



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 478 OF 2010

JANE NJOKI NJUGUNA.....1ST PLAINTIFF

JANET WAITHIRA GICHUHI.....2ND PLAINTIFF

(Suing as legal representatives of the Estate of The late PETER GICHUHI NJOROGE)

=VERSUS=

GEOFFREY MWAURA GICHUHI.....1ST DEFENDANT

NJENGA GICHUHI.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 7th October 2010 and filed in court on the 8th October 2010 the plaintiffs herein sued the defendants jointly and severally for:-

(a) A declaration that the transfer of all those parcels of land known as Githunguri/Nyaga/645 and Githunguri/Nyaga 1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268, and 1270 in the names of the 1st and 2nd defendants was fraudulent irregular and unlawful.

(b) An order cancelling the title deeds to the above said parcels of land and a declaration that the parcels of land form part of the estate of the late Peter Gichuhi Njoroge.

(c) An order restraining the 1st and 2nd defendants by themselves their agents, employees or servants from selling alienating, transferring, dealing with or many ways interfering with all those parcels of land known as Githunguri/Nyaga/645 and Githunguri/Nyaga/1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268 and 1270 until the estate of the late Peter Gichuhi Njoroge is distributed.

(d) Costs of this suit and interest.

2. Upon being served with copies of plaint and summons to enter appearance the defendants entered appearance and filed a statement of defence dated 9th February 2011.

3. By a notice dated 29th May 2012 and filed in court on 29th May 2012 the plaintiff withdrew the suit against the 3rd defendant.

4. The plaintiffs called three witnesses. PW1 Jane Njoki Njuguna also the 1st plaintiff told the court that she is the first born daughter of the Later peter Gichuhi Njoroge alias Gichuhi Njoroge (hereinafter referred to as the deceased). She also stated that the two defendants are her brothers. She also stated that she was relying in the witness statements dated 7th March 2012 and 12th October 2013 and urged the court to adopt the two statements as part of her evidence together with the bundles of documents filed on 1st December 2011 and 11th July 2013 and 15th October 2013 respectively.

5. She told the court that the deceased started ailing in 2005. He was forgetful and disoriented. He fell ill and was admitted at Nairobi West Hospital. It was while at the said hospital that Dr. Maru, a Psychiatrist diagnosed that he was suffering from dementia. She further told the court that it was around this time that the defendants took advantage of the deceased's condition and transferred several properties into their names.

6. She further told the court that in September 2006. The deceased donated a general power of attorney to her. It is through the power of attorney that she was able to obtain several title deed which titles were collected by the 1st defendant apparently to keep them under a safe custody. She further stated that it was about 2010, when they realized that the deceased had signed some documents. She produced all the documents in the bundle of documents as exhibits in this case.

7. PW2, George Njoroge Gichuhi a brother to the 1st plaintiff and a son to the deceased confirmed what PW1 told the court. He was also of the view that titles issued to the defendants be cancelled. He also urged that his witness statement be adopted as part of his evidence in this suit.

8. PW3 Doctor Fredrick Richard Owiti, a consultant psychiatrist confirmed that he saw Gichuhi Njoroge (deceased) on 28th February 2008. He prepared a report. His conclusion, was the said Gichuhi Njoroge was suffering from dementia. He formed the opinion that his mental capacity was greatly diminished and could not decide on who could take what form his estate. PW3 also confirmed that he saw reports from Doctor Gatere and Maru who reached the same conclusion. He produced his report and those by his colleagues as exhibit P4, P5, P6 and P15 respectively. When cross examined by defendants' counsel told the court that the condition progresses as years go by.

9. Mr. Gachoka for the defendants' told the court the 2nd defendant had passed on during the pendency of the suit. The 1st defendant who resides in USA was not able to attend court to testify. He urged that the court relies on the statement of defence and the witness statements filed by the two defendants. He therefore closed the defence case.

10. I have considered the pleadings, the respective witness statements and the bundles of documents filed. I have considered the evidence on record in its entirety. The issues for determination are:-

(i) Whether or not land Parcels Nos Githunguri/Nyaga/645 and Githunguri /Nyaga/1257 – 1270 were fraudulently irregularly transferred to the transferees.

(ii) Whether or not Peter Gichuhi Njoroge (deceased) had capacity to transfer the above mentioned parcels in view of the fact that he was mentally impaired and/or lacking mental capacity.

(iii) Whether or not the deceased had directed how his assets were to be shared out among the beneficiaries of his estate.

(iv) Whether or not the above mentioned title deeds should be cancelled and the suit properties to revert to the Estate of Peter Gichuhi Njoroge.

(v) Who should pay costs of this suit

11. I will deal with issues (i) and (ii) together as they are intertwined. It is not in dispute that the 1st plaintiff had been granted a general power of attorney by her father. She told the court that upon obtaining some titles she took them to her mother (2nd plaintiff). That the 1st defendant who resides in the United States of America took the titles with him apparently for safe keeping. It is also not disputed that in the year 2008, the 1st defendant organized for his parents to visit him in the USA. It is prior to the visit which prompted the 1st defendant to consult Dr. Fredrick Owito a consultant psychiatrist to confirm whether the deceased would be in a position to travel. Dr. Owiti produced his report prepared then. It is highly probable that this is the year the defendants may have taken advantage of the deceased's condition and had the parcels of land transferred to themselves.

12. The 1st defendant on this point stated in his witness statement that his late parents were of sound mind and neither of them was ever under any medication for Alzheimers disease or dementia. He denied any fraud in the transfers. That all he got was according to the mode of distribution that their parents intended. I have warned myself of the fact that the contents of the 1st defendants witness statement was not tested by cross examination as he did not testify in court.

13. In paragraph 6 of the statement of defence the defendants allege that the deceased Peter Gichuhi Njoroge had directed how the properties would be shared out long before the ailment set in and all the family members were involved and were aware of the mode of sharing out of the properties. In paragraph 5, they claim that the said parcels do not form part of the deceased's estate as he had transferred them inter vivos. I am of the view that they ought to have appeared in court to demonstrate that the above claims are true. In the absence of any proof these will remain mere allegations.

14. The three reports by the consultant psychiatrist all confirm that the said Peter Gichuhi Njoroge (deceased) suffered from dementia and Alzheimers. These reports have not been challenged. The defence did not avail any other report to controvert them. This therefore means that Peter Gichuhi Njoroge deceased had no capacity to transfer the said parcels as he was mentally impaired and/or lacking in mental capacity. It therefore goes without saying that the said parcels were fraudulently irregularly and/or unlawfully transferred to the transferees.

15. The law is protective of title and provides limited circumstances in which a title may be impeached. **Section 26 (1) of the Land Registration Act, 2012** provides that:-

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

16. As stated earlier, the deceased peter Gachuhi Njoroge lacked the mental capacity to transfer the said parcels. It means the said parcels of land could have only been transferred to the defendants through fraud. In the case of **Alice Chemutai Too vs Nickson Kipkurui Korir [2015] eKLR**. J. S. Munyao held that:-

“In our case there is no doubt that in so far as the title of the 1st respondent is concerned, it was procured by way of fraud or misrepresentation. The title of the 1st respondent is clearly impeachable by dent of the provisions of Section 26 (1) (a). It cannot be allowed to stand and must be cancelled. If it is cancelled then it follows that any subsequent transactions have to be cancelled as well for they were entered into by a party who had no capacity to do so, he not having a title in the first place.....”

17. Having found that the parcels were transferred to the defendants fraudulently, irregularly and unlawfully, I find that what this court is left to do is to order cancellation of the said title deeds. The same ought to revert to the Estate of Peter Gichuhi Njoroge.

18. In conclusion I find that the plaintiffs have proved their case on a balance of probabilities. I enter judgment in favour of the plaintiffs as against the defendants as follows:-

(a) That a declaration be and is hereby issued that all the transfer of all those parcels of land known as Githunguri/Nyaga/1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268 and 1270 into the names of the 1st and 2nd defendants was fraudulent, irregular and unlawful.

(b) That an order be and is hereby issued cancelling the title deeds to the above said parcels of land and a declaration is hereby issued that the parcels of land form part of the estate of the late peter Gichuhi Njoroge.

(c) That an order be and is hereby issued restraining the 1st and 2nd defendant by themselves, their agents, employees, or servants from selling, alienating, transferring, dealing with or in any way interfering with all those parcels of land known as Githunguri/Nyaga/645 and Githunguri/Nyaga/1257, 1258, 1259, 1260, 1261, 1262, 1263, 1264, 1265, 1266, 1267, 1268 and 1270 until the estate of the late Peter Gichuhi Njoroge is distributed

(d) A copy of this judgment shall be served upon the Land Registrar Kiambu to effect the necessary changes.

(e) The costs of this suit shall be borne by the defendants.

It is so ordered.

Dated, signed and delivered in Nairobi on this 19TH day of DECEMBER 2018

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant