



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 263 OF 2014

JOSEPH MUNENE MURIITHI.....1ST PLAINTIFF
GEORGE WACHIRA GATHUNGU.....2ND PLAINTIFF
JANE WANGECI.....3RD PLAINTIFF

VERSUS

EDWARD MURIITHI GATHUNGU.....1ST DEFENDANT
JOSEPH NJAGI MUNENE.....2ND DEFENDANT
NANCY KARUANA MURIITHI.....3RD DEFENDANT

JUDGMENT

By their amended plaint filed herein on 29th September 2015, the plaintiffs sought judgment against the defendants in the following terms:

- (a) A declaration that the registration of land parcel Nos MUTIRA/KIRUNDA/2426 and 2427 in the 2nd and 3rd defendants was fraudulent and the said registration be revoked.***
- (b) A declaration that land parcel Nos MUTIRA/KIRUNDA/2426 and 2427 belong to the 1st and 2nd plaintiffs and the same be registered in their names.***

The basis of the plaintiffs' claim is that the 1st defendant is the father to the 1st and 2nd plaintiffs while the 3rd plaintiff is the first wife to the 1st defendant. That on or about 16th January 2014, the 1st defendant's family convened a meeting and agreed on how to share land parcels No. MUTIRA/KIRUNDA/262 and MUTIRA/KAGUYU/3043 between the two families of the 1st defendant. The agreement was reduced in writing and attested by an advocate of the High Court of Kenya after which the 3rd plaintiff withdrew the caution on land parcel No. MUTIRA/KIRUNDA/262 so that it could be sub-divided into four parcels and be registered as follows:

1. MUTIRA/KIRUNDA/2425 to be registered in the names of the 3rd plaintiff
2. MUTIRA/KIRUNDA/2426 to be registered jointly in the names of the 2nd plaintiff, his wife and

minor son

3. MUTIRA/KIRUNDA/2427 to be registered in the names of the 1st plaintiff

4. MUTIRA/KIRUNDA/2628 to be registered in the names of the 1st defendant.

However, the plaintiffs were surprised upon visiting the Land Registry to learn that land parcels No. MUTIRA/KIRUNDA/2426 and 2427 had fraudulently been registered in the names of the 2nd and 3rd defendants. Particulars of the fraudulent registration are pleaded in paragraph 12 of the plaint and it is further pleaded that prior to the said fraudulent transfers, the 1st defendant had given the said parcels of land to the plaintiffs as a gift and even executed the transfer instrument in their favour and the plaintiffs and their families live on those parcels of land which they have heavily invested.

In a re-amended defence and counter claim, the defendants pleaded, inter alia, that no agreement could be entered into without involving the 3rd defendant and that if there is any such agreement, it was obtained through trickery and under a mistake since the 1st plaintiff took to the 1st defendant documents to sign alleging that they were for installation of electricity. The 1st defendant therefore pleaded that he is a stranger to the agreement and has never attended the firm of **MAINA KAGIO** advocates to sign it. The 1st defendant denied having signed any sub-division documents or transfer in favour of the 3rd plaintiff and the same was done fraudulently behind his back. That the 1st defendant being the owner of the property freely transferred the said parcel to the 2nd and 3rd defendants and the allegations of fraud are denied. That the issue of eviction of the plaintiffs does not arise as they are free to occupy the portion of their mother. That the land parcel No. MUTIRA/KIRUNDA/2427 does not exist since it has been sub-divided and therefore the prayers sought cannot be granted. That the 1st defendant being polygamous considered both houses when sub-dividing his land.

In their counter-claim, the defendants sought the following orders:

1. Permanent injunction restraining the plaintiffs from interfering with the land parcels No. MUTIRA/KIGUNDA/2516, 2530, 2531, 2425 and 2426 which are in the names of the 1st and 2nd plaintiffs and to vacate therefrom and in default, they be forcefully evicted with the assistance of the OCS Kerugoya and boundaries be reinstated.

2. Costs of the counter-claim and the suit.

The trial commenced on 20th July 2017 with the witnesses for both parties simply adopting their statements which had been filed together with their respective statements. They were then cross-examined. The plaintiffs were represented by the 1st and 3rd plaintiffs while the defendants were represented by **FRANCIS NJOGU NYAMU** to whom a power of attorney had been donated by the 1st defendant and the 2nd and 3rd defendants.

At the end of the trial, submissions were filed both by **MR. MOSI** instructed by **MOSI & COMPANY ADVOCATES** for the plaintiffs and **MS THUNGU** instructed by **ANNE THUNGU & COMPANY ADVOCATES** for the defendants.

I have considered the evidence on record and the submissions by counsel.

It is clear from the Green Card to land parcel No. MUTIRA/KIRUNDA/262 that it has since 27th April 1989 been registered in the names of the 1st defendant and a title deed was issued to him on 1st January 1990. Prior to that, it was registered in the names of **MURIITHI GATHUNGU** although the 3rd plaintiff had placed a caution thereon on 5th April 1988. That title was closed on 12th March 2014 when the said parcel was sub-divided into four portions being MUTIRA/KIRUNDA/2425, 2426, 2427 and 2428.

Parcels No. 2426 and 2427 are registered in the names of the 2nd and 3rd defendants respectively as per the certificates of search which were part of the documentary exhibits herein. It is also clear from the plaintiffs' pleadings that their case is premised on a family agreement entered into on 16th January 2014 by which the land parcel No. MUTIRA/KIRUNDA/262 and MUTIRA/KAGUYU/3043 was to be shared between the two families of the 1st defendant. The relevant paragraph of the amended plaint filed herein on 29th September 2015 are as follows:

6: “On or about 16th January 2014, the family of the 1st defendant convened and agreed on how to share two land parcels Nos MUTIRA/KIRUNDA/262 and MUTIRA/KAGUYU/3043 between two families of the said 1st defendant.

9: “The 1st defendant was then able to obtain a Land Control Board consent to sub-divide land parcel No. MUTIRA/KIRUNDA/262 into four parcels namely MUTIRA/KIRUNDA/2425, 2426, 2427 and 2428 and the same shared as follows:

(a) MUTIRA/KIRUNDA/2425 to be registered in the names of the 3rd plaintiff and their 7 sisters

(b) MUTIRA/KIRUNDA/2426 to be registered jointly in the 2nd plaintiff's names and his wife and minor son

(c) MUTIRA/KIRUNDA/2427 to be registered in the 1st plaintiff's names

(d) MUTIRA/KIRUNDA/2428 to be registered in the 1st defendant's names”.

10: “The land parcels No. MUTIRA/KIRUNDA/2425 and 2428 are already registered in the names of the 3rd plaintiff and their 7 sisters however the 1st and 2nd plaintiffs were in the process of registering parcels No. MUTIRA/KIRUNDA/2426 and 2427 in their respective names”

11: “The plaintiffs aver that they were taken down by surprise when the area assistant Chief informed them that land parcels No. MUTIRA/KIRUNDA/2426 and 2427 had been sold and that they should co-operate when the surveyor come to do demarcation for the new land owners”.

The plaintiffs have also pleaded in paragraph 13 of their amended plaint as follows:

13: “Prior to the said fraudulent transfer and registration, the 1st defendant had given the said parcels of land to the plaintiffs as a gift and even executed the transfer instrument in their favour and he had even obtained necessary consent to realize the same”.

It is the plaintiff's case therefore that the transfer of land parcel No. MUTIRA/KIRUNDA/2426 and 2427 to the 2nd and 3rd defendants was done fraudulently and should be revoked. All this is of course denied by the defendants.

My understanding of the above pleadings is that the plaintiffs want this Court to enforce the agreement dated 16th January 2014, to revoke the registration of land parcels No. MUTIRA/KIRUNDA/2426 and 2427 in the names of the 2nd and 3rd defendants for having been obtained fraudulently and finally, to find that the 1st defendant had gifted the plaintiffs those two parcels. Those issues, in my view are what this Court has to determine. It must be remembered that a Court can only grant a party what has been pleaded and proved. In **INDEPENDENT ELECTROL AND BOUNDARIES COMMISSION & ANOTHER VS STEPHEN MUTINDA MULE & OTHERS C.A CIVIL APPEAL No. 219 of 2013**, the Court of Appeal quoted with approval the following words of Sir JACK JACOB in his article titled **“THE PRESENT IMPORTANCE OF PLEADINGS”**

“As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finally, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation”.

The Court also cited the following passage from the case of **ADETOUN OLEDAJI (N.G) LIMITED VS NIGERIA BREWERIES PLC, SC 91 of 2002** where JUSTICE PIUS ADEREMI JSC said:

“..... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties, which does not support the averments in the pleadings, or put in another way, which is at variance with the averments in the pleadings, goes to no issue and must be disregarded”.

This Court will therefore interrogate the issues that arise from the pleadings herein.

1. WHETHER THE AGREEMENT DATED 16TH JANUARY 2014 IS ENFORCEABLE?

The cornerstone of the plaintiffs’ case, as I can see it, is that by that agreement, the 1st defendant was to transfer land parcel Nos MUTIRA/KIRUNDA/2426 to the 2nd plaintiff and MUTIRA/KIRUNDA/2427 to the 1st plaintiff. However, the 1st defendant fraudulently transferred those two parcels to the 2nd and 3rd defendants. I have looked at the said agreement. It is brief and was drawn by the parties themselves without the aid of an advocate although it was later attested by **MAINA KAGIO** advocate on 17th January 2014. It is signed by all the plaintiffs and the 1st defendant in addition to other persons and witnessed by one **SUSAN R. NYAGA**. It is what is commonly referred to in legal parlance as a “**home-made**” agreement and since it is short, I will reproduce it. It reads:

“We family of Edward Muriithi Gathungu do agree on 16.1.2014 time 9.20 that Edward Muriithi Gathungu is ready to share his land to the family land 262 Kirunda and be left with 0.8 acre and the rest to the family, family of 7 daughters 2 brothers and the mother and we are ready to surrender the other land of 0.9 acre to the other family of Edward Muriithi Gathungu. The family of Edward Muriithi Gathungu will take care of the 0.8 acre of Edward Muriithi Gathungu land 262 Kirunda. Edward Muriithi G. has given the go ahead of sub-division of the land”.

Pursuant to that agreement, the necessary applications for transfer of land parcels No. MUTIRA/KIRUNDA/2426 by the 1st defendant to the 2nd plaintiff, **ALICE MUCHAI** and **EVANS MUNENE WACHIRA** and land parcel No. MUTIRA/KIRUNDA/2427 to the 1st plaintiff were made. The Land Control Board gave its consent to those transactions on 27th February 2014. They were indicated as gifts. That being the position, it was not open to the 1st defendant to purport to transfer land parcel No. MUTIRA/KIRUNDA/2427 to the 2nd defendant as he did under an agreement dated 3rd April 2014 some two months after the transfer of that parcel of land to the 1st plaintiff had received the requisite consent from the Land Control Board. The agreement, if any, by which the 1st defendant also transferred land parcel No. MUTIRA/KIRUNDA/2426 to the 2nd plaintiff was not availed but that is not in doubt because in his own statement he admits having done so. He has stated in his statement as follows:

“I freely sold a portion of my land to the 2nd defendant JOSEPH NJAGI MUNENE. I went for normal Land Control Board and got consent to transfer the land to him and transferred the portion to him and he paid me the full purchase price. I also transferred a portion to NANCY KARUANA MURIITHI freely and took her to Land Control Board and obtained consent to

transfer and I signed a transfer form in her favour”.

The transfer of land parcels No. MUTIRA/KIRUNDA/2426 and 2427 was also, surprisingly, approved by the said Land Control Board on 29th May 2014. No valid consent can be given to transfer land to one purchaser when it has already been gifted to another party through a transfer which has been approved by the same Land Control Board. This case illustrates the extent of fraud that is perpetrated in our land registries. I have no hesitation in finding therefore that the transfer of land parcels No. MUTIRA/KIRUNDA/2426 and 2427 to the 1st and 2nd defendants was fraudulent. In his statement, the 1st defendant has denied having attended any Land Control Board to transfer land parcels No. MUTIRA/KIRUNDA/2426 and 2427 to the 1st and 2nd plaintiffs. He adds that he was not even aware that the original land parcel No. MUTIRA/KIRUNDA/262 had been cautioned by the 3rd plaintiff. Of course the 1st defendant having not come to Court to testify, there was no opportunity to examine his demeanour. Nonetheless, this Court is satisfied from the evidence placed before me that the 1st defendant voluntarily transferred land parcels No. MUTIRA/KIRUNDA/2426 and 2427 to the 1st and 2nd plaintiffs and that he infact did so pursuant to the family meeting and agreement dated 16th June 2014. I say so because as I have already mentioned above, the 3rd plaintiff had as far back as 5th April 1988 placed a caution on the original land parcel No. MUTIRA/KIRUNDA/262. That caution was only withdrawn by the 3rd plaintiff on 5th March 2014 two months after the meeting held on 16th January 2014 and the subsequent agreement. The 1st defendant has denied having attended such a meeting or signed the said agreement terming them as ***“strange”*** to him. It cannot be a coincidence however that the withdrawal of the caution placed on the original land parcel No. MUTIRA/KIRUNDA/262 was only done by the 3rd plaintiff shortly after the said agreement after which the application for transfer of land parcels No. MUTIRA/KIRUNDA/2426 and 2427 and the necessary consent was applied for and approved. It is my finding, and I hereby hold, that infact the only reason why the 3rd plaintiff removed the caution on the land parcel No. MUTIRA/KIRUNDA/262 was because the 1st defendant had agreed to have it distributed in the manner that the plaintiffs have pleaded. That is the only reasonable and plausible explanation as to why the process of transferring the land parcels No. MUTIRA/KIRUNDA/2426 and 2427 to the 1st and 2nd plaintiffs followed so soon after the meeting of 16th January 2014. It is also instructive to note that the 1st defendant does not appear to have any challenges with regard to the transfer of land parcel No. MUTIRA/KIRUNDA/2425 to the 3rd plaintiff which could only have happened after 16th January 2014 and following the removal of the caution placed by her on 15th March 2014. Indeed in his written statement, he confirms the transfer of land parcel No. MUTIRA/KIRUNDA/2425 to the 3rd plaintiff. The agreement dated 16th January 2014, ***“home-made”*** as it is, was nonetheless in compliance with the provisions of ***Section 3 (3) of the Law of Contract Act*** and also the consent of the Land Control Board was granted as required by the ***Land Control Act***. The transfer of land parcels No. MUTIRA/KIRUNDA/2426 and 2427 to the 1st and 2nd plaintiffs having met the legal requirements, any other subsequent transfer of those parcels to the 2nd and 3rd defendants was therefore fraudulent, null and void and of no legal effect.

The plaintiffs also claim that they are entitled to land parcels No. MUTIRA/KIRUNDA/2426 and 2427 as gifts. I am not persuaded from the evidence before me that there was any complete gift of those two parcels of land to the 1st and 2nd plaintiffs. ***Section 37 (1) and (2) of the Land Registration Act 2012*** provides as follows:

37 (1) “A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other forum as the Registrar may in any particular case approve.

(2) A transfer shall be completed by -

(a) filing the instrument; and

(b) registration of the transferee as proprietor of the land, lease or charge”.
Emphasis added

In my view therefore, there was no complete gift of land parcel No. MUTIRA/KIRUNDA/2426 and 2427 to the 1st and 2nd plaintiffs herein as there was no registration of the said parcels in the names of the two plaintiffs. However, as was held in the case of **THE REGISTERED TRUSTEES ANGLICAN CHURCH OF KENYA MBEERE DIOCESE VS THE REV. DAVID WAWERU NJOROGE C.A CIVIL APPEAL No. 108 of 2002 (2007 e K.L.R)**,

“However, an unregistered transfer can operate as a contract between the parties (Section 38 (2) RLA) with the result that a beneficial interest in the property as opposed to legal title is passed to the transferee”.

The Court was of course referring to the repealed **Registered Land Act** but similar provisions are found in **Section 36 (1) and (2) of the Land Registration Act 2012**. There is therefore an enforceable contract with relation to the land parcels No. MUTIRA/KIRUNDA/2426 and 2427 as between the 1st defendant and the 1st and 2nd plaintiffs in this case.

It is therefore clear from the above that not only is there an enforceable contract between the 1st defendant and the 1st and 2nd plaintiffs with regard to the transfer of the land parcels No. MUTIRA/KIRUNDA/2426 and 2427 but also, that the Land Control Board having granted the required consent for the transfer of those two parcels to the 1st and 2nd plaintiffs on 27th February 2014, the subsequent purported transfer of those two parcels to the 2nd and 3rd defendants was fraudulent and of no legal effect. The plaintiffs are therefore entitled to the orders sought in their amended plaint.

The defendants have on their part sought in their counter-claim an order of permanent injunction restraining the plaintiffs from interfering with land parcels No. MUTIRA/KIRUNDA/2516, 2530, 2531, 2425 and 2426. It is clear from the 1st defendant’s own statement that land parcels No. MUTIRA/KIRUNDA/2516, 2517, 2530 and 2531 were sub-divisions of land parcel No. MUTIRA/KIRUNDA/2427. Having already found that the transfer of land parcels No. MUTIRA/KIRUNDA/2426 and 2427 were fraudulently transferred to the 2nd and 3rd defendants, this Court cannot injunct the plaintiffs from interfering with those parcels of land because they do not belong to the defendants. Similarly, with regard to land parcel No. MUTIRA/KIRUNDA/2425, the 1st defendant has in his own statement dated 3rd October 2014 stated as follows:

“MUTIRA/KIRUNDA/262 was sub-divided to new numbers as follows:

MUTIRA/KIRUNDA/2425 to JANE WANGECHI”

Having acknowledged the transfer of land parcel No. MUTIRA/KIRUNDA/2425 to the 3rd plaintiff, he cannot now seek orders to injunct her from using that land. He cannot approbate and reprobate. In her submissions in support of the defendant’s counter-claim, **MS THUNGU** has referred me to the cases of ***MARIGI VS MURIUKI & OTHERS 2008 1 K.L.R 703***, ***JACINTA KAMAU VS ISAAC MUNGAI & ANOTHER C.A CIVIL APPEAL No. 59 of 2001*** as well as ***ELDORET ELC CASE No. 338 OF 2013 EDWARD CHEMURBII & ANOTHER VS CHARLES KOSGEI & ANOTHER*** for the proposition that a party cannot be forced to distribute his land when he is alive. That is correct. However, there is no evidence to suggest that the 1st defendant in this case was forced to distribute land parcel No. MUTIRA/KIRUNDA/262 against his will. The evidence before me is clear that he did so pursuant to an agreement and therefore it was a voluntary transmission of land. This case is therefore distinguishable from the above cases. Similarly, the plaintiffs did not plead any trust and therefore it is not in order for their counsel to submit, as he has done, that ***“it was clear from the evidence addressed before this Honourable Court that this land is a customary land which the 1st defendant held in trust”***..... Neither the amended plaint nor the witness statements filed herein made any reference to a claim based on trust. There was only a fleeting reference to trust in the course of cross-examination of the 1st plaintiff

and I am not satisfied under those circumstances that the parties herein required the Court to make any determination on the basis of a trust and that is why the Court has refrained from doing so. It is clear from the evidence that there is no basis upon which this Court can issue any orders of permanent injunction against the plaintiffs with regard to the land parcels No. MUTIRA/KIRUNDA/2516, 2530, 2531 and 2425 as sought in the defendants' counter-claim. That claim must therefore be dismissed.

Ultimately therefore and having considered the evidence by both parties, this Court makes the following orders:

1. Judgment is entered for the plaintiffs against the defendants in the following terms:

a) A declaration that the registration of land parcel Nos MUTIRA/KIRUNDA/2426 and 2427 in the 2nd and 3rd defendants' names was fraudulent and the said registration is hereby revoked.

b) A declaration that MUTIRA/KIRUNDA/2426 and 2427 belong to the 1st and 2nd plaintiffs and the same be registered in their names.

2. The defendants' counter-claim is dismissed.

3. Parties shall meet their own costs.

B.N. OLAO

JUDGE

10TH NOVEMBER, 2017

Judgment delivered, dated and signed in open Court this 10th day of November 2017 at Kerugoya

1st Plaintiff present

2nd Defendant present

3rd Defendant present

Both counsels absent

Right of appeal explained.

B.N. OLAO

JUDGE

10TH NOVEMBER, 2017