



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 26 OF 2016**

**JECKLIA RWAMBA KURINGIA.....PLAINTIFF**

**VERSUS**

**MUGO KINYOTHI Alias THOMAS NJIRU MUTURA..DEFENDANT**

**JUDGMENT**

**JECKLIA RWAMBA KURINGIA** the plaintiff herein filed this suit as the legal representative of the Estate of **NJIRU MUTURA** (the deceased) and also in her own capacity. She pleads that at all material times, the deceased who was her brother was registered as the proprietor of land parcel No. **KYENI/KIGUMO/651** (the suit land) to hold in trust for himself and all his siblings including the plaintiff herein. The deceased passed away in 1962 and it was not until September 2011 that the plaintiff, on visiting the Land office, discovered that on 7th March 1991, the defendant had wrongfully, unlawfully and fraudulently presented himself as the registered proprietor of the suit land and caused the name appearing on the parcel changed and/or corrected and a title deed issued in his name. By an amended plaint filed at the High Court Embu on 19th July 2012, the plaintiff therefore sought judgment against the defendant in the following terms:-

- 1. A declaration that as at the time the Land Control Board consent, correction of name and issue of title to parcel No. KYENI/KIGUMO/651 was unlawfully obtained by the defendant, the registered owner who was the plaintiff's deceased brother NJIRU MUTURA had died and therefore no lawful title could pass in favour of the defendant.***
- 2. An order for rectification of the register by directing the Land Registrar that the registration of KYENI/KIGUMO/651 in favour of the defendant THOMAS NJIRU MUTURA be cancelled as it was obtained or made by fraud.***
- 3. Eviction order to remove the defendant from parcel of land No. KYENI/KIGUMO/651.***
- 4. Cost of this suit with interest.***

The particulars of fraud against the defendant were pleaded in paragraph six (6) of the amended plaint as follows:-

- (a) The defendant caused and/or obtained ownership of parcel of land No. KYENI/KIGUMO/651 by misrepresentation misleading and cheating the Land Control Board and the Land Registrar the document for correction of name were valid.***
- (b) The defendant misrepresented to the Land Control Board and the Land Registrar that the registered proprietor was alive while he had died 29 years earlier.***

*(c) The defendant knew and knows that the registered proprietor of parcel of land No. KYENI/KIGUMO/651 was dead.*

*(d) The defendant has wrongfully and illegally acquired title to KYENI/KIGUMO/651 to which he has no claim.*

It is the plaintiff's case that the defendant is in illegal occupation of the suit land and has rendered the plaintiff landless.

By an amended defence filed on 24th July 2012, the defendant denied the claim and put the plaintiff to strict proof thereof. He pleaded further that his father **NJERU MITAMBO** had caused the suit land to be registered in his names **NJIRU MUTURA** also known as **MUGO KANYOTHI** and that he corrected his names to read **THOMAS NJIRU MUTURA** when he was baptized in 1991. He added that this suit is time barred and should be dismissed.

In a reply to the amended defence, however, the plaintiff reiterated the contents of her plaint adding that the defendant's real name is **MUGO KINYOTHI** Alias **MUGO KANYOTHI** and he only referred to himself as **NJIRU MUTURA** so as to defraud the plaintiff and her siblings of the suit land. Further that the plaintiff only discovered the fraudulent dealings with the suit land in September 2011 and immediately took action and so the suit is not time barred.

Following the transfer of this case from the High Court in Embu, the hearing commenced before me on 7th October 2013.

The plaintiff told the Court that she is the first born in her family and both their parents died while she, her sister **DIBORAH** and the deceased were young and so one **NJURANIO KAGEMBE** who was the Chairman of their clan and also their late father's friend took care of them. During the process of land demarcation, the suit land was registered in the names of their deceased brother to hold in trust for himself and the rest of the family. By that time, they were living with **KINYOTHI** who is the father of the defendant. The deceased then became ill and died at Kyeni Hospital. He was not married. The plaintiff and her sister continued living with **KINYOTHI** until she got married to one **MURU** and they had four children. Her husband who is also deceased later chased her away and she went back to live with **KINYOTHI** who, together with the defendant, also started beating, mis-treating her and chased her away. She reported these incidents to the area Chief and District officer. It was then that she discovered that on 8th September 2011, the defendant had registered the suit land in his names. She therefore placed a caution on the suit land as per the Green Card (Plaintiff's Exhibit 1). She also obtained a limited grant ad litem for purposes of filing this suit (Plaintiff's Exhibit 2). Her lawyer then wrote to the Lands office enquiring about the registration of the suit land in defendant's names and obtained a response (Plaintiff's Exhibits 3A and 3B). Plaintiff denied that the defendant was given the suit land by the clan adding that it was in fact the defendant's father who was given 13 acres and which he was to give his sons. She denied that the defendant is also known as **NJIRU MUTURA**.

In support of her case, the plaintiff called as witnesses her sister **DIBORAH MBIRO NYAGA** (PW5) and members of her clan **GEOFREY NJIRU KAGEMBE** (PW2), **ISAIAH NDWIGA MUGO** (PW3) and **JOHN NGARAMU NTHARANO** who is also a pastor (PW4).

**GEOFREY NJIRU KAGEMBE** (Pw2) told the Court that the plaintiff, her sister **DIBORAH** and their deceased brother **NJIRU MUTURA** lived on his father's home following the death of their parents in the 1960's. During the land demarcation period, the deceased was registered as the proprietor of the suit land. The defendant was not given any land because his father **KINYOTHI MUTAMBO** was allocated thirteen (13) acres of land being No. KYENI/KIGUMO/795 whose Green Card he produced (Plaintiff's Exhibit 4). He added that the plaintiff and the deceased were living on the suit land. Before he died, the deceased had been taken ill and was taken to Kyeni Hospital where he was buried because the defendant's father wanted to take the suit land which was being cultivated by the plaintiff. The plaintiff was later married but returned to the suit land after the marriage collapsed. However, the defendant chased her away alleging that the land was given to him by his father. According to the witness, the defendant took

the name **THOMAS** so that he could acquire the suit land and this was only discovered in 2011 whereupon the plaintiff placed a caution thereon.

**ISAIAH NDWIGA MUGO** (PW3) is also a member of the same clan and he too told the Court that during the demarcation exercise, the suit land was given to the plaintiff's late brother **NJIRU MUTURA** but the defendant was not given any land because his father **KINYOTHI** was given land.

**JOHN NGARAMU NTHARANO** (PW4) similarly testified that he lives on the same village with the parties herein. He added that the plaintiff's parents died and she and her siblings who are the deceased and **DIBORAH** were living with **KAGEMBE** during the demarcation and the suit land was registered in the names of the deceased. Later, he learnt that the deceased had died while in hospital but he did not attend his burial which was shrouded in secrecy.

**DIBORAH MBIRO NYAGA** (PW5) is a sister to the plaintiff and she confirmed that she and the deceased went to live with **KAGEMBE** following the death of their parents. Later, they were taken by **KINYOTHI** and during the land demarcation, the suit land was registered in the names of the deceased but he became ill thereafter and died at Kyeni Hospital where the defendant told them he was buried. The witness and plaintiff continued staying on the suit land before the plaintiff got married but later returned home. The witness told the Court that she knows the defendant as **MUGO KINYOTHI** and not **THOMAS NJIRU MUTURA**. She denied that the defendant was given the suit land by the clan adding that it belongs to her and the plaintiff.

In his defence, the defendant told the Court that his names are **THOMAS NJIRU MUTURA** also known as **MUGO KINYOTHI** and that the plaintiff is her sister born of the same mother and father. He said he is the registered proprietor of the suit land and produced a copy of the title deed and certificate of search (Defence Exhibits 1 and 2 respectively). He said the clan gave him the suit land in 1961 and denied that the plaintiff had a brother called **NJIRU MUTURA** adding that the **NJIRU MUTURA** being referred to herein is infact himself. He stated that when he was born, he was given the names **NJIRU MUTURA** but upon being baptized, he took the names **THOMAS NJIRU MUTURA** and he produced an affidavit to that effect (Defence Exhibit 3). He denied having obtained the suit land fraudulently and asked the Court to dismiss this suit.

The defendant did not call any witness in his defence, not even his own father who had recorded a statement and was in Court on 11th May 2016 when the defendant testified and closed his case.

Submissions have been filed by the firm of **ROSE NJERU Advocate** for the plaintiff and **EDDIE NJERU Advocate** for the defendant.

I have considered the evidence by both parties and their witnesses as well as the submissions by counsel.

I have framed the following issues for my determination:-

- 1. Whether this suit is time barred.*
- 2. Whether the suit land was registered in the names of the deceased during demarcation or whether it was infact given to the defendant.*
- 3. Whether the defendant's real names are THOMAS NJIRU MUTURA or he is MUGO KINYOTHI son of KINYOTHI who fraudulently held himself out as the deceased and obtained the registration of the suit land in his names.*
- 4. Whether on the evidence, plaintiff has proved that she is entitled to the orders sought in her plaint.*

As to whether or not this suit is time barred, the defendant pleaded in paragraph six (6) of his defence that this suit is caught up by the limitation statute. However, no evidence was led by either of the parties in

that regard but since a plea of limitation goes to the jurisdiction of this Court, I must interrogate it because if that plea is up-held, then there will be no need to consider the other evidence herein.

According to paragraph six (6) of the plaintiff's plaint, she discovered that the defendant had on 7th March 1991 wrongfully, unlawfully and fraudulently presented himself as the registered proprietor of the suit land. This discovery was made in September 2011 when she visited the Land Registry. This suit was filed on 19th July 2012 one year after the discovery of the alleged fraud. **Section 7 of the Limitation of Actions Act** provides that an action may not be brought to recover land after the end of twelve (12) years from the date on which the course of action occurred. According to the Green Card in respect of the suit land, (Plaintiff's Exhibit 1), it was registered in the name of **THOMAS NJIRU MUTURA** on 7th March 1991 as correctly pleaded by the plaintiff. A title deed was issued the following day. The plaintiff's evidence and pleading is that she discovered that fraud in September 2011 and placed a caution thereon. That is the date that time should start running because **Section 26 of the Limitation of Actions Act** provides as follows:-

*“Where, in the case of an action for which a period of limitation is prescribed, either –*

*(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agents; or*

*(b) the right of action is concealed by the fraud of any such person as aforesaid; or*

*(c) the action is for relief from the consequences of a mistake the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it”*

It is obvious therefore that this suit is not time barred as pleaded by the defendant.

On issues No. 2, 3 and 4 above, the defendant was categorical in his testimony that the suit land is his property. He said:-

*“I know about the land parcel No. KYENI/KIGUMO/651. I am the registered owner. This is the copy of title deed and search”.*

He also denied that the plaintiff had a brother called **NJIRU MUTURA** (deceased) who was the registered proprietor of the suit land. He instead insisted that he is the **NJIRU MUTURA**. He said as follows in his evidence in chief:

*“I heard the plaintiff's witness testify. I heard the plaintiff say that she had a brother called NJIRU MUTURA who died. That NJIRU MUTURA that she was referring to is me. I did not obtain the land through fraudulent means and so I ask the Court to dismiss the case. When I was born, I was given the names NJIRU MUTURA and when I was baptized, I was given the names THOMAS NJIRU MUTURA. This is the affidavit to show my names”.*

On the other hand, the plaintiff and her witnesses testified that she and **DIBORAH** (PW5) were the only siblings of the deceased and that the defendant's father is called **KINYOTHI**. They were also categorical that the deceased was registered as the proprietor of the suit land to hold in trust for the plaintiff and his siblings and that the defendant was not given any land by the clan because his own father was given land parcel No. KYENI/KAGUMO/795. A copy of the Green Card in respect to that parcel of land was produced and it shows that indeed it was registered in the names of **KINYUTHI MUTABO** on 9th August 1961 (Plaintiff's Exhibit 4). Counsel for the defendant made a strong submission that the only way the plaintiff could prove that **NJIRU MUTURA** lived and died in 1962 was by production of the birth and death certificates and further, that at that time, there was proper registration of births and deaths in the country. It is of course true that certificates of birth and death are the best evidence to prove that a person was born and died respectively. But such certificates are by no means the only evidence to prove the birth or death of a person. This Court must also take judicial notice of the fact that in this

country, due to either illiteracy or lack of knowledge, many births and deaths were not being registered in the 1960's. The Court is entitled to rely on other available evidence including the oral evidence of eye witness who can confirm that a person was alive and died. In this case, I am satisfied there is sufficient evidence upon which the Court can conclude that the deceased was indeed the brother of plaintiff and **DIBORAH**, that he was the registered proprietor of the suit land and that after his death, the defendant procured registration of that land in his names. To begin with, there is the credible evidence of not only the plaintiff but also and her witnesses who include her sister (**DIBORAH**) that the deceased was plaintiff's sibling. Those witnesses are members of their clan and they did not strike me as persons who had formed themselves into a gang of liars to give false testimony in this case. They knew both the parties and their parents well. It is also not conceivable that the plaintiff can come to this Court and testify that she had a brother who infact never lived at all.

Secondly, the suit land, as is clear from the Green Card (Plaintiff's Exhibit 1) was registered in the names of **NJIRU MUTURA** (the deceased brother to the plaintiff) on 9th August 1961 and it was not until thirty (30) years later (on 7th March 1991) that that registration was changed to read **THOMAS NJIRU MUTURA**. The Land Registrar Embu could not have registered land in the names of a person that did not exist.

Lastly, prior to filing this suit, the plaintiff filed Probate and Administration Cause No. 163 of 2012 at Embu High Court and **ONG'UDI J.** issued her with a Limited Grant ad litem for purposes of filing this suit on behalf of the Estate of the deceased **NJIRU MUTURA** (Plaintiff's Exhibit 2). **ONGU'DI J.** must have been satisfied that indeed the deceased whose names were given as **NJIRU MUTURA** had lived and died. Courts do not issue grants for the Estate of living persons. It cannot therefore be correct, and no one can believe the defendant when he testified that the **NJIRU MUTURA** being referred to is infact himself. On the contrary, there is cogent evidence which this Court must accept, that the deceased **NJIRU MUTURA** who died in 1962 was the only son in the family of the plaintiff and her sister **DIBORAH** and that the suit land was registered in his names to hold in trust for the plaintiff and the other members of the family, It is clear to me from the evidence on record that the scheme to have the suit land registered in the names of the defendant was hatched long before the deceased died. That is why the defendant's father, who was then the guardian of the plaintiff and her siblings, did not bury the deceased on the suit land. He was also the only person who could have obtained the death certificate and it was convenient not to do so.

The plaintiff has pleaded that the defendant fraudulently registered himself as the proprietor of the suit land. Fraud is a serious allegation and the standard of proof lay on her. In **PATEL VS MAKANJI 1957 E,A 314**, the Court of Appeal held as follows:-

***“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.***

See also **KOINANGE VS KOINANGE 1968 K.L.R** where it was held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings which is on the balance of probabilities. Has the plaintiff surmounted the burden cast upon her to prove fraud? That is what I need to interrogate now.

From the evidence before me, it is clear that the defendant is not the **NJIRU MUTURA** in whose names the suit land was registered in 1991 and his registration as proprietor of the same was therefore through fraudulent and other illegal means. In the course of the trial, **Ms NJERU advocate** for the plaintiff pointed at the defendant and asked **JOHN NGARAMU NTHARAMO (PW2)** to confirm if the defendant was **NJIRU MUTURA**. The witness said:-

***“That man you are showing me is not NJIRU MUTURA. That is a forgery. That man is MUGO KINYOTHI”***

Then there is the defendant's own evidence that he took the names **THOMAS NJIRU MUTURA** when

he was baptized although he was born **NJIRU MUTURA**. He does not say when he was baptized although I can see that year in the witness statement which was filed by his father. I cannot of course refer to that statement because his father did not testify. However it cannot escape this Court's attention that on 13th July 2012, the defendant swore an affidavit to show that his names are also **THOMAS NJIRU MUTURA**. That affidavit (Defence Exhibit 3) was only taken out a few days before this suit was filed. Clearly, the affidavit could only have been taken to conceal the fraud perpetrated by the defendant with respect to the suit land. Surely it didn't have to take the defendant upto July 2012 to swear that affidavit and he cannot be telling this Court the truth when he says:

***"It took long to swear it because I was facing some problems"***

Then there is the rather curious and un-usual refusal by the defendant to call his own father as a defence witness. A party is not obliged to call any particular witness in support of his case. But surely, where you own identity is in dispute, which better witness can you call than your own father or mother? Although the defendant had filed his father's statement as a defence witness in this case and although he was present in Court when the defendant closed his case on 11th May 2016, the defence opted not to call him to testify. The only conclusion that this Court can arrive at is that the defendant's father would not have supported his case or would have contradicted it altogether. That is the most logical conclusion in the circumstances.

Further, before the plaintiff's counsel filed this suit, she wrote to the Land Registrar Embu on 21st March 2012 requesting for a copy of the Green Card and other documents to confirm who had misrepresented himself as the deceased and fraudulently caused corrections to the register in respect of the suit land. The response (Plaintiff's Exhibit 3 (b)) was that the Land Registrar was ***"trying to trace the correction of name which was done on 7th March 1991"*** when the suit land was registered in the defendant's names. There is no evidence to suggest that the Land Registrar subsequently retrieved that record. The answer to that can only be that having executed the fraudulent transfer of the suit land into his names, the defendant, obviously with the connivance of officers in the Land Registry Embu, ensured that the evidence was not available for scrutiny by this Court or any other person. That is evidence upon which this Court can conclude that the registration of the suit land in the names of the defendant was done fraudulently.

Finally, there is evidence which is not rebutted that during the demarcation period, the defendant's father was given land. **GEOFREY NJIRU KAGEMBE (PW2)** said:

***"The defendant was very young then and he was not given any land because his father KINYOTHI MUGO was given 13 acres of land being KYENI/KIGUMO/795"***

The Green Card for that parcel of land was produced as Plaintiff's Exhibit No. 4. It is common knowledge that during the land demarcation period, land was being given either to the head of the family i.e. the father, or in his absence the eldest son to hold in trust for the family. It is not therefore plausible, as the defendant would like this Court to believe, that both he and his father were given land during that period. A perusal of the Green Cards for both the suit land and the land parcel No. KYENI/KIGUMO/795 registered in the names of the defendant's father shows that both registrations were done on 9th August 1961. The fact that the suit land was registered in the name **NJIRU MUTURA** makes nonsense of the defendant's claims that it was given to him because, as I have already stated above, that was not the practice. Further, and most importantly, if indeed the suit land was given to him, it ought to have been registered in his names as **MUGO KINYOTHI**.

Having considered all the above, I am satisfied that the plaintiff has proved her case against the defendant and is entitled to the orders prayed for in her amended plaint filed herein on 19th July 2012.

There will therefore be judgment for the plaintiff against the defendant in the following terms:-

***1. A declaration that the registration of land parcel No. KYENI/KIGUMO/651 in the names of the defendant was obtained fraudulently.***

***2. An order for rectification of the register by directing the Land Registrar that the registration of KYENI/KIGUMO/651 in favour of the defendant THOMAS NJIRU MUTURA be cancelled as it was obtained or made by fraud.***

***3. An eviction order removing the defendant from the land parcel No. KYENI/KIGUMO/651. Such eviction shall be carried out in the manner prescribed under Section 152 G of the Land Act.***

***4. Costs and interest.***

It is so ordered.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> DECEMBER, 2016**

Judgment, dated, delivered and signed in open Court this 9<sup>th</sup> day of December, 2016

Ms Muthike for Ms Njeru for Plaintiff present

Mr. Njiru for Defendant absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> DECEMBER, 2016**