



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 665 OF 2012**

**(Formerly Eldoret Hccc No. 166 of 2012)**

**PETER MAINGI NDEGWA.....1<sup>ST</sup> PLAINTIFF**

**CECILIA WAMBUI NDEGWA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MOSES MUIRURI NG'ANG'A.....1<sup>ST</sup> DEFENDANT**

**GEORGE KARANJA KURUIA.....2<sup>ND</sup> DEFENDANT**

**PHILEMON KIPROP KANDIE.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Peter Maingi Ndegwa and Cecilia Wambui Ndegwa (hereinafter referred to as the plaintiffs)** have come to this court vide plaint amended on 22<sup>nd</sup> July, 2013 pursuant to the court order of 9<sup>th</sup> July, 2013 claiming to be legal owners of the suit property Eldoret Municipality Block 2(King'ong'o)/2272. It is claimed that on or about the 9<sup>th</sup> January 1990, the 1<sup>st</sup> plaintiff bought parcel of land No. Eldoret Municipality Block 21(King'ong'o) 2272 from one Rachel Wairimu Ng'ang'a (deceased), the mother of the 1<sup>st</sup> defendant which parcel of land had previously been bought from Peter Kirwa Lelei, Raymond Lelei and Rosevelt Kiprono, the administrators of estates of the late Lelei Chepkwony. That it was a term of the agreement that when the succession process was finalized, the parcel of land was to be directly transferred to the 1<sup>st</sup> plaintiff.

On or about the year 1998, the process of succeeding the late Lelei Chepkwony was finalized but instead of the parcel of land No. Eldoret Municipality Block 21 (King'ong'o) 2272 being transferred to the 1<sup>st</sup> plaintiff, the 1<sup>st</sup> defendant fraudulently conspired and had the parcel of land registered in his name.

In furtherance of the fraud, the 1<sup>st</sup> defendant on 15<sup>th</sup> November, 2002 sold the land to one Anthony Mwangi Ngare who then sold the land to the 3<sup>rd</sup> defendant on 25<sup>th</sup> January, 2003. The 1<sup>st</sup> defendant at the time of alleged sale and transfer was aware that he had no transferable proprietary interest in the suit land and consequently could not confer any interest and therefore, the transactions were irregular, illegal and a nullity, void *ab initio*.

On 28<sup>th</sup> October, 1998, in order to correct the fraud perpetuated on the 1<sup>st</sup> plaintiff, the 1<sup>st</sup> plaintiff, 1<sup>st</sup> and 2<sup>nd</sup> defendants met at the Eldoret Municipality Land Control Board and agreed to reverse the transfer to the 1<sup>st</sup> defendant and as a consequence, the 1<sup>st</sup> defendant signed a transfer to the 1<sup>st</sup> plaintiff and the Land Control Board proceeded to issue a letter of consent to transfer the parcel of land back to him.

The reversal could however, not be effected since on 3<sup>rd</sup> February, 1999 the 2<sup>nd</sup> defendant without any colour or right proceeded to lodge a caution on the parcel of land and only removed the caution on 21<sup>st</sup> February, 2003 to facilitate the transfer of land to the 3<sup>rd</sup> defendant.

The particulars of fraud are:

1. *Presenting forged papers to enable the title deed to be issued.*
2. *The said Moses Muiruri Ng'ang'a purporting to be owner of the suit land.*
3. *Proceeding to transfer to the 3<sup>rd</sup> defendant land which did not belong to them.*

4. *Conniving with the 3<sup>rd</sup> defendant in order to defeat the 1<sup>st</sup> plaintiff's title to land.*

5. *Lodging caution in order to defeat the transfer of land to the 1<sup>st</sup> plaintiff.*

The plaintiff prays for a declaration that the plaintiff is the rightful owner of parcel number Eldoret Municipality Block 21 (King'ong'o) 2272 and Cancellation of the transfer of title of Eldoret Municipality Block 21 (King'ong'o) 2272 to the 3<sup>rd</sup> defendant. An order restraining the defendants, their agents and or servants from entering, trespassing or in any way interfering with the plaintiff's parcel of land No. Eldoret Municipality Block 21 (King'ong'o) 2272 and Costs of this suit.

The 2<sup>nd</sup> defendant denies the contents of the amended plaint and particularly denies all the particulars of fraud. The 2<sup>nd</sup> defendant further avers that in 1998, he had an agreement with the 1<sup>st</sup> defendant and he purchased the subject land parcel for Kshs.350,000 when the 1<sup>st</sup> defendant was the registered proprietor. The 2<sup>nd</sup> defendant claims that he proceeded to the Land Control Board to facilitate transfer but consent was not given. The 2<sup>nd</sup> defendant demanded refund of cash from the 1<sup>st</sup> defendant and put a caution on the land to protect his interest. Upon recovering his cash, he removed the caution. His interest ceased upon removal of caution.

The 3<sup>rd</sup> defendant denies the contents of the plaint and avers that he is the absolute owner of the land in issue having been duly registered as proprietor on 21.2.2003. The 3<sup>rd</sup> defendant purchased the suit property from one Antony Mwangi Ngare at a total consideration of Kshs.600,000. It is alleged that Antony Mwangi Ngare had purchased the suit land from the 1<sup>st</sup> defendant, Moses Muiruri Ng'ang'a.

The 3<sup>rd</sup> defendant claims to have been in use and possession of the property and has been paying rates and other charges due to the parcel of land since purchase. The 3<sup>rd</sup> defendant states that he is not privy to the contract or estate or the transaction between Rachael Wairimu Ng'ang'a and the plaintiff and the parcel in the agreement dated 9<sup>th</sup> January, 1990 relates to Eldoret Municipality Block 15/9 Plot No. 12 and not the suit land. It is alleged that the Vendor in the agreement dated 9<sup>th</sup> January, 1990 did not have capacity to transact on behalf of the Estate of Johnson Muiruri Ng'ang'a and therefore, the plaintiffs' claim lies against the Estate of Johnson Muiruri Ng'ang'a. The 3<sup>rd</sup> defendant pleads Limitation of Actions Act.

***PW1, Peter Mainigi Ndegwa*** states that he is a businessman. He states that on 9<sup>th</sup> January, 1990, he bought a parcel of land known as Eldoret Municipality Block 31(King'ong'o)/2272 from Rachael Wairimu Ng'ang'a. He states that the land was transferred to him afterwards but the 1<sup>st</sup> defendant fraudulently and illegally acquired the land and thereafter, illegally transferred it to other people and eventually the 3<sup>rd</sup> defendant. He prays that the said transfers be cancelled and the land be transferred to him. He produced the agreements dated 9<sup>th</sup> January, 1990, 30<sup>th</sup> November, 1999 and 28<sup>th</sup> October, 1998. He produced a transfer of land dated 18<sup>th</sup> November, 1988 certified by the District Commissioner but the same was not registered by the Land Registrar. He produced a consent of the land Control Board dated 5<sup>th</sup> November, 1998 signed by the District Commissioner as the claimer of the Land Control Board. He produced the green card.

On cross examination, he states that he entered into agreement with Rachael Wairimu in the year 1990 and filed this suit in the year 2010. The land was transferred to Moses Ng'ang'a Muiruri in 1998.

On cross examination by Mr. Mwinamo, he states that the agreement was made when there was no title. The title came out in 1998. He bought the land from Rachael Wairimu who died in 1998. He entered into the agreement in 1990 and filed the suit in the year 2010 that is 20 years after the agreement.

***PW2, Cecilia Wambui Ndegwa*** states that they purchased the land in 1990 from Rachael Wairimu Ng'ang'a. As at 19<sup>th</sup> June 1998, the registered owner was Moses Muiruri Ng'ang'a until 21<sup>st</sup> February, 2013 when Philemon Kiprop Kandie became the owner.

***DW1, George Karanja Kuria*** bought the plot from Moses Ng'ang'a Muiruri. The property was never transferred to him hence he asked for a refund of his money. When he was refunded his money, his interest ceased. On cross examination by Mr. Kariuki, he states that he realized that the property could not be transferred to him and therefore, he asked for a refund. After the refund, he washed his hands from the matter. He denies having ever dealt with Mr. Kandie the 3<sup>rd</sup> defendant.

***DW2, Philemon Kiprop Kandie*** states that he entered into agreement with Antony Mwangi Ngare who was not the registered owner. He claims to have conducted a search but he did not keep a copy. He never entered into agreement with Moses Muiruri. Antony Mwangi Ng'ang'a had a sale agreement with Muiruri and a title deed in the name of the said Muiruri. The transfer was signed by Antony Mwangi. He has been in possession since 2003. He has never developed but he has been paying rates. He states that he did not know George Karanja Kuria during the transaction.

***Mr. Kariuki***, learned counsel for plaintiffs submits that the fact that the 1<sup>st</sup> plaintiff bought the parcel of land in contention from the 1<sup>st</sup> defendant is not contested. Moreover, that the 2<sup>nd</sup> defendant held to the title and lodged a caution until the property was transferred to the 3<sup>rd</sup> defendant. The plaintiff relies on the agreement, transfer of land and consent of the Land Control Board to indicate that the plaintiff acquired the title to the suit property.

The plaintiff argues that the court has power to order the rectification of the register and cancellation of title in case of fraud or mistake. The plaintiff further refers to section 76(1) of the Land Registration Act, section 80(1) of the Land Registration Act and section 143(1) of the Registered Land Act repealed.

The plaintiff further argues that the cause of action arose when the 1<sup>st</sup> defendant declined to release the title deed for the transaction to proceed.

The 2<sup>nd</sup> defendant argues that based on the *nemo dat quod non habet* rule, Rachael Wairimu Ng'ang'a could not give a good title to Peter Maingi Ndegwa as she was not the owner of the suit property but Moses Muiruri Ng'ang'a being the registered owner of the suit property could pass good title to Philemon Kiprop Kandie and indeed passed good title to the 3<sup>rd</sup> defendant.

The gravamen of the 3<sup>rd</sup> defendant's submissions is that the plaintiff has not proved his case on a balance of probability as the claim is barred by Limitation of Actions Act. The agreement was made on 9<sup>th</sup> January, 2002.

Moreover, the agreement having been executed on 9<sup>th</sup> January 1990, the consent of the Land Control Board ought to have been obtained within 6 months from the date of the agreement. The plaintiff did not demonstrate that Michael Wairimu Ng'ang'a had capacity as legal representative. The 3<sup>rd</sup> defendant submits that he is a *bonafide* purchaser for value.

I have considered the pleadings, evidence and rival submissions and do find that the genesis of this matter is an agreement made on 9<sup>th</sup> January, 1990 between Rachael Wairimu Ng'ang'a of ID. No. xxxxx/xx and Peter Maingi Ndegwa of ID. Number xxxxx/xx. Rachael Wairimu Ng'ang'a is described as the Vendor of Eldoret Municipality Block 15/9 Plot No. 12 measuring approximately ¼ an acre. This parcel of land belonged to Johnson Muiruri Ng'ang'a. It is evident that by the time the deceased died, the plot was in the names of Lelei Chepkwony. Mr. Johnson Muiruri Ng'ang'a had purchased the land from Peter Kirwa Lelei, Roosevelt Kiprono Lelei, Wilson Lelei and Raymond Lelei on 13<sup>th</sup> June, 1988.

It is noted by this court that by the time Rachael Wairimu Ng'ang'a was selling the property, she did not have capacity as she did not have a grant of letters of administration. In fact, the property was still in the names of the "Leleis". The land had not been surveyed. The plaintiff has not demonstrated to the court.

It is clear from the evidence on record that the Lelei acknowledged the family of Muiruri as the owners of the ¼ land, but without a grant of letters of administration to the said Rachael Wairimu Ng'ang'a, she did not have capacity to sell the land.

The agreement dated 28<sup>th</sup> October, 1998 between Moses Muiruri Ng'ang'a and George Karanja Kuria did not confer any right to the plaintiff as the widow to the deceased, owner of the land did not have the power to sell the land. The dealings between the widow and the plaintiff were an affront to section 45 of the Law of Succession Act Cap 160 Laws of Kenya.

Section 45 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter "*the Act*") provides: -

**"45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased.**

**(2) Any person who contravenes the provisions of this section shall-**

**a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**

**b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."**

***(Emphasis added).***

On the other hand, Section 82 of the Act provides: -

**"82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -**

**a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;**

**b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:**

***Provided that -***

**i. the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and**

**ii. no immovable property shall be sold before confirmation of the grant;"**

***(Emphasis supplied)***

In the case of **Muriuki Hassan.v. Rose Kanyua and 4 others [2014] eKLR**, when faced with a situation of sale of property belonging to

an estate before succession was undertaken, **Makau J** held:-

*"The interested parties are not direct creditors of the deceased before his death but purchasers from one of the deceased's beneficiaries and the sale of land to them is challenged in this application. In such circumstances, the interested parties' interest cannot be considered in this matter and the remedy for them is if they would be aggrieved by final court's decision and distribution, is to file suit against the said Muriuki Musa Hassan."*

In **Re Estate of John Gakunga Njoroge [2015] eKLR** Murithi J held:

*"10. A person can only deal with the estate of a deceased person pursuant to a Grant of Representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in Section 45 of the Law of Succession Act....."*

*For the transaction between the applicants and the beneficiaries of the estate of the deceased entered into before the Grant of Letters of Administration to them and before the confirmed Grant, the contracts of sale are invalid for offending the provisions of sections 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators the dealings with immovable property of the estate is restricted by the provisions of the powers and duties of the personal representatives under Section 82(b) Proviso (ii), which provides that:-*

*"no immovable property shall be sold before confirmation of the grant."*

And in **Morris Mwiti Mburugu v. Denis Kimathi M'Mburugu [2016] e KLR**, the Court held:-

*".... where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of sections 45 and 82 of the Act, that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of the innocent beneficiaries who may have been affected by the act but were not involved in the same." (Underlining mine)."*

The net effect of the foregoing is clear; before a grant has been issued and confirmed, no part of the estate of the deceased may be dealt with in a manner that amounts to intermeddling.

This includes those not entitled therewith taking possession of, disposition, or alienation, as well as trespassing onto the property. Such acts are subject to reversal by the court summarily. The spirit behind sections 45 and 82 of the Act, in my view, is to preserve the property of a deceased person until the beneficiaries and their respective shares are identified, ascertained and distributed. If intermeddling is allowed, the likelihood of the innocent beneficiaries being prejudiced by having their shares affected by reduction is real whereby, there may be no settlement and or peaceful co-existence or end to disputes between of the family members. In this regard, it is for the purposes of preserving the social fabric, cohesion and peaceful co-existence of or end to disputes between family members who are beneficiaries to estates, that the law restricts, indeed prohibits any dealings with an estate until the grant is confirmed. The net effect of the aforesaid provisions of the law and decided cases is that, the estate of the deceased cannot be dealt with without the sanction of the court.

Before the grant of letters of administration are confirmed, no one including the administrators of the estate of the deceased can deal with the property of a deceased by way of intermeddling therewith or effect a sale of immovable property belonging to the estate. Anyone who purports to purchase property from the estate before confirmation therefore does so at his own peril.

This court further notes that the application for the consent of the Land Control Board was allegedly made on 5<sup>th</sup> November, 1998 and given on 5<sup>th</sup> November, 1998.

There is no copy of the application made and there are no minutes of the 11<sup>th</sup> Meeting of the Land Control Board.

In any event, the consent was given more than 8 years after the illegal agreement. The transaction between the plaintiff and the deceased Rachael Wairimu Ng'ang'a was full of irregularities and illegalities. In fact, the District Commissioner appeared to intermeddle in the whole land transaction. He signed the agreement between Moses Muiruri Nganga and George Karanja Kuria for a refund of the transaction costs. He certified the transfer and also signed the letter of consent of the Land Control Board indicating that he might have influenced the whole transactions. Unfortunately for the plaintiff the transfer of land was not registered. There is no sale agreement between Moses Muiruri Nganga.

I do find that the documents produced by the plaintiff do not demonstrate fraud against the 3<sup>rd</sup> defendant. It was the plaintiff's burden to prove fraud on the part of the 3<sup>rd</sup> defendant. I do find that the plaintiff has not discharged this burden of proof that he is the owner of the land and that the defendant obtained title fraudulently. The upshot of the above is that the suit has no basis and the same is dismissed with costs.

**Dated and delivered at Eldoret this 1<sup>st</sup> day of August, 2019.**

**A. OMBWAYO**

**JUDGE**