



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO.120 OF 2016

FRANCIS DUNCAN NJERU (suing as the Legal Representative of

MAGDALINE WANGUI NJERU (Deceased).....PLAINTIFF

VERSUS

MARY MARGARET WAWERU.....1ST DEFENDANT

REGINA WATETU NJENGA.....2ND DEFENDANT

GRACE NJOKI KAMUUL.....3RD DEFENDANT

FLORENCE NYAGUTHII NJENGA.....4TH DEFENDANT

ELIZABETH RUGURU WAWERU.....5TH DEFENDANT

CATHERINE MUTHONI MURAGE.....6TH DEFENDANT

JUDITH WAMBUI THUMBI.....7TH DEFENDANT

EMMAH WANGUI WAWERU.....8TH DEFENDANT

JUDGEMENT

BACKGROUND

The Plaintiff instituted this suit against the defendants for following orders;

i) This Honourable Court do be pleased to declare that the removal of the name of MAGDALINE WANGUI NJERU's name from the register of GICHUGU/SETTLEMENT/SCHEME/646 was both fraudulent and illegal and the Sub-division of the said land into GICHUGU/SETTLEMENT/SCHEME/3929, 3930, 3931 & 3932 was fraudulent and illegal.

ii) That the title deed in respect of land parcel number GICHUGU/SETTLEMENT/SCHEME/3929, 3930, 3931 and 3932 be cancelled and the land reverts to title number GICHUGU/SETTLEMENT/SCHEME/646.

iii) That the name of the plaintiffs be inserted in the register for land parcel number GICHUGU/SETTLEMENT/SCHEME/646 in place of MAGDALINE WANGUI NJERU, the deceased.

iv) The defendant do pay the plaintiff general damages.

v) The defendant do pay the costs of this suit.

On 15.11.2016, the defendant filed a joint statement of defence and counterclaim.

PLAINTIFF'S CASE

The Plaintiff stated that he has instituted this suit as a Legal representative of Magdalene Wangui Njeru (deceased) who passed away on 17.3.1992. He stated that the deceased was one of the children of the late JANE WAMBUI KARIUKI who bought the original land parcel No. GICHUGU/SETTLEMENT/SCHEME/646 and caused it to be registered in the name of one of her daughter namely REGINA WATETU to hold in trust for her mother and siblings. He further stated that on 15th January, 1982 the trust was terminated and the land was registered in the names of MAGDALINE WANGUI NJERU, MARY MARGARET WAWERU, REGINA WATETU NJENGA, GRACE NJOKI KAMUUI and FLORENCE NYAGUTHII NJENGA with their mother having a life interest in the said land.

When their mother passed on, they all agreed to partition the said land between themselves. They attended the Land Control Board and consent was granted to partition the said land on 2.10.1991. Unfortunately MAGDALINE WANGUI NJERU died on 17.3.1992 and the 1st, 2nd, 3rd and 4th defendants caused the name of MAGDALINE WANGUI NJERU to be removed from the Register of the said parcel of land. When he discovered the anomaly, he placed a restriction on the suit property. The defendant promised to include his name on the register in place of the deceased's name on condition that he files a succession cause in respect of the deceased.

DEFENDANT'S CASE

The defendants authorized GRACE NJOKI KAMUUI and REGINA WATETU KARIUKI (3rd and 2nd defendants) to testify on their behalf. In her evidence REGINA WATETU KAIRUKI (PW1) stated that sometime in the year 1973, she started purchasing land parcel No. GICHUGU/SETTLEMENT/SCHEME/646 from CHRISTOPHER KIBUGUA KARIUKI and on 2.4.1993, he completed payment and was issued with a title deed. Thereafter, she got married to one SIMON NJENGA GICHOYA and had to change her name to REGINA WATETU GICHOYA, the last name being her husband's surname. After she got married, she decided to incorporate her mother and sisters in the aforesaid land parcel as they had no other land. On 02:02:82, she incorporated her sisters and her mother in the suit land with her mother having a life interest. On the land and title was issued on 16.1.1985. On 8.5.1991, her mother died and on 17.3.1992 one of her sisters also passed on namely MAGDALINE WANGUI NJERU. After the demise of her sister MAGDALINE WANGUI NJERU, her name was removed from the parcels register and on 15.3.1999, they were issued with a title deed in the name of the surviving sister. On 16.11.2000 the plaintiff herein caused a restriction to be registered in the suit land. They went to complain to the Land Registrar, Kirinyaga County who removed the restriction on 16.9.2008 and on 11.2.2010, they applied for the partition of the suit land. On 19.4.2010 the suit land was jointly registered in their joint names. They finally partitioned the suit land and on 23.4.2010, the said title was closed on sub-division and new numbers were issued being GICHUGU/SETTLEMENT/SCHEME/3929, 3930, 3931 and 3932.

On 23.4.2010 she was registered proprietor of land parcel No. GICHUGU/SETTLEMENT/SCHEME/3929 measuring 0.56 and on 6.5.2000 she was issued with a title deed while her sisters were also issued with their respective title deeds. On 20.10.2016 she was served with summons to enter appearance and other court processes. In respect of the suit herein she stated that the plaintiff herein is a brother-in-law and was not entitled to file succession in respect of their late sister without involving them.

The defendants also contend that their brother-in-law was not entitled to file the succession cause as the suit land was not a family land as the same was bought by the 2nd defendant using her own money.

PLAINTIFFS SUBMISSIONS

The Plaintiff submitted that the removal of MAGDALINE WANGUI NJERU'S (deceased) from the register of land parcel number GICHUGU/SETTLEMENT/SCHEME/646 and the subsequent transfer of the same parcel of land to the 1st and 3rd and 4th defendants was illegal fraudulent malicious and meant to deny the estate of MAGDALINE WANGUI NJERU their fair and legal share out of the land parcel number GICHUGU/SETTLEMENT/SCHEME/646.

DEFENDANTS SUBMISSIONS

The defendants contend that the suit land was solely bought by the 2nd defendant using her own sweat and upon being incorporated on the title deed was an act of exgratia/humanity/benevolence and no trust was created over the land.

The defendant further submitted that the plaintiff never adduced evidence as to how his late mother-in-law bought the suit land through the 2nd defendant. They also submitted that the 2nd and 3rd defendants were candid in their testimony that the 2nd defendant who was employed in public service purchased the suit land from one CHRISTOPHER KABUGUA at a price of Kshs.7,200/= on 2.4.1973 before she got married. However, after she got married to one SIMON NJENGA GICHOYA she became benevolent to her family and agreed to incorporate their names on her title as joint proprietors purely on exgratia basis as none of them gave her any cash.

The defendant further submitted that the plaintiff has failed to adduce evidence to support the claim that the 2nd defendant purchased the land and got it registered in her names to hold in trust for herself, her mother and siblings. He submitted that the issue of trust has not been established to the required standard.

The defendants cited S.49 of the Land Act 2012 which reads as follows;

“49 if one of two or more joint proprietors of any land, lease or change dies. The Registrar shall, on proof of the death, delete the names of the deceased from the register by registration of the death certificate”

In conclusion the defendants submitted that it was futile for the plaintiff to file a succession cause for a grant upon the demise of his wife, she left behind no estate capable of being passed down to legal representations.

ISSUES FOR DETERMINATION

The following are issues for determination;

1. Whether the suit land was purchased by the 2nd defendant or the defendants and their late sister MAGDALINE WANGUI NJERU?
2. Whether the 2nd defendant held the suit land parcel No. GICHUGU/SETTLEMENT/SCHEME/646 in trust for herself her mother and siblings including the late MAGDALINE WANGUI NJERU?
3. Whether the removal of the names of MAGDALINE WANGUI NJERU from the title No. GICHUGU/SETTLEMENT/SCHEME/646 was fraudulently done and whether the subsequent partition and transfer of the land between the 1st – 4th defendants was fraudulent?
4. Whether the plaintiff's claim over land parcel No. GICHUGU/SETTLEMENT/SCHEME/646 and its resultant sub-divisions has been proved to the required standard.
5. Who will bear the costs of this suit?

ANALYSIS AND DECISION

This is a case where the Plaintiff married one MAGDALINE WANGUI NJERU (deceased) who passed away on 17.3.1992. Before her demise, the said MAGDALINE WANGUI NJERU was one of the joint registered owners of land parcel No. GICHUGU/SETTLEMENT/SCHEME/646 on 15th January, 1992. Upon her demise, the name of the said MAGDALINE WANGUI NJERU was removed from the register on 15.3.1999.

According to the plaintiff, the suit property was purchased by the mother to her late wife one JANE WAMBUI KAIRUKI (deceased) and caused it to be registered in the name of one of her daughter namely REGINA WATETU KARIUKI on 2nd April, 1973 to hold in trust for her mother and siblings. On 15th January, 1982, the said trust was terminated and the land was registered in the names of his wife MAGDALINE WANGUI NJERU (deceased) MARY MARGARET WAWERU, REGINA WATETU NJENGA, GRACE NJOKI KAMUUI and FLORENCE NYAGUTHII NJENGA with their mother JANE WAMBUI KARIUKI having a life interest in the land. According to the plaintiff, upon the passing on of his wife MAGDALINE WANGUI NJERU (deceased) the 1st, 2nd, 3rd and 4th defendants caused her name to be removed from the register. These allegations have not been proved by the plaintiff.

As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue.

Section 107 (1) of the Evidence Act (Chapter 80 of the Laws of Kenya) provides thus;

“107(1) whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

The issues were even put more aptly in the case Court of Appeal case of **JENIFFER NYAMBURA KAMAU HUMPHREY MBAKA NANDI [2013] e KLR** where the Court held;

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that; “whoever desiressection 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side”.

The Plaintiff has not been able to proof the existence of trust in the suit property. There is no evidential proof tendered by the Plaintiff that the suit property was bought by his mother-in-law JANE WAMBUI KARIUKI and that his wife MAGDALINE WANGUI NJERU (deceased) is therefore entitled to her estate. In the circumstances this case fails and the same is hereby dismissed with costs to the defendants.

READ AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 12TH JULY 2019.

E.C. CHERONO

ELC JUDGE

12TH JULY, 2019

In the presence of:

1. *Ms Kirasgu holding brief for Rugaita for Plaintiff*
2. *Mr. Ngigi holding brief for Kiguru Kahigah for the Defendant*
3. *Plaintiff in person present*
4. *2nd Defendant present*
5. *4th Defendant present*
6. *Court clerk - Okatch*