



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 102 OF 2014

FRANCIS MAINA NJOGU.....PLAINTIFF

VERSUS

NICOLAS KIRAGU NGACHA.....DEFENDANT

AND

JOHN MUCHINA NJOGU.....1ST INTERESTED PARTY

PETER MURIUKI NJOGU.....2ND INTERESTED PARTY

CATHERINE WANJIRU.....3RD INTERESTED PARTY

JUDGMENT

FRANCIS MAINA NJOGU (the plaintiff herein) and **JOHN MUCHINA NJOGU, PETER MURIUKI NJOGU** and **CATHERINE WANJIRU** (the 1st, 2nd and 3rd interested parties respectively) are siblings being the children of one **NJOGU GIKURU** (deceased) who during his lifetime was the registered proprietor of land parcel No. INOI/KARIKO/610. According to the plaint filed here on 24th April 2014, the land parcel No. INOI/KARIKO/610 was the subject of **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 255 of 2013** and was shared between the deceased's brother **MOSES MUCHINA GITAU**, the plaintiff and the interested parties as follows:-

- 1. MURIUKI NJOGU - 0.20 Ha**
- 2. JOHN MUCHINA NJOGU - 0.20 Ha**
- 3. FRANCIS MAINA NJOGU and
CATHERINE WANJIRU - 0.20 Ha**
- 4. MOSES MUCHINA GIKURU - 0.40 Ha**

Pursuant to the confirmation of grant, the land parcel No. INOI/KARIKO/610 was sub-divided into two portions being INOI/KARIKO/3465 measuring 0.40 Ha and INOI/KARIKO/3466 measuring 0.60 Ha and transferred through transmission as follows:

- 1. MOSES MUCHINA GAKURU - INOI/KARIKO/3465 - 0.40 Ha**

2. JOHN MUCHINA NJOGU - INOI/KARIKO/3466 - 0.60 Ha

FRANCIS MAINA NJOGU and jointly

PETER MURIUKI NJOGU

Each of the siblings was to utilize 0.20 Ha of land parcel No. INOI/KARIKO/3466 awaiting partitioning and issuance of title deeds and meanwhile, the siblings remained joint proprietors of the said land although the plaintiff leased his portion which had tea bushes to third parties.

However, on 28th January 2014, the defendant, some of the plaintiff's siblings and other unknown persons fraudulently conspired and caused the land parcel No. INOI/KARIKO/3466 to be unlawfully and illegally sub-divided into INOI/KARIKO/3479, INOI/KARIKO/3480 and INOI/KARIKO/3481 (the suit land) which was then registered in the following names:

1. PETER MURIUKI NJOGU (2nd interested party) -

INOI/KARIKO/3481 measuring 0.20 Ha.

2. NICOLAS KIRAGU NGACHA (defendant)

INOI/KARIKO/3479 and INOI/KARIKO/3480 each measuring 0.20 Ha.

It is the plaintiff's case that the sub-division of land parcel No. INOI/KARIKO/3466 to give rise to the suit land and subsequent transfer to the defendant was done illegally, fraudulently and tainted with illegality for purposes of disinheriting the plaintiff of his share. Particulars of fraud are pleaded in paragraph eight (8) of his plaint and include colluding with third parties to sub-divide land parcel No. INOI/KARIKO/3466 without seeking the plaintiff's consent as a registered owner, forging relevant documents and the plaintiff's signature whereas the plaintiff did not attend any Land Control Board meetings, unlawfully securing or forging copies of the plaintiff's legal documents like his Identity Card, photos and copies of Personal Identification Number (PIN) similar to those that the plaintiff had surrendered during the confirmation of grant, uttering forged documents and illegally bestowing unto himself the benefits of land parcel No. INOI/KARIKO/3479 and INOI/KARIKO/3480 yet the plaintiff never sold nor transferred them as a gift to the defendant etc. The plaintiff therefore sought judgment against the defendant in the following terms:

1. A declaration that the sub-divisions carried out over land parcel No. INOI/KARIKO/3466 into land parcels No. INOI/KARIKO/3479, 3480 and 3481 were illegal, fraudulent and tainted with irregularities.

2. A declaration that the subsequent transfer to the defendant of land parcel No. INOI/KARIKO/3479 and INOI/KARIKO/3480 and which portions were for the benefit of FRANCIS MAINA NJOGU and JOHN MUCHINA NJOGU were illegal, fraudulent and tainted with irregularities and the registration of the defendant over the suit land be cancelled and land parcel No. INOI/KARIKO/3479 be registered in the name of JOHN MUCHINA NJOGU whereas land parcel No. INOI/KARIKO/3480 be registered in the names of FRANCIS MAINA NJOGU.

3. That all the relevant costs and expenses for the cancellation and issuance of new title deeds as aforesaid be borne by the defendant.

4. That the defendant be forcibly evicted from land parcel No. INOI/KARIKO/3479 and INOI/KARIKO/3480 and such costs of eviction be borne by the defendant.

5. Costs of the suit and interest thereto at Court rates.

6. Any other better relief that the Honourable Court may deem just and fit to grant.

The defendant filed a defence denying the averments of fraud and putting the plaintiff to strict proof adding that if the plaintiff leased out his share of land parcel No. INOI/KARIKO/610, then he did so against orders issued in **KERUGOYA SUCCESSION CAUSE No. 133 of 1990**. However, in a reply to that defence, the plaintiff reiterated all the averments in his plaint adding that he was not aware of any orders issued in **KERUGOYA SUCCESSION CAUSE No. 133 of 1990**.

On 1st October 2015 the interested parties were enjoined in this suit by consent. They thereafter filed their joint defence which, save for the admission of the descriptive parts of the plaint, they denied all the other averments including those alleging fraud on their part and put the plaintiff to strict proof thereof. But in a reply to that defence, the plaintiff reiterated the averments in his plaint and added that the interested parties aided the defendant in committing acts of fraud as they abated the same.

The trial commenced on 11th October 2016 when the plaintiff asked the Court to adopt his written statement and reiterated that upon the death of his father **NJOGU GIKURU** (the deceased), land parcel No. INOI/KARIKO/610 was distributed between him, his siblings who are the interested parties herein and their uncle **MOSES MUCHINA GIKURU** pursuant to orders made in **KERUGOYA HIGH COURT SUCCESSION CAUSE No. 255 of 2013**. Land parcel No. INOI/KARIKO/610 was later subdivided into two portions being INOI/KARIKO/3465 which was registered in the names of their uncle **MOSES MUCHINA GIKURU** while parcel No. INOI/KARIKO/3466 was registered in the joint names of himself and his brothers **JOHN MUCHINA NJOGU** and **PETER MURIUKI NJOGU** the 1st and 2nd interested parties. Meanwhile, the plaintiff had leased his portion which had tea bushes to **ANTHONY MIANO** (PW2). However in or about 28th January 2014, he discovered that the defendant with the help of the 1st and 2nd interested parties had fraudulently and unlawfully caused the land parcel No. INOI/KARIKO/3466 to be sub-divided into three portions being the suit land herein and while parcel No. INOI/KARIKO/3481 was registered in the names of the 2nd interested party, parcels No. INOI/KARIKO/3479 and INOI/KARIKO/3480 were registered in the names of the defendant. That all this was done notwithstanding the fact that the defendant is not a beneficiary of the deceased's Estate and neither did the plaintiff attend any Land Control Board nor sell his share of the suit land to the defendant. In his statement which he asked the Court to adopt as his evidence, he adds that this fraud was perpetrated by the defendant, his siblings and other parties unknown to him adding that during the succession proceedings, his brothers had asked him for copies of his Identity Card, Personal Identification Number (PIN) and Passport photographs which he believes were used in the fraudulent transfer of the suit land.

In support of his case, the plaintiff called as a witness **ANTHONY MIANO KARIMI** (PW2) who confirmed that the plaintiff had leased to him his share of the original land parcel No. INOI/KARIKO/610 where he was growing tea in 2010. He paid Ksh. 425,500 for the 23 year lease with an understanding that he would eventually purchase the plaintiff's share once sub-division was done. However, after the sub-division was done in 2014, he learnt that the plaintiff had no share in the land and that his (plaintiff's) share had been taken by the defendant and the 1st and 2nd interested parties. He added that he is no longer using the land.

NICHOLAS KIRAGU NGACHA the defendant herein told the Court that the interested parties were present when he bought parcel No. IINOI/KARIKO/3480 from the plaintiff and INOI/KARIKO/3479 from the 1st interested party. He then took possession of the parcels No. INOI/KARIKO/3479 and INOI/KARIKO/3480. He added that the plaintiff attended the Land Control Board and denied that the transaction was conducted fraudulently.

JOHN MUCHINA NJOGU the 1st interested party testified on behalf of the others and confirmed that the plaintiff is their brother and that land parcel No. INOI/KARIKO/610 belonged to their late father and his brother **MOSES MUCHINA** and was shared between them but the plaintiff sold his share to the defendant in their presence. He therefore told the Court that he has no problem with the defendant retaining the portion sold to him and neither does he support the plaintiff's claim that the titles to the suit land be cancelled.

Submissions have been filed both by **KIGURU KAHIGA** advocate for the plaintiff and **IKAHU NGANGAH** advocate for the defendant and interested parties.

I have considered the parties oral and documentary evidence as well as the submissions by counsel.

The plaintiff's case is premised on allegations of fraud. It is his evidence that the sub-division of land parcel No. INOI/KARIKO/3466 which resulted in the suit land was done by the defendant in collusion with the interested parties and others fraudulently and that he never sold his share to the defendant. This is denied by the defendant and interested parties who claim that infact the plaintiff sold his share to the defendant.

An allegation of fraud is a serious one which must be proved to the required standard. In **B.G. PATEL VS LALJI MAKANJI 1957 E.A 314**, the Court of Appeal stated that:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”

Therefore, allegations of fraud must be specifically pleaded and set out and also distinctly proved to the required standard. The onus is of course on the party alleging fraud and the standard is much heavier than in ordinary civil cases but not as heavy as to require proof beyond reasonable doubt – see **MORJARIA VS DARBAR 2000 e K.L.R** and also **CENTRAL BANK OF KENYA LTD VS TRUST BANK LIMITED & OTHERS 1996**.

The plaintiff has distinctly pleaded the allegations of fraud levelled against the defendant in paragraph eight (8) of his plaint which include that he neither sold his share in the suit land to the defendant nor attended any Land Control Board for that purpose. He alleges that the interested parties who are his siblings and who took his Identity Card and Personal Identification Number (PIN) during the succession proceedings following the death of their father who owned the original land parcel No. INOI/KARIKO/610 must have used those documents to perpetrate that fraud. It is clear from the Green Cards herein that following the succession proceedings, land parcel No. INOI/KARIKO/3466 from which the suit land was hived was registered in the joint names of the plaintiff and the 1st and 2nd interested parties in equal shares. The Green Card does not indicate whether the plaintiff and the 1st and 2nd interested parties owned land parcel No. INOI/KARIKO/3466 as joint tenants or tenants in common. The law is that where a property is registered in more than one name, in the absence of a contrary entry in the register, the property is deemed to be held in a joint tenancy where the interest of each owner is indeterminable with each owning all and nothing – see **MUKAZITONI JOSEPH VS ATTORNEY GENERAL C.A CRIMINAL APPEAL No. 128 of 2009**. ... **Section 91 (4) of the Land Registration Act 2012** states as follows with regard to co-tenancies:

“If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently –

(a) dispositions may be made only by all the joint tenants

(b) “.

It follows therefore that the interested parties could not sell any portion of land parcel No. INOI/KARIKO/3466 to the defendant or any other person without the consent of the plaintiff. The plaintiff denies having sold his share nor given his consent to the transaction that resulted in the sub-division of land parcel No. INOI/KARIKO/3466 or the transfer of the suit land to the defendant. In his testimony, the defendant was categorical that the plaintiff attended the Land Control Board and consented to the transaction whereby he bought the suit land. He even stated that a sale agreement was drawn. In cross-examination by counsel for the plaintiff, he said:

“I have the title deed for that land. I bought it for Ksh. 680,000. I gave the sale agreement to my

lawyer. The agreement was drawn by Ndata advocate. I don't have the application for the Land Control Board consent. Everything was left in the Lands office. Advocate Mugo Ndata is not my witness"

The 1st interested party also stated as follows in his evidence in chief:

"The plaintiff sold his share to the defendant. I was present"

As the plaintiff denied all that, one would have expected that either the defendant or the interested parties would have availed a copy of the sale agreement signed by the plaintiff or even called as their witness, the advocate who drew it. They did neither. Since the plaintiff was alleging a negative i.e. that he did not sell the suit land to the defendant nor attend any Land Control Board, it would be impossible to expect him to produce evidence to prove the negative. In the Ugandan Case of **J.K. PATEL VS SPEAR MOTORS LTD SCCA No. 4 of 1991** cited by **ODUNGA J.** in **REPUBLIC VERSUS DISTRICT COMMISSIONER MACHAKOS J.R MISC APPLICATION No. 304 of 2013**, the Court held:

"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant"

Therefore the plaintiff having pleaded and testified that the transfer of the suit land to the defendant was fraudulent, it was the duty of the defendant to demonstrate that infact the plaintiff executed a sale agreement to that effect because the plaintiff cannot be expected to prove the negative. And since the defendant's testimony is that he paid Ksh. 680,000 for the suit land and an agreement was executed by a lawyer to that effect, nothing would have been easier than to produce that agreement.

That would enable the Court to peruse that agreement and confirm if indeed the plaintiff executed it and if infact it was in compliance with the provisions of **Section 3 (3) of the Law of**

Contract Act which provides that an agreement for the sale of land shall be evidenced in writing and signed by all the parties. It is noteworthy that the defendant was alleging a written agreement between him and the plaintiff and not an oral agreement. The onus was therefore on the defendant to prove the existence of that fact by producing the agreement. **Section 109 of the Evidence Act** provides as follows:

"The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is proved by any law that the proof of that fact shall lie on any particular person".

It is clear to me that the plaintiff did not enter into any agreement with the defendant or any other person over the sale of the suit land yet he was a joint owner of land parcel No. INOI/KARIKO/3466 together with the 1st and 2nd interested parties. It is also clear from the evidence that the defendant was aware that the plaintiff had a share in the land parcel No. INOI/KARIKO/3466 and also the resultant sub-divisions. He cannot therefore claim, which he has not even done, that he was an innocent purchaser for value. I am therefore satisfied from the evidence before me that the sub-division carried out with respect to land parcel No. INOI/KARIKO/3466 into INOI/KARIKO/3479, 3480 and 3481 was illegal, fraudulent and irregular as it was carried out without the consent of the plaintiff who was a joint owner thereof and should have been involved in the transaction.

Following the unlawful, irregular and fraudulent sub-division of land parcel No. INOI/KARIKO/3466, the resultant three portions were registered as follows:

1. PETER MURIUKI NJOGU (2nd interested party) – INOI/KARIKO/3481

2. NICHOLAS KIRAGU NGACHA (defendant) –

INOI/KARIKO/3479 and INOI/KARIKO/3480.

In his evidence in chief, the defendant testified as follows:

“I bought two portions being INOI/KARIKO/3479 from JOHN MUCHINA and INOI/KARIKO/3486 from the plaintiff himself in the presence of his siblings”

This Court has already made a finding that the sub-division of land parcel No. INOI/KARIKO/3466 to give rise to the suit land and the transfer that followed were all irregular and illegal. However, the 1st interested party **JOHN MUCHINA NJOGU** told the Court that he has no problem with the defendant retaining land parcel No. INOI/KARIKO/3479 which he sold to him. Indeed in his submission, counsel for the plaintiff said as follows:

“That since the interested party testified that he has no problem with his L.R INOI/KARIKO/3479 being in the hands of the defendant, we hereby abandon that portion of the claim”.

This Court will therefore not make any adverse orders with regard to land parcel No. INOI/KARIKO/3479 since the 1st interested party **JOHN MUCHINA NJOGU** has relinquished his right thereto in favour of the defendant. The Court will confine itself to the land parcel No. INOI/KARIKO/3480 which is the plaintiff’s share out of the original land parcel No. INOI/KARIKO/3466 and which was fraudulently and illegally transferred to the defendant. If the defendant paid any consideration for that parcel to the interested parties, he is at liberty to pursue that claim in a different forum as that issue was not placed before me for my consideration.

The up-shot of the above is that the plaintiff has proved his case against the defendant as required in law. Judgment is therefore entered for the plaintiff against the defendant in the following terms:

- 1. A declaration that the sub-divisions carried out over L.R INOI/KARIKO/3466 into INOI/KARIKO/3479, 3480 and 3481 were illegal, fraudulent and tainted with irregularities.***
- 2. A declaration that the subsequent transfer to the defendant of L.R INOI/KARIKO/3480 which portion was for the benefit of the plaintiff FRANCIS MAINA NJOGU was illegal, fraudulent and tainted with irregularities and the defendant’s registration as proprietor of land parcel No. INOI/KARIKO/3480 be cancelled and the said parcel be registered in the names of the plaintiff FRANCIS MAINA NJOGU.***
- 3. That the defendant be evicted from land parcel No. INOI/KARIKO/3480. Such eviction to be carried out in compliance with the provisions of Section 152 of the Land Act 2012.***
- 4. The defendant shall meet the plaintiff’s costs with interest at Court rates.***
- 5. The Court is not inclined to make orders that the defendant meets the costs of the cancellation and issuance of the new title deed or of the costs of his eviction from land parcel No. INOI/KARIKO/3480.***

Orders accordingly.

B.N. OLAO

JUDGE

31ST MARCH, 2017

Judgment delivered, dated and signed in open Court this 31st day of March 2017

1st Defendant present in person

No appearances by the other parties or counsel

Right of appeal explained.

B.N. OLAO

JUDGE

31ST MARCH, 2017