



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 221 OF 2012

LYDIA WAMBUI GITAU 1ST PLAINTIFF

REGINA WAMBUI GITAU 2ND PLAINTIFF

- V E R S U S -

FATUMA GATHIAKA1ST DEFENDANT

THE REGISTRAR OF TITLES, KWALE2ND DEFENDANT

THE HON. ATTORNEY GENERAL3RD DEFENDANT

JUDGEMENT

[1] The plaintiffs filed this suit in their capacity as the administrators of the estate of one PETER GITAU KARANJA deceased against the 1st, 2nd and 3rd defendants claiming inter alia that their deceased husband was the registered owner and entitled to possession of that piece of land known as Plot No. Kwale/Diani/129. That the first defendant without the consent or knowledge of the plaintiff entered upon the said and erected structures on the same and took possession of it.

[2] That the plaintiffs on being notified of such entry by the 1st defendant they conducted a search at Kwale District Land Registry and were surprised to find out that the Green Card in respect of the said land was missing and that the property had been subdivided into several portions namely Plot No. Kwale No. Kwale/Diani/2252-2262. The plaintiff avers that they have never sold any portion of the said land by themselves or through any body else and that any transfer of the suit by the Land Registrar Kwale to the 1st defendant is fraudulent. The Plaintiffs set out the particulars of fraud in their plaint and particulars of loss and damage. They prayed for a declaration that the plaintiffs are the legal and lawful administrators of Plot No. Kwale/Diani/129. Further for an order that the title deed issued to the 1st defendant in respect of the same be revoked. Finally they prayed for a permanent injunction restraining the 1st defendant by himself, his agents, assigns or any other person appointed by him from entering selling, disposing and/or dealing with the suit property aforesaid and damages for trespass and costs of the suit and interest.

The plaint in this case was served on the first respondent on 16th October 2012 through a Mr. Salim Juma who was in the 1st defendants house and who said he would take the summons to S.M. Otunga & Co. Advocates. the 2nd and 3rd defendants were also served.

[3] Ojode Udoto & Onjoro advocates appeared for the 1st defendants while the office of the

attorney general appeared for the 1st and 2nd defendants. This matter came for hearing of the application dated 11th October, 2012, on 19/6/2013 for an inhibition against the suit land Kwale/Diani/129. The application was not opposed by the defendants and it was allowed. The plaintiff then withdrew the case against the 2nd and 3rd defendant. The case was fixed for hearing on 24/9/2013. A hearing notice was served on Ujode Udoto & Onjoro Advocate for the 1st defendant on 4th September 2013 and on the State Counsel on 2nd September 2013. The matter came up for hearing on 24th September 2013. Miss.Okumu appeared for the plaintiffs Mr. Ngare Learned State Counsel appeared for the 2nd and 3rd respondents while there was no appearance for the 1st respondent though served. The first plaintiff Lydia Wambui Gitau gave evidence and stated that her husband died in 1985. She produced the letters of administration of her husband's estate and a confirmation of grant dated 14th October, 2011. She produced the confirmation of Grant showing that she and her co wife Regina Wambui Gitau were the administrators of her husbands' estate. In that Grant there were assets among them Kwale/Diani/33 and Kwale/Diani/129. She said she was in court in respect of Kwale/Diani/129. She produced the title for the said land. She produced land rates paid by her. The rates were paid upto 7th November, 2011. She told the court that after paying the rates of 2011 she went to Kwale Land Registry with the confirmed grant so that the properties can be registered in her names and her co-wife. She stated that when the parcel file was taken out there was no Green Card. She asked the Land Registrar what to do and was advised to swear an affidavit to say that she was the wife of wife of the deceased and that she would like to get a Green Card. She produced the affidavit dated 5th January, 2012. She bought a money order for the advertisement and forwarded the same by letter to Government Printer. The letter was produced in court. The matter was gazetted on 24th February, 2012. The copy of the Gazette was produced in court as Exh. 6. She stated that she brought the Gazette to Kwale Land Registry and was duly issued with a Green Card. She stated that on 28th February, 2012 she received a call from D.C.I.O. Kwale that there was an objection from Salome Otunga Advocate acting for the 1st defendant who alleged that she was the owner and had title deed of two acres. She stated that she visited the Kwale Land Registry where the Land Registrar Evans Maruanga mistreated her alleging that she was a land thief and that the land belonged to Salome Otunga who had divided it into 11 plots. Kwale/Diani Plot Number 2252-2262. She denied that she had at any time subdivided her husbands land. She stated that she visited the suit premises where she found that Fatuma Githiaka had built four houses one block being a mud house and three others made of blocks. She urged the court to evict the said Fatuma Githiaka from the land. She averred that the 1st defendant had been given a notice to vacate by her lawyers a notice dated 22nd August, 2012. She produced a letter written by Salome Otunga saying that the houses belonged to the 1st defendant. She also produced a letter written by her advocate to Land Registrar Kwale and the statutory notice to the Attorney General. She asked the court to reinstate her title and an order that the people on the land should move out and vacate therefrom and that all titles issued pursuant to the subdivision be cancelled and that the first defendant be restrained from entering her land and be ordered to pay cost of this suit.

[4] Miss Okumu Learned Counsel for the plaintiff requested for judgment against the 1st defendant who had not filed any documents inspite of service. She stated that the evidence had not been controverted. That the plaintiffs are lawful administrators of the registered owner. That they had paid rates upto 2011. That the Land Registrar Kwale acknowledged that the late Peter Gitau Karanja is the registered owner by advertising the loss of Green Card. She asked for judgment as prayed in the plaint.

Mr. Ngare State Counsel conceded that Peter Gitau Karanja was the registered owner and that the plaintiffs were the administrators of his estate.

[5] The first defendant in this case was served. She was represented by counsel. She filed no pleadings at all. She did not come to court. she did not take part in these proceedings. She was always served and was aware of every step of this suit. The evidence of the plaintiffs is unchallenged. The Land Registrar Kwale acknowledged that the plaintiffs were the true owners of the suit land when he forwarded their documents for advertisement to the Government Printer to advertise loss of the Green card. The same was duly advertised and a new card issued in favour of the plaintiffs as proprietors of the suit land. There is no dispute therefore that the suit land belongs to the plaintiffs. I allow the plaintiffs claim in the plaint and orders as follows:

1. That Plot No. Kwale/Diani/129 belongs to Peter Gitau Karanja and has remained as his own since it

was registered in his name on 11th June 1992

2. Any subdivision that may have been made on Kwale/Diani 129 are illegal, unlawfully done and are all revoked.
3. The Kwale District Land Registrar is ordered to revoke any such illegal resultant subdivisions in respect of Kwale/Diani/129 forthwith and reinstate the original title Kwale/Diani/129 in the name of Peter Gitau Karanja or the administrators of his estate (the plaintiffs in this case).
4. Any structures erected by the 1st defendant shall be removed from the premises within forty five (45) days failing which the plaintiffs shall be at liberty to remove them with the assistance of the Court Bailiff and the local police shall provide security. the cost of such removal being born by the 1st defendant.
5. A permanent injunction restraining the 1st defendant by herself, her agents assigns or any other person from entering, selling, disposing and/or dealing with the suit property in any manner is issued against the 1st defendant and any such agents or assigns save only for removal of their properties as stated in (4) above.
6. There were no damages proved before me and I will not make any order in that respect.
7. The plaintiffs shall have the costs of this suit and interests.

It is so ordered.

Dated and delivered in open court at Mombasa this 14th day of March. 2014.

S. MUKUNYA

JUDGE

14.3.2014

In the presence of:

Mr. Magolo Advocate holding brief for Miss. Okumu Advocate for the plaintiffs

Non appearance for the defendant.