



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 34 OF 2019**

**SUSAN WANJIRU KANYI**

**(Suing as the Legal representative of JOSEPH KANYI NGARI (Deceased).....1<sup>ST</sup> PLAINTIFF**

**SUSAN WANGITHI MUTHEE.....2<sup>ND</sup> PLAINTIFF**

**MONICAH WAKERA KINYUA.....3<sup>RD</sup> PLAINTIFF**

**MARY WAKUTHII KARIMI.....4<sup>TH</sup> PLAINTIFF**

**NICASIO MUCHIRI JOSEPH.....5<sup>TH</sup> PLAINTIFF**

**AGNES MUTHONI MURIUKI.....6<sup>TH</sup> PLAINTIFF**

**VERSUS**

**WAMBURA KANYI.....DEFENDANT**

**JUDGMENT**

**Introduction**

In their plaint dated 15<sup>th</sup> August 2019, the plaintiffs sought the following orders:-

*(a) Cancellation of registration of the title No. KABARE/NJIKU/2992 from the names of the defendant and register the same back to the name of the deceased for succession by his beneficiaries.*

*(b) In alternative to prayer (a) above, a declaration that the defendant holds land parcel No. KABARE/NJIKU/2992 in trust for herself, the plaintiffs and the defendant's children and determination of the said trust such that the land is shared equally between the said parties and/or in any other way this Honourable Court may deem fit and just.*

*(c) Costs and interest of the suit at Court rates.*

The suit was filed simultaneously with a Notice of Motion under certificate of urgency seeking interlocutory injunctive orders pending the hearing of this suit.

In a statement of defence dated 25<sup>th</sup> September 2019, the defendant denied the plaintiff's claim and sought to have the suit dismissed with costs.

### **Plaintiffs Statement of Facts**

The 1<sup>st</sup> plaintiff testified on behalf of the other plaintiff and stated that she has brought this suit on behalf of the Estate of Joseph Kanyi Ngari (deceased) who is her late father. She stated that her mother is one Lucy Wanjoka Kanyi who was his father's first wife. The 1<sup>st</sup> plaintiff further stated that when her late mother got married to her late father, she had two (2) children from a previous relationship namely Janeffer Wawira (deceased) and Esther Wanjira. The 1<sup>st</sup> plaintiff also testified that her co-plaintiffs are her siblings and that their late father Joseph Kanyi Ngari prior to his demise suffered from cancer and succumbed to death on 20<sup>th</sup> May 2018. The 1<sup>st</sup> plaintiff further stated that after the demise of their father, their step-mother Wambura Kanyi who is also the defendant herein fraudulently caused land parcel No. KABARE/NJIKU/2992 to be transferred from the late father's name to herself. She testified that none of them live in the suit property. She further stated that the house where their brother Nicasio Muchiri Joseph was living was demolished in 1987 or thereabouts and that Nicasio Muchiri Joseph is now living with their grandmother (maternal). She produced four (4) documents contained in their list of documents being a copy of letters of administration ad litem of the Estate of one Joseph Kanyi Ngari, Green Card for land parcel No. KABARE/NJIKU/2992, a copy of death certificate and a copy of the Chief's letter dated 12<sup>th</sup> June 2019 marked as Plaintiff's Exhibits 1, 2, 3 and 4 respectively.

### **The Defendant's Case**

The defendant testified on oath and stated that she was married by the late Joseph Kanyi Ngari (deceased) in 1986 under Kikuyu customary laws and that they complied with all statutory formalities. She stated that sometime in February 2018, her late husband gave her the suit property Land Reference No. KABARE/NJIKU/2992 measuring 1.5 acres or thereabouts as a gift in consideration of love and affection. She further stated that they used to cultivate the land with her late husband and had even planted cash crops among them tea bushes and coffee stems. She contends that when she was given the suit property, they applied for consent of the relevant Land Control Board and after appearing before the Board on 6<sup>th</sup> February 2018, their application was approved and a letter of consent was issued.

After complying with all statutory requirements, the land was transferred and registered in her name on 15<sup>th</sup> February 2018. She stated that sometime in May 2018, she decided to include the name of her daughter Esther Wanjira Kanyi as a joint owner after obtaining the requisite statutory consent from the Land Board. As regards the plaintiffs, the defendant stated that she does not know them. She stated that while her late husband was alive, the plaintiff never visited him and that her late husband never mentioned to her about the existence of another family.

### **Legal Analysis**

I have considered the viva voce evidence adduced by the plaintiffs and the defendant. I have also considered the documents produced and the applicable law. A title deed is a sacred document whose sanctity is recognized in our laws. **Section 26 (1) of the Land Registration Act No. 3 of 2012** provides as follows:-

*“The certificate of title issued by the Registrar upon*

*Registration, or to a purchaser of land upon 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, un-procedurally or through a corrupt scheme”.*

The plaintiffs in this case have challenged the acquisition of the defendant's title to the suit property land parcel No. KABARE/NJIKU/2992 on grounds of fraud. From the particulars of fraud set out in their plaint, the plaintiffs averred that the defendant fraudulently transferred the suit land to her name without attending Land Control Board for consent to transfer. It is trite

law that for one to challenge a certificate of title on grounds of fraud, she must prove that fraud was committed and that the proprietor of such title was a party in the commission of such fraud. Fraud is such a serious offence whose standard of prove is above the usual standard of proof in civil claims but not beyond reasonable doubt required in criminal cases. In the case of **R.G. Patel Vs Lalji Makanji (1957) E.A. 314**, the former Court of Appeal for Eastern Africa stated thus:-

*“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.*

It is trite law that all entries in the register of land in various registries in this country are recorded and maintained by Land Registrars. Before making any entries in the Register, the Registrar(s) are required to satisfy herself that all statutory requirements have been presented to her. When a party makes serious allegations that entries were made without the applicant presenting before the Land Registrar the statutory required documents, the burden of proof lies on that person that those documents were not presented. In this case, the plaintiff in his particulars of fraud has alleged that the suit land was fraudulently transferred to her name without attending Land Control Board for consent to transfer. The plaintiff has not availed the parcel register showing that the alleged instruments of transfer were not presented to the Land Control Board before effecting the transfer of the suit land in favour of the defendant. The Land Registrar was not enjoined as a party in this suit or even called as a witness to shed light on the subject. The second ground in the particulars of fraud is that the defendant forged Land Control Board application forms for transfer in order to have the land transferred to her name. Again, these are mere allegations which the plaintiff has not presented an iota of prove that the defendant forged any documents.

The plaintiffs also alleged that the defendant transferred the suit land to herself without knowledge of the deceased who was sick and hospitalized at Kenyatta National Hospital suffering from cancer. No medical report was produced and no evidence that one Joseph Kanyi Ngari (deceased) had no capacity to transfer the suit land to the defendant. The defendant in her evidence denied the plaintiffs claim and stated that her husband the late Joseph Kanyi Ngari (deceased) gifted her the suit land in consideration of love and affection and that they complied with all statutory formalities before the land was registered in her name as the absolute owner. The defendant produced application for consent of the Land Control Board for transfer from her husband Joseph Kanyi Ngari to herself as Defence Exhibit No. 1. She also produced a letter of consent issued by the Gichugu Land Control Board on 6/2/2018 as Defence Exhibit No. 2. She further produced another application for consent of the Land Control Board to transfer from Wambura Kanyi to Esther Wanjira Kanyi as Defence Exhibit No. 3. The defendant also produced a letter of consent issued by the Land Control Board on 8/5/2018 as Defence Exhibit No. 4. The next document was a eulogy of the late Lucia Wanjoka and the translation. The eulogy does not reflect the plaintiffs as relatives of the deceased. There is even no indication that the plaintiffs attended the burial of the said Lucia Wanjoka on 12/05/2007.

### **Conclusion**

From my analysis and the reasons given herein above, I find that the plaintiffs have failed to prove their claim on the required standard. Consequently, this suit fails and the same is hereby dismissed with costs to the defendant. It is so ordered.

***Judgment READ, DELIVERED physically and signed in open Court at Kerugoya this 20<sup>th</sup> day of November, 2020.***

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**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:-**

1. M/S Githaiga holding brief for Maina Kagio for Defendant
2. 1<sup>st</sup> Plaintiff – present
3. 2<sup>nd</sup> Plaintiff – absent

4. *3<sup>rd</sup> Plaintiff – present*

5. *4<sup>th</sup> Plaintiff – present*

6. *5<sup>th</sup> Plaintiff – present*

7. *6<sup>th</sup> Plaintiff – absent*

8. *Mbogo, Court clerk – present.*



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