



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELCA NO 9 OF 2017**

**(FORMERLY NKR HCCA NO 226 OF 2011)**

**JOSEPH NDUNGU MBUTHI.....1<sup>ST</sup> APPELLANT**

**MARY WANGUI MBUTHI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JOSEPH NDUNGU MUKUHI.....RESPONDENT**

**Being an Appeal against the judgment of Hon Teresia Matheka Principal Magistrate**

**at Nyahururu Court delivered on the 10<sup>th</sup> November 2011 in PMCC No. 261 of 2006**

**JUDGEMENT**

1. What is therefore before me for determination on Appeal is a matter wherein the Honorable trial Magistrate (as she was), delivered her judgment on the 10<sup>th</sup> November 2011 in Nyahururu PMCC No. 261 of 2006 where she dismissed the Appellants' counter claim and struck out the Respondent's suit with costs, for having no jurisdiction.

2. The Appellants, being dissatisfied with the Judgment of the trial Magistrate have filed the present Appeal before this court.

3. The grounds upon which the Appellants have raised in their Memorandum of Appeal include

i. That the learned trial Magistrate erred in law and in fact in failing to hold that the Respondent was a trustee of 11 acres for the estate of Ruth Wangari Nd'ungu alias Wangari Mbuti (deceased) out of the suit land.

ii. The learned trial Magistrate erred in law and in fact in failing to find that the suit land was the subject matter of Nyahururu RMCC No.38 of 1983 wherein the issue of ownership thereof had finally been settled.

iii. The learned trial Magistrate erred in law and in fact in failing to hold that the Respondent's registration as the proprietor of the suit land was obtained through fraud or misrepresentation of facts and was therefore null and void and ought to be canceled.

iv. The learned trial Magistrate erred in law and in fact in failing to follow, distinguishing decisions of the superior court cited by the Appellants' counsel in his submissions thereby occasioning a miscarriage of justice.

v. The learned trial Magistrate erred in law and in fact in giving a judgment which was against the weight of the evidence.

4. The Appellants thus sought for;

i. That this Appeal be allowed with costs.

ii. That the Appellants' counterclaim in the subordinate court be allowed with costs.

iii. That any other or better relief deemed fit to by the honorable court be granted.

5. The Appeal having been filed on the 19<sup>th</sup> February 2019 was admitted to hearing on the 25<sup>th</sup> March 2019 wherein by consent parties agreed to dispose of the same by way of written submissions.

#### **Appellants' submission.**

6. The Appellants' preamble to their submission was based on the defining issue of a constructive trust according to SNELLS which states that;

‘Constructive trust was a trust which is imposed by equity in order to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties. A constructive trust is a formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee’

7. The Appellants' submission was that the facts giving rise to the issue of trust was that there had been a case being Nyahururu RMCC No. 38 of 1983 between the Appellants' and the Respondent's mother. An order had been issued that the Appellants' mother would be entitled to a portion of 11 acres pursuant to which the land had been subdivided into parcels of land being No. 641 and No. 642, what had remained was the registration of the mutation and transfer at the Lands Office. That the Respondent herein as the holder of the legal title cannot in good conscience retain the beneficial interest and is deemed to be a trustee of the portion of the 11 acres on behalf of the decrease's estate. In so submitting the Appellants relied on the case of **NWK vs JKM & Another [2013] eKLR**

8. It was further the Appellants' submission that a constructive trust can arise from the conduct of a party and the court may infer a common intention therefrom that such property in dispute was to be shared beneficially.

9. That in the decided case of **Charles K. Kandie vs Mary Kimoi Sang [2017] eKLR** the court had held that;

‘that the law never implies, the court never presumes a trust but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intention of the parties to create a trust must be clearly determined before a trust will be implied’

10. It was therefore the Appellants' humble submission that in their scenario, a constructive trust had arisen.

11. On the second ground of Appeal, the Appellants' submission was that they had exhibited before the trial court that there had been a previous case between the Respondent and their mother wherein the case had been heard and determined and the issue of ownership had been settled, that therefore the matter before the trial court was res judicata in the circumstances.

12. The Appellants relied on the provisions of Section 7 of the Civil Procedure Act and the decided cases of **Nathaniel Ngure Kihiu vs Housing Finance [2018] eKLR** and the case of **John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** to submit that the issue at hand was res judicata and should not be litigated once again.

13. In regard to ground No. 3 of their Memorandum of Appeal, the Appellants submitted that it was trite law that fraud must be specifically pleaded and strictly proven. That the facts giving rise to the claim before the subordinate court were that after the death of the Respondent's mother, there had been a Succession Cause filed in Nairobi being Nairobi HC Succession Cause No. 1955 of 1944.

14. That although the Respondent had admitted that he knew that the Appellants' were in possession of the suit land, yet he had not included them as beneficiaries of the estate wherein he had proceeded with the suit and procured a Grant which made him the sole heir of the deceased's estate. He had then used the said Grant to process the title deed in his name thereby transferring the land secretly without involving the Appellants' although he was aware of their beneficial interest.

15. That the foundations of Section 26 of the Land Registration Act were categorical that a certificate of title is prima facie the evidence that the person named therein is the proprietor of the land, but that the same could be challenged where the certificate of title had been acquired fraudulently, un-procedurally or through a corrupt practice. The appellants' submission was that the evidence produced at the trial court was to the effect that the title to the Respondent had been obtained illegally and/or un-procedurally. The Appellants relied on the decided case of **Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others [2015] eKLR** and the provisions of Section 80(1) of the Land Registration Act to submit that the registration of the Respondent or as proprietor of the suit land ought to be cancelled and the appellants' entitlement given to them.

16. The appellants further submitted that the trial court failed to follow their Counsel's submission thus occasioning a miscarriage of justice despite them having discharged their burden to the required standard of proof.

17. The Appellants' thus sought for both their Appeal and counter claim in the subordinate court be allowed with cost. They also sought for any other or better relief deemed fit by the honorable court.

18. As the time I am writing this judgment, it must be noted that the Respondent herein neither filed his response to the Appeal nor filed his written submissions.

#### **Evidence adduced in the trial Court.**

19. I have considered the Appeal herein, Counsel's submission and the annexed authorities. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I

did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (*See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*). I also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*).

20. Briefly, the matter that gave rise to the present Appeal is that a suit was filed on the 27<sup>th</sup> July 2006 by the Respondent against the Appellants wherein the Respondent had alleged that the Appellants were illegally in occupation of the suit land being Nyandarua/Shamata/81, and had sought for their eviction.

21. The Appellants in their defence and counter claim filed on the 4<sup>th</sup> September 2003 had denied the allegations in the Respondent's plaint stating that the matter was res judicata pursuant to Nyahururu RMCC No. 38 of 1983 in which their mother had been awarded 11 acres of the suit land. That subsequently the Respondent had secretly filed succession proceedings in respect to his deceased mother's estate and in exclusion of the Appellants. Subsequently, he had secretly transferred the whole suit land to himself despite the same having been divided into two giving rise to parcels numbers 641 and 642 which action was pursuant to the court orders.

22. The Appellants, in their counter claim had sought for a declaration that the registration of the Respondent as absolute proprietor of No. Nyandarua/Shamata/81 was obtained fraudulently, through misrepresentation of facts and it was therefore null and void. That in the alternative they sought that the Respondent be registered as proprietor of 11 acres in trust for the estate of their mother Ruth Wangari Ndu'ngu. They also sought for the cancellation of the Respondent as the absolute proprietor Nyandarua/Shamata/81.

23. The matter proceeded for hearing on the 14<sup>th</sup> October 2010, where the Respondent herein testified that he had been the proprietor of the suit land since the year 2006 having inherited the same from his mother one Hannah Mukuhi Gutuki upon her death on 16<sup>th</sup> June 1991 through Succession Cause No. 1955 of 1994 wherein he had obtained letters of administration and a Grant thereafter dated 21<sup>st</sup> November 2005

24. He testified that because he was not in good terms with his mother, he had lived away from her but when he had come home in 1987, he had found the Appellants thereon and where upon inquiry, his mother had informed him that although she did not know the Appellants, that they had been occupying the suit land. That after the death of his mother and since the Appellants were hostile people, he had not wanted to chase them away or quarrel with them.

25. That when he had filed the suit against the Appellants, he was not aware of the previous suit in PMCC No. 38 of 1983, and neither was he aware of the alleged transfer of the 11 acres of land and the subdivision of the suit land into parcel No. 641 and 642. He has also testified that the Appellants had erected a fence comprised of posts and wire on his land which boundary was impassable. He was however adamant that although the Appellants occupied 11 acres of his land while he occupied 6 acres that they were trespassers to his land who ought to be evicted from therein.

26. The Respondent also testified that he was not aware that on 15<sup>th</sup> of August 1967 his mother had sold and transferred the land to anyone. That he was also not aware of any consent or Gazette Notice of 22<sup>nd</sup> November 2005, but that he had been given the title deed by his mother.

27. The Appellants' case on the other hand was hinged on the fact that their mother, Ruth Wangari Ndu'ngu had bought the suit land being Nyandarua/Shamata/81 which measured 17 <sup>1</sup>/<sub>2</sub> acres from Hannah Mukuhi Gutuki, the Respondent's mother, for ksh 3,150/- wherein she had been given the transfer by the Settlement Fund Trustee dated 15<sup>th</sup> March 1967 and a consent. That after the purchase of the suit land, the Appellants and their mother had taken possession in 1967. That vide a letter dated 15<sup>th</sup> March 1967 cancelling the original documents, Hannah Mukuhi Gutuki had left the suit land to an unknown destination.

28. Later in the year 1983 Hannah Mukuhi Gutuki had tried to evict them from the suit land wherein she had filed a complaint before the Chief, and the District Officer before escalating the same to the court in Nyahururu wherein she had filed suit which had been registered as Nyahururu PMCC No. 38 of 1983.

29. That pursuant to the judgment of the court in the said suit, there were orders to the effect that the land be divided and that their mother Ruth Wangari Ndu'ngu gets 11 acres. Subsequently a mutation map of Nyandarua/Shamata/81 was drawn and the land sub divided into two parcels of land creating parcel No. 641 belonging to the Appellants herein and Parcel No.642 which was given to the Respondent's mother. That the execution documents were issued and signed by the court executive officer. The matter was subsequently gazetted on 22<sup>nd</sup> April 2005 but before obtaining title, Ruth Wangari Ndu'ngu had passed away on the 3<sup>rd</sup> December 2005.

30. That the Respondent herein was registered on 28<sup>th</sup> January 2006 to the whole parcel of land being plot No. 81 through a Succession Cause which they were not aware of. The Appellants' had thus sought that the registration of the Respondent to the suit land herein be canceled and they be issued with a title deed for the 11 acres as per the court order in Nyahururu PMCC No. 38 of 1983.

#### **Determination.**

31. I have considered the evidence adduced in court as well as all the exhibits produced therein, the submissions by the Appellants' Counsel, the law as well as the Authorities herein cited. I find two issues arising for determination as;

- i. Whether by virtue of the decision in Nyahururu Civil suit No. 38 of 1983, the subsequent suit in Nyahururu Civil suit No. 216 of 2006 was res judicata.

ii. Whether the Respondent herein obtained title fraudulently and therefore the same should be cancelled.

32. On the first issue for determination, I find that indeed a suit had been filed by Mukuhi Gutuka against Wangari Mbuthi in the Resident Magistrate's Court at Nyahururu vide Nyahururu Civil suit No. 38 of 1983 claiming proprietorship of the suit land. That vide an order of 17<sup>th</sup> December 1985, the Court had directed that the Defendant apportion 7 acres to the Plaintiff. On the 19<sup>th</sup> May 1988 the court gave further orders that the Executive officer of the court executes all transfer documents, wherein vide the final orders of 16<sup>th</sup> May 1989, the Court made orders to the effect that;

i. 'That the Defendant Wangari Mbuthi to subdivide seven acres to the Plaintiff Mukuhi Gutuka

ii. That the remaining 11 acres be registered in the name of Wangari Mbuthi.

iii. That the Executive Officer of the court to execute all necessary transfer documents.'

33. The Court's pronouncement was published in the Gazette Notice No. 2933 of 22<sup>nd</sup> April 2934. Despite these orders being in place, the Respondent had gone ahead to file a Succession Cause in the Nairobi High Court being No. 143 of 2006 wherein he had obtained letters of Administration to the estate of Ruth Wangari Ndu'ngu alias Wangari Mbuthi and subsequently had the whole suit land transferred into his name. He then filed another suit being Nyahururu PMCC No 261 of 2006 seeking to evict the Appellants from the suit land.

34. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

**"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"**

35. Section 7 of the Civil Procedure Act is a provision applied to cases where the issue in disputes were similar to an issue that was previously in dispute between the same parties when they were litigating under the same title.

36. The test in determining whether a matter is *res judicata* was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows:

i. The matter in issue is identical in both suits;

ii. The parties in the suit are the same;

iii. Sameness of the title/claim;

iv. Concurrence of jurisdiction; and

v. Finality of the previous decision.

37. In the present case, it is not in dispute that the Appellants and the Respondent's mothers were parties to the suit in Nyahururu Civil suit No. 38 of 1983, where the subject matter was Nyandarua/Shamata/81, it is also not in dispute that the Respondent's mother in that suit sought to evict the Appellants' mother from the suit land claiming proprietorship. It is also not in dispute that the matter was heard and finally determined by a court of competent jurisdiction. And lastly it is not in dispute that the Respondent herein filed a similar suit being Nyahururu Civil suit No. 216 of 2006 wherein the subject suit was similar and the prayers sought were similar to Nyahururu Civil suit No. 38 of 1983. It is not in dispute that the Parties litigating in the subsequent suit were children of the parties in the former suit litigating over the same suit land and finally, it is not in dispute that there was no Appeal filed to challenge the decision of the court in Nyahururu Civil suit No. 38 of 1983.

38. A further look at the provisions of Section 7 of the Civil Procedure Act, the same clearly stipulates that;

'.....or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit... (My emphasis).

39. I find that the issues in the previous suit which were substantially the same in the subsequent suit were determined and covered by the decision in the previous case. I also find that parties in the subsequent suit, the Plaintiff/Respondent was a son to the Plaintiff in the previous suit hence he was estopped from litigating pursuant to the provisions of Section 7 of the Civil Procedure Act. Finally, I find that the previous case was determined by a court of competent jurisdiction and the same was not challenged on Appeal. The judgment and or/ order of the court in Nyahururu Civil suit No. 38 of 1983 having not been overturned by an appellate court remains a judgment of court and is enforceable. I therefore find that the Nyahururu Civil suit No. 216 of 2006 was Res judicata Nyahururu Civil suit No. 38 of 1983.

40. On the second issue as to whether the Respondent herein obtained title fraudulently and therefore the same should be cancelled; the Court of Appeal in the case of **Arthi Highway Developers Ltd vs West End Buthery Ltd & Others C.A Civil Appeal No. 246 of 2013 (2015 e K.L.R)**, cited the following passage from **Bullen & Leake precedents pleadings 13<sup>th</sup> edition** at Page 427:

“The statement of the claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of ..... It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved ..... General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

41. The standard of proof on the issue of fraud is very clear in law, wherein a party pleading the same is expected to go a notch higher than the mere balance of probability threshold as was held in the cases of **Mahendra Shah vs Barclays Bank International Ltd & Another [1979] eKLR** and in the case of **Davy vs Garrette [1978] Ch.473 at pg 469**, where it had been held that it was not allowable to leave fraud to be inferred from the facts.

42. I have no doubt in my mind that the Appellants herein distinctly pleaded the facts on which fraud is alleged against the Respondent. Which facts were that Judgment was delivered in Nyahururu Civil suit No. 38 of 1983 on the 16<sup>th</sup> May 1989, wherein 11 acres of the suit land was vested to the Appellants’ mother and orders issued that the Executive Officer of the court to execute all necessary transfer documents. Pursuant to the said orders being in place, the Respondent herein had himself registered as the proprietor of the whole parcel of land being Nyandarua/Shamata/81 on the 20<sup>th</sup> January 2006 wherein he had been issued with a title deed despite there having been no Appeal over -turning the trial court’s decision.

43. The Respondent herein having been registered as the proprietors of parcel No. Nyandarua/Shamata/81 and a title having been issued to him, the same could only be impeached in one of the two scenarios envisaged under Section 23(1) of the Registration of Titles Act Cap 281 Laws of Kenya (now repealed) and the new Section 26 (1) of the Land Registration Act, No. 3 of 2012 which embody the doctrine of indefeasibility of title as envisaged under the Torrens System of registration which applies to Kenya

44. It was **held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR**, that the statutorily, the sanctity of title to land is assured and protected under **Section 24, 25 and 26 of the Land Registration Act 2012** produced as herein under’;

45. Section 24 stipulates as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

46. Section 25 of the act provides:

(1) The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

47. Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

(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.

48. In the present case, the Respondent cannot shield himself with the title he holds. The act of the Respondent of processing the registering of the whole parcel of the suit land in his name through a Succession Cause Knowing very well that a court order was in existence that granted the Appellants’ mother 11 acres to be excised from the said parcel of land. He did not stop at that but went a step further to file another suit seeking to evict the Appellants from the suit land. The Respondent’s actions were patently illegal and un-procedural and he must

have known what he was doing. It is therefore clear the title held by the Respondent can be impugned under section 26(1) (b) of the Act since the title he holds was acquired illegally, un-procedurally or through a corrupt scheme.

49. I find that there having been an order in Nyahururu Civil suit No. 38 of 1983 that had not been overturned or set aside on Appeal and/or review, that the registration of the Respondent to the suit title was obtained through fraud and/or misrepresentation and his registration as proprietor of Nyandarua/Shamata/81, therefore stands impugned. To this effect therefore, I make the following order:

- i. The Respondent's registration as the absolute proprietor of title No. Nyandarua/Shamata/81 is herein canceled.
- ii. There should be immediate transfer of 11 acres to be excised from No. Nyandarua/Shamata/81 in the Appellants' favour as the personal legal representatives of the Estate of Ruth Wangari Ndungu Alias Wangari Mbuti (deceased) and in default the executive officer of the honorable court to execute all necessary transfer documents to effect the same pursuant to the orders issued in Nyahururu Civil suit No. 38 of 1983 .
- iii. There be costs to the Appellants both in this Appeal and in the Counter claim in the trial court.

50. It is so ordered.

**Dated and delivered at Nyahururu this 3<sup>rd</sup> day of December 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**