



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 237 OF 2014

SAMUEL KIMARU WACHIRA.....1ST PLAINTIFF

RONALD KAHARU WACHIRA.....2ND PLAINTIFF

(Suing as administrators

and legal Representative of the estate of

Philip Wachira Koigu (deceased)

VERSUS

KANJA WACHIRA KOIGU alias

THOMAS KANJA WACHIRA.....DEFENDANT

JUDGMENT

A. THE PLAINTIFFS' CASE

1. By a plaint dated 20th January, 2011 the Plaintiffs sought the following reliefs sought against the Defendants:

(a) A declaration that the Defendant holds title to L. R. Nyandarua/Ndaragwa Block 1(Kahutha)/88 unlawfully.

(b) That Title to Land parcel No. Nyandarua/Ndaragwa Block 1(Kahutha)/88 be cancelled and the land do revert to the deceased.

(c) Costs of the suit and interest thereon.

(d) Any other relief this honourable court may deem just to grant.

2. The Plaintiffs pleaded that they were joint administrators of the estate of the late Phillip Wachira Koigu (*the deceased*) who was the father of all the parties in the suit. It was further pleaded that prior to his death, the deceased held some shares in a land buying company as Kahutha Young Producers Limited (*the Company*).

3. The Plaintiffs further pleaded that 12 years after the death of the deceased, the Defendant fraudulently caused the deceased's shares in the company to be registered solely in his name in consequence whereof he was allocated parcel No. **Nyandarua/Ndaragwa Block 1(Kahutha)/88** without the knowledge and consent of all concerned beneficiaries and without undertaking any succession proceedings. It was further pleaded that despite demand the Defendant had failed to make amends hence the suit.

B. THE DEFENDANT'S DEFENCE

4. The Defendant filed a statement of defence dated 4th March, 2011 in which he denied the Plaintiff's claim in its entirety. The Defendant denied that he had fraudulently or unlawfully acquired the shares of the deceased in the company. He denied the particulars of fraud alleged against him and put the Plaintiffs to strict proof thereof.

5. The Defendant further contended that during his lifetime the deceased had indicated that his shares in the company should go to him hence

the Plaintiffs had no legitimate cause of action against him. The Defendant further contended that, in any event, the suit was statute - barred and he prayed for the suit to be dismissed with costs.

C. SUMMARY OF EVIDENCE AT THE TRIAL

(a) The Plaintiffs' evidence

6. The 2nd Plaintiff adopted his witness statement dated 20th December, 2010 as his evidence-in-chief. He testified that it was the deceased who was a shareholder of the company and that he died in 1991 before a title to the suit property could be issued to him. He further testified that he only discovered that the suit property was registered solely in the name of the Defendant in 2010 when he conducted an official search. He denied that the deceased had given the entire suit property to the Defendant alone whereas he had about 13 children. The Plaintiffs' case was that the Defendant must have acquired the suit property fraudulently since succession proceedings had not been conducted by the time was registered as sole proprietor.

7. The Plaintiffs also called the secretary of the company, Timothy Wambugu Njagi, who testified as PW3. He told the court that the deceased was the rightful shareholder of the company and not the Defendant. He maintained that although the Defendant was issued with a share certificate on the instructions of the chairman of the company, the Defendant's name was not in the register of members in 1988. He further stated that upon the death of the deceased the Defendant visited the company's office with a title deed for the suit property and sought to be issued with a share certificate on the basis that he was the only son of the deceased.

(b) The Defendant's evidence

The Defendant adopted his witness statement dated 20th May, 2013 and further statement dated 4th March, 2021 as his evidence-in-chief. Although his two witnesses statements were somehow contradictory, he maintained that he obtained registration of the suit properly lawfully and without any fraud. He further testified that it was the deceased who had appointed him a nominee way back in 1968 and that his status was entered in the company register. He further testified that it was the secretary of the company (PW3) who had escorted him to the Land's Office to obtain a title deed in 2003.

D. DIRECTIONS ON SUBMISSIONS

8. Upon conclusion of the hearing on 23rd March, 2021, the Plaintiffs were granted 30 days to file their submissions whereas the Defendant was granted a similar period to do likewise upon the lapse of the Plaintiffs' period. The record shows that the Plaintiffs filed their submissions on 15th June, 2021 whereas the Defendant filed his on 29th June, 2021.

E. THE ISSUES FOR DETERMINATION

9. The court has considered the pleadings, evidence and submissions on record. The court is of the opinion that the following issues arise for determination in this suit:

- (a) Whether the deceased was the original owner of the shares in the company which entitled him to allocation of the suit property.**
- (b) Whether the Defendant fraudulently acquired the deceased's shares in the company.**
- (c) Whether the Plaintiffs are entitled to the reliefs sought in the plaint.**
- (d) Who shall bear costs of the suit.**

F. ANALYSIS AND DETERMINATION

(a) Whether the deceased was the original owner of the shares in the company which entitled him to allocation of the suit property

10. The court has considered the material and submissions on record on this issue. Although the Defendant in paragraph 3 of his defence had conceded the shares belonged to the deceased and that the latter had indicated in his lifetime that the shares should be taken by the Defendant, he filed a witness statement on 20th May, 2013 which painted a completely different picture. He contended that although the deceased had some land in Endarasha, he also had his own separate and distinct land known as Plot. No 88. He asserted that he was the first and absolute owner thereof that the deceased had never owned the same at any time.

11. In his further statement dated 4th March, 2021 the Defendant changed tact and conceded that the shares belonged to the deceased but added that he was appointed as a **nominee** way back in 1968! The court is satisfied on the basis of the material on record and the Defendant's own concession that the deceased was the original owner of the 5 shares which entitled a member to allocation of land by the company.

(b) Whether the Defendant fraudulently acquired the deceased's shares in the company

12. The court has considered the evidence and submissions on record on this issue. Whereas the Plaintiffs contended that the Defendant had fraudulently acquired the shares several years after the death of the deceased without undertaking succession proceedings, the Defendant contended otherwise. The Defendant contended that he was appointed a nominee of the shares by the deceased in 1968 hence he lawfully

acquired the shares upon his death. The Defendant relied upon share certificate No. 134 of the company dated 12th May, 1988 bearing his name.

13. The court has noted that there is another share certificate No. 106 dated 12th May, 1988 in the name of the deceased. Both certificates were signed by directors of the company and the secretary who testified as PW53. At the trial, the secretary admitted signing both certificates and stated that the genuine certificate is No. 106 in the name of the deceased and that the second one in the name of the Defendant was issued on the instructions of the chairman of the company. His testimony was that the Defendant was issued with the second certificate after he presented a title deed in his name in 2003. It would thus appear that his share certificate was backdated to 12th May, 1988 to tally with the date of the original certificate.

14. Although the Defendant claimed that he was appointed a nominee in 1968 there is no credible evidence on record to support the nomination. The register of nomination was not produced by the Defendant or the company. The secretary of the company (PW3) denied being aware of such nomination by the deceased. The court does not accept the copy of a leaflet which the Defendant produced as evidence of nomination since its source and authenticity was not established. The company did not produce the nomination book or register to ascertain if it originated from the company. There is also no evidence of any company resolution having been passed to transfer the shares from the deceased to the Defendant on account of the alleged nomination.

15. In the case of **Margaret Njeri Mbiyu v David Njunu Mbiyu Koinange & 13 Others Civil Appeal No. 47 of 2016 (Consolidated with 50 and 56 of 2016) (UR)** the Court of Appeal considered the issue of transfer of shares of a deceased person as follows:

“It is therefore not correct that the Companies Act does not provide for transfer of shares by nomination. To determine whether the shares of the deceased in the company could be transferred to E as his next of kin, one had to look at the articles of association of the company. Where the articles of association provide for transfer of the shares to the next of kin that would constitute, by dint of Section 75, a transfer of the shares by operation of the law, so long as the transfer is by the personal representative of the deceased. The personal representative of the deceased has power to transfer the shares of the deceased as if it were the deceased himself and upon transfer of the shares, the transferee is entitled to be registered in the register of members. What we are saying is that upon death of the shareholder, his shares vest in his personal representative, but contrary to what the learned judge stated, there is nothing in the Act to stop the personal representatives, if the articles of the company so provide, from transferring the shares to the deceased’s nominee.”

16. The court is satisfied on the basis of the material on record that the Defendant must have acquired the shares of the deceased through fraudulent and dubious means. That must be the reason why there are two share certificates issued by the company one of which was backdated to 12th May, 1988 to suit the Defendant’s fraudulent scheme. The court, therefore, finds and holds that the Defendant acquired the deceased’s shares in the company through fraudulent means.

(c) Whether the Plaintiffs are entitled to the reliefs sought in the plaint

17. The court has found that the deceased was the rightful owner of the shares which entitled him to allocation of land by the company. The court has also found no credible evidence to demonstrate that the deceased ever appointed the Defendant as his nominee for the shares. The court has further found that the Defendant must have acquired the deceased’s shares in the company fraudulently and through the help of the former chairman of the company. Accordingly, the court is satisfied that the Plaintiffs are entitled to the reliefs sought in the plaint.

(d) Who shall bear costs of the suit

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. Accordingly, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful litigants should not be awarded costs of the suit. Accordingly, the Plaintiffs shall be awarded costs of the suit.

G. CONCLUSION AND DISPOSAL

19. The upshot of the foregoing is that the court is satisfied that the Plaintiffs have proved their case against the Defendant to the required standard. Accordingly, judgment is hereby entered for the Plaintiff against the Defendant in the following terms:

(a) A declaration is hereby issued that the Defendant holds Title No. Nyandarua/Ndaragwa Block 1 (Kahutha) /88 unlawfully.

(b) An order is hereby issued directing the Land Registrar Nyandarua to cancel the Defendant’s registration as proprietor of Title No. Nyandarua/Ndaragwa Block 1 (Kahutha)/88 forthwith.

(c) The Plaintiffs are hereby awarded costs of the suit to be borne by the Defendant.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 14TH DAY OF OCTOBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Karanja for the Plaintiff

Ms. Wambui Mwai holding brief for Mr. Ndirangu for the Defendant

CA- Carol

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Y. M. ANGIMA

JUDGE