



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 797 OF 2013

**MARGARET WAMBUCI MBUTU (SUING AS
THE REPRESENTATIVE OF THE ESTATE OF
MIRIARI MBARATWA (DECEASED)).....PLAINTIFF**

VERSUS

**MINAXI KIRITKUMAR PATEL
MEHA KIRITKUMAL PATEL..... DEFENDANTS
BIMAL KIRITKUMAR PATEL**

JUDGMENT

This suit was originally filed by **MARGARET WAMBUCI MBUTU** suing as the legal representative of the Estate of **MIRIARI MBARATWA** (deceased) on 15th November 2013. **MARGARET WAMBUCI MBUTU** was later substituted by her son **ALBERT WANJOHI MBUTU** following this Court's ruling delivered on 4th December 2015.

In the suit filed by **MARGARET WAMBUCI MBUTU** on 15th November 2013, she pleaded that her father **MIRIARI MBARATWA** was at all times the registered proprietor of land parcel No. KIINE/RUKANGA/405 measuring 3.8 Hectares (the suit land) prior to his death on 7th August 1985. However, on or about 26th June 1997, the suit land was fraudulently transferred to one **PETERSON MWANIKI** (also deceased) and subsequently, to one **KIRITI KUMAR BABOO BHAI PATEL** the father of the three defendants and is currently registered in the said defendants names. Particulars of fraud were pleaded in paragraph five of the plaint to include:

- a. Purporting that the deceased was alive on 26th June 1997.
- b. Mis-representing to the Land Registrar that the deceased had transferred the land to **PETERSON MWANIKI** as a gift.
- c. Forging the signature and/or thumb print of the deceased **MIRIARI MBARATWA**.
- d. Using persons masquerading as the deceased to obtain consent of the Land Control Board to effect the transfer.

e. Transferring land parcel No. KIINE/RUKANGA/405 without a clan title.

f. Conspiring to defraud.

The deceased therefore sought judgment against the defendant in the following terms:

1. ***A declaration that the transfer of land parcel No. KIINE/RUKANGA/405 from the names of the deceased MIRIARI MBARATWA to those of PETERSON MWANIKI together with all the other subsequent transfers were null and void.***
2. ***Cancellation of the 1st, 2nd and 3rd defendants as the proprietors of land parcel No. KIINE/RUKANGA and subsequently registration of MIRIARI MBARATWA as the proprietor of the same.***
3. ***Costs of the suit together with interest at Court rates.***
4. ***Any other relief which this Honourable Court may deem fit to grant.***

The defendants filed a joint defence in which they denied the allegations levelled against them adding that there are contradicting details as to the date of death of **MIRIARI MBARATWA** since it is alleged in this case that the deceased died on 7th August 1985 yet in another case being **KERUGOYA CMCC No. 118 of 2012**, the date of death is indicated as 16th July 1983 and therefore it is not clear when the deceased died. The defendants denied any knowledge of fraud adding that it is improper to challenge the transaction between the deceased and one **PETERSON MWANIKI** without involving the administrator of the Estate of **PETERSON MWANIKI**. That the defendants were registered as co-owners of the suit land through a Succession Cause having followed legal process and have been in occupation thereof since 1997 and therefore the suit is time barred. That the plaintiff has never occupied the suit land but is instead a stranger who illegally entered and had to be evicted by the Police following orders issued in **KERUGOYA CMCC No. 332 of 2008** in which the plaintiff was not a party. That the defendants would be raising an objection that this suit is not only time barred but there is also another case being **KERUGOYA CMCC No. 118 of 2012**. That the plaintiff has come to Court with in-ordinate delay having obtained letters of administration on 11th April 2013 yet her brother had obtained similar letters in February 2012 and therefore there are two parallel letters of administration. That this case is fabricated since the plaintiff's list of documents indicate that the deceased was 74 years at the time of death whereas other documents indicate that he was 105 years at time of death. That no demand or intention to sue was given and so this suit should be dismissed with costs.

The plaintiff and 3rd defendant were the only witnesses in their respective cases.

ALBERT WANJOHI MBUTU (PW1) asked the Court to rely on his statement filed on 28th April 2016 and told the Court that the deceased was his grandfather and the suit had originally been filed by his mother **MARGARET WAMBUKI MBUTU** as administratrix of his Estate following his death on 7th August 1985. That the deceased was the registered proprietor of the suit land since 1971 but on 26th June 1997, it was transferred to one **PETERSON MWANIKI** then on 23rd December 1997, it was transferred to **KIRIT KUMAR BABOO BHAI PATEL** for Ksh. 50,000. That the said transfer could not be possible since the deceased died in 1985. That the suit land was then transferred to one **JOSEPHAT KABINGA WACHIRA** on 25th October 1999 and subsequently to the defendants on 11th August 2015. He added that the said transfer from the deceased to **PETERSON MWANIKI** was done fraudulently as no succession had been done. He confirmed in re-examination by his counsel that the fraud was discovered by his late mother **MARGARET WAMBUKI MBUTU** in 2013 and that is when she filed for letters of administration in April 2013.

BIMAL KIRIT KUMAR PATEL who is the 3rd defendant testified on behalf of the defendants and also asked the Court to rely on his filed statement and documents. He told the Court that the defendants had been in occupation of the suit land since 2009 having obtained it legally from their late father **KIRIT KUMAR BABOO BHAI** who had obtained orders in **KERUGOYA CMCC No. 332 of 2008**. He therefore denied any wrong doing on the part of the defendants.

Submissions have been filed both by **Mr. NGIGI GICHOYA ADVOCATE** for the plaintiff and **Ms ANN THUNGU ADVOCATE** for the defendants.

I have considered the oral and documentary evidence by both parties and the submissions by counsel.

The following are not really in dispute:

- 1. That the suit land was registered in the names of the deceased on 25th May 1971.**
- 2. That on 26th June 1997, it was transferred to one PETERSON MWANIKI as a gift and six months later, it was transferred to KIRIT KUMAR BABOO BHAI PATEL the deceased father to 3rd defendant at a consideration of Ksh. 50,000.**
- 3. On 25th October 1999, it was transferred to one JOSEPHAT KABINGA WACHIRA and on 8th November, it was re-transferred back to KIRIT KUMAR BABOO BHAI PATEL.**
- 4. The suit land is currently registered in the joint names of the defendants.**

I need however consider whether first, the suit is time barred and also if there is another suit being **KERUGOYA CMCC No. 118 of 2012** pending at the subordinate Court. This was pleaded in the defence but was not raised as Preliminary Objections. I must however determine those issues because they go to the jurisdiction of this Court and without jurisdiction, this Court must down its tools – **OWNERS OF MOTOR VESSEL 'LILLIAN S' VS CALTEX OIL (K) LTD 1989 K.L.R 1.**

On the issue that this suit is time barred, it is the submissions of the defendants' counsel that the transfer to **PETERSON MWANIKI** happened on 26th June 1997 over twenty (20) years ago and that the plaintiff knew this all along and it is not therefore true that the plaintiff knew about the transfer in 2013. When he was re-examined by his counsel, the plaintiff said:

“We discovered this fraud in 2013 and that is when my mother obtained letters of administration dated 11th April 2013 to file this case. My father died on 7th August 1985”.

Apart from the bare submissions of the defendants' counsel from the bar that **“the plaintiff knew all along that the land had changed hands long ago”**, there was really no evidence led to rebut the plaintiffs assertion that this fraud was discovered in 2013. In her statement filed in this case on 15th November 2013, **MARGARET WAMBUCI MBUTU** stated as follows:

“That sometime in the year 2013, I was shocked when I was issued with a certificate of official search for land parcel No. KIINE/RUKANGA/405 and learnt that the land was transferred to PETERSON MWANIKI on 26th June 1997 some 12 years after the death of my father”

And in her statement filed herein on 4th May 2016, the plaintiff states that:

“That sometime in the year 2013, MARGARET WAMBUCI MBUTU discovered that land parcel number KIINE/RUKANGA/405 had been transferred to PETERSON MWANIKI after issuance of a copy of the land register by the Land Registrar Kirinyaga”

The record shows that **MARGARET WAMBUCI MBUTU** obtained a limited grant of letters of administration in respect of the Estate of the deceased on 11th April 2013 and filed this suit on 15th November 2013. I am therefore satisfied that the fraudulent transfer of the suit land from the Estate of the deceased to **PETERSON MWANIKI** was only discovered in 2013 and that explains why the suit was filed that year. Under **Section 26 of the Limitation of Actions Act**, it is provided as follows:

“Where, in the case of an action for which a period of limitation is prescribed either –

a. the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agents;

b. the right of action is concealed by the fraud of any such person aforesaid or

c. the action is for relief from the consequences of a mistake *the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it*".

As the fraud subject of this suit was only discovered in 2013 and this suit filed the same year, it is not barred by the provisions of **Section 7 of the Limitation of Actions Act.**

With regard to the pendency of **KERUGOYA CMCC No. 118 of 2012**, the record shows that that suit was withdrawn by a letter dated 3rd December 2013 and filed in Court on 9th December 2013. In his evidence during cross-examination, the 3rd defendant had this to say about that case:

"I am aware about the case No. KERUGOYA PMCC No. 118 of 2012. It was withdrawn and settled".

Clearly therefore, that suit is no longer pending in the subordinate Court as per the defendants own admission and the records filed herein.

The plaintiff's case is premised on a pleading of fraud by the defendants. The law is that an allegation of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required – **R.G. PATEL VS LALJI MAKANJI 1957 E.A 314**. It was therefore the responsibility of the plaintiff to prove fraud on the part of the defendants.

Counsel for the defendants has submitted that since allegations of fraud have also been made against **PETERSON MWANIKI** and the defendants, the said **PETERSON MWANIKI** should have been enjoined in these proceedings. However, that non-joinder of **PETERSON MWANIKI** or his legal representative is not fatal because **Order 1 Rule 9 of the Civil Procedure Rules** provides that:

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it". Emphasis added.

Whereas the initial transfer of the suit land was done in favour of **PETERSON MWANIKI** in 1997, the main order being sought by the plaintiff is the cancellation of the defendant's title to the suit land. Those are "***the parties actually before***" this "***Court***" whose "***rights and interests***" are due for determination in this dispute. Nothing really turns on the failure to enjoin **PETERSON MWANIKI** or his Estate in this suit.

The defendants' counsel has also submitted that the defendants are not sued as the Administrators of the Estate of **KIRIT KUMAR BABOO BHAI PATEL**. However, that was not necessary because the suit land is now registered in the names of the defendants since 11th August 2011. It was therefore proper for the plaintiff to sue the defendants in their own individual capacities since the suit land is no longer registered in the names of **KIRIT KUMAR BABOO BHAI PATEL**.

The defendants' counsel has however submitted, and rightly so, that there is considerable un-certainty as to when exactly the deceased died. The record herein confirms so. The following three (3) limited grant of letters of administration have been issued by different Court in respect of the Estate of **MIRIARI MBARATWA** each showing a different date of death:

1. A limited grant issued to **JAMES MBARATWA KIBOCHI** by **H.I. ONG'UDI J.** in **EMBU**

HIGH COURT SUCCESSION CAUSE No. 140 of 2012 on **9th March 2012** showing the date of death as **16th July 1983**

2. A limited grant issued to **MARGARET WAMBUCI MBUTU** by **C.W. GITHUA J.** in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 2 of 2013** on **11th April 2013** showing the date of death as **7th August 1985**; and

3. A limited grant issued to **ALBERT WANJOHI MBUTU** by **R.K. LIMO J.** in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 477 of 2014** on **18th September 2014** and showing the date of death as **18th May 2014**.

This confusion is compounded by the fact that there are two death certificates both issued by the Registrar Kirinyaga one dated 23rd February 2012 showing the date of death as 16th July 1983 and the other dated 19th November 2012 showing the date of death as 7th August 1985. Surely the deceased could only have died once. It is only in **JAMES BOND MOVIES where “YOU ONLY LIVE TWICE”**. When this contradiction in dates was put to the plaintiff, he was emphatic that the deceased died on 7th August 1985 and that the death certificate showing the date of death as 16th July 1983 was wrongly issued. In my ruling dated 4th December 2015, I refused to be drawn into the controversy as to which of the grants issued in respect of the deceased’s Estate was genuine. My argument was that only the Court that issued the grants could nullify them. I still hold that view. It is however unlikely that the deceased died on 18th May 2014 as indicated by the limited grant issued by **R.K. LIMO J.** on 18th September 2014 because, this suit was filed on 18th November 2013 in respect of his Estate and it is not possible that such a suit could be filed during the life time of the deceased.

That then leaves this court with two grants showing the date of death of **MIRIARI MBARATWA** as 7th August 1985 and 16th July 1983. That contradiction in dates, however, is not fatal to the plaintiff’s case for the main reason that as per the Green Card to the suit land, it was transferred by the deceased to **PETERSON MWANIKI** as a “*gift*” on 26th June 1997. Among the allegations of fraud pleaded is that the defendants purported that the deceased was alive on 26th June 1997. A transfer of land as a gift can only take effect when the disposition is done in the prescribed form as provided for under **Section 108 (1) of the repealed Registered Land Act** under which the suit land was registered. See also **Section 43 of the Land Act 2012** and **Section 43 of the Land Registration Act 2012**. Therefore, the transfer of the land must comply with both the substantive law and statutory procedures relating to transfer of land as a gift. It is clear therefore that by the time **PETERSON MWANIKI** was being registered as the proprietor of the suit land by way of a gift on 26th June 1997, the deceased had been dead and buried for fourteen (14) years (if he died in 1983) or twelve (12) years (if he died in 1985). He could not therefore have risen from the dead and complied with the law with regard to the disposition of land as a gift. The transfer of the suit land to **PETERSON MWANIKI** on 26th June 1997 was clearly procured through a fraudulent, corrupt, un-procedural and illegal scheme and cannot be protected by law. Such a title can therefore be cancelled by the Court as provided under **Section 143 (1) of the repealed Registered Land Act** and also **Section 26 (1) of the Land Registration Act 2012**. **PETERSON MWANIKI** did not therefore obtain a good title to the suit land which he could transfer to **KIRIT KUMAR BABOO BHAI PATEL** on 23rd June 1997 as he purported to do. Similarly, all other transactions relating to the suit land resting with the transfer to the defendants on 8th November 2005 are null and void. As was held in **JANE CATHETHA VS PRISCILLA GITUNGU & ANOTHER 2006 e K.L.R:**

“A thief acquires no right or interest which is transferrable in stolen property. The transaction would be void ab initio and the property is traceable”.

Decisions abound where Courts in this county have consistently declined to recognize and protect title to land obtained

fraudulently or illegally merely because one is registered as the proprietor thereof. See for example

NIAZ MOHAMED JAN MOHAMED VS COMMISSIONER OF LANDS & OTHERS 1996 e K.L.R and **JOHN PETER MUREITHI & OTHERS VS ATTORNEY GENERAL & OTHERS 2006 e K.L.R** among others. While it is clear that **Section 27 of the repealed Registered Land Act** and **Section 24 of the new Land Registration Act** vests in the registered proprietor the absolute ownership of the land or leasehold interest together with all the rights and privileges belonging or appurtenant thereto, such a title can be impeached if obtained fraudulently or illegally. **Sections 27, 28 and 143 of the repealed Registered Land Act** were considered recently by the Court of Appeal in a judgment delivered on 26th January 2018 in **CHEMEY INVESTMENT LTD VS ATTORNEY GENERAL & OTHERS C.A CIVIL APPEAL No. 349 of 2012 (2018 e K.L.R)** when it stated:

“The above provisions have consistently been held to guarantee sanctity of title which cannot be defeated except on the specific and serious grounds set out therein. However, we must hasten to add that title to property that is obtained fraudulently or illegally in violation of the provisions of the Statute is and was not sacrosanct and did not enjoy protection of the law under the repealed Act”

Having already found that there could not have been any proper transfer of the suit land by the deceased to **PETERSON MWANIKI** in 1997 since the deceased had died long before the purported transfer of the suit land as a gift, it follows that the defendants did not obtain a good title to the suit land capable of protection by law. Their title must therefore be cancelled as sought by the plaintiff.

The up-shot of the above is that there shall be judgment for the plaintiff against the defendants in the following terms:

- 1. A declaration that the transfer of land parcel No. KIINE/RUKANGA/405 from the deceased’s names to those of PETERSON MWANIKI together with all the other subsequent transfers thereof are null and void.**
- 2. Cancellation of the 1st, 2nd and 3rd defendants as the proprietors of land parcel No. KIINE/RUKANGA/405 and subsequent registration of MIRIARI MBARATWA as the proprietor of the same.**
- 3. The defendants shall meet the plaintiff’s costs.**

B.N. OLAO

JUDGE

28TH FEBRUARY, 2018

Judgment dated, delivered and signed in open Court at Kerugoya this 28th day of February, 2018

Mr. Ngigi for Plaintiff present

Ms Thungu for Defendants absent

3rd Defendant present

Plaintiff present

Right of appeal explained.

B.N. OLAO

JUDGE

28TH FEBRUARY, 2018