



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**ELC CASE NUMBER 815 OF 2017**

**THOMAS MWITA WANGUBO &**

**MOGOSI SAGIRAI TUNGUCHA**

**(Suing as the legal representatives and**

**administrators of the estate of**

**SAGIRAI TUNGUCHA).....PLAINTIFFS**

**VERSUS**

**MOHABE TURUKA.....1<sup>ST</sup> DEFENDANT**

**MOHAMMED OMARI.....2<sup>ND</sup> DEFENDANT**

**ZAKARIA WEINANI.....3<sup>RD</sup> DEFENDANT**

**JUMA WANDUZU.....4<sup>TH</sup> DEFENDANT**

**WANYACHA CHACHA.....5<sup>TH</sup> DEFENDANT**

**KIRIGITI TURUKA.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**A) INTRODUCTION**

1. At the heart of the present dispute is property comprised in title number Bukira/Buhiringera/60 measuring approximately forty decimal five hectares (40.5 Ha) in area (The suit property herein). The same is contained in Registry Map Sheet number 35. It is located within Migori County.

2. The plaintiffs are represented by Abisai and Company Advocates.

3. The defendants are represented by Agure Odera and Company Advocates.

**B) THE PLAINTIFFS' CASE IN BRIEF**

4. By a plaint dated 30<sup>th</sup> August 2017 and lodged in court on 4<sup>th</sup> September 2017, the plaintiffs have mounted this suit against the defendants jointly and severally for;

a) An order for a permanent injunction restraining the defendants from further trespass to the deceased's Parcel Land No. Bukira/Buhiringera/60, by tilling, committing waste, sub-dividing and/or occupying the suit property and eviction therefrom.

b) Costs.

c) Interest on (b) above.

d) Any other relief this court may deem fit and just to grant in the circumstances.

5. The plaintiffs' claim is that Sagirai Tungucha (Deceased) acquired the suit property through first registration in the year 1975. That the said deceased died on 18<sup>th</sup> September 1990 leaving the plaintiffs, among others, surviving him.

6. The plaintiffs further claim that in the year 2014, the defendants unlawfully trespassed into the suit property and committed acts of waste thereon. That as a result, the plaintiffs who are the lawful beneficiaries of the estate of the deceased, have suffered loss and damage thus, precipitating the instant suit.

7. The plaintiffs also reiterated the contents of the plaint in their reply to defence and defence to counter claim filed on 1<sup>st</sup> December 2017. They stated that the counter claim is founded on fraud and forgery hence the defendants have no claim whatsoever against them. They denied the counter claim herein and sought its dismissal as well as the statement of defence with costs.

8. The 1<sup>st</sup> plaintiff, Thomas Mwita Wangubo (PW1) testified that he was a grandson of the deceased. He relied on his statement dated 30<sup>th</sup> August 2017 alongside a grant of letters of administration in respect of the estate of the deceased dated 21<sup>st</sup> August 2017 (PEXh1), a certificate of death issued on 11<sup>th</sup> July 2017 regarding the deceased (PEXh2) and a certificate of official search dated 5<sup>th</sup> July 2017 in respect of the suit property (PEXh3).

9. PW2, Mogosi Sagirai Tungucha, a son of the deceased testified that the defendants unlawfully entered the suit property of the deceased in the year, 2014. That he is an administrator of the estate of the deceased which includes the suit property.

10. Learned counsel for the plaintiffs filed submissions dated 2<sup>nd</sup> June 2020 making reference to the orders sought in the plaint, brief facts of the case, the testimonies of PW1, PW2, Mohabe Turuka(DW1), Said Mohammed Omari (DW2) and other defendants and witnesses. Five (5) issues for determination including whether the defendants are the legal representatives of the estate of the deceased and whether the defendants jointly and severally trespassed into the suit property, are framed and analysed therein, in favour of the plaintiffs.

11. To buttress the submissions, counsel relied on authorities, inter alia, **Rujesh Pranjivan ChudaSama vs Sailesh Pranjivan ChudaSama (2014)eKLR**, which applied the authorities of **Kothari vs Quaresh (1967)EA 364**, **Otieno v Ougo and another (1986-1989)EALR 466 and Alfred Njau and others vs City Council of Nairobi (1982-88)IKAR 229** on *locus standi* of a litigant. Counsel further cited **Re Estate of John Gakunga Njoroge (2015)eKLR**, and **Morris Mwiti Mburugu vs David Kimathi M'Mburugu(2016)eKLR**, in regard to the protection of the estate of a deceased under Sections 45 and 82 of the Law of Succession Act Chapter 160 Laws of Kenya as well as the Court of Appeal decision in **Willy Kimutai Kitilit vs Michael Kibet(2018)eKLR**, with regard to the application of the doctrine of constructive trust. Therefore, counsel urged this court to enter judgment in terms of the orders sought in the plaint.

### C) THE GIST OF THE DEFENDANTS' CASE

12. In their statement of defence dated 19<sup>th</sup> October 2017 and filed in court on even date, the defendants denied the plaintiffs' claim and sought its dismissal with costs. They claim purchasers' interest over the suit property since they were purchasers for value thereof. That they purchased portions of the suit property from the kins of the plaintiffs namely Mwita Sagirai Tungucha(DW8), Jomo Sagiri Tungucha(DW7), Mogesi Sagirai Tungucha(PW2) and relevant agreements prepared accordingly.

13. The defendants stated inter alia, that the plaintiffs consented to the sale of part of the suit property and PW2 duly sold the same to them. That they occupy the suit property, enjoy the right to use the suit property and that the suit is statute barred.

14. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants claim to have duly bought 2.5 acres, 4.4 acres, 2.5 acres, 3 acres, 3 acres and 3 acres of the suit land respectively. They thus, counter claim against the plaintiffs for:-

- i. An order for a permanent injunction restraining the plaintiff from interfering in their respective portions forming part of LR No. Bukira/Buhiringera/60, by either threats to evict them and or cultivating therefrom.
- ii. An order to compel the plaintiffs and or their kin to execute instruments of transfer to the following defendants to wit; 1<sup>st</sup> defendant claim 2.5 acres, 2<sup>nd</sup> defendant claim 4.5 acres, 3<sup>rd</sup> defendant claim 2.5 acres, 4<sup>th</sup> defendant claim 3 acres, 5<sup>th</sup> defendant claim 3 acres and 6<sup>th</sup> defendant a claim of 3 acres, failure of which the Honourable court do allow the court Executive Officer /Deputy Registrar to execute instruments of transfer on behalf of each defendant as per the acreage claimed thereof, and in respect to LR NO. Bukira/Buhiringera/60.
- iii. Costs
- iv. Interest on ii above.
- v. Any other relief this court may deem fit to grant in the circumstances.

15. The 1<sup>st</sup> defendant(DW1) testified that he bought 2.5 acres of the suit property from DW7 at Ksh 62,000/= and signed a sale of land agreement dated 23<sup>rd</sup> May 2005(DEXh1). That he cultivated maize, potatoes, cassava and tobacco thereon between the year 2015 and the year 2017 before he was told by Benard a son of Mwita Sagirai to vacate the property.

16. According to Said Mohammed Omar, the 2<sup>nd</sup> defendant(DW2), he bought 4.5 acres of the suit property from DW7 as per agreement dated 12<sup>th</sup> April 2015(DEXh2). That he planted trees thereon as shown in the photos(DEXh3(a) and(b) as DW7 left for Tanzania.

17. DW3, Peter Zacharia Mwitwa told the court that he bought 2(1/2) acres of the suit property from Vincent Bitutu Mandere who had bought the same from DW7 and DW8 at Ksh 100,000/= . He relied on sale of land agreement dated 8<sup>th</sup> October 2011(DEXh4) and that he used to cultivate the portion of the suit property.

18. The 4<sup>th</sup> defendant(DW4) testified that he bought three (3) acres of the suit property from DW7 and DW8 in terms of (11 ) eleven herd of cattle. That he built and cultivated the portion of the suit property but does not live thereon. He did rely on his statement filed on 19<sup>th</sup> October 2017, agreement dated 19<sup>th</sup> October 2001(DEXh5) and photos (DEXh6).

19. DW5, Jacob Wanyacha Chacha testified that he bought three (3) acres of the suit property from DW8 who had inherited the same from the deceased. He relied on agreement dated 26<sup>th</sup> May 2005 (DEXh7).

20. In the words of Wycliffe Kirigiti Turuka, the 6<sup>th</sup> defendant(DW6), he bought three (3) acres of the suit property at Ksh 70,000/= from DW8, a brother to PW2. That DW8 had the right over the estate of the deceased.

21. DW7 relied on his statement filed in court on 19<sup>th</sup> October 2017. He stated that he sold part of the suit property to DW1, DW2 and DW4 who have the right over the same.

22. DW8 relied on his statement dated 19<sup>th</sup> October 2017 filed in court on even date and DEXhibits 1 to 7. He stated that PW2 in his step brother and that the suit property belonged to the deceased. That his brother DW7 sold part of the suit property to DW1, DW2, DW3 and DW4. He further stated that DW4 and DW5 bought part of the suit land from him(DW8) and he has no objection to the sale and transfer accordingly.

23. On 21<sup>st</sup> September 2020, learned counsel for the defendant's filed submissions dated 21<sup>st</sup> September 2020 making reference to the orders sought in the plaint and framed four (4) issues for determination including whether the defendants are purchasers for value of portions of the suit property and whether they are legally entitled to the property. Counsel analysed the issues in favour of the defendants. To reinforce the submission counsel cited the persuasive case of **Falcon Global Logistics Co. Ltd –vs- Management Committee of Eldama Ravine Boarding Primary School (2018) eKLR.**

#### **D) ISSUES FOR DETERMINATION**

24. It is trite law that the issues for determination in a suit generally flow from either the pleadings framed by the parties for the court's determination; see *Galaxy Paints Co Ltd vs Falcon Grounds Ltd(2000) 2 EA 385* restated in *Great Lakes Transport Company(V) Ltd vs Kenya Revenue Authority (2009)KLR 720.*

25. Having carefully considered the entire pleadings and evidence of the respective parties, as well as the rival submissions inclusive of authorities cited therein and the issues for determination dated 20<sup>th</sup> April 2018(plaintiffs' version), I am of the considered view that the following issues fall for determination herein;

a) Who is the proprietor of the suit property?

b) Do the claim of trespass and purchasers' interest for value hold to entitle the parties to the reliefs sought in their respective pleadings?

#### **E) DISCUSSION AND DISPOSITION**

26. Regarding the first issue, the plaintiffs stated at paragraph 3 of the plaint that the suit property belongs to the deceased who lawfully acquired the same through first registration in the year 1975. The defendants denied the plaintiffs' assertion at paragraph 8 of their statement of defence.

27. It was the evidence of PW1 that the deceased was the registered owner of the suit property as shown in PEXh3. That the deceased passed on in the year 1990 as disclosed in PEXhibit 1 and 2.

28. PEXh3 at part B (proprietorship section) reveals that the suit property is registered in the name of the deceased as at (w.e.f) 3<sup>rd</sup> April 1975 under the Registered Land Act Chapter 300 Laws of Kenya (The Repealed Act). This court is aware of the indefeasibility of title thereto under Sections 27 and 28 of the Repealed Act subject to Section 30 of the same Act.

29. In the case of *Michael Githinji Kimotho vs Nicholas Muratha Mugo Civil Appeal No. 63 of 1995 cited in Macharia Mwangi Maina and 87 others vs Davidson Mwangi Kagiri (2014)eKLR, at paragraph 15*, the Court of Appeal stated;

***“The protected rights of a proprietor under Section 28 of the Registered Land Act cannot be defeated except as provided in that Act and certainly not at the instance of a trespasser...”***

30. In the case of *Wainaina vs Murai and others(1976-80)IKLR 283 at 289/290*, Simpson J(as he then was) took a stand point which I duly

endorse. He observed thus:

***“The land in question is registered under the Registered Land Act...”***

31. PW2 fortified the testimony of PW1 that the suit property belongs to the deceased. He stated that:

***“...The land of the deceased which is LR No. Bukira/Buhiringera/60 and part of his estate has not been distributed amongst beneficiaries.”***

32. In cross examination, DW1 told the court that he knew that the suit property belonged to the deceased. DW1 also stated that the owner of the suit property was the deceased. The same position was affirmed by DW3, DW4, DW5, DW7 and DW8.

33. To that extent, it is common baseline that the suit property is registered in the name of the deceased. Thus, the issue of proprietorship thereof is resolved accordingly.

34. On the second issue, the plaintiff asserted that the defendants jointly and severally encroached on the suit property and committed acts of waste thereon with a view to dispossessing the lawful beneficiaries of the estate of the deceased. The particulars thereof are pleaded at paragraph 6(a) to (n) of the plaint.

35. On the other hand, the defendants stated at paragraph 10 of their statement of defence that they are strangers to the plaintiff's allegations. They claimed that they are purchasers of value and have rights over the suit property.

36. In examination in chief, PW1 told the court that:

***“The defendants unlawfully entered the suit land, LR NO. BUKIRA/BUKIRA/BUHIRINGERA/60 in the year 2014. They planted crops on the land and grazed thereon. The 2<sup>nd</sup> and 3<sup>rd</sup> built houses on the suit land.”***

37. During cross examination, PW1 maintained that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants used to cultivate the suit property until 2017. They claimed portions of the same ranging from 2.5 acres to 4.5 acres. That he was shocked to find the suit property having been sold to the defendants.

38. PW2 stated in examination in chief thus:

***“The defendants unlawfully entered the suit land in the year 2014. We did not allow them to enter thereon.”***

39. Both PW1 and PW2 testified that the suit property formed part of the estate of the deceased which has not been distributed among beneficiaries thereof. Indeed, PW1 and PW2 are lawful co-administrators of the estate as shown in PEXh1.

40. PW1 further testified;

***“...The sons of the deceased own no land. The suit land belongs to the deceased...”***

41. According to Clerk and Lindsell on Torts, 18<sup>th</sup> Edition at paragraph 18-01, the term “Trespass” means;

***“An unjustifiable entry by one person upon the land in possession of another...”***

42. In addition, I endorse the reasoning of Okong'o J in *Zachariah Onsongo Momanyi vs Evans Omurwa Onchagwa(2014)eKLR*, where he held that trespass is the unjustifiable intrusion of one person upon the land in possession of another. That the tort of trespass is actionable per se.

43. The plaintiff asserted that the purported purchase of the suit property by the defendants before the grant of PEXh1 and its subsequent confirmation, offends the provisions of Sections 45 and 82 of the Law of Succession Act Chapter 160 Laws of Kenya and as observed in *Mburugu case(supra)*,

44. This court is quite aware of the definition of “personal representative” and the relevant powers and duties under Sections 3, 76, 79, 82 and 83 of the Law of Succession Act Chapter 160 Laws of Kenya. It is also noted that Section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya defines the term “legal representative.”

45. It is trite law that the estate of a deceased person vests on the legal representative; see *Otieno vs Ougo and another(1986-89)EALR 466* and *Rajesh Pranjivan Chudasama vs Sailesh Pranjiva Chudasama(2014)eKLR*.

46. It has emerged from the pleadings and evidence on record that neither DW7 nor DW8 or both are legal representatives of the estate of the deceased. Therefore, they are not seized of legal capacity to deal with the estate including the suit property.

47. In *Fletcher vs Peck 10 U.S 87(1810)*, it was held

**“...but the rights of third persons who are purchasers without notice, for valuable consideration cannot be disregarded.....He has paid money for a title good at law...equity will not subject him to the penalties...”**

48. DW1 to DW8 were of the position that they bought portions of the suit property. However, they did so contrary to the law and procured no title thereto.

49. Clearly, the defendants are intermeddling with the estate of the deceased as stipulated under **section 45 of the Law of Succession Act (supra)** and were negligent in the purported transaction as noted by the Court of Appeal in the case of *Lawrence P. Mukiri Mungai, Attorney of Francis Muiroki Mwaura vs Attorney General Civil Appeal No. 146 of 2014(2017)eKLR*.

50. This court is conscious of the provisions of Sections 6 and 7 of the Land Control Act Chapter 302 of the Laws of Kenya alongside the decision in *Kariuki vs Kariuki(1983)KLR 227* with regard to void transactions and remedies thereof. Besides, I approve the reasoning in *Mwangi and another vs Mwangi(1986)KLR 328* that Land Control Board consent is not required for equitable and adverse possession rights over the land in question.

51. Additionally, I subscribe to the Court of Appeal position in *William Kipsoi Sigei vs Kipkoech Arusei and another (2019)eKLR*, that lack of consent of Land Control Board does not preclude the court from applying constructive trust and equitable estoppel in appropriate cases. In the present circumstances, DW7 and DW8 had no legal capacity to sell and transfer any portion of the suit property to DW1 to DW6 who are not bona fide purchasers of value. On that score, equitable principles under **Article 10(2)(b) of the Constitution of Kenya, 2010** and as held in *Sigei case (Ibid)*, can't be invoked in their favour.

52. The upshot is that the defendants' case fails to discredit the plaintiffs' case which is steadfast, cogent and proved against the defendants jointly and severally on a balance of probabilities. I proceed to render final orders thus:-

***a) Judgement is hereby entered in favour of the plaintiffs in terms of a permanent injunction, costs of the suit and interest on costs at court rates as sought in the plaint dated 30<sup>th</sup> August 2017 and duly filed on 04/09/2017.***

***b) The defendants' defence and counterclaim dated 19<sup>th</sup> October 2017 and filed in court on even date, be dismissed with costs to the plaintiffs.***

Orders accordingly.

**Delivered, Signed and Dated at Migori in open Court and through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge, this 22<sup>nd</sup> day of SEPTEMBER, 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In presence**

Both parties – Absent

Tom Maurice – Court Assistant