



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 283 OF 2015

JOSEPH GITARI PLAINTIFF

VERSUS

MUTHUI CHOMBA 1ST DEFENDANT

SAMUEL MURIITHI KIRAGU 2ND DEFENDANT

JOHN MWANIKI MUNENE 3RD DEFENDANT

MARY WANJIRU FRANCIS 4TH DEFENDANT

MARGARET WANGWERE FESTUS 5TH DEFENDANT

THE REGISTERED TRUSTEES OF

THE DIOCESE OF MURANG'A 6TH DEFENDANT

THE LAND REGISTRAR KIRINYAGA 7TH DEFENDANT

THE ATTORNEY GENERAL 8TH DEFENDANT

JUDGEMENT

1. By a plaint dated 27th October 2008 and amended on 15th December 2011, the Plaintiff sought the following reliefs against the Defendants;

a) A declaration that the suit properties number Mwea/Murinduko/220 measuring 1.35 Ha, Mwea/Murinduko/221, Mwea/Murinduko/772, Mwea/Murinduko/773, Mwea/Murinduko/834 and Mwea/Murinduko/835 measuring various sizes and any other subdivisions thereof belonged to the estate of the deceased and the Plaintiff who is the administrator of the estate of Nyaga Thumi now deceased be registered as the absolute proprietor of all these properties.

b) An order compelling the 7th Defendant to cancel and revoke title deeds number Mwea/Murinduko/220, Mwea/Murinduko/772, Mwea/Murinduko/773, Mwea/Murinduko/834 and Mwea/Murinduko/835, and any other sub-divisions thereof and restore the status quo as at 10.06.1975.

c) Permanent injunction to restrain the Defendants, whether by themselves, their agents and their servants from interfering with the ownership, use and possession by the Plaintiff or encroaching and trespassing on the suit properties.

d) An order compelling the Defendants to immediately execute transfer instruments in respect of L R number Mwea/Murinduko/220, Mwea/Murinduko/221, Mwea/Murinduko/772, Mwea/Murinduko/773, Mwea/Murinduko/834, Mwea/Murinduko/835, in favour of the estate of deceased and in default, the said order for transfer do bind the Deputy Registrar who can execute the transfer documents in place of the said Defendants.

e) The costs of this suit and interest.

f) Any other or further relief deemed just to grant by this honourable court.

2. The Plaintiff herein filed suit against the Defendants in his capacity as administrator of the estate of the late Nyaga Thumi (hereinafter called "the deceased"). The Plaintiff pleaded that at all material times the deceased was the proprietor of *Title Nos. Mwea/Murinduko/774, Mwea/Murinduko/220 and Mwea/Murinduko/221* (hereinafter called parcel Nos. 774, 220 and 221 respectively).

3. It was also pleaded that upon the demise of the deceased, the Plaintiff acquired the said 3 parcels of land through succession proceedings which culminated in a certificate of confirmation of grant dated 25th June 2008. When he attempted to have himself registered as the proprietor of the said parcels through transmission, he discovered that they were already registered in the names of various Defendants as proprietors. He could not, therefore, acquire the said properties.

4. It was further pleaded that sometime in 1996 the 1st Defendant sub-divided parcel No. 220 into parcel Nos. 772 and 773 and caused some of the subdivisions to be registered in the name of the 3rd and 6th Defendants. The 3rd Defendant further subdivided parcel Nos. 772 and 773 into new Nos. 834 and 835 which were transferred to the 4th and 5th Defendants respectively. It was also the Plaintiff's case that parcel No. 221 was fraudulently transferred to the 6th Defendant.

5. The Plaintiff contended that all the above named properties which originally belonged to the deceased were fraudulently transferred to the various Defendants in collusion with the Land Registrar, Kirinyaga. He listed various particulars of fraud against the Defendants.

6. The 1st, 2nd and 3rd Defendants did not enter appearance to the suit and they did not file any defences. The record shows that interlocutory judgement was entered against them on 7th July 2010. The court shall address the question of the validity or regularity of the said default judgement later.

7. The 4th Defendant entered an appearance and filed a defence in person. She admitted the description of the parties but otherwise denied all allegations of impropriety and fraud pleaded by the Plaintiff. She stated that she bought *Title No. Mwea/Murinduko/834* (hereinafter described as parcel No. 834) from James Maina Karii and Eliud Eliot Karii who had in turn bought it from the 3rd Defendant. It was her case that she relied upon the official land register and bought parcel No. 834 from the then registered proprietor. She contended that if the Plaintiff had any claim on the said land then such claim should be directed to the 3rd Defendant.

8. The record shows that the firm of A.P. Kariithi & Co Advocates entered an appearance and filed a defence on behalf of the 5th and 6th Defendants. The 5th and 6th Defendants denied the Plaintiff's allegations of fraud and impropriety in the acquisition of the suit properties. They denied having misled the 7th Defendant in any way or having participated in the sub-division of any of the suit properties. They stated that they lawfully purchased *Title No. Mwea/Murinduko/834* and *Title No. Mwea/Murinduko/835* (hereinafter described as parcel No. 835) from the respective registered proprietors for valuable consideration. They further stated that they were registered as proprietors of parcel Nos. 834 and 835 during the lifetime of the deceased who never lodged any claim over the said parcels.

9. At the trial hereof, the only parties who participated were the Plaintiff and the Attorney General for the 7th and 8th Defendants. The firm of A.P. Kariithi & Co had by then ceased acting for the 5th and 6th Defendants.

10. The Plaintiff testified as the sole witness in support of his case. He adopted his witness statement dated 18th November 2014. His evidence was that the deceased who was his father was the registered proprietor of parcel Nos 774, 220 and 221. It was his case that upon the death of his father, he inherited all the 3 properties as shown in the certificate of confirmation of grant dated 29th January 2008. He also produced a second certificate of confirmation dated 25th June 2008 purporting to amend the particulars of property in the first one.

11. The Plaintiff reiterated the contents of the amended plaint in his evidence and reiterated that the Defendants had fraudulently alienated the suit properties to which he was entitled and that it was done with the collusion of the Land Registrar Kirinyaga who was sued as the 7th Defendant. He maintained that the deceased had at no time transferred or sub-divided the suit properties during his lifetime.

12. The 7th and 8th Defendants called Mr J.K. Muthee, the District Land Registrar, Kirinyaga, to testify on their behalf. He adopted his witness statement dated 14th August 2017 as his sworn testimony. He produced copies of the land register for parcel Nos 220, 221 and 773. The records for parcel No. 220 and 221 showed that the deceased was registered as proprietor thereof on 10th June 1975. The records showed that the said parcel was transferred to the 1st Defendant on 9th August 1995 whereas parcel No. 221 was transferred to the 2nd Defendant on 10th June 1975. Later on, there were sub-divisions to parcel Nos. 220 and 221 which led to closure of the titles.

13. The said Land Registrar stated that the transfers from the deceased to subsequent proprietors were done lawfully and in accordance with the laid down procedures. He was not aware of any irregularities or fraud in the transfers and sub-divisions. He also stated that the certificates of confirmation of grant could not be acted upon since the concerned properties were not in the name of the deceased.

14. It would appear that the parties herein had signed and filed an agreed statement of issues. The record shows that a statement of issues dated 14th November 2013 was signed by the Plaintiff, A.P. Kariithi & Co for the 4th, 5th and 6th Defendants and the Attorney General's Office for the 7th and 8th Defendants. The said list contained the following 14 issues for determination;

a) *Whether the Plaintiff was the administrator of the estate of the late Nyaga Thumi pursuant to succession cause No. 41 of 2006 – Kerugoya.*

b) *Whether the Plaintiff had the legal capacity to sue the Defendants.*

- c) Whether the 1st to 6th Defendants had the legal right to sub-divide land parcel No. Mwea/Murinduko/92 measuring approximately 15.0 acres.
- d) Whether the newly numbers namely Mwea/Murinduko/774, 220 and 221 measuring approximately 1.35 ha, 3.37 ha and 2.83 ha were legal sub-divisions or end results of forgeries.
- e) Whether the Plaintiff's claim was proper in law and legally before court.
- f) Whether fraud existed and was used by the 3rd to 6th Defendants in acquiring the suit property herein.
- g) Whether this honourable court had power to cancel the titles of the Defendants if fraud was proved to have existed during the acquisition of the illegal titles.
- h) Whether the Defendants had been friends with the Plaintiff.
- i) Whether the sub-divisions made in the suit property herein and the documents thereon were valid in law.
- j) Whether the Plaintiff's defence was a sham, raised triable issues or a good candidate for dismissal.
- k) Whether the Plaintiff's claim was reasonable.
- l) Whether the orders sought by the Plaintiff were tenable.
- m) Whether the court had jurisdiction to hear this matter.
- n) Who shall bear the cost of the suit.

15. As is evident, the parties framed 14 issues for determination. The issue of the court's jurisdiction to entertain the suit was made the 13th issue. In my view, the issue of jurisdiction should be determined first because if the court were to find that it has no jurisdiction, then it would be futile to determine the rest of the issues. See **Owners of Motor Vessle "Lillians" Vs Caltex Oil (K) Ltd [1989] KLR 1**.

16. The court has perused the submissions filed by the Plaintiff and those of the Hon Attorney General. The issue of jurisdiction has not been canvassed at all. In my view, the instant suit relates to a land dispute which falls within the jurisdiction of the Environment and Land Court as contemplated in **Article 162 (2) (b) of the Constitution of Kenya 2010 and section 13 of the Environment and Land Court Act, 2012 (Cap 12A)**. The court, therefore, finds that it has jurisdiction to entertain and determine this suit.

17. The 1st issue in the list of agreed issues is whether the Plaintiff was the administrator of the estate of the late Nyaga Thumi (deceased) pursuant to Kerugoya Succession Cause No. 41 of 2006. There is no doubt on the basis of the evidence on record that the Plaintiff was the administrator of the estate of the deceased. He produced a certified copy of the grant of letters of administrator in the said succession cause. The said grant was not seriously challenged at the trial and it was not demonstrated that it was not genuine.

18. The 2nd issue was whether the Plaintiff had the legal capacity to sue the Defendants in this suit. It follows that if the Plaintiff was the administrator of the estate of the deceased, then he would be entitled to institute and prosecute any claims on behalf of the estate. It was pleaded by the Plaintiff that all the parcels of land in issue initially belonged to the deceased and that he was fraudulently deprived of them through the actions of the Defendants. In event, the Plaintiff would be entitled to file suit under the **Law of Succession Act (Cap 160)**.

19. The 3rd issue was whether the 1st – 6th Defendants had the legal right to subdivide *Title No. Mwea/Murinduko/92* (hereinafter called parcel No. 92) measuring approximately 15 acres. The court has examined the evidence on record on this issue. Although the Plaintiff claimed that the 1st to 6th Defendants sub-divided parcel No. 92, there was no evidence on record to support such allegation. On the contrary, the Plaintiff's own certificate of official search for parcel No. 92 indicated that the title was closed on 10th June 1975 upon sub-division into parcel Nos 220 and 221. The deceased remained the registered owner of the two parcels immediately upon sub-division. That is a strong indication that the sub-division was done by the deceased who was the registered owner at the time. The court, therefore, finds no evidence of the 1st to 6th Defendants having undertaken the alleged sub-division.

20. The question of whether or not they had a legal right to undertake the sub-division of parcel No. 92 becomes superfluous in view of the court's finding that there is no evidence on record to support the allegation of sub-division by the 1st to 6th Defendants.

21. The 4th issue was whether parcel Nos 774, 220 and 221 were legal sub-divisions or the result of mere forgeries. The answer to this issue would depend on whether or not the acquisition of those parcels by the Defendants was tainted with fraud. As indicated before, parcel Nos. 220 and 221 were created upon sub-division of parcel No. 92. This was done way back in 1975 during the lifetime of the deceased. There was no evidence on record to demonstrate that the deceased was not privy to the sub-division or that he had challenged the sub-division during his lifetime. The deceased died in 2001. So, for 26 years he did not challenge the sub-division of parcel No. 92. In my view, there was no evidence of fraud in the sub-division of parcel No. 92 to create parcel Nos 220 and 221.

22. Regarding the creation parcel No. 774, there was very scanty evidence thereon. The Plaintiff did not produce a copy of the land register in respect thereof. When the 7th Defendant sought to produce a copy of the register, the Plaintiff objected to its production. The court upheld

the objection hence it was never produced. This parcel of land does not form the subject of any relief sought in the amended plaint. The green card for parcel No. 220 indicated the title was closed upon sub-division to create parcel Nos 770 – 774. As there was no evidence to demonstrate that the creation of parcel No. 220 was fraudulent, there is no basis for holding that the creation of parcel No. 774 was fraudulent.

23. The 5th issue was whether the Plaintiff's claim was proper in law and legally before the court. The court has perused the submissions of the parties and noted that they did not canvass this issue at all. There is no doubt that the Plaintiff's suit was legally before the court. He was allowed to file it before the High Court which later transferred it to the Environment and Land Court. And, as indicated earlier, the Environment and Land Court has jurisdiction to entertain the suit. It is not clear to the court on what the parties meant by the suit being "proper" in law as they did not make any submissions thereon. The court will, therefore, consider and determine the Plaintiff's entire suit.

24. The 6th issue was whether the 3rd – 6th Defendants acquired the suit properties through fraud. The Plaintiff in his amended plaint pleaded that parcel Nos. 220 and 221 were acquired by the 1st and 2nd Defendants respectively in questionable circumstances in 1995. The 1st Defendant then sub-divided parcel No. 220 into parcel Nos 772 and 773 which he transferred to the 3rd Defendant and the 6th Defendant respectively. It was further pleaded that on 13th May 1996 the 1st Defendant sub-divided parcel Nos 773 into parcel Nos 834 and 835 which he transferred to the 4th and 5th Defendants respectively.

25. The evidence on the green cards produced by the Land Registrar Kirinyaga indicated that parcel No. 220 was transferred to the 1st Defendant on 10th June 1975. The said parcel was then transferred to the 2nd Defendant on 9th August 1995 who sub-divided it into parcel Nos 772, 773 and 774 on 13th May 1996. Parcel No. 772 was transferred to the 3rd Defendant on 1st August 1996 for a consideration of Kshs 49,000/- whereas parcel No 773 was transferred to the 6th Defendant on 5th June 1998. The green card for parcel No. 772 indicated that it was closed on 12th June 1998 upon sub-division and creation of parcel Nos 834 and 835. The green card for parcel No. 774 was not produced to confirm the ownership of parcel No. 774.

26. In those circumstances, it was clear that the 3rd – 6th Defendants were all subsequent transferees of the suit properties. They were not involved in the alleged fraudulent acquisition of the various suit properties directly from the deceased. There was no material evidence adduced by the Plaintiff to demonstrate that they were aware of, or privy to the earlier transactions. A charge of fraud is a serious charge. It must be pleaded, particularized and specifically proved to the satisfaction of the court. In my opinion, although the Plaintiff pleaded and enumerated various particulars of fraud in his amended plaint, the same were not proved at the trial as required by law.

27. The 7th issue was whether the court had power to cancel the Defendants' titles if fraud was proved to have existed during the acquisition of their titles. The law relating to cancellation of titles is to be found in **section 80 of the Land Registration Act**. The material provisions of the said section provide, *inter alia*, that;

“(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.”

(2) The register shall not be rectified to affect the title of a proprietor unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

28. The court has examined the evidence on record as given by the Plaintiff. The court is not satisfied that any fraud on the part of the 3rd – 6th Defendants was proved. It was also not demonstrated that they were aware of any fraud, mistake or omission on the part of the 1st and 2nd Defendants, if any. The evidence on record demonstrates that the current title holders were transferees from the earlier proprietors. Fraud or knowledge of fraud cannot be imputed to them unless there is either direct evidence or strong circumstantial evidence thereof.

29. The court is, therefore, of the view that even though it has the legal power to order rectification and cancellation of title to land, it can only do so where it is demonstrated that the title holders were privy to any mistake, fraud or omission in the process of its acquisition or that they substantially contributed to such factors. In the circumstances of this case, the Plaintiff did not sufficiently discharge the legal burden of proof placed upon him. The court has, therefore, no basis upon which it could invoke such jurisdiction of cancellation of title and rectification of the register.

30. In the case of **Koinange & 13 Others Vs Koinange [1986] KLR 23** it was held, *inter alia*, that;

a) It is a well established rule of evidence that whosoever asserts a fact is under an obligation to prove it in order to succeed. The party alleging fraud had the burden of proving it and had to discharge that burden.

b) Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond reasonable doubt, it ought to be more than on a balance of probabilities.

31. The 8th issue was whether the Defendants were "friends with the Plaintiff". That was a very curious issue. It was not clear why such an issue was framed and what bearing, if any, it would have on the outcome of the suit. Be that as it may, neither the Plaintiff nor the Defendants who participated in the trial led any evidence thereon. The parties did not also canvass this issue in their written submissions. The court, therefore, finds that there is no evidence on record to either prove or disprove this issue.

32. The 9th issue was whether the sub-divisions of the various suit properties and the documents thereon were valid in law. This issue was determined following the determination of issue Nos. 2, 3 and 4. The court having found that there was no evidence of fraud in the sub-

division of parcel Nos. 92 and the resultant parcels Nos 220 and 221, there is no legitimate reason to invalidate the sub-divisions and the title documents issued subsequently. The sub-divisions and resultant documents and titles, therefore, remain valid in law.

33. The 10th issue as framed by the parties was whether the Defendants' defences were a sham or whether they raised triable issues. It is strange why such an issue would be framed when there was no application for striking out the defences and when the parties had taken steps for the suit to proceed to full hearing. Be that as it may, the defences on record are not frivolous or a sham. They resulted into the framing of the fourteen (14) issues for determination which were apparently signed by all concerned parties.

34. The 11th issue was whether the Plaintiff's claim was reasonable. This issue is closely intertwined with the 12th issue on whether the reliefs sought by the Plaintiff were tenable. In my opinion, it doesn't really matter whether or not the Plaintiff's claim is reasonable. What really matters is whether the Plaintiff's claim discloses a reasonable cause of action and whether it has been proved to the required standard. The court finds that on the pleadings on record the Plaintiff had a reasonable cause of action although it may not have been proved.

35. The 12th issue as framed appears to beg the question as to whether or not the Plaintiff is entitled to the reliefs sought in the amended plaint as indicated in paragraph 1 hereof. The answer to this question depends on whether or not the Plaintiff's case was proved to the required standard as required by law. The Plaintiff's case was hinged on the alleged fraudulent acquisition of the suit properties by the 1st – 6th Defendants with the collusion of the 7th Defendant.

36. As indicated earlier in the judgement, the allegations and particulars of fraud were not proved to the required standard. Consequently, although the reliefs sought by the Plaintiff are legally tenable, the Plaintiff is not entitled to them because he failed to prove his case against the Defendants. The Plaintiff is, therefore, not entitled to the reliefs sought or any one of them.

37. Before I conclude this judgement, I have noted that the Plaintiff submitted that default judgement was entered against the 1st, 2nd and 3rd Defendants for failing to enter an appearance and file their respective defences. A perusal of the court record reveals that such judgement was entered on or about 7th July 2010. At the hearing hereof, the Plaintiff also requested the court to enter default judgement against the 4th, 5th and 6th Defendants for their failure to attend the hearing. The court declined the Plaintiff's request because there was no provision in law for entry of such judgement.

38. The court has perused the Plaintiff's original as well as the amended plaint. The reliefs as replicated in paragraph 1 hereof do not include a claim for any liquidated or pecuniary damages as contemplated under the provisions of **Order IXA of the former Civil Procedure Rules**. It, therefore, follows that the interlocutory judgement could not validly be entered against the 1st, 2nd and 3rd Defendants in default of appearance and defence. Such judgement was therefore made in error and was an irregular judgement which could be set aside by the court of its own motion under the inherent jurisdiction of the court.

39. The 14th and final issue related to costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs follow the event. As such, a successful litigant will normally be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 282**. There is no reason or material on record why the successful Defendants should not be awarded costs of the suit.

40. The upshot of the foregoing is that the Plaintiff has failed to prove his case to the required standard. Consequently, the Plaintiff's suit is hereby dismissed with costs to the 7th and 8th Defendants who participated at the trial hereof.

41. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **31st** day of **MAY, 2018**.

In the presence of the Plaintiff in person and Ms Ndundu for the 7th & 8th Defendants and in the absence of the 1st – 6th Defendants.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

31.05.18