



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 902 OF 2014

PENNINAH NJERI THIONGO PLAINTIFF

VERSUS

LUCY NDUTA THIONGO.....1ST DEFENDANT

ROSE NJOKI KENJU 2ND DEFENDANT

EQUITY BANK LIMITED 3RD DEFENDANT

THE LAND REGISTRAR, KIAMBU COUNTY 4TH DEFENDANT

SUSAN CAROLINE GATHIGIA WERU 5TH DEFENDANT

JUDGMENT

INTRODUCTION

The plaintiff is a very old lady, one Penninah Njeri Thiongo. The 1st defendant is her daughter (Lucy Nduta Thiongo), while 2nd defendant is her niece. Plaintiff **WAS** the owner of property Title No. Kiambaa/Thimbugua/4662 (herein referred to as the mother property). The 1st and 2nd defendant then caused the sub-division of the mother property into 4 parcels with resultant titles namely;

- Kiambaa/Thimbigua/5144
- Kiambaa/Thimbigua/5145
- Kiambaa/Thimbugua/5146
- Kiambaa/Thimbigua/5147 all registered in plaintiff's name on 4/3/2009.

On 16/4/2009, title No. Kiambaa /Thimbigua/5144 was apparently transferred and registered in 1st defendant's name while Kiambaa/Thimbigua/5145 was transferred and registered in 2nd defendant's name on 16/3/2009.

On 16th July 2009 the two titles. Kiambaa /Thimbigua/5144 and Kiambaa/ Thimbigua/5145 were amalgamated to one title, the same being **KIAMBAA/ THIMBIGUA/ 5317 (the suit land)**, which was

registered in 2nd defendant's name. The 2nd defendant then took a loan of Shs. 9.5 million on 7/6/10 from 3rd defendant using the Land Title No.5317 as security. The land was therefore charged. On 25/2/11, 2nd defendant took another loan of Shs.1.3 million from 3rd defendant with the same land being the security. On 13/6/13, a company known as Kebol Auto Hardware where 2nd defendant had interests got another loan of Shs.12.9 million. Again the same land was the security.

Sometime in February 2014, the 2nd defendant sold the suit land (Kiambaa /Thimbigua/5317) to one Susan Caroline Githigia Weru who is sometimes being referred to as the 5th defendant in these proceedings. The 3rd defendant advanced a loan facility of Sh. 45,000,000 to Susan Caroline to purchase the Suit land where by the same suit land was part of the security. Plaintiff wants the suit land to revert back to her.

THE PLEADINGS AND THE RECORD:

Plaintiff filed this suit on 8/7/2014 when she learnt of the land dealings in respect of the Suitland. She prays for :

i) A declaration that the consent to transfer and eventual transfer of ALL THAT property being Title No. Kiambaa/Thimbigua/5317 into the name of the 2nd defendant was unlawfully, fraudulently and illegally obtained by the 1st and 2nd defendant.

i. An Order that the 3rd defendant surrenders the original Title of all that property being Title No. Kiambaa/Thimbigua/5317 together with executed discharge of charges to the 4th defendant for purposes of discharge of charges and nullification and/or cancellation of the Title Deed in the name of the 2nd defendant within fourteen (14) days from the date of judgment.

ii. An Order that the 4th defendant proceeds to nullify and/or cancel Title No. Kiambaa/Thimbigua/5317 and have the same restored to Title No. Kiambaa/Thimbigua/5144 and Title No. Kiambaa/Thimbigua/5145 respectively in the name of the plaintiff.

iii. Cost and interest of this suit

As is common in land Matters, the trial was diverted into the prosecution of the application filed on 5/11/14. An affidavit of service filed on 24/11/14 shows that 1st to 4th defendants were served. A notice of appointment of advocates was filed on 25/5/14 by Wandugi & Co, for and on behalf of 1st and 2nd defendant whereas for 3rd defendant Kibatia & Co. Adv. filed a notice of appointment on 24/11/14.

The 1st, 2nd and 3rd defendants participated in the prosecution of the application of 5/11/14 and even filed submissions. However, none appears to have filed their defence statements. As for 4th and 5th defendants, they never entered appearance and have never participated in any proceedings herein.

The record of the court reveals that there is only one plaint dated 2/7/14 and filed on 8/7/14. That plaint bears the names of the parties as the plaintiff and the 1st to 4th defendant. The first time the 5th defendant Susan Caroline Gathigia Weru is introduced in court documents is in the Return of Service filed on 24/11/14 by one Mary O.J. Njue. She was serving the Certificate of Urgency, the Notice of Motion, Supporting Affidavit, and Summons to Enter Appearance and the Copy of the Plaint. She however doesn't state that she served Susan Caroline Gathigia Weru. During the trial, the court was never told as to how and when the said 5th defendant was joined in the suit. In the circumstances, I find that the said Susan Caroline Gathigia was not sued and is not a party to these proceedings.

As for the other defendants, they were served but never filed statement of defence. 1st to 3rd defendants

have been active in court proceedings, but 4th defendant has never participated in these proceedings. It is apparent that 1st -3rd defendants, who were represented by advocates appear to have concentrated in the prosecution of the application of 5/11/14 and perhaps they lost site of the importance of filing their pleadings. During the hearing of the case, only plaintiff and 3rd defendant participated in the trial. 3rd defendant did not offer any explanation as to why they never filed a defence.

THE EVIDENCE.

Plaintiff's case;

Plaintiff is a very old woman. When she was called upon to testify, she adopted her statement dated 29/1/14 as her evidence in chief. Her and her son (PW2), state that the issue of the subdivision of PW1's land came about because there was a need to have an access road to PW1's house. A house or shop was also to be constructed for her. All this was to be done by 1st defendant. The land was to be divided into 4 portions. However, PW1 was given just two titles written in her name. These were for parcels No. Kiambaa /Thimbigua/ 5146 and Kiambaa /Thimbigua 5147.

PW2, the son of PW1, later in 2012 did a search and found that the other two titles, Kiambaa /Thimbigua/ 5144 and Kiambaa /Thimbigua /5145 were in name of 1st and 2nd defendant separately and that the two titles had been combined to create Title No. Kiambaa /Thimbigua /5317 in name of 2nd defendant, Rose Njoki. PW2 had then reported the matter at Kiambu Police Station where he was told that police don't deal with Land matters. He was referred to the District Officer (D.O). The issue still was not resolved. PW2 tried to lodge a caution on the land all in vain. That is when plaintiff decided to file the suit.

Case for 3rd defendant.

On the side of 3rd defendant, Equity Bank, the Credit Manager, one Gerald Gakiri is the one who testified. He adopted his statement of 21/7/16 as his evidence in chief. He told the court that on 7/6/10, the 2nd defendant took a loan of Shs.9, 500,000 offering her Land Parcel No. Kiambaa /Thimbigua/5317 as security. On 25/2/2011, she took a further loan of Shs.1, 300,000 from 3rd defendant. The same parcel of land was the security. On 13/6/13 Kebol Auto Hardware a company where 2nd defendant was a director took a loan of Shs.12, 900, 00 and the same parcel of land was the security.

2nd defendant then sold the suit land to one Susan Caroline Githigia Weru at a price of Kshs. 45,000,000. 3rd defendant was at hand to finance the transaction since they still held the title as security for the loans previously taken by 2nd defendant. The actual borrower of the Kshs. 45,000,000 was a company by the name Well's Investment Ltd where Susan was a director. A charge to that effect was executed over the suit land.

Thereafter on 4/7/14, the 3rd defendant entered into a loan agreement with the borrower (Wells). On the same day 3rd defendant, the borrower and Susan Caroline executed a deed of assignment of Rental Income. Still on this day the 3rd defendant and Susan Caroline executed a guarantee and indemnity.

3rd defendant avers that it had no knowledge of the plaintiff's claim until when they were served with the suit papers. It contends that it has a legitimate interest over the suit property. 3rd defendant also took issue with the fact that plaintiff took long without taking action and that this caused 3rd defendant to believe that everything was okay.

DETERMINATION

I sum up the issues for determination as follows:

1. Whether the transfer of parcel No. Kiambaa /Thimbigua/ 5144 from plaintiff's name to 1st

defendant's name and transfer of parcel Kiambaa /Thimbigua 5145 from plaintiff's name to 2nd defendant's name, the subsequent amalgamations of the two parcels into Title No.5317 and the further land deals in respect of this parcel of land (5317) are valid.

2. Whether the rights and interest of 3rd defendant as well as those of Susan Caroline are protected.

3. Whether Title No. Kiambaa /Thimbigua 5317 should be nullified to revert to plaintiff.

Vaildity of land dealings in respect of parcels no. 5144, 5145 and 5317

Consent;

Plaintiff has pleaded that the transactions in respect of the parcels No. Kiambaa /Thimbigua/ 5144 and Kiambaa /Thimbigua/ 5145 are illegal for want of consent. The document produced as P Exhibit3 (a copy of green card) captures the history of the sub divisions in respect of the mother title. The original parcel was No. 4662 which plaintiff had acquired by dint of a succession cause. According to her, there was a need to have an access road to her shop and this necessitated the subdivision of the mother title. Plaintiff's son who is PW2 states that he is even the one who looked for a surveyor to assist her sister (1st defendant) in the process of the subdivision. Both PW1 and PW2 were therefore aware that the mother title would be sub divided to facilitate the hiving off, of the access road. The mother title was hence subdivided into four portions resulting in Title Nos Kiambaa/ Thimbigua /5144, Kiambaa /Thimbigua/5145, Kiambaa /Thimbigua/5146 and Kiambaa /Thimbigua/5147 all in plaintiff's name and the title deeds were issued on 4/3/09.

PW1 and 2 however state that they never saw the title documents to parcel No. Kiambaa /Thimbigua /5144 and Kiambaa /Thimbigua 5145. They came to learn later that Title No. Kiambaa /Thimbigua 5144 was in name of 1st defendant and 5145 was in name of 2nd defendant.

The 1st and 2nd defendant are family to plaintiff as they are a daughter and a niece respectively. They even had a lawyer (Wandugi and Co. Advocates). I am therefore inclined to believe that 1st and 2nd defendants are aware of this suit and that the issue of consent has been raised. The two have however not in any way rebutted the assertion by the plaintiff that there was no consent to transfer parcel Land No. Kiambaa /Thimbigua/5144 to 1st defendant's name and parcel No. Kiambaa /Thimbigua /5145 to 2nd defendant's name.

Likewise, there is no evidence to show that the requisite consent from the land control board had been obtained for amalgamations of the two parcels of land into parcel No. Kiambaa /Thimbigua/ 5317 in 2nd defendant's name.

2nd defendant apparently charged the suit land with Equity Bank on 3 different instances. Initially she got a loan of Shs.9,500,000 on 7/6/10, then on 25/2/11 she got another loan of Shs.1,300,000 and on 13/6/13 , she got a loan of Shs.12,900,000. Again it is evident that the requisite consent from the land control board was not obtained.

There after the land was sold by 2nd defendant to one Susan Caroline at a price of Kshs.45, 000,000. The title of the suit land (Kiambaa /Thimbigua /5317) was with Equity Bank. Equity Bank was in the mix of it all as it is the one which financed the purchase price. Again there is no evidence that there was a consent from Land Control Board.).

DW1 (witness for 3rd defendant) had told the court that **“when you are borrowing a loan, a consent must be obtained even it is not before the court”**. Is this not an admission by 3rd defendant that the consent was a requirement in the land dealings?

The mother title had been registered under the now repealed Registration of Lands Act (cap 300 laws of

Kenya), and so were the subsequent titles. Section 4 of the aforementioned act stipulates;

“ Provided that, except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as overriding any provision of any other written law requiring the consent or approval of any authority to any dealing”.

Section 6 of the Land control act with regard to the following transactions stipulates;

a. “the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

b. the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the

c. Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

d. the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,

Is void for all purposes unless the land control board for the land control area or division in which the Land is situated has given its consent in respect of that transaction in accordance with this Act”.

In Joseph Mathenge Kamutu vs. Joseph Wainaina Karanja & Another ELC No. 102 of 2014, Nyeri Waithaka J stated that;

“The reason behind the above stringent provisions of the Act is to be found, in our view, in the rationale of the land control legislation. Before enactment in its present form, the Land Control Act had existed in one form or another in the colonial period”.

The Judge quoted an eminent Kenyan Legal scholar the, late **Prof. HWO Okoth Ogendo** in his writing, namely, the **Land Control (Native Lands) Ordinance (No. 28 of 1959)**:

“The purpose of the Land Control (Native Lands) Ordinance was to protect uninitiated peasants from improvident use of their rights under the new tenure system. Even though individualization was seen as necessary precondition to the planned development of the African areas, it was also appreciated that it could lead to many other problems more difficult to solve than the ones it was intended to eliminate”.

In HCCC No. 232 of 1996 Kisumu, John Didi Omulo vs. Small Enterprises Finance & co.Ltd & Another, Warsame J while dealing with the issue of consent from land control board in determining the validity of a charge stated thus;

“ In my understanding if an act is void it is void abinitio, which means a transaction based on an act which is void is materially void and no party can get any benefit from such transaction”.

In absence of any evidence that there was consent obtained in respect of dispositions in parcel no 5144, 5145 and 5317, the logical conclusion to make is that such dispositions are illegal and a nullity. The 1st and 2nd defendant have vanished from the scene. They have obviously benefited from the illegalities aforementioned and it is therefore not surprising that the two would not be interested to defend the suit.

Speed;

A peculiar aspect of the land dealings in parcel No. Kiambaa /Thimbigua /5144, Kiambaa /Thimbigua/5145 and Kiambaa /Thimbigua/ 5317 is the hasty processes. One would certainly appreciate a smooth and expeditious transaction especially in land matters. The reality though is that land is a sensitive and emotive subject which naturally invites caution and due diligence. In addition, land transactions go through various stages involving various players in the land sector ,for instance the engagement with physical planners and surveyors, land control board, valuers, the land registry, lawyers etc.

The speed with which the land parcels were transferred from Plaintiff's name to Lucy and Rose's name was quite fast. P Exhibit 3, a green card indicates that the Registration of plaintiff as owner of parcel No. Kiambaa /Thimbigua /5144 and Kiambaa /Thimbigua /5145 was on 3/3/09 (after the subdivision of Kiambaa /Thimbigua /4662, the mother title). One month and 12 days later on 16/4/09, 1st defendant was registered as owner of Kiambaa /Thimbigua /5144. In the case of transfer to 2nd defendant for parcel No.5145, the speed was even faster, taking only 13 days (up to 16/3/09). It is quite apparent that these two transactions were fast tracked in order to bypass all handles including legal ones like that of land control board.

The amalgamation of the two titles also took a short period and by 16/7/09, the titles were merged into parcel no. Kiambaa /Thimbigua/ 5317.

Circumstances surrounding the dispositions of the land;

The conduct of 3rd defendant in dealing with 2nd defendant is rather wanting. There are 9 documents in 3rd defendant's list of documents filed on 6/4/2016. However, the charges in respect of the monies advanced to 2nd defendant on 3 different occasions (on 7/6/10, 25/2/11 and 13/6/13), and which are mentioned in paragraph 2, 4, and 5 of GERALD GAKIRI's statement (witness for 3rd defendant), are not in 3rd defendant's list. No explanation was advanced as to why such crucial documents have not been availed to this court.

The title for parcel No. Kiambaa /Thimbigua /5317 remained with the bank (3rd defendant) from around June 2012 when 2nd defendant took the initial, loan even as the loan facilities continued to be restructured or consolidated. It is rather peculiar that 3rd defendant has not submitted any evidence to capture the history of transactions between itself and 2nd defendant. The logical conclusion to make is that any such evidence would have been adverse to their case.

As for the transaction of 13/6/13 (where 2nd defendant was borrowing 12,900 000), something is certainly amiss. The borrower was a company called Kebol Auto Hardware Co. Ltd but the guarantors were 2nd defendant and two other persons, Olive Mugure and Beatrice Wangui Kenju. The signature of the said Beatrice Wangui has an uncanny resemblance to that of Rose Njoki Kenju , the 2nd defendant. One need not venture into the arena of forensic examination to arrive at this conclusion. The logical conclusion to make is that this was a transaction tainted with fraud.

The follow up transactions where 2nd defendant sold parcel no.5317 with assistance of 3rd defendant is a clear pointer of how illegality was being perpetuated. In paragraph 10 of the statement of DW1, he states;

“it was agreed and understood as amongst 2nd, 3rd and 5th defendants that the transfer from 2nd to the 5th defendant, the discharges relating to the charges between the 3rd defendant and the 2nd defendant, and the charge between the 5th defendant and 3rd defendant would be registered contemporaneously.”

According to DW1 **“The Bank had a relationship with 2nd defendant and 5th defendant but not 4th defendant”**.

Section 85 of the registered lands Act (repealed) provided that;

“the transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and by filing the instrument”.

It is not fathomable as to how the bank was not involving the Land Registrar in these processes. The logical conclusion to make is that even 4th defendant must have been in the mix since the registration of Susan Caroline as proprietor of the land could only be done via the statutory provided platform at the lands registry. Any person interested in due diligence would have been able to raise the red flag during the lifespan of the land transactions. However, it is quite apparent that none of the defendants was interested in conducting a clean process.

It is alleged by the 3rd defendant that plaintiff had done nothing even after discovering the fraud in 2012. However, PW2 has given a plausible account of the steps he took to pursue plaintiff’s claim. PW2 had reported the matter to the police at Karuri Police Station. He was however, referred to D.O, only to learn that D.O is the one who had issued the purported consent forms.

Caution;

PW2 did try to lodge a caution but in vain (see the application forms produced as d as P Ex 1 & 2). It is after PW1 and 2 were unable to lodge the caution on June 2014 that they came to court.

The lodging of a caution is provided for Under S.71 of the Land Registration Act (2012) which provides:

“A person who—

(a) Claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land.....”

The repealed Registered Lands Act contains similar provisions under section 131. Why did the 4th defendant refuse to register the caution? .It is the registration of such a caution which would have at least halted further dispositions in respect of parcel No. Kiambaa /Thimbigua/5317, especially the transfer of the suit land to Susan Caroline.

The history of the transactions in respect of land parcels No. Kiambaa /Thimbigua/5144, Kiambaa /Thimbigua/5145 and Kiambaa /Thimbigua/5317 clearly shows that plaintiff had an interest in the land hence the rejection of the caution by the Land Registrar was unreasonable and tainted with illegality.

My conclusion is that the land dealings in respect of parcel No. Kiambaa /Thimbigua /5144, Kiambaa /Thimbigua/5145 and Kiambaa /Thimbigua/5317 were done through corrupt schemes, were un-procedural, illegal and hence invalid.

2. Are the Rights and Interests of 3rd defendant and those of Susan Caroline protected in respect of title No. 5317?

Article 40(1) of the Constitution provides that:

“Subject to Article 65, every person has the right either individually or in association with others to acquire and own property”. Subsection 6 further provides:

Article 40 (6);

“The rights under this article do not extend to any property that has been found to have been unlawfully acquired.”

Section 26 of the Land Registration Act provides that;

“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, un procedurally or through a corrupt scheme”.

Thus the law is not on the side of 3rd defendant and Susan Caroline. Their rights and interest in parcel No. Kiambaa /Thimbigua/5317 are not protected as the land dealings in respect of the suit land were done through corrupt schemes, were un procedural and were illegal.

“In the case of *Elijah Materi Nyanwara vs. Stephen Mungai Njuguna & Another, ELC NO. 609(B) of 2012 ELDOROT, Munyao J* Made reference to the Land Registration Act stating that;

“The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”

There is a need to highlight the involvement of Susan Caroline in these suspicious land dealing? Just like in the previous dealings between 3rd defendant and 2nd defendant, it appears that the dealings between 3rd defendant and Susan Caroline are equally murky. In the latter deals, the borrower was a company known as Wells Ltd owned by Susan Caroline. This company was borrowing funds from 3rd defendant to facilitate the purchase of property from 2nd defendant to Susan Caroline! The minutes of the borrower company (Wells) D Exhibit 5 are signed by Susan Caroline. The minutes purports to ratify the offer of the facility. The said minutes are dated 28/3/14. The letter of offer is dated 2 days earlier on 26/3/14. The inconsistency clearly shows that Susan Caroline was not even an innocent purchaser. Curiously the copy of Title to reflect the sale of land from 2nd defendant to Susan Caroline has not been annexed as an Exhibit by the 3rd defendant yet the latter would naturally be the custodian of the document as the same is a security.

The upshot of my findings are that the rights and interest of the 3rd defendant are unprotected. The same goes to Susan Caroline. Whatever title that Susan Caroline is holding is not valid as the same was passed on to her through corrupt schemes with her full knowledge.

Should the Title No. Kiambaa /Thimbigua /5317 revert to the plaintiff?.

Plaintiff was dispossessed of her land irregularly and unlawfully. The logical trend is to reverse the process and give the plaintiff her lawful entitlement.

CONCLUSION

I proceed to make the following orders:

1. A declaration is hereby issued that the plaintiff is the legal owner of Land Parcel Title

No.KIAMBAA/ THIMBIGUA/ 5317.

2. declaration is hereby issued that the transfer of Title No. Kiambaa /Thimbigua /5144 from plaintiff to 1st defendant was illegal.

3. A declaration is hereby issued that the transfer of Title No. Kiambaa /Thimbigua/5145 from plaintiff to 2nd defendant was illegal.

4. A declaration that the Amalgamation of parcels of Land No. Kiambaa /Thimbigua/5144 and Kiambaa /Thimbigua /5145 into Kiambaa /Thimbigua /5317 in the name of 2nd defendant is illegal.

5. A declaration is hereby issued that the transfer of land parcel No. Kiambaa /Thimbigua/ 5317 by 2nd defendant to Susan Caroline is illegal.

6. Any encumbrances including charges, executed over the Land Parcel No.KIAMBAA/THIMBIGUA/ 5317 are hereby declared as illegal and are hereby nullified.

7. An order is hereby issued to 4th defendant to forthwith cancel Title No.KIAMBAA/THIMBIGUA/ 5317 and in place of it, to restore the Title Nos. Kiambaa /Thimbigua /5144 and Kiambaa /Thimbigua /5145 in the names of the plaintiff.

8. The plaintiff is awarded costs of the suit to be borne by 1st, 2nd and 3d defendants herein.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2017

HON. L. N. MBUGUA

ELC JUDGE

IN THE PRESENCE OF:-

1. Wanjala H/B Karuga for 3rd Defendant
2. Irungu for Plaintiff