



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1898 OF 2007

JAMES NJENGA MACHARIA (Suing as the legal representative of the Estate of

ELIUD MACHARIA KAHINGA).....1ST PLAINTIFF

SERAH NJERI WAKABA (Suing as the legal representative of the Estate of

JOSPHAT WAKABA KAHINGA).....2ND PLAINTIFF

-VERSUS-

NJOROGE KAHINGA).....DEFENDANT

JUDGMENT

In their further amended plaint dated 1st November, 2011, the Plaintiffs averred that at all material times, all that parcel of land known as Kiambogo/Mororeini Block1/249 (“hereinafter referred to as “the suit property”) was owned by one, Kahinga Njoroge, deceased (hereinafter referred to as “the deceased”). The 1st Plaintiff is the grandson of the deceased while the 2nd Plaintiff is the daughter in law of the deceased. The plaintiffs have averred that the deceased was a member of Itherero Farmers Co. Ltd by virtue of which membership he was allocated the suit property. The Plaintiffs have averred that the deceased died before he was issued with a title deed in respect of the suit property. The Plaintiffs have averred that it was the deceased’s wish that the suit property be shared out amongst his three (3) sons, namely, the defendant, the late Eliud Macharia Kahinga (the 1st plaintiff’s father) and the late Josephat Wakaba Kahinga (the 2nd Plaintiff’s husband). The Plaintiffs who are the legal representatives of Eliud Macharia Kahinga and Josephat Wakaba Kahinga respectively have averred that on or about 6th July, 1993, the Defendant without the consent of the other family members of the deceased and without first obtaining a grant of letters of administration in respect of the estate of the deceased fraudulently and through misrepresentation caused himself to be registered as the proprietor of the suit property. The Plaintiffs have averred that they discovered the Defendant’s fraudulent activities in 2005 and despite demands and notice of intention to sue, the Defendant refused to transfer the suit property back to the name of the deceased so that it may be shared equally amongst the deceased’s three (3) sons.

The Plaintiffs have averred that the Defendant holds the suit property in trust for them and have sought an order for the rectification of the register of the suit property by the cancellation of the name of the Defendant from the register and the replacement thereof with the name of the deceased. The plaintiffs have also sought an order that the suit property be shared equally between the Plaintiffs and the Defendant.

In his statement of defence, the Defendant admitted that the 1st Plaintiff is the grandson of the deceased

and that the 2nd Plaintiff is the daughter in law of the deceased. The Defendant admitted further that the deceased was at all material times the proprietor of the suit property. The Defendant denied however that the deceased had expressed a wish that the suit property be shared amongst his three sons. The Defendant averred that the suit property was transferred to him by the deceased before his death. The Defendant denied that he acquired the suit property fraudulently and that he holds the property in trust for the Plaintiffs. The Defendant averred that the suit is time barred.

At the hearing, the 1st Plaintiff (PW1) told the court that his father, Eliud Macharia Kahinga died in 2010. The 1st Plaintiff told the court that the Defendant who is his uncle was the administrator of the estate of the deceased who was his grandfather. The 1st Plaintiff adopted his witness statement dated 18th February, 2012 as his evidence in chief. In his witness statement that was filed in court on 21st February, 2012, the 1st Plaintiff reiterated the contents of the Further Amended Plaintiff that I have highlighted herein earlier. The 1st Plaintiff stated that he learnt that the suit property had been transferred to the Defendant when prospective purchasers of the property came looking for the Defendant. The 1st Plaintiff denied that the suit property was given to the Defendant by the deceased on 13th September, 1981 when he visited the Defendant. He denied that the deceased gave the Defendant the documents of title for the suit property on that day. The 1st Plaintiff stated that the deceased's three (3) sons were all using the suit property. The 1st Plaintiff stated that the suit property forms part of the deceased's estate and that the deceased's three (3) sons are entitled to share the same equally.

Next to give evidence was Susan Warindi Muchemi (PW2). PW2 was the assistant Land Registrar based at Naivasha Land Registry. PW 2 told the court that the suit property was initially part of a larger parcel of land owned by Itherero Farmers Co. Limited (hereinafter referred to as "the Company"). She stated that at the time when the company wanted to distribute the said larger parcel of land amongst its members, it presented to the Land Registry, Naivasha its membership register on the basis of which the Land Registry was to issue title deeds to each member who had been allocated land. PW2 stated that the said membership register contained the particulars of the members and the parcel numbers of the land they had been allocated. PW2 stated that to be issued with a title deed, the members were to bring to the Land Registry copies of their identity cards and letters of clearance from the company. She stated that that if a proprietor/member was deceased, the administrator was to bring a copy of confirmed grant of letters of administration. PW 2 stated that according to the register that was forwarded to them by the company, the person to whom the suit property was allocated was the deceased, Nashon Kahinga Njoroge of I.D No. 7248080/70. PW2 produced a certified copy of the membership register that was deposited with the Land Registry by the company as P Exh. 1.

PW2 stated that it was the deceased who was supposed to be issued with a title deed for the suit property if he was alive. She stated that according to the Land Register for the suit property, the property was registered in the name of the Defendant as the proprietor thereof. PW2 stated that the Defendant was registered as the owner of the suit property on 6th July, 1993. She stated that since the deceased was dead, the administrator of the deceased had to produce a confirmed grant of letters of administration before the property could be registered in his name. She stated that for the Defendant to be registered as the proprietor of the suit property, he must have produced a document at the Land Registry showing that he was the administrator of the estate of the deceased. She stated that the defendant could not have been registered as the owner of the suit property if he did not furnish the Land Registry with a copy of a confirmed grant of letter of administration in respect of the estate of the deceased. PW2 stated that the Land Registry did not have in its record, the documents which the Defendant used to support his application for registration as the owner of the suit property. She stated that the documents may have been misplaced when the documents were being transferred from Nakuru to Naivasha Land Registry.

The 1st Plaintiff was recalled and gave further evidence in chief on 13th February, 2017. In his further evidence, the 1st Plaintiff stated that the deceased died on 2nd October, 1990 and that the Defendant applied for grant of letters of administration in respect of the deceased's estate at Kiambu Law Court in

Kiambu SPMC Succession Cause No. 233 of 1993. He stated that he did not obtain any document in the court file for Succession Cause No. 233 of 1993 apart from the Gazette Notice. He stated that the Defendant transferred the suit property to his name before the institution of the said Succession Cause. The 1st Plaintiff stated that the Defendant filed another succession cause at Limuru Senior Principal Magistrate's Court in respect of the same estate of the deceased and obtained a grant of letters of administration in respect of the estate of the deceased. The 1st plaintiff produced the following documents as exhibits;

- i. Limited Grant ad Litem dated 2nd June, 2011 (PEXh. 3).
- ii. Limited Grant ad Litem dated 26th June, 2009 (PEXh. 4)
- iii. Extract of the register for the suit property (PEXh. 5)
- iv. A copy of the Gazette Notice No. 3913 dated 23rd July, 1993 published on 13th August, 1993 (PEXh. 6)
- v. A copy of Grant of Letters of Administration Intestate in respect of the estate of the deceased issued to the Defendant and another on 12th July, 2012 (PEXh. 7).

The plaintiff's last witness was Justus Muhuhi Kiragu (PW3). PW3 was the secretary of Itherero Farmers Co. Ltd. ("the Company"). He told the court that the deceased was a member of the company and that he was allocated the suit property by virtue of his membership. He stated that the deceased was given a clearance letter to take to the Land Registry to enable him to be issued with a title deed in respect of the suit property and that he was not aware whether the deceased was issued with a title deed. PW3 stated that the Defendant was not a member of the company and that he was not entitled to be issued with a title deed in respect of the suit property. He stated that the Defendant had approached him for a clearance letter in respect of the suit property and he declined to issue the same since the Defendant's name was not in the company's members' register.

In his evidence, the Defendant admitted that the suit property was initially owned by the deceased. He stated that after the death of the deceased, he obtained the deceased's death certificate which he presented to the land office together with the deceased's identity card and was issued with a title deed for the suit property. He stated that the deceased had given him the suit property as a gift. The Defendant stated that the deceased handed over to him a share certificate that had been issued to him by Itherero Farmers Company Limited ("the Company"). He produced in evidence as exhibits photographs which he claimed to have been taken when the deceased was giving him the suit property as a gift, and a photocopy of the share certificate he claimed to have been handed over to him by the deceased. The Defendant told the court that after he was issued with a title deed for the suit property as aforesaid, he sold the property to a third party who has since sub-divided the same into several plots.

The parties framed a total of ten (10) issues for determination by the court. The said issues in my view can be summarized as follows:-

1. Whether the suit property was owned by the deceased prior to his death.
2. Whether the Defendant acquired the suit property fraudulently.
3. Whether it was the deceased intention that the suit property be shared amongst his three (3) sons.
4. Whether the Defendant holds the suit property in trust for the plaintiffs.
5. Whether the plaintiff's suit is time barred.
6. Whether the plaintiffs are entitled to the reliefs sought in the Further Amended Plaintiff.

Whether the suit property was owned by the deceased prior to his death

It was not disputed that the deceased was a member of Itherero Farmers Co. Ltd. (“the Company”) and that he was allocated the suit property by virtue of that membership. The Defendant did not deny that the suit property was owned by the deceased prior to his death and before the same was registered in his name. Due to the foregoing, I would answer the first issue in the affirmative.

Whether the Defendant acquired the suit property fraudulently

As I have stated above it was common ground that the suit property was owned by the deceased. PW2 and PW3 gave uncontroverted evidence that the suit property could only be registered in the name of the deceased as proprietor and in the event of his death, in the name of his legal representative. It was common ground that the deceased died on 2nd October, 1990 while the suit property was registered in the name of the Defendant on 6th July, 1993. The duty was upon the Defendant to show how he acquired the suit property that belonged to the deceased after his death. Itherero Farmers Co. Ltd (“the Company”) gave evidence that they did not give the Defendant clearance to be issued with a title deed in respect of the suit property because the Defendant was not its member and his name was not in the register of members that was submitted to the Land Registry for the purposes of processing title deeds. The Land Registrar (PW2) also gave evidence that the membership list that was submitted to the Land Registry did not contain the name of the Defendant and as such the Defendant could not have been registered as the proprietor of the suit property. PW 2 told the court that she could not trace the documents that the Defendant used to support his application to be registered as the owner of the suit property. In his evidence, the Defendant claimed that he presented to the Land Registry a copy of the deceased’s death certificate and Identity Card and was registered as the owner of the suit property. The law is settled that the property of a deceased person cannot be dealt with until after a grant of letters of administration has been issued by the court. It follows therefore that any dealing with the property of a deceased to the contrary is illegal null and void. There is no evidence that the deceased transferred the suit property to the Defendant. There is also no evidence on how the Defendant caused the suit property to be registered in his name. In the circumstances, the contention by the Plaintiff that the suit property was registered in the name of the Defendant fraudulently and illegally cannot be resisted. It is my finding therefore that the Defendant acquired the suit property fraudulently and illegally.

Whether it was the deceased intention that the suit property be shared amongst his three (3) sons

I am in agreement with the Defendant that no evidence was led in support of the Plaintiffs’ contention that the deceased had expressed a wish that the suit property be shared equally amongst his three (3) sons. I would therefore answer this issue in the negative.

Whether the Defendant holds the suit property in trust for the plaintiffs

It was admitted by the Defendant that the Plaintiffs are grandson and daughter in law of the deceased respectively. The 1stPlaintiff’s father and the 2nd plaintiff’s husband were sons of the deceased and as such were beneficiaries of his estate. Since the suit property belonged to the estate of the deceased and was acquired by the Defendant irregularly, the Defendant must be taken to be holding the property in trust for himself and the other beneficiaries of the estate of the deceased, the Plaintiffs included.

Whether the plaintiffs’ suit is time barred

Under Section 6 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, actions for the recovery of land must be brought within 12 years of the date of the cause of action. The Defendant was registered as the owner of the suit property on 6th July, 1993 while this suit was filed on 7th June, 2006, 13 years later. The Defendant contended that the suit is time barred. The Defendant did not controvert the Plaintiffs’ claim that they learnt that the suit property had been registered in the name of the Defendant in 2005 after which they registered a caution against the title of the property. I am in agreement with the Plaintiffs that the suit herein is saved by the provisions of section 26 of the Limitation of Actions Act. For the purposes of Limitation of Actions Act, the time started running against the Plaintiffs in 2005 when they learnt of

the registration of the suit property in the name of the Defendant. The suit herein was in the circumstances filed within time. The fifth issue is answered in the negative.

Whether the plaintiffs are entitled to the reliefs sought in the Further Amended Pleat

The Plaintiffs have established that the Defendant acquired the suit property illegally and fraudulently. The suit property was registered under the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Section 143 (1) of the Registered Land Act empowered the court to rectify the register by cancelling registration that has been made illegally/fraudulently. The Defendant contended that his registration was first registration and as such not amendable to cancellation under section 143 (1) of the Registered Land Act. I am of the view that this argument has no basis. A copy of the register for the suit property that was produced in evidence by the Plaintiffs as PExh. 5 show that the first registered owner of the suit property was the Government of Kenya. It is not true therefore that the Defendant was the first registered owner of the suit property. The registration of the Defendant as the owner of the suit property is therefore subject to section 143(1) of the Registered Land Act. Having found that the Defendant was registered as the owner of the suit property illegally, the order sought for the rectification of the register of the suit property by the cancellation of the name of the Defendant as the owner of the property and replacement thereof with the name of the deceased has merit. The Plaintiffs had also sought a declaration that the Defendant holds the suit property in trust for them and that the property be shared equally between them and the Defendant. I am unable to make this order. Once the property is transferred to the name of the deceased, it will have to be dealt with in accordance with the provisions of the Law of Succession Act, Chapter 160 Laws of Kenya. This is not a succession court and as such cannot distribute the estate of the deceased amongst his heirs.

Conclusion

In conclusion, I hereby enter judgment for the Plaintiffs against the Defendant on the following terms:

- 1. The register for Title No. Kiambogo/Miroreini Block 1/249 is hereby rectified by the cancellation of entries No. 2 and No. 3 thereof. In place hereof, the deceased,KAHINGA NJOROGI shall be registered as the owner of the suit property;**
- 2. The suit property shall be distributed amongst the heirs of KAHINGA NJOROGI in accordance with the provisions of the Law of Succession Act, Chapter 160 Laws of Kenya;**
- 3. Each party shall bear its own costs of the suit.**

Dated and delivered at Nairobi this 21st day June, of 2018

S. OKONG'O

JUDGE

Judgment read in open court in the presence of

Mr. Getuma holding brief for Mrs. Muhuhu for the 1st Plaintiff

The defendant present in person

Catherine Court Assistant