



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CIVIL CASE NO. 922 OF 2004**

**EVANS NJOROGI MUNGAI.....1ST PLAINTIFF**

**ROBERT GIKURA NJOROGI.....2ND PLAINTIFF**

**BEATRICE WANJIKU MINUI.....3RD PLAINTIFF**

**(Administrators of the Estate of SAMUEL MUNIU MUNGAI)**

**RACHEL KAMENDE NG'ETHE.....4TH PLAINTIFF**

**PHILOMENA NJOKI MURICHU.....5TH PLAINTIFF**

**LUCY IRUGA MUNYUI.....6TH PLAINTIFF**

**GORETT WANJIKU.....7TH PLAINTIFF**

**(Administrators of the Estate of HANNAH NJERI MUNGAI also known as NJERI MUNGAI)**

**=VERSUS=**

**PETER JOHN KARIBA GITAHU.....1ST DEFENDANT**

**SIMON PETER MUNGAI.....2ND DEFENDANT**

**JUDGMENT**

1. The plaintiffs brought this suit seeking, *inter alia*, the following orders:

- a) *An order that the transfer and subsequent registration of Land Title Number Kiambaa/ Thimbigua /174 into the 1st defendant's name was illegal;*
- b) *That Land Parcel Number Kiambaa/Thimbigua/174 be registered in the names of Evans Njoroge Mungai, R G Njoroge and Njeri Mungai as per consent judgment in Kiambu Succession Cause No. 24 of 1980.*
- c) *A declaration that Beatrice Wanjiku Muniu is entitled to ½ share out of the ½ acre awarded to Evans Njoroge Mungai in Kiambu Succession Cause No. 24 of 1980*
- d) *Costs of this suit.*

2. At the hearing of the case, the parties framed the following as the agreed issues and invited the court to determine the four issues.

- a) *Whether the rectification of the parcel registers in respect of Land Title Numbers Kiambaa/Thimbigua/920 and 174 and the subsequent registration of Kiambaa/Thimbigua/174 in the name of the 1st defendant and subsequent transfer to the 2nd defendant by the 1st defendant were valid.*
- b) *Whether Kiambu SRM Succession Cause Number 24 of 1980 administering Land Title Number Kiambaa/Thimbigua/174 was valid.*

*c) If both processes as were valid, which one prevails.*

*d) Who should bear costs of this suit.*

3. The plaintiffs' case is that Parcel Number **Kiambaa/Thimbigua/174** was from the time of demarcation in 1958 upto 1980 registered in the name of Gathoni Mungai. Gathoni Mungai died on 14/1/1978. Upon her death, Kiambu SRM Succession Cause Number 16 of 1980 was filed and succession orders were granted in respect of Gathoni Mungai's Estate. The parcel register was subsequently and irregularly altered to capture Peter John Kariba Gitahi (1st defendant) as proprietor of the land. Peter John Kariba Gitahi subsequently fraudulently transferred the land to Simon Peter Mungai (2nd defendant). They contend that the land registrar could not legitimately alter the register in the manner he did without the involvement of the affected proprietor.

4. The case of the defendants is that indeed Gathoni Mungai was the registered proprietor of Parcel Number 174 effective from 1958. She was however inadvertently issued with a title deed bearing Parcel Number Kiambaa/Thimbigua/920 although this particular parcel (920) belonged to Wallace Mungai. Believing the title she held corresponded with the physical land which she possessed, she transferred the said Title Number 920 to Peter John Kariba Gitahi *inter vivos* in 1967 and appropriate entries were made in the parcel register and the 1st defendant was issued with a title in respect of 920 in 1967. The 1st defendant proceeded to obtain a loan from Standard Chartered Bank Limited in 1977 using the said Title. The defendants contend that the effect of the error relating to the capture of Gathoni Mungai's name in both Parcel Register Numbers 174 and 920 is that it left Wallace Mungai without land while Gathoni Mungai had both parcels on paper but only knew of one, the one she intended to transfer to Peter John Kariba Gitahi.

5. The defendants contend that the mistake was discovered in 1980 by Wallace Mungai and the Land Registrar commenced the process of rectification on 1/4/1980. Hon Okubasu (*SRM as he then was*) issued an order authorizing rectification of the register in respect of Parcel Number 920. The defendants further contend that once rectification was done in respect of Parcel Number 920, it was necessary that similar rectification be applied in respect of Parcel Number 174, otherwise the result would have been to return Wallace Mungai to the rightful position but deny the 1st defendant the land which Gathoni Mungai had intended to transfer to him in 1967. The defendants have exhibited correspondence between the Chief Land Registrar and the Kiambu Land Registrar and contend that there was no fraud and that the rectification was intended to rectify a genuine error. They urge the court to dismiss the suit.

6. I have considered the parties' respective pleadings, evidence, submissions and the four issues framed by the parties. The first issue in this suit relates to the powers of the Registrar to rectify a land parcel register or any instrument under Section 142(1) of the repealed Registered Land Act. The said Section provided as follows:

***“142 (1) The Registrar may rectify the register or any instrument presented for registration in the following cases***

***a) In formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor.***

***b) In any case and at any time with the consent of all persons interested***

***c) Where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.”***

7. The above legal framework has been the subject of interpretation in a number of cases, among them **Esther Njoki Rurigi v Patrick Gathonya (2005) eKLR; Republic v District Land Registrar Nakuru & Another (2006) eKLR; and Republic v Kisumu District Lands Officer**. It is settled law that under Section 142(1) of the repealed Registered Land Act, the Registrar had no powers to cancel a title or materially alter a parcel register without the consent of the registered proprietor or without an express order of the court.

8. In the present suit, the Registrar altered two parcel registers, Kiambaa/Thimbigua/920 and 174. Alteration of the register in respect of Parcel Number 920 was authorized by the Hon Okubasu (*SRM as he then was*) in **Kiambu SRM Misc Case Number 16 of 1980**. There is no evidence that the said order was challenged or set aside in any way. To challenge the order, one would have to pursue the appeal or review mechanism provided by the law. In the absence of any challenge against the said order, this court has no basis to question the rectification effected to Parcel Register Number 920 by the Registrar.

9. The same cannot be said of the alterations made to the register in respect of Parcel Number 174. This particular parcel register was opened on 10/5/1958. Gathoni Mungai was the first registered proprietor of the land. The parcel register shows that the land measured 1.57 acres. There are, however, handwritten alterations changing the acreage from 1.57 acres to 1.5 acres and subsequently to 0.6 hectares. The register shows that on 22/9/1980, the land was transferred to Peter John Kariba Gitahi. The Kiambu Land Registrar testified that in 1980 an instrument of transfer dated 1967 which had been registered against Parcel Number 920 was amended to read “174” instead of 920 and used to effect a registration against Parcel Number 174. This effectively removed the property from the Estate of Gathoni Mungai and vested it in Peter John Kariba Gitahi. At the time this was happening in 1980, Gathoni Mungai who was the registered proprietor of Parcel Number 174 was deceased and her personal representatives were not invited to give the Estate's consent to the rectification. Indeed, her estate had been distributed and the said parcel of land (Parcel Number 174) had been given to identifiable beneficiaries. Both the administrators of Gathoni Mungai's Estate and the identified beneficiaries were not invited to participate in the rectification. There is no evidence that the succession orders which distributed the estate of Gathoni Mungai have been challenged or set aside in any way.

10. In my view, the Land Registrar acted outside the limited powers conferred upon him by Section 142(1) of the repealed Registered Land Act. The rectification he effected was without the consent of the personal representatives of the registered proprietor (Gathoni Mungai). The rectification materially affected the estate of Gathoni Mungai. The result of that illegal action is that the 1st defendant irregularly acquired title to Parcel Number 174 through that act of the Registrar. A more holistic and legal approach would have been to involve all the parties affected by the rectification contemplated by the registrar and in the absence of their concurrence move the court for appropriate orders.

11. What is most disturbing in this suit is that whereas the registrar contends that he was prompted by a court order obtained in Kiambu SRMC Misc Case Number 16 of 1980 relating to Parcel Number 920, he did not bother to move the court for a similar order in respect of Parcel Number 174. Equally disturbing is the alterations casually made to the register in relation to the acreage of the land. It does appear the Kiambu Land Registrar did not respect the sanctity of the land register. He dealt with the register casually, changing the acreage from 1.57 acres to 1.5 acres and ultimately to 0.6 hectares. He similarly casually altered the parcel register together with a transfer instrument dated 1967.

12. In light of the foregoing, my finding on the first issue is that the court has no basis for faulting the rectification made to the parcel register relating to **Kiambaa/Thimbigua/920**. Any party challenging that particular rectification can only do so through review or appeal. However, the court finds that the rectification made to the parcel register relating to Parcel Number **Kiambaa/Thimbigua/174** transferring the said land from Gathoni Mungai to Peter John Kariba Gitahi and the subsequent transfer to Simon Peter Mungai were illegal, null and void.

13. The second issue relates to the validity of Kiambu SRM Succession Cause Number 24 of 1980 administering Land Title Number Kiambaa/Thimbigua/174. The Law of Succession Act provides both appeal and review mechanisms through which succession orders can be challenged. It is only through that mechanism that the succession orders issued in the above cause can be challenged. Unless and until the succession order are challenged and set aside in the manner provided by the law, they remain valid. I will not say more on the issue.

14. The third issue has been disposed by my findings on the preceding two issues. I have made a finding that rectification of the parcel register of Kiambaa/Thimbigua/920 was made pursuant to a court order and the present original suit does not avail the proper forum for challenging that order or the consequential rectification. I have also made a finding that the rectification done to the parcel register of Kiambaa/Thimbigua/174 was done irregularly and in violation of the law and is illegal, null and void. Lastly, I have made a finding to the effect that this original suit does not avail the proper forum for challenging the succession orders made in Kiambu SRM Succession Cause Number 24 of 1980.

15. Because the present dispute was largely caused by the Registrar's failure to abide by the law, I would not condemn any of the parties to bear costs of the suit.

16. The upshot of the above findings is that the suit herein succeeds in the following terms:

**a) It is declared and ordered that the transfer and subsequent registration of Land Title Number Kiambaa/Thimbigua/174 into the name of Peter John Kariba Gitahi was illegal.**

**b) The said Parcel shall be registered in the name of the original registered proprietor, Gathoni Mungai (now deceased) and any party seeking to change the registration or ownership of the land shall follow the procedure laid by the statutes.**

**c) Each party shall bear own costs of the suit.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JANUARY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Kihenjo holding brief for Mr Kiingati for the 2nd defendant

Ms Kivindu holding brief for Ms Gaituri for 4th – 7th plaintiff

Mr Magina for the 2nd plaintiff.

June Nafula - Court Clerk