



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**E & LC NO. 136 OF 2016**

**JULIA WANGUI MWANGI.....PLAINTIFF**

**-VERSUS-**

**MARGARET WANJIRU MAINA .....1<sup>ST</sup> DEFENDANT**

**JECINTA WANJIRU MUTHEE.....2<sup>ND</sup> DEFENDANT**

**STEPHEN MAINA BOIYO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The suit herein relates to the parcel of land known as L.R NO. Nyeri/Lusoi/311 hereinafter referred to as the suit property.
2. The plaintiff herein who is the registered proprietor of the suit property, claims that the defendants without any claim of right or interest in the suit property, entered into the suit property without her consent and erected structures therein.
3. Explaining that the defendants' activities on the suit property have caused and continue to cause her loss, the plaintiff prays for judgment against the defendants, who despite having been issued with demand to vacate the suit property and notice of intention to sue, have failed and/or refused to vacate the suit property she prays for:
  - (a) **An order compelling the defendants to vacate the suit property failing which they be forcibly evicted there from;**
  - (b) **A perpetual injunction restraining the defendants, their agents or servants from in any way dealing with the suit property.**
  - (c) **Costs and interest.**
4. In reply and defence to the plaintiff's claim, the defendants filed the statement of defence and counter-claim dated 19<sup>th</sup> October, 2016 through which they deny the allegations leveled against them and contend that the registration of the plaintiff as the proprietor of the suit property was effected by misrepresentation and/or fraud.
5. It is the defendants' case that they have been in occupation of the suit property since 1963 (especially the 1<sup>st</sup> defendant).
6. The 1<sup>st</sup> defendant contends that the suit property forms part of the estate of Kimuge Arap Kimesoi (deceased) in respect of which she has obtained a confirmed grant and in that regard the plaintiff has no claim whatsoever over the suit property.
7. Vide their counter-claim, the defendants have reiterated their contention that they have been in actual and uninterrupted use of the suit property and that the 1<sup>st</sup> defendant has obtained a certificate of confirmed grant in respect thereof through the first defendant.
8. It is the defendants' case that the plaintiff has without any lawful reasons, entered into the suit property, subdivided it and offered it for sale in disregard of their interest therein.
9. For the foregoing reasons, the defendants pray that the plaintiff's suit be dismissed with costs to them and judgment be entered in their favour for an order of eviction against the plaintiff and/or any other person acting on her behalf from the suit property.

## **EVIDENCE**

### **The Plaintiff's Case**

10. When the matter came up for hearing, the plaintiff relied on witness statements recorded on 23<sup>rd</sup> June, 2013 and the list of documents filed on 24<sup>th</sup> June, 2016 and a supplementary list of documents filed on 21<sup>st</sup> September, 2016.

11. Upon being cross examined by counsel for defendants the plaintiff;

(i) Admitted that there is a variance between her names as captured in her identity card and in her confirmed grant (her names as per her identity card are Julia Wangui Mwangi and Julia Wangui Kimugi as per the confirmed grant).

(ii) Stated that she knows the 1<sup>st</sup> defendant as the sister to her deceased husband, Kimugi.

(iii) Could not remember when the 1<sup>st</sup> defendant moved into the suit property as she had temporarily moved out to go and live with a mother-in-law.

(iv) Could not remember when she returned to the suit property.

(v) Stated that her father-in-law was a Nandi-her children have Nandi names;

(vi) Could not remember when her husband, Kimugi, died;

(vii) Stated that the 1<sup>st</sup> defendant has not lived in the suit property for a long period of time and only moved into the suit property after her husband passed on.

(viii) Explained that when she returned from her mother-in-law's house she found the 1<sup>st</sup> defendant living in the suit property.

(ix) Stated that when she applied for grant of letters of administration in respect of the suit property, she did not inform the court that the 1<sup>st</sup> defendant was living in the suit property.

12. In re-examination, the plaintiff informed the court that when she applied for letters of administration in respect of the suit property, the suit property was registered in the name of her husband, Kimugi.

13. She stated that Kimugi and Mwangi refer to one and the same person. All her children's names have Kimugi as their surname. (See certificate of grant).

14. She stated that she does not know how the 1<sup>st</sup> defendant took possession of the suit property; that she does not utilize the whole of the suit property as she cultivates only a portion of it.

15. She admitted that since she returned to the suit property, she has never tried to evict the defendants there from but she now wants them to vacate because she wants to use the land.

### **The Defence Case**

16. The 1<sup>st</sup> defendant who testified as D.W.1, relied on her witness statement in which she reiterates the contention that she has been in occupation of the suit property since 1963. She also avers that she lived in the suit property with her brother, Kimugi, who was unmarried. When her brother passed on in 1981, she applied for and obtained letters of administration in respect of her brother's estate comprising the suit property but was unable to register the suit property in her name because the register was misplaced at the lands registry.

17. Maintaining that the title held by the plaintiff was obtained fraudulently, she states that the plaintiff has not been living in the suit property; she only appeared recently and sub-divided it with a view of selling it.

18. According to the 1<sup>st</sup> defendant, the plaintiff was merely a girl-friend of her brother with whom she had only one child. The plaintiff was married to another man, a Mr. Maingi.

19. She stated that she lived in the suit property with her siblings and their mother and could not recall when the plaintiff came back to the suit property because the plaintiff kept coming and leaving.

20. She denied the allegation by the plaintiff that she was leaving with her mother-in-law and maintained that she lived with her mother and siblings in the suit property.

21. She acknowledged that both the plaintiff and she are living in the suit property but on different portions.

22. In cross examination the 1<sup>st</sup> defendant explained that before they moved into the suit property they were living as squatters in the

colonial village.

23. The court heard that the plaintiff was planting maize on her portion but left immediately after she got married to Maingi. The court heard that the plaintiff was also married to another man called Mwangi.

24. She testified that when the plaintiff came back, she continued utilizing the portion her husband was utilizing.

25. She informed the court that they were currently not utilizing the suit property because they were stopped by the plaintiff.

26. The court heard that the plaintiff has already sold half of the land.

27. The 1<sup>st</sup> defendant admitted that when she applied for grant of letters of administration in respect of her brother's estate, she did not disclose that her brother had a son but stated that she was given the land to hold on her own behalf and on behalf of all her siblings including her deceased brother's child.

28. The court heard that the clan had decided that the suit property be divided into four parts and shared amongst the plaintiff and her children, the 1<sup>st</sup> defendant's brother Boiyo and his Children, another brother of the 1<sup>st</sup> defendant known as Thinji and his children and 1<sup>st</sup> defendant and her children.

29. In re-examination, the 1<sup>st</sup> defendant informed the court that they are Kalenjins and that Maina is a Kalenjin name.

30. According to the 1<sup>st</sup> defendant, the name Mwangi appearing in the plaintiff's identity card is the name of the man to whom the plaintiff was married after she left her husband.

31. The court heard that the plaintiff left after Kimugi died and got married to Maingi and thereafter to Mwangi.

32. The court further heard that before Kimugi died, the plaintiff used to live with the defendants.

33. At the close of hearing, the defendants filed submissions. Despite having given an opportunity to file her submissions, the plaintiff did not file any.

#### **Defendants' submissions**

34. On behalf of the defendants, an overview of the cases urged by the respective parties is offered and submitted that the plaintiff has not proved her case; that the plaintiff obtained the title she holds in respect of the suit property either by forgery or fraudulently as there is a variance between the grant issued to the plaintiff and the names of the plaintiff as they appear in her identity card and title deed. Further, that the plaintiff obtained letters of administration in respect of the suit property fraudulently by failing to disclose to the court that the deceased had other dependants who included the defendants herein and who have always lived in the suit property. The plaintiff is said to have misstated her name to hoodwink the court and failed to inform the court that she immediately re-married following the death of her husband, Kimugi.

35. Based on the provisions of **Section 35** of the Law of Succession Act Cap 160 Laws of Kenya, it is submitted that the plaintiff's interest in the suit property terminated immediately she got married to Mwangi.

36. It is further submitted that even if the court were to hold that the grant obtained by the plaintiff was not fraudulently obtained, based on the provisions of **Section 35** of the Law of Succession Act, it is submitted that the plaintiff only holds a life interest in the suit property and cannot therefore evict the defendants from the suit property.

37. Terming the plaintiff's activities in the suit property illegal, the defendants urge the court not to countenance them.

#### **Analysis and determination**

##### **Departure from pleading**

38. The defendants whose pleaded claim is that the plaintiff obtained title in respect of the suit property by misrepresentation and/or by fraud, departed from their pleadings by leading evidence to the effect that the plaintiff is not entitled to the orders sought because she was either not a wife of the deceased or she re-married after the deceased passed on.

39. Having not raised such defence in their statement of defence and counter-claim, the defendants are by operation of law prohibited from relying on such evidence or contention as it amounts to a departure from their pleadings. In this regard see **Order 2 Rule 6** of the Civil Procedure Rules which provides as follows:-

**“No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit”.**

40. Also see the case of **Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 Others (2014)e**

**KLR** where the Court of Appeal cited with approval the decision of the supreme court of Nigeria in **Adetoun Oladeji (NIG) Ltd v. Nigeria Breweries PLC SC 91/2000** thus:-

**“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...in fact parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”**

41. From the pleadings filed in this matter and the submissions filed on behalf of the defendants, the sole issue for determination is whether any of the parties to this suit has made up a case for being granted the orders sought.

42. Concerning this question, the totality of the evidence led in this matter shows that the plaintiff became registered as the proprietor of the suit property following the passing on of her husband, Kimugi.

43. Whilst in their pleadings and evidence the defendants claimed that the plaintiff obtained the title she holds in respect of the suit property by fraud or misrepresentation, they not only failed to discharge the legal burden imposed on them of providing the necessary particulars of misrepresentation and/or fraud but also failed to prove that the plaintiff obtained the title she holds in respect of the suit property by misrepresentation or by fraud. In that regard see **Order 2 Rule 9** of the Civil Procedure Rules which provides as follows concerning pleadings:

**“Subject to sub rule 2, every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-**

**(a) Particulars of misrepresentation, fraud, breach of trust, willful default or undue influence which the party relies on.**

44. In the circumstances of this case, the defendants merely pleaded that if any registration of the suit property had been effected in favour of the plaintiff, then the same must be based on misrepresentation and/or fraud. That sort of pleading fell short of the standard expected in pleadings where allegation of fraud and/or misrepresentation is pleaded. In this regard see the case of **Vijay Morjaria v. Nansingh Madhusingh Darbar & Another (2000)eKLR** (Civil Appeal No. 106 of 2000 where the Court of Appeal (Tunoi, JA (as he then was) stated:

**“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”**

45. At the pain of repeating myself, the pleading in this case fell far short of the above standard as the defendants merely alleged that the title held by the plaintiff was obtained by either misrepresentation or fraud.

46. Concerning the evidence adduced in this suit in a bid to prove the pleaded fraud or misrepresentation, it is noteworthy that the defendants only flanked some disparities in the names appearing in the plaintiff's identity card and the grant of letters of administration of the estate of the plaintiff's husband as proof of the alleged fraud or misrepresentation. They also relied on the failure by the plaintiff to inform the court that they had beneficial interest in the suit property as proof of the alleged fraud or misrepresentation. That evidence fell short of the evidence required to prove fraud or misrepresentation which requires a higher standard of proof. In this regard see the case of **Denis Noel mukhulo Ochwada & Another v. Elizabeth Murungari Njoroge & Another (2014)e KLR** where the Court of Appeal stated:

**“As regards standard of proof of fraud, the law is quite clear. In R.G. Patel v. Lalji Makanji (supra), the former Court of Appeal for Eastern Africa stated thus:-**

**“Allegations of fraud must be strictly proved; 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.”**

47. The defendant having failed to prove that the title held by the plaintiff is vitiated by the alleged fraud or misrepresentation in the issuance of the title to her, the next issue to determine is whether despite there being evidence that the defendants have been in use and occupation of the suit property for a long period of time, the plaintiff is entitled to the orders sought.

48. In answering this question, I begin by pointing out that as the registered proprietor of the suit property, the plaintiff is entitled to the rights of a registered proprietor of land, of course subject to such overriding interest her registration may be subject to. In this regard see **Section 25** of the Land Registration Act, (LRA) 2012 which provides as follows concerning the rights of a registered proprietor of land:-

**“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.**

49. The overriding interests in respect of which registered land is subjected to are as follows:

“(a) spousal rights over matrimonial property;

(b) trusts including customary trusts;

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) natural rights of light, air, water and support;

(e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;

(g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law”.

In that regard see **Section 28** of the LRA, 2012.

50. Although the evidence adduced in this case shows that the defendants, especially the 1<sup>st</sup> defendant, have been in use and occupation of the suit property for a long period of time, the defendants did not lead any evidence capable of showing that the registration of the plaintiff is subject to any trust or overriding interest in their favour to warrant denial of the orders sought by the plaintiff or granting the orders sought in their counter-claim.

51. The upshot of the foregoing is that the plaintiff has made up a case for being granted the orders sought which I hereby grant her in terms of prayers (1) and (2).

52. This being a family dispute parties shall bear the costs of the suit.

Orders accordingly.

**Dated, signed and delivered in open court at Nyeri this 16<sup>th</sup> day of May, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

N/A for the plaintiff

Margaret Wanjiru Maina – 1<sup>st</sup> defendant

Jacinta Wanjiru Muthee – 2<sup>nd</sup> defendant

Stephen Maina Boiyo – 3<sup>rd</sup> defendant

Advocate for defendants – absent

Court assistant - Esther