



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 1339 OF 2005

MARY MUGURE DANIEL KARIUKI.....1ST PLAINTIFF

MARY WANJIRU KARIUKI2ND PLAINTIFF

VERSUS

RAHAB WARUGA KARIUKI & 8 OTHERS.....DEFENDANTS

JUDGMENT

The Plaintiffs by a plaint dated 8th November 2005 filed the instant suit against the 1st Defendant and inter alia sought a declaration that the transfer to the 1st Defendant of parcel No. **Kabete/Nyathuna/301** was fraudulent and void abinitio on the basis that she transferred to herself what was is not entitled to. An application seeking an injunction filed simultaneously with the plaint was not certified urgent and from the record there is no evidence that this application was ever disposed off. The matter was on 23/11/2005 ordered transferred to the family Division by **Hon. Lady Justice Wendo** but was again on 9/3/2009 ordered retransferred to the Environment and Land Division by **Rawal Judge** as she then was. Hence on 6/12/2010 when the hearing commenced before **Hon. Lady Justice Okwengu**, as she then was the Plaintiff is take to have abandoned her application for injunction.

Pursuant to leave granted by the court on 8th February 2010 the Plaintiff amended her plaint to enjoin the 2nd to the 9th Defendant to whom the 1st Defendant had on or about the 29th October 2007 transferred portions of subdivisions out of land reference **Kabete/Nyathuna/301** being parcel numbers **Kabete/Nyathuna/2749, 2750,2751, 2752 and 2753.**

The Plaintiff in her amended plaint contended that the 1st defendant had fraudulently caused Daniel Kariuki who was mentally impaired to transfer plot NO. **Kabete/Nyathuna/301** and that in turn the 1st Defendant fraudulently subdivided and transferred portions thereof to the 2nd to 9th Defendants. The plaintiff further contended the Defendants knew or ought to have known the transfer to them was fraudulent and that they acquired the titles subject to the 1st plaintiff's claim. The plaintiff consequently sought a declaration that the subdivisions and subsequent transfers to the 2nd to the 9th Defendants were fraudulently procured and were therefore void abinitio and a nullity. The plaintiff sought an order of transfer from the Defendants of 1.02 Hectares being her share of the original land reference number **Kabete/Nyathuna/301** and a further order that the 1st Defendant do give inventory of all the properties of the deceased and how they were distributed and that the 1st Defendant be ordered to surrender half of the proceeds to the 1st Plaintiff.

The Defendants by a defence filed on 18/2/2010 denied that the 1st plaintiff was the widow of the late Daniel Kariuki and the 1st Defendant denied that the late Daniel Kariuki was ever under any mental impairment and denied causing the said late Daniel Kariuki to transfer to her **L.R. NO. Kabete/Nyathuna/301**, shares in Kiambu Dairy & pyrethrum farmers co-operative union and Limuru Dairy co-operative society Ltd and/or receiving proceeds of sale of **L.R.NO. 69 Kambi Moto/Menengai Block 1 (Mangu)**. The Defendants denied the allegations of fraud set out in paragraph 4 of the plaint and put the plaintiff to strict proof.

The 1st Defendant contended that she was the registered proprietor of **L.R. NO. Kabete/Nyathuna/301** which had been transferred to her on 23/3/1992 by her late husband and she was therefore lawfully entitled to subdivide and transfer the subtitles to the 2nd to 9th Defendants. The 1st Defendant further contended that her late husband transferred the suit property in 1992 and died on 16/7/2003 and contends that if he had any intention to transfer any portion of the same to the 1st plaintiff he would have subdivided the same into two portions in 1992. The Defendants further contended that the Plaintiffs suit is statute barred under the provisions of the limitation of Actions Act (Cap 22 Laws of Kenya).

The suit as earlier indicated was part heard before Okwengu Judge (now a Judge of Appeal) and the Plaintiffs case was heard and closed before her. The parties on 12/6/2012 agreed that the case proceeds from where Okwengu Judge had left and the matter was listed before me on 5/7/2013 for hearing when the 1st Defendant testified on her own behalf and on behalf of the other Defendants and the defence case was closed following her cross-examination and re-examination by counsel. Counsel for the parties filed written submissions articulating their respective positions regards the suit.

The parties filed a statement of agreed issues on 25/5/2010 as follows:-

1. Whether the 1st plaintiff is a widow of the late Daniel Kariuki.
2. Whether the late Daniel Kariuki was of unsound mind when he transferred **L.R. NO. Kabete/Nyathuna/301**, shares at Kiambu Dairy & Pyrethrum Farmers co-operative union Ltd and Limuru Dairy co-operative society o the 1st Defendant.
3. Whether the said transfer was done fraudulently.
4. (a) Whether the subdivision of **L.R. NO. Kabete/Nyathuna/301** by the 1st Defendant into **Kabete/Nyathuna/2749, 2750, 2751, 2752 and 2753** was done legally.
5. Whether the transfer of **L.R. NO. Kabete/Nyathuna/2749, 2750,2751, 2752 and 2753** by the 1st Defendant to the 2nd-9th Defendants was lawful and/or fraudulent.
6. Whether there was any court order in force when **L.R. NO. Kabete/Nyathuna/301** was subdivided by the 1st Defendant and the subdivisions there from transferred to the 2nd -9th Defendants.
7. Whether this suit is statute barred under the limitation of Actions Act, Cap 22 Laws of Kenya.
8. Whether proceeds of sale of **L.R. NO. 691 Kambi ya Moto/Menengai Blocl (Mangu)** sold by Daniel Kariuki was entrusted to the 1st Defendant and whether she should account to the 1st Plaintiff.
9. Whether the 1st plaintiff is entitled to half share of proceeds of all properties of the late Daniel Kariuki which were sold and the money entrusted to the 1st Defendant.

The plaintiff in support of her case testified as pw1 and called two witnesses James Kahura Gichuhi Pw2 and Lucia Njenga Wamuyu Pw3 respectively. Only the 1st Defendant testified on behalf of the Defence.

In brief the plaintiff testified that she got married to Daniel Kariuki (now deceased) in 1964 under the Kikuyu customary law and that she had 6 children with her said late husband. The Plaintiff tendered in evidence birth certificates of her said children which all carried the name of the late Daniel Kariuki. The plaintiff further testified that her marriage to the late Daniel Kariuki under the Kikuyu customary law was formalized on 20/4/74 when representatives from both the plaintiff's side and the late Daniel Kariuki's side performed the Kikuyu customary marriage rites. The plaintiff produced in evidence a booklet that contained the record of the proceedings of 20/4/74 when the alleged marriage negotiations took place.

The interpreted version is contained in the plaintiff's bundle of documents:

The plaintiff in her evidence states that she got married to Daniel Kariuki in 1964 when he was working at Kiambu hospital and she was teaching at Kiambu A.C. Primary school and they both lived together at the hospital. The plaintiff acknowledges that the 1st Defendant Rahab Waruga Kariuki was the wife of Daniel Kariuki and thus a co-wife and that the 2nd to 9th Defendants are the 1st Defendant's children. However the 1st Defendant denies that the 1st Plaintiff was married to Daniel Kariuki and thus contends that the 1st plaintiff was not her co-wife. The 1st plaintiff further testified that when the late Daniel Kariuki was transferred to work at Kenyatta hospital she moved with him and lived together at the Kenyatta National Hospital and that when he retired from the hospital in 1968 they both moved together and resided at Uthiru where her said husband had started a beer distribution business.

The plaintiff further testified that the deceased and herself purchased a plot at Uthiru and built a house thereon where they resided. As per the evidence this plot being Title NO. **Dagoretti/Ithiru/T.69** was registered in the name of Daniel Kariuki Kimotho on 8/5/1970 and was on 2/1/1990 transferred to the plaintiff in consideration of '**Gift**' (see abstract of title (green card) contained in the plaintiff's bundle of documents at page 33. Additionally the 1st plaintiff testified that the said Daniel Kariuki was registered as owner of family land situated at Nyathuna in Kabete being land reference number **Kabete/Nyathuna/301** and was so registered in 1973. The 1st Plaintiff testified that she was using a portion of this land from 1973 and that the 1st Defendant was using the other portion and as per the 1st plaintiff the subject land had been physically demarcated on the ground into 2 portions and that each of them was using a distinct portion. The 1st plaintiff however stated she stopped using her portion in 1997 following an accident and during her absence from the country henceforth. She states she returned to the country in 2005 and that her husband Daniel Kariuki died in 2003 during her absence and that it was upon her return that she discovered that the husband had transferred land title number **Kabete/Nyathuna/301** to the 1st Defendant and further he had disposed the family shares in Kiambu Dairy and in Limuru Dairy Farmers and a piece of land at Kambi Moto in Nakuru county. The 1st Plaintiff further testified that the 1st Defendant with the object of defeating her claim over the suit land in 2007 subdivided the suit land and transferred the subdivisions to the 2nd to 9th Defendants who are her children when the present suit was still pending. She contends the transfers were fraudulent as the 1st Defendant was not entitled to effect the subdivisions. The 1st Plaintiff contends that the transfer of the original parcel **Kabete/Nyathuna/301** from her husband to the 1st Defendant was fraudulently procured. She alleges that the husband (Daniel Kariuki) was not of sound mind from 1991 and that in 1992 when the transfer was effected the late Daniel Kariuki was confused and was of unsound mind though no evidence was tendered to show that the deceased suffered from any mental illness.

The 1st Plaintiff's evidence and claim as I have understood the same is that she was the wife of Daniel Kariuki who was also the husband of the 1st Defendant and as such wife herself and her household were entitled to one half share of the properties owned by the said Daniel Kariuki in keeping with the Kikuyu customary law where under the custom the properties of a deceased who was polygamous is divided according to the houses depending on the number of wives the deceased had. It is on the basis that the 1st plaintiff was a co-wife to the 1st Defendant that she claims one half of the **Kabete/Nyathuna/301** land and one half of the shares proceeds and the land in Nakuru that was sold

The 2 witnesses Pw2 and Pw3 called by the 1st Plaintiff to testify on her behalf restated that they knew the 1st plaintiff to be a wife to the late Daniel Kariuki and that the 1st plaintiff was at sometime using a portion of land reference **Kabete/Nyathuna/301**. The two witnesses affirmed that the 1st plaintiff has never lived on the said land and that it is the 1st Defendant who lives on the parcel of land and has a house thereon.

The 1st Defendant, Rahab Waruga Kariuki in her evidence denied that she knew the 1st plaintiff before the institution of the present suit. She testified that Daniel Kariuki Kimotho was her husband who she married

before the emergency. She testified that before the death of her husband in 2003 they were residing together in land parcel NO. **Kabete/Nyathuna/301** and that she was taking care of her husband who was sickly. The 1st Defendant further testified that her late husband had transferred the parcel of land to her in 1992 and that it was her husband's wish that she should share the parcel of land amongst her 8 children. The 1st Defendant testified that she subdivided and transferred portions of the land to her 8 children in accordance with her late husband's wishes. She denied that her late husband was mentally disturbed and insisted that her husband was in his right frame of mind at the time he transferred the land at Kabete to her only acknowledging that her late husband was suffering from blood pressure before he died. The witnesses denied that her intention in subdividing and transferring the suit land to her children was to defeat the 1st plaintiff's interest in the land. She claimed the 1st plaintiff was not entitled to any share of the land and that she was lawfully entitled to subdivide the land as she did as the land was registered in her name and there was no restriction. The witness acknowledged her late husband had a parcel of land at Kambi Moto in Nakuru which he sold during his lifetime. The witness reiterated that at the time of his death her husband had no property in his name as he had distributed what he had during his lifetime.

The foregoing review of the evidence sets out the competing positions by the 1st plaintiff and the Defendants and I now turn to consider the application of the facts and the evidence to the issues and the law.

- a. **Whether the 1st plaintiff was married to Daniel Kariuki.** On this issue I would answer in the affirmative based on the evidence adduced by the 1st plaintiff and her 2 witnesses. There is uncontraverted evidence that the 1st plaintiff lived as husband and wife at Kiambu Hospital, Kenyatta National Hospital where the late Daniel Kariuki was working and later at Uthiru Dagoretti where the late Daniel Kariuki established a home after retirement. The **"come we stay"** arrangement between the 1st plaintiff and the said Daniel Kariuki appears to have been formalized on 20/4/1974 when both families met for marriage negotiations and thus even if before then there was no recognized marriage, from that date henceforth the marriage between the two became recognized. There is evidence that the children of the 1st plaintiff were named after Daniel Kariuki as their father. The birth certificates produced in evidence attest to this. The late Daniel Kariuki in 1990 transferred the land in Uthiru where he was living with the 1st plaintiff to the 1st plaintiff as a gift. I would reject the denial by the 1st Defendant that the 1st plaintiff was not married to her husband. The fact that the 1st Defendant solemnized her hitherto customary marriage in church in 1994 would not detract from the fact that her husband was polygamous which was perfectly permissible under the Kikuyu customary law.
- b. **Whether the said Daniel Kariuki was of unsound mind at the time he transferred Title NO. Kabete/Nyathuna/301 and the shares to the 1st Defendant.**

No evidence was adduced by the 1st Plaintiff to support her assertion that the said Daniel Kariuki was of unsound mind in 1991 or 1992 or indeed at any other time. Medical evidence would have been required to prove that fact. Indeed there was no evidence that the said Daniel Kariuki was a patient at any mental hospital during his lifetime. If anything the 1st Defendant testified that her husband was suffering from blood pressure and that he had been hospitalized at Kijabe Mission Hospital and at Nazareth Hospital. His death certificate also shows he died from high blood pressure complications. In the absence of any medical evidence I answer this issue in the negative and hold that the deceased was not of unsound mind at the time he effected the transfer to the 1st Defendant.

- c. **Whether the transfer to the 1st Defendant was done fraudulently.**

Having answered the issue under (b) above in the negative it is my view that on the evidence adduced by the 1st Plaintiff no fraud was established. The requisite land control board consent was given to the transaction on 17/9/1991. It is instructive that the deceased had way back on 9th June 1987 made a will bequeathing the land parcel **Kabete/Nyathuna/301** to the 1st Defendant for the benefit of her children. The copy of the deceased "last will" was included in the Defendant's supplementary list of documents.

The will was made before he transferred the parcel of land to the 1st Defendant in 1992 which means he decided to give effect to his wishes during his lifetime. It is to be remembered that the deceased during 1990 also determined to transfer title NO. **Dagoretti/Uthiru/T.9** which was in his name to the 1st Plaintiff's name. These actions by the deceased indeed are suggestive of a deliberate intention on the part of the deceased to distribute his assets during his lifetime such that by the time he died he had distributed all his earthly possessions/properties.

d. Whether the subsequent subdivision of L.R. NO. Kabete/Nyathuna/301 into Kabete/Nyathuna/2749, 2750, 2751,2752 and 2753 was done legally and whether the transfers to the 2nd-9th Defendants was lawful and/or fraudulent.

The 1st Defendant was legally registered as the owner of **L.R. NO. Kabete/Nyathuna/301** and consequently was entitled to carry out the subdivisions and effect the transfers. The 1st Plaintiff complained that the subdivisions and transfers were done during the pendency of the present suit which indicated the 1st Defendant was bent on defeating the ends of justice. The 1st plaintiff has herself to blame because while she filed an application for injunction at the time she filed the suit she did not prosecute the same such that the court never got to decide that application. There was no injunction restraining the 1st Defendant from dealing with the subject parcel of land. The 1st plaintiff could as well have registered a caution against the land which she did not do. Hence the 1st Defendant cannot be faulted for causing the subdivision and the consequent transfers.

However even if there was an injunction and/or a caution the same would have merely preserved the parcel of land as it was but would not confer any rights or interest to the plaintiff. On the evidence on record I am not satisfied the 1st Plaintiff would be entitled to any share of the suit property unless she was able to establish that the 1st Defendant was transferred the land to hold as a trustee for herself and the 1st Plaintiff. There is no claim of a trust and none has been established. The 1st Defendant was registered as an absolute proprietor of the parcel of land and her rights and interest are indefeasible.

e. Whether this suit statute barred?

The parties have submitted on this issue with the 1st Defendant maintaining that the Plaintiff's suit is statute barred and the 1st Plaintiff asserting that she only became aware of the fraudulent transfer in 2005 when she came back from the United States of America. If the 1st Plaintiff had acknowledged the transfer of the parcel of land to the 1st Defendant in 1992 or had become aware that the transfer had been effected to the 1st Defendant then and took no action for 12 years then her suit would be time barred. However since she claims she became aware of the transfer and the fraud in 2005 her suit cannot be said to be statute barred since the period of limitation would begin to run from the time of the discovery.

f. Whether the 1st plaintiff is entitled to any proceeds of sale out of **L.R. NO. 691 Kambi ya Moto/Menengai Block 1 (Mangu) and half share of proceeds of all properties of the late Daniel Kariuki which were sold and the money entrusted to the 1st Defendant.**

The evidence on record indicates that the properties that were owned by Daniel Kariuki (deceased) were sold during his lifetime by himself. As the owner he had the right to sell and apply the proceeds as he deemed fit. As indicated earlier there is no evidence that the 1st Defendant was constituted a trustee for the 1st Plaintiff and in the premises there can be no basis to require her to account any proceeds to the 1st plaintiff.

The 1st Plaintiff raised issue with the 1st Defendant testifying on behalf of the other Defendants without a written authority and referred the court to order 1 Rule 13 which allows one of several plaintiffs or defendants to appear, plead and/or act on behalf of the others provided the authority is in writing.

The essence of order **1 Rule 13** is to assist in case management and to obviate the necessity of filing

repetitive documents and/or adducing repetitive evidence particularly where the parties have similar and like issues. The requirement for authority to be given in writing is to ensure parties own the pleadings and/or evidence. A party may at the hearing of a case opt to offer no viva voce evidence. In the present suit the Defendants have filed a joint defence and the 1st Defendant opted to testify while the other defendants offered no additional evidence. My view is that the 2nd to 9th Defendants were within their rights to tender no evidence. The 1st Defendant apart from stating they were all her children did not state she had their authority to give evidence on their behalf. Essentially the suit was as between the 1st plaintiff and the 1st Defendant as all the actions complained of by the plaintiff were executed by the 1st Defendant.

The plaintiff in her submission referred the court to the decision by **Martha Koome J.** (now appellate Judge) in the case of **JANE WANJIRU KIARIE & ESTHER NJOKI KIARIE VS. MARIA WANJIKU & ISAAC KIARIE (Nakuru HCCC NO. 259 OF 2002)** where the 2nd Defendant and transferred family land to the 1st Defendant (a newly married wife) and the 1st Defendant sought to evict the plaintiffs who were the children of the 2nd Defendant and who were residing and had been in occupation of the land all their life. The Judge rightly and properly held that the children had overriding interests and the transfer to the 1st Defendant I that case was subject to those rights and interests.

The case is easily distinguishable to the present case where the 1st plaintiff was never in occupation but only used the land in the 1970s and in the circumstances cannot be said to have acquired any overriding interest such that the transfer of the suit land to the 1st Defendant would be said to be subject to such overriding interest. Besides the 1st plaintiff had a parcel of land transferred to her by the deceased who transferred the suit land to the 1st Defendant. The facts and circumstances in the **Kiarie case** supra are therefore different and not applicable to the present case.

On the whole and upon evaluation of the evidence I find and hold that the plaintiff has failed to establish her case on a balance of probabilities. The suit is hereby ordered dismissed with costs to the Defendants.

Judgment delivered and dated this 14TH day of FEBRUARY, 2014.

J.M. MUTUNGI

JUDGE

JUDGEMENT READ IN OPEN COURT IN PRESENCE OF:

.....**PLAINTIFFS**

..... **DEFENDANTS**