



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. 363 OF 2017

JANE WANJIKU MWANGI.....1ST PLAINTIFF

CATHERINE NYAMBURA MWANGI.....2ND PLAINTIFF

VS

NATHAN NDEGWA NJERU.....DEFENDANT

JUDGMENT

1. The Plaintiffs are the daughters of Amos Kihara Kibuthu who died on 21/7/06 aged 96 years. The Defendant is the nephew of the late Amos Kihara Kibuthu. His father was Josiah Njeru Kibuthu, a brother of the Plaintiffs' father. Amos Kihara Kibuthu was the registered owner of LR NO LOC.19/RWATHIA/1675 having become registered on 23/10/87. The suit land was a subdivision of LR NO. LOC.19/RWATHIA/738 which was similarly owned by the said Amos Kihara Kibuthu.

2. The Plaintiffs claim that they are entitled to inherit the suit land from their father. It is their case that the Defendant became registered as owner of one suit land on 20/4/2005 under circumstances that are illegal and fraudulent. They have listed particulars of fraud on the part of the Defendant which briefly state that the transfer was done without Land Control Board consent; no consideration was paid for the transfer; it was without the knowledge and consent of the Plaintiffs or the deceased close family members; the Defendant took advantage of the deceased during his ailing years to procure the transfer of the suit land to himself.

3. The Plaintiffs aver that the suit land has been subject to Land Dispute Tribunal at Kangema LDT 26/06 and Nairobi HCCC Misc JR 670 of 2006 which became moot as no substantive motion was filed.

4. The Plaintiffs aver that the Defendant has declined to retransfer the suit land to them and pray for the following orders stated in the amended plaint filed on 26/2/13;

- a) An order that the Defendant was on 20/4/05 registered as owner of LOC.19/RWATHIA/1675 through fraud.
- b) An order that the transfer to the Defendant of LR LOC.19/RWATHIA/1675 on 20/4/2005 was null and void for lack of consent and land control board under section 6 of the Land control Act No.302 Laws of Kenya.
- c) An order that the registration of the Defendant as owner of land reference number LOC.19/RWATHIA/1675 ON 20/4/2005 be rectified and cancelled and the land revert to the name of the deceased Mr. Amos Kihara Kibuthu as it was on 23/10/87.
- d) An order that a Succession case to determine the heirs of the land reference number LOC.19/RWATHIA/1675 be filed.
- e) Costs.

5. The Defendant denied the Plaintiffs claims and averred that the suit land was given to him as a gift by the deceased during his lifetime. He denied the particulars of fraud as pleaded under para 5 of the Plaint and sought to put the Plaintiffs to strict proof.

Plaintiff's evidence

6. Pw 1 – Catherine Nyambura Mwangi testified and stated that the suit land was owned by their deceased father and are therefore the rightful heirs. She stated that the Defendant became registered as owner of the land through fraud on 20/4/2005. That her father died on 27/7/2006. That she and the Co-Plaintiff discovered after the burial of her father that the land had changed hands into that of the Defendant.

That the transfer was done 15 months before the death of her father. She testified that she has 4 other sisters. That their father gave her sisters Tabitha, Monica and Esther land during his lifetime leaving them out. That her father had directed that the Plaintiffs would inherit the suit land upon his death. She testified that the Defendant took advantage of the old man while he was sick and fraudulently transferred the suit land to himself. She averred that no Land Control Board consent was obtained. The Defendant has produced none. She denied that the Defendant paid the upkeep of her father during his last days. She stated that she has not sighted any transfer between the Defendant and his father in respect to the suit land. She pleaded with the Court to cancel the title of the Defendant and revert it to the name of her deceased father to enable them file for Succession of the estate.

7. PW 2 – Peter Macharia Gatibari stated that he is the brother in law of the Plaintiffs being the husband of Monica, their sister. He testified that he enquired from the chief James Githu Kagunya about the alleged transfer of land to the Defendant to no avail. He proceeded to the DO's office at Kangema but did not succeed to get any records of Land Control Board or consent in respect to the transfer of the suit land. That on 5/12/2006 he visited the office of the Land Registrar Murang'a with a letter seeking certified copies of the transfer and other documents in respect to the suit land but the said letter has not elicited any no response to-date.

8. Further, he testified that he knew that his father- in law owned the original land LOC.19/RWATHIA/738. That he subdivided it into 4 parcels: two parcels of 0.5 acres each was given to two daughters. The 3rd parcel was sold and the 4th parcel, (the suit land) was to be given to the Plaintiffs. Asked why the old man did not give the Plaintiffs the land in his lifetime he responded that one of the daughters was away.

Defence evidence

9. The Defendant testified that he is the nephew of the Plaintiff's father. That the Plaintiffs are his cousins. His father was Josiah Njeru Kabuthu. That the deceased had 5 children. He died on 21/7/2006 and he became registered as owner of the land in 20/4/2005. Maintaining that he did not commit any fraud he explained that he and the deceased attended a special Land Control Board meeting which he obtained Land Control Board consent. He stated that he would not misled the deceased as he was like a father to him. He informed the Court that the Plaintiffs were married and busy with their lives and so accompanied the deceased alone to Land Control Board meeting as well as the Land Registrar's Office. He stated that the deceased transferred the land to him as a gift during his lifetime approximately 15 months before his death. He produced in evidence a copy of the green card showing the transfer of the land as a gift, Title Deed in his name registered on the 20/4/2005 and the Death certificate of the said deceased. He urged the Court to dismiss the Plaintiffs' claim.

Written submissions

10. On the 10/4/2018, the parties through their Counsels on record elected to file written submissions, which I have read and considered.

11. The Parties have filed a joint statement of 10 agreed issues which I have crystalized them into 2 major issues. Having considered the pleadings, the evidence on record, the rival submissions, the key issues for determination is whether the Plaintiffs have proved fraud?

12. It is not in dispute that the suit land belonged to Amos Kihara Kibuthu having become registered as such on 23/10/87. It is not in dispute that the parties are related. The Plaintiffs and the Defendant are first cousins, their fathers being brothers. it is common ground between the parties that the suit land is now registered in the name of the Defendant.

13. Section 25 of the Land Registration Act provides as follows:-

“(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”.

The suit land is registered in the name of the Defendant having become registered on 20/4/2005, 15 months before the death of the Plaintiffs' father. The Plaintiffs have claimed that the Defendant fraudulently registered himself the owner of the land that ought to have been available for their inheritance on account that they are the daughters of the deceased. The Plaintiffs have averred that the deceased did not attend any Land Control Board property constituted to seek the consent to transfer the land to the Defendant. The Defendant alleged in his evidence that he and the late Amos Kihara attended Land Board (special) and obtained the Land Control Board consent. That they also visited the land office to process the title. The Plaintiff has challenged this evidence on the ground that even if they attended the special Land Control Board, that was not properly constituted as per law provided. PW 2 testified that he sought the area chief, Land Control Board office and the land office to looking for records of the transaction in vain. That he delivered a letter to the Land Registrar inquiring certain documentations in respect to the transfer which he has not received any response. The Plaintiffs therefore concluded that the Land Control Board consent was not obtained and therefore the transfer was illegal.

14. He who alleges must prove. The burden of proof to establish the presence of fraud lies with the Plaintiffs. They did not lead evidence to show how the transfer of the suit land to the Defendant and or the circumstances surrounding the transfer were fraudulent. They did not lead evidence how the Defendant took advantage of the deceased's age and frail health to disentitle him of the land. The Plaintiffs have not discharged that burden.

15. To prove fraud the Plaintiff for example ought to have called the Land Registrar to explain how the land was transferred or at the very least table documentary evidence to prove fraud. Fraud is a serious accusation that must be proved.

16. The Defendant has stated in evidence that the land was transferred to him as a gift *intervivos*. A gift *intervivos* is defined in **Blacks Dictionary 10th edition** as;

“*Intervivos* gift is a gift of personal property made during the donor’s lifetime and delivered with the intention of irrevocably surrendering control over the property”.

According to the green card on record, the transfer of the land to the Defendant was on 20/4/2005 and according to the death certificate, the said Amos Kihara Kibuthu died on 21/7/2006 about 15 months later. No evidence has been produced by the Plaintiffs to disabuse the *intervivos* gift made out in the lifetime of the deceased.

17. The Plaintiff has averred that the old man was frail and senile and therefore could not have transferred the land to the Defendant. No evidence was tabled to show the state of the mind or health of the deceased at or around the time the land was transferred. One would have expected the Plaintiff to tender oral evidence or documentary evidence in form of a medical report to support the allegation. It was not.

18. Further, the Plaintiffs have pleaded that the Defendant caused the application for Land Control Board consent and transfer forms in Murang’a Land Registrar to be hidden making it impossible to unravel the mystery of the fraud in respect to how the land changed hands. As stated earlier it is difficult for the Court to determine for the Plaintiff based on allegations. No proof was tendered.

19. It is on record that the deceased owned LR LOC.19/RWATHIA/738 which was partitioned and gifted to his other two daughters. A third parcel was sold. This shows that the deceased disposed all his properties in his lifetime. The question one would ask is if the intention of the deceased was to grant the land to the Plaintiffs, there is nothing that would have stopped him from doing so in his lifetime. I say this because the subdivision of the LOC.19/RWATHIA/738 was done in 1987 or thereabouts according to the green card, from which parcel No. 1275 became registered in the name of the deceased on 23/10/1987.

20. Section 107 of the Evidence Act provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. The Plaintiffs have not discharged this burden.

21. The totality of the evidence is that the Plaintiffs have failed to prove their claim and their claim is hereby dismissed with costs to the Defendant.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 31ST DAY OF OCTOBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Njau HB for Kinuthia for the Plaintiffs

Defendant – Absent but served

Irene and Njeri, Court Assistants