



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 62 OF 2013

JOHN NDUNGU MWANGI (Suing as the Legal Representative of the Estate of

MWANGI MACHARIA.....**PLAINTIFF/APPLICANT**

VERSUS

TARSIANA WAMBURA KABUTU.....**RESPONDENT/DEFENDANT**

JUDGMENT

INTRODUCTION

In a plaint dated 13th June 2001, the plaintiff sought a declaration that land parcel No. KIINE/SAGANA/1613 is part of MWANGI MACHARIA's (deceased's) Estate and the same should devolve to his beneficiaries and in particular JOHN NDUNGU MWANGI. The plaintiff sought a second order directing the Land Registrar Kirinyaga to cancel the transfer to the defendant and effect a registration in favour of the plaintiff herein. The plaintiff also sought general damages for trespass and costs of the suit and interest. By way of a response, the defendant filed a statement of defence denying the plaintiff's claim and all particulars of fraud dated 27th June 2001.

The plaintiff's suit was filed contemporaneously with a Chamber Summons application seeking temporary injunction orders pending the hearing of the main suit. The suit was commenced in the High Court of Kenya, Nairobi and registered as HCCC No. 960 of 2001 and later transferred to the High Court Embu where it was registered as HCCC No. 14 of 2007. The case was subsequently transferred to this Honourable Court in 2013 where the defendant sought and was granted leave to amend her defence to include a counter-claim for a declaration that she is the registered owner of L.R. No. KIINE/SAGANA/1615. The defendant also sought a permanent injunction against the plaintiff, his servants, agents, employees and/or anyone acting through him from interfering with her use, possession and enjoyment of the suit property L.R. No. KIINE/SAGANA/1613 and an eviction order to remove the plaintiff, his servants and/or agents from the suit land. The defendant also counter-claimed for costs.

PLAINTIFF'S CASE

The plaintiff who is a resident of Kirindhae Village in the area known as "Kwa V" in Sagana within Kirinyaga County gave sworn testimony and stated that his father was MWANGI MACHARIA (deceased) and passed away on 18th November 1991. After his father passed on, he filed a Succession Cause No. 1172 of 1996 (Embu). He stated that he followed the due process including placing in the Kenya Gazette on 6th September 1996. He was granted letters of administration which was confirmed on 4th December 1996. Upon presentation of the confirmed grant to the Land Registrar to enable the suit land transmitted to him as the beneficiary of the Estate of his late father, he was surprised that the land had fraudulently been transferred to the defendant herein. He reported the matter to Kerugoya Police Station and investigations commenced. After completion of their investigation, the defendant was arrested and charged at Kerugoya Law Courts in Criminal Case No. 1023/2000. The case was heard and the defendant was found guilty, convicted and sentenced to one year community service. She did not prefer an appeal. Again on 13th April 1993, the defendant was also charged in Wanguru Law Courts with the offence of Trespassing the plaintiff's land contrary to **Section 3 (1) of the Trespass Act Cap. 294 Laws of Kenya**. After the case was heard, the Court found the defendant guilty. She was convicted and sentenced to a fine of Ksh. 500/= in default 2 months imprisonment. The defendant again did not appeal against the conviction and sentence. The plaintiff further stated that the defendant was not married to his late father Mwangi Macharia or anybody in his family. The plaintiff filed a list of the following documents which he also produced in evidence:

1. Death certificate No. 183119.
2. Grant of Letters of Administration dated 08/10/1996.
3. Copy of defendant's Identity Card.

4. Copy of fraudulently obtained title deed.
5. Certificate of confirmed grant.
6. Copy of fraudulently obtained Letters of Administration by the defendant.
7. Copy of Kenya Gazette Notice No. 5011.
8. Copy of Bond and Bail bond of the defendant.
9. Copy of Penal Notice.
10. Copy of Restraint order issued on 09/05/2007 by Hon. Khaminwa J.
11. Copy of proceedings convicting the defendant to civil jail for contempt.
12. Copy of letters from the Land Registrar Kerugoya stating the status of the subject parcel of land.
13. Proceedings of Case No. 210 of 1993 Republic Vs Tarsiana Wambura.
14. Proceedings and judgment of Criminal Case No. 1023 of 2000 (Kerugoya).
15. Copy of minutes of meeting by Elders dated 15th August 1990 on the eviction of Wambura from the premises of Mr. Mwangi prepared by the Village Headman.
16. Criminal Form No. 102 (IMP) committing Tarsiana Wambura Kabutu to civil jail on 29th July 2009 for 30 days at Embu G.K. Prison.

PW2 was Rosemary Mutitu Nyaga. She is the Deputy Land Registrar, Kirinyaga County. She stated that the suit land parcel No. KIINE/SAGANA/1613 came from L.R. No. KIINE/SAGANA/994 which was sub-divided by one Mwangi Macharia on 28/6/1984 and produced five (5) numbers being L.R No. KIINE/SAGANA/1609, 1610, 1611, 1612 and 1613. Land parcel number KIINE/SAGANA/1613 was issued to Tarsiana Wambura Mwangi on 4/2/2000. She gave the succession case number that was used to register the new owner being Succession Cause No. 100/1997 in the Senior Resident Magistrate's Court (Kerugoya). She was given the Grant and confirmation. The land was later cautioned by John Ndungu Mwangi claiming beneficial interest. She stated that by the time the documents were being registered, there were no I/D attached. She produced a certified copy of the green card and the Court documents used to register the new owner as Plaintiff Exhibits 17 and 18 respectively.

DEFENCE CASE

The defendant testified and stated that she is known as Tarsiana Wambura Mwangi Alias Tarsiana Kabutu. She stated that she used to be known as Tarsiana Kabutu when she was married to one Kabutu but they left each other in 1977 and Kabutu married another woman. They were blessed with four children namely Francis Mutugi, Pauline Muthoni, Josphat Murimi and Elizabeth Wairimu. When they left each other with Kabutu, she got married to one Mwangi in 1980 under Kikuyu Customary Law. In 1981, they went to her parents' home. They were blessed with four children with Mwangi namely: Johnson Kiragu, Stephen Ndungu, Benson Macharia and Margaret Wambui. She produced copies of National Identity Cards for Johnson Kiragu, Stephen Ndungu, Mwangi and Margaret Wambui as Defence Exhibit 1 (a) (b) and (c). She further stated that in 1991, her husband Mwangi passed on and they buried him. In December 1991, the elders told the plaintiff to leave the defendant's land but he refused. She produced a letter from the area Chief dated 3/5/1993 as Defence Exhibit No. 2. She went back to the Chief's office and reported that the plaintiff had refused to vacate her land but the Chief told her to go to Court. She later filed a Succession Cause No. 100 of 1997 (Kerugoya). She produced the proceedings as Defence Exhibit No. 3. She later presented the grant and the suit property was registered in her name. She produced a green card showing that the suit property was transferred in her name on 4/2/2000 as Defence Exhibit No. 4. The defendant also produced a copy of certificate of search for the suit property as Defence Exhibit No. 5. She stated that her husband Mwangi came from Ngoka in Mwea Village where he was buried.

The defendant further stated that her late husband had two other wives in Mwea namely Grace Njeri and Emily Wairimu. One was living in Mwea while the other was living in Sagana. She produced a death certificate as Plaintiff's Exhibit No. 7. She was written a letter by the Chief, Kinyaga Location dated 12th April 2018 confirming that she was the wife of the late Mwangi. The defendant said that she first saw the plaintiff during the burial of her late husband. She stated that the plaintiff is not the son of her late husband. She wants the plaintiff to be evicted from the suit property.

DW2 was David Muriithi Gichunju. He is the Chief, Nguga Location. He was referred to a letter dated 26/3/2003 which was written by one S.M. Gatei. He stated that the said S.M. Gatei was the Assistant Chief of Nguga Sub-location. He confirmed that the said letter originated from the said office. The letter was addressed to the Registrar of Persons Deaths and Births, Kerugoya confirming that the defendant, Tarsiana was the widow to the late Mwangi Macharia. He produced the letter as Defence Exhibit No. 5.

DW3 was Lucy Wanjogu. She is the Chief of Kinyaga Location. She was employed in 2016. In the year 2018, she wrote a letter confirming that one Tarsiana Wambura Kabutu hails from her location. She had confirmed from a village elder that the said Tarsiana Wambura Kabutu I/D No. 4955256 hailed from her location and that they used to live with her husband one Mwangi Macharia before his demise. He produced the letter as Defence Exhibit No. 8.

ANALYSIS AND DETERMINATION

The following are issues for determination:

1. **Whether the plaintiff has established a case for cancellation of the defendant's title No. KIINE/SAGANA1613?**
2. **What relief should be granted?**
3. **Who shall bear the costs of this suit?**

Whether the plaintiff has established a case for cancellation of the defendant's title in L.R. No. KIINE/SAGANA/1613?

The plaintiff in his sworn testimony has stated that he is the son of the late Mwangi Macharia (deceased). He explained how immediately after the burial, he obtained a death certificate No. 183119 dated 15/5/2008. The deceased is indicated to have died on 18th November 1991. The cause of death was cough with long illness. The plaintiff later filed Succession Cause No. 1172/1996 (Nairobi). The matter was placed on the Kenya Gazette Notice No. 5011 dated 6th September 1996. The plaintiff was later issued with a grant of letters of administration on 8th October 1996 which was confirmed on 4th December 1998. In the confirmed grant, the plaintiff was named as the beneficiary of the suit land registration No. KIINE/SAGANA/1613. Upon presenting the confirmed grant to the Land Registrar for purposes of registering the transfer in his favour, the plaintiff realized that the suit property was registered in favour of the defendant. He then filed a series of complaints before the law enforcement authorities against the defendant for fraudulently transferring his father's land to herself. The first of such cases was Criminal Case No. 210 of 1993 between Republic Versus Tarsiana Wambura where the accused was charged with three counts. The first count was false swearing contrary to Section **114 of the Penal Code**. The particulars are that on the 16/01/1998 at Ushirika Building Kerugoya before Isaack Muchiri an advocate of the High Court of Kenya, a person authorized to administer oath, she swore falsely upon a matter of public concern that she was the wife of the late Mwangi Macharia.

On the second count, the particulars are that on the 13th July 1999 at Ushirika Building Kerugoya, before Munene Muriuki, advocate of the High Court of Kenya, a person authorized to administer oath swore falsely upon a matter of public concern that she was the only person together with her four children who survived the late Mwangi Macharia. On the third and last count, the defendant/accused was charged with obtaining land registration by false pretences contrary to **Section 320 of the Penal Code**. The particulars are that on the 4th day of February 2000 at Lands office Kerugoya, she obtained registration of the land parcel No. KIINE/SAGANA/1613 by falsely pretending that she was the legal wife of the late Mwangi Macharia and the only beneficiary to his Estate. After hearing the case and the evidence, the trial Court rendered itself on 26/11/2002 as follows:

“ she did not have his death certificate and that is why she had to apply for an order of the Court to dispense with the said death certificate in the succession cause she filed

I have considered the evidence on record and find that the prosecution has proved its case against the accused beyond any reasonable doubt and I accordingly convict her as charged in the three counts”.

The trial magistrate in the criminal trial against the defendant (read accused) made a decision that the prosecution had proved its case beyond reasonable doubt and therefore convicted and sentenced the defendant/accused on all the three counts. The proceedings and judgment in the said criminal trial was produced as Exhibits in this case. The defendant did not appeal against the said conviction and sentence. The plaintiff's claim against the defendant in this case is for cancellation of the title deed in respect of the suit property L.R. No. KIINE/SAGANA/1613 on grounds of fraud. Fraud is a criminal offence and a Court of competent jurisdiction has already pronounced itself on the issue with a resounding conviction and sentence which has not been set aside. **Section 34 of the Evidence Act Cap. 80 Laws of Kenya** reads as follows:

34 (1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding, or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances:

- a. **Where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the Court considers unreasonable;**

And where, in the case of subsequent proceedings:

- b. **The proceeding is between the same parties or their representatives in interest; and**
- c. **The adverse party in the first proceeding had the right and opportunity to cross-examine; and**
- d. **The question in issue were substantially the same in the first as in the second proceeding”.**

In a similar scenario as the instant case, the learned **Judge Hon. Lady Justice M.A. Angawa** in the case of **Mary Wambui Mbuchuchu Vs David Kithinji Mwambi & Another HCCC No. 865 of 2002 (Nairobi)** (unreported) held as follows:

“ upon a trial being held, the evidence before the Criminal Court would be recorded. If that Court found there was no fraud, the plaintiff would have no case. If the Court would find there was fraud, then the plaintiff would use the proceedings

of the Criminal Court in the Civil Court under Section 34 of the Evidence Act Cap. 80 Laws of Kenya without calling any of the witnesses such as the Document Examiner”.

I agree with the decision by the learned Judge. The defendant who was the accused in the previous criminal proceedings was found guilty, convicted and sentenced after the prosecution proved its case beyond reasonable doubt. Those proceedings which were produced as Exhibits in this case are sufficient evidence which are admissible under *Section 34 of the Evidence Act*.

The sum total of my analysis is that all the documents used in effecting registration of the defendant as the proprietor of the suit land registration No. KIINE/SAGANA/1613 were forgeries. As such, the entire transaction which purported to transmit the suit land from the deceased father of the plaintiff to the defendant was fraudulent and therefore null and void abinitio.

In view of the foregoing, I find and hold that the plaintiff has proved his case against the defendant on the required standard. In the result, I enter judgment in the following terms:

- 1. A declaration be and is hereby issued that the purported transmission and registration of the defendant as the proprietor of L.R. No. KIINE/SAGANA/1613 was fraudulent, illegal and unlawful.**
- 2. An order be and is hereby issued directing the Land Registrar, Kirinyaga to rectify the register by cancelling the transmission and registration of the defendant, Tarsiana Wambura Mwangi and effecting a registration in favour of the plaintiff herein.**
- 3. The defendant’s counter-claim is hereby dismissed with costs.**
- 4. The defendant to pay the plaintiff General damages for trespass in the sum of Kenya Shillings Two Hundred Thousands plus interest at Court rate from today till payment in full.**
- 5. The defendant to be evicted from the suit land L.R No. KIINE/SAGANA/1613 in accordance with the law.**
- 6. The costs of this suit shall be borne by the defendant.**

READ, DELIVERED and SIGNED in open Court at Kerugoya this 20th day of December, 2019.

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E.C. CHERONO

ELC JUDGE

20TH DECEMBER, 2019

In the presence of:

1. M/S Mathanjuki
2. M/S Githaiga holding brief for Wangechi Munene
3. Mbogo – Court clerk