



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC N0.329 OF 2017

JOHNSON GATHANGA MWANIKI.....PLAINTIFF

VS

ESTHER WATHERI MWANIKI.....1ST DEFENDANT

SAMUEL GATHIMA MWANIKI.....2ND DEFENDANT

ESTHER WATHERI MWANIKI

(sued as the administrator or legal Representative of the estate of

CHARLES MBUTHIA MWANIKI).....3RD DEFENDANT

STEPHEN GITHAIGA MWANIKI.....4TH DEFENDANT

JUDGMENT

1. The Plaintiff filed suit against the Defendants 23/4/2014 seeking *inter-alia* the following orders;

a) An order for cancellation of the new titles in the names of the Defendants in respect of land parcel No. LOC 19/KIWAMBOGO/352, 360, 366 and T.189 (suit lands) and the restoration of the old titles in the name of the deceased Mwaniki Gathanga as per the certificate of confirmation of grant dated the 26/6/1990.

b) And order for the dissolution of the existing trust in the name of the 1st Defendant on the suit lands and the transfer of each respective positions to the beneficiaries of the said trust as per the Court dated the 23/3/1994.

c) Punitive costs by the Defendants as punishment for perpetuating and abetting in fraud.

2. The Plaintiff, the 2nd, 3rd (deceased) and 4th Defendants are children of the 1st Defendant. Their father Mwaniki Gathanga died on 18/2/1978. Prior to his demise, the deceased owned suit properties aforesated. Vide a Succ Cause No 148 of 1988 the estate (suit lands) were registered in the name of the 1st Defendant to hold in trust for herself and that of her 7 children pursuant to the grant issued on the 26/6/1990. According to the Plaintiff vide a Court order issued on the 23/3/1994, the Court ordered that the estate of the deceased shall be shared equally between the beneficiaries with the 1st Defendant retaining a life interest in the estate. The trust was also dissolved.

3. It is the Plaintiff's case that the 1st Defendant unlawfully and illegally transferred the suit lands contrary to the certificate of confirmed grant and the orders of the Court aforesated and dissolved the grant unlawfully with the consequence that some of the beneficiaries to the estate, the Plaintiff included, he argued, were disinherited. He alleges that the same was done secretly and without due regard to the trust existing then. That the alleged transfers were fraudulent and has particularized fraud in Para 11 of the Plaintiff. Further, he alleges that the 1st Defendant in collusion with the 2nd and 4th Defendants filed a succession cause in respect to the estate of the 3rd Defendant Charles Mbutia Mwaniki vide Succ Cause No 108 of 2007 wherein the 1st and 4th Defendants inherited the suit land LOC 19/KIWAMBOGO/352 and T.189 disinheriting the Plaintiff of his share of the said lands.

4. At the hearing of the suit, the Plaintiff led evidence and informed the Court that he is the 1st born son of the 1st Defendant and a brother to the other Defendants. That his father died in 1978 and was survived by his mother and 7 children. That at the time of his death he was the registered proprietor of 4 properties, the suit lands. In 1988, his mother without their consent filed a succession cause SPMCC NO 148/88, Muranga where she was appointed the administrator of the estate. The grant was confirmed on 26/6/90 where she was appointed trustee over

the suit lands on her own behalf and all her children. By a Court, order dated the 23/3/1994 the said trust was dissolved and the suit lands were shared equally among the children with the 1st Defendant retaining a life interest over the whole. It is his case that the 1st Defendant illegally secretly and unlawfully dissolved the trust and distributed the suit lands to some of the beneficiaries and left others out contrary to the orders of the Court, the Plaintiff, included. Parcel No 352 went to 1st, 2nd and 4th Defendants. Parcel No 360 and 366 was given to the 3rd Defendant. It is his case that he was discriminated in the manner in which his father estate was distributed. He accuses the 1st Defendant for colluding with the 2nd – 4th Defendants to disinherit him.

5. He informed the Court that he purchased the Ruiru land with the monies that he got from his father. He confirmed that he sold the land in Nyahururu and that Mutitu Ngoru land belonged to him which he sold too. That these 2 lands were not subject of the succession. That his case is in respect to the suit lands of which he was entitled to equal share pursuant to the confirmed grant issued in 1990.

6. The Defendants' evidence was tendered by the 1st Defendant who adopted her written statement dated the 10/6/14. She informed the Court that she is the mother of the Plaintiff and the 2nd-4th Defendants. That the Plaintiff is her 1st born son. That upon the death of her husband Gathanga Mwaniki she filed for succession vide No 148/88 at Muranga where she was appointed the administrator of the estate and upon confirmation of the grant she was appointed a trustee to hold the suit lands for herself and in trust for all her children. That she did this with the consent of all her children, the Plaintiff included.

7. She informed the Court that she made provisions for all her children, the Plaintiff included. She stated that that her husband did not want the Plaintiff to settle on any of the suit lands to settle, a fact that was known the Plaintiff. As a result the Plaintiff was given lands at Rwachia (MUTITU/NGORU/BLOCK 2) measuring 2.75 ha. That she built a home for the Plaintiff and settled him on the land but no sooner had he settled than her sold the land and returned home. Land Ref RUIRU EAST/JUJA EAST/BLOCK2/1805 was also offered to the Plaintiff but he refused to take it. She blamed the Plaintiff for squandering the land at Nyahururu and now wants to get more from the suit lands. She stated that though the two mentioned properties were registered in neither her name nor her husband's, they belonged to her deceased husband.

8. The Plaintiff submitted that the 1st Defendant appointed as a trustee in Succ cause No 148 of 1988 acted contrary to the terms of the trust in that instead of distributing the 4 parcels of land as per the Court orders she did breach the said trust hence disinheriting some of the beneficiaries. That the parcels of land stated in the 1st Defendant's evidence have no relevance to the suit land, as they did not form part of the trust assets. That should the 1st Defendant have any issue against the said parcels of land, they should form a different cause of action in another forum. That it is clear that the trust vested in the 1st Defendant was not dissolved. The Plaintiff was entitled to 1/8 of the estate of his father but got nothing.

9. The Defendants submitted that the suit is time barred having been brought 24 years later from 1990 when the grant was confirmed. They relied on section 7 of the Limitations of Actions Act, which bars recovery of land after 12 years from the date when the cause of action arose. They claimed that the cause of action arose 24 years ago after the right of action arose, if any to the Plaintiff. They relied on the case of **Chevron (K) Limited Vs Harrison Charo Shutu (2016)** buttress this point.

10. Further, that the Plaintiffs claim that he and his 3 siblings were disinherited is inaccurate and irrelevant as those siblings are not parties to the suit. That the Plaintiff got the lion's share of the estate and he cannot be demanding more.

11. The key issues for determination are;

- a. Whether the suit is time barred.
- b. Whether the Plaintiff has proved fraud.
- c. Whether the Plaintiff is entitled to the orders sought.

12. The background of this case is that the parties are related. The 1st Defendant is the mother of the Plaintiff and the 2nd -4th Defendants. They comprise the immediate family members of Moses Gathanga Mwaniki who died in 1978. The deceased died intestate leaving behind the following;

- a. Esther Waitheri Mwaniki – wife
- b. Johnson Gathanga Mwaniki- son
- c. Charles Mbuthia Mwaniki- son
- d. Evanson Mwaniki Mwangi- son
- e. Stephen Githaiga Mwaniki- son
- f. Irene Wairimu Mwaniki- daughter
- g. Samuel Gathima Mwaniki -son
- h. Lilian Wangari Mwaniki- daughter

13. At the time of his death, the deceased was the registered proprietor of the suit lands. This is evidenced by the certified copies of the green cards dated the 19/3/14 in respect to the suit lands which show that the suit lands were registered in the name of the deceased as at 1963 (parcel 352), 1976(parcel 360), 1965 (parcel 1965) and parcel T. 189.

14. The Plaintiff has pleaded that the 1st Defendant filed the succession cause No 148/1988 without their consent. He has inter-alia pleaded that she colluded with some named beneficiaries in filing the succession cause. The Plaintiff did not lead evidence to support a claim of collusion. It is on record that after the death of her husband, the 1st Defendant was appointed the administrator of his estate by consent pursuant to a succession cause No 148/88, Muranga. I refer to the affidavit in support of the petition together with the consent to the making of grant, which was executed by Evanson Maingi Mwaniki, Stephen Githaiga, Samuel Mwaniki, Charles Mbuthia and Irene Wairimu. Out of 7 children, 5 consented to the grant of letters of administration to the 1st Defendant. The Court is of the view that there is no evidence of collusion, which was presented in respect to the appointment of the 1st Defendant as the administrator of the estate of Gathanga Mwaniki.

15. Following her appointment, the grant was confirmed on the 26/6/1990 and she was to hold the suit properties in trust for herself and the 7 children.

16. On the 23/3/1994 she moved the Court, sought, and was granted orders for the dissolution of the trust. Consequently, the estate of the late Mwaniki Gathanga was to be shared equally amongst the 7 children with the 1st Defendant retaining a life interest over the whole.

17. The Plaintiffs case is that the 1st Defendant being the administrator and trustee of the estate of his father failed to distribute the estate as per the orders of the Court. That such action is a fraudulent act on the part of the 1st Defendant.

18. The Defendants do not dispute the Plaintiffs claim save to say that the Plaintiff was provided for through the allocation of 3 properties situate in Nyahururu and Ruiru. It is their position that the deceased father did not want him to settle on the suit lands and had expressed this in his lifetime. The 1st Defendant therefore appears to be justifying her actions of failing to distribute the share of the estate to the Plaintiff. According to her, she believes the Plaintiff has been over provided for so much so that he took more than 4 has of land against the balance of 8 has which was shared to the other beneficiaries. She explained that the Plaintiff sold the two properties and now wants a share of the family land while he has squandered his share.

19. The Court concurs with the submissions of the Plaintiff that the cause of action in this suit does not relate to the two parcels of land and should the Defendants want to pursue the said properties, the same would constitute a different cause of action which is not before this Court for determination.

Whether the suit is time barred

20. The Defendants have argued that the suit is time barred. It is their case that the cause of action arose in 1990 when the grant of letters of administration were confirmed. Relying on section 7 of the Limitation of Actions Act, the Defendants maintained that the Plaintiff cannot recover land after a period of 24 years, which is in excess of the statutory period of 7 years. This defense was not raised in the statement of defense but at the submissions. It is the view of this Court that submissions are not pleadings of the parties and a defense of statutory time bar ought to be raised in the pleadings to put the other party on notice and to call for a rebuttal.

21. That notwithstanding, time bar is a jurisdictional issue which I shall deal with.

22. Section 7 of the Limitation of Actions Act provides follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

23. Clearly, the above provisions would bar a claim in recovery of land that is brought after the expiry of 12 years. In the case of **Rawal –Vs- Rawal 1990 KLR 275**, the Court stated as follows:-

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting “stale claims on the one hand, and on the other hand protect a Defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. The effect of limitation enactment is to remove remedies irrespective of the merits of the particular case.”

24. Equally in the case of **Iga vs Makerere University 1972 EA65** also cited in **Rawal-Vs- Rawal (supra)** , the Court of appeal stated as follows:

“A plaint which is barred by limitation is a plaint “barred by law”. A reading of the provisions of section 3 and 4 of the Limitation Act cap 70 together with order 7 rule 6 of the civil procedure rules seems clear that unless the appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the Court shall reject his claim... The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred the Court cannot grant the remedy or relief.”

25. The Limitation of Actions Act provides under Part iii for circumstances under which extension of periods of limitation can be made. The circumstances have also been set under Clauses 22-27 of the Limitation of Actions Act. These include disability, acknowledgement and part payment, fraud, mistake and ignorance of material facts.

26. Section 4(2) provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. Fraud is a tortious act and therefore any action that arises out of fraud must be brought within 3 years from the time the person alleging discovers the fraud. The Court in the case of **Elijah Ntaiya Vs Lekinini Kulale & 3 Others (2008) eKLR** held that:-

“...Limitation period for an action founded on fraud is three years. See **Javed Igbal Abdul Rahma & Another Vs Alfred Wekesa Sambu & Another**. The Limitation period begins to run when the fraud is discovered”.

27. The Question that the Court should ask is whether the cause of action disclosed in this suit falls under section 7 of the Limitation of Actions Act or under section 20 of the said Act.

28. Section 20 of the Limitation of Actions Act makes provisions for Actions in respect of Trust Property or Movable Property of a Deceased Person. Section 20(1) states as follows;

“None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—

(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

29. (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued:

Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession”.

30. The meaning of the provisions under section 20 is that the period of limitation as set out in the Limitation of Actions Act do not apply to actions by a beneficiary under a trust, which is an action in respect of (a) fraud (b) fraudulent breach of trust. The overarching principle is that the trustee must be party or privy to the action. As a party, it denotes involvement and as a privy is that, he had knowledge and did nothing to prevent the fraud or fraudulent breach. The third scenario is where the beneficiary seeks to recover trust property or proceeds in possession of the trustee or received by the trustee or converted into personal use by the trustee. Fourthly, limitation does not apply in respect to a beneficiary’s future interest which is yet to crystalize.

31. The said proviso provides that an action in respect to a breach of trust may not be brought within 6 years from the date in which the right of action accrued. Therefore, a cause of action founded on breach of trust in respect to a beneficiary must be filed within a period of 6 years, in default, it would be time barred.

32. In the case of **Stephens & 6 Others vs Stephens & Anor Civil Appeal No. 18 of 1987**, it was held that:-

“the period of limitation as prescribed in the Limitation of Actions Act (Cap 22) Section 20 (1) (b) do not apply to actions by a beneficiary under a trust which is an action to recover from the trustee trust property or proceeds thereof converted by the trustee for his own use”.

33. It is trite that a question of how a trust is created is a question of fact to be proved by evidence. See **Mumo vs. Makau (2002) IEA 170 CA**. In the instant case the 1st Defendant was both an administrator and a trustee of the estate of the late Mwaniki Gathanga. Under the confirmed grant, she became a trustee of the estate and held the trust assets on her behalf and that of the beneficiaries. The record bears witness that once she was appointed a trustee in 1990; she proceeded to cause the registration of that trust on the suit lands. This is supported by for example entries Nos 2 in respect to title No 352 registered on the 30/5/1990 ; entry No 5 in respect to title No 360 registered on the 30/5/90 and entry No 3 in respect to title No 366 registered on the 30/5/90. The titles were registered in the name of the 1st Defendant to hold in trust for herself and in trust for her 7 named children. The confirmed grant changed the character of the estate into trust assets and her children into beneficiaries of the trust and she became a trustee in law. She therefore held a fiduciary position and was to deal with the trust asset as per the trusts created by it and no more.

34. It is on record that the 1st Defendant moved the Court and obtained orders on the 23/3/1994 to interalia dissolve the trusteeship of the estate of Mwaniki Gathanga and the estate was to be shared among the 7 children equally with a life interest to her credit.

35. Following the issuance of the orders, the actions of the 1st Defendant can be traced on the transactions on the titles. She proceeded to transfer the properties as follows; title No 352 became registered in the names of the 1st, 2nd, 4th Defendants on 21/12/2011 as per entry No 6 of the green card; title No 360 was transferred to the 2nd Defendant on the 29/1/99; title No 366 was transferred to the 2nd Defendant on 29/1/99. In all these, the Plaintiff did not receive any asset as provided for in the confirmed grant and the orders of the Court dated 23/3/1994, which required the 1st Defendant to distribute the estate equally among the 7 beneficiaries, the Plaintiff included.

36. It is apparent that despite the Court orders dissolving the trusteeship in 1994, the estate continued being held under trust by the 1st Defendant until 1999 when she proceeds in total fraudulent breach of the trust vested on her by the confirmed grant in 1990.

37. These actions do not meet the legitimate expectations of the Plaintiff to receive his equal share of the estate given to the Plaintiff as a

beneficiary by reason of succession. The 1st Defendant confirmed under cross-examination that there is no other land part of the estate to satisfy the trust on the part of the Plaintiff. The duty to account, I must state, was not dependent on the other lands. The lands that she was to account for under the trust are disclosed in the confirmed grant of 1990. The presence or otherwise of these lands does not absolve her of her duty to obey the Court orders and account to the Plaintiff, the beneficiary of the estate. The Defendant disposed the properties without giving an account when she had represented to the Court in 1994 that the Plaintiff is entitled following which the Court confirmed the grant and was discharged from the trusts.

38. The estate disclosed to the Court in succession did not include the lands that may as well been given to the Plaintiff. That in law is called an advancement. If the 1st Defendant wanted the advancement to be included, then this should have been disclosed to the succession Court. If this disclosure had been made the Court would have made the relevant provision/decision in accordance with section 26 of the succession Act. The Plaintiff would have been excluded in getting a share of the balance of the estate. The Court was not made aware that there were other properties. The 1st Defendant cannot now purport to change an order of the Court having been the mover of the succession cause in the first place. She is bound by the orders in the succession cause and unless and until she distributes the estate in accordance with those orders, she remains undischarged from the trusts comprised therein.

39. It is clear that the 1st Defendant's actions of transferring the trust assets contrary to the confirmed grant of 1990 and the Court orders of 1994 is a fraud and a fraudulent breach of trust for which the 1st Defendant was both a party and privy to. The 1st Defendant and the 2, 3 and 4th Defendants are also guilty of knowingly receiving trust asset contrary to the confirmed grant and the orders directing for the equal sharing of the estate to all the 7 beneficiaries, the 1st Defendant retaining a life interest. They converted trust assets into their own use. It is on record that upon the death of the 3rd Defendant (Charles Mbuthia Mwaniki), the title No T.189 which was transferred to him in fraudulent breach of trust later devolved to the 1st and 4th Defendants by way of a confirmed grant dated 10/6/2008. Given the root of the trust and the actions of the 1st Defendant, the legality of the confirmed grant is called to question.

40. From the above analysis, it follows that the 1st Defendant cannot reasonably be said to have been discharged from the trusts that she had not performed. Reliance on the Court orders in 1994 is dishonest. This behavior must be discouraged because it constitutes a fraud on Court orders. The discharge of trusteeship was dependent on her giving an account as per the Court orders to the beneficiaries. I hold that any contrary action did not discharge her from her trusts. She cannot rely on wrongdoing to say that she was discharged from the trust.

41. Section 28 of the repealed Act , Cap 300 provided that "The rights of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court shall not be liable to be defeated except as provided in this Act and shall be liable by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject to-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is a subject as a trustee. I hold that the 1st Defendant continued to hold the properties under a constructive trust on behalf of the beneficiaries, a trust that will hold until it is discharged as per the Court orders.

42. The recipients of the trust assets are the beneficiaries of the estate of Mwaniki Gathanga. They are Defendants in this suit. They did not give their own evidence. Their denial of the Plaintiff's claim is therefore subsumed in the evidence of the 1st Defendant. The Court has made a finding in such evidence. There is a reasonable presumption that they were aware that the distribution of the estate has been done contrary to the Court orders.

43. The long and short of it is that limitations of actions does not apply as she received a trust asset and disposed it contrary to the orders of the Court. The 1st Defendant has admitted fraud in her evidence by stating that she did not give the Plaintiff his share of the estate. Her claim that she believed that he had been provided for through other lands is not tenable. The Plaintiff has proved fraud and fraudulent breach of trust and conversion of trust asset by the Defendants.

44. The Court answers issue Nos. a in the negative and no b in the positive.

45. Section 26 of the Land Registration Act contains provisions, which are similar to section of Registered Land Act repealed on grounds of impeaching a title, which are not limited to fraud for which a person was a party to it. I have already held that the titles were dealt with fraudulently and I can do no better than to order cancellation under section 80 of the Registered Land Act. The tiles are reverted to the position they were at as at the confirmed grant in 1990 and the Court orders of 1994 to enable the 1st Defendant to give a proper account of the estate to the beneficiaries.

46. In respect to the claim for punitive costs against the Defendants, I hesitate to order such costs as the parties are close family members. The 1st Defendant is a senior citizen and punishing her with punitive costs will cause unnecessary hardship in her old age.

47. The Final orders;

a. An order for cancellation is hereby issued in respect of the new titles in the names of the Defendants in respect of land parcel No. LOC 19/KIWAMBOGO/352, 360, 366 and T.189 (suit lands) and the restoration of the old titles in the name of the 1st Defendant

pursuant to certificate of confirmation of grant dated the 26/6/1990 and the orders issued on 23/3/1994 in Succession Cause No 148/1988.

b. The Land Registrar is mandated to cancel all the entries made after the registration of the orders in a above in respect to LOC 19/KIWAMBOGO/352, 360, 366 and T.189 (suit lands).

c. An order for the dissolution of the existing trust in the name of the 1st Defendant on the suit lands and the transfer of the respective portion to the Plaintiff as per the Court orders dated the 23/3/1994.

d. Parties are related, each to meet their costs of the suit.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 22ND DAY OF JULY 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

T M Njoroge HB for Kirubi for the Plaintiff

Wachira for the Defendant

Irene and Njeri, Court Assistants