



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANGA
ELC NO 438 OF 2017

**ISAAC MURIGI MUIRURI (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF MUIRURI NJIRI (deceased) - PLAINTIFF/APPLICANT**

VS

FRANCIS KARUME - 1ST DEFENDANT/RESPONDENT

ANDREW NG'ANG'A - 2ND DEFENDANT/RESPONDENT

STANLEY MUTURI GATHERI - 3RD DEFENDANT/RESPONDENT

JUDGMENT

1. The Plaintiff is the administrator of the estate of Muiruri Njiri, his deceased father. The 1st and 2nd Defendants are the stepson and son respectively of Wanganga Wangombe. They are the joint administrators of the estate of Wanganga Wangombe. It is the Plaintiff's case that prior to his demise his father bought the suit land from Wanganga Wangombe who passed away before effecting the transfer to him. He avers that the 1st and 2nd Defendants illegally fraudulently and without disclosing material facts obtained a confirmed grant in their favour and purported to sell all that parcel of land LOC1/THUITA/160 (the suit land) to the 3rd Defendant when the interest of the deceased Wangombe had been extinguished by the sale of the land to his deceased father. He has pleaded particulars of fraud in para 11 of the plaint.

2. The Plaintiff consequently sought the following orders;

a. A declaration that all that parcel of land LOC1/THUITA/160 was not part of the estate of the late Wanganga Wangombe (deceased) who prior to his demise disposed the same to Muiruri Njiri (deceased) and a further declaration that the suit land belongs to the estate of Muiruri Njiri (deceased).

b. Permanent injunction against the 1st 2nd 3rd Defendants by themselves barring them from trespassing on disposing wasting transferring alienating charging and or selling any portion or all the suit land.

c. Order for revocation and or cancellation of the registration of title deed in favour of the 3rd Defendant in respect to all that parcel of land.

d. Costs of the suit.

3. The Defendants filed a joint defense and denied the Plaintiff's claim. The 1st and 2nd Defendants aver that they are administrators of the estate of Wanganga. That prior to confirmation of grant they sold the suit land to the 3rd Defendant. They assert that the Plaintiff just like his deceased father have no known legal claim on the suit land.

4. The 3rd Defendant denied the Plaintiff's claim and filed a Counterclaim in ELC No 304/2017, which was later consolidated with the current suit on the 26/7/18. In his Counterclaim he sought the following orders summarized as follows;

a. That the Plaintiff be evicted from the suit land and vacant possession be given to him.

b. Mesne profits.

c. Costs of the suit.

5. At the hearing, the Plaintiff led his own evidence and relied on his witness statement filed on the 28/8/17. The mainstay of his statement is almost word for word with the plaint filed herein. In addition, he stated that the suit land was purchased by his father in 1980 from Njoroge Wanganga, whom he claims was the son of Wanganga Wangombe. He produced two sets of agreements dated the 23/3/1980 and 24/7/1990 entered into between the said Njoroge Wanganga and his late father. He averred that he and his family occupy and reside on the suit land practicing farming. That he was born on the suit land in 1963 and has lived on the suit land ever since. He stated that he did not know the 1st Defendant. That he was not party to the succession cause in respect to the estate of the late Wanganga Wangombe. Whilst admitting that the 3rd Defendant is the registered owner of the suit land, he claims that the Plaintiff has acquired overriding interest on the suit land. He refuted the Defendants claim that they own parcel No LOC 1/THUITA/159.

6. In cross examination he stated that the land was sold by Njoroge Wanganga, the son of the original owner of the suit land. He stated that he was not aware if the estate of Wanganga had been succeeded then before Njoroge sold the land to his father. He stated that he learnt that Wanganga lived elsewhere not on the suit land. He could not confirm if the Land Control Board Consent was obtained. He confirmed that he did not apply for the revocation of the confirmed grant in the estate of Wanganga Wangombe. He stated that he was not present when his father was allegedly called to the Chief and ordered to vacate the suit land.

7. DW1 – Andrew Ngugi Nganga whilst testifying on his and the 2nd Defendant's behalf stated that he is the son of Wanganga Wangombe. He denied that the suit land was sold to the Plaintiff's father. That his father moved out of the suit land before he died and lived at Kibichoi where he died. That he was born in 1958 and he had two brothers and two sisters all of whom are deceased. He denied knowledge of a brother called Njoroge Wanganga. He stated that his siblings were the late, Joseph Kibugi, Njeri Wanganga and Salome Wachera Nganga.

8. That in 2008 he found Muiruri Njiri on the suit land. That their father's land had grown trees which they used to harvest. On being summoned by the local Chief, Muiruri failed to show any documents to support his occupation or ownership of the suit land. He stated that he and the 1st Defendant sold the suit land to the 3rd Defendant. He stated that Muiruri lived on parcel 159 but his children now reside and cultivate the suit land since 2008. That there was no one living on the suit land from 1965-2008. He however stated that the suit land was left in the care of Ngure Muiruri, the brother of Muiruri. That in 2014, when he sold the land, Muiruri's children occupied the suit land. He admitted that he last visited the suit land in 2009.

9. DW2 – Stanley Muturi Gatheri informed the Court that he is a retired civil servant. That he bought the suit land from the 1st and 2nd Defendants, the administrators of the estate of the late Wanganga Wangombe. When tasked to produce the agreement for sale he stated that he had none. That after registration of the title in his name, he demanded that the Plaintiff and his family vacate the suit land. He asserted that the agreement of sale in which the Plaintiff avers that his father acquired the suit land was not signed by Wanganga Wangombe, as by then he was deceased.

10. Further he explained to the Court that he was shown the land by a broker whom he could not remember his name. That he visited the suit land in 2014 alone where he met the Plaintiff's mother. That the 1st and 2nd Defendants did not accompany him. That there were no houses then as the Plaintiff's mother was only cultivating the suit land. He reiterated that parcel No LOC 1/THUITA/159 belongs to the Plaintiff. That he knows this because he comes from the same area with the Plaintiff. Parcel Nos LOC 1/THUITA/ 159 and 160 are separated by a road. He asserted that the Plaintiff's family had grabbed the suit land. He informed the Court that at the time he purchased the suit land there were no houses or graves thereon and that the houses were built later.

11. At the close of the hearing parties elected to file written submissions.

12. As to whether a declaration should issue that the suit land was not part of the estate of Wanganga Wangombe, the Plaintiff submitted that the Plaintiff's father purchased the suit land through an agreement dated the 23/3/1980 and another agreement dated the 24/7/1990. He testified that he and his siblings were born on the suit land and they have no other land to call home. That their presence was acknowledged by the Defendants who termed them as trespassers. The 3rd Defendant admitted that he purchased land that was occupied by the Plaintiff's mother through cultivation. He urged the Court to declare that the suit land is not part of the estate of the late Wanganga Wangombe.

13. As to whether a permanent injunction should issue, the Plaintiff submitted that if the same is not issued he stands to suffer irreparably as he and his siblings have been in occupation of the suit land and even buried their kin.

14. As to whether the title registered in the name of the 3rd Defendant should be revoked and or cancelled, the Plaintiff relied on section 80 of the Land Registration Act and sought to persuade the Court that the title should be cancelled. He emphatically submitted that the Defendants have not proved trespass onto the suit land.

15. He referred the Court to various case law which I have read and considered.

16. The Defendants on the other hand submitted that the 3rd Defendant is the registered and absolute owner of the suit land and as such he is entitled to protection of the law as set out in section 26 of the Land Registration Act. The 3rd Defendant submitted that he purchased the suit land on the 9/12/14. That he conducted due diligence and though the land was under cultivation by the Plaintiff's mother who lived in the next land which is LOC 1/THUITA/159, that there were no houses on the land. The bundle of pictures produced by the Plaintiff referred to houses and other developments on parcel No LOC 1/THUITA/159 and not 160. He faulted the Plaintiff and his family for not participating in the succession proceedings or revoking the confirmed grant through which he became registered as the owner of the suit land. They submitted that the title of the 3rd Defendant remains unchallenged in any manner whatsoever.

17. As to whether the Plaintiff has an overriding interest on the suit land, the Defendants submitted that it is undisputed that wangombe died in 1965 and therefore could not have sold the suit land to the Plaintiff's father in 1980. That the administrators of the estate upon obtaining

grant of letters of representation sold the suit land to the 3rd Defendant in whose name the suit land was distributed to him absolutely. The Defendants questioned the identity and authority of Njoroge Wanganga who is claimed to have sold the suit land to the Plaintiff's father. DW1 disclosed his siblings in evidence and none was called Njoroge. In any event, the Plaintiff was not a witness to the said agreements and neither of the witnesses were called to testify. Further, that the suit land is agricultural and Land Control Board was not obtained contrary to section 6 of the Land Control Board Act. The Defendants quoting the case of **Moses Kamande Nyambura Vs Francis Munyua Ngugi (2018) EKLK** where the Court held that the provisions of section 6 are mandatory. That the sale agreements adverted to by the Plaintiff in support of his case are null and void and unenforceable for lack of Land Control Board consent.

18. As to whether the Plaintiff has proved fraud, the Defendants submitted in the negative. It was their summation that though pleaded the Plaintiff failed to prove fraud and the same cannot be left for inference by the Court. They relied on various case law which I have read and considered.

19. The undisputed facts of the case are; the Plaintiff is the administrator of the estate of both his parents Muiruri Njiri and Naomi Muiruri who died in 2015 and 2018 respectively. Except for the 3rd Defendant, the parties are related. Muiruri Njiri was a cousin to the 1st and 2nd Defendants. The 1st Defendant is the stepbrother of the 2nd Defendant. It is a fact that the suit land belonged to Wanganga Wangombe having been so registered in 1963. Though no documentary evidence was produced, it is commonly acknowledged and accepted that Wanganga Wangombe died in 1965. Currently the suit land is registered in the name of the 3rd Defendant.

20. The key issues for determination are; has the Plaintiff proved any overriding interest in the suit land; whether the Plaintiff has proved fraud on the part of the Defendants; Was the suit land part of the estate of Wanganga Wangombe?; whether the suit land was to be excluded from the estate of the late Wanganga; whether the Plaintiff is entitled to the orders sought.

21. What rights has the Plaintiff proved?. I understand the claim of the Plaintiff to be premised on two limbs. The first one is on a purchaser's right. In para 4 and 5 of the plaint, the Plaintiff has pleaded that his father bought the suit land from Wanganga Wangombe but died before effecting the transfer to him. In his evidence in chief he stated that his father bought the suit land from Njoroge Wanganga. He has relied on an agreement dated 23/3/1980. In the said agreement it is stated as follows;

“ today the 23/3/1980 I Mr. Njoroge Wanganga I have sold to Mr. Muiruri Njiri my parcel of land measuring 1.4 points at a price of Kshs 11000/-. He has paid Kshs 3000/- He has told me that he will pay the balance of Kshs 8000/- on 30/10/1980. The witnesses for the seller are; Karenga Kabiari, Njuguna Wanganga, Karuma Karenga. The witnesses for the buyer are; Joseph Ngure, Njoroge Mwaura and Harun Thuu. The said land is in Gatanga L/C Fort Hall Kandara division.”

22. The 2nd agreement dated the 24/7/1990 states as follows;

“This is my agreement I Njoroge son of Wanganga and Muiruri son of Njiri I am willing to transfer land parcel 160 because he has been the one taking care of the land. The witnesses are relatives who are present as we are discussing this issue are F Njuguna son of Nganga, P Mareri son of Waguthu and P Mburu son of Waguthu”.

23. The 1st and 2nd Defendants have attacked these agreements on the grounds that ; Njoroge is not the son of Wanganga and so had no authority to sell the suit land; Wanganga died in 1965 and therefore could not have transferred the land in 1980; there was no Land Control Board consent and therefore even if there was any agreement it became void and unenforceable; the estate of the said Wanganga Wangombe had not been succeeded and therefore no authority in law to effect any disposition of the land to a third party.

24. I have reviewed the agreements of the Plaintiff and note the contradiction. He pleaded that his father bought the land from Wanganga Wangombe but Wangombe was long dead in 1980. The Plaintiff was not present nor a witness to the said two agreements and he did not call the said Njoroge to attest to the same. Neither of the witnesses were called to testify. The 1st agreement named the 1st Defendant as a witness but he was not called to testify. The agreement of 1980 does not define the land being sold. It states land in Gatanga; Kandara Division. There is no evidence that has been presented to link the suit land to this land. Though the agreement of 1980 provided for consideration, the one for 1990 stated consideration in kind, that is to say that Njoroge transferred the land to Muiruri for taking care of the land.

25. The Court is of the view that the Plaintiff has not proved a right of sale in respect to the suit land.

26. The second limb is that of overriding interests. The Plaintiff under para 7 and 8 of the plaint has pleaded that he has acquired overriding interests based on long possession and occupation of the suit land by himself and family. He led evidence that he and his family have lived on the suit land since 1963 and therefore the rights of Wanganga have been defeated by their overriding interests.

27. Section 28 of the Land Registration Act provides for overriding interest in land. It states that all registered land shall be subject to overriding interests as may for the time being subsist and affect the land without being noted on the register. The section goes ahead to list the overriding interests which range from customary trusts to rights acquired by virtue of any written law relating to the limitation of actions or by prescription. The Plaintiff has not disclosed which of the overriding interests he claims in the suit land other than to say that overriding interests in his favour have defeated the interests of the previous owner.

28. He who alleges must prove, so goes the old adage. The Plaintiff has not pleaded with clarity nor proved which overriding interest right he is pursuing.

29. Has the Plaintiff proved long possession and occupation of land? The Plaintiff has claimed that he and his family have lived on the land since 1963. The Defendants have denied this and claimed that the land was left unoccupied between the years 1965 -2008. The 2nd Defendant states that he kept away from the land. His father lived there last in the 1960s before moving to Kibicho where he died. He last

went to the land in 2009. He claims that the land was left in the care of Nguire, Muiruri's brother. That is the person who informed him that the Muiruri entered the suit land in 2008. The 3rd Defendant states that he found the Plaintiff's mother cultivating the suit land and that at that time there were no houses on the land. The Defendants have challenged the pictures produced by the Plaintiff and states that they refer to the developments in parcel LOC 1/THUITA/ 159 and not the suit land. The Plaintiff has not produced any site report to support his plea.

30. The Court is not convinced that the Plaintiff and his family have been on the land since 1963. If that was the case what was so easy for the Plaintiff than to plead and premise his case on adverse possession or prescriptive rights. He did not. Although he has alluded to an overriding interests, he has not disclosed them.

31. Has the Plaintiff proved fraud? It is the Plaintiff's case that the Defendants have committed fraud by obtaining the grant based with non-disclosure of material facts, including the suit land as part of the estate of Wanganga Wangombe; registering the suit land in the name of the 3rd Defendant without the Plaintiff's consent inter-alia. The Defendants denied fraud and stated that the Plaintiff has no claim on the land.

32. The general rule is that fraud must be pleaded and proved in evidence. It cannot be left to the Court to infer. The standard of proving fraud is on standard of probabilities but on a higher scale, higher than civil cases but below the standard required in criminal cases. The Plaintiff has not disclosed what the material facts are that the Defendants are guilty of concealing. The Court finds that the Plaintiff has not discharged the burden of proving fraud at all.

33. Was the suit land to be excluded from the estate of the late Wanganga? The Plaintiff has claimed that since he had acquired overriding interests in the suit land, the interest of Wanganga had been extinguished and therefore the suit land should not have formed the estate of the deceased. This question tends to be in the province of the law of succession. Having said that, there is no cause given by the Plaintiff to show that the suit land ought to have been excluded from succession of the estate of the deceased owner.

34. Is the Plaintiff entitled to orders of permanent injunction? Having made the holdings in the previous paras, this limb fails. The Plaintiff has not established a prima facie case to warrant such orders.

35. As regards the orders for revocation or title, section 80 of Land Registration Act mandates the Court to order for the cancellation of title if it is satisfied that any registration was obtained made or omitted by fraud or mistake. The qualification is that the proprietor had knowledge of such omission, mistake or fraud and that he caused or substantially contributed to such omission, mistake or fraud. The Plaintiff has not proved any fraud to entitle him the orders of cancellation of title as envisaged under section 80 of the Land Registration Act.

36. In the end the Plaintiff's case fails and is dismissed.

37. I shall now turn to the counterclaim of the 3rd Defendant. The 3rd Defendant informed the Court that he purchased the suit land from the 1st and 2nd Defendants and obtained a title. Section 26 of the Land Registration Act protects title of a registered owner unless it is successfully challenged under section 26(a) and or (b). The Plaintiff has not mounted any successful challenge on the title of the 3rd Defendant. It is admitted in evidence by the Plaintiff that he and his family are in occupation of the suit land.

38. Trespass is any unauthorized entry into the land of another without authority and or consent. The Court holds that the Plaintiff is in trespass of the 3rd Defendant's title. Having not given any good and justifiable reason why he should continue occupation on the land, the Court is satisfied that he remains a trespasser and is hereby ordered to vacate the suit land.

39. The 3rd Defendants claim succeeds.

40. In respect to the claim for mesne profits, the 3rd Defendant has not presented any facts before the Court to support a claim for mesne profits. It is dismissed.

41. Final orders

- a. That the Plaintiff by himself or other persons claiming through him are ordered to vacate the suit land within 90 days and in default, eviction to ensure.
- b. Each party to bear the costs of the suit.

Orders accordingly.

DELIVERED, DATED & SIGNED AT MURANG'A THIS 25TH DAY OF JULY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Maina Kagura for the Plaintiff

Ms Wanjira HB for Mr Gachau for the 1st – 3rd Defendants

Irene and Njeri, Court Assistants