



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 278 OF 2014**

**PRISHAR WAMBUI KAGUURA.....PLAINTIFF**

**VERSUS**

**PETER WAITHAKA KAGUURA.....1<sup>ST</sup> DEFENDANT**

**ELIZABETH WANJIRU WAITHAKA.....2<sup>ND</sup> DEFENDANT**

**SAMUEL MWANGI GACHUNGA.....3<sup>RD</sup> DEFENDANT**

**FLORAH NJOKI MWANGI.....4<sup>TH</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, MURANG'A.....5<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By her plaint filed herein on 10th October 2014, the plaintiff prayed for judgment against the defendants jointly and severally in the following terms:

- 1. A permanent injunction against the 1st and 2nd defendants by themselves barring them from disposing, wasting, transferring, alienating, charging and or selling any portion or all the suit land without involving the plaintiff.***
- 2. An order of revocation and or cancellation of the sub-division and title deeds in respect to all that parcel of land known as Land Reference No. LOC 2/KANDERENDU/1511 and LOC 2/KANDERENDU/1512.***
- 3. An order of reinstatement of and merger and issuance of title deed for the original land known as Land Reference No. LOC 2/KANDERENDU/640 as it was before.***
- 4. An order for eviction of the 3rd and 4th defendants from the suit land.***
- 5. A permanent injunction against the 3rd and 4th defendants barring them from trespassing and or entering into, disposing, wasting, transferring, alienating, charging, encroaching on the suit land.***
- 6. A permanent injunction against the 5th defendant barring it from effecting any registration regarding disposing, wasting, transferring, alienating, charging and or selling any portion for***

*the whole suit land without involving the plaintiff.*

*7. General damages for trespass be borne by the 3rd and 4th defendants.*

*8. Costs of this suit.*

*9. Interest on (7) and (8) above.*

The plaintiff's case, as I understand her pleadings, is that she and the 1st defendant who is her son were the registered proprietors of land parcel No. LOC 2/KANDERENDU/640 and sometimes in December 2007, she released the title to him. Unknown to the plaintiff, the 1st defendant sub-divided that land into two portions namely LOC 2/KANDERENDU/1511 and LOC 2/KANDERENDU/1512. He then sold land parcel No. LOC 2/KANDERENDU/1512 to the 3rd and 4th defendants without the plaintiff's consent or knowledge and had parcel No. LOC 2/KANDERENDU/1511 registered in the names of himself, the 2nd defendant and the plaintiff again without the plaintiff's consent or knowledge. The plaintiff discovered this in 2011 and approached the 5th defendant to enquire how this sub-division and registration was done. The 5th defendant summoned the 1st, 2nd and 3rd defendants and upon hearing the parties, the 5th defendant promised to cancel the registration. The plaintiff then lodged a caution on land parcel No. LOC 2/KANDERENDU/1511 and filed this suit alleging fraud on the part of the defendants particulars whereof are pleaded in paragraph fifteen (15) of the plaint and include applying for registration of land without the plaintiff's consent and knowledge, fraudulent registration, misrepresentation and conspiracy.

The 1st and 2nd defendants did not file any defence and although their counsel was in Court at time of hearing on 18th August 2016, he later disappeared from the Court when the trial commenced at 10.43 a.m. after it had been shown that he was still on record for the 1st and 2nd defendants. The 3rd and 4th defendants filed a joint defence in which they denied the plaintiff's averments adding that they are purchasers for value of land parcel No. LOC 2/KANDERENDU/1512 and did not require the plaintiff's consent as she was not the registered owner. That the plaintiff resides on land parcel No. LOC 2/KANDERENDU/1512 and was aware of all transactions involving that land and they were put in possession thereof and have developed it. They therefore denied the allegations of fraud adding that the case ought to have been filed at the nearest Court which is Muranga High Court. They sought the dismissal of the case against them with costs.

On behalf of the 5th and 6th defendants, the Attorney General filed a defence in which they pleaded that they are strangers to the allegations of fraud adding that the registration of the land in dispute in the names of the 1st, 2nd, 3rd and 4th defendants was based on the documents presented to them in the performance of the 5th defendant's duties as prescribed in law. They too sought the dismissal of the suit against them with costs.

The plaintiff was the only witness in support of her case and she asked the Court to adopt her statement as part of her evidence. She testified that the 1st defendant is her son while the 2nd defendant is his wife and that the original land parcel No. LOC 2/KANDERENDU/640 was purchased by her and her husband in 1991 and later registered in the joint names of the 1st defendant and herself as per the certificate of search (Plaintiff's Exhibit 1). The title to the property was in the custody of the 1st defendant who in December 2007 proceeded to sub-divide it into LOC 2/KANDERENDU/1511 and LOC 2/KANDERENDU/1512. The 1st defendant then proceeded to sell parcel No. LOC 2/KANDERENDU/1512 to the 3rd and 4th defendants by an agreement dated 2nd February 2010 alleging that she was part of the agreement (Plaintiff's Exhibit 4) yet she was not. The 1st defendant then registered land parcel No. LOC 2/KANDERENDU/1511 in his names and the names of the 2nd defendant and the plaintiff. She produced the respective certificates of search (Plaintiff's Exhibits 2 and 3). She added that the 1st and 2nd defendants should have sought her consent since the original land parcel No. LOC 2/KANDERENDU/640 was also registered in her names. She referred to the agreement dated 2nd February 2010 (Plaintiff's Exhibit 4) as a fraud since she was not consulted.

The 3rd defendant **SAMUEL MWANGI GACHUNGA** told the Court that the 4th defendant is his wife

and that they purchased 0.7 acres out of land parcel No. LOC 2/KANDERENDU/640 from the 1st and 2nd defendants for Ksh. 350,000. That the agreement was drawn by an advocate and they obtained the necessary Land Control Board's consent. He then obtained his title deed and put up a home in 2010. He added that the plaintiff is infact his neighbour on the land.

The 3rd defendant called as his witness **EVANS MWANGI MUCHOKI (DW2)** who testified that he (3rd defendant) sold him land at Kiganjo in 2010 so he could use the funds to buy the land parcel subject of this suit from the 1st defendant. He further testified that both the agreements between him and the 3rd defendant and that between the 3rd defendant and the 1st defendant were executed on the same day and that he saw the title deed which was in the names of the 1st and 2nd defendants.

The 5th and 6th defendants did not lead any evidence.

Submissions were thereafter filed both by the firm of **MAINA KAGURA & CO.** Advocates for the plaintiff and **WANGARI & CO.** Advocates for the 3rd and 4th defendants. No submissions were filed by the 5th and 6th defendants or the 1st and 2nd defendants against whom interlocutory judgment was entered and whose counsel disappeared during the trial.

I have considered the evidence both by the plaintiff and the 3rd defendant as well as the submissions filed.

The plaintiff's case is premised on the fraudulent transactions in relation to the original land parcel No. LOC 2/KANDERENDU/640 and thereafter the resultant sub-division being LOC 2/KANDERENDU/1511 and LOC 2/KANDERENDU/1512. The particulars of fraud have been pleaded in paragraph fifteen (15) of the plaint. The plaintiff's case is that the original land parcel No. LOC 2/KANDERENDU/640 was registered in the joint names of herself and her son the 1st defendant who sub-divided it into the portions mentioned above without her consent. He then sold parcel No. LOC 2/KANDERENDU/1512 to the 3rd and 4th defendants again without her consent or knowledge. As the plaintiff has pleaded fraud, the onus was on her to prove it to the required standard which is more than a mere balance of probabilities. In **R.G. PATEL VS LALJI MAKANJI (1957) E.A 314**, the then Court of Appeal for East Africa 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”***

In **CENTRAL BANK OF KENYA LTD VS TRUST BANK LTD & OTHERS C.A CIVIL APPEAL No. 215 of 1996**, the Court stated as follows:

***“The Appellant made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case”.***

Furthermore, **Sections 109 and 112 of the Evidence Act** casts the burden of proving the existence of any particular fact which he requires the Court to believe on the party alleging it. Those provisions read as follows:

***Section 109 “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 provided by any law that the proof of that fact shall lie on any particular person”***

***Section 112 “In civil proceedings, where any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him”***

The legal burden of proof lies on the party who asserts the affirmative of any issue.

Section 107 (1) of the Evidence Act reads:

***“Whoever desires any Court to give judgment as to any legal right of liability dependent on the existence of facts which he asserts must prove that those facts exist”.***

Has the plaintiff proved the allegations of fraud as against the defendants? The answer is “yes” and the reasons are not difficult to find.

In his evidence in chief, the 3rd defendant **SAMUEL MWANGI GACHUNGA** (DW1) stated as follows:

***“I am the 3rd defendant. The 4th defendant is my wife. I know the plaintiff in this case. I also know the 1st and 2nd defendants. They sold me and my wife in 2010. It is land No. LOC 2/KANDERENDU/640. It was in the names of the 1st and 2nd defendant. The purchase price was Ksh. 350,000. I was buying 0.7 acres. We entered an agreement before a lawyer”***

The 3rd defendant then proceeds to deny any fraudulent action on his part stating how they went to the Land Control Board for the necessary consent after which he obtained his title deed. The agreement that the 3rd defendant refers to is dated 2nd February 2010 and was produced as plaintiff’s Exhibit 4. It reads in paragraph two (2) and three (3) as follows:

***“Whereas land parcel No. LOC 2/KANDERENDU/640 is registered in the names of PETER WAITHAKA KAGURA and PRISHAR WAMBUI KAGURA measuring 2.83 Ha”***

***“And whereas the Vendor is desirous to selling to the Purchaser 0.7 acres out of the said parcel and whereas the Purchaser is desirous of buying the same”.***

It is clear from the agreement that as at the time the 1st defendant and the 3rd and 4th defendants were executing the same, they all knew that land parcel No. LOC 2/KANDERENDU/640 was ***“registered in the names of PETER WAITHAKA KAGURA and PRISHAR WAMBUI KAGURA”***. The 3rd and 4th defendants must therefore have been aware from that agreement that the plaintiff was also a registered owner of land parcel No. LOC 2/KANDERENDU/640 and it was mandatory that they seek her consent before entering into that agreement. The 3rd defendant cannot therefore claim, as he did in cross-examination, that: ***“I did not know the land was in the names of the plaintiff and 1st defendant as at 29.11.2007”***. The agreement speaks for itself and parties cannot run away from its contents. The 3rd and 4th defendants cannot therefore be innocent purchasers for value as pleaded. The 1st and 2nd defendants did not file any defence and therefore the plaintiff’s evidence that they secretly had land parcel No. LOC 2/KANDERENDU/640 to be sub-divided into parcels NO. LOC 2/KANDERENDU/1511 and LOC 2/KANDERENDU/1512 the latter of which was sold to the 3rd and 4th defendants without her consent has therefore not been rebutted and must be accepted by this court as the truth. The 1st defendant and his counsel **MR. MWANIKI** were in fact present in Court on the date of the hearing but **MR. MWANIKI** disappeared after the case had been allocated hearing time of 10.30 a.m. and although his client was present, he put no question to the plaintiff. As the initial sub-division of land parcel No. LOC 2/KANDERENDU/640 was fraudulent as one co-owner was not involved, it follows that all the other subsequent transactions were all null and void because the 1st and 2nd defendants had no title to pass to the 3rd and 4th defendants. This Court finds that the allegations of fraud levelled against the 1st, 2nd, 3rd, and 4th defendants by the plaintiff have been proved to the required standard and the plaintiff is therefore entitled to the orders sought in the plaint as against them.

What about the allegations of fraud as against the 5th and 6th defendants? No evidence was led by the 5th and 6th defendants as well. What the Court has on record is only their un-prosecuted defence that they exercised ***“due diligence”*** and believed the documents presented to them to be ***“genuine”***. It is clear from the evidence herein that in fact no due diligence was exercised and I dare say that there was a clear dereliction of duties if not outright conspiracy on the part of the officers in the 5th defendant’s office in this fraud. It is a common practice in the offices of the 5th defendant country-wide and that explains why they stayed out of the Court during the trial.

From the evidence therefore, this Court finds that the plaintiff has proved her case against all the defendants to the required standard. She is therefore entitled to the orders sought in the plaint.

Among the orders sought is one for general damages for the trespass by the 3rd and 4th defendants. As no title to land parcel No. LOC 2/KANDERENDU/1512 was passed to the 3rd and 4th defendants, they remain trespassers on that land even if they have put up houses thereon. The law is that once a trespass to land is established, it is actionable per se and there is no need of proof of damage necessary before a Court can award general damages. The plaintiff's advocate did not make any submission on what amount of general damages would be reasonable in the circumstances of this case. That appears to have been left to the Court. Doing the best I can, I would assess the general damages payable to the plaintiff by the 3rd and 4th defendants at Ksh. 300,000.

The plaintiff is also entitled to the orders for the eviction of the 3rd and 4th defendants from the suit land since they did not acquire any lawful proprietary interests in land parcel No. LOC 2/KANDERENDU/1512 or any part thereof. They would have been entitled to a refund of any purchase price paid but as is now clear, the plaintiff did not receive any and they may direct their claim against the 1st and 2nd defendants if they so wish. I however direct that the 3rd and 4th defendant vacate the suit land within six (6) months from the date of this judgment failure to which the plaintiff is at liberty to evict them as provided under **Section 152 of the Land Act.**

Ultimately therefore, there shall be judgment for the plaintiff against the defendants in the following terms:

- 1. A permanent injunction against the 1st and 2nd defendants barring them from disposing, wasting, transferring, alienating, charging and/or selling any portion of land parcel No. LOC 2/KANDERENDU/640 without involving the plaintiff.***
- 2. An order for revocation and cancellation of the sub-division and title deeds for the land parcels No. LOC 2/KANDERENDU/1511 and No. LOC 2/KANDERENDU/1512.***
- 3. An order for the reinstatement and merger of the original land parcel No. LOC 2/KANDERENDU/640 to what it was before.***
- 4. An order that the 3rd and 4th defendants do vacate the suit land within six (6) months from the date of this judgment and in default the plaintiff may evict them as provided under Section 152 of the Land Act.***
- 5. An order of permanent injunction against the 3rd and 4th defendants barring them from trespassing and/or entering into, wasting, alienating, or encroaching upon the suit land upon compliance with (4) above.***
- 6. An order barring the 5th defendant from effecting any registration regarding disposing, transferring, alienating, charging or selling any portion of the suit land without involving the plaintiff upon complying with (2) and (3) above.***
- 7. General damages of Ksh. 300,000 payable to the plaintiff by the 3rd and 4th defendants.***
- 8. Costs of the suit to be borne by the 3rd, 4th and 6th defendants.***

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> MAY, 2017**

Judgment dated, delivered and signed in open Court this 31<sup>st</sup> day of May 2017

No appearance by counsel for either parties though notified in writing by our letter dated 22<sup>nd</sup> May 2017

3<sup>rd</sup> Defendant is however present in person

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**31<sup>ST</sup> MAY, 2017**