



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 75 OF 2017

**SAMUEL MUIGAI KARIUKI (Suing as the legal
representative of the estate of the LATE DAVID**

KARIUKI MWANGI - PLAINTIFF

VS

FRANCIS MWANGI MUCHOKI - DEFENDANT

JUDGMENT

1. The Plaintiff filed suit on 23/10/16 against the Defendant as the legal representative of the estate of David Kariuki Mwangi, his deceased father. In the Plaint dated 23/10/16 and later amended on the 10/4/17, the Plaintiff averred that his late father David Kariuki Mwangi was the registered proprietor of Land Parcel NGINDA/SAMAR/BLOCK 2/82 which he acquired in 1994. That his father passed away on 9/7/94. Further he stated that on 5/10/16 he found out that the Defendant had in 2014 fraudulently transferred and registered himself as the owner of the suit property. He particularized 3 instances of fraud against the Defendant as follows;

- a. Getting registered as the owner when the registered proprietor was long dead.
- b. Acquiring the land when there was no valid sale agreement.
- c. Using forged documents to acquire registration.

2. The Plaintiff avers that through the fraudulent acts of the Defendant, the Defendant has taken occupation of the suit property which acts amounts to trespass and that the Plaintiff has been denied quiet possession of the suit property. It is his case that the registration of the Defendant was conjured by the Defendant in 2014 long after his father passed away in 1994.

3. On the basis of the above the Plaintiff seeks Orders as follows; -

- a. A declaration that the registration of the Defendant as the proprietor of Land Parcel No. NGINDA/SAMAR/BLOCK 2/82 was fraudulently acquired and the subsequent transfer and registration of the Defendant as the proprietor is null and void and his registration as the owner and his title be cancelled.
- b. The Defendant's name as the registered proprietor of the Land Parcel No. NGINDA/SAMAR/BLOCK 2/82 be deleted and the name of David Kariuki Mwangi be restored as the registered proprietor.

c. The Defendant, his servants, agents or anybody howsoever occupying through the Defendant's consent be evicted from Land Parcel No. NGINDA/SAMAR/BLOCK 11/82.

d. Damages for trespass.

e. Costs of this suit and interest.

4. The Defendant denied the Plaintiff's claims in his defence and counterclaim dated 19/12/16 and filed on 10/1/17. The Defendant denied that the Plaintiff's father was the registered owner of the suit property. He also denied fraud. In admitting that he is currently the registered owner, he denies being a trespasser. In para 6 of the Defence, he however avers that he bought the land from the registered proprietor one David Kariuki Mwangi vide a sale agreement dated 17/5/14 in consideration of Kshs. 2,500,000/=. That he also obtained Land Control Board after which the land was transferred to him on 6/6/14.

5. The Defendant contends that the Plaintiff has no *locus standi* to sue for and on behalf of the estate of David Kariuki Mwangi and sought to raise a Preliminary Objection to have the Plaintiff struck out. In his counter claim the Defendant sought the dismissal of the Plaintiff's claim with costs and an Order directing the Land Registrar, Murang'a to remove the restriction registered as entry No. 8 on 11/6/14 on the suit land. Further he sought general damages and costs of the suit.

6. At the hearing of the case the Plaintiff testified solely and stated that his father the late David Kariuki Mwangi was the registered proprietor of the suit land. He produced a certified copy of the green card dated 5/10/16 which showed that his father was registered as such on 26/1/94. On Cross-examination he admitted that though he held the documents of title for the land he had not produced them in Court other than the certified copy of the green card aforesaid.

7. The Plaintiff stated that he carried out a search of the suit land for purposes of commencing proceedings on the estate of his deceased father when he discovered upon obtaining an abstract of the title that the suit land had been transferred to the Defendant on 6/6/14.

8. The Plaintiff in support of his case produced an amended grant of letters *adlitem* dated 17/7/17 which indicated that the deceased David Kariuki Mwangi died on 9/7/94. Further he averred that he stopped cultivating the suit land in 2010 and that he has no knowledge of another person called David Kariuki Mwangi and that he did not know the Defendant before coming to Court. On further cross-examination the Plaintiff admitted that his mother did file a Succession cause where she was appointed the administrator of the estate of his father and that he did file fresh letters of administration purposely and limited to the filing of this instant suit. That he did not file any substitution of the mother as an administrator. The Plaintiff closed his case at that point.

9. The Defendant testified solely at the trial and stated that he is a Civil servant working in Garissa. He relied on his statement filed on 19/12/16 as his evidence in Chief. He produced the Land Control Board consent dated 8/5/14 and a copy of the title for the suit property registered in his name dated 6/6/14. In his evidence he stated that he did not buy the land from the Plaintiff's deceased father, but did from one David Kariuki Mwangi whom he entered into a sale agreement dated 1/7/14 and paid a consideration of Kenya Shillings 2,500,000/- and obtained Land Control Board consent after which the land was registered in his name on 6/6/14. He stated that he is in actual and legal possession of the land and therefore denied being a trespasser.

10. On Cross examination he admitted that he had not produced the copy of sale Agreement as the one he had was misplaced. That the law firm of Mwihaki & Company Advocates where the Agreement was drawn and signed had closed office and was unable to obtain a copy. He also admitted that he did not produce the original or copies of the Land Control Board application in respect to the suit property. He disclosed that he was shown the suit land by a broker in the name of Ben Wanjama, now deceased. That the said Wanjama together with another person whom he could not remember his name were witnesses to the Agreement. He also admitted non- production in Court the copies of transfer document which would ordinarily contain the ID, PIN & Photographs of the seller and the buyer. He also explained that he did

submit his photos, ID & PIN for purposes of preparation of transfer to the agent aforesaid. Further the Defendant explained that the restriction on the title was not placed by the Plaintiff but by the local District Officer. He stated that he has not sued the District Officer for the removal of the restriction. On further cross-examination he stated that he had not offered to buy the land from the Plaintiff after the case was filed.

11. When challenged why he did not produce the documents, he retorted that the onus of proving fraud rests with the plaintiff and not him and therefore the Plaintiff should have produced the said documents. Maintaining that he attended the Land Control Board with the seller, he contends that he is the legal owner of the suit land and urged the Court to *inter alia* grant his counter claim and dismiss the Plaintiffs suit.

12. In his submissions filed through Learned Counsel Mr. Mwaniki the Plaintiff submitted that the Defendant acquired registration of the suit property through fraud in that the deceased David Kariuki Mwangi passed away on 9/7/94 while the transfer to the Defendant was made on 6/6/14, as seen in the copy of the green card adduced at the hearing. The Plaintiff did submit that the registration of the suit land was effected in the absence of a valid agreement for sale and the transfer documents were forgeries. That although the Defendant pleaded in Para 4 of his defence that there was indeed a valid agreement, the same was not produced in Court. The reasons given for non-production of the same were said to be insufficient. The Plaintiff wondered why the Defendant expected the Plaintiff to produce the documents which he himself sought to rely on his case but failed to produce. In response to the Defendant's explanation that the Agreement for sale and transfer documents were unavailable by reason of the law firm that prepared them had closed down, the Plaintiff opined that the act of producing the Land Control Board consent was most selective on the part of the Defendant and most ingenuine . That it is an indication that the documents that were withheld were forgeries and that explains why they were not produced in Court for scrutiny. He averred that it cannot be said to be a case of two people sharing the same names.

13. Further the Plaintiff averred that the Defendant having acquired the property illegally is a trespasser which trespass is actionable *per se*. He sought Kenya Shillings Five Hundred thousand (Kshs. 500,000/=) for damages for trespass and to persuade the court on the quantum of damages, he placed reliance on the case of **Paul Audi Ochuodho vs Joshia Ombura Orwa ELC No. 102 of 2012, Kisii**.

14. The Defendant filed written submissions through the Learned Counsel Mr. Ngigi and averred that the Plaintiff failed to prove whether his father is the same person as the one who sold and transferred the land to the Defendant. In any event the Plaintiff failed to produce original documents of title, ballot papers from Mboi-i-Kamiti Farmers Company Limited to support ownership claims of his deceased father.

15. The Defendant further raised doubt as to whether the Plaintiff has locus standi to file this suit on behalf of his father's estate in the face of an admission by the Plaintiff of existence of another succession cause in which his mother is the administrator and while those letters of administration remain unrevoked. That in that event the Plaintiff would be guilty of non-disclosure to the Court when he obtained letters of administration *ad litem* and therefore the grant issued to the Plaintiff is irregular and void as two Succession Causes cannot be filed in respect to the same deceased's estate.

16. The Defendant contended that the Plaintiff has failed to proof fraud against the Defendant on his admission that he has not filed any formal complaint with the police against the Defendant. He stated that he acquired the suit property legally and is currently in legal possession.

Determination

17. I have considered the pleadings, the witness statement, evidence adduced during the hearing and the written submissions of the parties. I have also examined the various annexures by way exhibits produced by both parties and the issues that commend themselves for determination are; whether the Plaintiff has locus standi to institute the suit; whether the Defendant bought land from David Kariuki Mwangi; whether the title of the Defendant is vitiated by fraud; whether the Defendant is a trespasser on the suit

land; whether the Plaintiff is entitled to damages for trespass, and if yes, how much; who meets the cost of the case; whether an Order for removal of the restriction of the suit land should be granted as prayed in the counterclaim.

18. Article 22 (1) and 2)(a) of the Constitution gives permission for suits to be instituted by any person to protect an interest. It states as follows;

a. “(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

b (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

a. a person acting on behalf of another person who cannot act in their own name;

19. The interest being protected here is property rights. The rights to property are protected under in Article 40 of the Constitution which states that, subject to Article 65, every person has a right to acquire and own property. Because it is a right in the Bill of Rights, the Constitution directs the Courts to interpret the law or constitution in respect of the rights protected in the Bill of Rights in such manner that the right or freedom will be realized.

20. The gravamen of this suit is to determine the ownership of the suit land. The Plaintiff alleges that the suit property belongs to David Kariuki Mwangi who died in 1994, who was his father. In his evidence he produced a green card which bears the name of David Mwangi Kariuki under entry No.4 on the proprietorship section. If this Court finds that the land belongs to Mwangi it validates the Plaintiff’s claim on the land as part of the estate which he is a beneficiary.

21. Section 79 vests the property of the deceased in the personal representative, so that the latter can then exercise the powers set out in Section 82 and discharge the duties set out in Section 83 of the Act. It should be pointed out that the provisions in Section 82 can only be fully exercised by a substantive administrator, that is the person holding, not a limited grant, but a full grant. Likewise, the duties imposed by Section 83 are to be discharged to their fullest by the holder of a substantive grant of representation. Under section 54 of the Law of succession Act Cap 160 Laws of Kenya a court can issue a limited grant of representation. Section 55 (1) of the Law of Succession Act bars any distribution of assets until the grant is confirmed. It provides thus: -

a. “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”.

22. The grant of representation ad litem was issued to the Plaintiff specifically for the purpose of filing suit. The intention, I believe, was to file a civil suit to protect or defend the estate against third parties. Much as the Plaintiff stated on trial that the mother had filed a Succession Cause where she is the administrator, there was no information given to the Court to determine with certainty whether a full grant of representation or grant ad litem was given to the Plaintiffs mother. In any event when the parties appeared before me on the 30-1-18 it was clarified by the Plaintiff’s Counsel on record that there were no other letters of grant of administration in respect to the estate. That notwithstanding the Plaintiff is seeking to establish ownership of the suit property which if upheld by the Court, it will form part of the estate of his deceased father Mwangi and therefore capable of administration by whoever has a grant of representation. Such a person may be the Plaintiff or mother or such other person as the Court dealing with probate matters would determine. The Plaintiff produced in Court a limited grant of letters of administration to the estate of his father David Mwangi. The grant permits the Plaintiff to file suit/substitute the deceased until further representation is granted by the Court. Such grant is sufficient to facilitate the Plaintiff to file this suit. In the circumstances, I find that the Plaintiff has the locus to institute the suit.

23. The Plaintiff stated that the suit land is registered in the name of his deceased father David Kariuki Mwangi who died on 9/7/94. The Plaintiff's statement is supported by the certified copy of the green card which on entry No. 4 describes David Kariuki Mwangi as the registered owner having acquired the same at Kshs. 80,000/= from Mboi-Kamiti Farmers Company Limited. He was registered on 26/1/94 and a title deed issued to him on 2/2/94. The title was not produced in Court. Notwithstanding the foregoing however the entries in the certified green card were not denied or challenged by the Defendant. The Defendant states that; He entered into Agreement of sale for the land with David Kariuki Mwangi on 17/5/14; The purchase price was paid at Kshs 2.5million for the suit land; The application was made to Murang'a Land Control Board for consent to transfer the land to him on an undisclosed date. Land Control Board Consent to transfer the suit land was given on 8/5/14; A title was issued to him on 6/6/14 after registration. The Defendant did not call any evidence to show that he entered into agreement and bought land from another David Kariuki Mwangi which would have been an ideal situation.

24. Further Section 26 (1) of the Land Registration Act states as follows;

a) "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—

- 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, unprocedurally or through a corrupt scheme".

The effect of the law above is to call upon land owners to remove themselves from the negative effect of the law.

25. In the case of the Defendant, in the instant suit, the following matters are on record that; On 17/5/14 the Defendant entered into an Agreement for sale of suit land with David Kariuki Mwangi; The Defendant paid Kshs. 2.5 m as purchase price of the suit land. He did not disclose the payee; On unknown date an application was made for Land Control Board consent; On 8/5/14 Land Control Board consent to transfer the suit land to the Defendant was issued and addressed to David Kariuki Mwangi of unknown address.

26. The alleged Agreement of Sale was not produced in Court although the Defendant in his list of documents dated 19/12/16 had undertaken to furnish the Agreement to the Court. It is noteworthy therefore that the Court cannot ascertain with certainty compliance with section 3(3) of the Law of Contract Act. The Act requires that an Agreement for sale of land must be signed by both the seller and purchaser and independently witnessed. The Court finds and holds that there was no Agreement for sale of the suit land to the Defendant by David Kariuki Mwangi. He did not produce evidence that he paid the purchase price of Kshs. 2.5 million to David Kariuki Mwangi or any person at all. The Court finds and holds that the Defendant did not obtain ownership of the suit land by sale and purchase. At the hearing the Defendant stated that he was shown the suit land by broker called Benson Wanjama whom he alleged to be deceased. At the same time the Defendant did not adduce any evidence how he came to know, negotiate a price and enter into an Agreement with the said David Kariuki Mwangi, if ever he did at all.

27. The Defendant stated at the hearing that he attended the Murang'a Land Control Board with David Kariuki Mwangi and obtained the Land control board for transfer of the suit land to himself. The application for Land control board was not produced to ascertain if indeed the said David Kariuki Mwangi was party to the process. It is curious and the Defendant did not offer any explanation at the trial how the Land Control Board consent may have been obtained on 8/5/14 before he entered into agreement for sale of the suit land with David Kariuki Mwangi as alleged. As stated earlier the Land Control Board consent is incidentally addressed to David Kariuki Mwangi at an undisclosed address. These irregularities in the absence of a lucid reason or any explanation by the Defendant do no support valid and procedural

procurement of a document of title.

28. In Order to validly conclude acquisition of a document of title, to the suit land, a transfer of the land from David Kariuki Mwangi to the Defendant ought to have been filed in the land Registry. The green card indicates under entry No. 6 and 7 that the Defendant was registered on 6/6/14 as the owner of the suit land and a title issued to him on even date. The Defendant did not produce a copy of the transfer form duly signed by the said David Kariuki Mwangi.

29. In the midst of all these irregularities it is noteworthy that David Kariuki Mwangi known to the Plaintiff died on 9/7/94, in the green card shown as owner of suit land registered on 26/1/94 aforesaid. The David Kariuki Mwangi known to the Defendant was not produced or described in Court as different from that known to the Plaintiff. Taking the evidence of the Defendant in totally on documentation and in the absence of contrary evidence on the identity of David Kariuki Mwangi the Court is satisfied that there was no valid sale or transfer of the suit land from David Kariuki Mwangi to the Defendant. Weighing one thing with another and doing the best I can in respect to the evidence on record I do not find that the Defendant lawfully and procedurally acquired proper title or such other lawful interest in the suit land.

30. I am satisfied that the Plaintiff has discharged the test of proofing fraud as enunciated in the Court of Appeal Case of **Arthi Highway Developers Limited Vs Westend Butchery Limited & Others CA 246 OF 2013** where the Court held that fraud must be pleaded and proved to a standard above a balance of probabilities but not beyond the reasonable doubt. In the case of Insurance **Company of East Africa Vs The AG and 83 others HCCC No. 135/1998** the Court held that the establishment of fraud is a matter of evidence. In both circumstances the Plaintiff has proved fraud.

31. Trespass is defined in **Clerk & Lindsell on Torts, 18th Edition at page 923** as;

“any unjustifiable intrusion by one person upon the land in the possession of another”.

Section 3(1) & (2) of the Tresspass Act Cap 294 states as hereunder;

“(1) 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. (2) where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him”.

The Defendant would have a valid right to the land if he entered pursuant to consent or permission granted by the registered owner. In this case David Kariuki Mwangi or any person lawfully claiming a title under David Kariuki Mwangi. As stated earlier there was no evidence tendered to the Court to show that the David Kariuki Mwangi from whom the Defendant allegedly bought the suit land from is different from the David Kariuki Mwangi who died on 9/7/94. Persons who otherwise would have permitted the Defendant to occupy the suit land lawfully would have been the administrator of David Kariuki Mwangi. Ideally this would include the Plaintiff. The Plaintiff does not accept that he or other beneficiaries of the estate of David Kariuki Mwangi granted the Defendant permission to occupy the suit land. Infact going by the green card the Plaintiff on 11/6/14 caused a restriction to be registered on any dealings on the suit land.

The Defendant did not adduce any evidence to show who permitted him and when he did enter into and occupy the suit land. In the circumstances the Court finds and holds that the Defendant has unlawfully entered into, taken possession and continues to occupy the suit land.

32. Having found that the Defendant is a trespasser, the only item remaining is whether the Plaintiff is entitled to damages for trespass to land if so how much. Though the Plaintiff pleaded for damages in the Plaintiff he did not lead evidence at hearing on the usage of the land. Such evidence would have been in form of a valuation report to show an assessment of rental income or such other monetary value of economic activities on the suit land. Indeed trespass is actionable on the face of it. The Plaintiff in his

submissions pleaded for damages for trespass in the sum Kshs. 500,000/= without particulars. The defendant too did not contest the figure proffered by the plaintiff. There is cogent evidence on record of trespass onto the land and the Defendant having constructed on the land. The extent of the construction is not disclosed. In my discretion and having considered the period of occupation and the size of the land and all the cited factors above, I would award the sum of Kshs. 100,000/= which I consider to be fair and reasonable in the circumstances.

33. Ideally costs follow the event. In this particular case there is an admission by the Plaintiff that he did not issue a demand notice against the Defendant Notice before filing the suit. On the other hand going by the defence raised by the Defendant, it is clear that even if notice was given there is all probability that he would not have vacated the suit land. In such instances the suit would still have become necessary. The Plaintiff shall be paid $\frac{3}{4}$ of the total cost of the suit.

34. The Defendant has raised a counter claim and prayed for an Order for removal of the restriction dated 11/6/14. The Land Registered Act No 3 of 2012 has procedure on section 78 (1) & (2) on how restrictions ought to be removed. Saving the findings in this Judgement the ideal thing was for the Defendant to apply to the Land Registrar for removal of restriction. The Defendant would have been at liberty to apply to the Court with notice to the Land Registrar for removal of the restriction. There was no evidence that the Defendant applied for removal of the said restriction by Land Registrar. In the Counter claim the Defendant did not seek to include the Land Registrar as a party such that the counter claim serves as a notice to the Land Registrar as required by the law. In all circumstances, it would be unprocedural and imprudent to make an Order against the Land Registrar when he has not been heard on the issue at hand. The Order sought in the counter claim is declined.

35. The final orders are hereunder; -

1. A declaration is hereby made that the Registration of the Defendant as proprietor of the **No. NGINDA/SAMAR/BLOCK II/82** was fraudulently acquired and the subsequent transfer and registration as proprietor is null and void.
2. The title issued to the Defendant on 6/6/14 is hereby cancelled.
3. The Land Registrar, Murang'a is hereby directed and mandated to rectify the Register of the suit land by cancelling entries No 6 & 7 and revert the title to **DAVID KARIUKI MWANGI**.
4. The Defendant, his servants and agents to voluntarily vacate the suit land within 90 days from the date of this Judgement.
5. In default of order 4 above, the Plaintiff is at liberty to apply for eviction as provided by the law.
6. The Defendant shall pay to the Plaintiff Kshs. 100,000/= as general damages for trespass.
7. The Defendant shall pay $\frac{3}{4}$ of the costs agreed or taxed on the suit to the plaintiff.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF JANUARY, 2018.

J.G. KEMEI

JUDGE