



Ngugi (Suing as Personal Representative of the Estate of Paul Ngugi Mbute - Deceased) v Njuguna & 2 others (Environment & Land Case 737 of 2012) [2024] KEELC 4426 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4426 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 737 OF 2012**

EK WABWOTO, J

MAY 30, 2024

BETWEEN

MARTHA NJERI NGUGI (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PAUL NGUGI MBUTE - DECEASED) PLAINTIFF

AND

MILKA WANJIRU NJUGUNA 1ST DEFENDANT

PETER MUHOHO NJUGUNA 2ND DEFENDANT

PIUS KINUTHIA NJUGUNA 3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a Plaint dated 22nd October, 2012 and filed on 23rd October, 2012. The Plaint sought for the following reliefs:-
 - a. An order for Permanent Injunction restraining the Defendants, their Servants, Workers or any other person working on their behalf from trespassing, entering, cutting trees, damaging crops or undertaking any activities in the said Land Parcel Number Kiganjo/Handege/1313.
 - b. General damages, costs and any other relief that this Honourable Court shall deem fit to grant to meet to ends of justice.
2. The suit was opposed by the Defendants vide an Amended Statement of Defence and Counterclaim dated 22nd July 2013. The Defendants sought for the dismissal of the Plaintiff's suit and they equally sought the following reliefs in their counterclaim.
 - a. A declaration that the Plaintiff's transfer of parcel title Kiganjo/Handege/1313 to himself from the name of Mwangi Mbute was deceitfully, irregularly, improperly, fraudulently and



unlawfully done and the same be declared null and void and the said title in the name of the Plaintiff alone be ordered cancelled.

- b. Half share of the parcel of land known as Kiganjo/Handege/1313.
- c. Mense profits for loss of use of the above half share.
- d. Costs of and incidental to this suit.

The Plaintiff's Case

3. It was averred that the Plaintiff is the sole registered owner of Land Parcel Number Kiganjo/Handege/1313 and that the same was acquired in 1994 and the said land was transferred and registered in the Plaintiff's name. It was averred that after the acquisition, the Plaintiff planted coffee and other crops and no person ever interfered with the same until September, 2012 when the Defendants unlawfully entered the suit land and cut several trees and other crops without the Plaintiff's consent. It was also averred that due to the actions of the Defendants the Plaintiff has suffered irreparable damage.
4. During trial, two witness testified on behalf of the Plaintiff. Martha Njeri Ngugi testified as PW1 while Hellen Waigumo testified as PW2. Martha Njeri Ngugi adopted and relied on her witness statement dated 29th November, 2021 and bundle of documents dated 29th October, 2012. She also produced her further list of documents dated 12th January, 2015. She stated that her late husband had legally acquired the land and that his brother was not mentally ill. She also stated that the title came earlier before the death of Mwangi Mbuta and Mwani Mbuta is the one who processed the title.
5. When cross examined, she stated that she was married to Paul Ngugi in 1972. She also stated that her husband had two brothers Mwangi Mbuta and Njuguna Mbuta. She stated that the land was mainly used for farming. She also disputed any allegation that were made in respect to the late Mwangi's mental illness and maintained that Mwangi was very sound and used to do farming on the land. She also stated that Mwangi once slashed her father with a panga and throughout his life he was not married and neither did he have any children.
6. The witness stated that Mwangi was allocated only 3 acres, her husband was given 11.7 acres and Njuguna Mbuta was given 8 acres after the subdivision was done. She denied being aware of any case before the Chief seeking to solve the dispute relating to the suit property.
7. When re-examined, she stated that Mwangi had requested them to continue cultivating on the land when he was still alive. He also reiterated that Mwangi was not sick and neither was he of unsound mind. She also stated that Milka Njuguna was the one who collected the title deed from Mwangi and kept it in her custody.
8. Hellen Waigumo relied on her witness statement dated 12th January, 2014. She stated that Mwangi was not mentally ill. She also stated that the land was given out by Mwangi voluntarily.
9. On cross-examination, she stated that Mwangi was her brother and her was not mentally ill because he used to farm on his land she also stated that Mwangi was never admitted at Mathari Mental Hospital. She also stated that she was not aware of any case before the Chief.
10. When re-examined, she stated that the size of allocation after subdivision depended on whether someone had a family. Mwangi was allocated 3 acres because he did not have any family.
11. She also stated that Mwangi attacked his father due to anger and it was not because he was of unsound mind.



The Defendants Case

12. The defendants filed an Amended Statement of Defence and Counterclaim dated 22nd July 2013. The Defendants averred that the father to the deceased Paul Ngugi Mbutu was also the father of Mwangi Mbutu and Njuguna Mbutu. The Defendants denied that the Plaintiff had planted any coffee trees on the subject land. The defendants also denied damaging any trees and issuing any threats to the Plaintiff.
13. It was the Defendants case that Mbutu Kahiga Only shared his parcel of land to his sons for them to build on, cultivate and make use of the land with their families and that the eldest son Mwangi Mbutu got the smaller portion.
14. It was also the Defendants case that before Mbutu Kahiga died he told his two sons Njuguna Mbutu and Ngugi Mbutu that he had given their other brother namely Mwangi Mbutu the parcel of land he had given him only to build on, cultivate and use it for his upkeep as he was not of unsound mind but if he became unable to manage his said parcel of land due to his sickness, or he died before the other two brothers, they would share the said parcel of land between them equally.
15. It was also the Defendants case that when Mbutu Kahiga died in or about the year 1969 he had guaranteed a loan taken by his youngest son namely Ngugi Mbutu and he died the said loan had not been fully repaid by his said son and his second son namely Njuguna Mbutu repaid the balance of the same and in the course of repaying the loan he found out that his father's land had been transferred to Ngugi Mbutu irregularly and that matter was resolved through a suit in Kiambu Court and eventually the said brothers shared their father's said parcel of Land as follows:-
 1. Mwangi Mbutu got Kiganjo/Handege/1313 -3 acres.
 2. Njuguna Mbutu got Kiganjo/Handege/1312-& acres
 3. Ngugi Mbutu got Kiganjo/Handege/1311 -8 acres
16. It was also averred that after the death of Njuguna Mbutu, the Plaintiff capitalized on the unfortunate state of mental sickness of Mwangi Mbutu and without any shade of right, deceitfully, irregularly, fraudulently and unlawfully transferred parcel of land known as Kiganjo/Handege/1313 into his name in total disregard of the arrangement left by their father Mbutu Kahiga and against the rights of the family of his late Brother Njuguna Mbutu to own half of the said parcel of the land as previously arranged. The particulars of fraud and deceit together with the irregularity was pleaded at paragraph 9 of the defence and counterclaim.
17. During trial, 6 witnesses testified on behalf of the defendants. Milkah Wanjiru Njuguna testified as DW1. She adopted her witness statement dated 18th July, 2013 in her evidence in chief. She testified that Mwangi Mbutu was of unsound mind and was the elder brother of her husband. She stated that Mwangi Mbutu was given a small portion because he did not have a family and that it was also agreed that should Mwangi have been unable to farm then the land was to be allocated to the other brothers in equal shares. She also stated that she initially kept the original title deed because Mwangi could not have been able to keep it safely but the title was later given to Nelson who passed it over to Paul Ngugi.
18. It was her testimony that the dispute was also referred to elders who resolved it and agreed to have the land shared equally between the two brothers. She stated that no consent from the Land Control Board was obtained prior to the Land being transferred to Paul Ngugi and that the Plaintiff declined to share the land but opted to file this suit. She also relied and adopted her bundle of documents on record as her evidence in Chief.



19. When re-examined, she stated that she was privy to all the information relating to the property. She also stated that Mwangi was of unsound mind and at one point he slashed his father with a panga.
20. When asked about the meeting at the Chief's Office, she stated that she could not remember the exact date when the said meeting was held. She also stated that at the time of the meeting at the Chief's Office the land had already been transferred to the Plaintiff.

She also stated that Mwangi was cultivating on the said land and that he had no right by himself to give land to any person without the consent of the elders.
21. When re-examined, she stated that her Advocate tried to get information about Mwangi's mental status from Mathari Mental Hospital but no records were found as they had been destroyed through a fire incident. She also reiterated that there was no consent obtained from the Land Control Board prior to transferring the land to the Plaintiff.
22. John Kihui testified as DW2. He stated that he became the Area Chief in the year 2010 and had held that position to date. He stated that Mwangi was not of sound mind. He also stated that he remembers the land having been divided equally even though the Plaintiff refused to vacate the same. He also stated that in resolving the disputes amicably he summoned all the parties and elders and after the meeting it was resolved that the land be shared equally. He also stated that Paul Ngugi declined to sign the resolution. He also adopted his witness statement dated 27th July 2023 in his evidence in chief.
23. On cross-examination, he stated that the land was shared out equally. He also stated that a person of unsound mind cannot be able to farm on his land and he was still of sound mind when he was given the land.
24. When re-examined, he stated that the Plaintiff did not provide any evidence to demonstrate that the Land Control Board consent had been obtained. He also stated that nobody knew when the land had been transferred to the Plaintiff.
25. Peter Muhoho Njuguna testified as DW3. He adopted his witness statement dated 18th July, 2013 in his evidence in Chief. He testified that he is the son to the 1st Defendant. He stated that Mwangi used to farm on his land and that he did not have any family. He also stated that the elders had resolved the dispute by directing that the land be shared equally.
26. On cross-examination, he stated that Mwangi got his title around 1980's and that he was still alive when the land was transferred to the Plaintiff. He also stated that he did not have any evidence to demonstrate if Mwangi was a person of unsound mind.
27. On re-examination, he stated that the first subdivision of the land was done in the presence of the elders and that Mwangi was given the smallest portion because he did not have a family. He also stated that his grandfather had stated that upon Mwangi's death the land was to be subdivided equally among the 2 brothers.
28. Pius Kinuthia Njuguna testified as DW4. He adopted his statement dated 18th July, 2013 during his evidence in Chief. He stated that he was also the son to the 1st Defendant. He also stated that he attended the proceedings before the Chief wherein Paul Ngugi had declined to sign the final agreement. He also stated that the Plaintiff never produced any evidence consent obtained from the Land Control Board.
29. When cross-examined, he stated that he was present when the land was being distributed by his grandfather and that Mwangi was given a smaller portion than the rest because his grandfather knew



- that he was of unsound mind. He also stated that a person of unsound mind could not know if he had title to land. He also stated that Mwangi used to farm on the said land.
30. On re-examination, he stated that he could not remember when he knew of the Plaintiff's title to land and that the Defendants had filed a Counterclaim seeking to have the land divided equally.
 31. Nelson Mbuthia testified as DW5. He relied and adopted his witness statement dated 18th June 2013. In his evidence in Chief. It was his testimony that Mwangi was given the smallest parcel of land measuring 3 acres. He also added that Mwangi was a person of unsound mind even though he used to farm on his land. He also stated that he was given the original copy of the title by the 1st Defendant and he made a photocopy which he stayed with it for about a year. He also stated that the Chief had amicably tried to resolve the dispute and that the Plaintiff did not produce any evidence of the consent from the Land Control Board.
 32. When cross-examined, he stated that after the land had been divided and Mwangi got his title deed, it was within his right to allocate the land to any person he wished to transfer to. He also stated that Mwangi was a person of unsound mind and that he had been forced to sign the transfer documents. He also stated that the Plaintiff never agreed with the resolution adopted at the Chief's office.
 33. On re-examination, he stated that the Plaintiff never produced any document to show how he had acquired the land.
 34. The last witness to testify on behalf of the defence was Livingstone Ndutire Mbugua who testified as DW6. He adopted and relied on his witness statement dated 18th July, 2013 during his evidence in chief. It was his testimony that Mwangi was admitted at Mathari Mental Hospital for 3 months. He also stated that he attended the meeting that was conveyed at the Chief's Office and it was resolved that the land be divided equally. He also stated that during the meeting, the Plaintiff never produced any evidence nor consent from Land Control Board.
 35. In his cross-examination, he conceded that he did not have any documentary evidence to confirm the mental status of Mwangi. He also stated that according to him, the family had to be notified prior to the transfer of Mwangi's land.
 36. In his Re-examination, he stated that Mwangi never sold any land and that the family did not know if the same had been transferred to the Plaintiff.

Plaintiff's Submissions

37. The Plaintiff filed written submissions dated 14th March 2024 and submitted on the following five issues; Whether the late Mbute Kahiga sub-divided and transferred his land to his 3 sons, whether the late Mwangi Mbute the first registered owner of Kiganjo/Handege/1313 willingly transferred his share to Paul Ngugi Mbute, whether the Defendants have raised any claim of ownership over the suit land, whether Paul Ngugi Mbute is the registered owner of the suit land and whether the Plaintiff is entitled to the reliefs sought.
38. It was submitted that there was no evidence adduced by the Defendants of the subdivision of Kiganjo/Handege/424 having taken place prior to the death of Mbute Kahiga. It was also argued that Mwangi Mbute was of sound mind when he willingly decided to gift his land to his younger brother Paul Ngugi Mbute who was taking care of him during his old age when he was equally living with the Plaintiff. Reliance was placed to the cases of the Estate of M'Raiji Kithiano (Deceased) eKLR, Meru High Court Succ. Cause No 419 of 2006 and The Estate of the Late Gedion Manthi Nzioka (Deceased) (2015) eKLR. It was also submitted that the Defendants do not dispute that Mwangi Mbute was the registered



owner of the suit land. They only disputed the fact that Mwangi Mbutu had an absolute right to enjoy and dispose of his land without them contemplating his death so as to acquire the said land.

39. On whether the Defendants have raised any claim of ownership over the suit land, Counsel submitted that the claim by the Defendants over the land that belonged to the 1st Defendant's brother in law and 2nd and 3rd Defendants paternal uncle does not fall under any of the categories of land acquisition herein and the Defendants have not produced any evidence before court to support any entitlement to Mwangi Mbutu's apportioned parcel of land.
40. It was submitted that a transfer was registered in favour of Paul Ngugi Mbutu demonstrating the intention of Mwangi Mbutu to grant his land to his brother as a gift. On 19th May, 1994, a title deed was issued in the name of the said Paul Ngugi Mbutu who is the registered owner of the land. It was submitted that neither the Defendants nor their witnesses challenged the legality of the title held by the Plaintiff's husband and in the absence of the same, the Plaintiff urged the court to hold that they had a good title.
41. On the issue of the Land Control Board Consent, it was submitted that the land was transferred during the lifetime of Mwangi Mbutu and thus the Defendants had no moral or legal obligation to question how the said land was transferred to the Plaintiff.
42. In respect to the reliefs sought by the Plaintiff, it was submitted that the Defendants had failed to prove that Mwangi was of unsound mind incapable of holding land and or transferring the same to the Plaintiff. Reliance was placed on the provisions of Sections 26 of the [Land Registration Act](#), Section 2 of the [Mental Health Act](#) and the cases of John Patrick Machira versus Patrick Kahiaru Mutuni [2002]eklr, Patel & Another versus MJC & Another (Suing as the Guardians of PJP) (Civil Appeal 182 of 2019) [2022] [KECA] 364 (eKLR) and Grace Wanjiru Munyinyi & Another versus Gedion Waweru Githunguri & 5 Others [2011] [2011]eKLR which the court has duly considered. The court was urged to grant the reliefs sought in the Plaintiff.

The Defendants Submissions

43. The Defendants filed written submissions dated 4th April, 2024. It was submitted that the following issues were not in dispute; that the late Paul Ngugi Mbutu was a brother to Mwangi Mbutu and Njuguna Mbutu, that the 3 brothers were allocated the following parcels by their father Mbutu Kahiga Kiganjo/Handege/1311 to Ngugi Paul Mbutu 8 acres, Kiganjo/ Handege 1312 which went to Njuguna Mbutu measuring 7 acres and Kiganjo/Handege 1313 which went to Mwangi Mbutu measuring 3 acres. It was also not in dispute that Mwangi died without being married nor having any family.
44. The Defendants submitted that the following facts were in dispute; whether or not Mwangi Mbutu was of unsound mind, whether Mbutu Kahiga shared out his parcel of land to his three sons in his lifetime, whether Paul Ngugi Mbutu irregularly, fraudulently and unlawfully had or caused parcel of land Kiganjo/Handege/1313 to be transferred into his name from the name of Mwangi Mbutu and whether the family of Njuguna Mbutu and that of Paul Ngugi Mbutu should share the suit land in equal shares in the interest of justice.
45. It was submitted that the Defendants had adduced evidence that Mwangi Mbutu had some mental issues. It was also submitted that Mbutu Kahiga, the father to the 3 son's shared out his parcel Kiganjo/ Handege 424 amongst his three sons in his lifetime.
46. It was also submitted that no consent from the Land Control Board was ever obtained by the Plaintiff prior to the transfer of the suit land and pursuant to Section 6 of the [Land Control Act](#) (Cap 302) the



said transaction was void for all its purposes and reliance was placed to the case of Nairobi ELC No. 191 of 2012-Lucy Gathoni Ng'ang'a & 5 Others versus Jenifer Wanjiku Ng'ang'a.

47. The Defendants Counsel concluded his submissions by urging the Court to dismiss the Plaintiff's suit with costs and grant the reliefs sought in the counterclaim.

Analysis and Determination

48. The court has considered the parties pleadings, oral and documentary evidence adduced herein and written submissions and is of the position that the following are the salient issues for determination herein: -

- i. Whether the Plaintiff lawfully acquired the property known as Kiganjo/Handege/1313 (suit property).
- ii. Whether the Plaintiff is entitled to the reliefs sought.
- iii. What orders should issue in respect to the Defendants counter claim.

The Court will therefore proceed to make sequential pronouncements on the said issues.

Issue No. 1

Whether the Plaintiff lawfully acquired the property known as Kiganjo/Handege/1313 (suit property).

49. The Defendants challenged the manner in which the Plaintiff acquired the suit property. The Plaintiff on the other hand maintained and reiterated that the said property was acquired lawful after being transferred to Paul Ngugi Mbuti in 1994.
50. There are various legal and recognized ways of acquiring Land in Kenya. Some of the recognized ways of obtaining ownership of Land in Kenya include: gifting, nomination, purchase, succession-inheritance, adverse possession, nomination, surrender and compulsory acquisition.
51. In the instant case, the Plaintiff pleaded that the said property was acquired after it was transferred to Paul Ngugi Mbuti by his brother. The court has then to examine whether the said acquisition was lawful and proper and that the same was not marred by any fraud and or irregularities.
52. The law is very clear on the position of a holder of a title in respect to the land. Section 24(a) of the [Land Registration Act](#) provides for the interest conferred by registration. It provides;

“Subject to this act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or apparent thereto.”

Section 26(1) of the [Land Registration Act](#) provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner 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. During trial, the Defendants witnesses repeatedly testified that the Suit Property was not properly acquired and or transferred to the Plaintiff. The Defendants evidence was to the effect that no consent was obtained from the Land Control Board and further that Mwangi Mbutu was of unsound mind and hence unable to transfer the land to the Plaintiff.

54. Section 2 of the *Mental Health Act*;

“person suffering from mental disorder”

means a person who has been found to be so suffering under this Act and includes a person diagnosed as a psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse”

In this case, the court was not furnished with any medical report confirming the mental status of Mwangi Mbutu and as such, this court cannot make a conclusive finding that Mwangi Mbutu was a person of unsound mind.

55. As to whether or not consent from the Land Control Board was required prior to the transfer of the suit land. It was indeed evident that the same was never obtained by the Plaintiff and considering that this was agricultural land, the same ought to have been obtained by the Plaintiff. This was only necessary to ensure that any person who had any objection to the said transfer like the Defendants herein had an opportunity to raise the said objection with the Board.

56. Section 26(1) of the *Land Registration Act*, is clear that the Certificate of title is only “prima facie evidence”. The title can be impugned if obtained through fraud which is what the defendants have pleaded. It is however clear that the transaction was subject to the consent of the Land Control Board. Both parties allude to the same. It is worth noting that the Plaintiff did not avail any evidence of the consent obtained from the Land Control Board and as such it is the finding of this court that the transfer and registration of the suit land to the names of Paul Ngugi Mbutu was irregular. This therefore means that pursuant to the provisions of Section 6(1) of the *Land Control Act*, the transfer was “void for all purposes.” The term void is defined in Black’s Law Dictionary 10th Edition to mean, “of no legal effect; to null”. No interest in the suit land passed to the Plaintiff.

57. In the famous case of *Macfoy -vs- United Africa Ltd* 1961 3 All E.R. 1169, Lord Denning stated that: -

“If an act is void, then it is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Issue No. II

Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff.

58. The Plaintiff sought for a permanent order of injunction and general damages against the Defendants. However, the court having made a finding that the suit property was not lawfully transferred to the Plaintiff, the said reliefs cannot be granted since the Plaintiff’s case has not been proved to the required standard.



Issue No. III

What Orders should issue in respect to the Defendants' Counterclaim.

59. A Counterclaim just like a suit ought to be proved to the required standard on a balance of probability. The Defendants sought the following reliefs in the Amended Statement of Defence and Counterclaim dated 22nd July, 2013.
1. A declaration that the Plaintiff's transfer of parcel of land Kiganjo/Handege/1313 to himself from Mwangi Mbutu was deceitfully, irregularly, improperly, fraudulently and unlawfully done and the same be declared null and void and the said title in the name of the Plaintiff alone be ordered cancelled.
 2. Half share of the Parcel of Land known as Kiganjo/Handege/1313.
 3. Mense profits for loss of use of the above share.
 4. Costs.
60. The court having found that the Plaintiff did not obtain the suit property lawfully, it had no option but to proceed to cancel the title pursuant to the provisions of Sections 80 of the Land Registration Act. As such the Court is satisfied that the Defendant are entitled to some of the reliefs sought in their Counterclaim.
61. In respect to costs, under Section 27 of the Civil Procedure Act, the same is a discretion of the court and ordinarily costs follow the event, unless otherwise stated. However, in the instant case, the court has considered that the suit and counterclaim herein involved a dispute between family members and shall proceed to direct that each party to bear own costs of the suit and counterclaim.

Final Orders

62. In conclusion, this court makes the following orders in respect to the Plaintiff's suit and Defendants' counterclaim: -
- i. The Plaintiff's suit is dismissed.
 - ii. A declaration is hereby issued that the transfer of the suit property known as Kiganjo/Handege/1313 to Paul Ngugi Mbutu was irregular and improperly done.
 - iii. An Order be and is hereby issued directing the Land Registrar, to cancel the Title held in the names of Paul Ngugi Mbutu.
 - iv. An Order be and is hereby issued that the land known as Kiganjo/Handege/1313 be subdivided equally among the families of the Plaintiff and the 1st Defendant.
 - v. Each Party to bear own costs of the suit and the counterclaim.

Judgement accordingly.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF MAY, 2024.

E.K. WABWOTO

JUDGE

In the presence of:



Ms. Thungu for the Plaintiff.

Mr. Kamata for the Defendants.

Court Assistant: Caroline Nafuna.

