



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MURANG'A

ELC CASE NO. 298 OF 2017

GRACE NJOKI KIARIE PLAINTIFF

V ERSUS

ELIZABETH WAMBUI KIARIE.....1ST DEFENDANT

JOSEPH KARIUKI CHEGE2ND DEFENDANT

JUDGEMENT

1. The suit property relates to land LR No. Maragua/Ridge 1840 which was a subject to Succession Cause No 394 of 2001. In that cause Elizabeth Wambui Kiarie the 1st Defendant was appointed legal administrator of the estate of Kiarie Githua alias Kiarie Githua in a confirmed grant issued on 8/2/2007. In the said grant the estate was distributed *inter alia* to the Plaintiff together with the 1st Defendant to hold 2.05 acres LR No. Maragua/Ridge 1840 in trust for HMK and SMK the brothers of the Plaintiff. The Plaintiff and the 1st Defendant were also provided for in the estate and were allocated 35.1 acres (to hold in trust for her 5 Children) and shares in Kenya Fuel and Tank Supply Company Limited as a sole beneficiary while the Plaintiff got 5.85 acres of her own respectively.

2. It is the Plaintiff's case that notwithstanding the appointment as Co-trustee aforesaid, the 1st Defendant on 12/6/2014 transferred the suit land to the 2nd Defendant. That in turn the 2nd Defendant with the knowledge that the 1st Defendant held no genuine title went ahead to so purport to purchase the said land. The Plaintiff has particularized 4 instances of fraud on the part of the defendants as follows.

- a) The 1st Defendant fraudulently acting as the registered owner of parcel No. Maragua Ridge/1840 sought a consent to transfer the land to the 2nd Defendant.
- b) The 2nd Defendant being aware the 1st Defendant status went ahead to purchase parcel No. Maragua Ridge/1840.
- c) The 1st and 2nd Defendants conspired to deprive the two beneficiaries of their land.
- d) The 1st Defendant knowing there was a 2nd trustee by passed her and went ahead to transfer the land when she had no capacity to do so.
- e) The 2nd Defendant declaring himself owner of the parcel of land which he was not in possession while he is in occupation of parcel No.MARAGUA RIDGE/1842.

3. The Plaintiff sought the following Orders;

- a) A declaration that parcel No. Maragua Ridge/1840 is property of Hamuel Mbochi Kiarie and Samuel Maina Kiarie.
- b) The 2nd Defendant be ordered to transfer back the piece of land to the beneficiaries as the transfer was a nullity.
- c) Costs of this suit be provided for.
- d) Any other or further relief the Honourable Court may deem just.

4. The Defendant filed her defence and stated that there was no specific land given to the said Hamuel Mbochi Kiarie & Samuel Maina Kiarie. She also denied that at no time was the suit land registered in the names of the Plaintiff and Defendant in trust for the said beneficiaries and denied fraud. The second Defendant on his side stated that he was a *bonafide* purchaser of value of the land parcel aforesaid having acquired it by way of purchase.

5. In her reply to the Defence the Plaintiff stated that contrary to the confirmed grant the 1st Defendant proceeded to subdivide the land and registered herself as absolute owner of LR No. Maragua/Ridge 1840 and proceeded to transfer it to the 2nd Defendant.

6. That on the 20/9/17 the Defendants counsel on record Messrs Njoroge Kugwa applied and was granted orders to cease acting for the Defendants on account of want of instructions. The defendants therefore proceeded to act for themselves in person.

7. When the matter came up for hearing on 13/12/17 the Defendants were absent despite being personally served on 8/12/17. The Court being satisfied of service directed the matter to proceed *ex parte*.

8. At the *ex parte* hearing the Plaintiff testified solely and stated that she and the beneficiaries are the Children of the late Githua Kiarie, the registered owner of Makuyu/Maragua Ridge/348. That the said Kiarie had 2 wives: Jane Wanjiru Kiarie – 1st wife and the 2nd is Elizabeth Wambui Kiarie the 1st Defendant herein. That vide a Succession Cause No. 394 of 2001 she was allotted 5.85 acres of part of the original L.R No. Makuyu/Maragua/348 while the 1st Defendant got 35.1 acres to hold in trust for her 5 children. That her two brothers HMK and SMK were given 2.05 acres and the Court directed that the land be held in trust on their behalf by the Plaintiff and the 1st Defendant due to being minors/sick. She testified that the 2.05 acres is comprised in L.R No. Makuyu/Maragua/1840.

9. That before the Trustees had filed transmission documents she realized the land had been sold to the 2nd Defendant. That earlier the 1st Defendant had approached her requesting her concurrence in disposing the said suit property but she declined. It would appear that she proceeded to obtain Land Control Board consent and transferred the land to the 2nd Defendant without the consent of the Co-trustee. She contended that the 1st Defendant did not acquire a good title as the 1st Defendant held the land in trust for the beneficiaries. She deponed that the land should revert back to herself and the 1st Defendant until the minors are of age.

Determination

10. It is not in dispute that the 1st Defendant is the legal administratrix of the estate of Kiarie Githua. It is also not in dispute that the deceased estate was largely distributed to various members of the larger Githua family, the Plaintiff, the 1st Defendant and the beneficiaries included. The Court directed that the beneficiary's entitlement of 2.05 acres be held in trust by the Plaintiff and the 1st Defendant. It is indicated that the two were still minors and the Plaintiff has also alluded that they are sick. The details of the sickness however has not been disclosed.

11. The question that is for determination is whether the Plaintiff is entitled to the declaratory orders sought. The confirmed grant has stated that the 2.05 acres to be held in trust for the beneficiaries to safeguard the interest of the two minors. Save for general denials in her statement of defence, the Plaintiff's case is largely undefended. Nothing has been presented to this Court that the certificate of confirmed grant has been revoked or set aside.

12. In the absence of any evidence to the contrary and in view of the undischarged trusteeship by the Plaintiff and the 1st Defendant, it is clear to the Court that the 1st Defendant conveyed nothing to the 2nd Defendant in terms of interest in the land as the same belongs to the beneficiaries as determined by the probate Court. It would also appear that notwithstanding the explanation by the 1st Defendant that the grant did not specify (description other than acreage) the land that was to go to the beneficiaries (because by then the subdivision had not commenced), she did not give an undertaking as to the exact provision for the beneficiaries. Guided by the decision of the probate Court this Court holds and finds that the Plaintiff be granted the Orders sought. The Plaintiff in her testimony sought the Court to Order that the title be registered in the name of the trustees until the minors are of age.

13. In the upshot, the Plaintiffs case succeeds and the order are as follows:-

- a) The Maragua Ridge LR No. Maragua/Ridge 1840 be and is hereby declared to belong to HMK & SMK to own jointly.
- b) The transfer to the 2nd Defendant registered on 1/9/15 be and is hereby cancelled.
- c) The Deputy Registrar of this Court to sign the transfer to the Elizabeth Wambui Kiarie and Grace Njoki to hold LR No. Maragua/Ridge 1840 in trust for Hamuel Mbochi Kiarie & Samuel Maina Kiarie, the beneficiaries as per the Certificate of confirmation of grant dated the 8th February 2007.
- d) Costs of the suit to be borne by the Defendants.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 1ST DAY OF MARCH 2018

J G KEMEI

JUDGE