement with the (sic) Jane***

***Wangechi Kiragu for the sale of a portion of the above land. We are further instructed that the Estate of the deceased does not now wish to proceed with the sale of the said portion of land”***

Taking all the above into account, it is clear that the agreement entered into between the 1<sup>st</sup> defendant and JANE WANGECHI KIRAGU was in respect to Plot No. 48 Kagio Market and not L.R. No. MWERUA/KAGIO/212/48. It is also clear that the two properties are not one and the same property and that both form part of the Estate of the late KIRAGU STEPHEN KABUITO. From the confirmation of grant dated 19<sup>th</sup> May 2000 issued in the name of JANE WANGECHI KIRAGU, all the above mentioned properties which include parcel No. L.R MWERUA/KAGIO/212/48 and Plot No. 48 Kagio Market were granted to the said JANE WANGECHI KIRAGU as the “***Sole beneficiary***”. Under Section 82 of the Law of Succession Act, the said JANE WANGECHI KIRAGU was therefore within her right to sell to the 1<sup>st</sup> defendant a portion of the Plot NO. 48 KAGIO and it cannot therefore be correct for the plaintiffs to plead that the agreement between the said JANE WANGECHI KIRAGU and the 1<sup>st</sup> defendant in relation to that plot was illegal.

The plaintiffs have also pleaded that the said agreement was fraudulently entered into and the particulars of fraud have been stated to include an allegation that neither the plaintiffs nor their siblings were aware that their mother had entered into the agreement with the 1<sup>st</sup> defendant over that plot and that the consent of the Land Control Board was not obtained. The agreement herein did not relate to agricultural land but rather to a plot in Kagio Market and therefore did not require the consent of the Land Control Board. On the allegation of fraud, the Court of Appeal had this to say in the case of **CENTRAL BANK OF KENYA VS TRUST BANK LTD & 4 OTHERS C.A CIVIL APPEAL NO. 211 OF 1996:-**

***“The appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in ordinary civil cases”***

There is a high standard required to prove fraud. The plaintiffs have not got anywhere near meeting that standard. The 1<sup>st</sup> plaintiff alleged that neither he nor his siblings were aware about the agreement relating to Plot No. 48 at Kagio Market yet he was a witness to the same. If there was any fraud proved in this case, it was on the part of the 1<sup>st</sup> plaintiff in trying to renege on an agreement that he witnessed. In short, none of the allegations of fraud levelled against the 1<sup>st</sup> defendant have been proved by the plaintiffs in this case.

The plaintiffs also claim that an account of all arrears of rent be taken and that the 1<sup>st</sup> defendant be made to pay all such rent. The defendant insists that she is not a tenant on the said plot. In cross-examination by Mr. Kingara advocate for the plaintiff, she said:-

***“I was never a tenant. I bought it”***

No evidence was produced of any tenant/landlord relationship between the plaintiffs and the 1<sup>st</sup> defendant or even between JANE WANGECHI KIRAGU and the 1<sup>st</sup> defendant. Indeed the Court was not told what rent, if any, the 1<sup>st</sup> defendant was paying. The Court can only conclude therefore that this claim was an afterthought.

Further, even if there was a basis upon which this Court can make an order for the taking of accounts, the procedure for making an order for the taking of accounts is provided for in **Order 20 Rule 3 of the Civil Procedure Rules** in the following terms:-

***“An application for such order as is mentioned in rule 1 and 2 shall be made by Chamber Summons and be supported by an affidavit when necessary filed on behalf of the plaintiff stating concisely the grounds of his claim to an account and such application may be made at any time after the time for entering an appearance has expired”***

No such application was made for the taking of accounts as required under **Order 20 of the Civil Procedure Rules.**

Ultimately therefore and having considered all the evidence in this case, I find that the plaintiffs have failed to prove their case against the defendants and are therefore not entitled to any of the orders sought in their amended plaint dated 23<sup>rd</sup> July 2009.

In the circumstances, the plaintiffs' suit is dismissed with costs to the defendants.

**B.N. OLAO**

**JUDGE**

**4<sup>TH</sup> DECEMBER, 2015**

COURT: Judgment delivered, dated and signed this 4<sup>th</sup> December, 2015 in open Court.

Mr. Kinuthia for Mr. Kingara for Plaintiff present

Mr. Macharia for Mr. Kagio for 2<sup>nd</sup> Defendant present

Ms Kiragu for 1<sup>st</sup> Defendant present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**4<sup>TH</sup> DECEMBER, 2015**