



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 110 OF 2012**

**JAPHET KIRIMI.....1<sup>ST</sup> PLAINTIFF**

**PETER KINOTI.....2<sup>ND</sup> PLAINTIFF**

**MARTHA NKATHA.....3<sup>RD</sup> PLAINTIFF**

**GLADYS KAREGI M' MUGUNA.....4<sup>TH</sup> PLAINTIFF**

**-V-**

**ROSEMARY KAROKI RUTERE.....1<sup>ST</sup> DEFENDANT**

**PETER RUTERE.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs instituted this suit by way of a plaint filled in court on 6<sup>th</sup> June 2012, seeking judgment against the defendants jointly and severally as follows;

**a) An order directing the defendants to process and deliver titles to the plaintiffs in respect of their portions of land out of parcel LR Ntirimiti Settlement scheme 434.**

**b) Costs of the suit and interest.**

2. The plaintiffs' case is that the defendants are wife and husband respectively and that at all material times relating to this suit, the 1<sup>st</sup> defendant was the registered proprietor of all that parcel of land known as LR Ntirimiti settlement scheme/434(*hereinafter the suit property*) measuring approximately 20 acres.

3. It was the plaintiff's case that on diverse dates between 1988 and 1995, the 2<sup>nd</sup> defendant acting on behalf of the 1<sup>st</sup> defendant entered into land sale agreements with the plaintiffs herein and sold to each of the plaintiffs land equivalent to 5 acres. The plaintiffs took possession of their respective portions, set up homes thereon and extensively developed the same but to date the defendants have failed to deliver the title thus provoking the instant suit.

4. The defendants on the other hand filed a defence and counter claim on 4<sup>th</sup> July 2016, with the 1<sup>st</sup> defendant specifically denying having ever granted the 2<sup>nd</sup> defendant any authority to act on her behalf and further denied that the plaintiffs had constructed or developed any portion of the suit property and further contended that plaintiffs had trespassed on the same. The orders sought by the defendants in their counter claim are;

**(a) That the plaintiffs suit be dismissed with costs to the defendants.**

**(b) An order for eviction from land parcel no. Meru/Ntirimiti/434 of the plaintiffs and their agents, representatives or any other person occupying the aforesaid land at their behest.**

**(c) An order for permanent injunction to restrain the defendants either by themselves their agents, servants and or agents from entering, occupying, trespassing or in any other way dealing with land parcel No. Meru/Ntirimiti/434.**

**(d) General damages for trespass.**

**(e) Costs of the counterclaim and interest at court rates form the date of the filing of this defence and counter claim until payment in full.**

**(f) Any other orders this honourable court deems necessary.**

5. The plaintiffs' case was advanced by the 4 plaintiffs who adopted their statements found in their list of witness statements dated 28.5.2012 as their evidence. **PW1 is Japhet Kirimi.** It was his case that he knew the defendants as husband and wife who owned the suit property measuring about 20 acres, that each of the plaintiffs had bought portions in the suit property measuring 5 acres and that the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs had lived on the suit property since 1995 and 1988 respectively. PW1 utilizes his portion by cultivation and he has a structure on the suit land. He avers that he bought his portion of the suit land in 1995 from 2<sup>nd</sup> defendant.

6. It was his further evidence that the 4<sup>th</sup> plaintiff's husband one Jacob Muguna passed away in the year 2008 and was buried on the suit land. 1<sup>st</sup> defendant had filed a suit where she sought to bar the 4<sup>th</sup> plaintiff from burying her husband on the suit land. This was when they (plaintiffs) discovered that the suit property was in the name of the 1<sup>st</sup> defendant and not the second defendant. PW1 further stated that at some point, the defendants demanded money for subdivision and transfer of titles which they (plaintiffs) promptly paid but the transfer was never effected. Consequently, PW1 urged the court to issue an order compelling the defendants to process and deliver the title deeds to their portions.

7. **PW2 is Peter Kinoti.** It was his evidence that he knows the parties herein. He entered into a land sale agreement in respect of his portion of the suit land to wit 5 acres on 17<sup>th</sup> October 1994, whereupon he took possession of the same and he also built a house. Although he stays at a place known as Naromoru, he does utilize his portion of 5 acres. It was his further evidence that the defendants had at some stage demanded money for subdivision and transfer of the land which monies he paid and that despite several demands and requests, the defendants especially the 2<sup>nd</sup> defendant had remained evasive and refused to deliver title. PW2 avers that his father was buried on the suit land.

8. **PW3 is Martha Nkatha.** It was her evidence that she knows the parties herein and that on 17<sup>th</sup> July 1995, the 2<sup>nd</sup> defendant sold to her a parcel of land measuring 5 acres out of the suit property and that they reduced the agreement into writing in Kimeru language and paid the entire consideration and she took possession of the 5 acres. It was her further evidence that she remained on the suit land, extensively developed the same and that the 1<sup>st</sup> plaintiff who is her brother witnessed the agreement whereby the English translation and the certificate of translation were produced as plaintiff exhibit 1(b). PW3 stays on the suit land with her children.

9. **PW4 is Gladys Karegi.** She also knows the parties herein. Her evidence is that the 2<sup>nd</sup> defendant had entered into a land sale agreement with her late husband (Jacob M' Muguna) for the sale of 5 acres out of the suit land and that they took possession of the 5 acres in 1988. For the last 32 years PW4's family has remained on the suit land, whereupon they have extensively developed the same. There was a time the defendants demanded money for subdivision and processing of titles which they paid.

10. In 2008 when her husband died, PW4 was shocked when she was served with court papers intimating that she was unlawfully occupying the land and she was surprised to learn that the suit land was in the name of the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant's wife, yet all along, the 2<sup>nd</sup> defendant had posed as the owner of the suit property. PW4 produced as her exhibits three receipts indicating how her husband had installed water in the suit property (P-Exhibit 4 a, b and c) and another receipt indicating that PW4's husband had paid survey fees.

11. The defence case on the other hand was advanced by the two defendants, their son and a chief. These witnesses too adopted as their evidence their respective statements dated 20.12.2013. **DW1, Peter Rutere, is the 2<sup>nd</sup> defendant herein.** He stated that 1<sup>st</sup> defendant was his lawful wife and that he was not her agent, that he did not own the suit property, that he had not entered into any written agreement with the plaintiffs as he had no capacity to transact in land he did not own and that the plaintiffs had not undertaken any notable developments in the suit land. He however admitted that plaintiffs are the ones in occupation of the suit land.

12. **DW 2, Rosemary Karoki is the 1<sup>st</sup> defendant herein.** It was her evidence that she is the sole registered proprietor of the suit property measuring about 20 acres. It was her further evidence that she had never had any intention of selling the suit property and had never entered into any agreement to transfer the land to the plaintiffs either in person or by agent and that her husband could not be regarded as her agent merely by the fact of a marriage. She further denied that the plaintiffs had constructed or made any permanent developments in the suit property but she admitted that the plaintiffs are the ones in occupation of the suit land.

13. **DW3 is Simon Mutuma.** He is a son of the defendants. In his recorded statement, he stated that he lived on the suit property, but in his oral evidence, he stated that he does not live on the suit land. It was his evidence that his father (the 2<sup>nd</sup> defendant) herein had called two family meetings regarding the sale of the suit land and that in both meetings all the plaintiffs and the chief were there. The 2<sup>nd</sup> defendant had informed the plaintiffs that the land belonged to the 1<sup>st</sup> defendant and that if it was going to be sold, then the same would be according to the 1<sup>st</sup> defendant's terms. It was his further evidence that the plaintiffs continued occupying the suit land despite there not being any legitimate or formal agreement or consensus to do so.

14. **DW4, Daniel Muriuki is the chief of Ntirimiti location.** He stated that the parties herein were well known to him and he was aware of the dispute herein since it had been brought to his attention by the parties. He avers that at first, the defendants had brought a complaint seeking the removal of one of the plaintiffs, while the second time, the plaintiffs brought a complaint seeking to be acknowledged as rightful owners of the suit parcel. It was his evidence that there was no proof of ownership of the land by the plaintiffs.

15. It was submitted for the plaintiffs that defendants are legally married, that the 2<sup>nd</sup> defendant had sold the suit land to the plaintiffs openly and with the knowledge of the 1<sup>st</sup> defendant and that defendants were well aware that plaintiffs were living on the suit land. Further, it was submitted that defendants have never made any attempt to evict them (plaintiffs) from the suit property. It was also submitted that by virtue

of the family relationship between the defendants, there existed an agency between them and the 2<sup>nd</sup> defendant who acted for and in the interests of defendant's family and that the 1<sup>st</sup> defendant all along knew the actions of her husband. It was thus submitted that such conduct amounted to acquiescence and ratification.

16. The plaintiffs further submitted that the 2<sup>nd</sup> defendant sold the land to the plaintiffs knowing very well that the same did not belong to him a fact which was not questioned by the 1<sup>st</sup> defendant and that the occupancy of the land resulted in a constructive trust in favour of the plaintiffs which was protected by law.

17. On the other hand it was submitted for the defendants that the suit was defective as it disclosed no cause of action against either of the defendants, that there was no doubt that the suit property was registered in the name of the 1<sup>st</sup> defendant who legally acquired it and that the same had not been challenged in any way. It was submitted that no cause of action, either negligence, fraud, or breach of contract had been stated and particularized in their pleadings and that the 1<sup>st</sup> defendant had proved to court that indeed she never sold any property to the plaintiffs.

18. I have carefully considered the evidence on record and the rival submissions by the parties. It is not disputed that defendants are a wife and husband respectively and that 1<sup>st</sup> defendant is the registered owner of the suit property. It is also not in dispute that the suit land is in the hands of the plaintiffs.

**19. The question for determination is whether a constructive trust arises to warrant the registration of the suit land in the names of the plaintiffs.** To determine this issue, the court will analyze the circumstances under which the plaintiffs came to occupy the suit land.

20. All the plaintiffs have given an account of how they came to be on the suit land. Pw1 and pw3 who are siblings who bought their portions of the land from 2<sup>nd</sup> defendant in 1995, while PW2 bought his portion in October 1994. It therefore appears that the 1<sup>st-3<sup>rd</sup></sup> plaintiffs entered the land at almost the same time. However, for the 4<sup>th</sup> defendant and her family, they had commenced occupation of the suit land way back in 1988, when Jacob (4<sup>th</sup> plaintiffs' husband) purchased the land.

21. The 2<sup>nd</sup> defendant has denied ever having sold the suit land to the plaintiffs. He says that he came to meet these plaintiffs when they were summoned to the chief for the meeting. The evidence of the plaintiffs is consistent and in tandem with the resultant occupation of the suit property by the plaintiffs.

22. The plaintiffs' evidence that the defendants had at one point demanded money for subdivision and transfer which they promptly paid remained unchallenged throughout the trial. This is in tandem with defence documents produced as defence exhibit 4 and 5. The 1<sup>st</sup> defendant Rosemary Karoki is the one who produced the documents in her list as Defence exhibits 1-5, while the title is exhibit 6. However, she contradicted herself when she stated that she has never subdivided her land. She then went ahead to disown the consent to the land control board (defence exhibit 4), while she had nothing much to say regarding the mutation forms of 1997. As for the 2<sup>nd</sup> defendant, he stated that the mutation forms are frauds and that it is Jacob Miguna who did the fraud.

23. If the defendants were aware that their own documents were fraudulent, why on earth did they wish to rely on the same in their evidence? Were they forced to produce these documents in court? The consent to the land control board is dated 8.12.1994, while the mutation forms are dated 24.1.1997. The receipt availed by PW4 as plaintiff exhibit 5 indicates that Jacob M'Muguna (husband of pw4), paid for survey fees on 3.9.1996. The sequence of these events is a clear manifestation that both defendants were acting in concert and in cahoot with each other in selling the land to the plaintiffs. The fact that defendants sought to disown their own documents in court is a pointer to their joint conspiracy to defraud the plaintiffs.

24. It is not in dispute that the plaintiffs are the ones in control and occupation of the suit land. The 2<sup>nd</sup> defendant gave a vivid clear description of the respective portions occupied by each of the plaintiffs. The 1<sup>st</sup> defendant appeared to contradict herself regarding this aspect of occupation. In her recorded statement, she stated that plaintiffs had not constructed on the suit property. In her evidence in chief, 1<sup>st</sup> defendant stated that she knew that plaintiffs live on the suit land but they entered the land after the death of Jacob. However, she could hardly recall the last time she ever visited the land. During cross examination, she stated that she had allowed Jacob to use the land in order to look after the land and that this happened about 10 years ago! She stated that as of now the court can observe that the plaintiffs have built on the land. Further, whereas the 1<sup>st</sup> defendant stated that she was the one who had brought Jacob (the 4<sup>th</sup> plaintiff's husband) to the land, the 2<sup>nd</sup> defendant on the other hand stated that they used to work together with the said Jacob for a white man.

25. As alluded to earlier there was overwhelming evidence that indeed the plaintiffs had bought 5 acres each of the suit property from the 2<sup>nd</sup> defendant. PW1 has given a detailed account of how each of the plaintiffs has occupied the suit land. Pursuant to the mutation forms, the land was divided into 4 portions. Each portion of the suit land was given a number. Parcel no. 687 is occupied by Martha Nkatha, No. 688 is occupied by Peter Kinoti, No. 689 is occupied by Japhet Kirimi while No. 690 is occupied by Gladys Karegi. These numbers are the ones reflected in defendants document exhibit 5 (mutation forms). Thus each of the plaintiffs occupies a defined portion of the suit land.

26. On the other hand, there is no evidence to show that defendants have ever occupied the suit land. 1<sup>st</sup> defendant can't even remember the last time she stepped onto the suit land, and she guessed that it could be about 10 years ago.

27. In the receipts availed by defence (defence exhibit 3), the earliest one shows that 1<sup>st</sup> defendant started paying for the suit parcel no.434 on 20.7.1984. She was acquiring the land from the settlement Funds Trustee (S.F.T). She was still paying for the land in year 2007, the discharge was done on 30.6.2008 and she then acquired title to the land in 2009. It is apparent that by the time the 1<sup>st</sup> defendant was acquiring title to the land, the same was already encumbered by the fact that plaintiffs are the ones who were in occupation of the suit land. The plaintiffs had gotten into that position through the machinations of the defendants. I am therefore inclined to find that plaintiffs were

bonafide purchasers.

28. **The Black's law Dictionary 8<sup>th</sup> Edition** defines "bona fide purchaser" as:

***"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."***

29. In the instant case I am satisfied that the plaintiffs have been able to demonstrate that they were innocent purchasers for value without notice, of prior adverse claims by the 1<sup>st</sup> defendant. Their evidence that the 2<sup>nd</sup> defendant all along represented to them as the owner of the suit property remained uncontroverted throughout the trial. More so the 1<sup>st</sup> defendant who is the registered owner of the suit property cannot now be heard to say that all along she was not aware that the 2<sup>nd</sup> defendant had disposed off the suit property since plaintiffs had been in control of the suit property for a period of over 25 years with her knowledge and secondly, she had clearly embarked on the process of subdivision of the suit land between 1994-1997 where the resultant 4 parcels were even given respective numbers.

30. This is a situation whereby the plaintiffs could not have carried out a search on the suit property as the same was not registered until year 2009, long after plaintiffs had settled on the suit land.

31. **Section 30 (g) of the Registered Land Act cap 300 (Repealed)** provided that;

***"Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation...."***

32. As rightly submitted by the plaintiffs, the occupancy of the land by the plaintiffs has resulted in a constructive trust in favor of the plaintiffs which trust must be protected by the law.

33. In the case of **Twalib Hatayan & Another vs. Saggar Ahmed & 5 Others (2015)eKLR**, it was stated that ;

***"An imposition of a trust is thus to guard against unjust enrichment....."***

34. In the **Court of Appeal** case of **Willy Kimutai Kitilit vs. Michael Kibet, Civil Ap-peal no.51 of 2015- Eldoret**, it was held that;

***"The doctrines of equity are part of our laws although section 3 of the judicature act subordinates common law and doctrines of equity to the constitution and written law in that order. Section 3 (3) of the law of contract act and section 38(2) of the land act as amended clearly stipulate that the contracts from disposition of an interest in land should be in writing does not affect the creation of a resulting trust, implied or constructive trust....."***

35. A person in occupation of land has some rights, and it is upon a court of law to determine the nature and extent of such rights. In the instant case, the plaintiffs have been in occupation of the suit land for many years long before the acquisition of the title by the 1<sup>st</sup> defendant. I therefore find that a constructive trust does arise in this case to warrant the granting of the orders sought by the plaintiffs.

36. This is a case of unmitigated greed on the part of defendants who want a second bite of the cherry. It appears that a window of opportunistic maneuvers was opened when it became apparent that 1<sup>st</sup> defendant would be registered as the owner of the land after she obtained the discharge in year 2008.

37. The parties agree that there was a case before the magistrates court, the same being Meru CMCC no.414 of 2008 between 1<sup>st</sup> defendant and 4<sup>th</sup> plaintiff. It emerged that the suit was filed to prevent the burial of pw4's husband in the suit land but he was still buried there. None of the parties offered any further details about this case and as such, I also have nothing to say about it.

38. In conclusion, I find that the plaintiffs suit is merited and I accordingly grant the following orders;

**1) The counter claim of defendants is hereby dismissed.**

**2) An order is hereby issued to the effect that plaintiffs are entitled to the suit land Ntirimiti Settlement Scheme 434 in the portions captured in the mutation forms.**

**3) An order is hereby issued directing the defendants to process and deliver titles to the plaintiffs of their portions of the suit property namely; Ntirimiti Settlement Scheme 434. In the alternative, the Deputy registrar of this court is hereby authorized to sign any documents to facilitate the implementation of this judgment particularly the transfer of the land Ntirimiti Settlement Scheme 434 to the plaintiffs.**

**4) The consent of the land control board is hereby dispensed with in respect of the execution of this judgment.**

**5) Defendants are condemned to pay costs of the suit.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 17<sup>TH</sup> DAY OF JULY, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

M. Kariuki holding brief for Mokuu for plaintiff

Miss Kiuki holding brief for Miss Mutinda for defendant

2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiff

1<sup>st</sup> defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**