



**Kimaru v Gatei (Environment & Land Case 24 of 2021)
[2024] KEELC 36 (KLR) (19 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 36 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 24 OF 2021
JO OLOLA, J
JANUARY 19, 2024**

BETWEEN

ROBERT MWEMA KIMARU PLAINTIFF

AND

NANCY NJOKI GATEI DEFENDANT

JUDGMENT

Background

1. By his Complaint dated 17th November 2021, Robert Mwema Kimaru suing as an Administrator of the Estate of Peter Kimaru Theuri (the Plaintiff) prays for Judgment against the Defendant for;
 - i). Cancellation of title number Nyeri/Waraza/382 consolidated with title number Nyeri/Waraza/381 to revert back to the original title Nyeri/Waraza/128;
 - ii). Costs of this suit and interest at court rates; and
 - iii). Any other or further relief this Honourable Court may deem fit to grant.
2. Those prayers arise from the Plaintiff's contention that at all times material, Peter Kimaru Theuri alias Kimaru Theuri (deceased) was the registered proprietor of the parcel of land known as Nyeri/Waraza/128 measuring approximately 14.3 Ha.
3. The Plaintiff avers that long after the deceased passed away, the Defendant proceeded to fraudulently sub-divide the said parcel of land into Nyeri/Waraza/381 and 382 which titles he transferred into names of the deceased and herself respectively. The Plaintiff contends that the Defendant's said actions are unlawful and void ab initio and hence the prayers in the suit.
4. Nancy Njoki Gatei (the Defendant) however denies that the Plaintiff is entitled to the orders sought. In her Statement of Defence dated 12th January 2022, the Defendant avers that through a sale agreement



dated 31st May 1988, her father Benson Gatei Macharia (now deceased) did purchase from the said Peter Kimaru Theuri a portion of land measuring ten (10) acres which was to be excised from Title No. Nyeri/Waraza/128.

5. The Defendant avers further that subsequent to the sale, the said Title No. Nyeri/Waraza/128 was sub-divided into Nyeri/Waraza/381 and Nyeri/Waraza/382. The said parcel No. 382 measuring 10 acres constitutes the property bought by the Defendant's father. It is her case that the sub-division process was transparent, procedural, lawful and sanctioned by the Kieni East Land Control Board.
6. By way of her Amended Defence and Counterclaim, the Defendant and her co-claimants assert that the vendor having received the entire purchase price and thereafter having placed the purchaser in possession of the land, the doctrine of constructive and/or resulting trust operated in favour of the purchaser and that the vendor lost proprietary interest and rights over the suit property.
7. Accordingly the Defendant and her two Co-claimants in the Counterclaim pray for;
 - a). A declaration that the estate of Robert Mwema Kimaru (Deceased) has no proprietary interest or right over the suit land Title Number Nyeri/Waraza/382;
 - b). A declaration that the demand and claim by the Defendant in the counter-claim over the suit property known as Title Number Nyeri/Waraza/382 is inequitable, (and) unconscionable and the Defendant in the counter-claim is estopped from making such a demand;
 - c). A declaration that the registration of the purchaser- Benson Gatei Macharia (Deceased) as a proprietor was lawful and procedural;
 - d). A declaration that upon payment of the full purchase price and assuming possession of the suit land, the purchaser – Benson Gatei Macharia (Deceased) acquired rights and interests over the suit property by virtue of operation of the doctrine of constructive and resulting trust;
 - e). An order of permanent injunction restraining the Defendant in the counter-claim from trespassing, entering or in any way interfering with possession and user of the suit land Title Number Nyeri/Waraza/382; and
 - f). Costs of the suit and interest.

The Plaintiff's Case.

6. At the trial herein Robert Mwema Kimaru (PW1) testified as the sole witness in his case. Relying on his statement filed in court on 26th November 2021, he told the court that he is the legal representative of the estate of Peter Kimaru Theuri alias Kimaru Theuri. PW1 testified that before his death, the said Peter Kimaru Theuri was the registered proprietor of the parcel of land known as Nyeri/Waraza/128 measuring 14.3 Ha.
7. PW1 told the court that Peter passed away on 8th March 1989 and that the parcel of land known as Nyeri/Waraza/128 was sub-divided around 13th March 1998 into Nyeri/Waraza/381 and 382. He testified that Nyeri/Waraza/381 was then registered in the name of the deceased while Nyeri/Waraza/382 was registered in the name of the Defendant to hold in trust for one Benedict Gatei and Jayden Macharia who were indicated as minors at the time.
8. On cross-examination, PW1 testified that he was aware the 10 acres that were in the name of the Defendant were fenced on the ground. He denied that the fence was placed by the Defendant's father. PW1 conceded that he was aware his father had intended to sell the land. Shown a Sale Agreement



dated 31st May 1988, PW1 told the court he was not aware of the same. He told the court his father should have invited him to witness the Sale Agreement as it was a family matter.

9. PW1 further conceded that his father had not inherited the land but had acquired it from the Settlement Fund Trustees.

The Defence Case

10. Similarly Nancy Njoki Gatei (DW1) testified as the sole witness for the defence. Relying on her statement dated 4th April 2022 and filed in court on 6th April 2022, DW1 testified that she is the daughter and the legal representative of Benson Gatei Macharia while her Co-Plaintiffs in the Counter Claim are his step-mother and brother respectively.
11. DW1 told the court that by a sale Agreement dated 31st May 1988, her father who is now deceased purchased from one Peter Kimaru Thueri a parcel of land measuring 10 acres which land was to be hived from Title No. Nyeri/Waraza/128. DW1 further told the court that by a letter dated 12th January 1989, the vendor applied to have the 10 acres transferred to her father and the vendor acknowledged that he had been paid the whole purchase price.
12. DW1 testified that immediately after the purchase, her father took possession of the suit property, erected a barbed wire fence, planted trees and started using the land. Upon survey, the 10 acres were registered as Title No. Nyeri/Waraza /382.
13. DW1 told the court that the Plaintiff had himself by a letter dated 22nd January 1989 acknowledged that the vendor had sold the suit land to her father from whom she inherited the land.

Analysis and Determination.

14. I have carefully perused and considered the pleadings herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
15. The Plaintiff in this suit has urged the court to cancel the title numbers Nyeri/Waraza/381 and Nyeri/Waraza/382 and to have the same revert to the original parcel number Nyeri/Waraza/128. That prayer arises from the Plaintiff's contention that at all times material, his deceased father Peter Kimaru Thueri was the registered proprietor of the said parcel of land known as Nyeri/Waraza/128 measuring approximately 14.3 Ha.
16. It is the Plaintiff's case that long after his father passed away, the Defendant proceeded to fraudulently sub-divide the said parcel of land into Nyeri/Waraza/381 and 382 which titles were then registered in the name of his deceased father and that of the Defendant respectively. It is his case that the Defendant's said acts were unlawful and void ab initio.
17. But in her Defence and Counterclaim filed jointly with her step-mother Grace Wairimu Gatei and brother Gategi Macharia, the Defendant avers that the parcel of land known as Nyeri/Waraza/382 was lawfully acquired by her father Benson Gatei Macharia who purchased the same from the Plaintiff's father on 31st May 1988. It is the Defendant's case that subsequent to the purchase of the 10 acres which were then comprised in the original title Nyeri/Waraza/128, the said parcel of land was sub-divided into two portions. The portion known as Nyeri/Waraza/381 remained in the name of the Plaintiff's father while the portion known as Nyeri/Waraza/382 was registered in the name of the Defendant's father.
18. In both his pleadings and evidence in chief before the court, the Plaintiff contended that he was unaware of the circumstances under which the parcel of land formerly known as Nyeri/Waraza /128



- came to be sub-divided into two parcels. It was his case that the Defendant had fraudulently sub-divided the parcel of land many years after his father in whose name the land was registered, passed away.
19. From the material placed before the court however, it was apparent that the Plaintiff was being very economical with the truth. A perusal of the Defence exhibit 1 reveals that prior to his death, the Plaintiff's father – Peter Kimaru Theuri had on 31st May 1988 entered into a Sale Agreement with the Defendant's father- Benson Gatei Macharia wherein the Plaintiff's father sold 10 acres of the said parcel number Nyeri/Waraza/128, then measuring 35 acres to the Defendant's father, at a consideration of Kshs. 150,000/=.
 20. In his letter dated 12th January 1989 addressed to the KANU Munyu Sub-Location Working Committee, the Plaintiff's father applied to have the 10 acres transferred to the Defendant's father acknowledging therein that he had received the full purchase price. From a perusal of the said letter, it was apparent that the vendor had run into some difficulties in settling a loan owed to the Settlement Fund Trustees and needed money for the same and to settle other pressing financial issues.
 21. While the Plaintiff herein feigned ignorance of the circumstances under which the land came to be in the hands of the Defendant, it was clear to me that he was fully aware of the same. Shortly after his father sold the land, the Plaintiff himself wrote to the same KANU Munyu Sub-Location Working Committee approving of the sale as follows;

“Ref: Land Parcel No. Waraza/128/Nyeri

I Robert Mwema Kimaru the eldest son of the said Kimaru Theuri, the sole proprietor/ owner of the quoted parcel of land, for and on behalf of my family give consent for the sale of part of the quoted parcel of land measuring approximately ten (10) acres only on the understanding that no more transactions, sale or otherwise, will be negotiated and this is terminal as far as per land sale is concerned”.
 22. When asked in cross-examination about the letter (Dexh 16), the Plaintiff responded on oath as follows;

“This letter at page 22 was authored by me. I wrote this letter under duress. The previous night my father beat me up. I was then 29 years old. I did not give the consent willingly. He was dictating to me what to write. I was then working with Mitchell Cotts Kenya Ltd. I was an Accountant. I did not lodge any complaint with the police. Nobody was at home when the incident happened. I have never thought of reporting my father to the family.”
 23. It was surprising that while the Plaintiff could remember his being beaten and forced to write the letter in 1989, he would wake up some 32 years later and come to court in the year 2021 feigning ignorance of the circumstances under which the 10 acres came to be registered in the name of the Defendant's father and accusing the Defendant of fraud. If anyone was being fraudulent herein, it was certainly the Plaintiff and not the Defendant herein.
 24. As it were, it is noteworthy that the Plaintiff's father had worked to acquire the land. He did not inherit the same but acquired it under a loan from the Settlement Fund Trustees. Contrary to the Plaintiff's assumption of self-importance as the eldest son of his father, the father was under no legal obligation to seek his consent and/or to involve him before disposing of his properties.
 25. When the Defendant's father purchased the 10 acres of land from the Plaintiff's father, it was expected as stated in Clause 6 of the Sale Agreement executed between them that the property then known as Nyeri/Waraza/128 would be sub-divided. That sub-division was done and the Defendant's father –



Benson Gatei Macharia came to be registered as the proprietor of the 10 acres of land now known as Nyeri/Waraza/382 on 13th March 1998.

26. At paragraph 4 of his Plaintiff, the Plaintiff accused the Defendant of fraudulently sub-dividing the suit property and transferring the same to her name. The particulars of the alleged fraud are given thereunder as follows;

“Particulars of Fraud.

- (i). Purporting to sub-divide LR. No. Nyeri/Waraza/128 without any legal authority or at all;
- (ii). Illegally transferring LR. No. Nyeri/Waraza /382 to herself; and
- (iii). Purporting to have bought the deceased property long after his death.”

27. From the material placed before the court, there was nothing to back those particulars of fraud. As we have stated herein above, it was the Defendant’s father who acquired the land from the Plaintiff’s father and the land was thereafter on 13th March 1998 registered in the name of the Defendant’s father following the sub-division of LR. No. Nyeri/Warazo/128. That property did not pass to the Defendant herein until after the death of her father, the said Benson Gatei Macharia.

28. From a perusal of the Green Card for the said property, the same was only transferred to the name of the Defendant and her Co- Plaintiffs in the Counterclaim on 21st January 2020 following the conclusion of Karatina SRM Succession Cause No. 199 of 2016; *In the matter of the Estate of Benson Gatei Macharia*.

29. In his submissions before the court, the Plaintiff contended that the sub-division and eventual transfer were illegal as the original title remained in his hands and that there was no application for consent. There was however no denial that his father had received the purchase price for the suit property following the Sale Agreement executed between him and the Defendant’s father.

30. Considering a similar situation in *Peter Mbiri Michuki –vs- Samuel Mugo Michuki* [2014] eKLR, the Court of Appeal stated the law as follows;

“It is our considered view that when the Appellant entered into a Sale Agreement in 1964 and received the purchase price on the suit property, the Appellant became a trustee holding the suit property in favour of the Plaintiff...”

31. In *Gatimu Kiringuru –vs- Muya Gathangi* [1976] KLR 253, the court stated thus;-

“The creation of a trust over agricultural land in a land control area does not constitute an “other disposal of or dealing” for the purpose of Section 6 (1) of the *Land Control Act* and, therefore, does not require the consent of the Land Control Board.”

32. In any event and as was stated in *Macharia Mwangi; Maina & 87 Others – vs- Davidson Mwangi Kagiri* [2014] eKLR;

“... This court is enjoined to dispense substantive Justice. What is Justice? Justice is conscience, not a personal conscience but the conscience of the whole humanity, (See Alexander Solhenitsya). Would the conscience of humanity allow an individual to receive the purchase price and later plead that the agreement is void?



The conscience of humanity dictates that constructive trust and proprietary estoppel shall apply in such cases. Lord Denning in *Hussey -vs- Palmer* [1972] All ER 744 held that a constructive trust is a trust imposed by law whenever justice and good conscience require it.

33. Arising from the foregoing I was not persuaded that the Plaintiff's claim had any basis whatsoever. It was misconceived and filed hopelessly out of time. On the other hand, I was persuaded that there was merit in the Defence and Counterclaim dated 6th May 2022.
34. Accordingly Judgment is hereby entered for the Defendant as against the Plaintiff as sought in the counterclaim.
35. The Plaintiff shall bear the costs of his suit as well as that of the counterclaim.
36. It is ordered.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF JANUARY, 2024.

J. O. LOLA

JUDGE

In the presence of:

Ms. Wanjiru holding brief for Mr. Ng'ang'a for the Plaintiff.

Ms. Nduta holding brief for Mr. Mwangi for the Defendant

Court Assistant: Kendi

