



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
ENVIRONMENT AND LAND COURT
THIKA LAW COURTS
ELC.NO. 260 OF 2017

WANJIRU RICHU.....PLAINTIFF/APPLICANT

-VERSUS-

CYRUS GATHATA KIBUI.....1ST DEFENDANT/RESPONDENT

S R 2ND DEFENDANT/RESPONDENT

JUDGEMENT

The Plaintiff herein *Wanjiru Richu* by a *Plaint* dated *16th July 2014*, lodged a claim against the Defendants herein. In her claim, the Plaintiff sought for the following orders:-

- 1) An order that the Defendants do execute the Transfer and all other necessary documents that shall confer the sole ownership of the piece of land known as Lari/Magina/[particulars withheld] to the Plaintiff.*
- 2) An Order that the 1st Defendant do vacate the Plaintiff's piece of land known as Lari/Magina/[particulars withheld], and in the event of disobedience of this order, the 1st Defendant be evicted therefrom.*
- 3) The cost of this suit.*
- 4) Such other or further relief as this Honourble Court may deem fit and just to grant.*

It was the plaintiff's allegation that she is the lawful owner of all that piece of land known as title *No.Lari/Magina/[particulars withheld]* measuring *0.80 Hectares* having inherited the same from her late father *Kibuthu Mbuthia*. She further averred that her late father's piece of land known as *LR. No.Lari/Magina/[particulars withheld]* was subdivided and shared among the beneficiaries of the deceased estate. The Plaintiff's share was therefore *LR.No.Lari/Magina/[particulars withheld]*, the suit property herein. It was her further allegation that she decided to register her share in her own name jointly with the names of her sister's grandson *Cyrus Gathata Kibui*, the 1st Defendant and her adopted son – *S R*, the 2nd Defendant who was a minor then.

She also averred that on or about the *12th May 2014*, the Plaintiff discovered through a search that on or

about the **26th August 1998**, the 1st Defendant caused the said Plaintiff's land to be registered in the joint names of the Plaintiff and the Defendants, with respective shares defined. i.e 1st Defendant had given himself and 2nd Defendant the largest share of **0.88 Acres** each while leaving the Plaintiff with only **0.24 Acres**. The Plaintiff alleged that the purported sharing and registration of respective shares was illegal, unlawful and fraudulent. She particularized the said fraud in **Paragraph 8** of the **Plaint** among them that the Plaintiff did not authorize or sign for the said sharing and registration of the respective shares.

Further that despite Demand and Notice of Intention to Sue having been given, the 1st Defendant has refused and/or neglected to execute the necessary documents re-transferring the said piece of land to the Plaintiff. The Plaintiff

has urged the Court to allow the claim.

The Defendants herein were served with **Summons** to **Enter Appearance** and the **Plaint** as indicated in the **Affidavits of Service** filed on **23rd October 2014**, by **Stephen Karanja Hiram**. However the 1st Defendant filed a Memorandum of Appearance through **Moses Odawa & Co. Advocates** but did not file his Defence. The 2nd Defendant did not Enter Appearance nor file his Defence. Consequently, the Plaintiff on **22nd October 2014**, requested for judgement against the Defendants as stipulated by Order 10 Rule 4 of the Civil Procedure Rules. The said Interlocutory Judgement was entered against the Defendants on **21st November 2014**, and matter was set for Formal Proof. Though the Defendants did not Enter Appearance, the onus of proof is on the Plaintiff since its trite law that he who alleges must prove. See **Section 107** of the **Evidence Act** which provides that whoever desires the Court to give judgement as to any liability or legal right dependent on the existence of facts which he asserts must prove that those facts exist.

The Plaintiff herein has alleged that the Defendants fraudulently caused the suit land to be registered in the joint names of the Plaintiff and the Defendants with distinct shares of each party and giving the Defendants the largest shares. The Plaintiff therefore has the onus of proving the said allegations of fraud. Further see the case **of CMC Aviation Ltd..Vs.. Cruise Air Ltd (1) 1978 KLR 103**, where the Court observed that:-

“Pleadings contain the averments of the facts concerned and until they are proved or disapproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”

Since the Plaintiff alleged that the Defendants fraudulently registered the suit land with distinct shares without her consent, then the Plaintiff had a duty to prove the existence of the said fraud. In the case of **Urmilla w/o Mahendra Shah..Vs..Barclays Bank International Ltd & Ano. (1979) KLR 76**, the Court held 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, but something more than a mere balance of probabilities is required.”

In her **Plaint**, the Plaintiff has alleged that she is a beneficial owner of the suit property having acquired it from the estate of her late father **Kibuthu Mbutia** in **1996**. It was her allegation that the suit property is a subdivision of **Lari/Magina/[particulars withheld]**.

I have indeed considered the Green Card and I have noted that the suit property was a subdivision of parcel **no.[particulars withheld]** and was registered in the name of **Wanjiru Richu** on **5th November 1996**, and title deed was issued then.

Plaintiff has further alleged that the 1st Defendant caused the suit property to be registered in the joint names of the Plaintiff and the two Defendants on **26th August 1998**, and the Defendants obtained the

largest shares of **0.88 Acres** each whereas the Plaintiff was to retain **0.24 Acres**. It was her contention that this was done without her consent. Indeed there is a title deed issued **on 26th August 1998**, specifying that the suit land is jointly owned by the Plaintiff and the Defendants herein and the said title deed indicated the distinct share of each party.

From the Pleadings, the Plaintiff has alleged that the 2nd Defendant is her adopted son who was a minor when the suit land was registered in the year **1998**. The Court has also seen a letter dated **23rd May 2014**, allegedly written by **S R** who has alleged that he has no objection if the suit land **LR No.Lari/Magina/[particulars withheld]**, is registered in the name of his mother **Wanjiru Richu**. The said evidence has not been controverted.

The Court has considered the evidence adduced by the Plaintiff on **8th September 2016**, which evidence gave a chronology of what transpired and the reasons as to why the Defendants herein got into possession and occupation of the suit land. She however told the Court that she did not allow the Defendants to register the suit land with distinct shares for each of the party herein and that the Defendants were to obtain bigger shares than herself. This evidence of the Plaintiff has not been controverted.

The 1st Defendant Entered Appearance through the **Law Firm of Moses Odawa & Co. Advocates** but did not file his Defence. Failing to file their Defence meant that the Plaintiffs allegations and evidence in Court were not controverted or challenged. Though **Section 26(1)** of the **Land Registration Act** provides that the Certificate of title issued to proprietor of any land is a *prima facie* evidence that the said proprietor is the indefeasible and absolute owner of the said property, it is also provided by **Sub-Section 26(1)(a) & (b)** that the said registration can be challenged in the instances of fraud or if the said registration was obtained illegally or through misrepresentation.

The Plaintiff has alleged that the instant registration was obtained fraudulently and illegally without her consent. Her allegation has not been controverted or challenged. This Court therefore comes to a conclusion that having carefully considered the available evidence, the exhibits produced in Court and the relevant provisions of law, the Plaintiff has proved her case on a balance of probabilities.

For the above reasons, the court enters judgement for the Plaintiff against the Defendants jointly and severally as prayed in the Plaint in terms of **prayers No.(a) and (b)**. The 1st Defendant is directed to vacate from the Plaintiff's piece of land known as **Lari/Magina.1109** within the next **3 months** or **90 days** from the date of this judgement. Failure to do so, the Plaintiff herein to apply for an

eviction order.

Further the Plaintiff is entitled to costs of this suit and interest thereon.

Judgement accordingly.

Dated, signed and delivered at THIKA this 20th day of uly, 2017.

L. GACHERU

JUDGE

In the presence of

Ms Biubui for Plaintiff

No appearance for Defendant

No appearance for 2nd Defendant

Court clerk - Racheal

L. GACHERU

JUDGE

20/7/2017

Court – Judgement read in open court in the presence of Mr. Buibiu for the Plaintiff and, No appearance for the Defendants.

L. GACHERU

JUDGE

20/7/2017