



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC.SUIT NO. 459 OF 2011

ERICK MUNDIA WANENE.....PLAINTIFF

VERSUS

ANN WANJIKU NDUNGU.....DEFENDANT

JUDGMENT

The Defendant is the daughter, legal representative and beneficiary of the estate of James Ndungu Mwangi, deceased (hereinafter referred to as “the deceased”). The deceased died on 15th April, 1999 and left among others, two parcels of land known as L.R. No. Dagoretti/Kinoo/2167 and L.R. No. Dagoretti/Kinoo/2168 (“hereinafter individually referred to as “Plot No. 2167 and Plot No. 2168 and jointly as “the suit properties”). Upon the death of the deceased, one, John Njoroge Mwangi and Francis Karinga Kinunu were appointed as the administrators of his estate on 26th July, 1999 in Nairobi Succession Cause No. 923 of 1999. The Grant of Letter of Administration in favour of John Njoroge Mwangi and Francis Karinga Kinunu was confirmed on 18th July, 2000. Following that confirmation, the suit properties were registered in the name of John Njoroge Mwangi to hold in trust for the Defendant and her three siblings who were still minors.

On or about 23rd February, 2001, John Njoroge Mwangi (hereinafter referred to only as “the trustee”) sold Plot No. 2167 to the Plaintiff at a consideration of Kshs. 480,000/-. Plot No. 2167 was registered in the name of the Plaintiff on 23rd February, 2001. On 23rd December, 2006, the trustee sold Plot No. 2168 to the Plaintiff at a sum of Kshs.1,500,000/-. The Plaintiff paid to the trustee the purchase price in full and consent of the land control Board was issued in respect of the transaction on 7th December, 2006. Plot No. 2168 was however not transferred by the trustee to the Plaintiff as a result of a dispute which ensued between the Defendant and the trustee.

On 5th July, 2007, the Defendant filed an application in Nairobi Succession Cause No. 923 of 1999 (“the Succession Cause”) seeking the revocation of the Grant of Letters of Administration that had been issued to the trustee in respect of the estate of deceased and the appointment of the Defendant as the administrator of the deceased’s estate in place of the trustee. On 3rd September, 2007, the Grant of letter of Administration in respect of the estate of the deceased that had been issued to the trustee and Francis Karinga Kinunu was revoked and a new confirmed Grant of Letters of Administration in respect of the estate of the deceased issued to the Defendant with respect to the properties which the trustee was to hold in trust for the Defendant and her siblings. The Grant of Letters of Administration in favour of the Defendant and the Certificate of Confirmation were issued by Aluoch J. (as she then was) on 3rd September, 2007. In the Certificate of Confirmation of Grant dated 3rd September, 2007, it was specified that Plot No. 2167 and Plot No. 2168 were to be registered in the name of the Defendant to hold on her own behalf and on behalf of her three siblings. Following her appointment as the new administrator of the

estate of the deceased and a trustee of the suit properties, the Defendant on 13th December, 2007 caused herself to be registered as the owner of Plot No. 2198 which was still in the name of the trustee. The Defendant also caused a restriction to be registered against the title for Plot No. 2167 which at that time was in the name of the Plaintiff.

As at the time the Defendant was issued with a new Grant of Letters of Administration in respect of the estate of the deceased, Plot No. 2167 had already been sold and transferred to the Plaintiff by the trustee. Plot No. 2168 had also been sold to the Plaintiff and was awaiting transfer. The Plaintiff was aggrieved by the Defendants move to transfer Plot No. 2167 to her name and to register a restriction on the title for Plot No. 2168. The Plaintiff moved the court in the succession cause aforesaid seeking an order to restrain the Defendant from alienating or interfering in any other way with the suit properties. The Plaintiff also sought the review and variation of the order which the court had made in that cause on 3rd September, 2007 to exclude the suit properties from the properties to be administered by the Defendant. The Plaintiff also sought an order that the Defendant does execute a transfer of Plot No. 2168 in his favour. The Plaintiff's application in the succession cause was struck out by Nambuye J. (as she then was) on 21st April, 2011 on the ground that the issues which the Plaintiff had raised in the application could not be determined in the succession cause.

It is following that decision that the Plaintiff brought this suit on 2nd September, 2011 against the Defendant seeking, a permanent injunction restraining the Defendant from alienating, dealing in or in any other way interfering with Plot No. 2168; a declaration that the Plaintiff is the legal owner of the Plot No. 2168 and that the Defendant holds the same in trust for him; a mandatory injunction compelling the Defendant to transfer Plot No. 2168 to the Plaintiff and general damages. In his plaint dated 2nd September, 2011, the Plaintiff averred that the trustee sold and transferred Plot No. 2167 to him in order to raise funds for the upkeep of the minor children of the deceased. The Plaintiff averred that the trustee once again sold to him Plot No. 2168 on 23rd December, 2006 at a consideration of Kshs.1,500,000/- which amount he paid in full. The Plaintiff stated that the trustee obtained consent of the Land Control Board in respect of the transaction and gave him vacant possession of Plot No. 2168. The trustee had informed him that he intended to use the proceeds of sale to purchase separate assets for each of the deceased's minor children. Upon receipt of the purchase price of Plot No. 2168, the trustee used the same to purchase motor vehicle registration No. KAM 585 N and four (4) plots at Ruiru measuring 50 feet by 100 feet. Before the trustee could transfer Plot No. 2168 to him, the trustee entered into a consent with the Defendant in the succession cause to the effect that the Grant of Letters of Administration that had been issued to the trustee and Francis Karinga Kinunu in respect of the estate of the deceased was revoked and a new Grant of Letters of Administration issued in favour of the Defendant and that the properties which were to be administered by the Defendant included the suit properties. Pursuant to that consent, a confirmed Grant of Letters of Administration was thereafter issued in favour of the Defendant. The Defendant was aware all along that Plot No. 2167 had been sold to the Plaintiff. After the Defendant was issued with a Grant of Letters of Administration in respect of the estate of the deceased, the trustee handed over to the Defendant the assets which the trustee had purchased with the proceeds of sale of Plot No. 2168. With the full knowledge that Plot No. 2168 had been sold to the Plaintiff and that the proceeds of sale had been utilized to purchase assets which had been handed over to her, the Defendant caused a restriction to be registered against the title of Plot No. 2168 and thereafter transferred the said property to herself. The Plaintiff averred that the Defendant having taken over the administration of the estate of the deceased from the trustee, she was bound by the actions of the trustee. The Plaintiff averred that the transfer of the Plot No. 2168 to the Defendant was unlawful. The Plaintiff averred that the estate of the deceased having received the proceeds of sale of Plot No. 2168 could not be allowed to retain the same as that would amount to unjust enrichment. The Plaintiff averred that having purchased the suit properties for valuable consideration, he was the legal owner thereof and any title held by the Defendant in respect thereof was held in trust for him.

The Defendant filed a defence and counter-claim on 1st February, 2012. The Defendant denied that the trustee used the proceeds of sale of Plot No. 2167 for their upkeep. The Defendant averred that the Plaintiff purchased Plot No. 2168 after she had notified him of her objection to the transaction. The Defendant averred that Plot No. 2167 and Plot No. 2168(the suit properties) were sold to the Plaintiff

without her consent and as such the title held by the Plaintiff in respect of Plot No. 2167 should be cancelled. The Defendant averred that the Plaintiff had no valid claim over Plot No. 2168 and that his claim if any should have been directed against the estate of the trustee who has since passed on.

In her counter-claim the defendant averred that in her capacity as the administrator of the estate of the deceased, she lawfully caused Plot No. 2168 to be registered in her name to hold in trust for herself and her siblings. The defendant averred that Plot No. 2167 was sold by the trustee to the Plaintiff in breach of trust and in disregard of the interest of the Defendant and her siblings. The Defendant sought the cancellation of the title for Plot No. Dagoretti/Kinoo/2167 in the name of the Plaintiff and the registration of the property in the name of the Defendant to hold in trust for herself and her siblings. The Plaintiff filed a reply to defence and defence to counter-claim.

When the suit came up for hearing, the Plaintiff's attorney, Jane Wanjiru Wanene (PW1) gave evidence and called one witness, Hannah Wanjiku Wamithi (PW2). PW1 told the court that the Plaintiff was her son and that he lived in the U.S.A. She stated that the Plaintiff had given her a power of attorney on 6th January, 2005. PW1 adopted her witness statement and further witness statement dated 2nd September, 2011 and 26th August, 2015 respectively as her evidence in chief. In her evidence PW1 reiterated the contents of the plaint which I have highlighted herein earlier in detail. PW1 stated that the Plaintiff purchased Plot No. 2168 from the trustee who was the administrator of the estate of the deceased and paid the full purchase price amounting to Kshs. 1,500,000/-. She stated that before the Plaintiff purchased Plot No. 2168, she did a search and confirmed that the trustee was indeed the administrator of the estate of the deceased. PW1 stated that after the Plaintiff had made full payment of the purchase price, the suit property was not immediately transferred to him because the original title deed for the property was missing and the trustee had to seek a duplicate copy thereof. She stated that when the trustee was ready to transfer the property to the Plaintiff, she discovered that the property had been transferred to the Defendant who had by then taken over the administration of the estate of the deceased. PW1 stated that the proceeds of sale of Plot No. 2168 was used to purchase a motor vehicle and four (4) plots which were handed over to the Defendant and her siblings. PW1 stated that the Defendant refused to honour the agreement which the Plaintiff made with the trustee and made attempts to repossess Plot No. 2168 from the Plaintiff.

PW1 denied that Plot No. 2167 was transferred to the Plaintiff unlawfully and in breach of trust. She stated that when the trustee approached them to purchase Plot No. 2167, he told her that he was selling the property to enable him take care of the deceased's children. PW1 stated that the Plaintiff purchased the suit properties lawfully. She urged the court to make an order for the removal of the caution registered against the title for Plot No. 2167 and for the transfer of Plot No. 2168 to the Plaintiff. PW1 produced as exhibits the documents which were attached to the Plaintiff's list of documents dated 2nd September, 2011.

PW2 was the mother of the deceased and the trustee. She was a grandmother to the Defendant who was named after her. She told the court that, the deceased had a plot at Dagoretti which she realized was not sufficient for the four children he had left behind. She sold the said parcel of land at Dagoretti and purchased four (4) parcels of land at Ruiru for the deceased's children. She purchased the said parcels of land from Nyakinyua Investments and the same were registered in her name to hold in trust for the said children. She carried out all these transactions together with the trustee. When the Defendant became an adult, the Defendant asked her to transfer the four plots to her and her siblings and she complied. She stated that the said plots were in the names of the Defendant and her siblings.

On her part, the Defendant (DW1) gave evidence but did not call a witness. The Defendant adopted her witness statement dated 19th December, 2011 as her evidence in chief. She stated that pursuant to the Grant of Letters of Administration that was issued in the Succession Cause No. 913 of 1999 ("the Succession Cause"), the suit properties were registered in the name of the trustee to hold in trust for her and her siblings as they were minors. The Defendant stated that while she was still very young and staying with the trustee, the trustee sold Plot No. 2167 without informing PW2. She stated that there was nothing she could do because she was still young. She stated that when she became an adult and had

applied for identity card, she learnt that the trustee wanted also to sell Plot No. 2168. She was advised by a neighbour to go and register a caution against the title for the property which she did. She stated that it was PW1 who had purchased Plot No. 2167 and who also wanted to purchase Plot No. 2168. The Defendant stated that she went to PW1's home and warned her against purchasing the property. She stated that, PW1 dismissed her as a girl who had no business getting involved in land matters. They did not reach any agreement with PW1 on the issue. The dispute was then taken to the area Chief and ultimately to the District Officer who failed to resolve the same. The Defendant told the court that after registering a caution against the title for Plot No. 2168, she made an application in the Succession Cause to be appointed administrator of the estate of the deceased in place of the trustee. The application was allowed and she was issued with a Grant of Letters of Administration. She thereafter caused Plot No. 2168 to be registered in her name to hold in trust for herself and her siblings. The Defendant stated that her siblings and she did not consent to the sale of Plot No. 2167 to the Plaintiff and that the trustee did not obtain leave of the court to conduct the sale. She denied that the proceeds of sale of Plot No. 2167 and Plot No. 2168 were used to educate her and her siblings. She stated that PW2 and the trustee did not pay school fees for them. She stated that her siblings and she were all in children's homes. She produced as exhibits, the documents which were attached to her list of documents dated 26th July, 2013.

After the close of evidence, the parties were directed to file written submissions. The parties filed their respective submissions and the same are on record. The parties did not agree on the issues for determination by the court. From the pleadings, the evidence tendered and the submissions, the following in my view are the issues which arise for determination in this suit:

1. Whether John Njoroge Mwangi ("the trustee") had the legal capacity to sell and transfer Plot No. 2167 and Plot No. 2168 ("the suit properties") to the Plaintiff?
2. Whether the sale of the suit properties by the trustee to the Plaintiff was lawful?
3. Whether the Plaintiff is entitled to the reliefs sought in the plaint?
4. Whether the Defendant is entitled to the reliefs sought in the counter-claim?

The first issue:

It is not in dispute that the trustee was one of the legal representatives of the estate of the deceased who were appointed by the court through Grant of Letters of Administration issued on 26th July, 1999. It also not disputed that the said Grant of Letters of Administration was confirmed on or about 18th July, 2000 under the provisions of Section 71 of the Law of Succession Act, Chapter 160 Laws of Kenya. Section 79 of the Law of Succession Act vested all the properties of the deceased upon the trustee subject to any limitation that was imposed by the Grant of Letters of administration pursuant to which he was appointed. Section 82 (b) of the Law of Succession Act gave the trustee power to sell the suit properties subject to any limitation that was imposed upon him by the Grant of Letters of Administration. It is my finding arising from the foregoing that as an administrator of the estate of the deceased, the trustee had the legal capacity to sell the suit properties which were vested upon him by law. The power of sale was however subject to any limitation that was imposed upon him by the Grant of Letters of Administration.

The second issue:

As I have held above, the power of the trustee to sell the suit properties which were vested upon him was subject to the limitation if any which was imposed upon him by the Grant of Letters of Administration. The Grant of Letters of Administration that was issued to the trustee directed the trustee to hold the suit properties in trust for the deceased's children, Hana Wanjiku Ndungu, Beth Wanjiku Ndungu, Anthony Mwangi Ndungu and Finnie Mwangi Ndungu in equal shares. The said Grant of Letters of Administration expressly made the trustee, a trustee of the suit properties. As a trustee of the suit properties, the trustee's power to sell the suit properties was limited. Even if the Grant of Letters of Administration had not made the trustee a trustee of the suit properties, since the beneficiaries of the estate of the deceased were all minors, section 84 of the Law of Succession Act imposed an obligation on the trustee to act as a trustee of

the said properties. As a trustee of the suit properties, the trustee had no power to sell the suit properties without the consent of the persons on whose behalf he held the properties in trust. Plot No. 2167 was sold in the year 2001 while Plot No. 2168 was sold in the year 2006. In the year 2001, all the children of the deceased on whose behalf the suit properties were held in trust were minors and as such could not give the trustee consent to sell the suit properties even if he had sought the same. Since the trustee had no power to sell the suit properties without the consent of the children of the deceased who could not give such consent, he had an obligation to seek authority from the court to carry out the sale pursuant to section 56 of the Trustee Act, Chapter 167 Laws of Kenya. The Defendant in her submissions had contended that the trustee should have sought the consent of the court under section 82 of the Law of Succession Act. In my view, that section is not applicable in the circumstances because the trustee did not appropriate the suit properties but purportedly sold the same to purchase other properties for the beneficiaries who were minors. Such move as I have stated above required sanction of the court under Section 56 of the Trustee Act. There is no dispute that the trustee did not obtain consent of the court to sell the suit properties. The sale of the suit properties were in the circumstances carried out in breach of trust. Since neither the beneficiaries nor the court has subsequently approved the sale, the same is unlawful. It is my finding therefore that the sale of the suit properties to the Plaintiff was unlawful.

The third issue:

In view of my finding that the sale of the suit properties to the Plaintiff was unlawful, the substantive reliefs sought by the Plaintiff in the plaint dated 2nd September, 2011 cannot be granted. There is evidence however that the Plaintiff paid to the trustee a sum of Kshs.1,500,000/- for Plot No. 2168. The payment of this amount to the trustee was pleaded and proved. When this payment was made to the trustee, he was the duly appointed legal representative of the estate of the deceased and a trustee of the suit properties. He entered into an agreement for sale with the Plaintiff in that capacity. PW1 and PW2 gave evidence that was not controverted in any material respect by the Defendant that the proceeds of sale of Plot No. 2168 was used to purchase four (4) plots at Ruiru and a motor vehicle. The Defendant admitted that the said plots and motor vehicle were handed over to her and her siblings. These properties were not part of the estate of the deceased. I am satisfied from the evidence of PW1 and PW2 that the same were acquired using the proceeds of sale of Plot No. 2168.

I am of the view that the Plaintiff is entitled to a refund of the purchase price for Plot No.2168. It would be inequitable in my view for the Defendant to get back Plot No. 2168 from the Plaintiff and at the same time keep the money which the Plaintiff paid for the said property from which the Defendant admitted to have benefitted. As far as Plot No. 2167 is concerned, there was no evidence placed before the court as to how it changed hands from the deceased to the Plaintiff. Neither the agreement for sale nor evidence of payment was produced in court. In the circumstances, I am unable to make an order for a refund of the purchase price paid for this property.

The fourth issue:

For the reasons which I have given above, the Defendant's counter-claim is merited. The sale and transfer of the suit properties by the trustee to the Plaintiff was unlawful. DW1 testified that the Plaintiff was aware that the trustee was registered as the owner of the suit properties to hold the same in trust for minors. The Plaintiff was therefore aware of the trustee's trust obligations.

As part of due diligence, the Plaintiff had a duty to ensure that that the trustee obtained all consents necessary for him to convey a clean title. The Plaintiff failed in this regard and took the property subject to the trust. The rights of the trustee over the suit properties which included a right to sell were subject to his obligations as a trustee. See, the Proviso to Section 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) which was in force when the sale in dispute took place. This court has jurisdiction to cancel an illegal title like the one held by the Plaintiff over Plot No.2167 which was acquired in breach of trust.

In conclusion, I hereby enter judgment in the main suit and in the counter-claim on the following terms:-

1. Prayers (a), (b), (c), (d) and (e) in the plaint dated 2nd September, 2011 are disallowed.
2. Under prayer (f) of the plaint dated 2nd September, 2011, the Defendant in her capacity as the administrator of the estate of James Ndungu Mwangi shall pay to the Plaintiff a sum of Kshs.1,500,000/= being a refund of the purchase price paid by the Plaintiff for L.R. No. Dagoretti/Kinoo/2168.
3. The title held by the Plaintiff in respect of L.R. No. Dagoretti/Kinoo/2167 is cancelled. The property shall revert to the estate of James Ndungu Mwangi to be held by the Defendant in trust for herself and her siblings, Beth Wanjiru Ndungu, Anthony Mwangi Ndungu and Finnie Mwangi Ndungu.
4. Due to the peculiar nature of the case, each party shall bear its own costs of the suit and the counter-claim.

Delivered and Signed at Nairobi this 22nd day of September, 2017

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

.....for the Plaintiff

.....for the Defendant

.....Court Assistant