

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC CASE NO. E014 OF 2022

HARRISON NJOROGE KAMAU
.....PLAINTIFF

VERSUS

BONIFACE NJUGUNA NICHOLUS.....1ST
DEFENDANT

VERONICA WAIRIMU.....2ND
DEFENDANT

JUDGMENT

1. Through the amended plaint dated 8/4/2022, the Plaintiff seeks a declaration that registration of the land known as Nthawa/Riandu/5552 (the suit land) in favour of Irene Wangari Chege was fraudulent and that an order for rectification should issue directing the Land Registrar to cancel the registration of the suit land parcel in favour of Irene Wangari Chege. He sought an eviction order to remove the 2nd Defendant from the suit land and a permanent injunction to restrain the Defendants, members of their family, agents or servants or anybody acting under their instructions from entering, accessing, remaining or in any way interfering with the suit land. He also sought the costs of the suit with interest.

2. The 1st Defendant is sued in his capacity as the beneficiary and legal representative of the estate of his late mother Irene Wangaru Chege. The Plaintiff averred that at all material times, his father, the late Kamau Hosea Ng'ang'a, was the registered proprietor of the parcel of land known as Nthawa/Riandu/3255 measuring 8.64 hectares (ha) (the suit land) where he had settled with his family. That around 2009, the Plaintiff's father permitted his sister in law, the late Irene Wangari Chege, who is the Defendant's mother, and her children including the Defendants, to settle on part of the suit land. The Defendant's mother sued the Plaintiff's father vide Embu SPM Civil Suit No. 128 of 2014 claiming the portion that she had been permitted to occupy by the Plaintiff's father.
3. He averred that vide a consent dated 18/8/2014, his father agreed to transfer a portion measuring 4 acres (1.6 ha) out of the suit land to the Defendant's mother. On 10/11/2014, the suit land was subdivided into three portions. The 4 acre portion that was to be transferred to the Defendant's mother was designated as Nthawa/Riandu/5551 measuring 1.62 ha. That was the portion that the Defendant's mother and her children were occupying and had developed. The parcel of land which his father retained and which members of his family occupied was designated as Nthawa/Riandu/5552 (6.25 ha). Nthawa/Riandu/5550 (0.40 ha) was to be transferred to a third party.
4. He averred that his father who was at the time elderly and sick, delegated the process of subdivision and transfer of parcel 5551

to the Defendant's mother and her children. On or about 2016, his father discovered that the Defendant's mother had on 26/8/2015 fraudulently caused his parcel of land no. 5552 to be registered in her name instead of parcel no. 5551, which was to go to her. He set out the particulars of fraud against the Defendant's mother. He stated that upon the demise of his father, the 2nd Defendant trespassed upon parcel 5552 and was illegally occupying a portion measuring 0.5 acres (0.20 ha) thereby rendering the Plaintiff and the other beneficiaries of the late Kamau Hosea Ng'ang'a landless. He sought the reinstatement of parcel 5552 to the late Hosea and eviction of the 2nd Defendant from the suit land.

5. The Defendants filed a joint defence and averred that they settled on parcel no. 3255 in 1965 and not in 2009 as the Plaintiff claimed. They denied that the alleged consent dated 18/8/2014 was recorded and adopted as an order of the court. They denied the particulars of fraud set out against their late mother, Irene Wangari Chege and averred that the Plaintiff's father lawfully and procedurally transferred parcel no. 5552 to their mother and she was issued a title deed on 21/10/2015. They contended that the Plaintiff's father who died on 31/8/2020 did not challenge the transfer, registration and issuance of the title deed from 21/10/2015 until Irene Wangari died on 30/7/2020 and it is only after the parties' parents demise that the Plaintiff is challenging that transfer.

6. The Plaintiff gave evidence and told the court that the land that was to be transferred to the late Irene Wangari Chege was land parcel 5551. When his father discovered that the late Irene Wangari caused parcel no. 5552 to be transferred to her instead of parcel no. 5551, he reported the matter to Siakago Police Station vide OB No. 23 of 16/8/2016. The matter was under investigation, but his father died before the investigation was concluded. He averred that from 2016, his father fell ill and the members of his family concentrated on his treatment. **He told the court that his father, his two children and two grandchildren were buried on parcel no. 5552.**
7. He added that his father had extensively developed the land where he also had his home which was demolished unlawfully by the Defendants after his demise. That upon his father's death, the 2nd Defendant forcefully trespassed upon the suit land and had been in occupation of approximately 0.5 acres where she has put up some structures.
8. The Plaintiff produced copies of the limited grant *ad litem* issued in Siakago Miscellaneous Succession Cause No. 22 of 2022 and grant of letters of administration intestate in Siakago Succession Cause No. E62 of 2021. He also produced copies of the green card for parcel 3255, letter dated 2/9/2009 and consent dated 18/8/2014 in Embu SPMC Case No. 128 of 2014. The other documents tendered in evidence included copies of the mutation form for parcel 3255, letter dated 31/5/2016, green card for land parcel 5552, official search for land parcel

5552 and the affidavit sworn by the late Kamau Hosea Ng'ang'a on 15/8/2016.

9. The Plaintiff called his stepbrother, Cypriano Njeru Kamau as a witness. He stated that their late father permitted his late brother's widow, the late Irene Wangari Chege and her children to settle on his land because she was living on someone else's land but she later started demanding land. He maintained that their late father allocated parcel 5551 to late Irene Wangari and not parcel 5552.
10. He stated that he occupied and has developed a portion measuring approximately 3 acres out of parcel 5552 where he settled in 1996 after being shown by his late father. He told the court that the 2nd Defendant forcefully started utilising about 2 acres of parcel 5552. Their father complained about the fraudulent transfer of his land when he discovered what had transpired but he fell ill and died before filing suit.
11. On cross-examination, he elaborated that parcel no. 5550 measuring an acre was allocated to Paul Muchangi, a grandson of their father. Parcel no. 5551 was allocated to the Irene Wangari Chege and their father retained parcel no. 5552. However, during the Land Control Board process, the 1st Defendant made changes and parcel no. 5551 was instead registered in their father's name, contrary to the original intention, which was for their father to retain a larger portion of the original land.

12. The Plaintiff called Samuel Mugo Kariuki to give evidence. He stated that he knew the Plaintiff as the son of the late Hosea Kamau Ng'ang'a, who was his close friend. He knew that the Hosea sold part of his land to the 1st Defendant and gifted a portion of the suit land to the Defendant's late mother. The late Hosea told him that the 1st Defendant caused registration of his mother as proprietor of the wrong parcel of land for it is inconceivable that he would have transferred the larger portion to the Defendant's mother. The late Hosea informed him that he had given the Defendant's mother 4 acres (1.62 ha) yet she was registered as proprietor of 6.25 ha. He did not know what transpired afterwards because Hosea fell ill and was taken to Thika by his son for medical treatment where he passed away.
13. The 1st Defendant told the court that he has been in occupation of parcel 5552 with the 2nd Defendant and that the land belonged to their mother, the late Irene Wangari. He maintained that the Plaintiff's late father lawfully and procedurally transferred the land to their late mother. Further, he urged that the consent allegedly entered into by their **parents was not adopted as an order of the court and that their parents sat** down and changed the terms of that consent.
14. He denied that he interchanged the two parcels of land. He confirmed that the late Hosea lived on parcel 5552 on a house he built for him and he later demolished it because the Plaintiff would pass by there and insult him. He **stated that the late Hosea had two wives and several children and that he voluntarily**

agreed to give their mother a bigger portion of land because he had no one else to give the land.

15. He admitted that the late Hosea was buried on parcel 5552 but that his son's children were buried on land parcel 5551. He maintained that the late Hosea did not lodge any complaints after the subdivision of parcel 3255. He produced copies of the grant of letters of administration in the estate of the late Irene Wangari Chege issued to the 1st Defendant, the death certificate for the late Irene, official search for parcel 5552, mutation form for parcel 3255 and a title deed for land parcel 5552.
16. Parties filed and exchanged written submissions, which the court considered. The Plaintiff submitted that the intention of the parties was clear from the consent filed in Embu Civil Case No. 128 of 2014 vide which the late Irene was to get only 4 acres as parcel 5551. He submitted that the 1st Defendant's allegation during cross-examination that the parties subsequently arrived at a further agreement that the late Irene would get a bigger portion was not supported by any evidence.
17. Further, that it was clear from the late Hosea's letter to the Land Registrar dated 31/5/2016 that he did not intend to transfer parcel 5552 to the late Irene. He submitted that Section 80(1) of the Land Registration Act empowers this court to order rectification of the register by cancelling a registration obtained through fraud or mistake. He urged that he had demonstrated that the registration of the late Irene Wangari as proprietor of

the suit land was not only a mistake but also a product of fraudulent conduct.

18. The Defendants submitted that Section 26(1) of the Land Registration Act provides that a title issued by the Registrar is *prima facie* evidence of ownership and can only be challenged on grounds of fraud, misrepresentation, or illegality. They contended that the Plaintiff failed to provide concrete evidence of fraud as required under Section 107(1) of the Evidence Act, which places the burden of proof on the party alleging a particular fact. They cited the case of **Vijay Morjaria v Nansingh Madhusingh Darbar & Another (2000) eKLR**, on the point that fraud must be specifically pleaded and strictly proved through credible evidence. They urged that the Plaintiff did not meet this standard while maintaining that the suit land was lawfully and procedurally transferred by the Plaintiff's father to their mother.
19. They also submitted that the Plaintiff failed to join the Mbeere Land Registrar whom they believe would have been a key witness to the suit. They argued that any alleged fraud could not have been committed without the Registrar's involvement and their evidence was crucial to ascertain if any fraud was committed as alleged. Further, they submitted that the Plaintiff's claim of a police report made in 2016 was not supported by any extract from the Occurrence Book or other evidence, and should be disregarded. They urged the court to dismiss the Plaintiff's suit with costs.

20. The issue for determination is whether the Plaintiff's suit has merit and whether the court should grant the reliefs sought. The Plaintiff's case is that the registration of Nthawa/Riandu/5552 in the name of the late Irene Wangari Chege was fraudulently done and was and contrary to the intention of the parties as captured in the consent recorded in Embu SPM Civil Case No. 128 of 2014. It is his contention that the consent sets out the agreement between the late Hosea Kamau Ng'ang'a and the late Irene Wangari Chege namely, that Irene was to receive only four (4) acres out of original land being Nthawa/Riandu/3255 which after subdivision became parcel 5551 and not parcel 5552 which measures 6.25 ha and which the late Irene Wangari fraudulently caused to be registered in her name.
21. The Plaintiff produced the consent dated 18/8/2014, which the court has carefully examined. Looking at that consent, it is clear that the late Hosea Kamau was to surrender five (5) acres out of parcel 3255 by causing its subdivision and transfer of four acres to Irene Wangari Chege and Paul Mucangi was to receive an acre. The consent further stipulated that the areas to be held by the parties must be four (4) acres and one (1) acre respectively without graves. The consent was filed in court on 19/8/2014. The Defendants argued that the consent was not adopted as an order of the court. The authenticity of the consent was not disputed. The consent remains a true and credible reflection of the parties' intentions.

22. This finding is reinforced by the mutation form relating parcel 3255, which shows that on 7/11/2014, the land was subdivided into three portions, parcel 5550 measuring 0.40 ha, parcel 5551 measuring 1.62 ha and parcel 5552 measuring 6.25 ha. The Defendants contended that there was a subsequent agreement vide which the late Hosea Kamau decided to give their mother a larger portion than originally agreed. However, they did not tender any evidence to support this claim.
23. The Plaintiff produced the letter dated 31/5/2016 from Hosea's advocate to the Land Registrar, Mbeere, seeking to have a restriction placed against parcel no. 5552. The letter explained that the sons of the late Irene Wangari misled Hosea, being an elderly man aged 95 years, and that they disregarded the express directions of the court. This letter, together with the affidavit which the late Hosea swore on 15/8/2016 and which were not contested by the Defendants, strongly supports the Plaintiff's contention that the registration of Irene Wangari as proprietor of parcel No. 5552 was not voluntary or lawful but was procured through misrepresentation and undue influence.
24. The Defendants failed to explain how their late mother came to be registered as proprietor of a parcel of land measuring 6.25 ha (about 15.44 acres), when the evidence consistently demonstrates that she was entitled to only four (4) acres. It is inconceivable that the late Hosea would have given out the larger portion of his land to somebody else and retained a smaller portion when the 1st Defendant admitted during cross

examination that the late Hosea had two wives and several children.

25. The court is satisfied, on a balance of probabilities, that the registration of the late Irene Wangari as the proprietor of Nthawa/Riandu/5552 was obtained fraudulently.
26. The court grants prayers 1 to 4 of the plaint dated 8/4/2022. The Plaintiff will have the costs of the suit.

Delivered virtually at Bungoma this 11th day of February 2026.

**K. BOR
JUDGE**

In the presence of: -

Mr. Githinji Ithigah holding brief for Mr. Njeru Ithigah for the Defendants

No appearance for the Plaintiff