



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC CASE NO. 163 OF 2013**

**MIGWI A. MUCHIRI.....PLAINTIFF**

**(Suing as the Administrator of the Estate of MENGO KIONDO)**

**VERSUS**

**MWANGI A. MWAI.....1<sup>ST</sup> DEFENDANT**

**GITIMU MWAI MWANGI.....2<sup>ND</sup> DEFENDANT**

**NYAGA MUTUGI.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

The plaintiff herein, suing as the administrator of the Estate of MENGO KIONDO, moved this Court by a plaint filed on 4<sup>th</sup> November 2011 seeking judgment against the defendants in the following terms:-

- a. Declaration that title deeds No. MUTIRA/KIAGA/1085, MUTIRA/KIAGA/1072 and MUTIRA/KIAGA/1084 were illegally, irregularly, unlawfully and fraudulently obtained in the plaintiff's land parcel No. MUTIRA/KIAGA/439.**
- b. Permanent injunction to issue restraining the defendants, their servants and agents from entering into, remaining into or in any way whatsoever from interfering with the suit land originally being MUTIRA/KIAGA/439.**
- c. Costs of the suit.**
- d. Any further or better orders this Honourable Court may deem fit to grant.**

The plaintiff's case is premised on the pleadings that he is a relative of the late MENGO KIONDO who during his life time was the registered proprietor of the parcel of land No. MUTIRA/KIAGA/439 (herein the suit land) but had no wife or children. The defendants knowing that the said MENGO KIONDO (herein the deceased) had got lost for more than twenty (20) years, illegally, irregularly, and fraudulently schemed and grabbed the said suit land which they then sub-divided into MUTIRA/KIAGA/1085, MUTIRA/KIAGA/1084 and MUTIRA/KIAGA/1075 which they then registered in their names yet they are not related in any way to the deceased. All this was done by one ALKALIDO NJERU NYAGA who filed a petition for grant of letters of administration in KERUGOYA SUCCESSION CAUSE NO. 23 of 1994 in respect of the deceased's Estate, without involving the family members. That gave rise to this suit seeking the above mentioned remedies.

The defendants filed a joint defence in which they pleaded, inter alia, that they are the bona fide

purchasers for value of the parcels of land known as MUTIRA/KIAGA/1085, MUTIRA/KIAGA/1084 and MUTIRA/KIAGA/1072 which they purchased from the late ALKALIDO NJERU NYAGA in his capacity as the administrator of the Estate of the deceased MENGO KIONDO. The defendants further deny that they colluded with ALKALIDO NJERU NYAGA or anyone else for the issuance and/or confirmation of the grant issued in respect of the Estate of the deceased in KERUGOYA SENIOR RESIDENT MAGISTRATE COURT SUCCESSION CAUSE NO. 23 of 1994. The defendants deny that they fraudulently acquired title to their respective parcels of land although they admit that the same was a sub-division of the original suit land. It is also the defendants pleading that the plaintiff lacks locus standi to present this suit as he acquired the grant of representation to the Estate of the deceased subsequent to and with full knowledge that the same had been confirmed in favour of the late ALKALIDO NJERU NYAGA over fifteen (15) years ago and further, that this suit is res-subjudice as the parties were the same in Nairobi High Court Succession Cause No. 851 of 2000 that is still pending.

The defendants did not turn up for hearing on 12<sup>th</sup> March 2015 and although their advocate Mr. Kibatia had filed an application to cease acting, the same was yet to be prosecuted and an attempt by Mr. Mwangi, holding his brief, to adjourn the case was dismissed for reasons that are clear from the record.

The plaintiff's case was that the deceased was his uncle and the registered proprietor of the suit land and following his disappearance some twenty (20) years ago, the plaintiff moved the High Court in Succession Cause No. 742 of 2010 at Nairobi High Court and obtained grant of letters of Administration in respect of his Estate (Plaintiff's Exhibit 1). The plaintiff also produced a letter from his chief (Plaintiff's Exhibit 4) and copy of the Kenya Gazette showing that he applied for grant of letters of Administration in respect of the deceased's Estate (Plaintiff's Exhibit 5). He also produced a copy of the application that he filed in the High Court Nairobi to revoke the confirmation of grant issued on 30<sup>th</sup> June 1995 in High Court Succession Cause No. 851 of 2000 (Plaintiff's Exhibit 6).

He produced his list of exhibits and urged this Court to revoke the titles issued to the defendants as they bought the land fraudulently.

At the end of the trial, Mr. Omwega advocate for the plaintiff filed written submissions.

I have considered the plaintiff's evidence, un-controverted though it is, together with the documentary exhibits and his counsel's written submissions. Although the defendants did not lead any evidence as they were not in Court at the time of the trial, they had filed some documents most of which are Court orders and since they form part of the record, this Court was obliged to consider them more so considering that they were not in dispute.

The following are not really in dispute:-

- 1. The deceased MENGO KIONDO was the registered proprietor of the suit land (MUTIRA/KIAGA/439) which has since been sub-divided into three portions being MUTIRA/KIAGA/1085, MUTIRA/KIAGA/1084 and MUTIRA/KIAGA/1072 (or 1075) and registered in the defendants' names.**
- 2. One ALKALIDO NJERU NYAGA (also deceased) moved the SENIOR RESIDENT MAGISTRATE AT KERUGOYA IN SUCCESSION CAUSE NO. 23 OF 1994 and was issued with a grant of letters of administration in respect of the Estate of the deceased on 24<sup>th</sup> February 1995 which was later confirmed on 18<sup>th</sup> July 1995 and the only property distributed was the suit land which was shared between the said ALKALIDO NJERU NYAGA who got 2.6 acres and JOSEPH MWANIKI who got 2 acres.**

3. ***That on 1<sup>st</sup> November 2001 the plaintiff moved the High Court in Nairobi Succession Cause No. 851 of 2000 (there must be an error on the dates) seeking the revocation of the grant issued to the said ALKALIDO NJERU NYAGA on 24<sup>th</sup> February 1995 and confirmed on 18<sup>th</sup> July 1995.***
4. ***Although the plaintiff in his evidence in chief has stated that the said grant was revoked, what he has produced is an order of Aluoch J. issued on 10<sup>th</sup> February 2005 in which the following two orders were given:-***
  - a. ***“That this matter be mentioned on 8<sup>th</sup> March 2005 and be served upon the respondent to appear in Court.***
  - b. ***That the petitioner ALKALIDO NJERU NYAGA be and is hereby directed to bring to Court the original certificate of confirmation and grant documents”***
5. ***That on 16<sup>th</sup> November 2010 the plaintiff moved the High Court in Succession Cause No. 742 of 2010 and obtained a grant of letters of administration in respect of the Estate of the deceased.***
6. ***Prior to that, Kihara J. (as he then was) had issued an order on 6<sup>th</sup> February 2004 in High Court Misc Civil Application No. 1561 of 2003 that the said MENGU KIONDO be presumed dead.***
7. ***That notwithstanding all the above, the matter relating to the deceased’s Estate and specifically the dispute relating to the suit land herein ended up before the Wanguru Land Disputes Tribunal which on 8<sup>th</sup> December 1998 made the following order:-***

***“That even though the land has gone to the hands of Mr. Alkalido, it should be in the hands of clan members”***

The above order resulted in a decree being issued by the Senior Resident Magistrate at Kerugoya Court in the same Succession Cause No. 23 of 1994 where a grant had been issued and confirmed in 1995.

8. ***That having obtained confirmation of grant in respect of the Estate of the deceased, the said ALKALIDO NJERU NYAGA proceeded to sub-divide the suit land into MUTIRA/KIAGA/1085, MUTIRA/KIAGA/1084 and MUTIRA/KIAGA/1072 (or 1075) which he then sold to the defendants between 25<sup>th</sup> May 1995 and 19<sup>th</sup> March 1998 and the defendants were issued with their respective titles.***

As indicated above, although the defendants did not attend trial to lead evidence in their defence, the above are matters that form part of the record and which this Court cannot ignore. Given the above, can this Court make the declaration sought by the plaintiff that the title deeds No. MUTIRA/KIAGA/1085, MUTIRA/KIAGA/1075 and MUTIRA/KIAGA/1084 were obtained irregularly, unlawfully or fraudulently from the plaintiff’s land parcel No. MUTIRA/KIAGA/439” I am afraid not. This is because, the said title deeds were issued pursuant to orders issued by a competent Court in KERUGOYA SENIOR RESIDENT MAGISTRATE COURT SUCCESSION CAUSE NO. 23 OF 1994. Although the plaintiff filed an application in Nairobi High Court Succession Cause No. 851 of 2000 to revoke the grant issued by the Court in Kerugoya, no orders have been placed before me to show that the said grant was ever revoked. The orders issued by Aluoch J. in the Nairobi High Court Succession Cause No. 851 of 2000 have been reproduced above and they do not amount to revocation of any grant. This Court was not served with any orders to show what transpired on 8<sup>th</sup> March 2005 when the said Succession Cause was due for mention, if indeed it was mentioned as directed. In the circumstances, the orders issued by the magistrate in Kerugoya Senior Resident Magistrate Court Succession Cause No. 23 of 1994 remain valid and therefore this Court has no power to impugn the said orders even if it were to entertain any

doubt about the propriety of the said orders. That could only have been done by Aluoch J. when the application for revocation was placed before her. It is for those reasons that this Court cannot make the declaration orders sought herein.

The plaintiff has also pleaded fraud on the part of the defendants. In paragraph 7 of the plaint, it is pleaded as follows:—

***“The plaintiff contend that after the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants having knowledge that the plaintiff’s relative Mr. Mengo Kiondo has (sic) gotten lost and cannot be traced, they illegally, irregularly and fraudulently schemed a way in which to grab the parcel of land MUTIRA/KIAGA/439 registered in the name of the deceased”***

No attempt was made to particularize the allegations of fraud but that notwithstanding, an allegation of fraud is a serious allegation and a party alleging it has a heavy onus to discharge. In the case of **CENTRAL BANK OF KENYA VS TRUST BANK LTD & 4 OTHERS C.A CIVIL APPEAL NO. 215 OF 1996**, the Court of Appeal had the following to say on issues of fraud:-

***“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in ordinary civil cases”***

No evidence of fraud was led by the plaintiff to the required standard.

It would also appear that this claim is statute barred in terms of **Section 7 and 9 of the Limitation of Actions Act** which provides that an action to recover land may not be brought after the end of twelve years from the date on which the right of action arose. Since the plaintiff herein is seeking to recover land of a deceased person, the right of action occurred on the date of the death of the said MENGOKIONDO. It is clear from the record herein that no-one really knows when MENGOKIONDO died or where he disappeared to. That is why Kihara J. (as he then was) issued an order in **High Court Miscellaneous Civil Application No. 1561 of 2003** that he be presumed dead. It is clear from the Green Cards filed in this case that the parcels of land No. MUTIRA/KIAGA/1085, 1084 and 1072 were transferred to the defendants in 1996 and 1998. That can only mean that by the time those transfers were being made in favour of the defendants, MENGOKIONDO was already dead. This suit having been filed on 4<sup>th</sup> November 2011 is, in my view, statute barred.

Since this Court cannot make those declarations as sought in paragraph 17 (a) of the plaint, it follows that the defendants obtained registration of their respective parcels of land through a lawful process and in the circumstances, they are entitled to the rights and privileges that go with such registration as provided under **Section 27 and 28 of the now repealed Registered Land Act** under which the said titles were issued. In the circumstances, the other remedy of a permanent injunction restraining the defendants, their agents or servants from entering into, remaining or whatsoever from interfering with the suit land originally being MUTIRA/KIAGA/439 cannot be available to the plaintiff.

Ultimately therefore and for the reasons given above, the plaintiff’s suit against the defendants is dismissed and in the circumstances of this case, there will be no order as to costs.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**

13/11/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Omwenga Plaintiff – present

1<sup>st</sup> and 2<sup>nd</sup> Defendants – present

COURT: Judgment dated, delivered and signed this 13<sup>th</sup> November, 2015 in open Court.

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**13<sup>TH</sup> NOVEMBER, 2015**



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