



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 76 OF 2017**

**CAROLINE NYAMBURA THIONGO - PLAINTIFF**

**VS**

**ALICE WANJIKU JOHN - 1<sup>ST</sup> DEFENDANT**

**DAVID MUTHEE THIONGO - 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL - 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This suit was filed on the 23/11/2016 and later amended by leave of the Court on the 18/7/2018. The Plaintiff sought orders for;
  - a. A declaration that the registration of the Defendants as the proprietors of land parcel LOC 14/GAKURWE/108 was fraudulently done in contravention to the orders of the Court in HCCC Succession cause No 194 of 1985 and that the title should be cancelled.
  - b. An order directing the Land Registrar Murang'a to insert the names of the Plaintiff Caroline Nyambura Thiongo and Angela Elizabeth Thiongo as common owners of the suit property.
  - c. Costs of the suit.
2. The 3<sup>rd</sup> Defendant is sued on behalf of the District Land Registrar, Murang'a and the Public Trustee.
3. The background of the case is that the suit land was registered in the name of John Stephen Thiongo (deceased). The deceased was the husband of the 1<sup>st</sup> Defendant and the father of the Plaintiff, the 2<sup>nd</sup> Defendant and another daughter, namely Angela Elizabeth Thiongo (not a party to the suit). Upon his death on the 26/11/1983, the Public Trustee was duly appointed as the administrator of his estate. According to the affidavit in support of the petition for grant of letters of administration deponed by the Public Trustee on the 6/11/1985, Alice Wanjiku John (widow) David Muthee (adult son), Angela Elizabeth (adult daughter) and Caroline Nyambura (adult daughter) survived the deceased. The said persons are also named as the beneficiaries of the estate of the deceased as per the copy of the certificate of confirmation of grant issued to the Public Trustee on the 22/9/1986. Among the assets of the estate included LR NO Mombasa Block/VI/3466/MN and LOC 14/GAKURWE /108. The latter is the subject of this suit.
4. The Plaintiff has averred that on 5/8/2016 she discovered that the Defendants had in 1987 connived with unscrupulous people in the Lands Office and fraudulently registered the suit land in their names in equal shares to the exclusion of herself and her sister, Angela Elizabeth Thiongo. She maintains that this is in contravention of the grant of letters of administration issued by the High Court in HCCC Succ. Cause No. 194/1985 where the Court ordered that the suit land be registered in the names of the 4 beneficiaries in equal shares. She has set out the particulars of fraud under paragraph 5(a) in the plaint.
5. At the hearing of the suit, the Plaintiff gave evidence solely and informed the Court that at the time that the suit land was transferred to the Defendants she was 20 years old. That she and her siblings were all adults. That she had been pursuing the subdivision of the land with a view to getting her portion of the inheritance when the 2<sup>nd</sup> Defendant objected. In 2016, the dispute was referred to the local District Officer for arbitration whereupon she saw the title for the suit land for the first time and discovered that her name was excluded as one of the beneficiaries and registered proprietors. She informed the Court that unlike the suit land, the Mombasa property that comprised the estate of her late father, was sold and she received her share of the proceeds. She denied the 2<sup>nd</sup> Defendant's contention that she had used the title for the suit land for purposes of applying for a visa at the USA Embassy at Nairobi. She clarified that she had used the title for the Mombasa property instead. Insisting that she sued the Public Trustee for excluding her from her father's estate, she pleaded with the Court to have her name and that of her sister Angela included as co-beneficiaries of the suit land.

6. On the 13/10/2017 the 1<sup>st</sup> Defendant filed a notice of admission dated the 12 /10/2017. In it she averred that on perusal of the pleadings and documents filed in her case, the Public Trustee as the administrator of her deceased' husband estate erred in law and fact in causing the suit land to be registered in her and the 2<sup>nd</sup> Defendant's name as beneficiaries and proprietors to the exclusion of the Plaintiff and Angela Thiong'o. She informed the Court that at the time of transmission of the suit land into their names, she understood that she was holding the land in trust for herself and on behalf of her two daughters. She maintained and confirmed that the names of her two daughters should be included as beneficiaries in equal shares as provided for in the certificate of confirmation of grant.

7. The 2<sup>nd</sup> Defendant opposed the Plaintiffs claim in a statement of defense filed on 29/1/2018. He stated that the plaint is bad in law misconceived and is an abuse of the Court process and is one for striking out. He further faulted the impropriety of the plaint because of time bar. The 2<sup>nd</sup> Defendant contended that it is the Public Trustee that administered the estate of his late father and eventually transmitted the suit land into the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in equal shares.

8. Further he averred that the transfer of the suit land was made on 10/3/1987, 30 years ago and as such his rights to property under Article 40 of the Constitution have crystalized. The Plaintiff has been indolent and her claim is time barred. That her claim in respect to the transfer of the suit land should be directed to the Public Trustee as the administrator of the estate who should give an account to the beneficiaries.

9. Under para, 8 of his statement of defence the 2<sup>nd</sup> Defendant contended that at the time of the succession case and the distribution of the estate the Plaintiff was an adult and she indeed consented to the mode of distribution of the state and cannot feign lack of knowledge 30 years later. He denied any fraud as set out by the Plaintiff in her claim.

10. In refuting Plaintiff's claim that she discovered in 2016 that she had been excluded from the title, the 2<sup>nd</sup> Defendant averred that the Plaintiff had in 1988/1989 obtained the title from him and used it to apply for a visa to travel to the USA. That she therefore was all along aware that the title was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. In a strange turn of events, the 2<sup>nd</sup> Defendant defended the exclusion of the Plaintiff from the suit land on grounds that he dropped out of school after the demise of his father due to school fees and resorted to farming on the suit land to make ends meet while the Plaintiff continued with her education.

11. At the hearing of the case, the 2<sup>nd</sup> Defendant led evidence that the Mombasa property, which has no controversy, was sold with his consent and he received his share of the proceeds. He informed the Court that before the Plaintiff filed suit, the family had referred the matter to the Chief, District Officer for resolution in vain. When shown the copy of the grant, he confirmed that the beneficiaries are 4. He, however, insisted that in the case of the suit land they agreed as a family in the presence of their late grandfather that it would be shared equally between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. He stated that he is unaware of the basis or the document that informed the transfer of the suit land to the two beneficiaries.

12. Challenged to proof the existence of family consent as stated above he informed the Court that he had not seen the certificate of confirmation of grant. That he saw it for first time in Court. In the same breath, he stated that he and his mother agreed to have the land transferred to their names in exclusion of his two sisters. Finally, he concluded that there was neither fraud nor error in the transmission of the suit land to him and his mother. That the Public Trustee did the process.

13. The 3<sup>rd</sup> Defendant denied the particulars of fraud as pleaded under para 5 of the plaint and sought to put the Plaintiff to strict proof. It faulted the Plaintiff for failing to issue it with a statutory notice to sue as provided for in law. Jafred Erima Makiro, Advocate was its only witness. He stated that he is the Principal State Counsel attached to the Department of Administrator General/Public Trustee, Mombasa Office, and the erstwhile administrators of the estate of John Stephen Thiongo. That the Public Trustee was appointed as the Administrator of the state on 2/12/1985 vide Succ cause No 194 of 1995. On 24/1/1986, it became registered as the legal representative of the suit land. It then applied for confirmation of grant and proposed that Alice Wanjiru John to hold a life interest in the net intestate estate as provided for under the provisions of the Law of Succession Act but the Court on 22/9/1986 directed that the net estate be shared equally amongst the 4 heirs of the estate of the deceased.

14. On the 9/3/1987, the suit land was transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. He stated that the reason for the transfer was that there was an intention that both transferees would hold the suit land as trustees on their own behalf and on behalf of the Plaintiff and her sister Angela Thiong'o in equal shares and not absolutely. The office hurriedly transferred the suit land to the two heirs to protect it from intermeddling by the deceased brothers who at this time were claiming interest in the same. He produced correspondence in support of the circumstances at the time. He maintained that the word trust was omitted in error in the transfer form RL 19 and effectively transmitting the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants absolutely. He stated that there was no agreement and or consent by the heirs to the contrary in the distribution of the estate. The Court ordered that the suit land be distributed equally amongst the 4 heirs.

15. Maintaining that the Public Trustee had no intention to disinherit the two heirs except for the error in transmission, regrettably, he noted the error has had the effect of disinheriting 2 heirs of the estate. He argued succinctly that the error should not be used to take away the entitlement of the two heirs. The Mombasa property was distributed as per the confirmed grant of administration. He refuted any impression of negligence on the part of the Public Trustee.

16. He concurred with the position of the 1<sup>st</sup> Defendant that the suit land be registered in the names of the 4 heirs. In respect to the 2<sup>nd</sup> Defendants claim that there was a consent by the heirs that the suit land be transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, he refuted it as incorrect. He informed that the Court that on receipt of the Plaintiff's complaint in 2016, he sought the assistance of the District Commissioner to try and resolve the matter but the suit was filed before he received any response.

17. DW2- Nancy Nyambura Njenga stated that she is the District Land Registrar, Murang'a told the Court that her office received a RL7 (transfer by personal representative to person entitled) from the Public Trustee for registration in respect to the transfer of the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. She pointed out that in accordance to the certificate of confirmation of grant the heirs are 4 but RL7 contained two heirs only. She opined that the Land Registrar erred by registering the transfer which was contrary to the Court order. In case of discrepancy

between the RL7 and the grant, the grant will take precedence because it is a Court order. She explained that in ordinary circumstances the documents are meant to be rejected and returned to the presenter. In this case, the documents were processed and registered. She termed it an error that emanated from the office of the Public Trustee. She concurred with the Plaintiffs' Counsel that the undesirable effect of the registration was to disinherit two of the heirs to the estate. She refuted the claim by the 2<sup>nd</sup> Defendant that the Office of the Land Registrar was negligent in its duty to the Plaintiff.

18. On the 7/5/18, the parties through their learned counsels on record elected to file written submissions.

19. The Plaintiff reiterated his proposition that the suit land was transferred to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in total disregard to a valid Court order. In respect to the defence of time bar, the Plaintiff submitted that the 2<sup>nd</sup> Defendant failed to discharge the duty to rebut the Plaintiff's assertion that she got to know of the fraud in 2016. She faulted the Public Trustee and the Land Registrar for disregarding the order and sought to differ with their contention that they acted in good faith. She termed the action of the two officers as fraudulent.

20. In respect to the 3<sup>rd</sup> Defendants contention that no statutory notice to sue was issued by the Plaintiff, the Plaintiff submitted that it is no longer good law as section 13A of the Government Proceedings Act was declared unconstitutional by the decision in **Kenya Bus Service Limited & Another Vs the Minister for Transport & 2 Others (2012) EKL.R.**

21. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs claim is time barred having been brought 30 years later. He stated that the Plaintiff was an adult at the time of the probate proceedings and ought to have known that the title was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. That the claim is therefore stale. In any event, the Plaintiff had used the said title to apply for a Visa in 1988/1989. In any event, he has developed the land improving its value considerably over the years and acceding to the Plaintiff's claim would occasion him great injustice.

22. As to whether the Plaintiff has proved fraud, the 2<sup>nd</sup> Defendant submitted that the Plaintiff has not discharged the duty despite pleading the fraud in its particularity. He denied any fraud on his part and reiterated his position as given in evidence. He summed that the Plaintiff should pursue the Public Trustee for professional negligence and for breach of a fiduciary duty as an administrator.

23. The 3<sup>rd</sup> Defendant agreed with the 2<sup>nd</sup> Defendant that the Plaintiff did not proof fraud on the part of the Defendants. It denied any fraud and or negligence on its part and maintained that its actions were in good faith but in error.

24. The 3<sup>rd</sup> Defendant further made a proposition that the Court should exercise its powers under Section 80 of the Land Registration Act to rectify the mistake committed by its Office in order to make provisions for the two heirs in accordance with the Court order.

25. In response to the 2<sup>nd</sup> Defendants allegations that the 3<sup>rd</sup> Defendant was negligent, the 3<sup>rd</sup> Defendant stated that the burden of proof of negligence lied with the 2<sup>nd</sup> Defendant, which he failed to proof on a balance of probability. He urged the Court to reject that line of argument. In any event, negligence was part of the Plaintiffs claim.

26. Having considered the written submissions, the evidence adduced at the hearing and the legal authorities submitted the issues for determination are;

- a. Whether the suit is time barred.
- b. Whether the Plaintiff has proved fraud.
- c. Whether the suit land should be registered in the name of all the 4 heirs of the estate.
- d. Who meets the costs of the suit?

27. It is not in dispute that the certificate of confirmation of grant of administration was in favour of the 4 heirs of the estate of the late John Stephen Thiongo. It is also not in dispute that the suit property was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant absolutely to the exclusion of the 2 daughters who were entitled beneficiaries to the estate contrary to the Court order. See the certificate of official search produced at the hearing. It is not in dispute that both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants occupy the suit land.

28. The Plaintiff has asserted that she learnt in 2016 that the title was registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, immediately sought the assistance of the local administration, the Public Trustee, and later filed suit. The 2<sup>nd</sup> Defendant on the other hand has challenged this contention and holds the view that the Plaintiff was aware of the registration of the title as far back as 1987 and she cannot claim that she got to know it in 2016. He states that the Plaintiff is indolent and latches have caught up her claim. He sought to disprove the Plaintiff's position that firstly the Plaintiff was an adult in 1987 and ought to have known that she was not one of the beneficiaries of the suit land. Further, he stated that she had given her the title for application of a Visa in 1988/1989. It is trite law that limitation of time is not applicable to trust property. According to section 20 of the Limitations Act, None of the periods of limitation prescribed by the Act apply to an action by a beneficiary under a trust, which is an action is in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy or recover from the trustee trust property or the proceeds thereof in possession of the trustee or previously received by the trustee and converted into his use.

29. It is the finding of the Court that this suit is not statute barred.

30. The Black's Law Dictionary defines fraud thus: -

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another’. (Emphasis is mine).

31. Was there fraud? The Court order (read grant) stated that the suit land be share equally amongst the 4 disclosed beneficiaries. It was not done hence the order was not complied with. The 1<sup>st</sup> Defendant has admitted as much in her statement of admission on record. The 2<sup>nd</sup> Defendant tried to proffer reasons that were countered by both the Plaintiff, the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant. He stated that they agreed as a family to exclude the Plaintiff and her sister Angela from benefiting from their late father’s estate. He did not adduce evidence to support the same. Even if he had given evidence in support, it would still be contrary to the Court order that remains in force to date. The 3<sup>rd</sup> Defendant has claimed that the transfer of the land was in error. The Land Registrar did not help the situation. Despite the clear terms of the Court order, she proceeded to register the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in total contravention of the Court order. No action was taken immediately upon discovery by the Public Trustee to rectify the position. Whether the error was genuine, inadvertent, or negligent it did not obey the Court order. The totality of the actions of the Defendants were fraudulent as it is contra the Court order. It was fraudulent because it was a complete departure given to them in the grant of representation granted by the Court. If any of the parties were dissatisfied with the said Court order, they ought to have applied to Court for variation, setting aside or appeal. The Public Trustee had a duty to ensure that the Court order was adhered to in the administration of the estate. The Public Trustee had a duty to the beneficiaries to account to them for the assets of the estate. To the extent that some of the beneficiaries were left out, the Public Trustee failed in its fiduciary duty.

32. The conduct of the Public Trustee and the Land Registrar in their dealing with the suit land is clearly illegal, fraudulent affront to the rule of law and I dare say blatant breach of their terms of service as employees and public officers. This must be discouraged.

33. With regard to the 2<sup>nd</sup> Defendant, his evidence is clearly evasive, dishonest and geared towards supporting the wrong actions of the Land Registrar and the Public Trustee. Perhaps unknown to him, by reason of him and 1<sup>st</sup> Defendant being registered albeit wrongly, as owners of the suit land to the exclusion of the Plaintiff and another person beneficially entitled, became constructive trustees and cannot own the suit land absolutely.

34. To her credit, the 1<sup>st</sup> Defendant owned up the wrong done by the agents of the 3<sup>rd</sup> Defendant. The 2<sup>nd</sup> Defendant was totally indifferent, unapologetic and dismissive of the Plaintiff. The 3<sup>rd</sup> Defendant tried to sugar coat the wrongful acts of its agents, namely the Land Registrar and the Public Trustee. Such conduct may result in loss of faith by the public whose interest the 3<sup>rd</sup> Defendant represents. It may be advisable for the 3<sup>rd</sup> Defendant to review its strategy in matters before that are or become clear as in this case and adjust accordingly.

35. The justice of this case is to exercise my powers under section 80 the Land Registration Act, 2012 and rectify the title to include the 4 heirs in accordance with the grant of letters of administration.

**36. Final orders;**

a. It is hereby declared that the registration of the Defendants as the proprietors of land parcel LOC 14/GAKURWE/108 was fraudulently done in contravention to the orders of the Court in HCCC Succession Cause No 194 of 1985 and that the title should be cancelled.

b. It is hereby ordered and directed that the Land Registrar Muranga do insert the names of the Plaintiff Caroline Nyambura Thiongo and Angela Elizabeth Thiongo in addition to those of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as owners of the suit property in accordance with the certificate of the confirmation of grant dated the 22/9/1986.

c. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants shall jointly and severally pay the Plaintiff’s costs of this suit.

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Mr Peter Muthoni HB for Mr Mwaniki Warima for the Plaintiff

1<sup>st</sup> Defendant – Present in person

Mr Githinji for the 2<sup>nd</sup> Defendant

Mr Githinji HB for Ms Mwalozi for the 3<sup>rd</sup> Defendant.

Ms.Irene and Ms Njeri, Court Assistant