



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

**ELC CASE NO. 165 OF 2013**

WANJUE GICHOVI .....PLAINTIFF

(Suing as legal representative of Estate of KITHERE NAMU (Deceased))

VERSUS

PATRICK NAMU GICHOVI .....DEFENDANT

**JUDGMENT**

An earlier judgment delivered herein on 5<sup>th</sup> June 2013 was set aside vide a ruling delivered on 16<sup>th</sup> September 2013 after the defendant had complained about having not been served with a hearing notice. The suit therefore commenced before me afresh on 26<sup>th</sup> November 2013 when the plaintiff and her witnesses as well as the defendant were able to put forward their respective cases in relation to this dispute which involves ownership of L.R No. NGANDORI/MGOVIO/1297 which the plaintiff wants declared to be part of the Estate of the late KITHERE NAMU and which should therefore devolve to her.

On his part, the defendant states that the plaintiff was never the wife of the late KITHERE NAMU but was infact the wife of GICHOVI NAMU. Defendants adds that he obtained the land L.R No. NGANDORI/NGOVIO/1297 legally and has been in occupation of the same for the last 10 years and therefore the plaintiff's suit is in-competent and an abuse of the Court process and should therefore be dismissed.

The plaintiff's case was that she and PW2 (CHARITY RUGURU) were co-wives of one GICHOVI who was a brother to KITHERE NAMU and who had no wife or child and therefore allowed plaintiff and PW2 to live on the land subject matter of this suit. After his death, plaintiff and PW2 took out a grant of letters of administration in Succession Cause No. 128 of 2011 at Embu (Plaintiff's Exhibit 1). The plaintiff also produced the Green Card (Plaintiff's Exhibit 2) and official search (Plaintiff's Exhibit 3) which shows that L.R No. NGANDORI/NGOVIO/1297 was registered in the names of the said KITHERE NAMU in 1960 but on 20<sup>th</sup> November 1997, it was transferred into the defendant's names. It was the plaintiff's case that the said KITHERE NAMU was of un-sound mind and the defendant took advantage of that condition to fraudulently register himself as the owner of the land. Plaintiff's case was also that although the land was registered in the defendant's names in 1997, this was only discovered after the demise of KITHERE NAMU.

In his defence, the defendant stated that his father was GICHOVI NAMU and KITHERE NAMU was his uncle and owned the property subject matter of this suit which both he and plaintiff used to plough. He said the late KITHERE NAMU transferred the land to him on 20<sup>th</sup> November 1997 and the plaintiff consented to the transfer as she had no other children. He added that he has since sub-divided the land as follows:-

1. **Plot No. 4963 which is about 0.74 Ha is in his names**
2. **Plot No. 4964 which is 0.60 Ha - he has sold to Anthony Muchiri**
3. **Plot No. 4965 which is 0.60 Ha is in his names and he intends to transfer it to his sons.**

He said he had left a portion of land to plaintiff and another to his mother. He denied that KITHERE NAMU was of un-sound mind or that he forced him to give him the land. He denied the allegation of fraud levelled against him.

At the end of the trial, the plaintiff and MS Njeru Advocate for the defendant made submissions with plaintiff insisting that she wants a share of the land while MS Njeru submitted, inter alia, that there was no relationship between plaintiff and KITHERE NAMU and so she was not entitled to a share of his land. Further, counsel submitted that the land NGANDORI/NGOVIO/1297 no longer exists but has been sub-divided and a portion sold to Anthony Muchiri who was not a party in this suit and in any event, this suit is now time-barred.

I have considered the evidence on record and the submissions.

It is not in dispute that the land subject matter of this suit was registered in the names of the late KITHERE NAMU who had no wife or children. The defendant concedes in his defence that both him and the plaintiff used to plough that land before it was transferred to him in 1997. Plaintiff's case is that the said transfer was done fraudulently and only discovered after the death of KITHERE NAMU. It is clear that plaintiff was not the wife of KITHERE NAMU but instead was the wife of GICHOVI NAMU. However, both the plaintiff and CHARITY (PW2) were taking care of the late KITHERE and even settled on the suit land. The defendant is also not the son to the late KITHERE NAMU but rather, he is the son of GICHOVI NAMU. Strictly therefore, none of the two had a greater interest in the suit land than the other. What is significant, however, is that following the death of KITHERE NAMU, the plaintiff and PW2 obtained a limited grant (Exhibit 1) in respect to his Estate in Embu Succession Cause No. 128 of 2011. This was for purposes of filing a suit on behalf of the said Estate. It is not clear why the said grant was not issued in the joint names of plaintiff, PW2 and the defendant. However, the fact that it was issued in the names of plaintiff and PW2 lends credence to their evidence that although they were not strictly speaking the wives of KITHERE NAMU, he had allowed them to live with him on his land in a relationship that would be regarded as that of a man and his two wives. The defendant concedes to this when he states in his evidence in chief as follows:-

***“I was about eight (8) years old when we went to live there with plaintiff and Kithere”***

Further on in his testimony, the defendant states as follows:-

***“Kithere had no wife or child. He had a house on the suit property which is NGANDORI/NGOVIO/1297 which was five (5) acres in size. He used to plough the land but at times, I and plaintiff used to plough it with our sister:***

One of the issues raised by the defendant's advocate MS Njeru in her list of issues is whether the plaintiff was married to KITHERE NAMU or his brother GICHOVI NAMU. I think the answer to that question is what I have described above and which is infact confirmed by the defendant in his testimony. It is that relationship that enabled the plaintiff and PW2 obtain the limited grant that they did in respect to the Estate of NAMU and in those circumstances, the plaintiff was a beneficiary to the Estate of KITHERE NAMU. On the evidence before me, I find that the plaintiff was entitled to a share of the Estate of KITHERE NAMU which appears to consist only of the suit land.

On the issue of fraud, the plaintiff states that she was not aware about the transfer to the defendant's names until KITHERE NAMU had died. She says she was not involved in the transfer. In cross-examination by the plaintiff, the defendant said:-

***“I did not tell you when I was selling the land”***

Earlier in his evidence the defendant said he informed the plaintiff about the transfer of the land into his names and that she said all her wealth belonged to defendant as she had no other sons. It is however highly un-likely that the plaintiff would concede to the transfer of the land on which she was living only to turn around later and complain of fraud. It is also instructive to note from the Green Card (Exhibit 2) that the Title Deed in favour of the defendant was only re-issued in 2010. The Certificate of official search (Exhibit 3) shows that a caution had been placed on the land by plaintiff claiming a beneficial interest. This could only have been placed after the title was re-issued to defendant and therefore, the plea raised by the defendant’s advocate that this suit is time barred is not supported by the evidence because time started to run when the fraud was discovered which was in 2010. Clearly therefore, the transfer done in 1997 was done behind the back of the plaintiff. Clearly therefore, the plaintiff’s pleadings in paragraph 4 of her plaint that:-

- a. ***defendant caused the land to be transferred to himself without the deceased or plaintiff’s knowledge and that***
- b. ***the defendant dealt with deceased’s Estate without confirmed letters of administration***

are all well founded from the evidence on record and it is the law under **Section 45 of the Law of Succession Act** that intermeddling with property of a deceased is infact a Criminal offence. There being no evidence of when the Land Board consent was obtained etc, this Court is entitled to make a finding that the transfer of the land to defendant was fraudulent because as one who was living on the land, she was entitled to be informed about the transfer. I find, on a balance of probability, that the plaintiff has proved her case against the defendant and is deserving of the orders sought in her plaint. Clearly, the deceased KITHURE NAMU who was living on the land with the plaintiff would not have transferred the whole of it to the defendant leaving nothing for the plaintiff who was living with him and taking care of him.

Having said so, the suit property has now been sub-divided into three portions one of which (4964) has been sold to one Anthony Muchiri who is not a party to these proceedings and so this Court cannot make orders adverse to him without giving him a hearing. The defendant however still retains plot 4963 and 4965 which are in his names. He says he intends to transfer 4965 to his sons. He has only left ½ acre to the plaintiff. The plaintiff herself says that the defendant has fenced the land and only left for her a small portion where he house stands and her coffee stems have been taken away. A Court of Equity should not countenance such an injustice. If anything, the most equitable distribution of the land which was five (5) acres would be to have it shared equally among the plaintiff and defendant as both were living there with the deceased KITHURE NAMU. This Court having found that the defendant did not have a greater right to the land than the plaintiff and also that the transfer to defendant was done fraudulently, the order that commends itself to me in the circumstances of this case is to enter judgment for the plaintiff against the defendant in the following terms:-

1. ***A declaration that indeed L.R NO. NGANDORI/NGOVIO is part of the Estate of KITHURE NAMU (deceased) and the plaintiff was entitled to a share thereof***
2. ***An order that the defendant do transfer L.R NO. NGANDORI/NGOVIO/4963 measuring 0.74 Ha (which is slightly less than 2 acres) into the plaintiff’s names within 45 days of this judgment being delivered***
3. ***The Land Registrar Embu to ensure that this transfer is effected as directed above***
4. ***The Deputy Registrar to facilitate this transfer by signing all the necessary documents on behalf of the defendant should there be a default***
5. ***Each party to bear their own costs.***

It is so ordered.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> FEBRUARY, 2014**

14/2/2014

Coram

B.N. Olao – Judge

CC – Mwangi

Plaintiff – present

Mr. Okwaro for Ms Njeru for Defendant – present

COURT: Judgment delivered this 14<sup>th</sup> day of February, 2014 in open Court.

Plaintiff present in person

Mr. Okwaro for Ms Njeru for defendant present

Right of appeal explained