



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 309 OF 2017

JEMIMAH WANJIRU MATHERI 1ST PLAINTIFF

BERNARD MACHARIA MWANGI 2ND PLAINTIFF

VS

MURANGA COUNTY GOVERNMENT 1ST DEFENDANT

EMELDA WACHUI 2ND DEFENDANT

JUDGMENT

1. On the 28 /3/14, the Plaintiffs filed suit against the Defendants seeking the following orders;

- a. A mandatory injunction against the 1st Defendant directing it to cancel the registration of the 2nd Defendant as owner of plot No LOC 3/GITUGI/1515/15A.
- b. In the alternative and without prejudice to prayer 1 above the registration of the 2nd Defendant over the plot LOC13/GITUGI/11515/15A be ordered to be cancelled and that of Mwangi Macharia be restored.
- c. The 2nd Defendant be barred by injunction from interfering with entering into selling charging or demanding any rent from the tenant on the property LOC13/GITUGI/1515/15A.
- d. The 1st Defendant be directed to recognize and hence issue business permits to the tenant or tenants of the Plaintiffs until it receives a Court order barring the same.
- e. The Defendants be ordered to pay costs of the suit.

2. The Plaintiffs aver that the suit land belonged to their father namely Mwangi Macharia and on his death the suit land devolved through succession Cause No PMCC No 28 of 2001 to their mother Teresia Njeri Mwangi who died on 7/9/2005. The Plaintiffs are the children of Mwangi Macharia. Aggrieved by the decision of the Court in PMCC No 28 of 2001, the Plaintiffs filed a succession cause in HCCC No 2674 of 2003 seeking a revocation of the grant issued to their mother in PMCC No 28 of 2001. At the same time, they also obtained prohibitory orders on 17/2/2004 in PMCC No 28 of 2003 prohibiting any dealings on the suit land until the determination of the revocation cause in the HCC No 2674 of 2003.

3. Their case is that being aware of the said prohibitory orders as well as the death of their mother in 2005, the 1st Defendant caused the title to be registered in the name of the 2nd Defendant who has since been collecting rents from the tenant, namely David Kanjuki Mwangi. They accuse the 2nd Defendant of being a trespasser on the suit land and that the transfer in her name was done contrary to Court orders and is illegal. That the 1st Defendant should be ordered to reverse the transfer of the property to the name of the late Mwangi Macharia.

4. The 1st Defendant denied the Plaintiffs claims through its statement of defence filed on the 9/7/14. It stated that no prohibition orders were served on the 1st Defendant. Further, it denied any collusion with the 2nd Defendant and called for strict proof thereof. Further that the Plaintiffs have no locus standi in the suit and that they have not raised any cause of action against the 1st Defendant.

5. At the hearing of the case, the 1st Plaintiff testified and stated that she is the daughter of Mwangi Macharia and sister to the 2nd Plaintiff. Her father had a wife namely Teresia Njeri Mwangi who filed Succ cause PMCC No 28 of 2001 wherein the suit property devolved to her through a confirmed grant. However, by the time of her death the suit property had not been registered in her name. That she learnt later that the said Teresia Njeri Mwangi had sold the suit land to the 2nd Defendant before the grant of administration had been given. That the 1st

Defendant effected the transfer of the suit land in the name of the 2nd Defendant whilst a Court order was in force prohibiting any dealings in respect to the suit land, which orders had been served on the 1st Defendant prior to the transfer. That further the 2nd Defendant was aware of the prohibition orders having been a participant of the case in PMCC 28 of 2001. That the 2nd Defendant became registered as owner of the suit land contrary to the law and has assumed the rights of a land lady collecting rent and depriving them of rental income that hitherto were receiving from the premises. As against the 1st Defendant, she complained that it denied her tenant the license to run business on the plot. She produced the list of documents marked as PEX No 1-20 in support of her case.

6. Further, she testified that she has other two siblings Joseph Mwangi and Kariuki Mwangi who are not interested in the suit land. In cross-examination, she stated that she does not know how the 2nd Defendant acquired the suit land. She stated that she was not aware that her mother sold the suit land to the 2nd Defendant nor was she awarded the land to her in the succession case. She stated that the letters of grant of administration issued to her mother in respect of the estate of her father have not been revoked. She stated that she was not aware that her mother in respect to the estate of her father commenced a succession cause. In contradiction of her own statement and her Complaint, she however stated that she filed a succession cause No 2674 of 2003 seeking to revoke the letters of grant issued to her mother. She also stated that she has not obtained letters of grant of administration in respect to her mother's estate.

7. Whilst being re-examined by her Counsel she stated that by the time her mother died she had not transferred the suit land to the 2nd Defendant. She stated that the suit land houses shops, which are rented out. She does not live on the suit property.

8. The 1st Defendant did not call any witnesses and instead relied entirely on the defence filed on record. It also associated itself with the case of the 2nd Defendant entirely.

9. Whilst putting the Plaintiffs in strict proof thereof the 2nd Defendant denied any collusion between her and the 1st Defendant and averred that the 1st Defendant was within its mandate to transfer the suit land into her name upon presentation of the relevant documents to it. She averred that having become the owner of the suit land the Plaintiffs were illegally and irregularly collecting rents from the tenant in the suit land, namely David Kanjuki Mwangi. She further denies any trespass on the suit land. She denied being in disobedience of any Court orders in existence and further that she has not committed any illegality in the transfer and ownership of the suit land. She reiterated that she is the legal owner of the suit land having been legally and procedurally registered as such by the 1st Defendant.

10. In addition to her defense aforesaid she filed a Counter-claim where she sought orders as follows;

- a. An order of permanent injunction barring the Plaintiffs from interfering with entering into selling alienating charging demanding any rent from the tenants or in any way dealing with the suit property LOC13/GITUGI/1515/15A.
- b. Costs and interest of the suit
- c. Any other relief as the Court may deem fit to grant.

11. The 2nd Defendant testified and stated that she purchased the suit land from Teresia Njeri Mwangi who was the wife of the original registered owner Mwangi Macharia. That the transaction took place after the Teresia Njeri finalized the succession case in PMCC No 28 of 2001. She stated that she actually provided the funds to finance the succession cause with the consent of the parties. That the suit land was transferred to her vide minutes of the 1st Defendant dated the 30/4/14. That she was not a party to the succession cause both in the lower Court as well as the High Court and no Court order was served on her prohibiting any dealings with the suit land. That the transfer of the plot was lawful and in accordance with the laid down procedure and was not a party to fraud alleged by the Plaintiffs. She produced several documents marked as DEX No 1-5 in support of her case.

12. In cross-examination, she stated that she did not receive the orders of prohibition prohibiting any dealings in the suit land. She also informed the Court that she did not receive the demand letter written by the Plaintiffs to the 1st Defendant. She informed the Court that both Mwangi Macharia and Teresia Njeri Mwangi are deceased. Though she informed the Court that before the said Teresia Njeri Mwangi died the suit land had been registered in her name, she was at pains to produce any search to support her averments. She informed the Court that she is aware of the succession cause in respect to the estate of Mwangi Macharia. That on 27/1/2003 the said Teresia signed the application form changing the name of the owner from Teresia to her name in the Council. She denied any collusion with the 1st Defendant in transferring the suit land to her name.

13. In cross-examination by the Advocate of the 1st Defendant she stated that she was present when the sons of Mwangi Macharia initiated the succession proceedings. She stated that the plot is occupied by the 1st plaintiff and has been paying plot rates since 2000.

14. In re-examination, she stated that she purchased the suit land from Teresia in the year 2000. That the said Teresia died in 2005. The Plaintiffs raised the dispute after her death. The said Teresia sold the suit land as an administrator of the estate of Mwangi Macharia. There was a valid grant in respect of the estate and that the same has not been revoked. She stated that she was listed in the confirmation of grant as a purchaser of the suit land. That she services the rates in respect to the suit land as the legal owner. That she was not involved in any collusion with the 1st Defendant in whatsoever form.

15. The Plaintiffs submitted that they have been in occupation of the premises collecting rent and have enjoyed such possession even before the demise of the original owner Mwangi Macharia and Teresia Njeri Macharia. As such, the Plaintiffs did not need a grant of letters of administration in respect of either the deceased Mwangi Macharia or Teresia Njeri Mwangi. They argue that possession is independent of the title.

16. On the issue of legality or otherwise of the transfer of the land to the 2nd Defendant in view of the prohibitory order, the Plaintiffs submitted that the prohibitory order was served on the 1st Defendant while the 2nd Defendant was a party to the transaction. That by the time the prohibitory order was issued the suit land was still in the name of Mwangi Macharia. They opined that any attempt to transfer the property directly from Mwangi Macharia to 2nd Defendant was defective and hence the 1st Defendant made effort to create documents such as undated unheaded minutes to confer the transfer to the 2nd Defendant. That despite the certificate of confirmation of grant being changed to the name of Teresia, it did not make Teresia the owner of the suit land. That she had no capacity to sign a transfer documents in favour of Imelda.

17. As to whether the Counter-claim has merit, the Plaintiffs submitted that the 2nd Defendant's title in the suit land is defective and should be dismissed. They urged the Court to cancel the title in the name of the 2nd Defendant and revert the title to Mwangi Macharia.

18. The 1st Defendant submitted that its role was to receive documents from the interested parties and effect registration and change of ownership. That it was not served upon the orders in succession cause No 2674 of 2004. It averred that plot No 15 A is unsurveyed plot while LOC13/GITUGI/1515/15 is surveyed land, which is distinguishable and has a title. Further that it does not carry out the function of registration of land as that is the mandatory duty of the Registrar of Lands and therefore cancellation of title is not one of the tasks that it can legally do.

19. The 2nd Defendant submitted that the Plaintiffs lacked the capacity to file the suit on account of want of letters of administration of the estate of their late father or mother. That though the 1st Plaintiff admitted in her pleadings that she had filed revocation proceedings in the HCCC No 2674 of 2003, she did not produce any evidence in Court to show that the grant in PMCC No 28/01 was revoked.

20. In respect to fraud, the 2nd Defendant submitted that the Plaintiffs did not set out the particulars of fraud. No evidence was offered to show any illegality that was committed by the 2nd Defendant. The documents produced by the 2nd Defendant were not proved to be forged nor denied by the 1st Defendant. Further, no proof in form of affidavits of service were either produced to show that the prohibition order issued in PMCC 28/2001 was ever served on the Defendants.

21. The 2nd Defendant submitted that though the Plaintiffs sought a prayer for permanent injunction to restrain the 2nd Defendant from interfering with the suit property, they led evidence to the effect that they are in possession of the suit land. It is clear that the 2nd Defendant has never taken possession or occupation of the suit land despite paying the rates to the 1st Defendant.

22. Having considered the pleadings, the evidence led on trial, the submissions of the parties the issues for determination are; Whether the Plaintiffs have the locus standi to file this suit; Whether the suit land was registered in the name of the 2nd Defendant through illegality; Whether the Plaintiffs are entitled to the orders sought; Whether the Court should grant the prayers in the Counter-claim.

23. The undisputed facts in this case is that the suit land was registered in the name of Mwangi Macharia who is alleged to have disappeared in 1982 and a certificate of presumption of death was issued. His presumed date of death is 23/2/2000. After his presumed death, his wife Teresia Njeri Mwangi was appointed legal administrator of her estate and a certificate of confirmation of grant issued on the 22/3/2003 vide Succ. Cause No 28 of 2001, Muranga through which the suit land devolved to her as the sole proprietor.

24. Do the Plaintiffs have locus standi to file the suit? It is the Plaintiffs case that the suit land changed hands from her father to the legal administrator (Teresia Njeri Mwangi) to the 2nd Defendant in the presence of a Court order barring any dealings issued on the 28/11/03; the land had not been registered in the name of Teresia Njeri Mwangi ; the interests of the Plaintiffs were not considered as beneficiaries of the estate of Mwangi Macharia and or Teresia Njeri Mwangi; transfer done while the suit HCCC No 2674 of 2003 in respect to revocation of grant to Teresia Njeri Mwangi is pending. In her statement she has averred that their case is based on possession and being the surviving kin of Mwangi Macharia. The Counsel for the Plaintiffs has argued that the claim of the Plaintiffs is based on possession and occupation of the suit land which is independent. With respect, I do not agree with this summation. Being the children of Mwangi Macharia and Teresia Njeri Mwangi and pursuing a claim of beneficiaries in an estate of the deceased persons, it is trite that the Plaintiffs case is fatally defective due to lack of letters of representation to cloth them with the power to sue.

25. It is trite law that in order to undertake legal proceedings on behalf of the estate of a deceased person the person(s) must be clothed with legal capacity to do so. In the case of **Troustic International Union and Ingrid Vs Jane Mbeyu & Another Civil Appeal No. 145 of 1990 [1993] eKLR**, the Court of Appeal made the following observations in respect of a person's legal capacity to undertake legal proceedings on behalf of a deceased person;

“To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the Law of Succession Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer.”

26. Section 3 of the Law of Succession Act (Cap 160) as follows;

“Personal representative means the executor or administrator of a deceased person”.

Further, an executor is defined in the same section to mean the person to whom the execution of the last will of the deceased person is confided whereas an administrator is defined as a person to whom a grant of letters of administration has been granted.

27. According to **Black's Law Dictionary (9th Edition)**, a legal representative may refer to either a lawful representative or personal representative. A personal representative is described as;

“A person who manages the legal affairs of another because of incapacity or death, such as the executor of an estate. Technically, an executor is a personal representative named in a will, while an administrator is a personal representative not named in a will.”

28. The cause of action as proposed by the Plaintiff that is to say possession and occupation is such that it cannot stand independently of the estate of Teresia Njeri Mwangi and Mwangi Macharia. They have not acquired any other right that can be divisible from the estate of their parents. In that regard, this suit is fatally incompetent.

29. The Plaintiffs have pleaded illegality on the part of the 1st and 2nd Defendants in transferring the suit land from Teresia Njeri to the 2nd Defendant. The particulars of illegality have not been pleaded to show the actions of either party that are attributed to illegal acts. The court will make final orders in that respect.

30. According to the evidence on record the suit land devolved from Mwangi Macharia to Teresia Njeri vide a succession cause No 28 of 2001. She was appointed the legal administrator of the estate of Mwangi Macharia on the 5/7/2002 having petitioned for the same on 23/1/2001. After the expiry of the statutory period of 30 days, no interested party filed any objection.

31. According to the consent to the making of grant of letters of administration, intestate dated the 6/7/2000 the 2nd Defendant is included in the list of beneficiaries of the estate of Mwangi Macharia. All the beneficiaries have signed the document, the 2nd Defendant included.

32. It is alleged that the suit land was sold to the 2nd Defendant by Teresia Njeri Mwangi. The Court notes that no agreement for sale has been produced before the Court in support of a transaction between Teresia Njeri Mwangi and the 2nd Defendant.

33. Teresia Njeri Mwangi in her affidavit dated the 18/3/2002, under para 3 thereof listed the 2nd Defendant as one of the survivors of the estate of Mwangi Macharia but as a purchaser. In this affidavit she deponed under para 6;

“ that the identification and shares of all persons beneficially entitled to the said estate has been ascertained and determined that plot No 15 A Gitugi Market be registered in the name of EMELDA WACHUI”.

34. The record shows that on the 5/7/2002 the said 2nd Defendant was issued with a certificate of confirmation of grant in the estate of Mwangi Macharia. It is in evidence of the 2nd Defendant that the 1st Defendant declined to transfer the suit land in her name because she was not a beneficiary of the estate and was advised that the confirmation of grant had to come out in the name of Teresia Njeri Mwangi who would then transfer the land to the 2nd Defendant. There is an application for change of registered ownership of a plot dated 7/1/03 signed by both Teresia Njeri Mwangi and the 2nd Defendant with the remarks “deferred”. Alongside is a payment receipt of Kshs 5500/- being the clearance certificate from the 1st Defendant. It would appear that the same was not implemented pending the amendment of the confirmation of certificate of grant in the name of Teresia Njeri Mwangi. On 19/6/03, Teresia Njeri filed an application for the amendment of the certificate of confirmation of grant into her name. This was issued on 22/8/2003.

35. It would appear that on the 28/11/03 a prohibitory order was issued in Succ cause No 28 of 2001 as follows;

“that prohibitory order against all dealings with plot No 15 A Gitugi market also known as Plot No LOC13/GITUGI/1515/15 part A be and is hereby extended.

That the same be mentioned on 17/2/2004 so as to confirm the position of the High Court Succ. cause No 2674 of 2003.”

36. It is the evidence of the Plaintiff that prohibitory orders were issued by the Court in Succ cause No 28/2001 on the 28/11/2003 prohibiting all dealings on the suit land. By then the certificate of confirmation of grant had been issued in the name of Teresia Njeri Mwangi. There is no evidence on record that the Defendants were served with the said orders or that they acted in defiance of the same nor that the said orders were extended beyond 17/2/2004.. I have seen the letter dated the 8/2/13 from Mr. Mbutia, Counsel for the Plaintiffs addressed to the 1st Defendant and forwarding a copy of the Court order allegedly served on the 1st Defendant. No affidavit of service was placed before the Court to show that indeed the 1st Defendant was served with the Court order in 2003 or any other time except as notified by the Counsel 's letter received in the office of the 1st Defendant on the 11/2/13.

37. It is the Court's finding that there is no evidence that the Court orders were served on the Defendants and cannot hold that the transfer of the suit land is in defiance of a Court order. However, what is curious is that the Advocate of the 2nd Defendant was the same Advocate that acted for Teresia Njeri Mwangi in the succession petition. The question one would ask is why the said Advocate did not bring to the attention of the 2nd Defendant the existence of the court orders then?.

38. The Plaintiff has averred that she filed a case at HCCC No 2674 of 2003 seeking revocation of the grants issued to Teresia Njeri Mwangi. No evidence was tabled before this Court to show that the said grant was revoked.

39. According to the Plaintiff filed by the Plaintiffs, Teresia Njeri Mwangi died on 7/9/05. There appears to be inaction until 2012 when the 1st Defendant issues a change of registration of ownership from Mwangi Macharia to Emelda Wachui vide Min WTPM& H 32/2012 of the works, town planning markets and housing committee held on 30/4/12. The 2nd Plaintiff stated in evidence that this was an anomaly which was amended vide Min WTPM & H /52/2012 of the works town planning markets and housing committee held on the 2/10/12 showing the change of ownership from Teresia Njeri Mwangi to Emeldah Wachui. The question one would ask is how the suit land changed ownership in 2012 when the registered owner (as per the confirmation of grant of administration), Teresia Njeri Mwangi was long dead 6 years before. The curious question would be who then authorized the change of the plot to the 2nd Defendant on behalf of Teresia Njeri?

40. In answer to the question whether the 2nd Defendant obtained a valid title to warrant granting of the prayers sought in the Counter-claim, the starting point is the alleged sale between Teresia Njeri Mwangi and the 2nd Defendant. The 2nd Defendant has alluded that she financed the process of succession on behalf of the estate of Mwangi Macharia. She has stated in evidence that she purchased the suit land from Teresia Njeri in the year 2000. Teresia only became the administrator of the estate on 5/7/2002 according to the letters of grant of administration.

41. The 2nd Defendant has not produced any sale agreement between herself and the alleged vendor Teresia Njeri Mwangi. According to section 3 (3) of the Law of Contract provides as follows;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

a. the contract upon which the suit is founded—

i. is in writing;

ii. is signed by all the parties thereto; and

b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

42. It therefore follows that if indeed, there was such a sale then it was done in contravention of the above provisions and its validity is called into question.

43. Further as stated in the preceding paras the said Teresia Njeri Mwangi deponed to the purchase of the suit land by the 2nd Defendant which it now turns out may have been done in contravention of the provisions of section 45 of the succession Act which provides as follows;

“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”.

44. The act of purporting to sell the suit land in 2000 was tantamount to intermeddling with the estate of a deceased person which is illegal and the law has set penalties in section 45 (2) of the Law of Succession Act.

45. According to the record, the change of ownership was effected vide the minutes of the 1st Defendant on 2/10/12. By this time, the legal administrator of the estate of Mwangi Macharia is long dead. It is not farfetched to assume that the 2nd Defendant was not aware of the death of Teresia Njeri. The act of changing ownership from Mwangi Macharia to the 2nd Defendant and or Teresia Njeri Mwangi to the 2nd Defendant before the estate of the two had been administered amounted to intermeddling of the deceased suit land as by then the legal administrator is deceased and has not been substituted or replaced.

46. In conclusion, this Court is of the view that the 2nd Defendant has not proved ownership of the suit land and the Counter-claim is dismissed. If there are, any changes to the suit land that have taken place in contravention of the law cited above the same are invalid.

47. The justice of this case is to order the 1st Defendant to cancel the changes and rectify the register to reflect the name of Mwangi Macharia as the legal owner of the suit land.

48. Final orders;

a. The Plaintiff's suit is struck out for being incompetent.

b. The Counter-claim is dismissed.

c. The Register of the suit land as maintained by the 1st Defendant be and is hereby rectified to revert the suit land to the name of Mwangi Macharia.

d. Prohibitory orders be and are hereby issued prohibiting any dealings on the suit land until the legal representative of the estate of Mwangi Macharia is appointed or substituted as appropriately in law.

e. This judgment be served on the Land Registrar Murang'a and the First Defendant by the Court so that the prohibition order directed in (d) above may be entered on the Register of the suit lands (where applicable).

f. Each party to meet their costs of the suit.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14TH DAY OF FEBRUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Mbuthia for the 1st and 2nd Plaintiffs

Kimwere for the 1st Defendant

T M Njoroge HB for Mwangi Kamau for the 2nd Defendant

Irene and Njeri, Court Assistants