



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

E.L.C.C NO. 63 OF 2017

(FORMERLY NAIROBI ELCC NO.480 OF 2010)

MARGARET WARUGURU NGANGA.....PLAINTIFF

VERSUS

RITA WAITHIRA.....1ST DEFENDANT

MWANGI WAITHAKA.....2ND DEFENDANT

HINDU NJERI ROTENYO.....3RD DEFENDANT

LAND REGISTRAR THIKA.....4TH DEFENDANT

JUDGMENT

Introduction

1. By an Amended Plaint dated 22/08/2018 and filed on the same date, the Plaintiff, **Margaret Waruguru Nganga**, sued the Defendants jointly and severally seeking the following orders;

- a) **An order of permanent injunction against the 1st, 2nd and 3rd Defendants restraining the Defendants, their agents, servants employees from interfering with the quiet possession of land parcel No. Ngenda/Mangu/1040.**
- b) **An order of permanent injunction against the 4th Defendant restraining him/her, his/her agents, employees or servants from transferring land parcel No. Ngenda/Mangu/1040/ to the 1st and 2nd Defendants.**
- c) **Costs of the suit.**
- d) **Interest on C above.**
- e) **Any other relief this honourable court may deem fit to grant.**

2. The plaintiff is represented by Kipsang and Mutai Advocates. The 1st and 2nd defendants are represented by Nakato of Ngila and Mukoma and Co Advocates. The 3rd Defendants is represented by Macharia Ngaru and Wetangula advocates.

The Plaintiff's Case

3. The Plaintiff is the wife of the late **Sylvester Abdala Tairara** (Hereinafter referred to as "**Sylvester**") who was the grandson of the late **Al Haji Abdalla Njuguna Tairara** (Hereinafter referred to as "**AL Haji**"), who owned **Land No. Ngenda/Mangu/1040** which is approximately 11.9 acres in area (Hereinafter referred to as "**the suit land**"). The Plaintiff's claim is that before its subdivision, the suit land was originally registered as **Land Number Ngenda /Mangu/903**. That before AL Haji died, he transferred the suit land to the late **Abihanifa Ali Godoro** (Hereinafter referred to as "**Abihanifa**") to hold it in trust for the whole of his family. However, upon the death of Al Haji the said Abihanifa filed a succession cause and fraudulently obtained letters of administration together with **Hindu Njeri Rotenyo**, the 3rd Defendant (DW4) who forged a certificate of confirmation of grant and purported to sell the suit land to the 1st defendant (DW1) and the 2nd Defendant by conspiring with the 4th Defendant (**The Land Registrar Thika**). It is the Plaintiff's contention that DW4 obtained the Consent of Land Control Board (Hereinafter referred to as "**LCB**") fraudulently since minutes of LCB indicate that the meeting took place on **15th August**,

2010 and that **Abihanifa** who had died on **4th July, 2010** attended the said meeting.

4. The trial of this suit commenced on 6th November, 2018 when the Plaintiff (PW1) asked the court to adopt her witness statement and it was done accordingly and she essentially in accordance with her averments in the Plaintiff. She stated that she was the widow to the late Sylvester and that the 3rd Defendant was a cousin to her late husband. She further stated that she lives with her family on the suit land which is approximately 11.9 acres and has lived thereon since 1973. That she was neither aware of nor mentioned in the Succession matter before the Kadhi's Court. She denied that the DW1 obtained letters of administration after the suit land had been sold. She made reference to **P Exhibit 1 (Sale agreement dated 29th October, 2009)** and **P Exhibit 4 (a certificate of confirmation of grant dated 30 November, 2009)**. She stated that the 3rd Defendant and her brother, Abihanifa sold the land to the DW1 and the 2nd defendant who are wife and husband respectively.

5. Making reference to P Exhibit 3(**Copy of green Card**) PW1 stated that the original land was LR No. Ngenda/Mangu/903 registered on 10th April, 1963 which subsequently gave birth to LR No. 1039 and the suit land. According to her, the second entry in the suit land was made on 15th March, 2010 in favour of Abihanifa without following due process. Referring to P Exhibit 6, (**Copy of LCB Minutes**), PW1 testified that Abihanifa died in July 2010 and the consent to transfer the land was sought on 16th August, 2010 and given on 19th August, 2010. She further referred to P Exhibits 7 and 8 (**Application for consent of LCB** dated 19th August, 2010) and a copy of the **Letter of Consent** dated 19th August, 2010) to that effect. PW1 stated that the transaction that took place as exhibited by P Exhibits 9, 10 and 11 (**Various title deeds in the different names of DW1**) are not genuine.

6. During cross-examination, PW1 stated that she was the wife of Sylvester, married under Kikuyu Customary Law but did not have a marriage certificate or letters of administration for the estate of Sylvester. She further stated that her husband paid dowry to her mother in the year 2000, long after the death of Al Haji in 1978. That her father was not in attendance during dowry payment because he was not in good terms with her mother. She also stated that Al Haji was the owner of the suit land that she did not attend the LCB for Consent to transfer the suit land. It was her testimony that she commenced revocation proceedings in High Court of Succession cause No.2541 of 2010.

7. **PW2, George Ng'ang'a Tairara**, a son of **PW1**, testified that the original land was L.R No. Ngenda/Mangu/903 was subdivided into two (2) portions namely the suit land and L.R No. Ngenda/Mangu/1039. He confirmed the evidence of PW1 that they have been in occupation of the land for a period of thirty seven (37) years. He stated that DW4 was a grand-daughter to the late AL Haji, and was aware of the agreement relating to the sale of the original land. It was his testimony that the grant of letters of administration were issued when the suit land had already been sold. Upon cross-examination, **PW2** testified that titles to the suit land bore different names of DW1.

The 1st and 2nd Defendants' Defence and Counterclaim

8. The 1st and 2nd Defendants filed an amended Defence and Counterclaim dated 8/10/2018 on 9/10/2019. They argued that they are bonafide purchasers for value for the original **Land parcel Number Ngenda/Mangu/903** and that the **Suit land** does not exist as per the records. They maintained that they followed the legal procedure in acquiring the suit land and are unaware that the suit land was held in trust by **Abihanifa**. It is their position that they are strangers to any forgeries and fraudulent transfers allegedly made in respect of the suit land. They further contended that their claim is only over the original land, Ngenda/Mangu/903 which they rightly purchased from the 3rd Defendant and the 4th Defendant lawfully transferred the same to them.

9. In their counterclaim, they contended that they bought the suit land in good faith, paid the full market value and took possession of it with all developments thereon. They further claimed that the Plaintiff was aware of the transaction since she participated in the LCB meetings that gave rise to the consent to transfer the suit land. They stated that upon transfer of the suit land, PW1 continued to maliciously interfere with the quiet possession of their land by cutting down trees, ganging up the youth to raid and damage the perimeter wall and creating fear and threatening them with death. As a result, they instituted criminal proceedings against the Plaintiff's son for malicious damage to property.

10. The 1st and 2nd Defendants further contended that the Plaintiff's claim against them lacked any sustainable cause of action and that they had no dealings with her. Thus, they are seeking following reliefs against the plaintiff;

(a) An order of temporary injunction restraining the plaintiff, her agents, or any person purporting to be acting on her behalf from entering, damaging any property or crops or trees or any other plant in the point nine (0.9) acres of parcel of Land Number Ngenda/Mangu/903 or the land that belongs to the 1st and 2nd Defendants.

(b) Orders of eviction of the Plaintiff from the one acre of land which she now occupies in the land parcel no. Ngenda/Mangu/903

(c) General Damages, costs and any other relief that this honourable court deems fit for the ends of justice.

11. In her testimony, **DW1** stated that she came to know of the suit land, through brokers when they were with Abihanifa and the DW4 who informed her that they were administrators of the estate of Ali Haji. After doing a search, DW1 confirmed that all was in order and letters of administration were pending in respect of estate of Ali Haji. She testified that it was after confirmation of the grant that she bought 10 acres of the land. She claimed to have followed due process in obtaining the title to the land. She claimed further that she corrected the error on 1st and 2nd D Exhibit 15 by writing a letter to the Land Registrar as well as the date on 1st and 2nd D Exhibit 16, which reflects 22nd August, 2010 instead of 24th August, 2010 and correction was done accordingly.

12. DW1 further stated that she entered into the suit land and started cultivation thereon. That after obtaining 1st and 2nd D Exhibit 18, she continued to cultivate it but since the court battles began she has been unable to cultivate the same. On cross-examination, she stated that it

was an oversight on her part to allow brokers to approach her to buy the suit land. Denying to have intermeddled with the deceased property, she said that it was not true that they entered into the sale of land agreement before the confirmation of grant in respect of the estate of Ali Haji. She claimed that she bought 10 acres of the land from DW4 and Abihanifa and other beneficiaries of the estate. That there was a house on the estate and she learnt that it belonged to PW1. She also stated that she carried out an official search but could not tell where the certificate of official search was. She further could not tell if she applied for the transfer of the land.

13. DW1 also testified that consent to transfer the land was sought and obtained on 16th August, 2010 and 19th August, 2010 respectively. She confirmed that the transfer was done on 5th June, 2010 and consequently obtained three (3) titles to the land (1st and 2nd D Exhibits 15 and 16 and 6) issued on 2nd August, 2010, 2nd August, 2010 and 24th August, 2010 respectively. She testified that she bought 10 acres not 11.9 acres of the land or the other portion was to remain for the administrators. She stated that she did not know that P Exhibit 16 (Copy of letter to the Registrar of Lands) showed a subdivision of the suit land and did not know how it was done. That the seller, (DW4) herein, threw her under the bus. She further stated that she was not given LCB consent by all the beneficiaries to the estate. She admitted that PW1 occupied part of the suit land.

14. **DW2 Sylvester Mbugua Kuria**, the senior chief Mangu location testified that he authored P Exhibits 13, 14 and 15. His evidence was that PW1 is a beneficiary of the estate of Sylvester the husband of PW1.

15. **DW3, Michael Kinyanjui Njoroge** testified that he knew Al Haji and his grandson, Sylvester, who was the husband of PW1. He further stated that the original land L.R No. Ngenda/Mangu/903 belonged to the late Al Haji. That PW1 moved to the said land upon the demise of her husband.

Plaintiff's reply to defence And defence to Counterclaim

16. The Plaintiff's contention is that the alleged transaction entered into between the 3rd Defendant and the 1st and 2nd Defendants was void for reasons that the vendor had no authority to transact thereof. That there was no consent obtained from the LCB for the transaction and that it related to a non-existent land namely Title Number/Ngenda/Mangu/903. She maintains that she is in possession of the suit land.

17. Urging the court to dismiss the counterclaim for raising no cause of action, PW1 stated that she has never raided the 1st and 2nd defendants' property nor threatened them with physical harm but has instead written letters to various authorities complaining of the 1st and 2nd defendants' attempt to dispossess her of the suit land. The Plaintiff denies the allegation that the 1st and 2nd Defendant have caused harm or meant to deprive them of quiet possession of the suit land.

3rd Defendant's Case

18. In her statement of defence dated 1st November, 2018, the 3rd Defendant (DW4) averred that she is the biological granddaughter of **Al Haji**. She contends that the suit land was registered in the name of Al Haji under **Land Title Number Ngenda/Mangu/903**. It was later subdivided into the suit land and **Land Title No. Ngenda/Mangu/1039**. The Succession Cause of the estate of Al Haji was commenced by herself and Abihanifa in **Nairobi High Court Succession Cause 2064 of 2006**, where they jointly petitioned for Letters of Administration (Intestate) and a grant issued irregularly to them on 4th July, 2007. After the lapse of six (6) months, the grant was confirmed on 30th November, 2009, whereupon, they registered the grant against the title.

19. DW4 stated that after the demise of Abihanifa, she remained as the sole administrator of the estate of Al Haji. It is her position that the deceased did not settle matters pertaining distribution of the suit land and denies *in toto* the allegation by PW1 that she is the wife of the grandson of Al Haji. She further denied the allegation by PW1 that she is the beneficial owner of the suit land. She also stated that when Abihanifa, her co-administrator died, she was advised by LCB to have the grant of letters of administration rectified, a process which was done, to reflect her as the sole administrator for purposes of transferring the suit land to the 1st and 2nd Defendants.

20. DW4 also testified that the suit land belonged to Al Haji and she sold it to PW1. She obtained letters of Administration in respect of the estate with Abihanifa as evidenced by D Exhibit 6. She stated that Sylvester was not entitled to inherit from the estate of Al Haji since his mother converted to Christianity.

21. On cross-examination, DW4 testified that she never ceased to be a Muslim and admitted that PW1 was her sister-in law. She testified that she knew not all her grandfather's family members. The suit land went to Abihanifa after Certificate of Confirmation of grant. On further cross-examination by counsel for 1st and 2nd Defendants, DW4 stated that D Exhibits 1 and 2 was done before confirmation of D Exhibit 6.

Plaintiff's Reply to 3rd Defendant's Defence

22. Reiterating her position as stated in the Plaint, PW1 added that the DW4 commenced succession proceedings with **Abihanifa** fraudulently by failing to inform all the beneficiaries of the estate of AL Haji. She has filed summons for revocation of grant in **Nairobi High Court Succession Cause 2541 of 2010** in which DW4 is the respondent.

The 4th Defendant's Case

23. The 4th Defendant neither entered appearance nor participated in the proceedings.

Issues for determination

24. I have carefully studied the Plaintiff, the statements of defence for all defendants except 4th Defendant. I have also noted the 1st and 2nd defendants' counterclaim, the evidence of the PW1, PW2, DW1, DW2, DW3, DW4 and the rival submissions by the counsel for the respective parties. In the case of **Galaxy Paints Ltd –v- Falcon Grounds Ltd (2002) 2 EA 385** the Court of Appeal held that issues for determination generally in a suit are to be found in pleadings or as framed by the parties. In view of the fact that parties did not consent on the issues framed in their respective submissions, it is my very considered view that the following issues emerge for determination:-

- a) **The legal status and/or existence of the original land L.R No. Ng'enda/Mangu/903 vis-à-vis the suit land and whether the said two parcels of land are separate and distinct.**
- b) **Who is the registered proprietor of the finding issues in (a) herein above?**
- c) **The validity of the certificate of confirmation of grant, the sale agreement and transfer of the suit land to the 1st and 2nd defendants.**
- d) **The Orders this court should make in view of issue (c) herein above**

Analysis and determination

25. It is paramount for this court to first make a determination on the existence of the **suit land**. The Plaintiff claims that subdivision of the original land **L.R.No.Ngenda/Mangu/903** gave birth to the **suit land** and **L.R Ngenda/Mangu/1039**. DW1 and 2nd defendants, the purchasers herein, maintain that there is no existence of the suit land in the records. There exists only the original land which they bought. DW4 concedes that the subdivision of the original land resulted in the **suit land** and **L.R No. Ngenda/Mangu/1039**.

26. According to the green card, sheet No. 13, the 11th Edition of Cadastral plan compiled by Survey of Kenya dated March 1959, of Ngenda Location and Mangu Sublocation, there is no doubt that original land exists. As further evidenced by subdivision of the original land and the admission by the DW4 in her statement of defence that the subdivision of the original land gave rise to the suit land and Land parcel No. 1039, I do find that there exists the suit land hence the contention by the 1st and 2nd defendants do not hold any water at all.

27. The contention by the DW4 in their written submissions was that the Plaintiff is a Christian and therefore is not entitled to inherit from the estate of Sylvester who professed the Muslim faith. In her pleadings, DW4 did not raise the issue of disentitlement of the Plaintiff by virtue her Christian faith. The issue was only brought up at the submissions stage. This court is guided by the Court of Appeal decision in **Independent Electoral and Boundaries Commission & another. Vs. Stephen Mutinda Mule & 3 others (2014) eKLR**, where it was held that parties are bound by the four corners of their pleadings; see also **Galaxy Paints case (supra)**. That somewhat limits the issues upon which a trial court may pronounce itself. On that score, the issue of Plaintiff's disentitlement for the estate of Sylvester is not for determination herein; see **Article 162 (2) (b) Constitution of Kenya, 2010**.

28. On proprietorship of the suit land, **entry No.1** on the certificate of title shows that Al Haji as the registered proprietor of the suit land.

Therefore, I do find that he was the registered proprietor and legal owner of the suit land as envisaged. Under **Section 26(1) (a) of Land Registration Act (2016) 2012** 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 the proprietor is the absolute and indefeasible owner...”

29. The question that begs at this juncture is whether the **application for grant of letters of administration**, the resultant **certificate of Confirmation of grant** in favour of the 3rd Defendant and **Abihanifa** and the subsequent **the sale and transfer** of suit land was tainted with fraud and other illegalities to the detriment of the rights of the Plaintiff over the suit land. PW1 averred that **Abihanifa** filed a Succession Cause where he **fraudulently** obtained letters of administration together with the DW4 who forged a Certificate of confirmation of grant and obtained consent of the LCB to transfer the same fraudulently.

30. The Plaintiff pleaded fraud and irregularities regarding the sale and transfer of the suit land in paragraph 11 of the amended Plaintiff. The allegations of fraud must be specifically pleaded and strictly proved; see **Ndolo -vs-Ndolo (2008) eKLR (G & F) 742**.

31. When a court is called upon to make a determination on an allegation of fraud, the standard of proof is higher than that of balance of probabilities; See **Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979]eKLR** which quoted with approval the decision In **B.G Patel –vs- Lalji Makanji (1957) E.A 314** where the Court of Appeal stated 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, something more than a mere balance of probabilities is required”

32. I have thoroughly examined the documents referred to herein. I have also made reference to the oral evidence of PW1. It is not in doubt that **Abihanifa** appears in the 2nd entry of the green card as the registered proprietor of the suit land. The entry was made on 15th March, 2010. There is no dispute that Abihanifa died on 4/07/2010 in **Nairobi Hospital**, as per the **death slip issued by the hospital** and his **death certificate** issued by the **District/Assistant Registrar in Nairobi**.

33. A perusal of the Minutes of the LCB purported to have been conducted for proposes of transferring the suit land was done on 15th

August, 2010. Abihanifa, appears as the transferor and the transferees are 1st and 2nd defendants therein. On the remarks section of the LCB minutes, the transfer was marked **“approved”**. I note that in other transactions of the same date where parties failed to attend it was marked **“did not appear”**. I further note that the application for consent to the LCB was done by Abihanifa on 19th August, 2010, the same day when the LCB meeting was held. The purchasers as seen in the form are the 1st and 2nd Defendants.

34. It is abundantly clear that the entire transaction at the LCB took place after the death of Abihanifa. Thus, the same is fraudulent and void **ab-initio**. A deceased person has no capacity to transact in land or in any other way for that matter. There was no explanation by the defendants on how the Abihanifa who died more than a month before the transaction could be the one applying for consent before the LCB and subsequently appearing before the LCB as a transferor of the suit land. Further to that, the averment by the 1st and 2nd Defendant that the Plaintiff participated in the meeting is unfounded as her name is not on the list of the LCB meeting that took place on 15th August, 2010. If indeed the meeting took place and there was in attendance by Abihanifa, the remarks section would have indicated **“did not appear”**. It follows that the 1st and 2nd Defendant did not receive a good title in the suit land due to apparent fraudulent purchaser; see **Samwel Kamere-vs-Land Registrar, Kajiado (2015) eKLR**.

35. Having so found, what remains unresolved is the propriety of the sale agreement that was purportedly entered into pursuant to Certificate of Confirmation of Grant issued to Abihanifa and DW4. The sale agreement as revealed from the Plaintiff's and the 1st and 2nd Defendants' bundle of documents, was entered into on 29th November, 2009. I observe that the confirmation of grant was done in 30th November, 2009, a month after the transaction had taken place. It is also not lost on the court that in Nairobi High Court Succession Cause No. 2541 of 2010, the Plaintiff and three others filed in court Summons for Revocation/Annulment of the said grants on 22nd October, 2010. The Plaintiff claimed therein inter-alia, that Nairobi HCGH Court Succession Cause 2064 of 2006 was filed in secrecy leaving out other beneficiaries, and illegalities in the process through which the certificate of confirmation of grant was issued.

36. In her the examination in chief, DW2 testified that;

“I knew the late Abdalla Tairara, who was the grandfather of Silverster Tairara (deceased). PW1 was married to Sylvester Tairara (deceased) I knew them. P Exhibits 13, 14, and 15 (various letters) are authored by myself. They show that PW1 was a beneficiary of the estate of Silverster Tairara who was her husband.”

37. This honourable court is not inclined to ratify the transactions that have been done by the DW4 and Abihanifa as they tainted with illegalities, misrepresentation and fraud: See **Arthi Highway Developers Limited –vs- West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR** where the court ordered cancellation of fraudulently obtained titles and. The court further ordered the land to revert back to the original owner.

38. The letters of administration appear to have been issued more than once. The third one purporting to be rectified to capture the 3rd Defendant as the sole administrator is not in the bundle of the 3rd defendant documents. It is clear that the PW1 has all along fought to remain in the suit land. The confirmation of grant, the sale, the transfer and inevitably the title to the 1st and 2nd Defendants are all clearly under challenge; see **Munyu Maina-vs-Hiram Gathiha Maina (2013) eKLR**.

39. It was also clear from the testimony of the DW1 from the very inception that she knew she was not an innocent and bonafide purchaser for value without notice. She alleged to have conducted due diligence but could not tell where the certificate of official search was. She also could not explain whether she applied for a transfer of the suit land. It was her testimony that all the beneficiaries had not consented to the sale but nevertheless went ahead with the transaction. She further even testified that **“she was thrown under the bus”** by DW4 nonetheless her title to the suit land is impeached by the exception at **section 26(1) (supra)**.

40. DW1, DW4 and 2nd Defendant cannot purport to rely on the decision in **Katende -vs- and Company Limited EAIR[2008]2 EA, Zebak Limited –vs- Nadem Enterprises Limited [2016] eKLR** and **Sophie Wanjiku John –vs- Jane Mwhaki Kimani [2013]eKLR** to disclaim fraud for having been bonafide purchasers. As evidenced in the foregone discourse, DW1 knew that she was not going to get a good title. She even participated in the process of tainting the whole process by forging ahead with the transaction inspite of knowing that all the beneficiaries had not been involved. She also knew that certificate of confirmation of grant had not been issued at the time of entering into the sale agreement.

41. As already noted at paragraph 22 herein above, Nairobi High Court Succession Cause No. 2541 is pending hearing and determination. Fraud, although not pleaded in this matter, has been proved against DW1, the 2nd defendant and DW4 to the required standard; See **Koinange and 3 others vs- Koinange (1986) KLR 23**. In that regard, I bear in mind the case of **Odd Jobs –vs- Mubia (1970) EA 476**, the **Overriding Objective under section 3 of the Environment and Land Court, 2015 (2012) and Article 159 (2) (d) of the Constitution of Kenya, 2010**. I find that the title of the 1st and 2nd defendants in respect of the suit land is definitely for cancellation as envisaged under sections 26 (1) and 80 (1) of the Land Registration Act, 2016 (2012).

42. In the circumstances, the orders sought in the parties' respective pleadings are declined and in lieu thereof in order to meet the ends of justice, this suit is determined in the following terms;

a) The title of the 1st and 2nd defendants to the suit Land L.R No. Ngenda/Mangu/1040 was improperly procured and the same be and is hereby cancelled.

b) The distribution of the suit property to abide by the outcome of the Summons for revocation/annulment of the grant in Nairobi High Court Succession Cause No. 2541 of 2010.

c) Each party to bear their own costs of this suit in view of the nature and circumstances of the case.

SIGNED and Dated at Migori this 7th day of May, 2019

G.M.A ONG'ONDO

JUDGE

SIGNED, Dated and Delivered at Thika this 14th day of JUNE 2019

L.N GACHERU

JUDGE