



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 55 OF 2016**

**SALOME KINYA KIOGORA (Suing as the administrator of the**

**estate of NKIRITI M'MBWIRIA) DECEASED.....PLAINTIFF**

**VERSUS**

**HELLEN GACHERI.....DEFENDANT**

**JUDGMENT**

**Background**

1. Plaintiff is a wife of M'Nkiriti M'Mbiria (deceased) while defendant is a daughter of deceased and step daughter of plaintiff. Deceased, M'Nkiriti owned land No. NTIMA/NTAKIRA/4090 and 4089. When he died, plaintiff filed a succession cause to distribute the estate of deceased. She obtained a grant to that effect only to discover that parcel no. 4089, (the suit land) was in the name of defendant.

2. A portion of this land no. 4089 has since been compulsorily acquired by the government to make provision for a road, the acreage so acquired being 0.038 ha.

3. Plaintiff claims that the transfer of the parcel no. 4089 from her husband to defendant was fraudulent and hence the land should revert back into name of deceased.

4. Defendant contends that the land was lawfully transferred to her by her father since plaintiff had deserted her father for a period of 40 years or so.

**Plaintiff's case**

5. Plaintiff and her witnesses gave oral testimony and they also relied on their statements filed in this court on 15.5.2017. Plaintiff's case is that her husband owned land no. Ntima/Ntakira/4089 measuring 0.054 hectares which land was distributed via the certificate of confirmed grant (Plaintiff exhibit 1). She however realized that this land had already been fraudulently transferred to defendant on 18.6.2010. Plaintiff avers that defendant used forged documents to effect the transfer of the land to herself. She and her witnesses also claim that M'Nkiriti died in year 2009, yet the transfer of the suit land occurred in June 2010.

6. Plaintiff further testified that defendant was present when the succession cause was on going, where by the court inquired if anyone had anything to say, and defendant never raised any objection.

7. Plaintiff claims that defendant presented her name for compensation in respect of a portion of land 0.038 hectares which was compulsorily acquired by the government of Kenya for the establishment of a bypass road in Meru Town.

8. In support of her case, plaintiff produced the documents filed in her list of 15/5/2017 as her exhibits. The documents are;

- (i) Plaintiff's exhibit 1: certificate of confirmation of grant
- (ii) Plaintiff's exhibit 2: a certificate of official search for L.R No. Ntima/Ntakira/4089
- (iii) The Kenya Gazette Notice no. 1518 of 6<sup>th</sup> March 2015
- (iv) Application for consent of land control board

- (v) Letter of consent dated 12.01.2010
- (vi) Transfer of land dated 17.6.2010
- (vii) Application for registration of transfer, dated 18.6.2010
- (viii) Pin certificate for the defendant
- (ix) Alleged pin certificate for the deceased
- (x) ID cards used to transfer the suit land fraudulently
- (xi) The correct ID card for the late M’Nkiriti M’Mbwiria
- (xii) A receipt for the reduced stamp duty paid dated 17.6.2016
- (xiii) A valuation report, dated 31.03.2010
- (xiv) A demand letter/notice of intimation to sue
- (xv) A notice of withdrawal of Meru ELC case no. 210 of 2013.

### **Defence case**

9. Defendant testified and also relied on her statement filed on 25.8.2016 she also availed one witness. Defendant avers that her father had subdivided his land L.R No. Ntima/Ntakira/166 into two portions, giving rise to parcel No. 4090 and 4089 whereby his whole intention was to give parcel no. 4090 to defendant’s sister Joyce Mwendwa while the other portion, (the suit land) was to go to defendant.

10. During her testimony defendant admitted that a portion of the land NO. 4089 was compulsorily acquired by the government and she was paid Kshs.750,000.

11. DW 2 one David Mwenda testified that he is a neighbor of defendant. He claims that the land of deceased (M’Nkiriti) was divided into two portions by deceased himself and the clan, whereby each family (wife) was to get a portion.

12. In support of her claim, defendant produced documents filed on 26/8/2016 as her exhibits as follows;

- (i) Copy of the green card for L.R No. Ntima/Ntakira/166
- (ii) Copy of the official search for L.R No. Ntima/Ntakira/4089
- (iii) Copy of death certificate of M’Nkiriti/M’Mbwiria
- (iv) Copy of the land control board consent dated 12/1/2016
- (v) Copy of the application for land control board consent
- (vi) Copy of the plaint in ELC Case no. 210 of 2013 at Meru.

### **Determination**

13. I have carefully analyzed the evidence adduced herein, and the rival submissions of the parties. The relationship between plaintiff and defendant is not disputed. This is a step-mother step daughter relationship which is not all that good. It appears that plaintiff left the family of her husband for many years. Defendant claims that plaintiff deserted the family for a period of 40 years, but plaintiff did resurface to bury the husband. It is also not disputed that defendant is the one who was looking after her father up to the time of his death.

14. There is no dispute that defendant is the registered owner of the suit land parcel NO.NTIMA/NTAKIRA/4089 measuring 0.654 hectares. Further, defendant has admitted that a portion of this land was compulsorily acquired by the government and she was duly compensated.

15. Defendant was rather evasive about the succession cause, but she is listed as a beneficiary. I am therefore certain that she was aware of this succession cause. Defendant has not stated that she is in any way challenging the proceedings in Chuka SPM’S succession cause no. 310/11 where plaintiff is the administrator of the estate of M’Nkiriti M’Mbwiria. It is therefore a non-issue as to whether plaintiff had deserted the family or not, whether she had been divorced from her husband or not, whether she occupies the suit land or not, whether she is entitled to the suit property or not. As far as the property of deceased is concerned, the law applicable is the law of succession and the distribution of the estate must be in accordance with the applicable law.

16. The issue before this court for determination is; **whether the transfer of L.R Ntima/Ntakira/4089 from deceased M’Nkiriti**

**M'Mbwiria to defendant was lawful or not. If the answer is in the affirmative, what relief is available to the parties?**

17. Plaintiff claims that M'Nkiriti died in 2009. The witnesses of the plaintiff admitted that they did not know when M'Nkiriti died. While being cross examined, PW 2 (Jeniffer Ruth Karimi) admitted that her father died on 24.1.2010. I have perused the document produced as defence exhibit 3. It is a death certificate of M'Nkiriti showing that death occurred on 24.1.2010. No other document has been availed to challenge this death certificate. I therefore conclude that M'Nkiriti died on 24.1.2010 and not in 2009.

18. If M'Nkiriti died on 24/1/2010, **had he effected the transfer of the suit land to defendant by then, was there fraud in the transfer of the suit land?**

19. Plaintiff and her witnesses admit that they were not there when M'Nkiriti subdivided his land from parcel no. 166 to no. 4089 and no. 4090. They also don't know when deceased went to land control board to seek consent to transfer the land no. 4089 to defendant. Despite this scanty knowledge, it appears that the transfer of the suit land was not above board on account of the following reasons:

**(a) Documents**

20. The first telltale signs of fraud is to be found in the documents availed here in. Plaintiff has availed the documents which effected transfer of the land 4089 from M'Nkiriti to defendant which document defendant has admitted. Some of these documents have also been produced by defendant and they include the application for consent to the land control board and the consent thereof.

The application for consent of land control board (plaintiff exhibit 4; defence exhibit 5) is not signed by M'Nkiriti or defendant. It has no date but bears a strange number 62.01.2010. It is not discernible as to when the application to the Land Control Board was made.

21. The subsequent transfer forms were signed on 17.6.2010 before Kiogora Arithi advocate. Certainly by then M'Nkiriti was dead. An explanation has been advanced in defendant's submissions that **"Your Honour, we submit that it was the deceased who executed the transfer form by affixing his thumb print before he died. Your Ladyship, we submit that it was only later that defendant submitted the same to the advocate for commissioning and lands officer for registration after she procured money to pay the stamp duty and effect transfer"**. I find that defence is trying to adduce evidence through submissions. Nowhere in her evidence has the defendant clarified as to why the transfer was being effected on 17/6/2010, few months after the death of her father in January 2010. Defendant was vague on this aspect of transfer. She even stated that **"I never went to Kiogora Arithi Advocate for the transfer"**, yet the execution of the documents was before the aforementioned advocate. There being no plausible explanation by Defendant as to how a deceased person could have been effecting transfer after death, then the logical conclusion to make is that the transfer was fraudulent.

22. The documents and particulars presented in the transfer process are also questionable. Plaintiff has availed the true identity card of M'Nkiriti as plaintiff exhibit 11. Although the document is not very legible, defendant confirmed that it was the identity card of her father bearing a number 8883242 in the name of M'Nkiriti M'Mbwiria. She has however not clarified why in the transfer forms, her father's identity card was reflected as 8887242.

23. The identity card attached to the transfer form has been availed by plaintiff as plaintiff exhibit 10. It shows that deceased name is Ngiriti Mbwiria. Certainly deceased could not have been having two ID cards. The death certificate availed by defendant herself (defence exhibit 3) shows that deceased was known as M'Nkiriti M'Mbwiria. Defendant, while being cross examined also confirmed that this was the name of her father. In the succession cause, deceased was also referred to as M'Nkiriti M'Mbwiria. So where did defendant get this identity card bearing the name of Nkiriti Mbwiria with a different identity card number?. Again there being glaring inconsistencies regarding the identity of deceased in respect of documents used to effect transfer of the land, and there being no clarification from defendant thereof, I can only conclude that there was fraud in the transfer of the suit land to defendant.

**(b) Sickness and death of M'Nkiriti M'Mbwiria**

24. M'Nkiriti died on 24/1/2010. There is no evidence regarding the nature and extent of his illness which made him succumb. But he was certainly very sick a week before his death. This is as per evidence of defendant. It is not fathomable that M'Nkiriti was healthily engaged in daily affairs like going to the land board when he was sick. This factor on its own would not lead to a conclusion of fraud, but considering the fact that I have already established that there was fraud in the execution of transfer of the land, then the health status of M'Nkiriti buttresses this aspect of fraud.

**(c) The succession cause**

25. Plaintiff exhibit 1 is a copy of the confirmed grant where by defendant is listed as one of the beneficiaries. Her share thereof is indicated as a quarter of parcel no 4089. How comes defendant did not disclose the fact that she was the registered owner of the suit land before the succession court, yet she was issued with a title on 5/8/2010 (as per the search certificate)?.

26. In **Meru Succession cause no 720 of 2013, in the matter of the Estate of Ndubi Javan (deceased), Priscillah Ndubi and another versus Gerishon Gatobu Mbui, Gikonyo J**, on the issue of non-disclosure of material facts made an elaborate statement as follows; **"Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (uberimae fidei) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law"**. I have nothing useful to add on this issue save to state that this non-disclosure has seen defendant get compensated for the portion which was compulsorily acquired and she has appropriated the money to herself, though she apparently gave her sister Gakii Kshs.100,000.

## Relief

27. The provisions of **article 40 (1) of the constitution** provides that:

**“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property— of any description and in any part of Kenya...”.**

28. Section 26 of the Land Registration Act also provides that: “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, **except— on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme**”.

29. In the case of **Elijah Makeri Nyang’wira vs Stephen Mungai Njuguna & another (2013) KLR**, the court stated that: **“The law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.**

30. In the instant case, the title to parcel no. 4089 in defendants name was obtained by fraud and misrepresentation. It is not a food title. It shall be impeached.

31. This is however a situation whereby the prayer for injunction outlined as prayer (b) in the plaint cannot be granted wholly for two reasons. Firstly a portion of the land has already been alienated to give way to a road. Defendant has already been compensated for that portion an amount of Kshs.750,000, which she has already appropriated. This prayer has been overtaken by events and the court cannot halt or reverse the compensation process. Secondly, this court is not determining the issue as to who is entitled to the suit land. After all even defendant is a daughter of deceased and she is the one who lives on the suit land. It is only in the process of distribution of the estate that parties will get to know where their rightful portions are.

32. **Final orders:**

**(i) An order is hereby issued for the cancellation of the defendant Hellen Gacheri as the registered owner of parcel no. L.R No. Ntima/Ntakira/4089 and reversion/registration thereof is to be in the name of M’Nkiriti M’Mbwiria.**

**(ii) The reversion is to take into account the portion/acreage already compulsorily acquired such that the acreage of 0.038 ha. will be subtracted during the registration.**

**(iii) Once the title of parcel no NTIMA/NTAKIRA/4089 reverts back to the name of M’Nkiriti M’Mbwiria, then the land is to form part of the estate of M’Nkiriti M’Mbwiria (deceased) to be distributed in accordance with the applicable law of succession.**

**(iv) A permanent injunction is hereby issued against defendant restraining her from transferring or selling the suit land.**

**(v) The deputy registrar of this court is hereby authorized to sign the requisite document to give effect to this judgment.**

**(vi) Defendant is condemned to pay costs of the suit.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2018**

**IN THE PRESENCE OF:-**

**Court Assistant:** Janet/Galgalo

Calpeters Mbaabu for plaintiff

Mmamumu holding brief for Kithinji for defendant

Plaintiff

Defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**