



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 433 OF 2017

MERCY WAITHERERO KANIA Suing as the administrator of the

Estate of the late **ESTHER WANJIRU KANIA**.....**PLAINTIFF**

VERSUS

JOSEPH KIMOTHO KABIRA**1ST DEFENDANT**

MUGUMO FARMERS COOPERATIVE SOCIETY LIMITED....**2ND DEFENDANT**

THE DISTRICT LAND REGISTRAR, THIKA**3RD DEFENDANT**

THE ATTORNEY GENERAL.....**4TH DEFENDANT**

JUDGMENT

1. Mercy Waitherero Kania filed suit against the Defendants as the administratrix of the estate of the late Esther Wanjiru Kania on the 31/5/2012 seeking the following orders;

a. A permanent injunction restraining the 1st Defendant from interfering or in any other way dealing transferring and or disposing of charging and or interfering with the claimant's peaceful occupation of parcel of land Title No. ITHANGA/NGELELIA BLOCK1 (MUGUMO)/608 (suit land).

b. A declaration that the deceased is the rightful proprietor of Title No ITHANGA/NGELELIA BLOCK1 (MUGUMO)/608 and the Land Register/Green card opened in the name of Joseph Kimotho Kabira (1st Defendant) in respect of Title No ITHANGA/NGELELIA BLOCK1(MUGUMO)/608 purportedly on 5/5/1998 and the resultant title deed be cancelled and the absolute proprietorship of the said title to revert back to the estate of the deceased Esther Wanjiru Kania.

c. Costs of this suit and interest at Court rates.

2. The Defendants were duly served with the summons to enter appearance but they failed to file memorandum of appearance and or statements of defence. Pursuant to the order of the Court issued on the 22/1/2014 the 1st Defendant was served through substituted services on 27/8/2014. The plaintiff filed for request for judgement against the 1st and 2nd Defendants. At the time of the hearing of the case the 3rd and 4th Defendants had neither entered appearance nor filed defences.

3. The plaintiff testified that she is the daughter of the deceased Esther Wanjiru Kania who died on 9/2/2003 and administrator of her estate having been appointed on the 11/3/2011. She gave evidence that the deceased was the registered owner of the suit land. That the deceased was a member and shareholder of the 2nd Defendant through membership No 441 and qualified for allocation of a plot from the 2nd Defendant. She stated that upon allocation and the execution of all the relevant transfer documents by the 2nd Defendant, the deceased became registered as owner of the suit land and issued with a title on the 5/5/1998.

4. The Plaintiff avers that after the death of Esther Wanjiru Kania, while taking account of the status of her estate she carried out a search at the Thika Land Registry and discovered that the deceased title was cancelled on the 2/4/1991 and title in its state was issued to the 1st Defendant. It is her case that the cancellation and reissuance of title was done in collusion with the Defendants and without the consent of the deceased. That the 3rd Defendant in disregard to procedure for transfer of land illegally cancelled the title of the deceased and has refused to avail the register for inspection by the Plaintiff. She termed the actions of the Defendants as illegal, fraudulent and contrary to the proprietary rights of the said parcel. She has particularized fraud, illegality and breach of trust on the part of the Defendants. As a result, the estate of the deceased has suffered loss.

5. She added that at no time did the deceased sell the plot to the 1st Defendant or to any other person. She annexed the following documents to support her case; copy of the title of the suit land issued in the name of the deceased dated 5/5/1988, share certificate No 06825 dated the 7/9/1975, Green card for the title showing the 1st Defendant as the registered owner of the suit land, letters of grant of administration in the estate of the deceased Esther Wanjiru Kania.

6. The plaintiff submitted that there is no dispute that the deceased acquired the suit land lawfully and therefore was the registered proprietor of the suit land. That the deceased did not transfer the suit property to the 1st Defendant. That no evidence has been brought forward to demonstrate that she did transfer the suit land to 1st Defendant. She also submitted that there is no evidence that the 1st Defendant was entitled to be registered as proprietor. Relying on Art 40 of the constitution, she submitted that the constitution protects the right to own property but does not extent to property acquired illegally as the one held by the 1st Defendant. She urged the Court to determine the case in her favour.

7. The key issue for determination is whether the Plaintiff has proved her case against the Defendants. It is trite law that he who asserts must proof. That is true even in the circumstance like this case that is uncontroverted or undefended.

8. The Plaintiff's case is that the deceased was the registered owner of the suit land. She produced a copy of the title issued to her on the 5/5/1988 to support her claim. Section 27 of the Registered Land Act Cap 300 (repealed) provides that the title of a registered owner shall not be subject to challenge except on the ground of fraud or misrepresentation for which the registered owner is proved to be a party. This is similar to the current section 26 of the Land Registration Act 2012. The Plaintiff's claim is based on fraud. She as particularized instances of fraud, illegality and breach of trust on the part of the Defendants in her claim. Section 107 of the evidence Act provides as follows;

“(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

9. The **Black's Law Dictionary 10th Edition** defines fraud thus: -

“Fraud consists of some deceitful practice or wilful 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).

10. Further section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence. The onus was on the plaintiff to prove fraud on the part of the Defendant. The plaintiff did produce a copy of the green card for the suit land which I have perused. The entries are as follows;

1. 5.5.88 – Government of Kenya P.O Box 30089, Nairobi.
2. 5.5.88 – Joseph Kimotho Kabira ID NO 1469753/67, P.O Box 107 Uplands.
3. 2.4.1991- Title Deed issued.

The Plaintiff also produced a copy of the title deed dated the 5/5/88 in the name of the deceased Esther Wanjiru Kania. It should be noted that there is no entry on the green card in the name of Esther Wanjiru Kania. The plaintiff has not provided evidence to support her claim that the register was cancelled and the 1st Defendants name inserted thereon. The Register is clear. It is in the name of 1st Defendant. There is no evidence to support the title registered in the name of Esther Wanjiru Kania. The Plaintiff did not call the Land Registrar to explain the circumstances in which the green card reads the 1st Defendant whilst the deceased held a title for the same suit land. This would have helped the Court to get to the truth of the matter. The Plaintiff has not laid sufficient ground to support the allegations of illegality fraud and breach of trust on the part of the Defendants.

11. The Plaintiff stated in her evidence that her mother's membership in the 2nd Defendant cooperative society was No 441. She has however annexed a share certificate number 06825 in the name of Kania Muriithi. There is no nexus given between the said Esther Wanjiru Kania and the holder of the certificate in relation to the deceased membership in the Mugumo Farmers Cooperative Society.

12. The conclusion is that upon analyzing the evidence and the law, the Plaintiff has failed to proof her case. It is dismissed with costs.

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:

Plaintiff – Absent

Defendants 1

2 Absent

3

4

Irene and Njeri, Court Assistants