



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 144 OF 2017

SUSAN WANGUI MUIRURI.....PLAINTIFF

VERSUS

GABRIEL NGUGI MUIRURI.....1ST DEFENDANT

NELSON KARANJA NGUGI.....2ND DEFENDANT

PETER MUIRURI NGUGI.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff through a plaint dated 19/10/2016 sued the 1st, 2nd and 3rd Defendants and sought the following reliefs;
 - a. Immediate delivery of vacant possession of the suit land and in default the Defendant and /or his agents be forcefully evicted from the suit property.
 - b. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
 - c. Any such other further relief as this Honourable Court may deem fit.
2. The Plaintiff's case is that she is the registered owner of all that parcel of land known as LOC.1/ KIUNYU/1439 (hereafter referred to as the suit land) and is therefore entitled to absolute ownership, occupation and possession of the same. That the suit land is a resultant subdivision of land parcel number LOC.1/KIUNYU/233 which belonged to the Plaintiff's father namely Jacob Muiruri Kingara (deceased).
3. The Plaintiff claims to have acquired the suit land after the distribution of her father's estate vide succession cause number LOC.1/KIUNYU/ 674 of 1983 as filed by the Public Trustee in execution of her father's will dated 21/09/1975 and a certificate of confirmation of Grant issued pursuant to the aforestated will on 25/06/2014.
4. That all the beneficiaries of the estate were duly allocated their respective shares however the Plaintiff's portion has been encroached by her brother and his two sons being the 2nd and 3rd Defendants respectively.
5. The Plaintiff further claims that the Defendants have wrongfully and with no color of right entered into the suit land and taken possession of the suit land and continue to remain thereon. That the Defendants have failed to heed the Plaintiff's several demands to vacate from the suit land. That the acts of the Defendants have caused the Plaintiff loss and damage as she has been deprived of her right of possession and use of the suit land. She therefore seeks for restraining orders against the Defendants for continued trespass on her land.
6. In her further witness statement, the Plaintiff stated that in the year 1981 she constructed a permanent house on the suit land which is now occupied by the 1st Defendant. That the 1st Defendant has always been in possession of parcel number LOC.1/KIUNYU/1438 but during the pendency of the succession cause encroached on parcel number LOC.1/KIUNYU/1439 dragging the 2nd and 3rd Defendants into the dispute. That the Defendants have refused to acknowledge that their fathers will provided that the suit land was to be divided into three portions; parcel LOC.1/KIUNYU /1437 (west), 1438(middle) and 1439 (east).That both houses of the deceased widow's were provided for in the confirmation of grant. The house of Wanjiku being represented by Francis Ndungu Muiruri and the house of Gachiru represented by the 1st Defendant and the Plaintiff. That the Francis Ndungu and the 1st Defendant had filed parallel succession proceedings to the estate in Thika succession cause no. 260 of 1994, which proceedings were nullified by the High Court vide revocation proceeding in Succession cause no. 332 of 1996 and upheld the succession proceedings H.C P&A No. 647 of 1983, which was thereafter concluded in 2014 and no appeal has been preferred to date. That the Defendants have therefore come to Court with unclean hands and are not entitled to the reliefs sought in the counterclaim. In asserting her ownership rights over the suit land, she stated that she acquired title to the suit land legally and is entitled to

the reliefs sought in the plaint. In addition, she claims that the Defendants are determined to disinherit her of her rightful inheritance.

7. In their joint statement of defence, the Defendants deny that the Plaintiff is the legal registered owner of the suit land and claim that the suit land forms part of their rightful shares under the will and testament of the 1st Defendant's father and grandfather to the 2nd and 3rd Defendants respectively. They claim that Jacob Muriruri Kingara left a will distributing his estate but the will was interfered with by the Public Trustee in collusion with the Plaintiff. That they have been in possession and occupation of the suit land since 1975 and have extensively developed the same to the extent of building permanent houses thereon. That they are the rightful owners of the suit land. That the Plaintiff unlawfully transferred and registered the suit land title in her name through un-procedural, unlawful and fraudulent subdivision of the mother title.

8. In their counterclaim, the Defendants aver that the Plaintiff acquired the title to the suit land fraudulently and worked in collusion with the Public Trustee to alter the will left behind by the deceased. That the confirmed grant in the succession cause gave rise to three parcels of land namely LOC.1/KIUNYU/1437,1438 & 1349 and have preferred the particulars of fraud thereunder to wit; converting the deceased estate into her parcel of land; colluded to defraud other beneficiaries of their shares of the estate; aiding in doctoring of documents in support of her claim to the suit land; obtaining ownership documents fraudulently; holding ownership documents with knowledge that they were fraudulently acquired; presenting the application for consent purported to be for the Defendant when in fact it was not; signing the application without consent of the 1st Defendant and deceiving the Land Registrar that the suit land belonged to her thereby unduly influencing the issuance of a title deed without the Defendants' knowledge.

9. That the distribution of the estate was discriminatory and the wishes of the deceased to distribute the estate to his two widows equitably was not put into consideration. They claim that the distribution should be equitable and in consultation with all the beneficiaries of the estate. That the possession of the shares of the suit land has been in respect to the members of the two houses. That the Plaintiff is the daughter of the house of Gachiru and not of Wanjiku as pleaded and as such she should not get a share of Wanjiku's land. That in the will no daughters (married or unmarried) of the deceased including the Plaintiff were allocated land. That the subdivision process of the estate was marred with fraud therefore the resultant titles should be revoked and canceled

10. The Defendants claim that the resultant parcels of land from subdivision of the original parcel of land were fraudulently acquired therefore they should be cancelled and reverted back to the original title for fair distribution of the estate of Jacob Muriruri Kingara, deceased.

11. The Defendants under para 23 of their statement of defense further challenged the jurisdiction of this Court to determine the suit herein. They urged the Court to dismiss the Plaintiff's suit for being vexatious and failing to disclose any cause of action in law, tantamount to abuse of Court process and prayed for it to be struck out with costs.

12. Subsequently the Defendants made the following prayers in their counterclaim;

- a. A declaration that the subdivision on the land parcel number LOC. 1/KIUNYU/233 was fraudulent and the resultant titles numbers LOC. 1/KIUNYU/1437,1438 and 1349 be cancelled / revoked and revert to the original land parcel
- b. Costs for the counterclaim
- c. Any other better relief this honourable Court may deem fit and just to grant.

13. In their further statement the Defendants aver that they did not discuss and agree on the allocation and positioning of each of the shares of the estate as the beneficiaries of the deceased. That the Plaintiff has never constructed any permanent structure on the suit land. That the Plaintiff unfairly allocated to herself the portion of land that had been developed by the Defendants. That the Public Trustee had concealed the fact of the custody of the titles for the other parcels of land with ill motive. They seek the titles to be revoked to allow for redistribution of the estate as per the current mode of occupation and developments on the land. That the Plaintiff is married to one Jackson Munge who paid her bride price according to kikuyu customary law. That the Plaintiff has never lived on the suit land and has not build any permanent structures there.

14. PW1 reiterated the averments in her witness statement in oral evidence. That the 1st Defendant constructed a house on her land and allowed his sons to build on her land. That the suit land was registered in the name of the Public Trustee before it was transferred to her. The succession proceedings have not been revoked to date, she denied having forged any documents. That her mother was Gachiru. That she got 1/3 of the land and other two brothers got a 1/3 each. That the houses were built knowing that the land was hers. That the Public Trustee made an application to transfer the estate to the children of the deceased. That she was given her share by her father that would be from her mother's share before his death and her two other sisters were not given any land. That she was married but came back home and built a house, which is now being occupied by the Defendants. That she intends to have vacant possession of the land in order to settle her sons too. That the distribution into three portions was in accordance to the will. She contends that she is the legal registered owner of the parcel number LOC1/KIUNYU/1439 and further that no fraud has been proved against her and no appeal has been preferred to the succession proceedings to date.

15. PW2, the representative of the Public Trustee, testified that the report of the death of Jacob Muriruri Kingara was made by the 1st Defendant and they embarked on the succession proceedings when the widows were still alive. That the Plaintiff's brothers failed to sign the consent forms. That the matter was placed before the High Court Judge who issued the certificate of confirmed grant. That after the death of the widows they submitted the matter to the local administration to seek a way forward and it was after confirmation of the beneficiaries by the County Commissioner that they went ahead to prepare the transmission forms to the Public Trustee for the three resultant parcels and later that of the Plaintiff was transferred to her name and that they are still holding those of the two brothers. Challenged to produce the confirmation from the County Commissioner, the witness stated that she did not produce the letter in Court that authorized her to distribute the estate of the late Muiruri. That the titles were prepared in accordance with the will and divided into three equal shares. That it is only the

Plaintiff who was following up and the brothers were not cooperating. That the public trustee relied on a letter from the deputy county commissioner which she did not produce to distribute the land in three shares.

16. With that, the Plaintiff closed her case.

17. DW1- Gabriel Ngugi Muiruri relied on the joint statement filed by the Defendants on the 17/1/18 and 16/8/18 and stated that the suit land belonged to Jacob Muiruri Kingara who left a will on the mode of distribution of the estate amongst his beneficiaries. He was categorical that the Plaintiff was not one of the beneficiaries disclosed in the will. It is his evidence that the Plaintiff caused the illegal subdivision of the original land parcel LOC.1/KIUNYU/233 into three parcels LOC1/KIUNYU/1437, 1438 and 1439 in collusion with the Public Trustee and without their approval and involvement. That they were not informed that the estate had been distributed as per the will of the deceased and learnt of the same when they were served with the suit. That their houses are situated on the suit land and have nowhere else to call home. They contend that the Public Trustee had no authority to determine which portion of the land each beneficiary was to occupy and to the extent that they transferred, the portion on the eastern side which is developed to the Plaintiff was in bad faith. That the Plaintiff has never built on the suit land.

18. On being cross examined by the Plaintiff the witness stated that the suit land devolved to their two mothers; Wanjiku and Gachiru and none of the children were given land (out of the parcel LOC.1/KIUNYU/233), the Plaintiff included.

19. DW2- Ndungu Thiongo stated that he is the cousin of the parties to the suit. That the late Muiruri Kingara subdivided his land into two portions and in his will bequeath it to his two wives; Wanjiku and Wanjiru/Gachiru (both are deceased) to whom he bequeath the original land LOC.1/KIUNYU /233. That the Plaintiff was not given any land. He stated that the Plaintiff has not built any house on the suit land.

20. DW4 – Alias Muiruri Thiongo testified and reiterated the evidence as given by DW3. That the Plaintiff is married to one Jackson Munge and lives at her matrimonial home. That the Defendants live on the suit land where they have built houses and carry out farming thereon whilst the Plaintiff has not built any structure on the land. He stated that he was not aware that the Public Trustee had subdivided the land into three portions.

21. The Plaintiff filed her written submissions which to a large extent is a replica of her evidence in Court. I need not repeat the same. In a nutshell she stated that her deceased father divided the land into 3 portions and bequeath them as follows; to Wanjiru to the west and to Gachiru to the east and the middle portion that was occupied by the late Jacob Muiruri Kingara. That Gachiru therefore had 2 portions. She submits that the Public Trustee was right to subdivide the original land into 3 portions which in her opinion was in accordance with the deceased's will. That her portion devolved to her vide the confirmed grant of the Court in the family division, which orders have not been set aside, vacated and or overturned on appeal.

22. The Defendants in their submissions maintain that the estate was to be subdivided into two shares; one for the 1st house and the other for the second house and no share was specifically allocated to the Plaintiff. For that reason, they are convinced that the Plaintiff colluded and fraudulently influenced the division of the land into three portions in disregard of the wishes of their deceased father. By dint of section 45 of the succession Act a transfer to the Plaintiff if any ought to have been accompanied by a Court order which is not the case herein, thus the transfer to the Plaintiff amounts to intermeddling on the estate, that the transfer of parcel no. 1439 was an illegality which should not be condoned by this Court. That section 26 of the Land Registration Act allows for cancellation of title on grounds of fraud. That the Plaintiff has failed to prove her case on a balance of probability and ought to be dismissed.

23. Issues for determination;

- a. Does this Court have jurisdiction to entertain the suit?
- b. Whether the Defendants have a legitimate claim to the suit land?
- c. Whether the Plaintiff acquired a valid title in the circumstances?
- d. Who meets the cost of the suit?

24. The Defendants in para 23 of their statement of defence have challenged the jurisdiction of this Court to hear and determine the matter. The Plaintiff did not make any response to the issue. Since my jurisdiction to entertain the matter is under assault, I am duty-bound to determine the issue at the onset.

25. It is trite that jurisdiction of a Court is donated by either the constitution or statute or both. Neither the Court nor a party before it can confer jurisdiction to a Court of law. Art 162 (2)(b) of the Constitution read together with Section 13 of the Environment and Land Court Act mandates the Court to hear and determine disputes relating to environment and land including disputes inter alia relating toland use planning, title, tenure boundaries The dispute before the Court relates to title to land. The Plaintiff avers that she is the rightful owner of the suit land and has urged the Court to grant her eviction orders against the Defendants whilst the Defendants in their counterclaim sought a declaration the Plaintiffs title is fraudulent. I find that I have jurisdiction to hear and determine the suit for which I shall proceed to do so.

Whether the Defendants have a legitimate claim to the suit land

26. The 1st Defendant was the son of Gachiru Muiruri, one of the widows of the late Jacob Muiruri Kingara. The 2nd and 3rd Defendants are the sons of the 1st Defendant. The land they are litigating on by way of a counterclaim is part of the entitlement of Wanjiru and Gachuri, the widows of the 1st Defendants father as expressed in the will of 1975 and endorsed by the Court through the confirmation of grant in 2014. To that extent, they are required to take out letters of administration to clothe themselves with the necessary locus in law to allow them to step

into the shoes of the widows and file suit in respect to the land that was bequeath to them by their late husband. By the time of the hearing of the suit no letters of representation were presented to the Court. Their action of raising a counterclaim therefore amounts to intermeddling of the deceased estate contrary to section 45 of the law of Succession Act.

27. The orders that commend themselves to this issue is to strike out the counterclaim of the Defendants in its entirety for being incompetently before the Court.

Whether the Plaintiff acquired a valid title

28. It is common ground that the Plaintiff is the current registered owner of the land parcel number LOC.1/KIUNYU/1439 which is a resultant portion after the subdivision of the original parcel number LOC.1/KIUNYU/233 owned by the Plaintiff's father, now deceased. Though it is undisputed, none of the parties tabled any evidence in form of certified copies of title, green card or search to show that the late Jacob Muiruri Kingara was the registered owner of the original parcel LOC.1/KIUNYU /233.

29. It is also common ground that the deceased died testate on the 13/3/1976, leaving behind a will which was relied on by both parties to the suit in arguing their cases. After his demise, a report of his death was filed by the 1st Defendant on 20/8/1977 with the Public Trustee where inter alia he confirmed that the deceased left a will. It was also disclosed in the said report that the deceased had left behind two wives; Gachiru and Wanjiku and Gabriel Muiruri and Irungu Muiruri as the surviving children. On receipt of the information, the Public Trustee embarked on the succession proceedings and was appointed the legal administrator of the estate of the deceased on the 21/10/1983 as per the letters of grant of administration on record.

30. On the 25/6/2014 a certificate of confirmed grant was issued by the Court and distribution of the estate was to be carried out as per the deceased will dated the 21/9/1975. The relevant sections of the will dated 21/9/1975 states as follows;

“The purpose of writing this my last sincere will is to ascertain that I have accorded to everybody his own share of inheritance with blessings and I object to anybody interfering with something that does not belong to him.

(1) KIUNYU PLOT NO. 10; I have got two plots A and B. Plot A I leave to Ngugi Wa Gachiru and Plot B I leave to Ndungu Wa Wanjiku.

(2) SHAMBA NDUNGO 233. The shamba boundary extends from the main road (Kiunyu to Kihumbuini) upto Karia river. The boundaries were determined by our house (Mbari wa Ndungo) in 1968. I being their leader. To the west of the boundary I leave to Wanjiku.

To the East of the boundary I leave to Gachiru and the piece of land I was using belongs to Gachiru. Nobody should claim that piece from her or even raise any disputes since I leave it to her principally due to her care and hospitality towards me. This I do in accordance with the Kikuyu Customary laws of the Wakikuyu (Mugukuyu).

(3) Coffee plants to the west of the boundary belongs to Ndungu just as far as his mothers' piece of land extends. The coffee plants to the East of the boundary (655 plants) belongs to Ngugi son of Gachiru as far as his mother's piece extends plus his share from me. However, its shares and dividends shall be mine as long as I can still manage and thereafter Ngugi will take the whole responsibility of taking care of it.

All these I say with the finality without leaving anything behind. ...”

31. It would appear that the 1st Defendant and his stepbrother Ndungu Muiruri filed a succession cause at Nairobi No 332 of 1996 in the estate of their late father. It is also on record that another succession cause was filed at Thika Resident Magistrates Court vide cause No 260 of 1994. Vide the orders issued by Justice Mbito (as he then was) in cause No 332 of 1996, the Court revoked cause No 260 of 1994 and nullified any disposition of property under that cause. The Court further ordered and directed that the administration of the estate of Jacob Muiruri to proceed under cause No 647 of 1983 through which the Public Trustee was appointed the administrator of the estate.

32. The Plaintiff claims to have been awarded the land parcel number LOC.1/KIUNYU/ 1439 after administration of the estate was executed by the Public Trustee as one of the beneficiaries of her late father's estate. According to her reading of the will the land was subdivided into three portions; one for Wanjiru and two for her mother Gachiru. That parcel LOC.1/KIUNYU /1437 went to Irungu son of Wanjiru while 1438 and 1439 went to the 1st Defendant and the Plaintiff respectively (of the house of Gachiru). That she proceeded to collect her title from the Public Trustee whilst her siblings remained uncooperative. That their titles lie at the Public Trustee's office uncollected. She averred that she has built a house on her land which the Defendants are encroaching and hence her quest for eviction of the 1st Defendants and his two sons. According to her the process was legally carried out by the Public Trustee in accordance with the will of the deceased and the Court orders, which orders stand unchallenged by the Defendants. She therefore informed the Court that she holds a valid and absolute title.

33. I shall now turn to the evidence in respect to how the suit land became registered in the name of the Plaintiff. The Public Trustee led evidence that by the time the grant was confirmed the widows of the deceased were long dead. That the sons of the deceased, the 1st Defendant included, became very uncooperative in signing the consents in respect to the confirmation of the grant. That since there was no objection to the petition, the Court confirmed the grant to the Public Trustee. Noting that the current provisions of the Succession Act recognizes the children of the deceased as beneficiaries of the estate of the widows, the family was sent to the local administration to forge the way forward. In its evidence she stated that it sought directions from the local authorities who gave them the go ahead to distribute the suit land to the children of the deceased. It claimed to have relied on some letter from the County Commissioner, which was not produced in Court. It was the Plaintiff's contention that the Defendants were called to attend a meeting at the Public Trustee office for purposes of being given an interpretation of the will which they declined. That the Public Trustee interpreted the will to mean that there were three shares of the

estate, one for Wanjiku and two for Gachiru. The one for Wanjiru was allocated to her son Francis and those of Gachiru were allocated to the Plaintiff and the 1st Defendant respectively. The Public Trustee obtained Land Control Board consents for the subdivision of the original land. That the Plaintiff collected her title while those of Francis and the 1st Defendant are still in custody of the Public Trustee.

34. From the evidence adduced above it is clear that the Public Trustee administered the estate in blatant contradiction with the terms of the will. The land was to be distributed to two widows as per the will. There was no provision in the will that the Plaintiff nor the Defendants would be awarded the subject land. The 1st Defendant and his late brother were given a share of the two other plots as well as coffee plants on each side of their mothers' portions. Though undisputed, there was no evidence tendered by any of the parties as to when the widows died. This would have been in form of death certificates. Be that as it may it behooved the Public Trustee to await the succession of the estate of the widows to enable the distribution of their estates.

35. Section 26 of the Land Registration Act provides as follows;

“ (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

36. The Public trustee's admission that it administered the estate through a letter from the County Commissioner shows that the estate of the deceased was administered contrary to orders of the Court in succession and the will of the deceased. It follows that the Plaintiff got a title that was acquired from a process that was unprocedural and illegal.

37. The orders of the Court in confirming the grant to the estate of the deceased have not been set aside, appealed and or vacated.

38. Going by the provisions of the law in section 26(b) of the Land Registration Act, I find that the title held by the Plaintiff was acquired illegally and unprocedurally and the orders that commend themselves is as mandated by Section 80 of the Land Registration Act which is to order for the cancellation of the same.

39. Having held that the Plaintiff acquired no title in the suit land, she cannot be entitled to orders of eviction. The Plaintiffs suit therefore fails.

40. **Final orders;**

a. The Plaintiffs suit fails. It is dismissed.

b. The Defendant's counterclaim is struck out.

c. The title held in the name of the Plaintiff be and is hereby cancelled and reverted to the Public Trustee.

d. The Public Trustee to distribute the suit land in accordance with the confirmed grant issued by the Court on the 25/6/2014.

e. None of the parties have succeeded in their claims. I order that each to meet the cost of their suits.

41. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANGA THIS 19TH DAY OF SEPTEMBER 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Plaintiff: Present in person

1 – Absent

Defendants 2 – Present in person

3 – Present in person

