



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 227 of 2017

(FORMERLY NAIROBI ELC CASE NO. 532 OF 2007)

ELIZABETH WANJIRU MURIUKI.....PLAINTIFF

VERSUS

ELIZABETH KIBUI RUWA.....1ST DEFENDANT

JUDGMENT

1. By a re-amended Plaint dated 26th January, 2009, the Plaintiff namely Elizabeth Wanjiru Muriuki has sued the Defendant, Elizabeth Kibui Ruwa for the following reliefs:-

a) An Order for rectification of the Register of Title to L.R. No. LIMURU/BIBIRIONI/1926 by deleting the Defendant's name therefrom and substituting it with that of the Plaintiff.

b) An Order for the cancellation of the Title Deed issued to the Defendant and issuing of a new Title deed for L.R. NO. LIMURU/BIBIRIONI/1926 to the Plaintiff.

c) An Order for the eviction of the Defendant from L.R. NO. LIMURU/BIBIRIONI/1926

d) Mesne profits assessed at Kshs. 20,000/= per year as per paragraph 8 of the Plaint.

e) Costs of this suit together with interest.

2. The Plaintiff is represented by learned Counsel, Mr. M. Shairi of Mwaura Shairi and company Advocates. The defendant is represented by learned Counsel, Mrs. A. Mwadumbo.

3. Briefly, the Plaintiff's claim is that in the year 1986 while the Plaintiff was ailing and in hospital, the late **Peter Ruwa Murungaru**, who was the husband of the defendant, colluded with the Plaintiff's husband, **George Muriuki Murungaru** and secretly subdivided **L.R. No. LIMURU/BIBIRIONI/1477** (the original suit land), into two portions without the knowledge of the Plaintiff or her children. That the Plaintiff's husband secretly and irregularly transferred one portion **L.R. No. LIMURU/BIBIRIONI/1926** measuring approximately **0.50 Acres** (the suit land) to the defendant's late husband.

4. The Plaintiff further claims that the defendant's late husband filed **Kiambu CMCC No. 61 of 1989** which was dismissed. That the court held that the title to the suit land was irregularly and fraudulently obtained by the defendant's late husband.

5. The Plaintiff also claimed that the defendant filed Kiambu SPM'S Court **Succ. Case No. 210 of 1998** and fraudulently included the suit land in the schedule of assets left behind by the late husband. That in **1999**, the defendant caused herself to be registered as the proprietor of the suit land through fraud and he pleaded particulars of fraud on the part of the defendant at paragraph 7 of the Plaint. That the defendant has been in possession and user of the suit land since **1999** to date.

6. The defendant did not file a re-amended statement of defence further to the re-amended Plaint. Nonetheless, in her statement of defence dated **16th April, 2002**, she stated that the Plaintiff has no **locus standi** to institute the suit as the Plaintiff has no rights over the suit land. She sought dismissal of the suit claiming it is resjudicata. She denied the Plaintiff's claim and stated that she has and continued to occupy the suit land legally as the registered proprietor.

7. The Plaintiff (P.W.1) testified that she stays on the suit land which was the original suit land. She produced and relied on Judgement in Kiambu **SRMCC No. 61 of 1989** (P-Exhibit 1) and an abstract title to the suit land (P Exhibit 2).

8. On her part, the defendant referred to and relied on her list of documents dated **27th November, 2006**. These documents are as follows:-

- a. Judgement delivered on 9th September, 1993 in Kiambu C.M.C.C. No. 704 1992 Peter Rua Murungaru – Vs- George Muiruri Guanga.(D Exhibits 1)**
- b. Sale agreement dated 12th March 1986 between Muriuki Guanga and Peter Rual Murungaru.(D. Exhibit 2)**
- c. Consent of Land Control Board dated 31st August, 1988 (D. Exhibit 3)**
- d. Application for partition of Limuru Bibirion 1477 (D. Exhibit 4)**
- e. Mutation form for Limuru Bibirion/1477 (D. Exhibit 5)**
- f. Title deed for Limuru/Bibirion/1926 dated 24th October 1988 in the name of Peter Rua Murungaru (D.Exhibit 6).**
- g. Letters of administration issued on 15th October, 1998 to Elizabeth Kibui Rua Estate of Peter Rua Murungaru (D. Exhibit 7)**
- h. Certificate of confirmation of the grant to Elizabeth Kibui Ruwa (D. Exhibit 8)**
- i. Title Deed issued on 23rd March, 2001 to Elizabeth Kibui Ruwas for Limuru/Bibirion/1926 (D. Exhibit 9)**
- j. Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd civil suit No. 699 of 2001 – High Court Nairobi (D. Exhibit 10)**
- k. Garden Square Limited – Vs- Kogo & Another, Civil case No. 1266 of 2002 –High Court Nairobi (D. Exhibit 11).**

9. D.W.1, a son of the defendant, relied on the defendant's statement dated **12th June, 2013** and stated that they have lived on the suit land since **1994**. That the decision in P Exhibit 1 is in favour of the defendant's husband against the Plaintiff's husband and termed the suit misplaced.

10. This Court permitted Counsel to submit orally, The time for submissions was limited to ten minutes for each counsel who acted accordingly.

11. Learned Counsel for the Plaintiff submitted that there was no dispute that the defendant was the registered owner of the suit land. That the registration was irregular hence void. Counsel cited **section 93 (1)** of the Land Registration **Act 2012** and termed the suit land matrimonial property.

12. Counsel submitted that consent of P.W.1 was necessary before the purported disposal of the suit land. P.W.1 stated that she was in hospital at the time of sale of the land and urged the court to grant the reliefs sought in the plaint.

13.. Learned Counsel for the Defendant submitted that the registered Land Act (Cap 300 repealed) was the relevant statute which did not provide for spousal consent to the dealings in the suit land hence the Land Registration Act cannot apply retrospectively. That the present suit is an abuse of the court process.

14. Counsel also submitted that since the Plaintiff's husband is alive, the Plaintiff has no locus standi to file the suit. That by D. Exhibit 1, the suit is res-judicata and there was no appeal from the decision in P. Exhibit 1 which was never executed. That the Plaintiff's husband as well as the Land Registrar are not parties to this suit. She further submitted that the Plaintiff is using the suit to ventilate her grudge against the defendant.

15. I have carefully considered the entire pleadings, evidence of P.W.1 and D.W.1 as well as submissions by counsel in this matter. In **Galaxy Paints Ltd –Vs- Falcon Grounds Ltd(2000) 2 E.A 385**, it was held that the issues for determination in a suit generally flow from the pleadings or as framed by the parties for the Court's determination. I embrace the statement of agreed issues dated 16th February, **2004**, which is jointly signed and filed by counsel for the respective parties, herein. The issues are:-

- a. Whether the Plaintiff has any "locus standi" to institute this suit and whether she has any legally enforceable rights over the suit land.**
- b. Whether the defence of Res Judicata is applicable herein**
- c. Whether the defendant's late husband fraudulently/irregularly transferred to him the suit land.**

16. On the issue of locus standi, P.W.1 stated that the late husband of the defendant bought the land and that the portion that remained after the transfer of the suit land from the original suit land, is not enough for their family. She testified that her husband is an alcoholic and does not have interest of their family at heart.

17. The Defendant counsel contended that the Plaintiff is not the registered owner of the suit land. That the defendant's husband who is the proprietor of the land is still alive hence the Plaintiff has no locus stadi to sue the defendant.

18. In the case of *Marigi –vs- Muriuki (2008) 1KLR (G & F) 1073 at 1077/1078*, it was held that the owner of the suit property was still active or alive and it was upon him to decide to subdivide or distribute it according to his own free will. The same position applies in the instant case.

19. It is pretty clear that the Plaintiff has not shown the capacity in which she is suing the defendant. She has not demonstrated that she has either general or specific power of attorney donated by her husband to originate the instant suit. Furthermore, she has not proved that the suit land is trust property.

20. In respect of res-judicata, I am guided by section 7 of the *Civil Procedure Act (Cap 21 Laws of Kenya)* on the definition of the term and its essential elements. Counsel for the defendant relied on D Exhibit 1 and asserted that the suit is res-judicata.

21. In D Exhibit 1, the defendant's late husband was the Plaintiff while the defendant was the Plaintiff's husband who is alive. The land in dispute was the suit land. The matter was finally determined by a Court of competent jurisdiction (SRM, Kiambu) hence the Plaintiff can't revive the suit in the circumstances.

23. On fraud, I am aware of *Chitty on Contracts, Vol.2, 22nd Edition at 844* that dishonest exaggeration not made in good faith will amount to fraud. In D Exhibit 1, the Court observed that the defendant's late husband was the registered rightful owner of the suit property and his rights were protected by *sections 27 and 28* of the repealed Act (*Cap 300*).

24. Quite clearly, the suit land was registered under the Registered Land Act (repealed) and not under the *Land Registration Act, 2012*. In *Wainaina –vs- Murai & others (1976-80)1KLR 283 at 289 and 290, Simpson J(as he then was)* held that:

“The land in question is registered under the Registered Land Act, an Act cited.....”

25. It is discernible from the evidence including D. Exhibits 1 to 9, that the defendant's late husband lawfully purchased the suit land from the Plaintiff's husband; see *Kuria Greens Ltd –vs- Registrar of Titles & another (2011)eKLR*. Therefore the allegations of fraud against the defendant are far-fetched in this matter.

26. In the premises, I find that the Plaintiff has no locus standi to commence this suit which is resjudicata by dint of D. Exhibit 1. The Plaintiff's case has not met the standard of proof higher than a balance of probabilities that the defendant's late husband obtained registration to the suit land by fraudulent process: see *Koinange and 3 others –vs- Koinange (1986)KLR 23*.

27. In the result and for the above reasons, I dismiss the Plaintiff's suit with costs to the defendant.

G.M.A ONG'ONDO

JUDGE

Dated, signed and delivered at Thika this 26th day of November, 2018.

Present:

Mrs, Mwaura for the Plaintiff.

Court Clerk: Tom

G.M.A ONG'ONDO

JUDGE