



**REPUBLIC OF KENYA**  
**ENVIRONMENT AND LAND COURT**  
**AT NYAHURURU**

**ELC CASE NO 241 OF 2017**

**MARGARET WANJIRU KINYANJUI**

**(Suing as the legal representative of the Estate**

**of PERIS WAMBUI KINYANJUI (Deceased)....PLAINTIFF**

**VERSUS**

**JOHN MBURU KINYANJUI.....DEFENDANT**

**JUDGEMENT**

1. By a plaint dated 27<sup>th</sup> April 2016 the plaintiff herein instituted this suit against the defendant seeking for orders that:

- i. A declaration that the Estate of Peris Wambui Kinyanjui (Deceased) is the legitimate owner of the parcel No. LR No. Nyandarua /Olkalaou South 2586
- ii. There be cancellation of the Defendant as the Proprietor thereof and for the same to revert to Peris Wambui Kinyanjui.
- iii. Costs of the suit plus interest at court rates.
- iv. Any other further relief that the court may deem just and fit to grant.

2. The pleadings as well as summons to enter appearance were served upon the defendant who entered his memorandum of appearance and filed his statement of defence the 28<sup>th</sup> June 2016.

3. Upon the Establishment of the Nyahururu High court and the subsequent transfer of matters from the Land and Environment Court Nakuru to the Land and Environment Court Nyahururu, Notices were issued and this matter was set down for mention.

4. On the 27<sup>th</sup> April 2017 when the matter came up for mention with a view of taking a hearing date, Counsel for the plaintiff informed the court that the Plaintiff had complied with order 11 of the Civil Procedure Rules and sought for the matter to be certified ready for hearing.

5. The Defendant's Counsel on the other hand confirmed that they had not complied but was in agreement with the Plaintiff's counsel that the matter be set down for hearing by which time they would have complied with order 11 herein above stated.

6. The matter was confirmed ready for hearing and set down for hearing for the 27<sup>th</sup> June 2017 on which day the defendant had not complied but asked for an adjournment to do so. The adjournment was granted despite protest from Counsel for the Plaintiff. Another date for hearing was thus re-scheduled for the 16<sup>th</sup> October 2017 on which day, the Defendant had still not complied and neither was there an appearance by either his Counsel or himself.

7. The court, being aware that the hearing date was taken by consent by both parties in court, and further being aware of the provisions of Order 12, rule 2 of the Civil Procedure Rules, the court directed that the matter proceeds ex-parte.

**The Plaintiff's case**

8. The plaintiff testified that she was the daughter of one Peris Kinyanjui (deceased) who died on the 24<sup>th</sup> November 2005. A death

certificate was produced and marked as exhibit 1.

9. That before her mother died, she had land parcel No. LR No. Nyandarua/Olkalaou South 1206 measuring 12 acres. A green card to this effect was produced and marked as exhibit 2.

10. That the family had agreed that the said parcel of land was to be sub-divided into 4 pieces of 3 acres each amongst her 4 brothers namely;

- i. Wilson Mbugua Kinyanjui
- ii. Joseph Wanjohi Kinyanjui
- iii. Nicholas Njenga Kinyanjui
- iv. Francis Muronga Kinyanjui

11. That before the family could institute a Succession Cause she was informed that the Defendant herein, who is her brother had fraudulently sub-divided the land and had transferred part of it to his name and sold the rest to unsuspecting individuals, without consent of the family members.

12. That when she went to investigate this allegation, she found that indeed the defendant had sub-divided the deceased's land on the 1<sup>st</sup> November 2013 which resulted into parcels No 2574-2587. This was long after their mother's death and the family had not filed a Succession Cause.

13. That amongst the sub-divided parcels of land, parcel No LR No. Nyandarua/Olkalaou South/2586 measuring 6 acres was still registered in the defendant's name (green card to this effect was produced as exhibit No. 3) wherein counsel for the Plaintiff, vide his letter dated the 16<sup>th</sup> December 2014 and addressed to the District Land Registrar asked him to place a restriction on the said parcel of land, which was done. This letter was produced as exhibit 4.

14. That on the 3<sup>rd</sup> November 2015, the Plaintiff was issued with Letters of Administration Ad litem of the Estate of the deceased for the purpose of filing and prosecuting the suit against the defendant herein and for cancellation of the title deed for No. Nyandarua/Olkalaou South/2586. The said Grant ad litem was produced as exhibit 5.

15. The plaintiff testified that the remaining piece of land belonged to her two brothers who were residing in the United States of America but she preferred that the court orders that the whole piece of land be reverted in the names of her deceased mother so that the family could take out letters of Administration to enable them deal with the deceased's property legally and appropriately.

16. The plaintiff closed her case and asked the court to rely on her evidence and exhibits produced as they would not be filing any submissions.

17. I have also looked at the defendants' statement of defence wherein he denied each and every allegation by the plaintiff adding that the suit land did not form part of the estate of the deceased Peris Wambui Kinyanjui and that suit No Nyahururu CMCC No. 159 of 2015 touching on the same matter was still pending in court upon which he would raise a Preliminary objection prior to the hearing of the present suit.

18. I note that No Nyahururu CMCC No. 159 of 2015 which was pleaded in the plaint shows that the parties to the suit were different from parties in the present suit. The court, having not been supplied with neither further information on the said suit nor there being an application for preliminary objection raised to the effect, that this suit was subjudice, I am afraid that I cannot deliberate on this issue.

19. Having heard the plaintiff's evidence as well as having looked at the documents filed herein above, the issues for determination in my view can be framed as:

- i. Whether the suit land formed the Estate of the deceased.
- ii. Whether the subdivision of Nyandarua/Olkalaou South 1206 and subsequent sell and/or registration of the resultant sub plots, in particular Nyandarua/Olkalaou South 2586 to the Defendant was fraudulently and illegally done.
- iii. Whether the defendant herein intermeddled with property of deceased
- iv. Whether the plaintiff is entitled to the prayers sought in the plaint.

20. It is worth noting that the matter proceeded ex-parte pursuant to Order 12, rule 2 of the Civil Procedure Act and as such the evidence adduced in court was uncontroverted.

21. From the evidence tendered in court, there was therefore no dispute that at all material times Land Parcel No. Nyandarua/Olkalaou South 1206 was registered in the name of one Peris Kinyanjui(deceased) on the 27<sup>th</sup> April 1999, who subsequently collected the title on the same day.

22. That the said Peris Kinyanjui died on the 24<sup>th</sup> November 2005 and subsequently that about 1<sup>st</sup> November 2013, the Defendant, who is the plaintiff's brother and the son of the deceased, fraudulently and without consent or authority of the family of the deceased caused a subdivision to be done on the parcel whereof the same was subdivided into parcels No 2574-2587.

23. It was also not in dispute that the defendant subsequently, fraudulently and illegally, more so as he had not sought the necessary authority by way of a confirmed Grant of Letters of Administration to the deceased's Estate, registered himself as the proprietor of parcel no parcel No 2587 consisting of 6 acres on the 31<sup>st</sup> July 2014.

24. It is trite law that once a proprietor of land has died, his estate can only be administered by his administrators who of necessity must obtain Letters of Administration from the court, and only after confirmation of the grant would the administrators be seized with legal authority to deal with capital assets of the deceased constituting his estate.

25. **Section 55(1) Laws of Succession Act, Chapter 160** stipulates as follows:

**“No grant of representation whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by Section 71.**

26. In the present case, the plaintiff had testified and adduced documentary Evidence that no grant of representation was applied for by any of the deceased's beneficiaries as at the time the Defendant was dealing with the deceased's property being Land Parcel No. Nyandarua/Olkalaou South 1206 and therefore all dealings touching on the deceased's land by way of sub-division and registration thereafter was illegally done.

27. The particulars of fraud and illegality were stated in the plaint.

28. Evidence adduced in court clearly pointed out to the fact that the deceased's property was to be divided amongst her 4 sons two of whom reside out of the Country. The action of the defendant herein deprived them, their beneficial share of the deceased's Estate.

29. It is also not in dispute that upon the defendant dealing with the deceased's property as above stated, a caution was registered against the resultant title to prohibit all dealings pending grant of letters of administration which as at the date of filing this suit had not been obtained save for a limited grant obtained by the plaintiff.

30. From that evidence, it is quite clear that the Defendant's title was not procedurally and legally entered but was obtained through an elaborate scheme of illegality and fraud.

31. **Section 26(1) of the Land Registration Act** provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 .....and the title of that proprietor shall not be subject to challenge except-

- i. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- ii. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.”

32. **Section 80(1) of the Land Registration Act, 2012** stipulates as follows;

(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

33. This is to the effect that a title that has been fraudulently obtained, ought to be rectified through cancellation of the same by a court order.

34. In the Case of **Paul Muira and Another -vs- Jane Kendi Ikinyua and 2 others (2014) eKLR**, the court of Appeal held that the law does to recognize or protect persons who claim properties that were obtained through unlawful means.

35. Having made findings that due process was not followed in dealings with the deceased's land parcel, the subject of this case, as far as there was no confirmed grant of Letters of Administration or any authority, and particularly for the subdivision and registration of the said subdivision to the defendant, I came to the inevitable conclusion that the Title Deed issued on the 31<sup>st</sup> July 2014 to the defendant was so issued fraudulently through an illegal scheme made to deprive the deceased's estate of its enjoyment and benefits from the said land parcel.

36. Section 45 of the Law of succession prohibits anyone from intermeddling with property of deceased person and stipulates that:

45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

37. The evidence adduced in court clearly shows that the estate of the deceased has been intermeddled with and has changed hands even before the institution of the succession cause. I find that the acts of the defendant herein amounted to intermeddling with the estate of the deceased which is in contravention of the mandatory provisions of **Section 45 (1) of the Law of Succession Act** and as such, he is liable to be punished in accordance with Section 45 (2) (a) of the Law of Succession Act..

38. Consequently, and for the above reasons judgment is herein entered for the plaintiff against the Defendant as follows:

- i. A declaration is issued that Peris Wambui Kinyanjui (Deceased) is the registered proprietor of land parcel known as No. LR No. Nyandarua /Olkalaou South 1206.
- ii. That the Subdivision of Nyandarua/Olkalaou South 1206 into portions No 2574-2587 and the subsequent registration of Nyandarua/Olkalaou South 2587 in the Defendant's name as the proprietor are fraudulent, illegal and therefore null and void.
- iii. An Order of cancellation of title Nyandarua/Olkalaou South 2587 is issued together with a an order for the amendment of the map to restore Land Parcel Nyandarua/Olkalaou South, 1206 to its status as at 27<sup>th</sup> April 1999.
- iv. Pursuant to Section 45(2) (a) of The Law of Succession Act, the defendant is herein fined a sum of kshs.9000/- in default of payment to serve five (5) months imprisonment.

39. In the upshot, I find that the Plaintiff herein has proved her case on a balance of probabilities and I allow it with cost as prayed.

**Dated and delivered at Nyahururu this 31<sup>st</sup> day of January 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**