



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO.775 OF 2012

MARGARET WAIRIMU KARIUKI

(Suing as the administratrix of the

estate of KARIMONI KARIUKI (deceased).....PLAINTIFF

VERSUS

GEORGE WAHINYA MACHARIA.....DEFENDANT

JUDGMENT

By a plaint dated 9th November 2011 and amended on 16th November 2011 the plaintiff herein sued the defendant seeking for the following orders:

a) The plaintiff avers that the defendant's registration is fraudulent and a nullity and seeks a declaration to that effect cancellation of the defendant's registration as the proprietor of the land parcel known as **Eldoret Municipality/Block 11/300** and substituting thereof the plaintiff coupled with a perpetual injunction restraining the defendant whether by himself, his servants and/or agents from interfering with the plaintiff's interests on the land whether by collecting rent of harassing her.

b) Costs and interest.

The defendant filed a statement of defence dated 5th September 2013 and denied the allegations against him and averred that the deceased had sold to him the suit land vide an agreement dated 29th January 1987 and he was subsequently registered as proprietor and certificate of lease issued to him on 26th January 2010.

Plaintiff's Case

PW1 adopted her statement and stated that her husband owned plot No. 166 Uganda Road and that he had not sold it to any one. She produced a certificate of confirmation of grant and stated that she had been given a letter of consent dated 27th September 1993 from the defunct Eldoret Municipal Council and another letter dated 26th August 1993 asking her to pay Ksh 2000/.

It was further her evidence that her late husband had been given an allotment letter and that he never entered into a sale agreement with anyone to sell the plot. She further stated that the defunct Municipal Council of Eldoret had confirmed that she was the rightful owner of the land.

On cross-examination she confirmed that her late husband had never informed her about the sale agreement and that she had never stayed on the suit land. She also stated that she neither attended a meeting with the Town Clerk Mr. Kiptoo in respect to the land, a meeting with late Karisa Mathai the then Minister of Lands nor with Gikonyo Advocate.

PW2 Dorothy Chepkogei testified and stated that she dealt with issuance of land titles and certificate of leases. She stated that she had a copy of the title to the suit land indicating that the defendant is registered owner which was issued on 26th January 2010. On cross-examination she testified that the lessor was the government of Kenya.

PW3 Dorcas Cheptoo came to court and produced the file where the plaintiff was granted letters of administration. On cross-examination she said there was an application seeking to revoke the grant issued by the Judge and that there was a gazette notice in the file.

PW4 Barnabus Cheruyiot an Administrative Officer testified that the land in question was allocated to Karimoni Kariuki and the plaintiff

had requested to have the land transferred to her, she was asked to pay Ksh 2000/= before she could be granted the consent. On cross-examination he said there was an agreement in their file dated 29th January 1987 between Karimoni Kariuki and George Wahinya and the plaintiff was informed about the same. He also stated that there is a letter dated 25th February 2002 indicating the land had been sold.

Defence case

DW1 George Wahinya adopted his statement dated 5th September 2013 and stated that Karimoni Kariuki used to work at Highlands Inn. He entered into a sale agreement with him and the same was drafted by A.G. N Kamau Advocate dated 29th September 1987 whereby he paid Ksh. 300 as legal fees for the same. It was further his evidence that the late Karimoni Kariuki signed the transfer forms in his favor and was given the original allotment letter dated 23rd June 1986, a covering letter and he then processed a certificate of lease in his name.

DW1 also stated that the plaintiff had encouraged the deceased to sell him the land and to date nobody has ever asked him to move out of the land. Further that he has been paying the land rates and followed due process to acquire the same.

On cross-examination he testified that he had never challenged the grant issued to the plaintiff and that the allotment letter was in the name of Eldoret Municipal who approved his construction on the suit land. On re-examination he stated that he bought the land in 1987 and that it did not form part of the estate and further that the Land Registrar did not mention that the transfer of lease was not signed.

DW2 Esther Muthoni Muthui testified that the late Karimoni Kariuki was his employee at Highlands Inn from 1975. Her husband assisted him to get the plot in Mwanzo which was adjacent to his. Karimoni later sold the land to the defendant. In cross-examination she testified that she was not present when they entered into the sale agreement.

The Plaintiffs Submission

Counsel reiterated the evidence of the parties and submitted that the late Karimoni Kariuki died on 20th July 1991 and thus the suit land formed part of the estate. The plaintiff petitioned for letters of administration intestate and the application was duly published in the Kenya Gazette for a period of 30 days on 18th September 1992 vide gazette notice no. 4023. The property was initially known as Plot no.166 Old Uganda Road site A, but was later called Eldoret Municipality/Block 11/300. The Municipal Council granted her a consent to transfer on 27th September 1993 which had been confirmed from the testimony of their witness PW4. The consent was never granted to the defendant to effect the transfer.

Counsel further submitted that the allotment letter indicated that the land could only be transferred with the consent of the Council. The allotment was on 23rd June 1986 and the defendant alleged to have purchased the same on 29th January 1987. He submitted that the defendant did not lay a basis on how he acquired the land.

Counsel cited the case of **Muny Maina v. Hiram Gathiha Maina** Nairobi Court of Appeal No. 239 of 2009, where it was held;

“we have stated that when a registered proprietor’s root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

Mr. Mogambi also submitted that the defendant did not plead limitation of actions as provided by Order 2 rule 1 of the Civil Procedure Rules. He cited the case of **Stephen Onyango Achola & Anor v. Edward Hongo Sule & Anor** Nairobi Court of Appeal no. 209 of 2004 where it was held that,

“matters which must be specifically pleaded. The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise, or which raises issues of fact not arising out of the statement of claim”

Counsel further relied on the case of **Mohamed Fugicha v. Methodist Church in Kenya**, Nairobi Court of Appeal no.22/2015 where it was held that,

“We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him know what case to answer.”

It was his submission that the cause of action only arose when the defendant obtained the title on the 26th January 2010. Further that the defendant’s claim that he holds the first registration does not hold water since his title did not originate from the Municipal Council of Kenya. It was the Council that was to draw up a lease for presentation to the Lands Office, and this would be in Karimoni Kariuki’s name. In **Nancy Wanjiru Kunyaha (suing as the administratrix of the estate of the late Augustine Kunyaha) v. Samuel Njoroge Kamau** [2018] eKLR where the case had similar circumstances as in the instant case. Counsel submitted that the defendant’s claim that the deceased signed for him transfer forms was not true since the land was yet to be registered under the Registered Land Act, Cap 300(now repealed).

Counsel also relied on the case of **Lazarus Estates Limited v. Beasley** (1956) 1ALL ER 341, where Lord Denning held as, “No court in this land will allow a person to keep an advantage which he had obtained by fraud.” The plaintiff claims the only way the defendant got his

name registered as owner of the parcel of land was through fraud. Counsel therefore urged the court to allow the plaintiff's claim as prayed in the plaint.

Defendant's Submission

Counsel submitted that this suit was filed on 9th November 2011 before the RLA Cap 300 was repealed. The plaint at paragraph 8(a) makes reference to RLA Cap 300. Section 107(1) of the Land Registration Act 2012 provides as,

*“unless 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”*In addition section 23(3) of the Interpretation and General Provisions Act Cap 2 Laws of Kenya provides, “where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not:

- a. Revive anything not in force or existing at the time at which the repeal takes effect.
- b. Affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed or
- c. Affect a right privilege, obligation or liability acquired, accrued or incurred under a written law so repealed.
- d. ...,”

Counsel relied on Section 3 of the Law of Succession Act 160 CAP 160 Laws of Kenya in regards to the suit land. That if the land did not form part of the deceased estate then the court did not have jurisdiction over the issue. The said section defines **estate to mean the free property of a deceased person, Free property in relation to a deceased person means, “the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his death”**

Counsel submitted that the evidence on record and from the file produced by PW4 showed that there was a sale agreement between the deceased and the defendant. He relied on the case of In **Re Estate of Jacob Ndunda Muthike(deceased)**[2018] eKLR, where Odunga J held that,

“in succession matters where the court is called upon to determine whether a property in question belongs to the estate of the deceased, the court must be satisfied that is the position so as to avoid a possibility of wrongfully incorporating a third party's property into the estate as that may lead to serious consequences.”

It was Counsel's submission that the plaintiff had the burden of proving that the defendant acquired the suit land through fraud. The defendant had produced a copy of the title deed he had acquired and the sale agreement between the deceased and him. He even produced the allotment letter, which was legally obtained by him after a valid sale transaction which was witnessed by a competent advocate. Further he had been registered as the first proprietor to the suit land.

Finally the defendant argued that section 7 of the Limitation of Actions Act Cap 22 provides for time within which to file suits. The plaintiff obtained a certificate of confirmation of grant on 23rd July 1993 and the limitation period lapsed on 23rd July 2005. Further that the plaintiff knew of the sale agreement as the defunct Municipal Council notified her of the existence of a sale agreement between the deceased and himself. He urged the court to dismiss the plaintiff's case.

ANALYSIS AND DETERMINATION

The following issues arise for determination.

- a) Whether there was a sale agreement between the deceased and the plaintiff.
- b) Whether the suit land formed part of the estate of the deceased.
- c) Who is to bear costs.

The plaintiff is the administratrix of the estate of the late Karimoni Kariuki. She obtained grant of letters of administration on 30th October 1992 which was confirmed on 23rd July 1993 and the suit land was among the properties to be distributed. The defendant argued that the interest in the land had been transferred to him way back in 1997 and the same was not to form part of the estate of the deceased. Section 93 of the Law of Succession Act provides as follows:

“93(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of

the deceased have not been discharged nor provided for.”

The defendant produced a sale agreement dated 29th January 1987 which also formed part of the file produced by PW4. The sale agreement shows that the suit land had been sold to the defendant at a consideration of Ksh 12,500/-. The sale was witnessed by A G N KAMAU Advocate. In addition the original letter of allotment dated 23rd June 1986 was produced by him which confirmed that the deceased had been allotted the suit land.

While it is true that the documents on record show the allottee as the deceased, there is a sale agreement on record which shows sale of suit land. This land was sold during the life time of the deceased. PW2 the County Land Registrar testified that the record she had indicated that the defendant was the registered proprietor having obtained the same on 26th June 2010. The defendant testified that he took immediate possession of the land and made improvements on them, if the same was true, how come the plaintiff herein did not notice at that time there were developments, and only came to file the suit in 2011.

In *Kirugi & Another – Vs – Kabiya & 3 Others* [1987] KLR 347, the Court of Appeal held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

The question that we must ask is that how come the defendant had these documents? The only plausible answer is that the deceased must have surrendered them to him after the sale of his interest on the suit land. There was no report to the police or any investigative agencies that the documents were lost or stolen. There was no report of the title having been procured fraudulently or through misrepresentation.

In the case of *Urmilla W/O Mahendra Shah. Vs Barclays Bank International Ltd & Another (1979) KLR 76* quoted with approval in the case of *Mike Maina Kamau v Attorney General/ [2017/ eKLR* the Court held that:-

"Allegations of fraud must be strictly proved although the standard of proof may_ not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required.

The plaintiff alleged fraud on the part of the defendant but she failed to discharge this duty through her witnesses.

Section 26 of the Land Registration Act provides that 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, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally. There was no evidence of fraud on the part of the defendant . The court would not hesitate to cancel a title if it is proven that it was acquired fraudulently.

This is a case where the plaintiff woke up and remembered that there was a plot that the husband previously owned and thought that she could claim it through succession and transmission. If the plaintiff had done her homework and due diligence well then she could not have included the suit land in the succession Cause. The records indicated that there was a sale agreement between the plaintiff's husband and the defendant. Why would the Council have such record if it was not done legally? I find that the plaintiff's claim for the suit land is an afterthought and cannot be allowed to flourish.

I have considered the pleadings, evidence adduced and submission by Counsel and come to the conclusion that the plaintiff has not proved her case against the defendant and is therefore dismissed with costs.

Dated and delivered at Eldoret on this 21st day of May, 2019.

M.A. ODENY

JUDGE

JUDGMENT READ in open court in the presence of Mr.Mogambi for Plaintiff and Mr.Muhoro for Defendant.

Mr.Mwelem – Court Assistant