



Kinyua & another v Wangai & 3 others (Environment and Land Case Civil Suit 71 of 2019) [2024] KEELC 4417 (KLR) (29 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4417 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT 71 OF 2019
MN GICHERU, J
MAY 29, 2024**

BETWEEN

JOHN NJOROGE KINYUA 1ST PLAINTIFF

SAMUEL GITHUKU KINYUA 2ND PLAINTIFF

AND

WALLEN GITAU WANGAI 1ST DEFENDANT

JAMES RUO WANGAI 2ND DEFENDANT

POTTERS GROUP LIMITED 3RD DEFENDANT

LAND REGISTRAR, KAJIADO NORTH 4TH DEFENDANT

JUDGMENT

1. The plaintiffs seek the following reliefs against the four defendants both jointly and severally.
 - i. That the court issues a declaration that title number Ngong/Ngong/1418 prior to subdivision into LR Numbers Ngong/Ngong/65357, 65358 and 65359 was held in trust for the benefit of the plaintiffs and other beneficiaries.
 - ii. That the court issues a declaration that that the 1st and 2nd defendants lacked the capacity to subdivide LR No. 1418 which was held in trust for the plaintiffs and other beneficiaries.
 - iii. That the court issues a declaration that the 1st and 2nd defendants did not have a good title to sell LR 65358 to the 3rd defendant and thereafter lacked the requisite capacity to sell and the sale was therefore null and void.
 - iv. That the court issues an order for revocation and cancellation of LR Numbers 65357, 65358 and 65359 registered in the names of the 1st, 3rd and 2nd defendants respectively and the three



defendants be compelled to transfer to the plaintiffs their claim for 2.56 acres from the suit properties.

- v. That in the alternative to prayer 4 above, the court issues an order compelling the 1st, 2nd and 3rd defendants to transfer to the plaintiffs their claim of 2.56 acres from LR No. 65357 and 65359.
 - vi. That in the alternative to prayers 4 and 5 above, the court issues an order compelling the 3rd defendant to transfer to the plaintiffs their claim of 2.56 acres from LR 65358.
 - vii. That the plaintiffs are awarded the costs of this suit. This is as per the amended originating summons dated 12/3/2021.
2. The plaintiffs' case is as follows. They are sons of the late Kinyua Muiru. On 16/8/1970 fourteen (14) men who included their father purchased LR Ngong/Ngong/1418 measuring 8.2 hectares from one Nakuu Parpai. The other purchasers were Mbugua Kinyanjui, Nobert Kinyanjui, Njenga Muiru, Gathegi Ngotho, Kariuki Kinyariri, Ngotho Wairara Muiru, Thuu Wamunye and Njoroge Wamunye among others. The plaintiffs' father was entitled to 2.56 acres of the suit land. A boundary dispute arose between the suit land and a neighbouring parcel being Ngong/Ngong/1417. This dispute took a long time to resolve and it became a hindrance to the subdivision of the suit land amongst the beneficiaries or their lawful dependants. The plaintiffs' father passed away before the boundary dispute could be resolved.
 3. The fourteen purchasers of the suit land had agreed to have Karuenyi Njonge and Thuu Muiru registered as the proprietors of the suit land which they held in trust for the rest of the owners. This Karuenji Njoroge was the grandfather to the 1st and 2nd defendants. The 1st and 2nd defendants filed High Court Succession Cause No. 2664 of 2012 and through this case, they became registered proprietors of the suit land. This was done in secrecy and without disclosing to the plaintiffs and the other beneficiaries of the suit land. Furthermore, the fourteen purchasers of the suit land did not have equal shares. There were those who owned 1.28 acres. They included Karuenji Njonge, Thuu Muiru, Mbugua Kinyanjui, Nobert Kinyanjui, Njenga Muiru, Gathegi Ngotho, Kariuki Kinyariri, Ngotho Muhuthu and Ruo Wangai. Waitara Muiru, Thuu Wamunye and Njoroge Wamunye were to be allocated 1.14 acres.
 4. The dependants of the original purchasers of the suit land were divided on what to do with the land. There were those who wanted to sell and share the proceeds of the sale and there were those who wished to retain the land. The 1st and 2nd defendants coerced those who did not want to sell into selling. Those who succumbed to the coercion included Augusta Hinga who is a sister in law to the plaintiffs.

In 2014, the 1st and 2nd defendants caused the suit land to be subdivided into three (3) parcels namely 65357, 65358 and 65359. LR No. 65358 was sold to the 3rd defendant even before the boundary dispute could be resolved. This was contrary to the wishes of the majority of the beneficiaries. The land sold to the 3rd defendant measures 9.39 acres and it constitutes the 2.56 acres which had been allocated to the plaintiffs' father. The plaintiffs therefore challenge the appointment of the 1st and 2nd defendants as the representatives of the estate of their grandfather Karuenji Njonge, their being registered as the proprietors of the suit land, their selling of part of the suit land to the 3rd defendant and they claim their father's share of 2.56 acres out of the 20 acres that was bought by the 14 original owners.
 5. In support of their case, the plaintiffs filed the following evidence.
 - a. Witness statement by the two plaintiffs.
 - b. Affidavit by the 1st plaintiff dated 1/8/2019.



- c. Copy of limited grant in Kiambu Chief Magistrates Court Succession No. 452 of 2018.
 - d. Copy of sale agreement dated 16/8/1970.
 - e. Copies of letters dated between 2015 to 2018 over the suit land.
 - f. Copy of register for LR 1418.
 - g. Copies of green card for LR 65358 – 65359.
 - h. Copy of certificate of confirmation of grant in succession Casue No. 2664 of 2012 (Nairobi).
 - i. Copy of proceedings on CMC Ngong ELC 17 of 2019.
 - j. Copy of valuation report for the suit land dated 15/2/2019.
 - k. Witness statement by David Thuo Nduati and Augusta Njeri Hinga.
 - l. Pleadings in ELC 6/1986 and 154/2015 at Kajiado.
 - m. Copy of register for LR 1417.
 - n. Copy of summons dated 11/7/2017.
 - o. Certificate of official search for LR 65358 and 65359.
6. The summons is opposed by the 1st and 2nd defendants and in this regard, the 1st defendant has sworn a replying affidavit dated 7/10/2019 in which he deposes as follows.

Firstly, the originating summons is premised on a lie perpetrated by the plaintiffs. To start with, they are not the only children of the deceased. There are others who include the wife of Charles Hinga and the plaintiffs' sisters.

Secondly, the plaintiffs' father executed a letter of mandate on 21/4/2008 in which he authorized Stephen Waweru Waitara and Peter Wangai to deal with his share of the suit land.

Thirdly, the 1st plaintiff attended many meetings convened by the beneficiaries of the suit land and in one such meeting held on 20/5/2012, consented to the sale of the land at the rate of Kshs. 1.7 million per acre. Six members were selected to progress the transaction. They included the 1st defendant, David Mwangi Thuo, Stephen Waweru Waitara, James Kinyanjui Mbugua, Mbugua Kariuki and Norbert Kinyanjui Karanja.

Fourthly, at another meeting held on 27/5/2012 at another meeting which was attended by the 2nd plaintiff, two families said they were not willing to sell their shares and their wishes were respected. This reduced the acreage of the land that was to be sold. In all these meetings, the plaintiffs were on the side of those who wished to sell their land.

Fifthly, with the authority of all members and in the presence of the area District Officer and Chief, a sale agreement in favour of Ephantus Gakau Ndiritu was signed.

Sixthly, a resurvey of the suit land established that the size of the land on the ground was 11.3 acres and not 20.25 acres in the register.

Seventhly, an initial amount of Kshs. 4.6 million was paid by the purchaser and it was distributed among all the family members in line with each member's entitlement. The 1st plaintiff received a total of Kshs. 600,000/- being his family's share of the deposit and he acknowledged receipt of the amount.



Eighthly, as per the agreement the suit land was subdivided into three portions out of which LR 65358 was transferred to the 3rd defendant, Potters Group Limited, a company owned by Ephantus Gakuu Ndiritu. The rest of the land was transferred to the families that did not wish to sell and they currently occupy their respective parcels. All this was done above board with the knowledge of all the beneficiaries of the land.

Finally, when the balance of the purchase price was paid, Augusta Njeri Hinga, the wife of the plaintiffs' deceased brother was paid her portion. The 1st and 2nd defendants therefore call for the dismissal of the summons as it is an afterthought as the plaintiffs participated in the sale of the suit land and received their due share.

7. In support of their defence, the 1st and 2nd defendants filed the following evidence.
 - i. Witness statements by Wallen Gitau Wangai, Engineer Stephen Waweru Waitara, Veronicah Wanjiku Njunge and Ephantus Gakuu Ndiritu.
 - ii. Copy of affidavit of mandate dated 21/4/2008.
 - iii. List of members present and absent at the meetings of 1/5/2012, 27/5/2012 and 20/9/2012.
 - iv. Copy of agreement for sale of a portion of the suit land dated 12/10/2012.
 - v. Copy of supplementary agreement which has no dates.
 - vi. Schedule of payment to the beneficiaries.
 - vii. Copy of acknowledgement of Kshs. 600,000/- by 1st plaintiff.
8. The third defendant filed an affidavit dated 20/9/2019 in response to the summons in which he states as follows.

Firstly, he purchased the suit land from the registered owners after conducting due diligence and no trust was revealed in the ownership of the same.

Secondly, he visited the land and found that it was occupied by some members of the “Mbari ya Mega” who were in agreement about selling the portion that he was to buy.

Thirdly, he challenged the manner in which the suit was commenced saying that there are many disputed facts like the existence of a trust, the consensus of the parties in the sale and others which call for viva voce evidence requiring cross examination. For these and other reasons, he calls for the dismissal of the Plaintiffs' suit.
9. In support of his case, the 3rd defendant filed the following evidence.
 - i. Witness statement dated 20/6/2022.
 - ii. Copy of the title deed for LR 65357 and executed transfer forms.
 - iii. Other exhibits already filed by the 1st and 2nd defendants.
10. At the trial on 8/12/2022 and 31/5/2023, the 1st plaintiff testified and called one witness. They both reiterated what is in their witness statements. The plaintiffs witness admitted having received some money from the 1st defendant but she said she did not know that it was part of the purchase price for the suit land. The plaintiff denied ever having received any money from the 1st defendant or anybody else over the sale of the suit land. On the other hand, the 1st defendant testified together with the 3rd defendant. They called two witnesses namely Stephen Waitara and Veronicah Wanjiku. The evidence



by Waitara who said that he is a cousin to both the plaintiffs and defendants is to the effect that the Plaintiffs participated in the meetings where they agreed to sell their share of the suit land and that they were paid for their share.

11. Counsel for the parties filed written submissions on 1/11/2023 and 18/12/2023 respectively. They identified the following issues for determination.
 - i. Whether LR No. 1418 suit land was held in trust for the plaintiffs and other beneficiaries.
 - ii. Whether the 1st and 2nd defendants had capacity to subdivide and sell 18.75 acres of the suit land.
 - iii. Whether the 3rd defendant holds an indefeasible title to LR 65358.
 - iv. Whether originating summons was the appropriate method through which to commence this suit.
 - v. Whether the plaintiffs are entitled to the reliefs sought.
12. I have carefully considered the evidence adduced by both sides including the witness statements, affidavit, documents and testimony at the trial. I have also considered the written submissions by learned counsel for the parties the issues raised therein and the law cited. I am in agreement with learned counsel that the issues as identified will resolve the dispute.
13. The answer to the above issues will depend on whether the court believes the plaintiffs when they say that they were not involved in the sale of the land and whether they received the proceeds thereof. That is the most crucial determination in this case because the entire case depends on that single determination. I do not believe the plaintiffs for the following reasons.

Firstly, it is the plaintiffs who have the burden of proof under Sections 107 and 108 of the *Evidence Act*. They are the ones who would fail if no evidence was adduced on either side. They are the ones who filed the suit. They must therefore prove it on a balance of probabilities.

Secondly, I find that this burden is not discharged because at the end of the day, it is the evidence by the defendants that is more credible than the evidence by the plaintiffs. The first witness called by the plaintiff, Augusta Njeri Hinga admitted having received money from the defendants. This money, according to the defendants was for the suit land. According to Augusta, the money was a contribution for the burial expenses for her husband. In her witness statement, Augusta said that her husband died in the year 2007. Yet the receipt of the money was in 2013 which is about 6 years after the death of her husband. The money could not therefore be for her husband's burial. I do not believe her testimony in as far as she claims that the money was for the burial of her husband. I believe that it was part payment for the land. There is credible and consistent evidence from Stephen Waitara that the 1st plaintiff received money for the sale of the suit land from the defendants and he signed for it. I believe this evidence. Coming to the issues, I find that the suit land was held by the 1st and 2nd defendants in trust for the plaintiffs and other beneficiaries and the 1st and 2nd defendants do not deny this.

On the second issue, I find that the 1st and second defendants had capacity to subdivide and sell the land because they had the authority of the plaintiffs and other beneficiaries. Besides, the 1st and 2nd defendants had the affidavit of mandate dated 21/4/2008 which was signed by all the fourteen (14) original owners of the suit land including the plaintiffs' father Kinyua Muiru. The plaintiffs are, under Section 120 of the *Evidence Act*, estopped from denying that their father authorized the 1st and 2nd defendants among other persons to sell their father's share of the suit land.



Secondly, the 1st plaintiff is again estopped from denying that the 1st and second defendants had authority to sell the suit land because he not only attended the meetings where such authority was given but he also received proceeds of the sale and signed for it.

14. On the third issue, I find that the third defendant holds a good title to LR No. 65358 for the reasons already given and for failure by the plaintiff to prove any fraud on the part of the defendants. Fraud would have to be proved to a standard higher than the ordinary one of a balance of probabilities but not as high as in criminal cases. See *Ndolo v Ndolo* Civil Appeal No. 128 of 1995.
15. On the penultimate issue of whether this suit should have been commenced by way of originating summons, I find that it should not have been so commenced. Originating summons by law ordinarily concern suits where there is unlikely to be any substantial dispute of facts. In this all facts are in dispute including whether the plaintiffs received cash from the defendants and whether they attended meetings where they agreed that the land be sold. A summons is ill suited to resolve such a dispute. A plaint which pleads the particulars of fraud and where evidence to prove those particulars is adduced would have been the most appropriate way of commencing this suit.
16. Finally and for all the reasons given above, I find that the plaintiff is not entitled to any of the reliefs sought. I therefore dismiss the summons with costs to the defendants.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 29TH DAY OF MAY 2024.

M.N. GICHERU

JUDGE

