



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 34 OF 2015

ROBERT NJOROGE 1ST PLAINTIFF

MARIA THAYU GROUP 2ND PLAINTIFF

-VERSUS-

JAMES MWANGI KANYI 1ST DEFENDANT

ZELIPAH WAMBUI KANYI 2ND DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated **3rd February, 2015** the plaintiffs who have described themselves as beneficial owners of portions of the parcel of land known as Ruguru/Kiamariga/1876 measuring $\frac{1}{2}$ an acre and $\frac{1}{4}$ an acre respectively seek judgment against the defendants for:

a) A declaration that the 1st and 2nd plaintiffs be registered as beneficial owners of the parcels of land.

b) An order of specific performance compelling the defendants to sign transfer forms for $\frac{1}{2}$ an acre out of title number Ruguru/Kiambaa/1876 to Robert Njoroge or in alternative the transfer forms be executed by the executive officer of this court.

c) An order of specific performance compelling the defendants to sign transfer forms for $\frac{1}{4}$ an acre out of title number Ruguru/Kiamariga/1876 to Maria Thayu Group or in alternative the transfer forms be executed by executive officer of this court;

d) That in the alternative, the defendants be ordered to refund the purchase price of kshs. 250,000/- to the 1st plaintiff with interest accrued thereof;

e) That in the alternative, the defendants be ordered to refund the purchase price of Kshs. 120,000/= to the 2nd plaintiff with interest accrued thereof.

f) Costs of the suit.

2. It is the plaintiffs' case that they bought portions of the suit property measuring $\frac{1}{2}$ and $\frac{1}{4}$ an acre for the 1st plaintiff and the 2nd plaintiff respectively out of the suit property from the 1st defendant who was at

the material time the registered proprietor of the suit property.

3. The plaintiffs' accuse the 1st defendant of having fraudulently and illegally transferred the suit property to his mother, the 2nd defendant herein.

4. Terming the transaction between the defendants null and void ab initio, the plaintiffs explain that their attempts to get the defendants to transfer the portions they bought have been in vain.

5. Despite the defendants having been served with summons to enter appearance, they failed to enter appearance and/or file their statements of defence within the time provided in law and at all. Consequently on request of the plaintiffs' the matter was set down for formal proof.

6. Before the matter was set down for formal proof, the 1st defendant appeared before the court and requested to be given 60 days within which to transfer the portions claimed by the plaintiffs to them.

7. The court acceded to the 1st defendant's request and granted the defendants 90 days within which to transfer the portions claimed by the defendants or file their statements of defence.

8. After the time granted by the court for the defendants to either transfer the portions claims by the plaintiffs to them or file their statements of defence lapsed, the 1st defendant informed the court that owing to complications at the clan he was unable to comply with the order of the court.

9. Because neither the 1st defendant nor the 2nd defendant had filed a statement of defence as ordered by the court, the court set down the matter for formal proof.

10. When the matter came up for hearing, the plaintiffs informed the court that when they bought the portions they are claiming, the suit property was registered in the name of the 1st defendant and lamented that instead of transferring the portions they had bought, the 1st defendant transferred the entire portion of the suit property to the 2nd defendant who is his mother.

11. At close of hearing, the plaintiffs filed submissions detailing the circumstances leading to filing of the suit and what transpired after the suit was filed.

12. Arguing that they have made up a case for being granted the orders sought, the plaintiffs urged the court to allow their claim as prayed.

Analysis and determination:

13. From the pleadings filed in this suit and the uncontroverted evidence of the plaintiffs in respect thereof, there is no doubt that the suit property was registered in the name of the 1st defendant when he sold portions thereof to the plaintiffs.

14. Although the 1st defendant did not file a statement of defence, he appeared before court and acknowledged having sold the portions of the suit property claimed by the plaintiffs. In fact he expressed willingness to transfer the portions to the plaintiffs but later on informed the court that he was unable to do so because of complications from his clan.

15. Despite the 2nd defendant having been served with summons to enter appearance she neither entered appearance nor filed a statement of defence within the time stipulated in law for doing so and at all.

16. When the matter came up for hearing, the plaintiffs led evidence showing that at the time they bought portions of the suit property they are claiming, the 1st defendant was the registered proprietor thereof.

17. The evidence adduced by the plaintiffs also shows that the 1st defendant transferred the suit property to the 2nd defendant shortly after he had sold it to the plaintiffs.

18. From the evidence adduced in this case, I entertain no doubt that by transferring the suit property to the 2nd defendant without first fulfilling his obligations to the plaintiffs, the 1st defendant had the intention of compromising the plaintiffs' interest in the portions of the suit property he had sold to them. For that reason, I agree with the plaintiffs' contention that the transfer of the suit property was fraudulent.

19. Although the title held by the 2nd defendant enjoys legal protection, the law allows this court to interfere with such a title on among other grounds, fraud. In this regard see **Section 26** of the Land Registration Act, 2012 which provides as follows:

“26. (1) 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.”

20. Having determined that the transfer of the suit property to the 2nd defendant was fraudulent, in the absence of any explanation by the 2nd defendant, who though served, failed to file any defence, I entertain no doubt that the 2nd respondent, being the mother of the 1st defendant was party to the fraud committed by the 1st defendant.

21. **Section 80** of the Land Registration Act, 2012 gives power to this court to order rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained by, made or omitted by fraud or mistake.

22. Having determined that registration in favour of the 2nd defendant was effected by fraud, I find that the plaintiffs' have made up a case for being granted the orders sought.

23. As the plaintiffs' have in their prayers given the defendants an option of either transferring the portions of the suit property they are claiming or refunding the consideration that passed between them, I direct the defendants, jointly and severally, to either transfer the suit property to the plaintiffs within thirty (30) days from the date of delivery of this judgment or refund such consideration as passed between the 1st defendant and the plaintiffs with interest at court rates from the date of payment of the purchase price, failing which the orders of specific performance sought under prayers (a), (b) and (c) shall automatically accrue in favour of the plaintiffs.

24. I award the costs of the suit to the plaintiffs.

Dated, signed and delivered in open court at Nyeri this 16th day of August, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Robert Njoroge – 1st plaintiff

Samuel Maina & Pauline Nyawira – officials of Mama Thayu group

No appearance by the 1st and 2nd defendants

Court clerk - Esther