



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.101 OF 2013

ENG (Suing as the legal representative of the estate of JGW (Deceased)....PLAINTIFF

VERSUS

MWG.....DEFENDANT

JUDGMENT

(Plaintiff filing suit as legal representative of her late husband and seeking to have land that her late husband had transferred to the defendant returned to the estate; defendant being son to the deceased and step-son to the plaintiff; plaintiff having separated from her late husband; husband transferring the land when they were separated; plaintiff claiming that transfer was fraudulent as she had placed a restriction; no grievance by the estate on the manner of transfer to the defendant as deceased transferred the land voluntarily; no fraud in the manner in which the restriction was removed for notice was issued to the plaintiff through the address that she gave; suit land having been owned by the deceased before the time he married the plaintiff; no evidence of any contribution made by the plaintiff to the suit land; plaintiff thus not having any stake on the land; plaintiff's suit dismissed)

1. This suit was commenced by way of a plaint which was filed on 15 March 2012. The suit has been filed on behalf of the estate of JGW (deceased) by ENG, who is his wife and administrator ad litem. It is averred that the deceased was the registered proprietor of the land parcel Bahati/Kabatini Block 1/xxx (hereinafter referred to as "the suit property"). It is pleaded that the plaintiff and the deceased got married in the year 1977 under Kikuyu customary law after the deceased was widowed following the death of his first wife, one AN, the previous year. It is averred that the deceased had two children from his first marriage, namely MW (the defendant) and LW. The plaintiff has pleaded that she brought the two children up from when they were below four years old together with her own four children born after her marriage to the deceased. It is pleaded that in the year 1999, the deceased purposed to sell the suit land, a decision which the plaintiff opposed, and proceeded to register a caution. The deceased died on 22 July 2011, and when the plaintiff did a search, she found that the property had been transferred to the defendant in the year 2007. It is the contention of the plaintiff that this registration was done fraudulently and the following particulars of fraud are pleaded against the defendant :-

(a) Causing to be removed the caution registered against the suit property without due process.

(b) Failing to involve the family of the deceased in the process of obtaining consent of the Land Control Board, if any was obtained at all.

(c) Causing transfer to be effected in his name fraudulently.

2.The plaintiff thus wishes to have the title of the defendant cancelled alongside the costs of the suit.

3. The defendant appointed counsel and filed a statement of defence. He pleaded that the deceased transferred to him the suit property in the year 2009 when the caution registered by the plaintiff was removed after due notice was given to her by the District Land Registrar, which paved way for the registration of the suit land in the defendant's name. He has pleaded that in the circumstances, the plaintiff has no locus to bring this suit.

4. In her evidence, the plaintiff testified that she now resides in Kiambu in a rented house where she is a businesswoman. She had the Certificate of Death of her late husband and a grant of letters ad litem which she produced as exhibits. She testified that she got married to her late husband in the year 1977 and that they lived together in Molo in land that was owned by her husband's father. She averred that when she got married, the defendant was about 6 years old, and his sister, about 4 years old and she raised them up until adulthood. She herself got 8 children, but 4 died, and she is left with 3 daughters and one son. She stated that they moved from Molo to the suit land in the year 1979 and that this land was given to them by her father in law but title was later issued in the name of her husband. She had differences with her late husband and she moved out in the year 1999 and never went back as her husband threatened to kill her. She mentioned that her husband intended to sell this land and she placed a caution in the same year, 1999. She was surprised in 2011, when she did a search which showed

that the land was now registered in the name of the defendant, as she did not know how the caution that she had placed was ever removed. She asserted that she never got any letter from the Land Registrar that he intended to remove the caution and she denied having received the letter dated 30 January 2009 from the Land Registrar displayed by the defendant. She also denied knowledge of a letter dated 16 January 2008, claimed by the defendant to have been written by her late husband to remove the caution.

5. She denied that a meeting was ever held by the family where she agreed to have the land transferred to the defendant and she refuted minutes presented by the defendant, of an alleged meeting held on 13 September 2011, and denied ever signing them. In the said minutes, there is a note that she had accepted to receive land in Ngarua, in Laikipia, which is land measuring 3 acres, but she denied having made such acceptance. She described the land in Ngarua as stony and not suitable for farming, and that they face disturbance from the neighbouring different community. She asserted that the suit land is the place where she developed her home and further faulted the transfer to the defendant for she was not called to the Land Control Board.

6. Cross-examined, she inter alia testified that in the year 1999 when she left the suit land, her husband was 56 years old. She stated that between 1999 and July 2011 when he died, she never resumed cohabiting with him. She acknowledged that the title to the suit land was in the sole name of her late husband. She did not have anything to show that she contributed to its purchase and did not know for how much it was purchased. She also did not know when it was bought. She did not however agree that the suit land was purchased solely by her late husband and his first wife. She came to learn of the transfer to the defendant, in May 2011, before the death of her husband and she pointed out that the transfer was done in the year 2009, about two years before her husband died. Thus, at the time that her husband died, the land was already in the name of the defendant. She mentioned that the land in Ngarua is still registered in the name of her late husband and that nobody lives on this land. She herself stated that she has never been there and does not even know where this Ngarua land is located.

7. Re-examined, she reiterated that the suit land was bought by her father in law. She stated that after her separation with her late husband, she tried to go back but she was chased away by the defendant, while her husband was still alive. She stated that she was a housewife and she helped her husband so that he may be able to acquire the suit land. She asserted that the land should not have been transferred to the defendant because she had placed a caution.

8. With the above evidence, the plaintiff closed her case.

9. DW-1 was the defendant. He acknowledged that PW-1 got married to his father in the year 1977 after his mother had died the previous year. He stated that there before, the family lived in Molo and they used to farm on the suit land, and they were still resident in Molo when his mother died. The family moved to this land in the year 1979. They lived together until 1998 when she moved out with her children. At this time, he (the defendant) had already built his own house on the suit land. After she had moved out, his father continued to live on the suit land with the family of the defendant who by then was married with children. He stated that in the year 2007, his father decided to gift him the suit land and he called his grandfather and uncle to inform them of this decision. They went to the Lands office but found a caution registered by PW-1 in the year 1998. His father then wrote to the Land Registrar, the letter dated 16 January 2008, asking for removal of the caution, and he explained that they had separated with his wife and did not know of her whereabouts. The Land Registrar then wrote the letter dated 30 January 2009 to the plaintiff, of his intention to remove the caution within 30 days. Another letter dated 19 March 2009 giving a 14 days notice was also written. He testified that PW-1 did not come to oppose the intended removal of the caution and thus the caution was removed and go-ahead given for his father to transfer the land to him. An application was made to the Land Control Board and consent to transfer was issued. The land was then transferred to the defendant and registered in his name.

10. He stated that all this time, his father was well and worked as a long distance driver just as the defendant. He also continued living on the suit land until his death in July 2011. He stated that PW-1 never came to the land after leaving in the year 1998 and he next saw her during the burial of his father. He stated that she threatened to stop the burial unless she was informed what her late husband had left for her but she was prevailed to wait until after the burial. After the burial, she was informed of how the deceased had distributed his wealth and was informed that her entitlement is the land in Ngarua, which the defendant claimed was purchased by his father when he worked in Libya and that he used to send money to PW-1 to buy the land. He handed to her the title deed to this land in Ngarua. The suit land was already registered in the defendant's name and the family decided that this should be left that way. He stated that this was so held in the meeting of 13 September 2011 where the plaintiff was present and signed the minutes. The minutes were also signed by his grandfather, two brothers to his grandfather, a brother to his father, a sister to his late father, a sister to his late mother, his grandmother (mother to his late mother), and a daughter of the plaintiff, a neighbour, and his sister Lydia. He pointed out that this land had already been purchased by his late father when the plaintiff got married and he asserted that she did not contribute anything towards its purchase. He mentioned that he was born in the year 1968 and was 9 years old when the plaintiff got married to his late father. She left in 1998 when he was 30 years old. He reiterated that his father transferred the land to him out of his own free will.

11. Cross-examined, he testified that when the plaintiff left, she left with her children. He stated that his father started ailing in November 2009. He denied that he inherited everything and averred that his father distributed his wealth, with two plots being given to his daughters, and the land in Ngarua being given to the plaintiff and her children. He reiterated that the plaintiff never came back to the land since leaving in the year 1998 and denied threatening her. He acknowledged that they did not personally look for the plaintiff when the Land Registrar wrote the letter for removal of the caution. He did not know if she ever got the letters.

12. With the above evidence, the defendant closed his case.

13. I invited counsel to make written submissions which they did. I have taken note of these in arriving at my decision.

14. Before I go too far, I need to put the nature of the suit into context. The plaintiff has not filed this suit on her own behalf. That she made clear in the pleadings, where it is averred that the suit has been filed on behalf of the estate of her late husband JGW. She has further pointed out that she holds a grant of letters of administration ad litem issued vide Nakuru High Court Succession Cause No. 200 of 2011. Nowhere has she averred in the pleadings that she has filed this suit on her own behalf. In essence, what the plaintiff is saying is that the estate of her late husband is aggrieved by the transfer of the suit land to the defendant and thus wishes to have this land back to the estate. Despite this context in which the plaintiff has brought this suit, it is apparent to me that the estate of the deceased has absolutely no grievance. Indeed, the suit land was transferred by the deceased himself, on 8 May 2009, two years before the deceased died on 22 July 2011. In all respects, this

transfer to the defendant was voluntarily done by the deceased and nowhere can it be alleged that the deceased had any problem with the manner in which the transfer of the suit land was done to the deceased. The estate of the deceased cannot thus have any issue on the sale of the suit land to the defendant and I really do not see how the plaintiff now wishes to allege that the estate of the deceased is aggrieved hence this suit.

15. From what I can see, it is the plaintiff herself, in her individual capacity, who is offended by the sale of the suit land to the defendant. In that event, what the plaintiff needed to do was to file a suit on her own behalf, giving her own reasons as to why she believes that the suit land ought not to have been transferred to the defendant. It certainly cannot be argued that if the deceased were alive, he would have brought suit against the defendant to claim that the suit land was fraudulently transferred to him, seeing that he voluntarily transferred the land to him. He had no issue with the defendant and it follows that the complaints that the plaintiff has brought in this suit are not those of the estate of the deceased but are principally her own grievances. That being the case, the plaintiff thus needed to file her own suit, in her own capacity, to claim the suit land. This suit, as filed is thus a non-starter, as the estate of the deceased has no problem with the defendant and on that ground alone this suit ought to be dismissed.

16. I nevertheless opt to look into the complaint of the plaintiff, in the event that I am wrong in my finding that the suit is a non-starter owing to the fact that the estate of the deceased does not contest the defendant's title.

17. The plaintiff's main contention is that she had placed a caution and that the land ought not to have been transferred to the defendant because of this caution. She claims that this caution was wrongfully removed and it is because of this that the land was transferred to the defendant.

18. I have seen the certificate of official search produced by the plaintiff which shows that the suit land came to be registered in the name of her late husband on 11 September 1985. She registered her restriction on 13 January 1999, the restriction providing that there should be no dealings with the suit land without her consent and she gave the address P.O Box xxx Nakuru. When the deceased wished to transfer the suit land to the defendant, they faced this restriction, and the deceased wrote the letter dated 16 January 2008 asking for its removal. The Land Registrar then wrote two letters, that dated 30 January 2009, and the other dated 19 March 2009, informing the plaintiff that her restriction will be removed unless she files a written objection. These letters were addressed to the plaintiff through P.O Box xxx Nakuru, which is the same address that she provided in registering the restriction. I have seen evidence of postage of these letters but they appear to have been returned unclaimed. The plaintiff of course denied receiving such letters and faulted the defendant for not looking for her to personally serve the notices from the Land Registrar. On my part, I am unable to fault the manner in which the restriction/caution was removed. The plaintiff herself gave the address P.O Box xxx Nakuru, as her address. This ought to have been deemed to be the address that she wished to be used in sending notifications to her. If she had changed her address, it was her duty to inform the Land Registrar of the change in address, but she cannot fault the Land Registrar for sending letters to the address that she herself gave. I therefore see nothing wrong in the manner in which the caution was removed as adequate notice was given to the plaintiff through the address that she herself had given. Moreover, if she thought she had any claim on the land, she ought to have presented her grievance in court and not simply leave a restriction in place for an indefinite period. The aim of a restriction is only to preserve the property while parties sort out the issues giving rise to the restriction. It is not the purpose of a restriction to just be left in place indefinitely. The period that the plaintiff left the restriction in place without pursuing whatever rights she thought she had over the property was too long and I cannot fault the Land Registrar for removing it.

19. In addition, in as much as the plaintiff claimed that she had an interest in this land, from the evidence, it is apparent that this land was already held by her late husband at the time that she married him and she never contributed to its purchase. In essence, she found her husband already owning this land when she married him. Generally, in such properties, the spouse needs to show that she has contributed to the improvement of the property (**See the case of *Muthembwa v Muthembwa (2002) 1 EA 186***). The plaintiff did not state what contribution she made on the suit property. She indeed vacated the suit land in the year 1998 and never set foot on the suit land until the demise of her husband, which happened more than 12 years later. Given the fact that this land was already owned by her late husband when she got married to him, and the fact that she has not demonstrated any contribution to any improvement made on the suit land, I do not see how the plaintiff can claim to have any stake in the suit land. To me the deceased was not at fault in dealing with the suit land by transferring it to the defendant and I have not been persuaded that there was any fraud in the manner in which the land was transferred to the defendant. The title of the defendant is therefore a good title acquired above board.

20. The upshot of the above is that I find no merit in the plaintiff's case and it is hereby dismissed with costs.

21. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Tanga holding brief for Mr. Ngure for the plaintiff.

Ms. Kimure holding brief for Mr. Ikuu for defendant.

Court Assistants: Nancy Bor/Alfred Cheronu.

JUSTICE MUNYAO SILA

