



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANGA**

**ELC NO 111 OF 2017**

**MUKUNYA MUGO A.....1<sup>ST</sup> PLAINTIFF**

**MM B.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ELIZABETH MUGURE MUKUNYA.....DEFENDANT**

**JUDGMENT**

1. The Plaintiffs filed suit against the Defendant seeking the following orders;

- a) A declaration that the Plaintiffs are jointly *bona fide* owners and proprietors in equal shares of the property described as LOC.1/KIUNYU/172 measuring approximately 3.41 Hectares the same having been held in trust of Mukunya Mugo and Winnie Wambui respectively and that the Defendant 's occupation of the same is illegal and unlawful and therefore amount to trespass.
- b) An eviction order to issue against Elizabeth Mugure Mukunya, the Defendant herein requiring her to unconditionally and forthwith vacate the suit premises at her own cost and in the alternative the OCS Kirwara Police Station to conduct the said eviction.
- c) A Permanent Injunction to issue against Elizabeth Mugure Mukunya the Defendant herein whether by herself, her servants, agents, representative, employees and/or any other person deriving authority under her restraining her from entering, cultivating, occupying or interfering in any manner whatsoever with the property described as LOC.1/KIUNYU/172 situated at Kiunyu within Murang'a County.
- d) Costs of the suit and interests thereon.

2. The Plaintiffs' case is that the land was initially registered in the name of the name of LIVINGSTONE MUKUNYA MURIU deceased the grandfather of the Plaintiffs. That during his lifetime he distributed his property to the immediate and extended family. In particular he gave land to his grandsons named after him. The Plaintiffs are the sons of Benson Mugo Mukunya, the only son of the deceased. That in December 1999 the deceased transferred the suit land to the 1<sup>st</sup> Plaintiff and Winnie Wambui, the mother of the 2<sup>nd</sup> Plaintiff as a trustee for the 2<sup>nd</sup> Plaintiff who was then a minor. On 24/12/2000 he followed up and executed the transfer of the suit land before an Advocate in Thika and handed over the certificate of title, Land Control Board consent and the duly executed transfer of the land thus completing the process of conferring a gift to the Plaintiffs. The documents were finally registered on the 7/2/2005.

3. The Plaintiff also claimed that the Defendant was allowed by the late proprietor to reside in the land since she was destitute and had a disabled child. However this was only temporary as the deceased intended that she vacates after she gets an alternative land. They aver that the Defendant had been given her own land of 4 acres by their grandfather which she sold. Her son was given 2 acres which she declined to take.

4. That the Land Registrar erred during registration and confirmed title to be owned by MM and Wambui as trustees of M instead of registration of Wambui in trust of Mukunya while Mukunya had his own share exclusively. That the deceased executed transfer forms and appeared before the Land Board at Gatanga to obtain requisite consent to transfer the land to the 1<sup>st</sup> Plaintiff and Wambui as a trustee of the 2<sup>nd</sup> Plaintiff who was still a minor.

5. The Defendant denied the Plaintiffs' claim in her statement of defense dated the 13/4/16 where she stated that the suit land belongs to Livingstone Mukunya Muriu deceased and is subject to Succession cause No 397 of 2005 in which prohibitory orders have been issued. She asserted that the deceased did not distribute his property during his lifetime and therefore the suit lands is subject to the succession proceedings.

6. She averred that the suit is an abuse of the process of the Court because the suit land is subject to another case to wit; PMCC NO. 152 of 2014; Billy Benson Gakahu and Peter Muiruri Nyoike Vs Elizabeth Mugure Mukunya who claim purchasers interest in the suit land.
7. The Defendant further averred that the Plaintiffs have never owned the suit land but for the fraudulent acts of their father namely Benson Mugo Mukunya that the transfers were made illegally. It is her case that she entered the land with the blessings of the late proprietor who was also her father.
8. The matter was fixed for hearing on the 12/10/17. On the material day neither the Defendant and nor her Advocate was present in Court. The Court being satisfied that the hearing notice was duly served, the hearing proceeded with the Plaintiffs case.
9. The Plaintiff's testimony was captured by the evidence of PW1 who testified on his own behalf and that of the 2<sup>nd</sup> Defendant who is his step brother pursuant to the authority to act dated the 5/2/16 by the 2<sup>nd</sup> Plaintiff. The two Plaintiffs share similar names hence the A and B description for distinction. The 1<sup>st</sup> Plaintiff testified that their late grandfather gifted the land to them, the 2<sup>nd</sup> Plaintiff was still a minor and thus the land was held in trust by his mother, Winnie Wambui, who also happens to be the step mother of the 1<sup>st</sup> Plaintiff.
10. The Court received evidence that the suit land previously belonged to their grandfather Livingstone Mukunya Muriu who died in 2004. That in 1999 the deceased distributed various properties to his family members some of whom are the Plaintiffs who are his grandsons named after him. It is stated that the deceased attended Gatanga Land Control Board and obtained land control board consent to transfer the suit land to the 1<sup>st</sup> Plaintiff and Winnie Wambui as trustee for the 2<sup>nd</sup> Plaintiff who was a minor then.
11. In addition, he informed the Court that the deceased in 2000 in the presence of his parents Benson Mugo Mukunya and Winnie Wambui executed a transfer before an advocate in the names of the Plaintiffs. That the actual registration of the transfer took place on the 7/2/2005 because the deceased wanted to continue receiving income from the coffee on the suit land in his lifetime. That the title was registered in the names of the 1<sup>st</sup> Plaintiff and Winnie Wambui, as a gift and on the proprietorship section it was recorded as the 1<sup>st</sup> Plaintiff and Winnie Wambui Mugo as Trustees for MM -Minor. This he attributes to an error by the Land Registrar.
12. Further he testified that the Defendant and her two children moved into the suit land prior to their grandfather's death. Her father allowed her to live on the land temporarily as she had a disabled child and as she looked for an alternative land of her own. It is his evidence that she had been given 4 acres of land which she sold and her son got 2 acres which she declined to occupy. That the Defendant has adamantly refused to vacate the suit lands despite demands to do so.
13. He testified that the 2<sup>nd</sup> Plaintiff is now an adult and is desirous to have the trust dissolved and the land be transferred in his name.
14. To the best of his knowledge he asserted that the Defendant has no claim on the Suitland. The Plaintiff claimed that he was not party to the suit that the defence referred to as pending in the lower Court and relating to the land. Infact, the property is not part of the estate of the deceased and there has been no case brought by the Defendant to cancel the title issued in 2005.
15. PW2 – Rev Joseph Karanja Kinyanjui stated that he is an ordained Minister of the African Christian Church and Schools in Gatanga, Muranga County. That the deceased Livingstone Mukunya was his uncle who lived in Ndakaini at the time of his death in 2004.
16. He informed the Court that on 27/11/97 he was summoned to a meeting by the deceased at his home in Ndakaini where he met several other invited family members and friends of the deceased. That his only son Benson Mugo Mukunya was present as well. At the meeting the deceased informed them that he wished to make a will on how to distribute the remainder of his properties to his children and grandchildren. It fell on Joseph Kimura David, deceased to write down the will. Livingstone Mukunya signed the will and they all countersigned as well. In respect to the suit land he states that the land was given to Mukunya Lois and Mukunya Wambui being the two sons of Benson Mugo Mukunya. He also informed them that he wished to retain the ownership of the land until his death. He testified that he was aware that the said Livingstone later changed his mind in 1999 and attended the Land Control Board at Gatanga and obtained consent to transfer the land to his grandsons, the Plaintiffs.
17. After the close of the hearing the Defendant filed an application to set aside the proceedings to allow the trial to reopen for fresh hearing of the suit, which application was heard and dismissed. Another application seeking stay of proceedings pending appeal suffered the same fate as the earlier one paving way for the determination of the current suit.
18. The Plaintiffs filed Written Submissions on the 13/11/17 which I have read and considered. In their brief submissions, the Plaintiffs stated that the suit land was transferred to the Plaintiffs as a gift intervivos as evidenced by the letter of consent and the 1<sup>st</sup> Plaintiff's evidence at the trial. That the Defendant has not tendered evidence to support her claim that the suit land is part of the estate of her father for which she is a possible beneficiary.

### **Analysis and determination**

19. The following issues are framed for determination;
  - a. Who are the legal owners of the suit land?
  - b. What orders may issue?
  - c. Who meets the cost of the suit?

20. According to the green card produced in evidence it is not disputed that the suit land belonged to the deceased Livingstone Mukunya Muriu who became registered as proprietor on the 12/8/62. It is in evidence that he died on the 31/7/2005.

21. The parties to this suit are also related. The Plaintiffs are step brothers being the sons of Benson Mukunya Mugo, the only son of the deceased. Winnie Wambui is the mother of the 2<sup>nd</sup> Plaintiff and the step mother of the 1<sup>st</sup> Plaintiff, she being the wife of Benson Mukunya Mugo.

22. The Plaintiff's case is undefended. That being the case, there is nothing to relieve the Plaintiffs from discharging the burden of proof albeit in the absence of contestation by the Defendant.

23. The provisions of Section 24 of the Land Registration Act, 2012 provide that the Land Registration Act provides as follows:

*“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

24. The Section is a replica of Section 27 of the Registered Land Act, Cap 300 (now repealed ) which provided that a registered proprietor has absolute rights and privileges over his land .These rights can only be limited by encumbrances restrictions and easements noted on the registered and further overriding interest under the repealed Section 30 of the said Act .

25. Section 28 of the repealed Cap 300 states that;

*“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 liable by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject to-*

- a. To leases, charges and other encumbrances and to the 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 are declared by section 30 not to require noting on the register

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

26. Section 32 (2) of the repealed Act provided as follows:-

*“A title deed or a certificate of lease shall be only prima facie evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register.”*

27. The suit land was registered in 2005 under the Land Registration Act.

28. The Plaintiffs have stated in their case that they are the registered owners of the suit land. I have perused both the certified copy of the title deed and the green card for the suit land and note as follows; the title deed is registered in the names of M M and Winnie Wambui both of P.O. Box 245 Thika. On the proprietorship section (part B) of the title entries are shown as M M and Winnie Wambui as trustees of MM – minor. The green card under entry No. 5 shows that the suit land is registered in the names of M M and Winnie Wambui as trustees of M M - Minor. The consideration is entered as Kshs 1.2 million.

29. The Plaintiffs have claimed in this case that they are the absolute owners of the suit land. That there is an error on the face of the title in that according to them the title ought to read the plaintiff and Winnie Wambui as trustee of the 2<sup>nd</sup> Plaintiff. That it is Winnie Wambui who was the trustee of the 2<sup>nd</sup> Plaintiff and the 1<sup>st</sup> Plaintiff was a co-owner of the suit land. This is not reflected in the title which denotes that the 1<sup>st</sup> Plaintiff and Winnie Wambui are holding the suit land in trust for M M. Interestingly the case is filed by M M A and B. The title and green card does not contain M M A and B and therefore there is no evidence that the M M- Minor is necessarily the 2<sup>nd</sup> Defendant.

30. Curiously, the Plaintiffs' have not produced the transfer document for the Court to evaluate whether indeed there was an error in the manner in which the title was registered as claimed by the Plaintiffs. The letter of consent dated the 24/11/99 states as follows;

*“ From Livingstone Mukunya Muriu*

*To; M M A and Winnie Wambui, trustee for MM -Minor.*

*Consideration; Gift”*

Neither was the Land Registrar called to testify to the averments.

31. In the absence of the transfer document, it is difficult for the Court to follow the Plaintiffs' claim and evidence. It is clear that the land is registered in the names of M M and Winnie Wambui as trustees of MM -Minor.

32. There is no evidence that the trusts held by either the Plaintiff and /or the said Winnie Wambui have been dissolved to vest the property in the 2<sup>nd</sup> Plaintiff. The 2<sup>nd</sup> Plaintiff therefore remains a stranger as far as the ownership of the suit land is concerned in relation to the suit.

33. More fundamentally the Court notes that the co-owner of the suit land Winnie Wambui is not a party to the suit. According to the title and the green card she is the co-owner of the land in her capacity as a trustee either singly or with the 1<sup>st</sup> Plaintiff and any orders that might be issued in the case are likely to affect her adversely without affording her the right to be heard.

34. The right to be heard is a fundamental right that is enshrined in our Constitution under Art 50 (1) which states as follows;

“Every person has a right to have any dispute that can be resolved by the application of law decided in fair and public hearing before a Court of law or if appropriate, another independent and impartial tribunal or body.”

35. In the case of **J M K Vs M W K & Anor (2015) EKLK** the Court held;

“The Courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.”

36. The Court went ahead in upholding the right to be heard in the case of **Mbaki & Others Vs Macharia & Anor (2005) 2EA 206;**

“the right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

37. From the Supreme law and the cited case law, the principles of natural justice demand that she be given the opportunity to be heard and frowns on any attempt to condemn an individual unheard.

38. If as indicated on the title the said Winnie Wambui is indeed a Trustee, then she is obligated legally to account to the beneficiary in respect to the trust asset and should have been made a party in this case.

39. The Court is not satisfied that the Plaintiffs have proved ownership. In the circumstances this suit is struck out for being non-suited.

40. I make no orders as to costs.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 28<sup>TH</sup> DAY OF MARCH, 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

1<sup>st</sup> & 2<sup>nd</sup> Plaintiff – Absent

Opiyo for the Defendant

Njeri and Kuyiki, Court Assistants