



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 444 OF 2017

STEPHEN KAHUGU KINYANJUI

(Suing as the Administrator of the

Estate of RUTH WAMWAE KIYANJUI alias RUTH WAMAE.....1ST PLAINTIFF

MARGARET WANJIRU NGANGA and JOYCE WANGARI GATHONI

(Suing as the Administrators of the Estate of

HANNAH GATHONI GITHEGI Deceased)..... 2ND PLAINTIFF

ROSEMARY NJERI MAGANJO 3 RD PLAINTIFF

VERSUS

JOHNSON KIGUNDU 1 ST DEFENDANT

JOSEPH KAARA KAMAU 2 ND DEFENDANT

CHIEF LAND REGISTRAR..... 3 RD DEFENDANT

JUDGMENT

Background

1. The 1st plaintiff, Stephen Kahugu Kinyanjui, contends that he is the administrator of the Estate of the Late Ruth Wamwae Kinyanjui *alias* Ruth Wamae *alias* Kinyanjui Wamae (hereinafter referred to as “the **2nd deceased**”). The 3rd plaintiff contends that she is a daughter of the 2nd deceased and a beneficiary of her estate. Margaret Wanjiru Nganga and Joyce Wangari Gathoni are the joint administrators of the Estate of Hannah Gathoni Githegi (the **1st deceased**) and they are jointly designated as 2nd plaintiff.

2. The dispute in this suit relates to Land Title Number Nairobi/Block 110/309, situated in Thome Estate, Nairobi (the **suit property**). The plaintiffs contend that the said land was acquired by Ruth Wamwae Kinyanjui and Hannah Gathoni Githegi (the **2nd deceased** and **1st deceased** respectively) from Thome Farmers No 1 Limited through Share Certificate Number 463. Subsequent to the acquisition of the land, the 1st deceased died on 12/11/1984. The 2nd deceased died on 9/12/2004. Prior to her death, the 2nd deceased wrote to the Chairman of Thome Farmers No 1 requesting them to transfer her share to her daughter, Rosemary Njeri Maganjo (the 3rd plaintiff).

3. Subsequently, title to the suit property was processed and registered in the names of the two deceased persons, Ruth Wamwae Kinyanjui *alias* Ruth Wamae *alias* Kinyanjui Wamae and Hannah Gathoni Githegi in 1991. The plaintiffs contend that on 27/2/1997, unknown to the estate of Hannah Gathoni Githegi who had died in 1984, and unknown to Ruth Wamwae Kinyanjui who was still alive then, a fraudulent entry was made in the parcel register of the suit property, fraudulently transferring the suit property into the name of Joseph Kaara Kamau (the 2nd defendant). On 14/11/2002, a second fraudulent entry was made in the parcel register, transferring the suit property into the name of John Kagundu (the 1st defendant). The plaintiffs contend that they learnt about the fraudulent entries in 2017.

4. Consequently, the plaintiffs brought this suit on 30/6/2017 against the defendants, pleading fraud, and seeking the following verbatim orders:

a) A declaration that the plaintiffs are the legal owners of the property known as Land Reference Nairobi/Block 110/309;

b) A declaration that the purported transfer of Land Reference Nairobi/Block 110/309 by Wamae Kinyanjui and Hannah Gathoni Githegi to the 2nd defendant was illegal, fraudulent, unprocedural, out of a corrupt scheme and/or void;

c) A declaration that the 2nd defendant could not pass good title of Land Reference Nairobi Block 110/309 to the 1st defendant;

d) An order of permanent injunction be issued to the 1st defendant, his agents, employees or persons claiming on his behalf or his instructions preventing them from entering, remaining in, charging, transferring, leasing or otherwise disposing off or developing the property known as Land Reference Nairobi Block 110/309;

e) A mandatory order of injunction directed to the 3rd defendants to cancel any title issued to the 1st and 2nd defendant and rectify the land register to reflect the plaintiffs as the registered owners;

f) Costs of the suit;

g) Any other relief the honourable court deems fit and just to grant.

5. On 19/7/2017, the firm of Matundura & Wamalwa Advocates filed a notice of appointment on behalf of the 1st defendant. On 29/1/2018, an affidavit of service sworn by a process server by the name Humphrey Kinyungu was filed, indicating that the 2nd defendant was on 6/10/2017 served with summons to enter appearance. The 2nd defendant did not enter appearance. Both defendants did not file statements of defence. The court record shows that the firm of Matundura & Wamalwa was subsequently served with appropriate notices prior to the hearing of this matter. They did not, however, attend the hearing.

3rd Defendant's Defence

6. The 3rd defendant filed a statement of defence dated 31/10/2017. She averred that she did not have knowledge of the averments made in the plaint by the plaintiffs. She denied collusion, connivance or being privy to any fraudulent transfer relating to the suit property. She contended that any transfer made in the parcel register was made upon submission of all necessary documents and was done by the registrar procedurally without any knowledge of the alleged fraud.

Evidence

7. At the hearing, the plaintiffs led evidence by three witnesses. Margaret Wanjiru Nganga testified as PW1. She stated that she was one of the two administrators of the Estate of Hannah Gathoni Githegi, who was her mother. She adopted her written statement dated 29/6/2017. In summary, her testimony was that in 1979, the 1st and 2nd deceased persons bought shares in a land buying company known as Thome Farmers No 1 Limited and were jointly issued with Share Certificate No 463. Pursuant to their ownership of the said share certificate, the suit property was allocated to them by the land buying company, and they were put in possession of the suit property. Survey was subsequently carried out in 1983. Unfortunately, Hannah Gathoni Githegi died in 1984 before the land registration process had been completed. In 1988, Ruth Wamwae Kinyanjui gave her share of the land to her daughter, Rosemary Njeri Wamaganjo. The process of titling was handled by an advocate by the name Dorcas Ayoma Nanjero. In 2003, they visited Ms Nanjero's chamber to enquire about the title and they were advised to obtain letters of administration in relation to the Estate of Hannah Gathoni Githegi who had died in 1984. The personal representatives of Hannah Gathoni Githegi duly applied for a grant of letters of administration.

8. She added that in 2017, the 1st defendant emerged with a search showing that he was the registered proprietor of the suit property. Shocked, they decided to carry out a search and the search revealed that in February 1991, the suit property was registered in the names of Wamae Kinyanjui and Hannah Gathoni Githegi. The search further indicated that in February 1997, Wamae Kinyanjui and Hannah Gathoni Githegi who had already died in 1984 purportedly sold and transferred the suit property to Joseph Kaara Kamau at a consideration of Kshs 300,000. It further indicated that in November 2002, Joseph Kaara Kamau transferred the suit property to John Kigundu at a consideration of Kshs 750,000. At the time the above entries were made, they were in possession of the suit property and neither the 2nd nor the 1st defendants came out in the open to lay claim to the suit property between 1997 and 2017.

9. It was PW1's testimony that the 2nd defendant fraudulently obtained title to the suit property and fraudulently purported to convey it to the 1st defendant. PW1 produced 16 exhibits, among them, an extract of the parcel register relating to the suit property.

10. Stephen Kahugu Kinyanjui testified as PW2 while Rosemary Njeri Maganjo testified as PW3. PW2 stated that he was the administrator of the Estate of Ruth Wamwae Kinyanjui *alias* Ruth Wamae *alias* Kinyanjui Wamae who was his mother. His testimony regarding ownership and possession of the suit property was similar to that of PW1.

11. PW3 testified that she was daughter to Ruth Wamwae Kinyanjui *alias* Ruth Wamae *alias* Kinyanjui Wamae. Her testimony relating to ownership and possession of the suit property was similar to that of PW1.

Submissions

12. The plaintiffs through their advocates, M/s Waweru Gatonye & Co Advocates, submitted that Hannah Gathoni Githegi having died on 17/11/1984, the suit property which had been registered in their joint names as original owners could not be lawfully transferred to the 2nd defendant on 27/2/1997 without a grant of letters of administration. Reliance was placed on Section 45(1) of the Law of Succession Act and the decision in **The Matter of the Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR**. It was argued that the 2nd defendant's title registered on 27/2/1997 was illegal and fraudulent. Counsel for the plaintiffs added that the 2nd defendant did not have a good title to pass to the 1st defendant hence the 1st defendant did not get a good title. Reliance was placed on the framework in Section 26(1) (b) of the Land Registration Act 2012 and on the decision in **Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another (2013) eKLR**.

13. Counsel for the plaintiffs added that even if the court were to find that the titles of the 1st and 2nd defendants were procured legitimately, the plaintiffs had satisfied the court on the requirements for acquisition of title under the doctrine of adverse possession because Rosemary Njeri and Margaret Wanjiru had held the suit property continuously and without interruption from 1997 when the first impugned registration was procured. They urged the court to find that the 2nd and 3rd plaintiffs had acquired title to the suit property under the doctrine of adverse possession.

14. The 1st and 2nd defendants did not file written submissions. The 3rd defendant filed written submissions dated 20/9/2019 through Ms Elizabeth Mwalosi, State Counsel. She submitted that the plaintiffs had not tendered evidence of any wrong doing by the Land Registrar. Counsel relied on Sections 107 and 109 of the Evidence Act and argued that the plaintiffs had failed to discharge their burden of proof as against the 3rd defendant. Reliance was also placed on the Court of Appeal decision in **Karugi & Another v Kabiya & 3 Others (1987) KLR 347** where the Court of Appeal held that the burden of proof remains even if no valid defence is filed.

15. Counsel for the 3rd defendant added that the 3rd defendant should not be held liable for acts committed by the 1st and 2nd defendants because the Land Registrar registers entries according to information and documents presented. She argued that the plaintiffs had failed to show fault or collusion on part of the Land Registrar. She urged the court to dismiss the suit against the 3rd defendant.

Analysis & Determination

16. I have considered the plaintiffs' pleadings, evidence and submissions. I have also considered the defence and submissions by the 3rd defendant. I have similarly considered the statutory framework and jurisprudence relevant to the issues falling for determination in this suit. The claim against the 1st and 2nd defendants was not defended. Consequently, two key issues fall for determination in this suit. The first issue is whether the plaintiffs have made out a case of fraud and corrupt scheme, on a balance of probabilities, against the three defendants or against any of them. The second issue is whether the plaintiffs are entitled to the prayers sought in the plaint.

17. The plaintiffs have tendered evidence to demonstrate that the suit property was purchased by Ruth Wamwae Kinyanjui alias Ruth Wamae alias Wamae Kinyanjui and Hannah Gathoni Githegi through a land buying company by the name Thome Farmers No 1 Limited. An extract of the parcel register was tendered as evidence and shows that in 1991, the parcel register was opened and a title was processed in the names of the two purchasers, Wamae Kinyanjui and Hannah Gathoni Githegi, proprietors in equal shares. The land was subsequently transferred to the 2nd defendant on 27/2/1997. The transfer entry made on 27/2/1997 was made long after Hannah Gathoni Githegi had died in 1984. Under Section 45 (1) of the Law of Succession Act, Gathoni's interest in the land could only be legally transferred by her personal representatives holding a grant of representation. There is no evidence of any grant of representation presented to the court. The entry made in favour of the 2nd defendant was therefore illegal. Secondly, the 2nd defendant did not have a legitimate title to convey to the 1st defendant. What he purported to convey was a forgery. The conveyance to the 1st defendant was therefore part of a corrupt scheme. It is therefore my finding that the plaintiffs have made out a case, on a balance of probabilities, against the 1st and 2nd defendants.

18. As regards the claim against the 3rd defendant, there is no evidence to demonstrate that the Land Registrar was aware of or had reasonable opportunity to know, that the documents presented to the Land Registry to procure the two impugned entries were forgeries. In the circumstances, I will not hold the 3rd defendant liable for the impugned transfers. It is therefore my finding that the plaintiffs have not proved their case against the 3rd defendant.

19. Having come to the finding that the transfers to the 1st and 2nd defendants and the resultant title held by the 1st defendant were obtained fraudulently, irregularly, through misrepresentation, and contrary to statute, the legal status of a fraudulently procured title such as the one held by the 1st defendant is well settled in our jurisprudence as outlined in a line of decisions, among them: **(i) Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR**; and **(ii) Charles Karathe Kiarie & 2 Others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others (2013) eKLR**.

20. The second issue relates to the reliefs sought by the plaintiffs. Firstly, having found that the titles held by the 1st and 2nd defendants were fraudulent and are void, a claim for adverse possession cannot stand against the fraudulent titles.

21. Among the reliefs sought is a declaration that all the plaintiffs herein are the legal owners of the suit property. In my view, the suit property belongs to the Estates of the two deceased purchasers, Ruth Wamwae Kinyanjui alias Ruth Wamae alias Wamae Kinyanjui and Hannah Gathoni Githegi. The courts with jurisdiction to vest the share of the respective heirs to their respective estates are the succession courts dealing with the two succession causes relating to their respective estates. I will therefore not declare all the plaintiffs herein as the legal owners of the suit property. The other prayers sought in the plaint are in tandem with the findings of the court and are therefore available to the plaintiff.

Summary and Disposal Orders

22. In summary, I find that the plaintiffs have proved their case on a balance of probabilities against the 1st and 2nd defendants. Secondly, I find that the plaintiffs have not proved their case against the 3rd defendant.

23. In light of the above findings, the following disposal orders are made in tandem with the prayers sought in the plaint:

a) It is hereby declared that Land Title Nairobi/Block 110/309 belongs to: (i) the Estate of Ruth Wamwae Kinyanjui alias Ruth Wamae alias Wamae Kinyanjui; and (ii) the Estate of Hannah Gathoni Githegi, in equal shares.

b) It is hereby declared that the purported transfer of the said property to the 2nd defendant was illegal, fraudulent, unprocedural, out of a corrupt scheme, and is void.

c) It is hereby declared that the 2nd defendant could not pass a good title to the suit property to the 1st defendant.

d) An order of permanent injunction hereby issues to the 1st defendant, his agents, employees or persons claiming on his behalf or under his instructions preventing them from entering, remaining in, charging, transferring, leasing or otherwise disposing off or developing the suit property.

e) A mandatory order of injunction hereby issues directing the 3rd defendant to cancel any title issued to the 1st and 2nd defendants and rectify the land register of the suit property to cancel transfers registered in favour of the 2nd and 1st defendants respectively.

f) The 1st and 2nd defendants shall bear costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF NOVEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Mwema holding brief for Mr Githumbi for the plaintiff

Mr Munyuga holding brief for Ms Mwalozi for the 3rd defendant

Court Clerk - June Nafula