



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT THIKA
ELC NO E045 OF 2022

SIMON NGUGI WAWERU - **PLAINTIFF**
VS
PENINAH WAMBUI MBUTHIA - **1ST**
DEFENDANT
JASON K WAWERU - **2ND DEFENDANT**
DISTRICT LAND REGISTRAR -KIAMBU - **3RD**
DEFENDANT

JUDGMENT

Pleadings

1. Vide a plaint dated the 8/12/22 the Plaintiff filed suit against the Defendants seeking the following prayers;
 - a. A declaration that the restriction placed on land reference No Ndumberi/Riabai/5080, 5081,5083, 5088, 5089 and 5093 (suit lands) is still in force.
 - b. A declaration that the transfer of the suit land as captured in entries Nos 5 and 6 in respect to Ndumberi /Riabai/5080 was irregular, unlawful, fraudulent, null, and void.
 - c. A declaration that the transfer of the suit property as captured in entries Nos 7 and 8 in respect of Ndumberi/Riabai/5081,5083, 5088, 5089 and 5093 were irregular, unlawful, fraudulent and void.

- d. An order of this Court to issue and direct the 3rd Defendant to cancel entries Nos 5 and 6 in the register for parcel Ndumberi/Riabai/5080 and a further order to issue and direct the 3rd Defendant to restore in the register of Ndumberi/Riabai/5080 in the name of Mary Muthoni Waweru.
 - e. An order of this Court to issue and direct the 3rd Defendant to cancel entries Nos 7 and 8 in the register for parcels Ndumberi/Riabai/5081,5083,5088,5089 and 5093 and a further order to issue and direct the 3rd Defendant to restore in the registers of the said lands in the name of Mary Muthoni Waweru.
 - f. A permanent injunction be issued restraining the defendants from interfering, disposing, of, or alienating, dealing adversely in any way whatsoever in respect of the suit properties Ndumberi/Riabai/5080 -5102 until a fresh subdivision is undertaken.
 - g. Costs of the suit
2. It is the Plaintiff's case that his mother, Mary Muthoni Waweru, was the registered owner of parcel No Ndumberi/Riabai/898 (the mother title). He claims that the mother title was illegally and fraudulently subdivided into 23 parcels, including Ndumberi/Riabai/5080-5102 (the suit lands), despite a restriction on the said lands. When a search was conducted on 17/12/2021, he discovered that the restriction had been removed without his consent, and the titles had been transferred to the 1st and 2nd Defendants.
 3. He pleaded and particularized fraud and illegality on the part of the defendants under para 8 of the plaint. He argued that the defendants' fraudulent actions have deprived them of the suit lands and urged the Court to, inter alia, cancel the titles and revert them to the mother's name.

4. The 1st and 2nd Defendants denied the claim of the plaintiff vide their statement of defence dated the 27/6/22. They contended that the lands were subdivided and transferred to them by their mother inter vivos and sought to put the Plaintiff to strict proof.
5. Despite service, the 3rd Defendant failed to enter an appearance or file a statement of defence. Learned Counsel Ms. Ngira, however, represented it during the hearing.

The evidence of the parties

6. **PW1 - Simon Ngigi Waweru** testified and relied on his witness statements dated 8/12/22 and produced documents marked as PEX No 1-7.
7. He stated that he is the brother of the 2nd Defendant and a brother-in-law of the 1st Defendant, who is his late brother's wife. The original title, parcel Ndumberi/Riabai/898, was registered in the name of Mary Muthoni Waweru, their mother, who passed away in 2022. Although she had seven children, two sons predeceased her. It was subdivided in 2012 into 23 plots. He occupies three parcels, namely 5101, 5098, and 5094. The 1st and 2nd Defendants also occupy some of the parcels on the land. He and some of his siblings protested at the Land Control Board office due to their mother's age and senility, and they were assured that the consent would not be issued. He filed a suit in the High Court seeking guardianship of his mother, but the Court dismissed it because a psychiatrist did not produce any medical report; therefore, the Court found that there was no proof that his mother was senile and incapable of managing her own affairs.
8. Furthermore, he stated that his mother never subdivided the land nor transferred it to the 1st and 2nd Defendants. Despite his mother's death, he has not applied for letters of grant of administration.
9. **PW2- Margaret Gathoni Gitahi** relied on her witness statement dated 8/12/22. She is the daughter of Mary Muthoni and the sister of the Plaintiff and the 2nd Defendant. She informed the Court that,

although the mother's title was registered in her name, she was unaware of how the land was subdivided or distributed among her siblings, as she does not reside on the suit land.

10. Regarding the question of the restriction, she stated that she was unaware if the said restriction was registered on the suit land. She was not aware of how it was removed. Concerning fraud, she stated that she knows of no incident that indicates any fraudulent activity by the 1st and 2nd Defendants.
11. She added that she learnt from her brothers that the land was subdivided by their mother in 2012 and that land control board consent was obtained. All her siblings have received their titles, except the plaintiff, who has yet to collect his.
12. **DW1 - Jason Waweru Kariuki** relied on his witness statement 23/5/23 and produced documents marked as DEX 1-6.
13. He confirmed that the Plaintiff is his brother and the 1st Defendant is his sister-in-law, having been married by his late brother.
14. He stated that there was no restriction registered on the titles at the time of lodging the subdivision and transfer of the said titles. That Land control board consent was duly obtained, and there was no fraud in the consent. The trial proceeded, and instead, counsel for the 3rd Defendant elected to close its case.

The Written Submissions

15. With the concurrence of the Court, the parties through their counsel on record elected to file written submissions, which I have read and considered.

Analysis and Determination

16. Having considered the pleadings, and the evidence adduced at the hearing, the written submissions and all the material placed before the Court, the issues that commend themselves for determination are;
 - a. Whether the Plaintiff has proven his case, if yes, should the titles in the names of the defendants be cancelled?

b. Who meets the costs of the suit?

17. The background of this suit is quite straightforward. The Plaintiff avers that the subdivision of the mother's title and the transfer of portions to the 1st and 2nd Defendants were illegal and fraudulent because the subdivision was carried out while a registered restriction was lodged on the titles of the suit land. The Defendants removed the restriction without their consent or knowledge. His mother, Mary Wambui, who is over 90 years old, was senile and therefore lacked the capacity to carry out any of the transactions. Despite their open protests and the assurance from the District Officer that the land control board's consent would not be issued, that consent was obtained.
18. The 1st and 2nd Defendants, on the other hand, denied the allegation of fraud and illegality levelled against them and stated that their mother carried out the subdivision and transfer *inter vivos*, obtained the land control board consent, and that all due processes were followed. They denied that their mother was suffering from any mental infirmity and averred that the High Court had dismissed similar arguments brought by the Plaintiff, hence, the claims have no basis. They also informed the Court that all their siblings, including the Plaintiff, were allocated land.
19. The Court is being called upon to determine whether the Plaintiff has proven fraud and illegality; if so, should the titles in the names of the 1st and 2nd Defendants be cancelled?
20. Before delving into the issues outlined above, it is appropriate to discuss who bears the burden of proof. It is well established that he who alleges must prove. In civil cases, the burden of proof is based on a balance of probabilities. This burden is grounded in statute. Sections 107-109 of the Evidence Act state;
107. Burden of proof
- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts

exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

21. From the above provisions, it is clear that the burden of proof rests with the Plaintiff to establish her case on the balance of probabilities.

22. There is another fundamental issue that the Court will examine at this stage. In their written submissions, the 1st and 2nd Defendants have raised a question regarding whether there is a competent suit before the Court. It is widely acknowledged that the original mother title, namely Ndumberi/Raibai/898, was registered in the name of Mary Muthoni, their mother. According to the death certificate presented in evidence, she died in 2022. The Plaintiff is contesting the subdivision of parcel 898 and the transfer of the suit lands, which are the resultant subdivisions in the names of the 1st and 2nd Defendants. This issue was put to the Plaintiff during cross-examination, and he readily admitted that he had not petitioned for the letters of grant of administration of the estate of Mary Wambui.

23. Section 3 of the Law of Succession Act describes an administrator to mean a
a person to whom a grant of letters of administration has been made under this Act.

24. Section 45 of the said Act states that, except so far as expressly authorized by this Act, or by any other written law, or by

a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

25. In the absence of a grant of letters of administration obtained by the Plaintiff, he has no legal capacity to file suit or assert any purported interest or the title of his late mother.

26. The question then is whether, in the absence of a grant of letters of representation having been issued in the name of the Plaintiff, he can legally initiate a suit on behalf of the estate of Mary Muthoni. The clear answer is No. This response is sufficient to resolve the case by way of dismissal. However, for the sake of the completeness of the record, I will also consider the other issues.

27. Has fraud and illegality been proven? It is settled that the Court cannot infer fraud. Fraud must be pleaded and particularised in the pleadings. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, the Court stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

28. Looking at the Plaintiff, the Court is satisfied that particulars of fraud have not only been pleaded but also particularised under para 13 of the Plaintiff.

29. The standard of proof in matters fraud was settled by the Court in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** when it expressed itself as follows; -

“... It is trite law that any allegations of fraud must be pleaded and strictly proved. See **Ndolo vs Ndolo (2008) 1 KLR (G & F) 742** wherein the Court stated that: “...We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases....”....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

30. The next question is whether fraud and illegality have been proven? Section 26 of the Act provides ways in which a title can be impugned. It states as follows;

“ (1) 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 12 Land Registration Act (Cap. 300) Kenya 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

31. The original title, namely Ndumberi/Rabaini/898, was registered in the name of Mary Muthoni on 4/10/83, and the title was issued on the same date. On 3/6/2013, the title was subdivided into 23 plots and named Parcel Number/Rabaini/5080-5102.
32. The Plaintiff presented a mutation dated 25/9/12, which was properly executed by Mary Muthoni, resulting in 23 plots. The Plaintiff claimed that the mutation was obtained fraudulently. The Court received no evidence to support this claim. There was no handwriting expert testimony, for instance, to verify that Mary Muthoni's signature was forged.
33. The Plaintiff has contended that the subdivision and transfer of the suit lands occurred while a restriction subsisted on the title. I have reviewed the letter dated 23/10/13 authored by the Deputy Commissioner, Kiambu County, addressed to the District Land Registrar, requesting the registration of a restriction on the suit lands. The Plaintiff presented copies of searches of the suit lands, which I have examined. However, there are no entries, namely Nos. 5 - 7, indicating the existence of a restriction. The searches presented before the Court do not reveal any encumbrances on the suit titles, let alone a restriction.
34. The Plaintiff further informed the Court that the alleged restriction was removed without their knowledge or consent. In the absence of any lodgment of the restriction, the Court is not satisfied that any was removed.
35. I have also examined the copies of the titles before the Court, and there is not an iota of evidence to support any registration of a restriction at all.
36. Another argument presented by the Plaintiff is that Mary Wambui was senile due to her age and thus lacked the capacity to effect the subdivision and transfer of titles in favour of the 1st and 2nd Defendants. I have reviewed a ruling delivered on 27/10/2020 in which the Court stated the following;

“6. Regarding whether or not the subject suffers from mental disorder or illness to the extent that she is unable or incapable of managing her affairs, the Court has jurisdiction under Section 26(3) of the Act to make an inquiry to establish the extent of her mental disorder.

7. Justice M. Muigai conducted an inquiry and received oral evidence and observed that the medical report on which the petitioners relied was contested. The medical report relied on in the petition stated that the subject had been examined by a medical Doctor on 25/7/2014 at Kiambu District Hospital and found to have senile dementia owing to old age, and that she could not recall or make an informed decision. The report had been signed by Dr. S. Kariuki of the Hospital. The Doctor was not made available to testify to support his report. Instead the petitioners called Dr. Kevin Nguriga (a general practitioner at the hospital) to produce the report. Dr. Kevin Nguriga stated that he had himself examined the lady on 18th April, 2016 and found her senile and suffering dementia. When the Doctor was cross-examined it turned out that he worked at Accident and Emergency Department of the Hospital and not in the Psychiatry Department. The Doctor did not say he was a psychiatrist or that he had been managing psychiatric patients. There was no evidence that Dr. S. K. Kariuki was a psychiatrist.

8. To determine that a person has mental disorder requires irrefutable medical evidence. This is because a person who suffers mental disorder loses the capacity to sue or to enter into any contract. He cannot manage his life.

9. It is my finding that there was insufficient evidence placed before the Court to enable the finding that the lady in question had any mental disorder or illness, or had such disorder or illness that she was incapable of managing her

life and property. That result is that the position has no merits.

10. I dismiss the petition and applications with costs.”

37. The allegation of mental infirmity and incapacity of Mary Wambui is not supported in evidence, and taking the cue from the Hon Courts Ruling, the Court is not convinced that she was incapable of managing her life and property.

38. In the absence of any evidence to the contrary, the Court has determined that this is a clear case of transfers inter vivos. I say this because the titles subject to this suit were registered on 3/8/2020 and 13/1/2022, before the demise of Mary Wambui on 21/3/22. Ultimately, I find that the Plaintiff has failed to impugn the titles of the 1st and 2nd Defendants. I find no evidence to support fraud and or illegality.

39. Although costs of an action or proceeding are at the discretion of the Court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap. 21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. In this case, the Court finds that the suit was entirely unnecessary; however, to preserve harmonious living, given that the parties are related, I will order each party to meet their own costs.

40. Final Orders for Disposal

- a. The Plaintiffs' suit is unmerited. It is dismissed.
- b. Parties being related and to maintain harmony in the family, I make no orders as to costs.

41. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1st DAY OF OCTOBER 2025 THROUGH MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered in the Presence of:

1. Ms. Kurgat HB for Ms. Malungu
2. Ms. Fundi for 1st and 2nd Defendants.
3. No appearance for the 3rd Defendant
4. C/A - Ms Yvette Njoroge

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