



**Nderitu v Nderitu & another (Environment & Land Case 681 of 2014)  
[2024] KEELC 684 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 684 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 681 OF 2014  
JO OLOLA, J  
FEBRUARY 15, 2024**

**BETWEEN**

**JANE WANJIRU NDERITU ..... PLAINTIFF**

**AND**

**SAMUEL NDIRANGU NDERITU ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS MATHENGE NDERITU ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This matter was initially instituted before the High Court as Nyeri HCCC No. 172 of 2008.
2. By a Plaint dated 9<sup>th</sup> December, 2008 and filed in the High Court on 10<sup>th</sup> December, 2008, Jane Wanjiru Ndiritu (the Plaintiff) sought Judgment against the two Defendants for:
  - (a) A declaration that the registration of the Defendants as the owners of Land Parcel Gakawa/Kahurura/Block 2/62 to themselves was fraudulent and illegal and of no consequence in law;
  - (b) An order directed to the Land Registrar Nyeri District to rectify the Register over Gakawa/Kahurura/Block 2/62 removing the names of the Defendants as the owners and in place thereof substituting the name of the Plaintiff as the owner of the land free from (any) encumbrance;
  - (c) An order of permanent injunction directed against the Defendants, their agents or anybody claiming under them or any 3<sup>rd</sup> party under whatsoever rights purportedly accruing from dealings with the Defendants hereto before or after from in any way dealing, alienating, appropriating profit, charging, further charging or otherwise in any way dealing with Gakawa/Kahurura/Block 2/62 without consent from the Plaintiff herein.



(d) Costs of this suit plus interest.

3. Those prayers arise from the Plaintiff's averment that she is the wife of one Nderitu Muita Githaiga (now deceased) who was also the father of the two Defendants by another wife. It is the Plaintiff's case that on or about 20<sup>th</sup> May 2008, the deceased had caused their parcel of land known as Gakawa/Kahurura/Block 2/62 (the suit property) which was previously in their joint names to be transferred to the Plaintiff as the sole proprietor thereof.
4. The Plaintiff asserts that shortly after her husband passed away on 12<sup>th</sup> October 2008, she did discover that the Defendants had fraudulently and illegally caused themselves to be registered as the owners of the subject property and hence the prayers sought herein.
5. But by their joint Statement of Defence and Counterclaim dated 14<sup>th</sup> October, 2009 as filed herein on 19<sup>th</sup> October 2009, Samuel Ndirangu Nderitu and Francis Mathenge Nderitu (the Defendants) assert that their father had only one lawful wife, their mother, Lydia Wambui and deny that the late Nderitu Muita got married to the Plaintiff.
6. The Defendants deny that the Plaintiff and the deceased were joint proprietors of the suit property and/or that the deceased did transfer the same to the Plaintiff as the sole proprietor thereof. On the contrary, the Defendants state that the suit property was on 7<sup>th</sup> February, 2000 transferred to and was registered in their names under instructions issued by the deceased who was the owner thereof and the same was effected by virtue of a valid Power of Attorney granted to the 1<sup>st</sup> Defendant by the deceased.
7. By way of their Counterclaim, the Defendants aver that as the lawful proprietors of the suit property, they are entitled to all the income accruing from the property. They accused the Plaintiff of holding herself out as the proprietor of the land and demanding and collecting rent accruing therefrom and thereby denying the Defendants their lawful entitlement through fraud and unlawful conversion of the property.
8. Accordingly, the Defendants pray that the Plaintiff's suit be dismissed and that Judgment be entered in their favour for:
  - (a) A permanent order of injunction restraining the Plaintiff from interfering with the Defendants' use and enjoyment of the Land Title Number Gakawa/Kahurura/Block 2/62 and further restraining the Plaintiff from laying claim to the ownership or income accruing from the said land;
  - (b) Taking of accounts to determine the amount of income accruing from the said property appropriated by the Plaintiff and payment of the amount to the Defendants; and
  - (c) Costs of the suit.

### **THE PLAINTIFF'S CASE**

9. At the trial herein which commenced before the Honourable Justice A. O. Ombwayo on 22<sup>nd</sup> January 2013, the Plaintiff called three (3) witnesses.
10. PW1 – Jane Wanjiru Nderitu is the Plaintiff and a farmer in Ndaragwa area of Nyandarua County. She told the Court that the two Defendants were the sons of her co-wife and that her husband Nderitu Muita Githaiga died on 12<sup>th</sup> October, 2008.
11. PW1 testified that the suit property belonged to her husband who had constructed a house thereon in the year 2001 – 2002 and herself. At some point when the husband was unwell he had given a Power of



- Attorney to the 1<sup>st</sup> Defendant in September 1994. The 1<sup>st</sup> Defendant later used the power to transfer the suit property to his name and that of the 2<sup>nd</sup> Defendant.
12. PW1 further told the Court that the suit property was transferred to her name in 2008 and that she had been collecting rent from the building that had been erected thereon by her husband.
  13. PW2 – Susan Mueni is the Land Registrar, Nyeri County. She told the Court that from their records, the first registered owner of the suit property was Nderitu Muita Githaiga. Currently, the property was registered in the names of the two Defendants as joint proprietors. The registration was by way of a transfer from Nderitu Muita to the two.
  14. PW2 testified that she was unable to get any supporting documents for the transfer and the Land Control Board consent. She told the Court a Power of Attorney cannot be used to transfer land from the donor to the donee. Where a Power of Attorney was used to transfer land to a purchaser, that fact ought to be indicated in the Register but there was no such indication on their records.
  15. PW2 further told the Court they did not have anything in their record showing that the land was initially registered jointly in the name of the Plaintiff and the said Nderitu Githaiga.
  16. PW3 - James Chacha is the Deputy County Commissioner, Kieni East. He produced minutes of the Kieni East Land Control Board for 15<sup>th</sup> May, 2008 indicating that the Plaintiff and the said Nderitu Muita Githaiga attended a Board meeting seeking to have the suit property transferred to the Plaintiff by way of gift. He told the Court the transfer was approved.

### **The Defence Case**

17. On their part, the Defence called a single witness who testified in support of their case.
18. DW1 – Samuel Ndirangu Nderitu is the 1<sup>st</sup> Defendant and a farmer. He told the Court the Plaintiff herein claims to be a wife to his father Nderitu Muita Githaiga yet she was not. He told the Court his father was married only to his mother and that their marriage was solemnized at a church wedding in 1945.
19. DW1 testified that upon realizing that he was old and of ill-health, his father issued him with a Power of Attorney on 13<sup>th</sup> September, 1994. He further testified that while the Plaintiff claims that DW1's father transferred the land to herself in the year 2008, that could not be true as the father had already transferred the said land to DW1 and the 2<sup>nd</sup> Defendant in the year 2000 through the Power of Attorney.
20. DW1 told the Court that by the time his father is said to have attended the Land Control Board meetings to transfer the land to the Plaintiff, he was already diagnosed with cancer and was always in hospital. He later died in the same year 2008.

### **Analysis and Determination**

21. I have carefully perused and considered the pleadings herein, the testimonies of the witnesses as well as the evidence adduced at the trial herein. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates acting for the Parties – Mr. Karweru for the Plaintiff and Mr. C. M. King'ori for the Defendants.
22. By this suit, the Plaintiff herein urged the Court to declare that the registration of the two Defendants as the owners of the parcel of land known as Gakawa/Kahurura/Block 2/62 was fraudulent and illegal. The Plaintiff accordingly craves an order directed to the Land Registrar, Nyeri requiring him to rectify



- the Register concerning the suit property by removing the names of the Defendants therefrom and substituting therein her name as the rightful owner of the suit property.
23. In addition, the Plaintiff craves a permanent order of injunction directed against the Defendants, their servants and/or agents restraining them from dealing in any manner whatsoever with the suit property.
  24. It is the Plaintiff's case that she was the wife of one Nderitu Muita Githaiga (now deceased) and that the said Nderitu Muita Githaiga was also the father of the two Defendants by his first wife. The Plaintiff avers that on or about 20<sup>th</sup> May 2008, the deceased had caused the suit property which was previously in their joint names to be transferred to her name as the sole proprietor thereof.
  25. The Plaintiff accuses the Defendants of proceeding shortly after the death of the said Nderitu Muita Githaiga on 12<sup>th</sup> October 2008, to fraudulently and illegally cause themselves to be registered as the proprietors of the suit property.
  26. On their part, the two Defendants while admitting that they are the sons of the late Nderitu Muita Githaiga, deny that their father was married to the Plaintiff. It is their case that their father had only one lawful wife, the same being their mother Lydia Wambui.
  27. The Defendants further deny that their father did transfer the suit property to the Plaintiff as the sole proprietor thereof. On the contrary, they assert that the suit property was on 7<sup>th</sup> February, 2000 transferred to them and was registered in their joint names under instructions issued by the deceased who was the sole proprietor thereof.
  28. From the material placed before the Court, there was no dispute that the suit property initially belonged to the said Nderitu Muita Githaiga. There was also no dispute that the said Nderitu passed away sometime on 12<sup>th</sup> October, 2008. According to the Plaintiff, the deceased was her husband and the father of the two Defendants herein. It was her case that prior to the deceased's death, he had in the year 2006 caused the suit property to be registered in their joint names and that subsequently in the year 2008 he had transferred the same to her name as the sole proprietor thereof.
  29. On their part the Defendants asserted that the deceased had transferred the property to themselves on 7<sup>th</sup> February, 2000 and that the same was not therefore available for transfer to the Plaintiff as purported. It was further the Defendants' case that the 1<sup>st</sup> Defendant had effected the transfer on the deceased's instructions through a Power of Attorney that had been donated to himself by the deceased.
  30. As it were, there was no dispute that in the year 1994, the deceased had indeed executed a general Power of Attorney in favour of the 1<sup>st</sup> Defendant. Under Clause 3 of the said Power of Attorney the deceased had given the 1<sup>st</sup> Defendant power as follows:
    - “ 3. To sell all or part of my freehold and leasehold properties whenever situated with the appurtenances either by private contract or by public auction and either together or in separate lots for such price as shall seem reasonable and to give receipts for all or part of the purchase money with like powers to mortgage charge or otherwise deal with my said property or properties as may seem fit as fully as effectively as I could have done.”
  31. As it were, while the Defendants have put much emphasis on the above clause as having given the 1<sup>st</sup> Defendant power to transfer the deceased's property unto himself and his brother, I was unable to see anywhere in the above clause or any other clauses in the Power of attorney where such power was expressly donated to the 1<sup>st</sup> Defendant. That clause as framed in my view only gave the 1<sup>st</sup> Defendant



power to sell or part with the land in which case he would still be required to account for the proceeds of the sale to the deceased as he was still alive at the time.

32. There was no clause in the Power of Attorney produced before the Court that gave the donee the power to transfer unto himself the property of the donor. As it is, it is trite law that in a situation where the instrument donating the power is ambiguous, the donee who is a mere agent of the donor who is the principal is supposed to act in good faith. In regard to the absence of such an express power, Halsbury's Laws of England Vol. 1, 4<sup>th</sup> Edition provides as follows:  

“In the absence of express directions, the agent may exercise his discretion so as to act in the best manner possible for the principal. An agent whose instructions are in ambiguous terms is justified if he acts in good faith and places reasonable construction on his authority; but where the limits imposed are definite he has no right to exercise his discretion.”
33. In support of her case, the Plaintiff called Susan Mueni, the Land Registrar Nyeri (PW2) who was categorical that as a rule, where property is to be transferred pursuant to such a general Power of Attorney, the same was first registered as against the title sought to be transferred before the transfers were registered. This was not done in regard to the transfer of the suit property into the names of the two Defendants. In my view and as correctly stated by PW2, a donee under a Power of Attorney could not transfer a property to himself as that would be tantamount to the donor, from whom the donee gets his powers from, transferring his property to himself.
34. As it turned out, the Defendants' father on whose instruction the property was said to have been transferred to the names of the Defendants was himself unaware of the transfer. In support of her case, the Plaintiff produced before the Court Minutes of proceedings held on 6<sup>th</sup> August, 2008 before the Nyandarua North District Land Disputes (Shauri) Committee. A perusal of those proceedings reveal that the Defendants' father considered the Plaintiff herein as his second wife on account of which he had given her and her nine (9) children several parcels of land including the suit property herein.
35. Indeed in further support of her case, the Plaintiff called James Chacha, the Deputy County Commissioner and Secretary to the Kieni East Land Control Board (PW3). In his testimony before the Court, PW3 confirmed that indeed the Plaintiff and the Defendants' father appeared before the Board on 15<sup>th</sup> May, 2008 in person whereupon they caused the suit property to be transferred to the name of the Plaintiff as a gift. He produced minutes of the Board meeting which at Minute 229 thereof confirm that the Board gave its approval for the land to be transferred to the Plaintiff.
36. On the other hand, the Defendants did not produce anything to demonstrate that there was any Land Control Board attended and/or any consent given for the transfer of the suit property into their names.
37. While the Defendants denied that the Plaintiff was their father's wife, it was apparent from the proceedings taken at Nyandarua District Commissioner's Office aforesaid that the father considered the Plaintiff his wife and had sired children with her. That fact was indeed known to the 1<sup>st</sup> Defendant. In his Replying Affidavit sworn on 6<sup>th</sup> January, 2009 and filed herein on 14<sup>th</sup> January, 2009 in response to an application dated 9<sup>th</sup> December, 2008 filed by the Applicant, the 1<sup>st</sup> Defendant has attached an Affidavit sworn by himself on 8<sup>th</sup> December 2008 and filed before the Senior Principal Magistrates Court at Nanyuki. At Paragraph 3 of the said Affidavit, the 1<sup>st</sup> Defendant acknowledges that his father was prior to his death on 12<sup>th</sup> October, 2008 cohabiting with the Plaintiff.
38. It was also apparent to me that it was only after their father's death that the Defendants tried to collect rent from the suit premises and that prior thereto, the rent was collected by the Plaintiff. The



Defendants themselves confirmed that position even though according to them the Plaintiff was only doing so as an agent of their father.

39. Arising from the foregoing, it was evident to me that the transfer of the suit property into the Defendants' name was fraudulent and that the same was done without the authority of the registered proprietor thereof. I am therefore persuaded that the Plaintiff has proved her case on a balance of probabilities.
40. In the premises I find no merit in the Counterclaim as filed by the Defendants. Accordingly I hereby enter Judgment for the Plaintiff as against the Defendants in the following terms:
- (a) The Defendants' counterclaim is hereby dismissed.
  - (b) A declaration is hereby issued that the registration of the Defendants as the owners of Land parcel Number Gakawa/Kahurura/Block 2/62 was fraudulent, illegal and of no consequence in law.
  - (c) An order is hereby issued to the Land Registrar Nyeri County directing him to rectify the Register for L.R No. Gakawa/Kahurura/Block 2/62 by removing the names of the Defendants as the proprietors thereof and in place thereof substituting the name of the Plaintiff as the owner of the land free from (any) encumbrance.
  - (d) An order of a permanent injunction is hereby issued directed against the Defendants, their agents and/or servants restraining them from in any way dealing with, alienating, appropriating profit, charging, further charging or otherwise in any way dealing with the parcel of land known as Gakawa/Kahurura/Block 2/62 without the consent of the Plaintiff herein.
  - (e) The Defendants shall bear the costs of this suit and that of their Counterclaim.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**In the presence of:**

Mr. Karweru for the Plaintiff\*

No appearance for the Defendant

Court assistant - Kendi

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J. O. OLOLA

**JUDGE**

