



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 230 OF 2017

(FORMERLY NAIROBI HCC 703 OF 2016)

WANJIRU THUKU AND MARY NJERI MUTHIANI

(Suing as the legal representatives of the Estate of David Thuku Deceased)PLAINTIFFS

VERSUS

DAVID NGIGI KIGAMBA.....1ST DEFENDANT

KOMU PARENTS SELF HELP GROUP.....2ND DEFENDANT

STANLEY KIWIRI GACHURU.....3RD DEFENDANT

JUDGMENT

Before the Court makes its determination, it has noted that vide an Application dated **14th November 2016**, the Plaintiffs had sought leave of the Court to amend their pleadings so as to incorporate the 3rd Defendant herein. However, it seems like the Application was never dealt with, but nevertheless the parties adopted the Amended Plaintiff, the 3rd Defendant was enjoined in the suit and the Defendants responded to the said Amended Plaintiff.

Therefore, in the interest of justice and in line with **Article 159(2)(d)** of the **Constitution** which enjoins the Court to administer justice without undue regard to technicalities and also in observing the overriding objectives as set out **under Section 1A, 1B 3A of the Civil Procedure Act**, the Court has deemed the Amended Plaintiff as duly filed as no Party would be prejudiced. The Court notes that it is too late in the day to deal with the issue, yet the contents of the Amended Plaintiff were canvassed at the hearing and the Defendants properly responded to the issues in their Amended Defences.

By an Amended Plaintiff dated **16th November 2016**, the Plaintiffs sought for Judgment against the Defendant for the following orders:-

a) A declaration that the said subdivision of Title No. Kiambu/ Munyu/4537 and Kiambu/Munyu/4538 were fraudulently acquired and the same be cancelled and/or annulled and reverted to the original state.

b) A permanent injunction restraining the Defendants from trespassing on the parcel title Kiambu/924 and the subdivisions Kiambu/Munyu/4537 and Kiambu/Munyu /4538.

c) Any Order that the Court may deem fit.

In their statement of claim, the Plaintiffs averred that they are daughter and wife to **David Thuku, (Deceased)** and owner of the parcel of land **Title No. Kiambu/Munyu 924**, and legal occupants thereof. That on **3rd July 2014**, immediately upon the demise of the said **David Thuku**, the Defendants started trespassing on the suit property and brought surveyors to survey the land as they claimed ownership. Further that the Defendants are trespassers who have **fraudulently** acquired title over the suit property, which act is detrimental to the deceased's Estate. They further contended that **Title No. Kiambu/Munyu/924**, has been subdivided into **Title No. 4537** and **4538** and owned by the 3rd Defendant and the 1st & 2nd Defendants respectively.

It was the Plaintiffs further contention that they have lived on the suit property, their entire lives, and that they are still cultivating thereon and the deceased is also buried on the suit property. They further contended that the subdivisions and the title in possession of the 3rd Defendant was fraudulently acquired.

They particularized fraud as; illegal and fraudulent subdivision of **Title Kiambu/ Munyu/924**, to **Kiambu Munyu 4537 and 4538**, illegal and fraudulent transfer of the subdivisions to the 2nd and 3rd Respondents respectively. Misrepresenting to the members of the public that the 1st, 2nd and 3rd Respondents have legal title over the suit premises whereas they are not. Therefore, the Plaintiffs contended that the title in possession of the Defendants were fraudulently acquired and the titles acquired subsequent to the subdivision were illegal **ab initio**.

The suit is contested and the 1st and 2nd Defendants filed an Amended Defence dated **8th March 2017**, and denied all the allegations made in the Amended Plaintiff. They particularly denied that the deceased was the owner of the suit property and that the Plaintiffs are the legal occupants. It was their contention that the prayers sought against the Defendants are untenable in law as there is no cause of action against them.

The 3rd Defendant filed his Defence and Counter Claim dated **8th March 2017**. In his Defence, the 3rd Defendant denied all the allegations made in the Plaintiff and also denied that the Deceased, **David Thuku** was the owner of **L.R Kiambu/Munyu/924**, and that the Plaintiffs are legal occupants. It was his contention that the Plaintiffs enjoined him as an afterthought upon receiving a demand letter from his Counsel, seeking to have them vacate his land. It was his contention that there is no cause of action against him.

In his Counter claim, the 3rd Defendant sought for orders that;

- i) A Declaration that the 3rd Defendant is the bonafide and registered owner of all that parcel of land known and or described as Kiambu/ Munyu/4537.*
- ii) A perpetual injunction restraining the Plaintiffs , their servants and or any and/or all persons howsoever acting for in their stead from trespassing, encroaching into, using, having access, alienating , disposing off and or howsoever dealing with all that parcel of land known and or described as Kiambu/ Munyu/ 4537.*
- iii) An eviction order against the Plaintiffs , their servants, agents and or and / all persons howsoever acting for or in the stead the Plaintiffs from Kiambu/ Munyu/ 4537.*
- iv) The officer in charge of Thika Police Station to ensure compliance of the eviction order.*
- v) Costs of this suit.*

In his Counter Claim, the 3rd Defendant reiterated the contents of his Defence and averred that on **26th November 2013**, he purchased **3 acres** out of **L.R 924**, from the 2nd Defendant at a consideration of **Kshs.3,150,000/=**. That the property was owned by the 2nd Defendant, and on **25th April 2016**, he obtained title to the suit property which he now legally owns. That on **27th September 2016**, he found a house constructed thereupon and upon investigation, he found out that it was the Plaintiffs who had encroached on the said parcel of land. He then instructed his advocate who did a demand letter. He contended that the Plaintiffs are trespassers on the suit property and they should therefore vacate forthwith.

The Plaintiffs filed a Reply to Defence and a Defence to Counter Claim dated **22nd March 2017**, and denied all the allegations made in the Counter claim and reiterated the contents of the Amended Plaintiff.

The matter proceeded by way of Viva Voce evidence wherein the Plaintiff called two witnesses and the Defendants also called **two** witnesses and closed their case.

PLAINTIFFS' CASE

PW1 Wanjiru Thuku adopted her witness statement as evidence in Court, and produced her list of documents as **Exhibit 1**. It was her testimony that she stays on the suit property with her children and has stayed on the said land since **1968**. That the suit property was owned by her husband, **David Thuku (Deceased)**. That **Komu Parents Self Help Group**, used to raise poultry on the suit land but stopped the activity about 30 years ago. She denied that her family ever transferred the suit property to the said **self help group**.

She acknowledged that there was no proof that she has been in occupation of the suit property. She further acknowledged that they leased the suit property to **Komu Self Help Group**, but denied knowledge of her husband having been sued at the Thika Law Courts or if orders were ever issued transferring the suit property to **Komu Parents Self Help Group**. It was her testimony that there was no title deed issued nor was there a transfer pursuant to Court orders. She denied ever signing any transfer. That she did not report any case of forgery, but filed the instant suit. Further that her late husband's title has never been cancelled and that she was never informed that her land had been transferred to anyone.

PW2 Mary Njeri Muthoni, adopted her witness statement in Court as her evidence, and also produced her list of documents as exhibits. It was her evidence that they stay on the suit property which was owned by their father. She produced the title deed and the green card of the land, and that she was born on the suit property. Further that her father never sold the suit property to anyone.

It was her testimony that **David Ngigi** had leased the suit property as **Komu Parents Self Help Group**, but the group was unable to pay rent and were therefore evicted by her father. That her father died in the year **2014**, and before his demise, there was no claim against the suit property. That the Defendants claimed the suit property after her father's death and though her father was buried on the suit property, there was no claim during the burial. Further that the suit property is now registered in the Defendants name and that the Plaintiffs also have a title deed for the suit property. She denied knowledge of any Court order from **Thika Court** in **1990**, transferring the suit property to the 2nd

Defendant. It was her testimony that in **2016**, the Plaintiffs received a demand letter to vacate the suit property, but to her, the suit property was fraudulently obtained. That the Defendants transferred the suit property to themselves in **2016**, during the existence of the Court order.

DEFENCE CASE

DW1 David Ngigi Kigamba, adopted his witness statement dated **17th October 2017**, and produced the List of documents as Exhibits **1 to 4** and a further list of documents dated **17th September 2019** as **Exhibit 5 to 13**. It was his testimony that he came into ownership of the suit property when the owner of the suit property agreed to sell to them. That since **Mr. David Thuku** refused to transfer the property to them, they obtained a Court order. That the Court ordered **David Thuku** to transfer the suit property to 2nd Defendant. However, **David Thuku** declined and the Court ordered the **Land Registrar** to transfer the suit property to the 2nd Defendant and that since there was no Appeal, the 2nd Defendant came into possession.

It was his testimony that the suit property changed hands from **David Thuku (Deceased)** to the 2nd Defendant. That he did not have a sale agreement and that they did not go to the **Land Control Board** for any **consent**. That they got orders against **David Thuku** and the said Court order was not a forgery. That after the Court order, the 2nd Defendant registered it at the Lands office. He denied that the 2nd Defendant obtained the title fraudulently. He acknowledged that there was no document to show that the 2nd Defendant bought the suit property from the late **David Thuku**.

Further that the 2nd Defendant sold part of the suit property to the 3rd Defendant. That 2nd Defendant sold **3 acres** meaning the whole land was sold to 3rd Defendant. Further that the **Late Thuku's family** live on a part of the suit property but the said family does not cultivate the whole land. That the Plaintiffs live where they used to live before and that is their homestead. That the 2nd Defendant had built a **poultry house** but later removed them because there was a breakout of chicken disease and they stopped poultry farming.

That the Defendants have not been charged with forgery in any Court of law and that the Court order has never been challenged. That the Plaintiffs have never had title to the suit property and that there was only an oral agreement in the year **1980**, between the 2nd Defendant and **David Thuku**.

DW2 Stanley Kiwiri Gachuru adopted his witness statement dated **8th March 2017**, as part of his evidence and produced his list of documents as Exhibits **14 to 19**. He testified that he bought the suit property from the 2nd Defendant and he was the rightful owner of the suit property. That before the purchase, he conducted a search and found that the suit property was registered in the name of the 2nd Defendant and thus, he is an innocent purchaser for value. That he bought the suit property in **2013**, and the title was issued to him in the same year. He confirmed that the title in Court was issued in **April 2016**. That he bought the entire land from the 2nd Defendant and he did a formal transfer after obtaining the **Land Control Board's** Consent.

He denied being a member of the 2nd Defendant and further denied that he does not use the land. That he wanted to occupy the land, but found some other people on the said property but before he could sue them, he was sued. That he found structures on the suit property after he had bought it though he conducted due diligence. That he paid the full purchase price of **Kshs. 3.2 million** in instalments wherein the purchasers went for the money in his office at **Githurai 45**. That he wanted the encroachers evicted from his property.

It was his testimony that he is the sole registered owner and that he has never been charged with a criminal case of fraud. Further that he was not privy to what transpired between the Plaintiffs and the 2nd Defendant.

On **16th December 2019**, the Court directed the parties to file their written submissions and in compliance with said directives the parties filed the same which the Court has now carefully read and considered. The Court finds as follows:-

It is not in doubt that the suit property was initially **Kiambu/ Munyu/ 924**, and that the same was registered in the name of **David Thuku (Deceased)**. The Plaintiffs have produced letters of Administration which indeed show that they are the wife and daughter of the said **David Thuku** and the **Legal Administrators of his Estate**. Further the Plaintiffs have alleged that they have been in the suit property since **1968**, and that they have lived on the said suit land and cultivated the same. They further alleged that the transfer and the subsequent subdivision of the suit property was fraudulently done by the Defendants.

The Plaintiffs further denied any existence of any suit between the Deceased and the Defendants and it was their contention that the 2nd Defendant was only leased the suit property, and allowed to rear poultry but that after some time they left. In their submissions, the Plaintiffs have submitted that the Defendants have led evidence in their testimonies over matters that they did not plead and it was therefore their submissions that the Defendants could not bring a new angle in their evidence over issues that they had denied

Though in their statements of Defence, the Defendants denied knowing the Plaintiffs or the deceased, in their testimony and vide production of documentary evidence, they testified that the 2nd Defendant bought the suit property from the deceased. It was the 2nd Defendants contention that they procured a Court order that made a declaration that the 2nd Defendant was the rightful owner of the suit property and are thus entitled to the suit property. The 2nd Defendant further contended that the Plaintiffs were not in occupation of the suit property and urged the Court to dismiss the Plaintiffs suit. That the 1st Defendants testimony on their relationship with the deceased **David Thuku** was raised during the earlier trial, and that the same was interrogated and tested and left to the Court to decide.

The Court finds the issue for determination are:-

1. Whether the Court should admit the Unpleaded evidence

2. *Whether the 2nd Defendant fraudulently acquired L.R Kiambu/ Munyu/924 that subsequently led to the fraudulent subdivisions.*

3. *Whether the Plaintiffs are entitled to the orders sought*

4. *Whether the 3rd Defendant is entitled to the orders Sought In his Counter Claim*

5. *Who should bear the costs of the suit*

1. *Whether the Court Should admit the Unpleaded Evidence*

It is the Plaintiffs submissions that the Defendants completely disowned knowing **David Thuku (Deceased)** or that he ever owned the suit premises. That having denied knowledge of the said person, the Defendants cannot bring a new angle in their evidence.

The Court notes that it is indeed true that though the Defendants had denied knowing the Deceased, they led evidence in Court stating that they had bought the suit property from him and that they had filed a suit against him and obtained a Decree. Though the Plaintiffs have urged the Court to find that Defendants never pleaded these facts and are therefore not entitled to rely on them in their evidence, the Court notes that the Defendants produced in evidence a list of documents that contain the **Court Decree** together with other documentations that appertain to the suit filed against the Deceased and 2nd Defendant herein. In the said Decree, the 2nd Defendant allegedly obtained ownership over the suit property and these documents are in support of the said facts.

Further the Court notes that the said list of documents are already part of evidence produced in Court during hearing of the suit, and the Plaintiffs never objected to the same being produced. Therefore, it becomes impossible for this Court to disregard evidence that has been produced in Court and which the Plaintiffs had an opportunity to respond to. The Court is guided by the case of **Kinyanjui Kamau ...Vs... George Kamau Njoroge [2015] eKLR** where the Court held that:-

“This was a true representation of the legal position. Parties are indeed bound by their own pleadings. See Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR (Civil Appeal No. 219 of 2013). Of course if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not pleaded, then the court will make a determination on the matter. As was held in Odd Jobs v Mubia [1970] EA 476, “a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.” In the present appeal, the issue of lack of consent of the Land Control Board was only mentioned in passing by George (DW2), and was not canvassed by the parties, and having not brought this issue for full interrogation before the trial court either by pleading it or by leading evidence on it, we agree that the appellant was then estopped from raising it in his grounds of appeal.”

Given that the issues were canvassed by the parties, the Court is therefore inclined to admit the same.

2. *Whether the 2nd Defendant fraudulently acquired L.R Kiambu/ Munyu/924 that subsequently led to the fraudulent subdivisions*

It is the Plaintiffs contention that the Defendants have trespassed on their land and that they have even gone ahead to fraudulently acquire title over the suit property and have subdivided it into two parts with the 1st and 2nd Defendants getting one part and the 3rd Defendant getting the other part.

Was the suit land transferred fraudulently to the Defendants? **Fraud**’ has been defined in **Blacks Laws Dictionary** as;

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to cause him an injury.”

Further **Black Laws Dictionary Ninth Edition at Page 731** also defines fraud as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”

With the definition of fraud in mind, the Court will thus seek to determine whether there was fraud in the acquisition of the suit property.

It is the Plaintiffs contention that the Defendants have not produced before this Court any evidence that indicates that they bought the suit property from the deceased. Further that no transfer document has been produced to evidence the same. On the hand the Defendants have testified that they were able to obtain ownership of the suit property pursuant to an order of the Court in **Thika CMCC No. 334 of 1990**, and that the Court allowed the **Executive Officer** to sign the documents of transfer.

This Court has seen an Order dated **12th October 1998**, in which the Court declared that the **Land Parcel No. Kiambu/Munyu/924**, belonged to the 2nd Defendant and the Court ordered the **Land Registrar** to register it in the name of the Plaintiff who at that time was the 2nd Defendant herein.

Though the Plaintiffs had claimed forgery, they have not produced any evidence that contradicts the said Order of the Court in the said suit. Further there is no evidence that the said order has ever been set aside or impugned. Therefore, having made a finding and given that there is

no evidence that the order was appealed against and overturned nor was it ever set aside, the Court finds and holds that the **Decree** produced by the Defendants is proper and binding to the Plaintiffs as Administrators of the Estate of the **Deceased (David Thuku)**.

Further the Plaintiffs have averred that there was a forgery in obtaining the title deed to the suit property as they are still holding the Original Title to the suit property. However, the Court has seen the Gazette Notice dated **21st May 1999**, produced in evidence in which the Land Registrar stated:-

“All efforts to compel the registered proprietor to surrender the land title have failed , notice is given that at the expiration of 30 days, registrar, intends to dispense with the production of the title deed . Land Title Deed issued to David Thuku shall be deemed to be cancelled and of no effect.”

From the above, the Court finds that the dispensation of the said Title Deed was legally dispensed with and as per the Gazette Notice the 2nd Defendants acquired a Title Deed legally and that means that the Notice took effect. Further from the said Gazette Notice, after the expiry of the stated period, the title deed held by **David Thuku** was deemed as cancelled.

From the definition of fraud stated above, it is not in doubt that a party has to prove that there was misrepresentation of facts. In this instant case, the Court is satisfied by the documentations produced by the Defendants and the evidence tendered in court that the 2nd defendant acquired the suit property pursuant to a **Court order** which Court order has never been set aside. Therefore, the 2nd Defendant acquisition of the suit property was not fraudulent. Though it may seem that the Plaintiffs might have been genuinely blindsided over certain issues, it was **David Thuku** only who was the registered proprietor of the suit property, and there is an order against him. This Court finds that the said order also binds the Administrators of his estate.

From the available evidence, the court finds and holds that the Plaintiffs have not proved any fraud on the part of the 2nd Defendant in acquisition of the **L.R Kiambu/ Munyu/ 924**. Further given that the 2nd Defendant acquired the suit property lawfully, then it follows that any subdivision and subsequent transfer to the 3rd Defendant was therefore legal.

3. Whether the Plaintiffs are entitled to the Orders Sought

In their Amended Complaint the Plaintiffs had sought for a declaration that the subdivisions were fraudulent and therefore ought to be annulled. The Court has already held and found that the acquisition of the property did follow due process and was therefore not fraudulent. **Section 26 (1) of the Land Registration Act** provides for instances in which a registered owner's title to the suit property can be impeached. See **Section 26 (1)** of the Land Registration Act provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

Having held that there was no **fraud** in the acquisition of the suit property by the 2nd Defendant and subsequent transfer to the 3rd Defendant, the Court holds and finds that the said prayer sought by the Plaintiffs is **not** merited.

Further the Court cannot grant a Permanent Injunction as the registered proprietor of a suit property is the **absolute and indefeasible** owner and is entitled to all the rights and privileges as provided for by **Sections 24 and 25 of the Land Registration Act**.

4. Whether the 3rd Defendant is entitled to the Orders Sought in his Counter Claim

The 3rd Defendant has sought for a Declaration that he is the bonafide owner of **Kiambu/ Munyu/4537**, and thus an injunction restraining the Plaintiffs from trespassing on the same.

The Court has already held that the 2nd Defendant acquisition of the property was lawful. Further the Court has seen the Sale agreement dated **26th November 2013**, in which the 2nd Defendant sold part of **L.R 924** to the 3rd Defendant and further a title deed issued in his favour with regards to **L.R 4537**. In the absence of any evidence to prove the contrary, the Court finds and holds that the said prayer is merited and since 3rd Defendant is the rightful owner of the suit property, he is entitled to all the rights and privileges appertaining to it including the right to quiet possession. He is also entitled to an order of permanent injunction as sought.

Further the 3rd Defendant had sought for an eviction of the plaintiffs from the suit property. In his testimony DW1 testified that the Plaintiffs are occupying part of the suit property that the Plaintiffs used to live on the said portion all along. Therefore, the Court finds that before the Plaintiffs are evicted, it must be ascertained that they are indeed occupying the 3rd Defendant's portion of land.

The 3rd Defendant has also sought for Police assistance. At this juncture, the Court is not satisfied that there is any acts from the Plaintiffs that have gone to show that they will not comply with the orders of this Court and therefore the same is not necessary at the moment and it is thus not merited.

5. Who should bear the costs of this suit

There is no doubt that costs usually follow the events. However **Section 27 of the Civil Procedure Act** gives the Court discretion to grant costs. It is trite that there are instances in which the Court will order that each party to pay their own cost. Considering the circumstances of this case, the Court is convinced that the Plaintiffs were blindsided as to the acquisition of the suit property. Further it does not help that the Defendants in their pleadings did not bring out these issues until at a later stage. Therefore, the Plaintiffs might have been convinced that they had superior rights to the suit property. Taking into account the above circumstances, the Court finds that each party herein should bear its own costs.

The Upshot of the foregoing is that the Plaintiffs have failed to prove their case on the required standard of balance of probability and consequently the Amended Plaint dated **16th November 2016** is **not** merited and the same is dismissed.

However, the 3rd defendant has proved his claim on the required standard of balance of probability on his Counter Claim dated **8th March 2017**. The Court finds the same is merited and is allowed in terms of prayers **No. (i), (ii) and d(iii)**.

The eviction to be carried out only upon confirmation that the Plaintiff have occupied the 3rd Defendants portion of land and upon giving the necessary **Eviction Notice** as provided by **section 152 E** of the **Land Act**.

Each party to bear their own costs.

It is so ordered.

Dated, signed and Delivered at Thika this 29th day of October 2020.

L. GACHERU

JUDGE

29/10/2020

Court Assistant – Jackline

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Nyanja for the Plaintiffs

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

No appearance for the 3rd Defendant

L. GACHERU

JUDGE

29/10/2020