



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 70 OF 2017**

**(FORMERLY NAIROBI CIVIL SUIT NO.604 OF 2010)**

**JANE WANJIRU MURUGA (Suing on behalf of the**

**Estate of Serah Wambui Kiriira).....PLAINTIFF**

**-VERSUS-**

**CN (Sued as the mother and next of friend of SWK (Minor)....DEFENDANT**

**JOHN MWENDIA KAMAU.....2<sup>ND</sup> DEFENDANT**

**STEPHEN NDUATI KAMAU.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

By a Plaint Amended on 4<sup>th</sup> August 2017, the Plaintiff herein filed a suit against the Defendants and sought for the following orders:

***a) An order that parcel No.LR.Karai/Gikambura/2587 measuring 0.53 Hectares registered in the names of the Defendants be subdivided into two parcels measuring 0.36 Hectares and 0.17 Hectares to be registered in the names of the Defendants and the Plaintiff Jane Wanjiku Muruga respectively.***

***b) Costs of this suit with interest***

***c) Any other relief that this Honourable Court may deem fit to grant.***

The Plaintiff in her statement of claim averred that she is the Administrator of the Estate of **Serah Wambui Kiriira**. She further averred that the deceased was the registered owner of **L.R Karai/Gikambura/549**, measuring **1.181Ha** before she decided to subdivide and distribute it amongst her children, her intention being that her sons would each get **0.36ha** while her daughters would each get **0.17ha** each, and she would get **0.39** ha. She alleged that during the subdivision an error occurred and the portion that was to be given to the Plaintiff was given to Defendants who are children of **Peter Kamau (deceased)**, who was one of the sons of **Serah Wambui Kiriira (deceased)**, and therefore they were issued with a parcel of land measuring **0.53ha** being **L.R Karai/Gikambura/2597**, thereby disinheriting the Plaintiff. She averred that out of the **0.53ha, 0.17ha** belongs to the Plaintiff and therefore the same should be excised and registered in her name.

The suit is contested and the Defendants filed a statement of Defence dated 17<sup>th</sup> June 2013. They denied the contents of the Plaint but admitted that the deceased was the owner of the registered land parcel **No.Karai/Gikambura/549**. They averred that the Plaintiff subdivided the suit property into four portions giving two of her sons **0.53ha**. each, and one son **0.39ha** and her remaining with **0.39ha**. They also averred that the suit herein is an afterthought and brought in bad faith with sole intention of dispossessing the Defendants and asked the court to dismiss the suit.

After various interlocutory Applications, the matter finally proceeded for *viva voce* evidence on the 22<sup>nd</sup> of February 2018, whereby the Plaintiff called two witnesses and the Defendants called one witness.

**PLAINTIFF'S CASE**

**PW1 - Jane Wanjiku Muruga** the Plaintiff herein, testified that she is the administrator of her mother's estate who was the initial Plaintiff and adopted her witness statement dated 23<sup>rd</sup> November 2017. She also testified that the suit land belonged to her mother and that the same was shared amongst her brothers and she was also to get **0.017 hectares**. According to her mother's wishes who gave evidence in court before the defendants applied for the judgment to be set aside. She urged the court to allow her prayers.

On cross examination, she testified that the matter was heard in **Milimani Environmental & Land Court**, and that she was not aware about the court's Ruling for the matter to start afresh. She further testified that the suit land was **Karai/Gikambura/549**, and that the defendant is her sister in law. It was her evidence that her mother subdivided the suit land in **2010** and the case was filed in **2012**. It was her further testimony that her mother wanted to subdivide the land amongst all her children and that before coming to court, they had first gone to the Land Disputes

Tribunal and also that they had gone to the Land Control Board. She further testified that the land in question is **2587(Karai/Gikambura)** and that she was not aware when the title deed was issued. It was her testimony that she wanted the court to give her a portion of land from **Karai/Gikambura/2587**, a subdivision of **Karai/Gikambura/549**. She also contended that her mother filed the suit after 5 years and by then, the grandchildren(Defendants) had already acquired title and that she has cultivated the said portion for 20 years.

On re-examination she stated that the parcel of land **No.2587**, is for her brothers children's home and that the same was issued without her mother's knowledge. She testified that the said portion is **0.53 hectares** but her brother was entitled to **0.36 ha** and from that, her portion is **0.17ha** the same as her other sisters as per her mother's wishes.

**PW2 - Edward Kiriira Nduati** stated that he was the son of the deceased, **Serah Wambui Kiriira** who was the initial owner of the suit land and that the Plaintiff is his sister. He adopted his witness statement dated **23<sup>rd</sup> November 2017**, as his evidence in court. He also testified that his parcel of land is **0.36 ha**, same as his brothers and that his sisters were given **0.17 ha**. He also testified that his deceased brother was to get **0.36ha**, of the land but the Defendants occupy **0.53 ha**. instead of **0.36 ha**. It was his testimony that his mother filed the suit so that his sister, the Plaintiff could get her share of **0.17ha**.

On cross examination he testified that the land was subdivided into portions and that the beneficiaries all got their shares of **0.36 ha** and the children of his deceased brother were issued with a title to their parcel of land **No.2587**. He testified that his mother wanted the land to be subdivided amongst her children and that she went to the **Land Control Board** and that the suit land is in the name of the children of his deceased brother(Defendants herein). He further testified that he has never attended any tribunal over this matter and that what he attended was a chief's meeting where his mother was advised to write what she wants in a letter which she served a copy to the Defendants.

#### **DEFENDANTS CASE**

**DW1 C N K**, testified that the defendants are her children and also adopted her witness statement. She also testified that the deceased was her mother in law who owned the land parcel **No.L.R Karai/Gikambura/549**, which she later subdivided amongst her children and the same was done when her husband was still alive and that he was given **0.53 ha** but was not issued with a title. However later his portion was issued to their children. It was her testimony that her mother in law remained with 0.36 ha and that when her sister in law died leaving behind 3 children, the same was to be given to them. She further testified that the deceased involved surveyors and went to the **Land Control Board**. She also testified that when the deceased wanted the children to obtain titles she complained about the Defendants and took them to the tribunal and later filed the present suit. She stated that she was present at the **Land Control Board** and the deceased did not state that she wanted to transfer the **0.17ha** to the Plaintiff.

On cross examination she testified that her husband was given **0.53ha** the same as that of **Edward Kiriira, PW2** and that he lied to the court and that the deceased got **0.36ha**. though the search shows that the land is **0.39 ha**. She denied fabricating evidence and that one **Wairimu** got **0.17 ha** from PW2. She also testified that she has never appeared before any tribunal. She further testified that she was present when the deceased signed the consent at the **Land Control Board** and that she was not aware what the deceased said in court in her absence.

On re-examination, she testified that she was not aware about the matter and only came to know of it when surveyors came to subdivide her land and that she utilizes the land for farming as she does not live thereon.

The court directed the parties to file written submissions and in line with the said directions, the Plaintiff through the **Law Firm of Waithaka Wachira & Company Advocates** filed her submissions on the **20<sup>th</sup> February 2018**, and submitted that she has made out a case on a balance of probabilities for the grant of the orders sought and urged the court to grant their prayers.

The Defendants through the **Law Firm of Ochieng' Opiyo & Co. Advocates**, filed their submissions on the **24<sup>th</sup> April 2018** and submitted that once a certificate has been issued to a proprietor of land, that serves as conclusive proof of ownership and cannot be defeated regardless of whether it is a first registration or a subsequent registration. They relied on various provisions of law and the decided case of **Alice Chemutai Too... vs.... Nickson Kipkurui Korir & 2 Others, ELC Kericho No.51 of 2014 (OS) (2015)eKLR**, where the Court observed:-

***“For a certificate of title to be impeached, the ingredients set out in Section 26 of the Land Registration Act must be proven against the proprietor of the land”***

The court was therefore urged to dismiss the suit with costs.

This Court has now carefully considered the pleadings in general, the available evidence, the rival written submissions and cited authorities. Further the court has considered the relevant provisions of law and renders itself as follows:-

The suit herein was initially filed by **Serah Wambui Kiriira**, who is the mother to **Jane Wanjiku Muruga** and grandmother to **S W K (Minor)** who is being represented by C N and also grandmother to **2<sup>nd</sup> & 3<sup>rd</sup> Defendants**.

It is also not in doubt that the said **Serah Wambui Kiriira** was also the mother to other children being **Paul Njoroge Nduati, Edward Kiriira Nduati, Peter Kamau Nduati (deceased), Mary Wairimu and Edith Wanjiru**.

It is also not disputed that the said **Serah Wambui Kiriira** was the registered owner of **LR.No.Karai/Gikambura/549**, measuring approximately **1.181 ha**. It is also evident that she subdivided the said parcel of land in a year which is not very clear and distributed the resultant subdivisions to her children and herself. However, it is evident that **LR.No.Karai/Gikambura/549** is now closed upon subdivision. Further what is evident that **LR.Karai/Gikambura/2587** is one of the resultant subdivisions of **LR.No.Karai/Gikambura/549**. The said land parcel **No.Karai/Gikambura/2587**, is registered in the names of the Defendants and a title deed to that effect was issued on **29<sup>th</sup> May 2003**, which title was issued under **'the Registered Land Act' Cap 300 (now repealed)** regime.

Under **Section 27** of the said repealed **Cap 300**, it provided that once the Defendants were registered as the proprietors of **LR.Karai/Gikambura/2587**, they were vested with absolute ownership and they held the said land with all rights and privileges appurtenant thereto. The above position is captured by **Section 24(a)** of the **Land Registration Act** which provides:-

*Subject to this Act—*

*(a) 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;*

Further by dint of **Section 28** of the said repealed Act, the rights held by the Defendants shall not be liable to be defeated except as provided by the law. Therefore on the face of it, the Defendants are the absolute and indefeasible owners of **LR.No.Karai/Gikambura/2587** and their rights can only be challenged as provided by exceptions in **Section 26(1)(a)&(b)** of the **Land Registration Act**, which provides:-

*“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 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.*

However, it is also evident that under **Section 143(1)** of the repealed **Cap 300 Laws of Kenya** and which provisions have been repeated in **Section 80(1)** of the **Land Registration Act**, the court may order the rectification of the register directing the registration be cancelled or amended if the said registration was obtained, made or omitted by fraud or mistake. It provides as follows:-

*143. (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 a first registration) has been obtained, made or omitted by fraud or mistake.*

The Defendants are the registered owners of **Karai/Gikambura/2587** and they got registered so on **29<sup>th</sup> May 2003**. *Prima facie*, they are therefore the absolute and indefeasible owners of the said property.

The Defendants have alleged that they were rightly registered as the owners of the suit property and so their registration cannot be challenged under any of the exceptions provided by **Section 26(1)(a)&(b)** of the **Land Registration Act**. However, the Plaintiff has alleged that during the subdivision of the land, the Defendants who were supposed to be registered as beneficiaries of **0.36 ha** were given more land with an additional of **0.17ha** which was supposed to have been inherited by **Jane Wanjiku Muruga**, the Plaintiff herein. The Plaintiff has therefore sought for rectification of register under **Section 143(1)** of **Cap 300** (repealed) and now **Section 80(1)** of the **Land Registration Act**. The Plaintiff has alleged that the said registration was done through a **mistake or error** and the court should rectify the same and allow her claim. However, the Defendants have vehemently opposed the said allegations and have stated that **Serah Wambui Kiriira** willingly signed the transfer documents and transferred **0.53 ha**. to the Defendants. Further that **Jane Wanjiku Muruga** who is married and has her matrimonial home did not object to the said transfer. That the Plaintiff complained 7 years after the suit land was registered in favour of the Defendants and therefore the Plaintiff's claim is an afterthought and is actuated by malice. The Defendants urged the court to reject the Plaintiff's claim.

It is trite that **'he who alleges must prove'**. The Plaintiff is the one who has alleged that a mistake arose during the registration of the title deed held by the Defendants. The onus of proof is upon her and as provided by **Sections 107 and 109** of the **Evidence Act**, the Plaintiff needed to marshal sufficient evidence to convince the court to allow her claim.

As the court held earlier observed, the late **Serah Wambui Kiriira** subdivided her land parcel **No.Karai/Gikambura/549**, and so it was closed upon subdivision. Once she subdivided and gave the resultant subdivisions to the different recipients, **Serah Wambui Kiriira** stopped having any control over the said resultant subdivisions. However, as the court has also observed, rectification of the titles can be done as provided by **Section 143** of **Cap 300** (repealed) and/or **Section 80(1)** of the **Land Registration Act**.

From the available evidence, the Plaintiff had alleged that **Serah Wambui Kiriira** had intended to have the suit land **Karai/Gikambura/549**, subdivided into six portions as it was stated in paragraph 5 of the Plaint. However, the Plaintiff did not produce the alleged **Mutation forms** that had the said intended portions of land and specifically showing that **Jane Wanjiku Muruga** was to get **0.17 ha** and the Defendants **0.36 ha**. The said Mutation forms would have shown the real intentions of **Serah Wambui Kiriira**. Further, the Surveyor who carried out the survey work and subdivisions was not called as a witness to confirm the allegations made by the Plaintiff.

The Plaintiff and her witness did not give the exact date of the subdivision. However, the Defendant obtained their title deed on **29<sup>th</sup> May 2003** and this suit was not filed until **7<sup>th</sup> December 2010**. Why did the Plaintiff take that long to seek for rectification of the said mistake? Is the suit herein an afterthought as alleged by the Defendants? It is evident that **Jane Wanjiku Muruga** is married and she told the court that

she lives in Gitaru area. If the subdivisions was done in the year **2003**, why did she not assert her right then? Why did she wait until the year **2010**?

As the court had held earlier, the Plaintiff had the onus of proving her allegations on the required standard. However, in this case, the Plaintiff's evidence has left more questions than answers. The Plaintiff also did not produce the proceedings held at the Land Disputes Tribunal wherein the Plaintiff had alleged that she had referred the matter to at first.

There was also no evidence available in court to show that the Plaintiff herein is in occupation and possession of **0.17 ha** and that the only thing that is remaining is that the said portion was registered together with title **No.LR.No.Karai/Gikambura/2587** and she should get her separate title deed.

Having found that the Plaintiff has failed to prove that indeed a mistake did occur during the subdivision of the mother title **Karai/Gikambura/549**, the Court finds that the allegations made by the Defendants are more probable. That the suit herein is an afterthought and maybe actuated by malice in that **Serah Wambui Kiriira** felt like she was cheated when she voluntarily subdivided her initial parcel of land and gave the Defendants a portion measuring **0.53 ha** which is now **LR.No.Karai/ Gikambura/2587**.

The upshot of the foregoing is that after careful consideration of the available evidence, the Court finds that the Plaintiff has not proved her case on the required standard of balance of probabilities. For the above reasons, this Court dismisses the Plaintiff's claims as stated in the Amended Plaint of **4<sup>th</sup> August 2017**, with costs to the Defendants herein.

The Court further reiterates that the Defendants are the registered owners of the suit property **Karai/Gikambura/2587**, as per the certificate of registration issued on **29<sup>th</sup> May 2003**, and therefore they are the **absolute** and **indefeasible owners**, enjoying all the rights and privileges appurtenant thereto and their rights shall not be defeated except as provided by the law.

It is so ordered.

***Dated, Signed and Delivered at Thika this 31<sup>st</sup> day of May 2019.***

**L. GACHERU**

**JUDGE**

**31/5/2019**

In the presence of

Mr. Cherongis holding brief for Mr. Kariuki for Plaintiff

M/S Mathia holding brief for Mr. Ochieng Opiyo the Defendants

Lucy - Court Assistant

**Court** – Judgment read in open court in the presence of the above advocates.

**L. GACHERU**

**JUDGE**

**31/5/2019**