



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 18 OF 2017

PETER KAMAU KIMANI.....PLAINTIFF

VERSUS

GRACE GAITAU KIMANI.....1ST DEFENDANT

DANIEL MUIRURI KIMANI.....2ND DEFENDANT

KENNEDY MAINA KIMANI.....3RD DEFENDANT

HANNAH NYAMBURA KIMANI.....4TH DEFENDANT

**(suing as the personal representative of Simon Kimani Njuguna-
deceased)**

JUDGMENT

1. The parties in this suit are all related. The 1st and 4th Defendants are wives of the late Simon Kimani Njuguna. The Plaintiff and the 2nd and 3rd Defendants are sons of the 1st Defendant.

2. By an amended Plaint filed on the 14/12/12 the Plaintiff filed suit against the Defendants seeking the following orders;

a. The registration of the 1st Defendant as proprietor of land parcel No MAKUYU /KIMORORI/BLOCK111/89 (suit land) entered on the 9/11/12 and the title deed issued on the same day be cancelled and the registration thereof and title do revert and remain in the names of the Plaintiff.

b. A permanent injunction do issue restraining the Defendants, their agents, servants and or employees or people working under them from collecting rent, entering, undertaking acts of waste upon, or in any other way interfering with the Plaintiffs proprietorship, ownership, possession and use of the land parcel No MAKUYU/KIMORORI/BLOCK 111/89.

c. Costs of the suit and interest thereon.

3. It is the Plaintiff's case that he is the registered proprietor of the suit land and the buildings and structures thereon. That the Defendants have forcefully and without his consent and authority taken and collected rent from the building under lease to tenants

and that despite demand and request to them to deceased they have continued interfering with the possession and benefit of the said suit land.

4. The Plaintiff has also accused the 1st Defendant of fraudulently procuring the registration of the title of the suit land in her name. He avers that this took place after he served the 1st Defendant with demand notice to repossess the suit land. He has pleaded the particulars of fraud on the part of the 1st Defendant in the plaint.

5. On the 16/1/12 the parties recorded a consent upon which the Court issued the following orders;

“By consent the registration of the 1st Defendant on the proprietor of land parcel No MAKUYU/KIMORORI/BLOCK111/89 entered on the register on the 9/11/2012 and the title deed issued on the same day is hereby cancelled and the said registration and title to the said parcel of land do revert to the Plaintiff.”

6. The 1st -4th Defendants filed a joint statement of defence and counterclaim on the 8/7/14. In it they denied the Plaintiffs claim and stated that Plaintiff was registered at the behest of the 4th Defendant to hold in trust for the family of the 1st Defendant as the Plaintiff was the 1st born son of the 2nd house of the 1st Defendant. The 4th Defendant averred that he bought the suit land in 1980s when the Plaintiff was a minor and together with the 1st Defendant have developed a 3-storey building which is rented to tenants. He claims that the Plaintiff has no right to the rent proceeds from the said rented building as he never contributed any penny towards its development. That he relied on the rental income for his upkeep at his twilight years. In the counterclaim he averred that he has been in exclusive possession of the suit land. That the reason he registered the suit land in the name of the Plaintiff is because he wanted to avert disputes between his two houses since the house of the 1st wife also had a son with similar names with the Plaintiff. The dispute lead to the filing of a civil case in Thika pitting his two wives over the suit land and to avert future wrangles he elected to place the registration of the suit land in the name of the Plaintiff. He accused the Plaintiff of fraud in failing to transfer the suit land to the 1st house (read 1st Defendant) and he has pleaded fraud under para 13 of the statement of Defence and Counterclaim.

7. The Defendants averred that the Plaintiff has already been given two plots from the family to wit; MAKUYU/KIMORORI/BLOCKIII/2990 and MAKUYU/KIMORORI/BLOCKIII/59.

8. The Defendants sought the following orders in the counterclaim;

a. A declaration that the registration of the suit land in the names of the Plaintiff was done in trust for the family for the 1-4th Defendants as he 1st born.

b. That this Court be pleased to order the cancellation of the Plaintiff's title or abstract of title in regard to the suit land and be reissued in the names of the 1st Defendant.

c. Costs of the Counterclaim.

9. On the 19/3/15 the 3rd Defendant filed an affidavit deponing that he did not authorise the filing of the joint statement and defence dated the 4/7/14. Alongside it, he denied signing the verifying affidavit to the statement of Defence and Counterclaim dated the 7/7/14. However, he did not seek to withdraw from the suit.

10. On the 8/1/2015 Simon Kimani Njuguna passed on and in his place his 1st wife, Hannah Nyambura Kimani was substituted in the case.

11. On the 3/4/18 the Plaintiff filed a notice of intention to act in person. The Court directed him to serve his erstwhile Advocates which he did after which he conducted his case in person.

12. At the hearing the Plaintiff testified solely and informed the Court that he became registered as owner of the suit land by his father who gifted him the land at the time, he was a minor. He got his title on the 31/5/11. The Defendants however did not give him vacant possession and use of the suit land and continued to collect rent without his authority and consent hence the suit herein. He presented a certified copy of the title land, control board consent and official search in respect to the suit land. That the 1st and 4th

Defendants sued each other in CMCC No 50 of 2011 Thika. In that suit the 1st Defendant admitted that the suit land belongs to the Plaintiff and she cannot now turn around to state that it is under trust for her and her family. He denied any trust on the suit land. He informed the Court that the suit land belongs to him and currently is collecting rent from the building thereon.

13. The 1-3rd Defendants did not defend the case and therefore their case is uncontroverted. I note from the record that they filed a change of advocates on the 8/10/18. At the time of hearing their previous advocates were duly served with the hearing notice. Neither did the new advocates attend the hearing of the suit.

14. The 4th Defendant's witness one Peter Maina Kimani stated that he is the step brother of the Plaintiff and the 1st born in the 1st house. He informed the Court that the land was acquired by his father through purchase in the 1980s and caused it to be registered in the name of the Plaintiff. He stated that the 1st Defendant even admitted that the land belonged to the Plaintiff during the hearing of the case CMCC No 50 of 2011. He stated that his mother the 4th Defendant is asserting no interest in the suit land. He categorically stated that there is no dispute in respect to the suit land as every other member of the family has been given their own parcels of land. He informed the Court that the suit land belongs to the Plaintiff.

15. The Plaintiff did not file any written submissions except for the 4th Defendant who did.

16. The key issue is whether the Plaintiff is the absolute owner of the suit land. Whether the Plaintiff held the suit land under trust. Whether the Plaintiff has proved fraud on the part of the 1st Defendant.

17. It is not in dispute that the parties are all related being of the 1st and 2nd houses of Simon Kimani Njuguna. He acquired the suit land by way of purchase in 1980s. The land was registered in the name of the Plaintiff on the 1/7/88 while he was a minor. According to the pleadings it is the Defendant's case that the suit land was registered in the name of the Plaintiff to hold in trust. However, they did not adduce evidence at the trial and therefore the Plaintiff claim as against them is uncontroverted.

18. The 4th Defendant through her witness supported the Plaintiffs claim and stated that the suit land belongs to the Plaintiff. It was his evidence that the 4th Defendant had no interest in the suit land.

19. Section 24,25 and 26 of the Land Registration Act mandate this Court to take a certificate of title as prima facie evidence of ownership. In the instance suit the Plaintiff has presented a copy of the certificate of title issued to him on the 31/5/111. According to the copy of the official search dated the 18/12/2009 the suit land was registered in his name on the 1/7/88 with a restriction that no dealings should be done with the title until the registered owner attains the majority age of 18 years. He led evidence that once he attained the age of majority he got a tile in his name.

20. The Court holds and finds that the suit land belongs to the Plaintiff.

21. As to whether the Plaintiff held the suit land in trust, it is noteworthy to note that the 1-3rd Defendants did not lead evidence to prove trust and the Court dismisses that claim. Effectively the whole counterclaim is dismissed for failure of the Defendants to prove their claim.

22. The Plaintiff pleaded fraud against the 1st Defendant however by consent the title was reverted to his name hence the claim fell off and the Court holds and finds that it is spent.

23. In the absence of evidence to the contrary, the Plaintiffs claim succeeds and it is granted as follows;

a. The Defendant's counterclaim is dismissed.

b. A permanent injunction do issue restraining the Defendants, their agents, servants and or employees or people working under them from collecting rent, entering, undertaking acts of waste upon, or in any other way interfering with the Plaintiffs proprietorship, ownership, possession and use of the land parcel No MAKUYU/KIMORORI/BLOCK 111/89.

c. Parties being related, each to bear their own costs of the suit.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14TH DAY OF FEBRUARY, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Plaintiff – Present in person

1st – 3rd Defendants – Absent. But served.

4th Defendant - Mr Mugo

Court Assistants - Irene & Njeri,



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