



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.263 OF 2013

RAPHAEL KINORU WANDAKA1ST PLAINTIFF

SAMSON NGUGI MUTURI2ND PLAINTIFF

MILKA MUTHONI MUTURI.....3RD PLAINTIFF

VERSUS

ELIZABETH WAMBUI MWANGI.....DEFENDANT

JUDGMENT

(Suit by plaintiffs claiming ownership of land for which defendant has title; land having been originally under a land buying company; 2nd & 3rd plaintiffs claiming that their late father balloted for the land and that defendant's title is therefore fraudulent; defendant having acquired the land through a person who held a ballot for the said land; on the evidence, court finding that there was no fault in the defendant's predecessor's ballot and not persuaded that the father of the 2nd & 3rd plaintiffs balloted for the land; suit by the plaintiffs also a non-starter since if their claim is that the land was owned by their father, they needed to hold letters of administration for his estate to present a suit on his behalf; 2nd & 3rd plaintiffs also had no capacity to sell the land to the 1st plaintiff without letters of administration; plaintiffs therefore lacking capacity; suit also time barred; defendant's predecessor obtained title in the year 1990; suit filed 23 years after this period; actions to claim land need to be filed within 12 years; suit by plaintiffs dismissed; counterclaim by defendant allowed)

1. This suit was commenced through a plaint which was filed on 25 March 2013. In the plaint, the plaintiffs claim that one Muturi Munene (deceased) was the owner of a ballot No. 36 in Mukinye Farmers Cooperative Society Limited, a land buying company. The said Muturi Munene is the father of the 2nd plaintiff and husband to the 3rd plaintiff. It is pleaded that during his lifetime, he transferred his share and ballot to the said plot No. 36 to the 2nd and 3rd plaintiffs who later sold it to the 1st plaintiff. However, when they went to the offices of the Society to transfer the said plot, they found that the same had been transferred to one Erastus Kimanga, then to Geoffrey Gacathi and later to the defendant. It is their position that this was done fraudulently and illegally and the following particulars of illegality and fraud are pleaded :-

- (i) Changing ownership of Plot No. 36 shareholding without the knowledge of the owner.
- (ii) Selling and/or fraudulently transferring ownership of ballot/Plot No. 36 to the defendant fraudulently.
- (iii) The defendant buying the shareholding of ballot/plot No. 36 without establishing who the real/true owner of the land was.
- (iv) Pretending that ballot/plot No. 36 and its shareholding belonged to the defendant.

2. It is further pleaded that this plot No. 36 became registered as the land parcel Gilgil/Karunga Block 5/36 (hereinafter referred to as "the suit land") and the title is now with the defendant. In the suit, the plaintiffs have principally asked for orders of cancellation of the title of the defendant and title to be issued in the name of the 3rd plaintiff.

3. The defendant filed a statement of defence which she later amended to include a counterclaim. She denied that she fraudulently transferred title to the suit land and averred that she purchased the same for consideration from one Geoffrey Gacathi Ngengi. She then got title in her name in April 2011 following a lawful and transparent process. She has further averred that she was not privy to any transactions within Mukinye Cooperative Society. In her counterclaim, she has sought orders for a declaration that she is the rightful proprietor of the suit land and a perpetual injunction to restrain the plaintiffs from the same. The plaintiffs filed a defence to counterclaim and more or less repeated

their averments in the plaint. They also contended that the defendant has never been on the ground and that it is the 1st plaintiff who has all along been in possession.

4. PW-1 was Raphael Kinoru Wandaka, the 1st plaintiff. He testified inter alia that on 12 July 2012, the 2nd and 3rd plaintiffs sold to him the share Nos. 36 and 37 in Mukinye Farmers Society (the Society or Mukinye FCS) at a consideration of Kshs. 350,000/=. He was informed by the sellers that what they were selling was a share of their deceased father, one Muturi Munene (Munene) who had died on 20 July 2001, and they gave him the original ballot card from the Society which he produced as an exhibit. He was also given receipts to show that Munene had purchased the shares sold to him and he produced various receipts. He followed up on getting title for the two plots that he had purchased, but only got title to the Plot No. 37. He was informed that he could not get title to the Plot No. 36 (the suit land) for the same was already registered in the name of the defendant. In the meantime, he took possession and fenced the two parcels of land together and he has been cultivating on the same to date. He testified that they tried to resolve the dispute at the Society's offices but eventually had to come to court.

5. Cross-examined, he acknowledged that by the time he was purchasing the plot, Muturi Munene, its owner, was deceased and he did not ask the vendors for any grant of letters of administration for his estate. When he entered into the sale agreement, he also had not done a search on the property despite being aware that some people already had titles over land in Mukinye FCS. It is on 21 March 2013, that he did a search which showed that the defendant had title. A meeting was held at the Society and he learnt that she had also purchased the same land. A register of Mukinye FCS was put to him but he stated that he was not aware of it. He was cross-examined on the ballot given to him, which had two numbers, 37 and 36, in that order. He affirmed that the number printed in the ballot was 37 and not 36. He himself was not present when the balloting was done. A ballot printed No. 36 was put to him and he affirmed that the same bore the name of Erastus Kimanga. Re-examined, he testified that it was not erroneous for the ballot to have two numbers and that the register of Mukinye FCS showed that Muturi Munene owned the two shares.

6. PW-2 was Samson Ngugi Muturi the second plaintiff. He testified that Milka Muthoni Muturi, the 3rd plaintiff, is his mother and that he is son of Muturi Munene. He affirmed that through the sale agreement of 12 July 2012, they sold the suit land and the plot No. 37 to the 1st plaintiff. He stated that the share to the plot No. 36 was held by his father, whereas he himself in his individual capacity held the share to the plot No. 37. At the time of sale, they had yet to receive the title deeds and only had the ballots and receipts. There was no problem in the transfer of the Plot No. 37 to the purchaser, but the Plot No. 36 could not be transferred owing to the title held by the defendant. A meeting was then called to resolve the issue but there was no agreement hence this suit. He testified that they never used to utilize the two plots and it is after the sale that the 1st plaintiff started using them. He explained that the ballot they have shows two plots, for whoever had 2 shares, after balloting, was given the next plot. He faulted the title of the defendant for having been issued without the accompanying receipts from Mukinye FCS.

7. Cross-examined, he asserted that he was a shareholder of Mukinye FCS. He however could not trace his name in the register of the Society, although he could identify the name of Muturi Munene for the Plots No. 36 and 37. He then contended that membership is shown by the receipts although the receipts produced did not show a plot number. He conceded that the ballot exhibited only showed the name of Muturi Munene and his name was not indicated. He had no answer when his witness statement was put to him where he had stated that both ballots were held by his father. He agreed that no succession case over the estate of his father had been filed before the sale to the 1st plaintiff. He also conceded that this suit has not been filed on behalf of the estate of their late father.

8. PW-3 was one Gabriel Gatheru Mbugua, the current chairman of Mukinye FCS, having taken office on 22 May 2014 after the previous Chairman, one Alex Nganga died on 5 May 2014. He produced the register of Mukinye FCS as an exhibit and stated that according to the record, Munene owned the plots No. 36 and 37. He explained that people were being registered as they balloted, and after balloting, the persons were supposed to register their ballots with the Society. He further explained that the register has some gaps, where no name is noted against the plot number, as some people have not come to register their ballots. He acknowledged the plaintiffs' ballot as a genuine ballot as he had two shares. He also testified that Munene paid survey for the two plots. He stated that even if a person had more than one share, he only picked one ballot, which would then carry the other share held. The ballots that were not picked were returned to the office and persons asked to come for them at a later date. He stated that if Munene picked the ballot No. 37 and plot No. 36 had not been taken, he would get both plot No. 36 and 37. He affirmed that Mr. Munene picked the ballot No. 37 and was to get a second plot from the office later on. He however did not know why he was given the plot No. 36 and not the plot No. 38 which is what follows the number 37.

9. He testified that payment of shares came before the balloting and one could not ballot before fully paying for their shares. A member who had not paid survey fees was also not allowed to ballot. Whatever they had paid was refunded to them and their shares sold to other members. He noted that the two survey fees receipts produced bore different names, one in the name of Muturi Munene and the other in the name of Ngugi Munene (PW-2).

10. He did not find fault in the ballot No. 36 relied upon by the defendant and stated that it could be genuine. He explained that each person only picked one ballot, but since some people had more than one share, some ballots were not picked. These ballots were taken to the office of the Cooperatives officer so that those with more than one share could have the additional plots noted in the ballot that they picked. However, the directors of the Society had access to these ballots and they were tampered with and not all excess ballots remained in the Cooperatives office.

11. He emphasized that for one to get a ballot, he needed to have a receipt. He also stated that they have only one register which is also what is in the Lands office for issuance of title. A register relied upon by the defendant was put to him and he asserted that it was not genuine. He also added that before the year 1994, the Chairman used to process titles at the land's office and a member would collect the title at the offices of the Society. After 1994, it is the members who now went personally to the Lands office to process their titles. He averred that balloting was done in the year 1988 or 1989.

12. Cross-examined, he asserted that the title to the suit land would be fraudulent if there are no receipts for it. He testified that Samson Ngugi Muturi (PW-2) is not a shareholder and never held any share either to the plot No. 36 or 37. He reiterated that if one had two shares, he only picked one ballot and the other ballot from the Co-operatives office, but the ballot number was indicated at the time of ballot. He however conceded that he was not present when balloting was done, as it was his father, and not himself who was a shareholder at the

Society. He thus did not know who inserted the numbers in the ballots. He stated that he cannot tell the owners of the plots which have no names against them in the register.

With the above evidence, the plaintiffs closed their case.

13. DW-1 was one Joseph Kariuki Kibicho. He served as treasurer of the Society from the year 1980. He stated that the Society started buying land in the year 1970 and the balloting was done in the 1980s. He was present at the balloting exercise and explained that a member would be called and pick a ballot. He testified that the ballot No. 36 was picked by one Erastus Kimanga who was a member. He stated that he was present and saw him balloting. He produced the said ballot No. 36 as an exhibit. He testified that he does not know Muturi Munene as he was not a member. He stated that the balloting exercise ended at the farm and the ballots which remained, for not all members attended to ballot, were taken to the D.O's office. If one had paid money, he would get a letter to allow him to ballot at the D.O's office in the company of an official. He asserted that there was only issued one ballot per plot.

14. Cross-examined, he testified that he served as treasurer up to the year 1996 and that he joined the Society in the year 1970 when the land in issue was bought. He was the one who used to issue receipts and he stated that before Erastus balloted, he was verified as a member and he had paid the requisite fees.

15. DW-2 was Elizabeth Wambui Mwangi, the defendant. She testified that she purchased the land from one Geoffrey Gacathi Ngengi on 24 January 2011. Before purchasing the land, she had seen the Green Card and conducted a search and she produced the said documents as exhibits. She obtained consent from the Land Control Board and effected transfer into her name. She went to the land in the year 2011 but could not establish the exact ground and she thus went and obtained a map. She then engaged a person to fence the land. It is when she started fencing that the 1st plaintiff emerged, claiming to own the land. She stated that before purchasing the land she did all due diligence and even obtained the ballot to the suit land. She has however not been able to take possession as the 1st plaintiff took it over.

16. Cross-examined, she stated that she was given the ballot but did not have the receipts for the ballot. She has no claim against either Mr. Gacathi or Erastus Kimanga.

17. With the above evidence, the defendant closed her case.

18. I invited both counsel to file written submissions and they did. Mr. Kariuki in his submissions, inter alia emphasized the point that there is only one register of Mukinye FCS before court and the same shows that the plots Nos. 36 and 37 belonged to Mr. Munene and not Erastus Kimanga. He further referred to the evidence of PW-3, that in order to differentiate the ballots, one needed to look at the receipts, and pointed out that no receipts were produced by the defence. He also found it strange that the defendant did not call her alleged previous owners of the land to testify. He was of the view that the plaintiffs have thus proved their case.

19. On the other hand, Mr. Kahiga, learned counsel for the defendant, inter alia submitted that the 1st plaintiff purchased land from persons who had no capacity to sell and were intermeddling with the estate of a deceased person contrary to the provisions of Section 45 of the Law of Succession Act, Cap 160, Laws of Kenya. He further questioned how the plaintiffs' ballot bears two plot numbers. On the register relied upon by the plaintiffs, he referred me to the evidence of DW-1 who stated that the same was not a genuine register. He also faulted the plaintiffs for not suing the Society or the Land Registrar whom he thought were necessary parties. He was not persuaded that the plaintiffs have proved their case to the required standard and was of the view that the evidence tendered was not sufficient to overturn the defendant's title to the suit land. He submitted that the defendant was an innocent purchaser for value and without notice and her title ought not to be impeached. To support his arguments, he relied on a wealth of authorities, all of which I have taken into consideration.

20. Both counsel tendered their issues but in my view, the following issues will determine who ought to be considered the rightful owner of the suit land.

(i) Which is the genuine ballot to the plot No. 36 ?

(ii) Whether the registration of the defendant as owner of the suit land was procured fraudulently.

(iii) Whether the plaintiffs have capacity.

(iv) Whether the plaintiffs' suit is time barred .

21. Both plaintiffs and defendant availed two ballots to the suit land. The plaintiffs' ballot has a printed serial No. 37 but is handwritten Plot No. 37 and 36. On the other hand, the defendant's ballot is printed with the serial No. 36 and is handwritten Plot No. 036. The question that arises is which of the two ballots should be considered to be genuine ?

22. PW-3 in his evidence stated that both ballots were issued by the Society. He however believed that the plaintiffs' ballot is the correct ballot, his general explanation being that if someone had two plots, he was given the other plot next to what was noted in the ballot and this other plot was handwritten into the ballot that he picked. I am personally not swayed by this evidence of PW-3. First, he was not present when the balloting exercise was being conducted and I do not see how he can thus state with finality what transpired during the balloting. This is in contrast to the evidence of DW-1 who was present when balloting was done and who testified that it is Erastus who picked the ballot to the plot No. 36. In fact, I did not find the explanation of the two plots being indicated in the same ballot as being convincing. If it is to be believed that where one had two plots, and he balloted for one, then the next was given to him, why not simply also issue him with the ballot for the other plot so that he can have two ballots for the avoidance of doubt ? If the process is as outlined by PW-3, if this second ballot was not given as I have pointed out above, where then would this other ballot go ? The ballot to the second plot would have been printed in advance and thus available. His explanation on what would happen to this ballot was certainly not convincing.

23. I have also not forgotten the discrepancy between the evidence of PW-2 and PW-3. PW-3 stated that PW-2 was never a member of the Society, yet PW-2 contended that he is the one who owned the plot No. 37. If he indeed owned the plot No. 37, where is his ballot for this plot? Apart from receipts bearing his name, and which do not refer to the Plot No. 37, or even plot No. 36, there was nothing else to show that PW-2 owned the plot No. 37 as he alleged. Moreover, if indeed he was entitled to the plot No. 37 as he claims, how come it was his father who was entered in the register and not himself? Why didn't he complain about the fact that his name is nowhere in the register? When cross-examined on why his name did not appear in the register, PW-2 stated that the register was probably altered. PW-2 is the second plaintiff, and now, if one of the plaintiffs himself states that it is probable that the register was altered, I find it curious that the same plaintiffs wish to also rely on the same register that they believe was altered.

24. My own assessment of the evidence is that the ballot No. 36 was indeed picked by Erastus Kimanga and not either PW-2 or their deceased father. The printed ballot No. 36 bears his name and there is no suggestion that he forged this ballot.

25. Mr. Kariuki made heavy weather of the fact that the name of Erastus Kimanga does not appear in the register which was produced by PW-3. As I have just mentioned, the plaintiffs themselves also seem to have a concern with the register, and given that position, it is probable that there is a serious problem with the said register. Without other evidence, one cannot simply rely on this register, for as I have pointed out, even the plaintiffs do not believe in it. In fact, DW-1, a long standing official, whose evidence must be given considerable substance, did state that what was availed was not the genuine register, and given that position, I am unable to give much weight to the register that was produced by PW-3.

26. Neither am I persuaded that the non-production of receipts by the defendants negated the ballot that they rely on. The evidence was clear that no one could ballot without having been fully paid up. The fact that Erastus Kimanga picked a ballot would infer that indeed he was fully paid up and eligible to ballot. His status was confirmed by DW-1. I really see no issue at all with the ballot that he picked.

27. My holding on the first issue therefore is that the ballot to the Plot No. 36 was picked by Erastus Kimanga and that is the genuine ballot for the suit land.

28. That being the case, I see no problem with Erastus Kimanga having taken out title in the year 1990 and I see no problem with the subsequent transfers leading to the title of the defendant.

29. But even if I am wrong on the above, I still do not see how the plaintiffs can succeed. Firstly, it is their case that the ballot to the plot No. 36 was owned by the late father to the 2nd and 3rd defendants. If that is the case, the 2nd and 3rd defendants had no capacity to sell the said plot to the 1st plaintiff before first conducting a succession case and the property being distributed. They also cannot say that they have capacity to present this case as they have not presented this case for the benefit of the estate of their late father, if their position is that the said plot was owned by their father. That alone would lead to the plaintiffs' suit being defeated for lack of capacity. There was a pleading that Muturi Munene had transferred his interest to the 2nd and 3rd plaintiffs before his demise, but no such evidence was led.

30. I also note that the title to the suit land was first taken on 22 August 1990 by Erastus Kimanga. The plaintiffs, if indeed they thought that the title was not a good title, had 12 years from this time to challenge the title of Mr. Erastus, as their cause of action accrued immediately title was issued to Mr. Erastus. This is brought out by the provisions of Section 7 of the Limitation of Actions Act, which provides as follows :-

7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

31. I do not for one moment think that the plaintiffs can escape this 12 year rule. They themselves did state that they had acquired title to the land parcel No. 37. They probably would have persuaded me that they only got wind of the title of Erastus in the year 2013 if they had revealed to me when exactly they got title to their land parcel No. 37. But they never brought forth this evidence, and I am not persuaded that they never knew of the title of Erastus from the time it was issued in the year 1989 or shortly thereafter. They have in fact not told me why they have never followed up on the issuance of the title to the suit land for all those years, if they had fully paid for it, balloted for it, and their name was in the register, and they believed that they owned it. My own view of the matter therefore is that the case of the plaintiffs is time barred pursuant to Section 7 of the Limitation of Actions Act.

32. I see no problem with the title of the defendant. For all intents and purposes, the defendant was an innocent purchaser for value who conducted proper due diligence before purchasing the suit land. It cannot be said that she procured her title fraudulently or through misrepresentation. Neither have I seen any fraud in the manner in which her predecessors in title obtained title to the suit land. I am thus unable to impeach her title. As owner of the suit land, the defendant is entitled to all rights of ownership as provided for in Section 25 of the Land Registration Act, 2012 and the plaintiffs must therefore keep off this land.

33. On the whole, I do dismiss the plaintiffs suit and allow the counterclaim of the defendant. I issue a declaration that it is the defendant who is the rightful proprietor of the land parcel Gilgil/Karunga Block 5/36 (Mukinye). I also issue an order directing the 1st plaintiff, to immediately give vacant possession of the suit land and in any event no later than 14 days from the date of this judgment. If he does not do so, he be forcibly evicted. I also issue an order permanently restraining the plaintiffs from the suit land. The defendant shall have the costs of both the main suit and of the counterclaim.

34. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 7th day of March 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

No appearance on the part of M/s Wambugu Kariuki & Co. for the plaintiffs.

Ms. Amulabu holding brief for Mr. L.M Karanja for the defendant

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU