



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.689 OF 2017

PETER NJUGUNA NJONGE.....PLAINTIFF

-VERSUS-

PHILIP MAINA KAMAU.....1ST DEFENDANT

FRANCIS KIHARA NGANGA.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

LAND REGISTRAR KIAMBU.....4TH DEFENDANT

JUDGMENT

The matter for determination is the *Originating Summons* dated **28th July 2017** brought by the Plaintiff herein **Peter Njuguna Njonge** against the Defendants herein **Philip Maina Kamau & 3 Others** wherein he has sought for orders that:-

- 1) That it be ordered that the Respondents herein be restrained from interfering with the quiet possession of property reference Karai/Karai/580 and Karai/Karai/579.**
- 2) That the title issued to Philip Maina Kamau on the 28th December 1984 Karai/Karai/580 be revoked and title issued to Francis Kihara Nganga on the 28th December 1984 Karai/Karai/579 be revoked.**
- 3) That the said two properties being Karai/Karai/579 and Karai/Karai/580 in the names of Francis Kihara Nganga and Philip Maina Kamau do revert back to the original owner, ie, Njonge Chungu Njoroge to enable the Defendants and beneficiaries to share out as per the Certificate of Confirmation of Grant.**
- 4) That the Respondents do pay costs of this Originating summons.**

The said *Originating Summons* is supported by the grounds on the face of the said *Summons* and the *affidavit* of **Peter Njuguna Njonge**. These grounds are:-

- a) That the 1st and 2nd Respondents have without any colour of right obtained title for Karai/Karai/580 and Karai/Karai/579.**
- b) That the 1st and 2nd Respondents have irregularly obtained title without any proper documentation.**
- c) That the Applicant was, after he obtained Letters of Administration, to proceed to sub-divide their land and share out, they noted that the 1st and 2nd Respondents had taken titles way back in the year 1984, when the registered owner who is his father died two years early.**
- d) That unless the Respondents are restrained they may continue claiming ownership under irregular registration as the transfer forms used indicate that the owner was one Mr. Njoroge Chuchu Njoroge while our father's name was Njonge Chungu Njoroge.**
- e) That it is fair and just in the circumstances to issue restraining orders to enable the Honourable Court to determine the issues herein for the interest of justice and fairness.**

In his *Supporting Affidavit*, the Plaintiff **Peter Njuguna Njonge** reiterated the contents of the grounds in support of the *Originating*

Summons.

The Plaintiff had also filed a **Notice of Motion** application even dated and had sought for restraining orders against the Respondents. However, the Court urged the Plaintiff to concentrate on the main suit since the alleged transfer was done about **30 years ago** and the Plaintiff is in possession and occupation of the suit property.

Summons to enter Appearance were served upon the Respondent on **22nd August 2017** as is evident from the **Affidavit of Service** of **Joshua Kiema Musyoki**, a **Process Server**. However, none of the Respondents entered appearance nor filed their responses to the **Originating Summons**.

The Plaintiff sought for request for **Judgement** on **8th October 2017** and matter was set down for formal proof.

Matter proceeded for formal proof on **19th April 2018** wherein Plaintiff gave evidence for himself and called one more witnesses. The Plaintiff and his witness adopted their witness statements which had been filed in court on **25th January 2018**.

The facts of this case is that the suit properties were originally **Karai/Karai/450** which was owned by one **Njonge Chungu Njoroge**, the father to the Plaintiff herein. Further that the said **Njoroge Chungu Njoroge** died on **24th May 1982** and left behind the **original title deed** for the suit property **Karai/Karai/450**, which the Plaintiff showed to this court on the date of the hearing. It was alleged that **Letters of Administration** were issued to the Plaintiff and two other administrators on **24th January 2016**. The said **Letters of Administration** were **confirmed** on **11th October 2016** as per the exhibit produced in court. In the Confirmed Grant, the suit property **Karai/Karai/450** was distributed among the six beneficiaries of the **Estate of Njonge Chungu Njoroge** as per the **Confirmed Grant** produced in court.

However, after the Mutation and subdivision of the said **Karai/Karai/450** which belonged to **Njonge Chungu Njoroge** as per land Certificate produced in court and which was issued to **Njonge Chungu Njoroge** on **27th August 1981**, the beneficiaries were surprised to find that this original property **Karai/Karai/450** was alleged subdivided in **1984** to give rise to three portions of land being **Karai/Karai/578, 579 and 580**. Further the **Transfer Form** showed that the subdivision was done by one **Njoroge Chuchu Njoroge** who was not the registered owner and who was not the father to the Plaintiff. The said transfer was done on **20th December 1984** and by then the proprietor of **Karai/Karai/450, Njonge Chungu Njoroge** was long dead and so he is not the one who authorized the said submissions. Further that the resultant to the **1st** and **2nd** Defendant and the official **Certificate of Search** shows that **Karai/Karai/579** was transferred to **Francis Kihara Nganga**, the **2nd** Defendant and **Karai/Karai/580** was transferred to **Philip Maina Kamau**. To the Plaintiff, the said transfers were illegal and fraudulent since they were not authorized by the proprietor **Njonge Chungu Njoroge** who was long dead nor the administrator of the Estate. Again, the Plaintiff and his siblings were still living on the suit property and have been occupying the same since their father passed on. It was submitted that the said proprietors of **Karai/Karai/579** and **580** have never gone to the ground to claim possession of the suit property and could also not be reached through their **Postal Address** of **24532 Karen**. It was the Plaintiff's evidence that these two proprietors are not known to the Plaintiff and his siblings and they are therefore strangers to the beneficiaries of the **Estate of Njonge Chungu Njoroge**. Further that the person who alleged subdivision **Karai/Karai/ 450** was **Njoroge Chuchu Njoroge** who is not the proprietor of the suit property and the said subdivision and transfer was done **2 years** after the death of the genuine proprietor **Njonge Chungu Njoroge**. The Court was urged to allow the Plaintiff's claim.

The Plaintiff's advocate filed written submissions on **18th May 2018** which this court has carefully read and considered. The Court has also considered the pleadings in general and the annexures thereto. Further the Court has considered the relevant provisions of law.

From the Green Card produced in court, it is evident that the parcel of land **Karai/Karai/450** was initially a partition of **parcel No.43** and was registered in the name of **Njonge Chungu Njoroge** on **27th August 1981**. A Certificate of title was issued thereafter. Therefore as provided by **Section 27** of the **Registered Land Act Cap 300 (now repealed)**, the said **Njonge Chungu Njoroge** became the absolute and indefeasible owner of the said parcel of land. Further, **Section 28** of the said Act provided that's this right could not be defeated except as provided by the law but the title was subject to overriding interests as provided by **Section 30** of **Cap 300 (now repealed)**.

However, there is no evidence that this title **Karai/Karai/450** was affected by the overriding interests mentioned in **Section 30** of **Cap 300 (now repealed)**. It is also evident that the said **Njonge Chungu Njoroge** died on **24th May 1982** and left behind **nine (9) beneficiaries**. The land was therefore subject of a **Succession Cause** for the **Estate of the said Njonge Chungu Njoroge**. Further, it was evident from the Green Card that this title was closed upon subdivision of **Karai/Karai/578, 579 and 580**. The Plaintiff has alleged that the said subdivision was certainly not authorized by his father **Njonge Chungu Njoroge** as in **1984**, he was long dead. From the attached documents, this subdivision was authorized by **Njoroge Chuchu Njoroge** who is not the proprietor and was not an administrator of the **Estate of Njonge Chungu Njoroge**. Therefore the said subdivision was **illegal** and **fraudulent** and amounted to **intermeddling** of the property of a deceased person contrary to **Section 45** of the **Succession Act**.

It is evident that only parcel **No.Karai/Karai/578** remained in the name of **Njonge Chungu Njoroge** as per the **Certificate of Official Search** dated **8th March 2009**. However **Karai/Karai/579** was transferred to **Francis Kihara Nganga**, the **2nd** Respondent who did not appear in court to explain how he got registered as such proprietor.

Further, **Karai/Karai/580** was registered in the name of **Philip Maina Kamau** the **1st** Respondent who also failed to turn up in court to defend his proprietorship. With all the available evidence, it is clear that the subdivision of **Karai/Karai/450** was done fraudulently by a person who was not the proprietor of the said property. Therefore the resultant subdivisions was therefore **null** and **void** and the transfer of the said **resultant subdivisions Karai/Karai 579 and 580** to the **1st** and **2nd** Respondent is also **void**. **Karai/Karai/450** forms part of the **Estate of Njonge Chungu Njoroge** and should be distributed in accordance with the Law of Succession.

Having found that the resultant subdivisions of *Karai/Karai/450* which are *Karai/Karai/578, 579* and *580* are null and void, then the Court finds that the said titles cannot stand and should be voided and/or cancelled.

Section 79 of the **Land Registration Act** allows the Registrar to rectify the Register or any instrument presented for registration. The Registrar has not done so. However, **Section 80(1)** of the said **Land Registration Act** which is a *replica* of **Section 143** of the **Registered Land Act Cap 300 (now repealed)**, which the regime wherein the impugned titles were registered under, gives the court discretion to order for rectification and/or cancellation of any entry in the Register. **Section 80(1)** of the **Land Registration Act** provides:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

The Court will also rely on the case of ***Esther Ndegi Njiru & Another..Vs..Leonard Gatei (2014) eKLR***, the Court held that:-

“...my view therefore is that where fraud or mistake is proved even what would qualify to be a first registration would under the provisions of the Land Registration Act be liable to be rectified and/or cancelled”.

Further, in the case of ***Mary Ruguru Njoroge...Vs...Samuel Gachuma Mbugua & 4 Others (2014) eKLR***, the Court held that:-

“...It is however upto the party seeking rectification to prove to the court’s satisfaction that there has been fraud or mistake in the registration. In any view the mistake referred to under Section 80(1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name.... The Court too has powers to order the rectification of the title or register in appropriate circumstances.....Registration vide the said Section refers and includes a title or entry in the registry or on the title itself”.

The Court finds that the 1st and 2nd Defendants have never taken possession of their respective parcels of land maybe because they knew the said parcels were acquired fraudulently. However, the Plaintiff has proved to the satisfaction of the court that the said registration in favour of the 1st and 2nd Defendants was done fraudulently and that this is a clear case where the court should use the provision of **Section 80(1)** and order for rectification of the Register by directing the **Land Registrar, Kiambu** to cancel the resultant subdivisions of *Karai/Karai/450* being *Karai/Karai/578, 579* and *580* and revert the title to its original proprietor **Njonge Chungu Njoroge (deceased)** so that the distribution of the said land can be done as per the **Confirmed Grant** that was issued by the court on **11th October 2016**.

Having now carefully considered the available evidence, the **Court finds that the Plaintiff has proved his case against the Defendants herein on the required standard of balance of probabilities**. Consequently, the **Court allows the instant Originating Summons dated 28th July 2017 entirely in terms of prayers No.1, 2 and 3. Costs of this Originating Summons be met by the Defendants**.

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of November 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Githui holding brief for Mr. Osoro for Plaintiff

No appearance for 1st Defendant

No appearance for 2nd Defendant

No appearance for 3rd Defendant

No appearance for 4th Defendant

Lucy - Court clerk

L. GACHERU

JUDGE

Court – Judgment read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

16/11/2018