



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC.351 OF 2017

GEORGE NGUGI THUO (Suing as the Administrator

of the Estate of MARY NJERI THUO).....PLAINTIFF

-VERSUS-

ANN MUGURE NJOROGE.....1ST DEFENDANT

MARY NJERI NJOROGE.....2ND DEFENDANT

FLORENCE WAIRIMU NJOROGE..... 3RD DEFENDANT

SARAH WAMBUI KARIUKI.....4TH DEFENDANT

JUDGMENT

By a *Plaint* dated 27th February 2017, the Plaintiff herein *George Ngugi Thuo*, (suing as the Administrator of the Estate of *Mary Njeri Thuo*) has sought for the following orders against the Defendants jointly and severally:-

- a) ***A declaration that the transfer of land parcel Ngenda/ Githunguchu/2441 is fraudulent and confers no title to 4th Defendant.***
- b) ***Cancellation of title issued to Sarah Wambui Kariuki on 9th January 2015.***
- c) ***Title does issue to Plaintiff.***
- d) ***Costs of suit.***

The Plaintiff averred that on or about 7th July 2011, the 1st, 2nd and 3rd Defendants and *Mary Njeri Thuo* were by an Order of the court in *Thika Succession Cause No.2008*, awarded equal shares in land known as *Ngenda/Githunguchu/760*, then part of the estate of *Cecilia Wambui Njoroge*, their mother.

Further, that the 1st, 2nd and 3rd Defendants acting as the Legal Representatives of the Estate of the late *Cecilia Wambui Njoroge*, caused land parcel *No.Ngenda/Githunguchu/760*, to be subdivided into equal portions being parcels *No.Ngenda/Githunguchu/2438, 2439, 2440* and *2441*. That land parcel *No.Ngenda/Githunguchu/2441* which is the parcel of land that was occupied by *Mary Njeri Thuo*, was to devolve to her and she did forward the completion documents to the 1st – 3rd Defendants so that the same would be transferred to her.

However, the 1st -3rd Defendants acted fraudulently and without the knowledge of *Mary Njeri Thuo (now deceased)* transferred the said parcel of land to *Sarah Wambui Kariuki*, the 4th Defendant herein. Therefore it was the Plaintiff's contention that the said fraudulent transfer to *Sarah Wambui Kariuki*, did not confer to her any proprietorship rights. That though the Plaintiff has demanded from the 4th Defendant to transfer the land back to the estate of *Mary Njeri Thuo*, she has adamantly refused to do so.

The particulars of fraud of 1st – 3rd Defendants were given in paragraph 6 of the *Plaint* among them failing to transfer the suit property to *Mary Njeri Thuo* and also transferring the land belonging to the estate of *Mary Njeri Thuo* to a stranger who is the 4th Defendant herein.

Though the Defendants were served with the *Summons to Enter Appearance* through *Substituted Service* as is evident from

the documents filed in court being the **Daily Nation** of **26th January 2018**, the Defendants failed to enter appearance nor file their defence.

The matter proceeded for formal proof on **26th March 2019** wherein the Plaintiff herein **George Ngugi Thuo** gave evidence and adopted wholly his witness statement dated **27th February 2017**. He also produced as exhibits the documents enumerated in his list of documents filed on court on **27th May 2017**.

After the close of the Plaintiff's case, the **Law Firm of Waithira Mwangi & Co. Advocates**, for the Plaintiff filed written submissions which this Court has carefully read and considered. The Court too has considered the cited authorities thereto and makes the following findings:-

There is no doubt that the Plaintiff herein **George Ngugi Thuo** is the administrator of the estate of **Mary Njeri Thuo**. He is in possession of **Limited Grant of Letters of Administration Ad Litem**, limited only for purposes of filing suit for recovery of property of the deceased. Therefore, it is evident that the Plaintiff has *locus standi* to bring this suit as provided by **Section 82(a)** of the **Succession Act, Cap 160 Laws of Kenya**. Further, it is not in doubt that the 1st-3rd Defendants are the Administrators of the Estate of **Cecilia Wambui Njoroge**, who died on **15th November 2007**. The said **Letters of Administration** were issued on **19th September 2007**.

As administrators of the Estate of **Cecilia Wambui Njoroge**, they had;

'the duty to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts according to the respective beneficial interests under the Will or Intestacy' as provided by **Section 83(f)** of the **Succession Act (supra)**.

It is also evident from the **Consent** filed in court on **6th July 2011**, that the Administrators of the estate of **Cecilia Wambui Njoroge**, agreed on mode of the distribution of the estate of the deceased as per the said **Consent**. Among the properties that were distributed was **Ngenda/Githunguchu/760**, wherein the said parcel of land was to be shared equally among the beneficiaries. The beneficiaries were **Anne Mugure Njoroge, Mary Njeri Njoroge, Florence Wairimu Njoroge** and **Mary Njeri Thuo**. The said consent order was adopted by the court in **Succession Cause No.435 of 2005 at Chief Magistrates Court at Thika on 7th July 2011** and indeed the court confirmed the Grant in respect of the estate of **Cecilia Wambui Njoroge (deceased)** and land parcel **Ngenda/Githunguchu/760** was therefore supposed to be shared equally among the four beneficiaries, **Mary Njeri Thuo** being among the said beneficiaries.

The plaintiff in his **Plaint** averred that the said suit property was subdivided and the resultant subdivisions were **Ngenda/Githunguchu/2438, 2439, 2440** and **2441**. Further that land parcel **No.2441** is where **Mary Njeri Thuo** occupied and that was supposed to be her parcel of land.

It is also evident from the Certificate of official search dated **1st September 2014**, that this land parcel **No.Ngenda/Githunguchu/2441** was registered in the names of the Defendants herein being **Florence Wairimu Njoroge, Anne Mugure Njoroge** and **Mary Njeri Njoroge** but not **Mary Njeri Thuo**. The said allegation has not been controverted by the Defendants since they never filed any defence.

It is also not in doubt that the advocate for **Mary Njeri Thuo** had vide a letter dated **8th October 2015**, brought to the attention of the **Assistant County Commissioner, Ngenda Sub-County of Kiambu County** that the land parcel **No.Ngenda/Githunguchu/2441** which was meant for **Mary Njeri Thuo** had been transferred to **Sarah Wambui Kariuki** in a fraudulent manner. The said letter is an exhibit in this matter and has not been challenged by the Defendants. The Court has no reason to doubt that the suit property **Ngenda/Githunguchu/2441**, has now been transferred to **Sarah Wambui Kariuki** who is not a beneficiary of the estate of **Cecilia Wambui Njoroge**.

From the copy of the **Green Card** produced in court as exhibit, land parcel **No.Ngenda/Githunguchu/760** was closed upon subdivision as per the **Succession Cause No.435 of 2005**. In the said subdivision as per the **Green Card**, only three beneficiaries were named and **Mary Njeri Thuo** had been left out contrary to the **Confirmation of Grant** issued on **7th July 2011**. The said closure of the mother title was done on **23rd December 2013** and entry of the result of Succession Cause was done on **11th June 2013**.

From the Plaintiff's exhibit which is the **Limited Grant of Letters of Administration** the deceased, **Mary Njeri Thuo** died on **30th June 2014**. Therefore the said subdivisions of **Ngenda/Githunguchu/760**, was done in the lifetime of **Mary Njeri Thuo (now deceased)** but she was not named in the **Green Card** as per the **Confirmed Grant**. From the above analysis, it is evident that the Administrators of the estate of **Cecilia Wambui Njoroge** who are the 1st-3rd Defendants herein failed to register **Mary Njeri Thuo** as one of the beneficiary of the estate of **Cecilia Wambui Njoroge** and specifically proprietor of **Ngenda/Githunguchu/2441**, the suit property herein. Further by presenting themselves as the proprietors of the said parcel of land, that was a fraudulent action and/or misrepresentation which was tainted with illegality and contrary to the **Confirmed Grant** or a valid **Court Order**.

The **Plaint** filed statement of issues which this Court will turn them into issues for determination. These issues are:-

1) Is the Plaintiff the beneficiary of the land parcel Ngenda/Githunguchu/2441?

2) Was the deceased (Mary Njeri Thuo) the legal owner of the land parcel Ngenda/Githunguchu/2441?

3) Did the 1st – 2nd Defendants have an interest in land parcel No.Ngenda/Githunguchu/2441 that could be transferred to any other person than Mary Njeri Thuo (deceased).

4) Do the transfer by 1st – 3rd Defendants confer rights on the 4th Defendant?

5) Was the transfer of the land parcel Ngenda/Githunguchu/ 2441 by the 1st – 3rd Defendants to the 4th Defendant fraudulent?

6) Is the Plaintiff entitled to the prayers sought together with costs?

1) Is the Plaintiff the beneficiary of the land parcel Ngenda/Githunguchu/2441?

From the available evidence, land parcel No.Ngenda/Githunguchu/

760, was to be shared equally among the four beneficiaries of the estate of Cecilia Wambui Njoroge. Indeed the said parcel of land was subdivided on 23rd December 2013 and closed upon subdivision. The resultant subdivisions were Ngenda/Githunguchu/2438 – 2441. The Plaintiff alleged 2441 was the parcel of land meant for Mary Njeri Thuo. The Plaintiff is the Administrator of the estate of Mary Njeri Thuo. This parcel of land Ngenda/Githunguchu/2441, was meant for Mary Njeri Thuo (now deceased) and the Plaintiff being a son of Mary Njeri Thuo is one of the beneficiaries of her estate and this parcel of land is one of the assets left behind of Mary Njeri Thuo and thus George Ngugi Thuo is a beneficiary of the said parcel of land.

2) Was the deceased (Mary Njeri Thuo) the legal owner of the land parcel Ngenda/Githunguchu/2441?

As the Court found above, Mary Njeri Thuo was one of the beneficiaries of the estate of Cecilia Wambui Njoroge and one of her parcel of land Ngenda/Githunguchu/760 was to be subdivided into four equal portions, which subdivision was done on 23rd December 2013. Mary Njeri Thuo was to get land parcel No.2441, but instead the 1st – 3rd Defendants registered it in their names. That was contrary to the Confirmed Grant of 6th July 2011 and this Court finds that indeed Mary Njeri Thuo is the legal owner of the suit property herein Ngenda/ Githunguchu/2441.

3) Did the 1st – 3rd Defendants have an interest in land parcel No.Ngenda/Githunguchu/2441 that could be transferred to any other person than Mary Njeri Thuo (deceased)?

It is evident from the certificate of Official Search dated 1st September 2014 that the 1st - 3rd Defendants were the registered owners of the suit property as at that time. As provided by Section 26(1) of the Land Registration Act, they were deemed to be the absolute and indefeasible owners. The said Section 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, the exceptions in (a) & (b) above provides that the said certificate of title can be challenged if acquired through fraud, misrepresentation or if acquired illegally or through corrupt scheme.

It is evident that the 1st – 3rd Defendants fraudulently or illegally registered the suit property in their respective names instead of the name of Mary Njeri Thuo, who was a beneficiary as per the Confirmed Grant. Therefore the illegal registration in favour of the 1st – 3rd Defendants was null and void and they had no capacity to transfer the said parcel of land to any other person apart from Mary Njeri Thuo. An illegally acquired title is null and void and cannot confer a good title to any other person. See the case of Iqbal Singh Rai...Vs...Mark Lecchini & Another (unreported), where the Court held that:-

“A fraudster cannot transfer a valid title to another party even if that other party becomes the registered proprietor. The fraudulent transfer would be declared null and void and the second title would be cancelled.”

4) Do the transfer by 1st – 3rd Defendants confer rights on the 4th Defendant?

The 1st – 3rd Defendants acquired the title to the suit property illegally. They could therefore not confer any good title or right to the 4th Defendant. See the case of Esther Ndegi Njiru & Another ...Vs...Leonard Gatei(2014)eKLR, where the Court held that:

“Having held and found that the 2nd Defendant fraudulently processed and acquired the title to the suit property in his name my view is that he did not acquire a good title to the property and no interest in the property could pass to him. The 2nd Defendant therefore not having any good title or interest in the suit property could not pass a good title to the plaintiffs”.

Equally in this case, even if the 4th Defendant was not part of the scheme herein, by dint of Subsection 1(b) above, she could not acquire any right over the suit property and her title can be impugned.

5) Was the transfer of the land parcel Ngenda/Githunguchu/2441 by the 1st – 3rd Defendants to the 4th Defendant fraudulent?

‘**Fraud**’ is described as:-

“a false representation of a matter of fact – whether by works or conduct, by false or misleading allegations or by concealment of what should have been disclosed – that deceives and intends to deceive another so that the individual will act upon it for her or his legal injury.”

It is evident that there is a **Court Order** on **Confirmed Grant** which the 1st – 3rd Defendants flouted. Since the 1st – 3rd Defendants acted contrary to the **Court Order**, then the transfer of the said parcel of land to 4th Defendant was **invalid, null** and **void**. See the case of Wildlife Lodges Ltd...Vs...County Council of Narok & Another, where the Court

expressed itself that:-

“It was the plain and unqualified obligation of every person against or in respect of whom an Order was made by a court of competent jurisdiction to obey it until that order was discharged and disobedience of such Order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attach and in application and in an application to the court by him not being entertained until he had purged his contempt”.

Having found that the actions of the 1st – 3rd Defendants was against the **Court Order** and they registered the suit property in their names during the lifetime of **Mary Njeri Thuo** without informing her and further sold it to 4th Defendant (**Sarah Wambui Kariuki**) at the expense of **Mary Njeri Thuo**’s estate, then the said transfer was fraudulent and the title acquired by 4th Defendant is challengeable and it is **null** and **void** for having been transferred by persons who had acquired it fraudulently. Therefore the Plaintiff is entitled to the prayer of cancellation of the said title. See the case of Ogada...Vs...Mollin (2009) KLR, where the Court held that; ‘**A nullity has no legal effect and must be reversed**’.

6) Is the Plaintiff entitled to the prayers sought together with costs?

Having found that the 1st – 3rd Defendants registered the suit property **Ngenda/Githunguri/2441**, illegally and fraudulently in their names, the Court finds that the 4th Defendant did not acquire a good title and therefore her certificate of title is **null** and **void**. The Plaintiff is therefore entitled to the prayers sought in **No.(a), (b)** and **(d)**.

On prayer **No.(c)**, the Court finds that though the Plaintiff is a beneficiary of the estate of **Mary Njeri Thuo**, this Court is not distributing the estate of **Mary Njeri Thuo** as that is a preserve of the **Family Court** which has jurisdiction over **Succession matters**. Further the Court is not sure whether the Plaintiff is the only beneficiary of the said estate or whether there other beneficiaries. The Court will order the suit property to be registered in the estate of **Mary Njeri Thuo** and distribution of the same be done through a **Succession Cause**.

Having now carefully considered the available evidence, the Court finds that the Plaintiff has proved his case on the required standard of balance of probabilities. For the above reasons, the Court enters Judgment for the Plaintiff against the Defendants herein jointly and severally as prayed in **prayers No.(a), (b)** and **(d)** of the **Plaint**.

Further as provided by Section 80(1) of the **Land Registration Act**, the Court directs the **Land Registrar Thika** to rectify the register in respect of the suit property herein **Ngenda/Githunguchu/2441**, so that the same can now be registered in the name of the estate of **Mary Njeri Thuo** and can thereafter be distributed to the beneficiaries of the said estate through a **Succession Cause**. Section 80(1) of the **Land**

Registration Act provides:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

Since the Court finds that the Plaintiff is entitled to **prayer No.(d)**, then the Court finds that the costs of this suit shall be borne by the Defendants herein jointly and severally.

It is so ordered.

Dated, Signed and Delivered at Thika this 13th day of May 2019.

L. GACHERU

JUDGE

13/5/2019

In the presence of

No appearance for the Plaintiff though M/S Mwangi had held M/S Waithera brief in the morning.

No appearance for the Defendants

Lucy - Court Assistant

L. GACHERU

JUDGE

13/5/2019