



IN THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APEAL NO. 24 OF 2014

PENINAH WANJIRU NJOROGE.....1ST APPELLANT

JANE WAIRIMU NJOROGE.....2ND APPELLANT

ESTHER WANJIKU NJOROGE.....3RD APPELLANT

MUCHIRI NJOROGE.....4TH APPELLANT

=VERSUS=

JANE NYAGUTHI NDIRANGU.....RESPONDENT

(Being an appeal from the Judgement of Hon. J W Onchuru Ag. Principal Magistrate

delivered on 18th June 2014, in Thika Chief Magistrate's ELC Case No.10 of 2013).

JUDGEMENT

Background:

1. The 1st Appellant is the mother of the 2nd, 3rd and 4th appellants . The 1st appellant is the wife of Njoroge Muchiri (Deceased), who was a member of Githunguri Constituency Ranching Company Limited. The litigation before the lower court centred on a property formerly known as LR No.Ruiru/Ruiru East Block 1/1480 which was later subdivided into 14 parcels known as LR No.Ruiru/Ruiru East Block 1/3553 to 3566.
2. During the hearing before the lower court, the Respondent contended that she purchased LR No.Ruiru/Ruiru East Block 1/1480 from Caroline Wambui Ndungu after which she subdivided it into 14 parcels with individual titles all in her name. In the year 2010, the Respondent visited her plots and found that a structure had been erected on LR No.Ruiru/Ruiru East Block 1/3556 and there was a cross on LR No.Ruiru/Ruiru East Block 1/3561 indicating that a body had been interred on it.
3. The Respondent asked her sister to carry out investigations and find out on who may have trespassed to the two plots. It was found that it is the appellants who had put up the structure and interred the remains of the deceased on the plot. The Respondent then filed a suit against the appellants in which she sought orders of exhumation, eviction and injunction against the appellants.
4. The appellants raised a defence and counter-claim in which they contended that LR No.Ruiru/Ruiru East Block 1/1480 had been allocated to the deceased by Githunguri Constituency Ranching Company Limited but that Caroline Wambui Ndungu had fraudulently obtained title for the same before she sold it to the Respondent. The appellants prayed for cancellation of title in favour of the Respondent.
5. At the conclusion of the hearing, the trial magistrate found in favour of the Respondent and granted her all the prayers in the Plaint. The appellants counter-claim was dismissed. This is what triggered this appeal.

The Appeal.

6. The appellants raised the following grounds of appeal:-

1. *The learned trial magistrate erred in law and fact in making an outrageous judgement against the entire weight of evidence*

which was uncontroverted.

- 2. The learned trial magistrate did not make any findings on the relevant evidence adduced before him and he made a judgement in a hurry thereby making a judgemental error.**
- 3. The learned trial magistrate did not consider that the Land Control Board (LCB) consent was given by the land Board when the purported owner of the property had no title deed which the learned magistrate openly ignored or never took into consideration.**
- 4. The learned trial magistrate erred in law and fact in taking into account irrelevant evidence and he greatly neglected relevant evidence and he therefore arrived at a decision that was unfair and injurious to the appellants.**
- 5. The learned trial magistrate was greatly influenced by extrinsic factors in arriving at the decision he made taking into account that the respondent was able to obtain consent to subdivide land that was not in her name, an outrageous occurrence.**
- 6. The learned trial magistrate failed to direct his mind into the evidence adduced by the chairman of Githunguri Ranching Company who stated categorically that Caroline Wambui Ndungu was never a member of the company to be in a position to be allotted any property.**
- 7. The learned trial magistrate decided the case against the weight of evidence tendered before him.**
- 8. The learned trial magistrate miserably failed to consider that the seller of the subject Land LR No. Ruiru/Ruiru East Block 1/1480 was not called as a witness by the plaintiff who would have obviously given a negative inference on the plaintiff's case.**
- 9. The learned trial magistrate failed to consider that the defendants disowned the purported Land L.R Ruiru Kiu block 2/1480.**
- 10. The learned trial magistrate failed to give relevance to the evidence adduced by the Thika Lands District Registrar that his office had no documentation relating to L.R Ruiru Kiu Block 2/1480.**
- 11. The learned trial magistrate failed to consider the defence evidence and therefore arrived an erroneous judgement.**
- 12. The learned trial magistrate erred in law and in fact in failing to appreciate that without a public health approval that a deceased person may be exhumed without any public concern and health hazard an order for exhumation should not be granted.**
- 13. The learned trial magistrate failed to consider that the court has a duty to call for the evidence of a public officer of health to guide the court on the consequences of the orders of exhumation.**

7. The Court directed parties to file written submissions in respect of the appeal on 23rd May 2018. The appeal was set down for mention on 25th September 2018 to confirm filing of submissions. On 25th September 2018, the Advocates for the appellants as well as the respondent indicated that they had not filed submissions. They each sought 7 days to do so. As at the time of writing this judgement neither the appellants advocate nor the respondent's advocate had filed any submissions and if any were filed, then they are not in the file. However, this notwithstanding I will go ahead to write the judgement.

8. I have carefully considered the grounds of appeal vis-à-vis the evidence adduced before the lower court and the main issue which emerges for determination in this appeal is whether the trial magistrate arrived at a correct finding based on the evidence before him. As a first appellate court, I am obliged to evaluate the evidence adduced before the lower court and arrive at my own conclusion but of course bearing in mind that I did not see the witnesses testify.

ANALYSIS.

9. I have gone through the judgement of the trial magistrate. After summarising the evidence adduced before him, he found that the main issue for determination was on the ownership of LR No. Ruiru/Ruiru East Block 1/1480. He went on to state that once this issue was resolved, then the issue of ownership of LR No. Ruiru/Ruiru East Block 1/3556 and 3561 would be as good as resolved. To this extent, the trial magistrate was correct because the appellants were claiming that Ruiru/Ruiru East Block 1/1480 had been allocated to the deceased and the respondent was also contending that it is the same land which she bought from Caroline Wambui Ndungu and later subdivided it to yield 14 parcels among them the two properties which were the subject of her claim before the lower court.

10. As I said before in this Judgement, the issue for determination is whether the trial magistrate arrived at a correct finding given the evidence before him. According to the respondent, she carried out a search which confirmed that LR No. Ruiru/Ruiru East Block 1/1480 was registered in the name of Caroline Wambui Ndungu. She purchased it and proceeded to subdivide it into 14 parcels. In the trial magistrate's judgement, he found that the respondent had acquired an indefeasible title which could not be challenged. On the other hand, he found that the deceased's land was LR No. Ruiru/Ruiru Kiu Block 2/1480 and that the deceased's kin should proceed to the lands office and obtain title in respect of this particular plot.

11. The trial magistrate ignored crucial evidence adduced before him which would have made him reach a different conclusion had he considered the same. The trial magistrate seems to have been convinced that as Caroline Wambui Ndungu had title, she was capable of passing the same to the Respondent. The trial magistrate did not interrogate on how this title which Caroline Wambui Ndungu had was obtained. The basis upon which Caroline Wambui Ndungu obtained title to LR No. Ruiru/Ruiru East Block 1/1480 was that she was a

member of Githunguri constituency Ranching Company Ltd where she had been given the plot after a balloting exercise where she picked ballot No 641.

12. There is evidence which was on record that Caroline Wambui Ndungu was not a member of Githunguri Constituency Ranching Company Limited. This evidence came from the chairman of the company who was categorical that Caroline Wambui Ndungu was not a member of the company. Caroline Wambui Ndungu was born in 1976. The ballot which she gave to the Respondent shows that she was shown plot 641 which was 1 ¼ acres 14th April 1985. Caroline Wambui Ndungu also surrendered a share certificate No. 9490 to the Respondent. This share certificate was issued to Caroline Wambui Ndungu on 17th May 1987. It is not possible that at the age of 9 years, Caroline Wambui Ndungu would have been shown a plot. The balloting exercise came before she was issued a share certificate. As at the time she was issued with a share certificate, she was 11 years old.

13. This evidence was before the trial magistrate. There was a report from the Principal Registrar, National Registration Bureau which showed that Caroline Wambui Ndungu was born in 1976. There was no evidence to controvert this report. Caroline Wambui Ndungu was not called as a witness of the respondent. The trial magistrate ignored this evidence arguing that there was no witness called from the National Registration Bureau and that even if Caroline Wambui Ndungu would have been called as a witness, she would not have changed the evidence of the Respondent. With respect to the trial magistrate, this was a wrong finding and misdirection which led him to fall into error.

14. There was no evidence adduced to show how Caroline Wambui Ndungu obtained her title. The trial magistrate seems to have been convinced by the evidence of the respondent and the District Registrar that the mere fact that a title was issued, then it means that all documents necessary before it was issued may have been availed. The law currently is that a mere flash – of title without evidence on how it was obtained is not enough. A person has to demonstrate that the process leading to the acquisition of the title was proper.

15. Evidence before the trial magistrate showed that Caroline Wambui Ndungu was not a member of Githunguri Constituency Ranching Company Ltd. The certificate which Caroline Wambui Ndungu gave to the respondent was issued on a Sunday when the offices of the company were not open. The trial magistrate ignored this evidence holding that there was no evidence from the company to show that their offices were not operating on Sundays and that in any case, the chairman who testified on that was not a director or official when the certificate was issued. The chairman of the company did not have to be a chairman or director at the time the certificate was issued for him to give evidence as to the operations of the company.

16. The trial magistrate agreed with the evidence of the respondent that the deceased was owner of *LR No. Ruiru/Kiu Block 2/ Githunguri/1480* and that his kin should pursue the title in respect of this particular plot. The District Land Registrar who testified stated that he had no records in respect of *LR No.Ruiru/Kiu Block 2/ Githunguri/1480*. It is the respondent who brought a title in the name of the deceased. It is also the respondent who brought a photocopy of an extract of title in respect of *LR No.Ruiru/Kiu Block 2/ Githunguri/1480*. The evidence of the chairman of Githunguri Ranching Company Ltd was that this plot i.e *Ruiru/Kiu Block 2/(Githunguri) 1480* was in their company name.

17. The trial magistrate did not query from where the respondent obtained the title in the name of the deceased as well as the copy of extract of title. The Land Registrar could not produce records for this property. The photocopy of extract of title showed that there was a restriction placed on *LR No.Ruiru/Kiu Block 2/ Githunguri/1480*. The police officers were investigating ownership of *LR No.Ruiru/Kiu Block 1/ Githunguri/1480* and *LR No.Ruiru/Kiu Block 2/ Githunguri/1480*. The Chairman of the company gave details of ownership of the two properties. The letter dated 11th February 2012 clearly showed that *LR No.Ruiru/Kiu Block 2/ Githunguri/1480* is owned by the company. It is therefore not clear where the respondent found the title in the name of the deceased. Ordinarily, extracts of title are given in their original form. In this case, the respondent produced a photocopy of a certified extract. Where she found that it is not clear as the District Land Registrar stated that he had no records regarding the said land which was alleged to be in the deceased's name.

18. The appellants had maintained that the deceased was never allocated plot No. *LR No.Ruiru/Kiu Block 2/ Githunguri/1480*. The deceased had been allocated plot *LR No.Ruiru/Ruiru East Block1/1480*. When the deceased died, his remains were interred on this property. There is evidence from the appellants that they went to the land and found that the cross on the tomb of the deceased had been removed and the land subdivided. They went and reported to the police who advised them to remove the beacons so that the person behind them could come out. This is exactly what they did and the person behind it surfaced. When the Respondent's sister was cross-examined, she conceded that there was a cross which appeared new though the person interred there was indicated to have died in 2002. This confirms the evidence of the appellants that there was interference with the cross which they later replaced after involving the clergy who prayed before a replacement of the cross was done.

19. The person behind the mysterious certificate of title in the name of the deceased is the respondent. The respondent's evidence is that when they found a structure on one of the subdivisions and a grave on another, the respondent asked her sister to carry out investigations to establish who was behind this. The respondent's sister is the one who came up with the certificate and copy of extract which purported to show that the deceased was owner of *LR No Ruiru/Kiu Block 2/(Githunguri)/1480*. All documents which had been given to the deceased showed that he had been allocated plot No.*Ruiru/Ruiru East Block 1/1480* which was 1 ¼ acres that is 0.55 of an hectare. The plot which the respondent purport is owned by the deceased is 0.5000 of a hectare which is less than what he had been allocated. The respondent's sister was working with Ministry of Lands and may have obtained these documents in a bid to defraud the deceased of his rightful land by claiming that the deceased's land lay elsewhere.

20. The manner in which the respondent began subdividing *LR No. Ruiru/Ruiru East Block 1/1480* even before the same was transferred to her shows that she was aware that the title held by Caroline Wambui Ndungu was not genuine. Consent to subdivide the land was obtained even before a sale agreement was executed. Consent to subdivide was obtained on 7th April 2009 following an application made on 31st March 2009. A sale agreement was signed on 8th April 2009. The respondent started subdivision process even before the title was transferred into her name. The mutations were signed on 8th May 2009. The respondent obtained title on 25th May 2009. The speed at which things were going clearly shows that the respondent was aware that Caroline Wambui Ndungu had no good title to pass to her. This is confirmed by the fact that the respondent went out of her way to obtain fake documents showing that the deceased had been allocated a different plot other than the one she purchased. The respondent should have called Caroline Wambui Ndungu to come and testify on how she obtained her title

considering the fact that acquisition of the title was in question.

21. A title which is obtained through a corrupt scheme to which the purchaser is shown to be a party to cannot stand. The trial magistrate did not take into account evidence adduced by the appellants with the result that he arrived at a wrong finding. The trial magistrate used strong language in dismissing the evidence of appellants which he termed as wild allegations .

CONCLUSION.

22. From the analysis hereinabove, it is clear that the trial magistrate was wrong in his findings. There is merit in all the grounds appeal except grounds 3 and 5. I therefore allow the appeal with the result that the judgement of the trial magistrate is hereby set aside and in place thereof, I make an order dismissing the respondents claim with costs to the appellants. The appellants claim is hereby allowed with the result that the Land Registrar Thika is hereby ordered to cancel land titles No.Ruiru/Ruiru East Block 1/3553 to 3566. The cancellation should also include any entries in favour of Caroline Wambui Ndungu and the respondent in relation to LR No.Ruiru/Ruiru East Block 1/1480. The appellants shall have costs of the counter-claim and the appeal.

Dated, signed and delivered at *Nairobi* on this 26th day of *November 2018*.

E.OBAGA

JUDGE

In the presence of :-

M/s Chelule for Mr Bosek for Respondent

Hilda : Court Assistant

E.OBAGA

JUDGE