



REPUBLIC OF KENYA



KENYA LAW

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Githanga (Suing on her Personal Capacity and in her Capacity as the Administrator of the Estate of the Late David Githanga Kinyanjui) v Githanga & 2 others (Environment & Land Case 366 of 2016) [2024] KEELC 3342 (KLR) (22 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3342 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 366 OF 2016**

JA MOGENI, J

APRIL 22, 2024

BETWEEN

ANASTACIA WACUKA GITHANGA (SUING ON HER PERSONAL CAPACITY AND IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE DAVID GITHANGA KINYANJUI) PLAINTIFF

AND

JAMES NGENGA GITHANGA 1ST DEFENDANT

THE REGISTRAR OF TITLES 2ND DEFENDANT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated 11/04/20215, the Plaintiff has sued the Defendants for the following orders: -
 - a. Rectification of the lands register of the property formerly known as Dagoretti/waithaka/391 further subdivided into seven subdivided portions bearing the following number Dag / Waithaka/ 1907, Dag/ Waithaka/ 1908, Dag/ Waithaka/ 1909, Dag / Waithaka/ 1910, Dag / Waithaka/ 1911, Dag / Waithaka/ 1912, and Dag / Waithaka/ 1913 to reflect the estate of David Githanga Kinyanjui as the registered proprietor thereof.
 - b. Possession of the suit property formerly known as plot number Dagoretti/ Waithaka/ 391 further sub-divided into seven subdivided portions bearing the following numbers Dag / Waithaka/ 1907, Dag / Waithaka/ 1908, Dag / Waithaka/ 1909, Dag / Waithaka/ 1910, Dag / Waithaka/ 1911, Dag / Waithaka/ 1912, and Dag / Waithaka/ 1913.
 - c. Damages
 - d. Costs



- e. Any other relief the court deems fit to grant .
2. It is the Plaintiff's averments that she is administrator of the estate of David Githanga Kinyanjui (deceased) hereinafter their father and lawful proprietor of plot number Dagoretti/Waithaka/391 and she annexed the Letters of Administration. That their father passed on on 2/04/1989 and the suit property is to be shared between her and her siblings and co-beneficiaries.
3. She contends that the suit property has been transferred in the name of the 1st defendant who is a co-beneficiary and he has further sub-divided it into seven portions without the knowledge nor consent of the other co-beneficiaries. Further that the said transfer to the 1st defendant was done during the lifetime of their father but that her siblings and herself were never informed as his children nor was their consent sought as is the requirement under the [Land Control Act](#).
4. The Plaintiff avers that the suit property was never transferred to the 1st defendant by the deceased and if any transfer was effected then it was obtained by fraud. She lists the particulars of fraud as follows:
 - a. Procuring a fraudulent transfer between himself and the deceased and thereafter purporting to have it registered as genuine.
 - b. Failing to ensure that the Plaintiff and/or her co-beneficiaries appeared before the Land Control Board for purposes of effecting a consent which is mandatory in all transactions relating to Agricultural Land as governed by the [Land Control Act](#).
 - c. Failing as a son and co-beneficiary to the estate of the deceased to inform the plaintiff and/or her co beneficiaries of his alleged purchase of the suit property from the deceased.
 - d. Failing to ensure that the property is transferred to all beneficiaries of the deceased's estate as provided for by law.
 - e. Failing to procure the requisite letters of Administration to ensure that the transfer is lawfully effect to the concerned beneficiaries.
5. The plaintiff also averred that the 2nd defendant acted fraudulently by registering a transfer on the suit property since the plaintiff and her co-beneficiaries never appeared before the Land Control Board to give their consent which is mandatory in all transactions relating to agricultural land under the [Land Control Act](#).
6. It is her contention that the 2nd defendant listed the following particulars of fraud on the part of the 2nd defendant:
 - a. Registering a fraudulent transfer since at no time whatsoever did the Plaintiff nor her beneficiaries ever appear before he Land Control Board for purposes of effecting a consent which is mandatory in all transactions relating to Agricultural Act as governed by the [Land Control Act](#).
 - b. Failing to ensure that the said transaction that is now being disputed complied with all the laid down provisions of the then Law in relation to transfer of property.
 - c. Failing to ensure that a recorded deed of transfer is available at the correspondence file in relation to the suit property to enable thorough scrutiny of the disputed transaction.
7. The suit is contested by the defendants. The 1st defendant filed a statement of defence and denied all the allegations made in the Plaint and put the Plaintiff to strict proof.



8. The 1st defendant averred their father divided the suit property when he was still alive and allocated the impugned parcel of land to him in 1979 before he died in 1989. It was his contention that he was given two acres of land the portion being identified as Dagoretti/waithaka/391.
9. He stated that when his mother died, his sisters ganged up wanting a portion of his land alleging that the land was not shared out.
10. On the part of the 2nd and 3rd defendant they filed a joint statement of defence dated 20/07/2017 and denied all the averments in the plaint and put the plaintiff to strict proof. They contended that if any subdivision was carried out on the suit property then it was done procedurally and by the representation of the 1st defendant. They denied being involved in any fraud.
11. For the above reasons, the Defendants urged the Court to dismiss the suit with costs.
12. The matter proceeded by way of viva voce evidence wherein the Plaintiff was the only witness. The 1st Defendant was also the only witness since the 2nd witness who had recorded a witness statement died before she testified and the 1st defendant did not apply to substitute. On the other hand, the 2nd and 3rd defendants did not call any witnesses at the hearing

Plaintiff's Case

13. PW1 – Anastacia Wacuka Githanga the plaintiff herein stated that she was the administrator to the suit property. She adopted her witness statement dated 19/06/2018 as part of his evidence in chief. She also produced the documents contained in her list of Documents filed on 19/06/2018 and dated 18/06/2018 as exhibits.
14. Upon cross-examination, she testified that the suit land originally belonged to their father the late David Githanga Kinyanjui (deceased) That the suit land was transferred from the Late David Githanga Kinyanjui (deceased) to James Njenga Githanga, 1st defendant without consulting the rest of the family and without seeking a consent from the land contrale board. That she applied for Letters of Administration and she got a limited grant. That it was when she and her siblings minus the 1st defendant were advising their mother about the estate of the deceased that they discovered that the 1st defendant was claiming that plot number Dagoretti/waithaka/391 belonged to him.
15. That although they tried to solve the matter amicably the 1st defendant was not willing and whereas the court referred the matter to court annexed mediation the whole process collapsed and the parties went back to court.
16. She testified that their mother also passed on 12/12/2014 and that as at the time she filed for a limited grant the suit property was in their father's name. That she undertook a search which showed this fact though she did not file the same in court. She also stated that she annexed copies of receipts of rates to the City Council dated 31/05/2011. That the 1st defendant and the daughters of the deceased were paying rates.
17. She denied that the father who died in 1989 had ten year prior to his death transferred the suit land to the 1st defendant's name and this is because the documents in the bundle and specifically documents at page 2 still show that the documents relating to the suit property are still in their father's name. That any time they paid land rates the receipt always showed that the suit property is in their deceased father's name.
18. Counsel for the 2nd and 3rd defendants Mr Mwalozi on cross-examining the plaintiff, he stated that she sued the 2nd and 3rd defendants purely for enforcement purposes. That her siblings and her as



- co-beneficiaries did not know when the land was sub-divided and that she wrote a letter to the 2nd defendant on 29/01/2016 but on the sub-division inquiry she went to the County Government of Nairobi on 15/02/2016. It was her testimony that she never made an application to register caution.
19. Upon re-examination she testified that she knew that plot Dagoretti/waithaka/391 was in their father's name because the receipts that they used to pay rates still showed his name. She stated that she did not know that her sister-in-law has Power of Attorney from the 1st defendant who is the plaintiff's brother.
 20. She testified that though the sub-divisions were done in 2013 when their mother was still alive that on the ground one cannot see the said sub-divisions. That no one was ever called by their dad to inform them that the suit property had been transferred to the 1st defendant because if that were the case they would have given their feedback.
 21. That the family has lived on the suit property since 1979 and even now they live on the said suit property and during all this time there has been no claim from the 1st defendant. Her prayer is that the court should pronounce the suit parcel as family property. With that the plaintiff closed her case.

Defence Case

22. DW 1 James Njenga Kithamo adopted his witness statement dated 17/10/2018 and bundle of documents dated 26/06/2018 which he stated that he would rely on as his evidence in chief. He testified that their father died in April 1989 and that by the time he died he had transferred the suit property to him in 1979. That upon receiving the suit property he made subdivisions to the suit property and produced titles to each subdivided parcel. It was his testimony that he had charged parcel number Dagoretti/ Waithaka 1913 and 1909.
23. He further testified that he had developed by building rentals, temporary and permanent structures on the suit parcels. It was his testimony that in 2015 he was staying in the United States and he never received any citation in many matter. He denied that the address that the plaintiff sited as his while in the US belonged to him.
24. He testified that he had no duty to transfer the suit property to any one and that no one has asked him to do so either. That by the time the father died the suit property was only divided to himself and his brothers. He stated that he had no knowledge of any one having a confirmed grant.
25. Upon cross-examination he testified that he had 8 sisters and that his father's property was not given to any of his sisters but only to him in 1979 and that their father lived on the same suit property by the time he died. That his mother also lived on the same suit property.
26. He further stated that he did not give of his sisters any land because the suit property was transferred to him and his brothers. He testified that their father took them to the Land Control Board and then to the Ministry of Lands where they signed Consent Forms to facilitate the transfer but he had not produced the said Consent Forms in court. He stated that they went to the Land Control Board with together with their father, his mother and step brothers.
27. He testified that the other sub-divided titles were Dagoretti/Waithaka 265 which their father divided into four portions namely Dagoretti/Waithaka 351, 352, 353 and 354. That their father remained with Dagoretti/Waithaka 351 and he gave the rest to his brothers. So when Dagoretti/Waithaka 351 was later sub-divided it produced Dagoretti/Waithaka 391 which was given to DW1 and Dagoretti/Waithaka 392 and 393 were given to his brothers Samuel and Daniel.
28. DW1 testified that he was not aware that parcel number Dagoretti/Waithaka 351 was subdivided in 1973 and not in 1979 as he was alleging. He further stated that he got his title in 1979. He stated



- that his sisters never went to the Land Control Board. It was his testimony that the suit property was transferred to him by way of gift but he had no document to show this allegation. He also stated that duty was paid but that he had not presented any receipts in court to attest to the payment.
29. He stated that he has indicated in his witness statement that the suit has been divided as per Kikuyu custom but that this was not true since the suit property was not transferred to him to hold in trust.
 30. He told the court that he subdivided the suit property in 2010. When cross-examined on the issue of rates he stated that he receipts for payment of rates at pages 2 and 3 show the owner of the suit property as David Githanga and the date on the receipts is 31/05/2011 and also the receipts do not indicate any sub-division. Further the receipt at page 3 is dated 20/04/2006 and the owner of the suit property is indicated again as David Githanga. He also stated that he was not aware who paid for the rates at City Hall and that in his list of documents he did not produced any receipts for rate payment.
 31. It was his testimony that when a father passed away the property was always given to the male children. He testified that he had promised his father that he would give Jacinta Wambui 2 plots because she resided on the same and their father had requested him to give her the plot she resided on and that he had made an application to the Land Control Board for the sister's portion. He stated that he never involved his other sister and neither did any of them ask him to allocate them some parcel of land.
 32. When he was cross-examined by Counsel for the 2nd and 3rd defendants he testified that he had no receipts for the Land Control Board.
 33. In re-examination he stated that the suit property belonged to his father and that there was not complaint raised by his sisters between 1979 to 2014 about his ownership of the suit property. He stated that he did not know if the law allowed for payment of stamp duty for a gift of land such as the one he was gifted by his father.
 34. He further testified that the land was given to him as an individual and not to hold in trust for his siblings. Further that DW1 was registered in his name and therefore he was not a trespasser since he cannot trespass on his property.
 35. DW1 intended to call another witness who unfortunately passed on the day of the hearing on 27/02/2024 and therefore her witness statement could not be adopted. The defendant did not seek to substitute . With that the defendant closed his case.
 36. After viva voce evidence, the Court directed the parties to file their written submissions.
 37. The Plaintiff through the Law Firm of S.K Opiyo & Company Advocates, filed her written submissions dated 8/04/2024. She has relied on the quoted cases and case law as well elaborated in the submissions and which I have duly considered.
 38. The plaintiff was of the view that the 1st defendant has failed to show any legal process that he engaged in to claim a beneficial interest in the suit property that is exclusive from the siblings. She contends that the 1st defendant failed to produce any transfer document, as well as deed of gift and no evidence that the Land Control Board consent was sought and obtained before the suit property was transferred to him.
 39. As a result of the gaps in acquisition of title referred to by the plaintiff it is her submissions that the title that the 1st defendant is referring to as having obtained can therefore be impeached by being fraught with irregularities. That the said title can be impeached as provided for under Section 26(1) (a) of the [Land Registration Act](#) 2012 which replaced the repealed sections 27 and 28 of the Registration of [Land Act](#) (Cap 300 repealed).



40. In Conclusion, the Plaintiff submits that she has proved her case on a balance of probability and that Judgement should be entered in her favour as prayed in the Plaint.
41. The 1st Defendant through the Law Firm of N.A Owino & Co Advocates, filed his Written Submissions dated 11/04/2024. The 1st Defendant relied on the case of Kibiro Wagoro Makumi vs Francis Nduati Macharia & Another [2018] Eklr where Justice Kemei reiterated the conditions accruing to an absolute title which can only be challenged as provided for under Section 25 and 26 of the *Land Registration Act*.
42. It is the 1st Defendant's further submissions that the Plaintiff has failed to prove that there was illegality or fraud in acquisition of the suit property and therefore the 1st defendant's title remains unchallenged since this was a gift from his father. The 1st defendant has also referred to Cap 160 of the Laws of Kenya on matters of Succession which is a preserve of the Succession Court and the issues can be raised in that particular court.
- That as a result, the Plaintiff had failed to satisfy a claim for fraud and illegality against the 1st Defendant.

Determination

43. The court has noted that the parties filed their own list of issues and to enable the court clearly articulate the issues of concern the court came up with the list of issues that are critical to determine the instant suit. This is in line with provisions of Order 15 Rule 2 of the Civil Procedure Rules.
44. In the opinion of the court, the following arise for determination in this suit;
- a. Whether the 1st Defendant obtained registration of the suit property as a gift from the late David Githanga Kinyanjui or through fraud, misrepresentation and illegality.
 - b. Whether as a result the 1st Defendant obtained a good and valid title to the suit property.
 - c. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
 - d. Who shall bear the costs of the suit.
45. The court has considered the evidence on record on the 1st issue. Although the 1st Defendant claimed that he was given the suit property by their father, the late David Githanga as a gift, there was no evidence to support this allegation. He did not produce copies of the documents which would have shed light on this issue such as the application for consent of the Land Control Board, the consent of the Land Control Board and the transfer form. He did not call any witness who could testify about him having been given the gift.
46. In his testimony the 1st defendant testified that he signed the Consent Forms at the Land Control Board. That he went to the Land Control Board together with his father the Late David Githanga, with his mother and his step brothers. However, he was not able to produce the said Consent Form in court. He also did not call any witness who could testify to him having obtained consent of the Land Control Board to have the suit property transferred to him as a gift. He did not even invite any one of his step brothers to testify to this fact. The plaintiff also testified that as children of the deceased, they were never informed of the transfer nor invited to go to the Land Control Board and are not aware that such a consent was obtained at all. The court observed the demeanor of the plaintiff at the trial hereof and was satisfied that the plaintiff was an honest and credible witness.
47. It would be expected that in the ordinary course of things, a sibling would know when one of their siblings has been gifted a parcel of land by the father or mother.



48. The other reason why the court is convinced that the 1st Defendant was not gifted the suit property is the following. The 1st Defendant had an opportunity to call the Land Registrar to testify and give evidence of having undertaken the transfer process and to produce the instruments which were used in the transfer of the suit property to the 1st Defendant. The Registrar would ordinarily keep such documents in a parcel file.
49. Such evidence was not called nor produced in court. The court was not provided with any documents that would show whether the original land certificate issued to the late David Githanga was surrendered to the registry before the transfer to the 1st Defendant was registered.
50. In view of the foregoing, the inevitable conclusion the court would make is that the 1st Defendant must have acquired the suit property through some fraudulent and illegal means. The transfer form must have been a complete forgery. The court is, therefore, satisfied that the 1st Defendant's acquisition of the suit property was fraudulent and unlawful.
51. As to whether the 2nd Defendant obtained a good and valid title to the suit property. The court has already held that the 1st Defendant acquired the suit property through illegal means. He acquired the suit property through criminal conduct and forgery of documents. The late David Githanga and the 1st defendant did not apply for consent of the Land Control Board to convey the suit property to him. The Late David Githanga did not, likewise, sign any transfer form in favour of the 1st Defendant. Whatever documents the 1st Defendant presented for registration purporting to have been signed by the late David Githanga if at all must have been complete forgeries.
52. In those circumstances, the 1st Defendant did not obtain a good and valid title hence he could not convey any legitimate interest upon the beneficiaries of the purported sub-divisions through his criminal activities. The provisions of section 26 (1) of the [Land Registration Act](#), 2012 provide as follows;
- “2 (1) 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, unprocedurally or through a corrupt scheme.
53. It is thus clear that whereas section 26 (1) (a) requires the proprietor to have been privy to fraud, paragraph (b) does not require a proprietor to have been party to any illegality, irregularity or corrupt scheme before a court can cancel or nullify such certificate of title. See Eldoret ELC case No. 609 B of 2012 Elijah Makeri Nyang'wara Vs Stephen Mungai Njuguna & Another [2013] eKLR. The court is also aware that under the provisions of Article 40 (b) of [the Constitution](#) of Kenya 2010 any property which is found to have been unlawfully acquired is not accorded constitutional protection. The court, therefore, finds and holds that the 1st Defendant did not obtain a good a valid title to the suit property.
54. The 2nd and 3rd defendants statement of defence dated 20/07/20217 filed by Counsel Fatma Ali stated that that the transactions undertaken by the 1st defendant including the sub-divisions were done procedurally and with representation of the 1st defendant. Apart from this averment the 2nd and 3rd defendants did not call any witnesses nor present to the court any documents that would lend credence to this statement. It remains a hollow statement made without substantiation.



55. The 3rd issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has noted that the Plaintiff did not advance further her claim for damages apart from stating that the family home was demolished and that her and her siblings had suffered losses. In circumstances the plaintiff is entitled to such remedies that she has proved against the Defendants to the required standard. The court is, however, not satisfied that the claim for loss of profits and damages were proved. No cogent evidence was led to demonstrate how much money the Plaintiff may have reasonably made from the use of the suit property. No report or other material was placed before the court to demonstrate the magnitude of the loss incurred. The court is, therefore, unable to allow those two claims.
56. Before concluding this judgement, I would like to address the issue of objections to production of electronic evidence which the plaintiff's advocate raised at the trial hereof. The court upheld the objection and reserved the reasons for the decision. The objection was on the basis that the electronic evidence was recorded without leave of the court having been sought. Infact in the course of the trial the court was informed that the person who recorded the evidence had since passed on.
57. There was not application made for substitution and the 1st Defendant's Counsel chose to close their case. It is trite law that whenever a document of evidence is produced in court the other party has to be given a chance to cross-examine the maker where the maker is unavailable if there is no substitution then such evidence cannot be produced. It will prejudice the other party who has no opportunity to test the authenticity of the evidence.
58. Given the circumstances the said recorded electronic evidence could not be produced at the trial.
59. The 4th and final issue relates to costs. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event. As such, a successful litigant will normally be awarded costs of the suit unless, for good reason, the court directs otherwise. See Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287. There is no good reason why the successful Plaintiff should not be awarded costs of the action. The Plaintiff shall, therefore, be accorded costs of this suit to be borne by the 1st Defendant who engineered the mischief which precipitated the proceedings. The 1st Defendant will also bear the costs of the 2nd and 3rd Defendants.
60. The upshot of the foregoing is that the court finds merit in the Plaintiff's suit and the same shall accordingly be allowed and makes the following orders;
- a. Rectification of the lands register of the property formerly known as Dagoretti/waithaka/391 further subdivided into seven subdivided portions bearing the following number Dag / Waithaka/1907, Dag/ Waithaka/ 1908, Dag/ Waithaka/1909, Dag /waithaka/ 1910,Dag/ Waithaka/ 1911,Dag/ Waithaka/1912,andDag /waithaka/ 1913 to reflect the estate of David Githanga Kinyanjui as the registered proprietor thereof.
 - b. Possession of the suit property formerly known as plot number Dagoretti/waithaka/391 further sub-divided into seven subdivided portions bearing the following numbers Dag/waithaka/1907,Dag/Waithaka/1908,dag/waithaka/1909, Dag/waithaka/1910, Dag/ waithaka/1911, Dag/waithaka/1912, and Dag/waithaka/1913.
 - c. Costs of this suit will be borne by the 1st defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF APRIL 2024

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MOGENI J



JUDGE

Judgement read in virtual court in the presence of:

Mr. Kendara for the Plaintiff

Ms. Njuguna for the 2nd and 3rd Defendant

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE

