



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 323 OF 2014

(Formerly Nyeri HCC No.95 of 2012).

**JENNIFER NJERI WANJOHI (Suing as the legal Representative of the estate of
MATHENGE MBUTHIA (DCD))..... PLAINTIFF**

-VERSUS-

CHRISTOPHER MUCHOMBA WARUI.....1ST DEFENDANT

THE LAND REGISTRAR, NYERI.....2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff who has described herself as the wife to one of the grand children of Nelson Wanjohi Muruthi (deceased) contends that there was fraud in sub-division and registration of the original parcel of land to wit Konyu/Baricho/154 into Konyu/Baricho/2339, 2340 and 2341.

2. According to the pleadings filed in this matter, the fraud in the sub-division and transfer of the suit properties was done by Abraham Mbuthia Muriithi, one of the grandchildren of the deceased, who has since passed on and the first defendant.

3. It is pointed out that the said Abraham Mbuthia Muriithi and the 1st defendant were charged with criminal offences concerning the impugned sub-division and transfer of the suit properties. Abraham Mbuthia Muriithi was found guilty of the offences they were charged with and convicted while the 1st defendant was acquitted.

4. Maintaining that the sub-divisions and registration of the original parcel of land was fraudulent and unlawful as it was done without the administration of the estate of the deceased; by false pretences (using forged documents), and that it amounted to intermeddling with the estate of a deceased person, the plaintiff prays for judgment against the defendants jointly and severally for:-

(a) A declaration that the registration of the 1st defendant, Christopher Muchomba Warui, as the proprietor of L.R Nos. Konyu/Baricho/2341 and Konyu/Baricho/ 2389 (the suit properties) was fraudulent;

(b) Rectification of the registers in respect of the suit properties by cancellation of the 1st defendant's name as the proprietor thereof and in place thereof the same to revert to the name of Mathenga Mbuthia (deceased) for administration as his estate.

(c) Costs of the suit and interest.

5. Through his statement of defence filed on **11th May 2012**, the 1st defendant denies the allegations levelled against him and avers that he bought the suit property from Abraham Mbuthia free from any encumbrances and after following the right procedures; that the parcels he bought were from land parcel Konyu/Baricho/2340 as opposed to parcel No. 154 as contended by the plaintiff and that the plaintiff lives in Konyu Baricho/2339 which he has no interest in.

6. The 1st defendant further avers that he bought land parcel 2341 from Jedidah Kachecha Mathenga when she was alive and contends that nobody has a right to interfere with his interest in that parcel of land.

7. The 1st defendant further contends that he is an innocent purchaser of the suit properties for value without notice of any defect in the title of his predecessors in entitlement to the suit properties.

8. Arguing that this suit has been brought in bad faith, the defendant urges the court to dismiss it with costs to him.

9. Like the 1st defendant, the 2nd defendant, through the statement of defence filed on 27th March 2015, denies all the allegations of wrongdoing levelled against it and puts the plaintiff to strict proof of those allegations. It is also contended that the suit is time barred and contrary to mandatory provisions of the law.

The plaintiff's case

10. When the matter came up for hearing, the plaintiff produced the following documents as **Pexbt 1** to 7:-

- (i) Limited grant of letters of administration ad litem issued to her in respect of the estate of Mathenge Mbuthia entitling her to file a suit to preserve the estate of Mathenge Mbuthia;
- (ii) Certificate of death in respect of Mathenge Mbuthia;
- (iii) Certificate of death in respect of Jedidah Kabecha Mathenge;
- (iv) Certificate of death in respect of Nelson Wanjohi Mureithi;
- (v) Copies of register in respect of L.R No.Konyu/Baricho Nos. 154, 2341 and 2389;
- (vi) Petition in Nyeri SRM Succession Cause No.138 of 1989; and
- (vii) Proceedings in Karatina R.M Criminal Case No.61 of 2000.

11. In cross-examination, the plaintiff informed the court that Mathenge Mbuthia is the grandfather to her husband and that she is his legal representative. The court heard that Mathenge Mbuthia was married to Jedidah Mbuthia (deceased) but the plaintiff has not taken letters of administration in respect of the estate of Jedidah.

12. The court also heard that Abraham Mbuthia Muruthi is a brother to the plaintiff's husband. The plaintiff has also not taken letters of administration in respect of Abraham Mbuthia's estate.

13. The plaintiff informed the court that she does not know how the original parcel of land, Konyu/Baricho/ 154 was divided into 2339, 2340 and 2341.

14. The court heard that land parcel 2339 is in the plaintiff's name though the plaintiff does not know how it was transferred to her; that parcel No. 2388 which is a sub-division of parcel No. 2340 is also registered in her name.

15. The court further heard that Konyu/ Baricho/2340 was registered in the name of Abraham Mbuthia Muriithi before it was sub-divided into parcels 2387, 2388 and 2389.

16. The plaintiff acknowledged that out of the various sub-divisions of the original parcel of land 154, she is only seeking two of the parcels to be reverted to the original owner. She further acknowledged that she never sued Jedidah and Abraham Mbuthia concerning the impugned transfers of the suit properties before they died.

17. The plaintiff further acknowledged that the 1st defendant was not party to the succession proceedings in respect of the estate of Mathenge Mbuthia.

18. Concerning the criminal case preferred against Abraham Mbuthia and the 1st defendant, the plaintiff acknowledged that the 1st defendant was acquitted of the forgery charges preferred against him. She also acknowledged that according to the evidence of the Land Registrar in the criminal case, at the time of the impugned transfer, the suit properties were in the name of Jedidah and that she participated in the impugned transfer; she took Jedidah to the lands office. She acknowledged that in the lower court proceedings, she stated that her grandmother transferred land to her and that she was aware that the 1st defendant had land transferred to him; that notwithstanding, she believed that the 1st defendant was part of the fraud.

19. In re-examination, the plaintiff stated that she is seeking cancellation of the two titles because theirs are proper as they emanated from the land office hence there will be no need to cancel them.

20. Concerning her testimony in the lower court, the plaintiff stated that at the time, she was not aware that the title held by the 1st defendant had been obtained fraudulently. She pointed out that at the time the impugned transfers were done, her grandmother, Jedidah had obtained letters of administration but distribution had not been done. (the transfers were done before the grant was confirmed).

21. P.W.2, Paul Mwangi Mwacharia, informed the court that he knows that at some point the suit land was transferred to Jedidah wife of Kabecha Mathenge but does not know how it came into the hands of Christopher Muchomba Warui.

The Defence case

22. On his part, the 1st defendant informed the court that he is the registered proprietor of Konyu/ Baricho/2341 and 2389. He purchased 2341 from Jedidah Kabecha Mathenge and 2389 from Abraham Mbuthia Mureithi. He informed the court that at the time he purchased the suit properties they were in the names of Jedidah and Abraham. Before he purchased the suit properties, he conducted searches and confirmed that the properties were in the names of the vendors. He obtained Land Control Board consent for transfer of the suit properties to him and later on obtained titles. He has since developed the suit properties and used them to obtain loans. The sellers were not related to him in any way.

23. The 1st defendant informed the court that at the time he bought the suit properties, he was not aware of any pending succession proceedings. He acknowledged that in 2000 he was charged along side Abraham Mbuthia with forgery but he was acquitted. He produced the sale agreements pursuant to which he gained interest to the suit properties as **Dexbt 1** and **2**.

24. In cross examination, he admitted that Abraham was found guilty of forgery but stated that he learnt about the succession cause during the criminal case. He stated that he is not sure whether the conviction of Abraham had the effect of rendering the transactions done by Abraham fraudulent. He stated that he is aware that Speransia Nyaguthia who testified in the criminal case informed the lower court that the manner in which the consent of the land control board was obtained was not proper as members of the board were not present. He also acknowledged that the sale agreement executed between him and Jedidah was signed by Abraham on Jedidah's behalf as Jedidah could not see well.

25. In re-examination he stated that in her evidence, Speransia informed the lower court that consent was obtained and that the consent was signed by the District Officer and was not a forgery.

26. At close of hearing, parties to this case filed submissions which I have read and considered.

27. From the pleadings and the submissions, I find the sole issue for determination to be whether the plaintiff has made up a case for being granted the orders sought.

28. With regard to that issue, being the one desiring the court to give her judgment on the basis of her allegation that the registration of the 1st defendant as the proprietor of the suit properties is vitiated by the pleaded fraud in the registration, it behooved the plaintiff to prove that the registration of the 1st defendant as the proprietor of the suit properties is indeed vitiated by the pleaded fraud. In that regard, see the provisions of **Sections 27, 28** and **143** of the Registered Land Act, RLA (now repealed) as read with **Section 107** of the Land registration Act, 2012 (RLA, 2012) which provide as follows:-

“27. (RLA) Subject to this Act-(a) The registration of a person shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

28. (RLA) The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

a. to leases, charges and other encumbrances and to conditions and restrictions if any, shown in the register; and

b. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and not declared by section 30 not to require noting on the register.

Provided that nothing in this section shall relieve a proprietor from any duty or obligation to which he is subjected as a trustee.

143 (RLA) (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than first registration) has been obtained, made or omitted by fraud or mistake.

2. The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

“107. LRA, 2012 (1) Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

(2) Unless the contrary is specifically provided for in this Act or the circumstances are such that the contrary must be presumed to be the case, where any step has been taken to create, acquire, assign, transfer, or otherwise execute a disposition, any such transaction shall be continued in accordance with the law applicable to it immediately prior to the commencement of this Act.”

29. By dint of the provisions of **Section 107** of LRA, 2012 supra, the law applicable to the title held by the 1st defendant is the Registered Land Act, Cap 300 Laws of Kenya.

30. By dint of the provisions of **Section 143** supra, for the court to order rectification of the register in respect of the suit properties, the plaintiff must satisfy the following conditions:-

(i) That the registration in favour of the 1st defendant was obtained or made by fraud; and

(ii) That the 1st defendant had knowledge of the fraud or caused such fraud or substantially contributed to the fraud by his act, neglect or default.

31. On whether the plaintiff satisfied the above conditions, on behalf of the plaintiff, it is contended that the 1st defendant had knowledge of the pleaded fraud and contributed to it by his negligence and default. In that regard, it is contended that the 1st defendant participated in the removal of the caution which had been filed to restrict dealing with the suit property; entered into agreements for sale of the suit properties with a person who had no valid or lawful authority to enter into any valid transaction in respect of the suit property, closed his eyes to the suspicion that the estate of the original owner of the suit property might not have been administered.

32. On behalf of the 1st defendant, it is pointed that fraud was committed on the original parcel of land which was none existent at the time the 1st defendant bought the suit properties and because the 1st defendant bought the suit properties from the persons to whom the subdivisions were transferred, submitted that the plaintiff has not proved her case against the 1st defendant.

33. On whether the plaintiff has made up a case for being granted the orders, whilst the evidence produced in this case shows that there was fraud in transfer of the original parcel of land to Jedidah and Abraham from whom the 1st defendant obtained his titles, the evidence adduced in this case is incapable of proving that the 1st defendant had knowledge of the fraud or caused such fraud or substantially contributed to the fraud by his act, neglect or default to warrant granting the orders sought against him. According to the lower court proceedings, no evidence capable of linking the 1st defendant to the fraud in the transfer of the suit properties to him was adduced. The lower court, in its judgment observed:-

“We have no evidence to connect A2 (A2 was the 1st defendant in these proceedings) with the offences brought against him. He has almost convinced the court that he could be an innocent buyer for value because even when we look at the price he paid for the parcel reflected on the agreement made before Ndirangu advocate, there is nothing to indicate that the value was less than that on the market...”

34. While its true that the standard of prove required in this case is lower than that required in the criminal case, upon review of the evidence adduced in this case, I equally find it to be incapable of proving that the 1st defendant was aware of the pleaded fraud in the transfer of the suit property and/or caused it or substantially contributed to it by his act, negligence or default.

35. The upshot of the foregoing is that the plaintiff’s case has no merit and is dismissed with costs to the defendants.

Dated, signed and delivered in open court at Nyeri this 11th day of February, 2019.

L N WAITHAKA

JUDGE

Coram:

Mr. Mugo h/b for C. M. King’ori for the plaintiff

Christopher Muchomba – 1st defendant

Mr. Njoroge for the 2nd defendant

Court assistant - Esther