



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 12 OF 2015

MARY MUTHONI NGARI.....PLAINTIFF

VERSUS

JOSEPH NGARI KAMAU.....1ST DEFENDANT

JANE WAIRIMU NGARI.....2ND DEFENDANT

JORUM KAMAU NGARI.....3RD DEFENDANT

JAMES MWANGI NGARI.....4TH DEFENDANT

SAMUEL GITHUA NGARI.....5TH DEFENDANT

PATRICK KURIA NGARI.....6TH DEFENDANT

ELIUD KAGUMO NGARI.....7TH DEFENDANT

JUDGMENT

INTRODUCTION

By a plaint dated and filed on 13th February 2015, the plaintiff sought from the defendant the following orders:

- i. An order cancelling the sub-division and new titles to L.R. Title Nos. MUTIRA/KIAGA/1510 and MUTIRA/KIAGA/1511.**
- ii. An order cancelling the registration and ownership of L.R. Title No. MUTIRA/KIAGA/1510 in the joint names of the 4th, 5th, 6th & 7th defendants as appearing in the search certificate.**
- iii. Further to order (i) & (ii) above, this Honourable Court be pleased to order and/or declare that the plaintiff is entitled to 5 acres of the initial L.R. Title No. MUTIRA/KIAGA/525 as the 2nd wife and the 2nd defendant is entitled to also 5 acres as the 1st wife.**
- iv. That this Honourable Court be pleased to order that the District Land Registrar Kerugoya do issue the plaintiff and the 2nd defendant each with new titles to L.R. Title No. MUTIRA/KIAGA/525 and the same be equally sub-divided.**
- v. That the costs of this suit be provided for and be borne by the defendants jointly and severally.**
- vi. Any other relief/orders as this Honourable Court may deem fit/just to grant.**

The plaintiff also filed a verifying affidavit, list of witnesses, her witness statement and list of documents pursuant to *Order 3 CPR*.

On 27th February 2015, the defendants filed a joint statement of defence and counter-claim. They also filed a verifying affidavit, list of witnesses, witness statement and list of documents pursuant to *Order 7 of the CPR*.

On 11th March 2015, the plaintiff filed a reply to defence and defence to the defendants counter-claim. On 24th March 2015, the plaintiff also filed nine issues for determination and pre-trial Questionnaire pursuant to *Order II CPR*. In a Notice of Motion dated 16th April 2015 and filed the same date under certificate of urgency, the plaintiff sought the following orders:

1. Spent.

2. That this Honourable Court be pleased to order that a medical report by a recognized Hospital/Doctor demonstrating the current state of mind and/or health status of the 1st defendant herein Joseph Ngari Kamau be prepared to be filed as part of record before this Honourable Court.

3. That further to and/or prior to and/or after filing of the medical report as in 2 above, this Honourable Court be pleased to order that the evidence of the 1st defendant JOSEPH NGARI KAMAU regarding L.R. Title No. MUTIRA/KIAGA/525 but now sub-divided into 1510 and 1511 be taken and be part of the record right away.

4. That the costs of this application be provided for.

On 5th May 2015, the respondents filed a replying affidavit through the 3rd defendant opposing the said application. On 25th May 2015, the defendants filed a further list of documents, issues for trial and pre-trial Questionnaire.

In a ruling delivered on 8th April 2016, this Court allowed the Notice of Motion dated 16th April 2015 in the following terms:

1. The 1st defendant be examined by a doctor agreed upon by both parties who should file a report in this Court within 30 days indicating the current state of mind of the 1st defendant and in particular whether he is capable of giving evidence in Court.

2. The plaintiff shall meet the costs of that examination.

3. As it has been deponed, that the 1st defendant's mobility is difficult, such examination can be conducted at his home.

4. The Court shall make further orders upon receipt of the doctor's report.

5. Costs of this application shall be in the cause.

6. This case shall be mentioned on 5th May 2016 when I expect the report to have been filed and for further orders.

PLAINTIFF'S CASE

The plaintiff testified on oath and stated that Joseph Ngari Kamau is her husband and Jane Wairimu Ngari is a co-wife. The 3rd – 7th defendants are her co-wife's children. She has six children of her own who are all adults. The last born of her children is 34 years old. She recalled that on 12th December 2016, they held a meeting at her co-wife's house. Their husband had called his sons and co-wife and her elder son one Timothy Kamau. Jane Wairimu and Joram Kamau were also present. Her grand children and sons of her co-wife were also in attendance. Their husband prayed and distributed his properties. Her elder son Timothy wrote what their husband said. All the children were asked to sign. It was written in Kikuyu. Later those minutes were typed and everyone was called to sign and indicate their personal Identity Cards. She stated that all the other properties were distributed according to the minutes except the suit land which was to be divided into two, the upper side for the first wife while the lower side was to belong to her. She stated that the suit land is measuring 10 acres. Her co-wife was to get five (5) acres while she was to get the other five (5) acres. In December 2014, she wanted to plant trees on her portion. She went and found the 4th defendant has built on her portion. The 4th defendant told her not to enter the land until he talked to their father Joseph Ngari Kamau. She went to see her husband and when she talked to him, he said he was waiting on God. According to her, he had senile dementia. She decided to go to the Lands office and found the land had been sub-divided and other people registered. Later, she got a letter from the lawyer saying that she had cautioned someone's land. She wrote to back to the lawyer saying that she had the right. She then discovered the mutation and registration documents produced as Plaintiff's exhibits 1 – 7. They attempted to bring the 1st defendant to Court to give evidence. She filed a doctor's report dated 31st May 2016 which was also produced as Plaintiff's Exhibit No. 8. The plaintiff also referred to another medical report by the defendants dated 5th May 2016. The same was also produced in evidence as Plaintiff's Exhibit No. 9. She stated that from the medical report, the 1st defendant suffers senile dementia which is a loss of memory. She stated that Joram Kamau Ngari who is the 4th defendant also admitted in his witness statement that there was a meeting on 12th December 1996 in the issue of distributing the land. She said that the 1st defendant could not change his mind since he never gave land to any child but gave land to his two wives households only. The plaintiff further stated that in 2009 when the 1st defendant is alleged to have transferred the land, he was sick. She stated that the defendants probably just took him there. She did not call any witness.

DEFENDANTS CASE

The 3rd defendant testified on behalf of the defendants and stated that his father who is the 1st defendant passed on in 2016 or thereabout. He stated that the 2nd defendant is his mother while the 4th, 5th, 6th and 7th defendants are his brothers. The plaintiff is his step mother. He referred to a statement he recorded and filed in Court on 27th February 2015. He also referred to a further statement dated 8th July 2017. He asked the Court to adopt the same in his evidence. He filed a list of documents dated 27th February 2015 and a further list of documents

dated 21st May 2015 which he produced as exhibits in this case. He also filed a consent signed by his co-defendants authorizing him to testify and speak on their behalf. Regarding the subject matter in dispute, the 3rd defendants stated that the original proprietor of the suit property was his father Joseph Ngari Kamau. He said that sometimes in the year 1996, they held a family meeting in their home in Kagio where their late father proposed how to divide the family land. The minutes were taken in Kikuyu language. He stated that the meeting was not attended by his sisters. The minutes were later translated into English. The parcels of land to be sub-divided is also reflected in the minutes. The witness also stated that there were other properties owned by his late father which were not shared out e.g. land parcel No. Karingari/Muiru/72. There was one parcel of land which was given to the girls being L.R. No. Karingari/Muiru/1397. He stated that their late father did not transfer the parcels of land according to how he had proposed. He said that in 2008 or thereabout, their late father gave Mary Muthoni Ngari land parcel No. Karingari/Muiru/1472. In the year 2009, he sold land parcel No. Karingari/Muiru/1472 to Morris Gitonga. The same year, they were given their portions also. They went to the Land Control Board where they obtained consent to transfer. He stated that the land was given to them by their father. He said that their mother Jane Wairimu Ngari was not given land but one Jane Wairimu Kamau who is the grand-daughter of the 1st defendant and who is not a party to this suit. He sought to have this suit dismissed with costs.

LEGAL ANALYSIS

I have considered the evidence of the plaintiff and that of the defendants and the documents produced by both sides. I have also considered the submissions and the authorities cited. The land parcel No. MUTIRA/KIAGA/525 which was sub-divided into two portions was initially registered in the name of Joseph Ngari Kamau who was husband to the plaintiff and the 2nd defendant herein. On 12th December 1996, the said Joseph Ngari Kamau called for a family meeting in which he shared out his land between his two wives. According to the minutes of that meeting which was also translated into English and produced as Plaintiff Exhibit No. 1, land parcel No. 525 which is the subject of this dispute was to be sub-divided equally at the centre such that on the side at Rural road was given to Mary Muthoni Ngari, the plaintiff while the side of River Nyaikunga was to go to Jane Wairimu Ngari who is the 2nd defendant. The original copy of these minutes written in Kikuyu were signed by all those in attendance including the plaintiff and the defendants who also gave their personal Identity Card numbers. From the plaintiff's list of documents dated 13th February 2015, the suit land was sub-divided into two portions namely MUTIRA/KIAGA/1510 and 1511 and subsequently transferred to the defendants. Land parcel No. MUTIRA/KIAGA/1510 was registered jointly in the names of Jane Wairimu Kamau and Kamau Ngari while land parcel No. MUTIRA/KIAGA/1511 was registered in the names of Patrick Kuria, Samuel Githua, Eliud Kagumo and James Mwangi. Their registration was confirmed through certificates of search also contained in the plaintiffs list of documents dated 19th January 2019. The plaintiff is seeking cancellation of the sub-divisions and issuance of titles in respect of the two titles.

Section 26 of the Land Registration Act No. 3 of 2012 provides as follows:

“26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon 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 which the person is proved to be a party;**
- b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.**

The plaintiff at paragraph 8 of the plaint stated as follows:

“8. It is the plaintiff's case that the defendants further fraudulently caused partition/sub-division of the said parcel of land into L.R. Title Nos. MUTIRA/KIAGA/1510 and MUTIRA/KIAGA/1511. The plaintiff in the subsequent paragraphs went ahead and explained how the defendants caused the new titles to be registered in their names leaving out the plaintiff contrary to the intentions of the original registered proprietor Joseph Ngari Kamau who had expressed through the family meeting held on 12th December 1996. That meeting has even been admitted to have existed by the defendants who confirmed having attended the same. The medical report by Dr. Chege Andrew on Joseph Ngari Kamau on 30/4/2016 and filed in Court on 5/5/2016 by the advocate for defendants concluded as follows:

“From the above, it can be concluded that Mr. Joseph Ngari Kamau exhibits senile dementia. He is therefore incapable of making any sound decision on his own”.

Another medical report by Dr. Alex Nyabuto on the same Joseph Ngari Kamau the same date and filed in Court on 3/5/2016 shows as follows:

“The above named person underwent medical and mental status assessment on the above date. He has been bedridden for more than one year and therefore cannot ambulate from history from family members over his recent past, it is approximately over ten years since memory lapses started. After examination, it is clear that he has lost his cognitive ability and cannot recall any past events and can't recognize people even close family members.

Conclusion

He suffers from senile dementia due to ageing, consequently, he cannot testify as a witness as he has lost all of his memory for past events”.

The 1st defendant Joseph Ngari Kamau (now deceased) on 12th December 1996 in a family meeting shared out his properties to his two wives equally. He could not have changed his mind in 2009 and give one of the properties to one wife and her children leaving out the second wife and her children. The medical report indicate that the said Joseph Ngari Kamau (now deceased) suffered memory lapses over ten (10) years. A simple arithmetic shows that the said Joseph Ngari Kamau started to lose his cognitive ability from the year 2006. That therefore meant that he was not in a capacity to transact any lawful transaction capable of being recognized in law. I therefore find and hold that the purported mutation sub-division and transfer of the land parcel No. MUTIRA/KIAGA/525 between 2008 and 2010 was tainted with fraud and illegality. The two titles issued as a result of the said fraud and illegality is therefore impeachable and cannot be allowed to stand. In the upshot, I find that the plaintiff has proved her case on the required standard. Having said that, I find that the defendants have not proved their counter-claim and the same fails.

In the final analysis, I make the following orders:

- 1. An order cancelling the sub-divisions and new titles to L.R. Title No. MUTIRA/KIAGA/1511.**
- 2. An order cancelling the registration and ownership of L.R. Title No. MUTIRA/KIAGA/1510 in the joint names of the 2nd and 3rd defendants and L.R. Title No. MUTIRA/KIAGA/1511 in the joint names of the 4th, 5th, 6th, & 7th defendants as appearing in the search certificate.**
- 3. Upon cancellation of the two titles, the title revert back to the name of JOSEPH NGARI KAMAU to be shared equally between the plaintiff and the 2nd defendant in accordance with the wishes of their husband JOSEPH NGARI KAMAU (deceased) as reflected in the family meeting held on 12th February 1996.**
- 4. Costs of this suit to be borne by the defendants.**

READ, DELIVERED and SIGNED in open Court this 18th day of October, 2019.

E.C. CHERONO

ELC JUDGE

18TH OCTOBER, 2019

In the presence of:

1. Mr. Munene holding brief for Wambugu Kariuki for the Plaintiff

2. Mbogo – Court clerk