



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MURANG'A**

**ELC NO 328 of 2017**

**WAITHIRA MWANGI (substitute for MWANGI PHILIPKIGUTA -deceased).....PLAINTIFF**

**VERSUS**

**ISAAC KAMAU MWANGI (substitute for WANJIRU MWANGI (Deceased).....1<sup>ST</sup> DEFENDANT**

**GACHARAGE TEA FACTORY.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. On the 17/2/1998, Mwangi Philip Kiguta filed suit against Wanjiru Mwangi and sought the following orders;

- a. An order evicting the Defendant from the Plaintiff's land Parcel No LOC18/GACHOCHO/839 (suit land).
- b. Mesne Profits to be calculated at Court rates.
- c. Any other and further relief this honourable Court deems necessary.

2. It is the Plaintiff's case that he is the registered owner of the suit land and that on or about 1995 the Defendant without the consent and authority of the Plaintiff trespassed onto the suit land and continues to do so and despite requests to vacate which she has flatly refused to do so. He pleaded loss of use as well as mesne profits against the Defendant.

3. By an amended defence filed on the 14/3/19 the Defendant denied the Plaintiffs claim and asserted that the Plaintiff procured the registration of the title in his name secretly and through fraud. Under para 3 she set out the particulars of fraud. That prior to that the title was registered in the name of the Defendant's son Isaac Kamau Mwangi who held the title in trust for the family after the death of the Defendant's husband namely Kamau Mwangi, the 1<sup>st</sup> registered owner of the suit land in 1965.

4. The Defendant contends that the Plaintiff sued her late husband in 1988 vide RMCC No 408 of 1988. That her husband died on 9/10/89 but despite knowledge of his death the Plaintiff proceeded to obtain exparte judgement against him on 21/10/1993 without any substitution of the Defendant. That in any case the suit land by then was registered in the name of the Defendant's son Isaac Kamau Mwangi. That the Plaintiff proceeded to obtain exparte judgement against a dead Defendant and further used the same orders to have the title cancelled and was issued with a title deed.

5. The Defendant denied trespassing onto the suit land. That she and her family have lived on the suit land since 1960s.

6. In her counterclaim the Defendant sought the following orders;

- a. A declaration that the registration of the land parcel No Loc 8/Gachocho/839 in the name of Mwangi Philip Kiguta on 20/1/1995 was done fraudulently.
- b. Cancellation of the name of the Plaintiff Mwangi Philip Kiguta and the subsequent issuance of title deed on 20/1/95 and 25/1/95 respectively and restoration of the title deed in the name of the Defendant as per entry Nos. 4 and 5 of the green card dated 26/10/93.
- c. A permanent injunction against the Defendant her family and anybody acting under her from interfering with the Defendant's occupation use and enjoyment of land parcel No Loc18/Gachocho/839.
- d. Costs of the counterclaim

e. Interest in a and c above at Court rates

7. At the hearing the Plaintiff's evidence was led by Waithira Mwangi who adopted her witness statement dated the 8/5/18. She informed the Court that the title of the suit land is registered in the name of her late husband Philip Mwangi Kiguta vide the orders of the Court in SRMCC No 408 of 1993. That the Defendant has been in occupation of the suit land since 1965 and urged the Court to grant orders in her favour.

8. In respect to the claim of the Interested Party she admitted that it is entitled to 0.1 acres and that its claim is genuine.

9. The Defendant's evidence was adduced by Isaac Kamau Mwangi who testified that Wanjiro Mwangi was his mother and he is the legal administrator of her estate having been enjoined on 10/8/11. She died in 2010. His father was Mwangi Kamau and he died in 1989. His father became registered owner of the suit land in 1965 and the same was transferred to his name in 1993 as a gift, 5 years after the death of his father. That his father had obtained LCB consent to transfer the land to him on the 1/8/88 and executed the transfer on the 9/8/88 and the transfer was registered on the 26/10/93 as shown on the green card produced in Court. That he lacked funds to pay for the registration fees to effect the transfer of the land in his name until in 1993.

10. That Philip Kiguta was registered as owner of the suit land on the 20/1/95. He asserted that he did not transfer the suit land to Philip Kiguta and he discovered the registration in 1996 when he applied for a green card.

11. He informed the Court that according to the green card the said Philip Kiguta was registered as owner of the suit land on the 26/10/93 pursuant to Court orders issued on 21/10/93 in SRMCC No 408 of 1988 at Thika. By then he had become the registered owner of the suit land for a period of about 2 years since 26/10/93. His name was removed from the register without being heard and the title registered in the name of Philip Kiguta.

12. He conceded that by the time the judgement was delivered on the 21/10/93 the suit land was still registered in the name of his deceased father.

13. Further he stated that the hearing of the case commenced on the 13/9/1993 after his father's death in 1989. That his father was not substituted.

14. That though he was dissatisfied with the judgement in SRMCC 408/88 he has never appealed nor sought orders to set aside or vacate the same.

15. The claim of the Interested party was compromised vide a consent recorded by the parties on the 19/9/19 and adopted by the Court as orders of the Court. It reads as follows;

“by consent the Interested party's application dated the 8/5/18 be marked as settled on the following terms;

a. An order of declaration is hereby issued that the interested party is entitled to 0.1 acres out of LR LOC18/GACHOCHO/839 comprising of Nyona tea buying centre.

b. The parties hereby agree that the interested party is entitled to 0.1 acres out of LOC18/GACHOCHO/839 comprising of Nyona Tea buying centre.

c. An order is hereby issued directing the party finally declared to be the rightful owner of LOC18/GACHOCHO/839 to transfer 0.1 acres of the suit parcel to the interested party.

d. Costs of the Interested Party shall be in the cause.”

16. The Plaintiff submitted and reiterated the evidence as adduced by the Plaintiff's witness. In respect to the Defendants claim the Plaintiff submitted and denied that fraud was committed in the civil case No SRMCC No 408 of 1988. He averred that the case was determined by a Court of competent jurisdiction in which valid orders were issued pursuant to which the Plaintiff became registered as the owner of the land on the 20/1/1995. That the said Court orders were never challenged through appeal or any other manner permitted by law. That the Court has not been sued either. He contended that this Court has no powers to interfere with the judgement and orders given in 408/88 unless by way of appeal for which none has been proffered in 31 years.

17. She submitted that the present Defendant was registered as owner 5 days after the judgement was delivered on the 21/10/93 and that the registration was intended to defeat the judgement of the Court. That the registration of the Defendant was fraudulent.

18. She further argued that the Defendant fraudulently registered himself as owner of the suit land long after his father was dead without obtaining letters of grant of administration as required by law. That there was no land available for the Defendant because the land had not been succeeded and in any event the suit land had been decreed to belong to the Plaintiff vide valid Court orders.

19. The Defendant submitted that the Plaintiffs non-disclosure of the proceedings in SRMCC 408/88 was designed to conceal material evidence before this Court.

20. The Defendant submitted that the original Defendant Mwangi Kamau filed his defence in SRMCC 408/88 on 13/9/88 however the suit was heard in his absence on the 13/10/93 and judgement delivered on 21/10/93. By then Mwangi Kamau had died 4 years earlier on 9/8/1989. That no substitution was made pursuant to Order 24 rule 4 of the Civil Procedure Rules. The Defendant argued that the Plaintiff's

suit therefore abated on the 9/8/1990 and that by 1993 when the suit was heard there never existed one capable of being heard and judgement rendered. That the proceedings were null and void ab initio on account of abatement. That the execution of the decree was also null and void and of no legal effect.

21. Further he argued that the judgement of the Court issued on 21/10/93 was invalid because the Defendant against whom the judgement was to be executed was already dead; the suit land was no longer in the name of Mwangi Kamau but in the name of Isaac Kamau Mwangi; the new owner was not enjoined in the case as a party.

22. He argued that the law does not stipulate when a transfer should be registered after execution. That though the transfer to the current Defendant was done in 1988 it was only registered in 1993 due to lack of money to pay for the registration fees.

23. He asked the Court to do justice and rectify the whole process of transfer in both the Plaintiff and the Defendant and revert the land to the name of Mwangi Kamau, the original owner as it will give sanctity to the rule of law to prevail over any tainted transactions after the owners death.

24. Having evaluated the pleadings the evidence, the written submissions and all the materials placed before me in this case, the following are issues for determination;

- a. Whether the suit is abated.
- b. Whether the orders issued in the judgement in SRMCC No 408/88 were obtained through fraud; has the Defendant proved fraud.
- c. Who owns the suit land?
- d. Whether the Defendant has trespassed onto the suit land.
- e. Whether the Plaintiff is entitled to orders of eviction
- f. Whether the Plaintiff is entitled to orders of mesne profits

25. This case has had a treacherous and sustained odyssey through the corridors of the Court system for the last 6 decades starting from the African Courts in 1951 in the 1<sup>st</sup> phase.

26. According to the record, it is said that the suit land belonged to Gicharu Mbuthia the grandfather of the Plaintiff, Mwangi Philip Kiguta. His grandfather left the suit and in the care of Waiguru Kaniri when he left to settle in Rift Valley. A clansman namely Ngechu Chege sought permission to till the land from Mbuthia instead of Waiguru Kaniri. Ngechu gave a goat to Kaniri to redeem the land. Waiguru Kaniri was unhappy at the turn of events and filed a case at the Kigumo Land Tribunal in 1951 against Ngechu Chege. The Tribunal ruled in favour of Ngechu Chege to hold the land in trust for Gicharu Mbuthia. Waiguru Kaniri filed an appeal which was dismissed. At the second appeal the Court ruled that 4 goats should be given to Waiguru Kaniri so that he could relinquish the land to Ngechu Chege. When he was released from detention in 1957, Mwangi Philip Kiguta redeemed the land from Ngechu Chege by giving him 5 goats wherein vide an agreement dated the 20/8/1957, Ngechu chege agreed to surrender the land to Mwangi. Philip Kiguta took possession of the land after Mwangi Kamau the person whom Ngechu had put in possession to till the land was asked to vacate.

27. That during the land demarcation Kamau Mwangi claimed the land whereupon he was registered as owner of the suit land and a title issued to him on the 6/11/1965.

28. The 2<sup>nd</sup> voyage was in 1988 when the then Plaintiff sued the Defendant. Philip Kiguta filed a case SRMCC No 408/1988 at Thika where he claimed the suit land from Kamau Mwangi. The Court determined the case on the 21/10/93 in his favour and ordered Kamau Mwangi to be evicted from the suit land.

29. Dissatisfied by the outcome, the current Defendant filed Judicial Review proceedings vide JR No 73 of 1996 at Nyeri. Upon hearing the motion, the Court struck it out on the 16/12/1999. The orders issued by the Court dated the 21/10/93 thus remained undisturbed.

30. On the 17/2/98 Mwangi Philip Kiguta filed an independent suit in Nairobi vide HCCC No 345 of 1998 against Wanjiru Mwangi, the wife of Kamau Mwangi seeking inter alia eviction and mesne profits. This would later become HCCC No 63 of 2003 -Nairobi before being transferred to Nyeri and given HCCC No 147 of 2008 and later Nyeri ELC 266 of 2016.

31. This is the file that was transferred to Muranga ELC Court and registered under ELC 328 of 2017.

32. Unbuoyed and whilst the HCCC No 345 of 1998 was pending in Nairobi, Isaac Mwangi Kamau, the son of the late Mwangi Kamau filed a suit at Thika SPMCC No 259 of 2002 against Philip Kiguta which suit was stayed on the 29/6/2009 pending the hearing and determination of HCCC No 345 of 1998.

33. It is on record that in the SRMCC No 408 of 1988 was filed in 1988. The Plaintiff was Philip Kiguta against Kamau Mwangi. According to the death certificate on record Kamau Mwangi died on the 9/8/1989 while the case was pending. I have seen an order dated the 3/4/1990 which stated as follows;

“That Wanjiru Mwangi be and is hereby named the legal representative on behalf of Mwangi Kamau, deceased.”

34. On the 11/2/2000 the Defendant in HCCC No 345 of 1998 Wanjiru Mwangi filed a defense denying the Plaintiffs claim and a counterclaim seeking orders inter alia that a declaration that the suitland does not belong to the Plaintiff and damages in the sum of Kshs 217,000/-. This defence and counterclaim was later amended with leave of the Court on 28/1/19.

35. The record shows that Wanjiru Mwangi died on the 18/9/2010. On the 10/8/2011 an application was made to substitute the said Wanjiru Mwangi with her only son Isaac Kamau Mwangi. This application was made within 12 months hence the suit had not abated. It was allowed by consent of the parties on the 27/2/18.

36. According to the death certificate on record Philip Mwangi Kiguta died on the 15/9/2012 and was substituted by Waithira Mwangi who was appointed as administrator of his estate vide letters of grant of administration dated the 13/3/2014. This application was allowed on the 27/2/18.

37. The 1<sup>st</sup> issue is whether the suit against the Defendant has abated. The determination of this issue will set the course for the determination of the other issues set out above.

38. Order 24 Rule 1 provides as follows;

“The death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues.

where the cause of action survives or of continues to the surviving Plaintiff or Plaintiffs alone or against the or Defendants dies surviving Defendant or Defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving Plaintiff or Plaintiffs, or against the surviving Defendant or Defendants.

Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit. (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and, on the application of the Defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff: Provided the Court may, for good reason on application, extend the time.

Where within one year no application is made under subrule (1), the suit shall abate as against the deceased Defendant.”

39. In the case of Philip Kiguta, the Court is satisfied that substitution was proper. I say so because the letters of grant issued in favour of Waithira Mwangi are on record to evidence that she was legally appointed as such. The suit therefore as regards the current Plaintiff having survived the Plaintiff was properly revived and the deceased substituted.

40. On the 27/2/18 by consent of the parties the substitution of Wanjiro Mwangi, the deceased with the current Defendant was allowed. The said consent was adopted as the orders of the Court. There is nothing on record to show that that order has been set aside, vacated or appealed. It is the view of the Court that the substitution of Wanjiro Mwangi was and is valid and the parties would be estopped by their consent from claiming otherwise.

41. The finding of the Court is that the suit has not abated.

42. Were the orders issued in the judgement in SRMCC No 408/88 were obtained through fraud? It is the Defendant’s case that the orders in SRMCC No 408 of 1988 were obtained by the Plaintiff through fraud. That the suit was filed in 1988 against Kamau Mwangi who died on 9/8/1989. That he was never substituted in that suit and therefore the suit abated on the 9/8/1990. That the hearing that commenced on the 13/10/93 and the subsequent judgement delivered on 21/10/93 were nullities since the basis was an abated suit.

43. In response the Plaintiff has asserted that Mwangi Kamau was duly substituted by his wife Wanjiro Mwangi. That the suit did not abate and the orders granted were valid and have never been challenged in any Court of law.

44. Fraud being a serious charge, it is trite law that it must be pleaded and strictly proved to the standard higher than the balance of probabilities but slightly lower than beyond reasonable doubt. Courts cannot infer fraud from the facts/evidence in a case. The burden of proof lies with the one who alleges fraud to do so. It is the duty of the Court therefore to determine if the Plaintiff has successfully proved fraud on the part of the Defendants.

45. In the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

46. I have perused the record and it is not in dispute that the suit was filed in 1988 between Philip Kiguta and Mwangi Kamau. It is on record that Mwangi Kamau died on the 9/8/1989 as per the death certificate dated the 17/10/98. The record also attests to a Court order issued on

the 30/10/1989 substituting Mwangi Kamau with Wanjiro Kamau. It read as follows;

“ . . . . . Upon hearing the counsel for the Plaintiff in the absence of the counsel for the Defendant who was duly served it is hereby ordered that Wanjiro Kamau be and is hereby named the legal representative on behalf of Mwangi Kamau (deceased).”

47. Going by the above orders it follows that Kamau Mwangi was duly substituted in a valid suit.

48. According to the record, the said Kamau Mwangi and later Wanjiro Mwangi were represented by counsel on record namely R K Kimani, now deceased. It is also on record that the said substituted Defendant attended Court severally and was recorded as present.

49. Come the hearing date on the 13/10/93 the record clearly shows that both the Plaintiff and the Defendant was represented by counsels. In particular Mr R K Kimani was recorded as being present for the Defendant. It would appear that the Defendant was absent but that notwithstanding the hearing of the case proceeded as scheduled in the presence of the Defendants said Advocate.

50. It is the finding of the Court that Kamau Mwangi was duly substituted by his wife Wanjiro Kamau and the said Defendant was duly represented by counsel at the hearing of the case.

51. It is on record that the Defendant has admitted that he has not appealed against the judgment was delivered on the 21/10/93. An attempt to file a Judicial review in Nyeri was struck out and therefore the judgement remained undisturbed.

52. According to the green card on record the Defendant became registered as owner of the suit land on the 26/10/93 under unexplained circumstances. I say unexplained because though he claims to have been gifted the suit land by his father, he caused the registration of the same 5 years later and after the death and without confirmation of letters of grant of administration.

53. It is the finding of the Court that the Defendant has not successfully proved fraud on the part of the Plaintiff.

54. Section 24 and 25 of the Land Registration Act contains provisions similar to section 27 and 28 of the Registered Land Act( now repealed). Section 26 of Land Registration Act further mandates Courts to take a certificate of title issued by the Registrar as prima facie evidence that the person named as proprietor of the land is absolute and indefeasible owner subject to the encumbrances restrictions and limitations permitted by law. The said section goes ahead to provide two instances in which a title can be impugned which is; on the ground of fraud or misrepresentation to which the person is proved to be a party; secondly whether the title is acquired illegally unprocedurally or through a corrupt scheme.

55. Barring no other evidence to support any fraud or the acquisition of title through illegalities and or a corrupt scheme, the Court finds no ground to impugn the title of the Plaintiff as disclosed in the register as at 20/1/95.

56. Whether the Defendant has trespassed onto the suit land. Section 3 (1) of the Trespass Act, Cap 294 provides that:

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

Thus, trespass is an intrusion by a person into the land of another who is in ownership

57. Evidence has been led that the Defendant has entered the Plaintiff's land and remained thereon from 1965 to date. This trespass is the nature that is continuous. The Defendant has not given any justifiable reason to so enter and remain on the suit land and I am inclined to find that the Defendant is trespassing on the land of the Plaintiff. I also find that eviction of the Defendant is founded.

58. The Plaintiff's prayer for mesne profits fails because it is unsupported.

**59. Final orders;**

a. The Defendant's counterclaim failed. It is dismissed.

b. The Plaintiff's case partly succeeds.

c. The Defendant is ordered to voluntarily vacate the suit land LOC18/GACHOCHO/839 within a period of 120 days from the date of this judgment and in default eviction to ensue.

d. The OCS commanding the Police Station in the area is ordered to supervise the eviction and ensure law and order is maintained.

e. The eviction to be carried out by an authorized Court bailiff.

f. An order of declaration is hereby issued that the interested party is entitled to 0.1 acres out of LR LOC18/GACHOCHO/839 comprising of Nyona tea buying centre.

g. The Plaintiff be and is hereby ordered to transfer 0.1 acres to GACHARAGE TEA FACTORY as per the Court orders as set out

in para 15 of the Judgement.

h. The claim in respect to mesne profits is declined.

i. The Defendant is ordered to pay the costs of the suit and the counterclaim to the Plaintiff

**60. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 19<sup>TH</sup> DAY OF DECEMBER, 2019.**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Maina HB for Karuga Wandai for the Appellant

Mureithi HB for Kirubi for the Defendant

Irene and Njeri, Court Assistants