



REPUBLIC OF KENYA



KENYA LAW
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**Kiragu v Kiragu (Environment & Land Case E010 of 2022)
[2023] KEELC 17077 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17077 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E010 OF 2022**

JM MUTUNGI, J

APRIL 20, 2023

BETWEEN

GRACE WAINOI KIRAGU PLAINTIFF

AND

IGNACIOUS WACHIRA KIRAGU DEFENDANT

JUDGMENT

1. The Plaintiff by way of an Originating Summons dated 22nd February, 2022 filed in Court on 24th February, 2022 prays for orders that:-
 1. That the Plaintiff herein is the bonafide legal owner of the Parcel of land known as Title No. Inoi/Kiamburi/1359 which is the mother title of parcel of land title No. Inoi/Kiamburi/2282.
 2. That the Plaintiff herein is the bonafide legal owner of the parcel of land known as Title No. Inoi/Kiamburi/2282 previously part of the parcel of land known as title No. Inoi/Kiamburi/1359.
 3. That the Defendant herein fraudulently and with intent to defraud transferred to himself parcel of land known as Title No. Inoi/Kiamburi/2282 without the consent of the Plaintiff herein who at all material times was the legal owner of the parcel of land known as Title No. Inoi/Kiamburi/2282 previously part of the parcel of land known as title No. Inoi/Kiamburi/1359.
 4. That an order is issued to the Land Registrar in Kirinyaga County (Kerugoya) to cancel Title No. Inoi/Kiamburi/2282 issued and registered in the name of the Defendant.
 5. That an order be/is issued to the Land Registrar in Kirinyaga County (Kerugoya) to transfer and register title No. Inoi/Kiamburi/2282 in the name of the Plaintiff herein (Grace Wainoi



Kiragu) and David Murimi Kiragu both to jointly hold as trustees for Peter Chomba Wachira(minor).

6. That the Defendant should bear the costs of this suit.
2. The Originating summons was supported on the grounds set out on the body of the application and on the supporting and supplementary Affidavits sworn by the Plaintiff in support of the Originating summons.
3. The Defendant filed a Replying Affidavit in opposition to the Originating summons and he basically denied all the averments and allegations made by the Applicant, who is his mother in her Affidavit in support of the Originating Summons. The Originating summons was heard viva voce where the Plaintiff and the Defendant testified and were cross examined.

The Plaintiff's Case

4. The Plaintiff testified and in her evidence adopted her Supporting Affidavit and the supplementary Affidavit as her evidence in Chief. The Plaintiff affirmed in her evidence that she was the mother of the Defendant. The Plaintiff stated she subdivided her land parcel Title No. Inoi/Kiamburi/1359 with the intention of giving the respective shares to her children. She stated she divided her land into 5 portions to share amongst her 3 sons and 5 daughters. She explained that all the daughters were to take one(1) share and the sons one(1) share each except that she did not want to transfer the share intended for the Defendant directly to his name because if he was given the land the Defendant would sell which would leave the children destitute. She stated the Defendant had four(4) children, 2 sons and 2 daughters. She further testified the defendant drunk too much and she feared he would not be responsible and for that reason she decided to have the land parcel Title Number Inoi/Kiamburi/2282 a subdivision from Title No. Inoi/Kiamburi/359 registered in her name and her son David Murimi Kiragu to jointly hold as trustees for Peter Comba Wachira(minor) who was the Defendant's son.
5. The Plaintiff testified that she sought and obtained consent to have the parcel of land Title No. Inoi/Kiamburi/2282 in her name and the name of her son, David Murimi Kiragu as Trustees for her grandson who was a minor. She explained that the Defendant was nonetheless utilising the portion that she wanted to have registered in trust for her grandson. The Plaintiff affirmed that she had not transferred the parcel of land Title No. Inoi/Kiamburi/2282 to the Defendant and asserted that the Defendant had obtained registration and title to the land fraudulently and without her consent or authority. She denied that she signed any transfer in favour of the Defendant and/or obtained any consent from the Land Control Board for such transfer. The Plaintiff stated she could not have the land transferred to the Defendant's wife as she explained the wife was also used to drinking and both the Defendant and her, would have sold the land to get money to drink. The Plaintiff asserted her fears were confirmed when she discovered that the Defendant had in fact sold a portion of the land which led her to place a caution against the title to preserve the land.
6. The Defendant in his evidence testified that he was given land parcel Title No. Inoi/Kiamburi/2282 by his mother. He denied that he had any agreement with his brother, David Murimi to give him a portion of his said land. He maintained he got title to his land as did all the other children. He stated before his mother subdivided the land, all the children were residing on the land. He asserted they all attended before the Land Control Board for consent to transfer though he admitted he had not exhibited any copy of the signed transfer in his bundle of documents. The Defendant further admitted he never had the title held by his mother at the time he effected the transaction. He stated he lodged the transfer for registration on 25/1/2022 and was issued title on the same date.



7. The Defendant under cross-examination admitted that he entered into an agreement on 28/1/2022 to sell a portion of his said land. He admitted Peter Comba was his son born in 2004. He stated since his mother gave all her children land including himself, there should be reason for anybody to interfere with his dealings relating to his land. The Defendant maintained he held a valid title to his parcel of land.
8. The parties filed written submissions following the conclusion of the trial. The Plaintiff filed her submissions on 2nd December, 2022 while the Defendant filed his submissions on 31st January, 2023. I have reviewed the pleadings and considered the submissions filed by the parties and the issues that arise for determination are as follows:-
 - i. Whether the Defendant's acquisition of title to land parcel Inoi/Kiamburi/2282 valid and/or whether he acquired the title fraudulently?
 - ii. Whether the register of land title Number Inoi/Kiamburi/2282 should be rectified, and if so, in what manner?
 - iii. Who bears the costs of the suit?
9. It is not disputed that the Plaintiff, the Defendant's mother was the registered proprietor of land parcel Inoi/Kiamburi/1359 which she subdivided to create land parcels Inoi/Kiamburi/2281 to 2285 as per the copy of the Mutation dated 27/11/2021 exhibited in the Plaintiff's bundle of documents. The Plaintiff further exhibited a copy of the Title deed for land parcel Inoi/Kiamburi/1359, which shows she issued Title to the land on 24th February, 2017. The issue is whether after subdividing the mother title, the Plaintiff freely and voluntarily transferred land parcel Inoi/Kiamburi/2282 to the Defendant. The Plaintiff in her evidence denied that she did. The Plaintiff stated the defendant was irresponsible owing to his drinking habits and for that reason she stated that she did not wish to transfer the portion of land to the Defendant's name directly as he would sell the land which would render the children (her grandchildren) destitute which she did not wish to happen. The Plaintiff denied she executed any transfer in favour of the Defendant and neither did she attend the Land Control Board to seek consent to facilitate the transaction.
10. Evidently, the Court is placed in a position where one party asserts while the other party denies. The Plaintiff asserts the Defendant could only have obtained the title to land parcel Inoi/Kiamburi/2282 fraudulently as she never signed any transfer in his favour and/or sought the Board's consent for such transaction. The Plaintiff explained that she wished that the parcel of land should be held in trust for the minor children of the Defendant and it was in that regard she and her son David Murimi were to be registered as Trustees for Peter Comba Wachira (a minor) and in that regard applied for and obtained consent for that transaction.
11. I have carefully evaluated the documents exhibited by both parties. The Plaintiff exhibited an abstract of title (green card) for land parcel Inoi/Kiamburi/2282 which shows that the register was opened on 1/12/2021 when the Plaintiff was registered as proprietor and she was issued with a Title deed on 22/12/2021. The Defendant is shown to have been registered as proprietor on 25/1/2022 and issued with a title on the same date. On 15/2/2022 the Plaintiff registered a caution against the title. The Plaintiff further exhibited an application to the Land Board for consent for transfer where her son David Murimi Kiragu were to be registered to hold the land as Trustees for Peter Comba Wachira(a minor). Letter of consent given on 16/12/2021 was exhibited by the Plaintiff.
12. The Defendant for his part exhibited a copy of the title deed for land parcel Inoi/Kiamburi/2282 issue to him on 25/1/2022 a sale agreement entered between him and one Danson Njeru Wangai for sale of a



portion of the land dated 28/1/2022 and a copy of letter of Consent for subdivision of the suit land into 3 portions. The Plaintiff in her Affidavit in support of the Originating Summons under paragraphs 10 and 11 of the Affidavit specifically denied having participated in having the suit property transferred to the Defendant. The Plaintiff in the said paragraphs deponed as follows:-

- 10 That the Defendant never obtained any varied consent from the Land Control Board in Kirinyaga County in respect of the parcel of land known as Title No. Inoi/Kiamburi/2282 and any consent obtained by the Defendant must have been procured fraudulently by the Defendant without my consent.
- 11 That I never signed any transfer forms nor authorised the transfer of land known as Title No. Inoi/Kiamburi/2282 to the Defendant herein and any transfer forms lodged with the Land Registrar to transfer parcel of land known as Title No. Inoi/Kiamburi/2282 to the Defendant must have been procured fraudulently by the Defendant without consent.
13. It is thus evident that the Plaintiff was challenging the authenticity of the title held by the Defendant over land parcel No. Inoi/Kiamburi/2282. The Defendant therefore was aware that the title he held was under challenge and it was incumbent upon him to demonstrate how he acquired the title. The Defendant did not exhibit any application for Land Board consent or any letter of consent sanctioning the transfer of the suit property from the Plaintiff to himself. The Defendant equally never exhibited any instrument of transfer signed by that Plaintiff to himself which he utilised to have the property registered in his name.
14. In his evidence, the Defendant stated he did not have the original title held by the Plaintiff over the suit property at the time he sought to be registered as owner. This was in clear contravention of Section 31 of the *Land Registration Act*, 2012 that requires that the original title be produced unless the Land Registrar dispenses with such production. Section 31 of the Act provides as follows:-
 31. (1) If a certificate of title or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease.
 - (2) Where the disposition is a transfer, the certificate shall, when produced, be cancelled, and in that case a new certificate may be issued to the new proprietor.
 - (3) Where the disposition is a charge, the certificate shall be delivered to the chargee.
15. Under Section 7 of the *Land Registration Act*, 2012 the Land Registrar inter alia is required to maintain a land register and parcel files for each registered parcel of land containing the instruments and documents that support subsisting entries in the land register. The Defendant having taken note of the fact that the Plaintiff was challenging his title, and specifically the Plaintiff having indicated she never obtained any consent for the transfer and/or signed the alleged transfer, the burden shifted to the Defendant to demonstrate how he acquired the title. He had to show there was a consent to transfer and that the Plaintiff had indeed signed a transfer.
16. Under Section 26(1) of the *Land Registration Act*, 2012 a proprietor's title can be challenged on the grounds that the title was fraudulently and/or irregularly acquired and/or that the title was unprocedurally and illegally acquired. Section 26(1) of the Act provides as follows:-
 26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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, unprocedurally or through a corrupt scheme.
17. The Plaintiff has placed reliance in her submissions on the Cases of *Alice Chemutai Too v Nickson Kipkurue Korir & 2 Others* (2015)eKLR and *Munyu Maina v Hiram Gathia Maina*(2013) eKLR. In the latter case the Court of Appeal held as follows:-

“----- We state that when registered proprietor’s root of title is under challenge it is not sufficient to dangle the instruments of title as proof of ownership it is this instrument and of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need to be noted on the register. It is our considered view that the Respondent did not go this extra mile that is required of him and no evidence was led to rebut the Appellants testimony.”

Munyao, J in the Case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* (2016) eKLR faced with the issue of two competing titles issued over the same parcel of land to two different parties pointedly observed as follows:-

- 31). A Court faced with a case of two or more titles over the same land has to make an investigation so that it can discover which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles ----- No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case on the title document they hold; Every party must show that their title has a good foundation and passed properly to the current holder -----“.
18. The Defendant in his submissions has contended that though the Plaintiff pleaded fraud on the part of the Defendant in the acquisition of title to the suit property, no particulars were given and there was no proof of any fraud. The Defendant submitted he was not party to any fraudulent dealing maintaining that the Plaintiff had freely and voluntarily transferred the suit property to him. The Defendant relied on the Case of *the Estate of the Late Muriungi M’chuka(alias Miringu M’Gichuga) v M’chabari Kinoro* (2022) eKLR in support of the proposition that since the Land Registrar was neither joined as a party or called as a witness the documents emanating from the Land Registry are taken to be valid and not fraudulent. With respect I think the Defendant has misconstrued the Plaintiff’s contentions. The Plaintiff contention was that she had not transferred the suit property to the Defendant and in case there was any instrument of transfer, the same was not signed by her and/or must have been fraudulently obtained.
19. The Defendant as earlier noted never exhibited any instrument of transfer and it remains a mystery how the transfer to the Defendant was achieved. The abstract of title Inoi/Kiamburi/2282 exhibited shows the Plaintiff was issued title to the land in her name on 22/12/2021. If that was the case, did the Plaintiff apply for consent to transfer the land to the Defendant? Did she execute any transfer in favour of the Defendant? Did she surrender the title to the land for cancellation to facilitate the transfer to the Defendant? These are pertinent questions to which no plausible answers were given or provided. The



- Plaintiff stated she never applied for consent to transfer the suit land to the Defendant; never executed any transfer; and/or surrender the original title for cancellation.
20. The evidence by the Plaintiff was not rebutted by any evidence from the Defendant. The Defendant himself admitted he never had the original title from the Plaintiff when he processed the transfer and it is therefore baffling how the Land Registrar went ahead to register a transfer when the original title was not produced for cancellation. There was no notation by the Land Registrar that he dispensed with the production of the original title. The provisions of Section 31(1) of the [Land Registration Act, 2012](#) were in essence not complied with.
 21. The Court considers the evidence of the Plaintiff believable. There would have been no reason, if the Plaintiff had freely and voluntarily transferred the suit property to the Defendant for her to within less than a month later to apply to register a caution over the land as a claimant on 15/2/2022. The Plaintiff appears to have had a valid premonition that if she transferred the land to the Defendant he would sell the land, as the Defendant as soon as he got the land somehow transferred to his name on 25/1/2022, he on 28/1/2022 had a sale agreement for a portion, of the land made with a third party. It is also rather intriguing that the Defendant appears to have made an application to subdivide the suit land even before he was registered as the owner. The copy of the letter of consent for subdivision of land parcel Inoi/Kiamburi/2282 indicates the application was made on 20/1/2022 yet the Defendant was registered as the owner of the land on 25/1/2022. The Defendant could not have properly applied to subdivide land that he was not the registered owner of.
 22. On my evaluation of the evidence, it is my view that the Defendant has failed to demonstrate that he procedurally and regularly got the suit property transferred to himself. In the face of the Plaintiff's assertion that she never signed a transfer in favour of the Defendant, the Defendant had a duty to demonstrate that there was a transfer and that the same was signed by the Plaintiff. In the absence of any evidence that consent to transfer was sought and obtained, and in the absence of any instrument of transfer duly signed by the Plaintiff coupled with the fact that the Plaintiff was not required to surrender the original title, the irresistible conclusion that the Court reaches is that the Defendant did not acquire the title to the suit property procedurally and lawfully. The Defendant has simply failed to prove the legality of how he acquired the title to the suit property. As was observed by the Court of Appeal in the Case of [Munyu Maina v Hiram Gathia Maina](#)(*supra*) the root of the Title held by the Defendant was under challenge and he had to demonstrate how he legally acquired it. That he failed to do.
 23. From the evidence, the Plaintiff's intention in subdividing the mother title land parcel Inoi/Kiamburi/1359 was so that he could allocate to her children. Land parcel Inoi/Kiamburi/2282 was intended for the Defendant and that was where the Defendant resides with his family. The Plaintiff however did not want to transfer the land to the Defendant's name since she was apprehensive he would sell and render the children(Defendant's) landless. It is not clear how the Plaintiff's other son, David Murimi Kiragu came to have an interest over a portion of the land that was intended for the Defendant. The consent obtained by the Plaintiff dated 16/12/2021 to have her and her said son registered as Trustees for Peter Comba Wachira(minor) shows the said David Murimi Kiragu was to get a portion of 0.05 Ha out of the suit land. The assertion that the said David Murimi Kiragu was given land parcel number Inoi/Kiamburi/2283 was not disputed. There was no explanation why the said David Murimi Kiragu was to get a portion out of the land that was intended for the Defendant and/or why the Plaintiff did not give him the portion when she was subdividing the mother title. The Court finds no justification for David Murimi Kiragu to get a share of the portion that was according to the Plaintiff intended for the Defendant and his family.



24. The Court having found that the Defendant had not procedurally and regularly obtained title to the suit property, the Court is satisfied that the register of land parcel Inoi/Kiamburi/2282 needs to be rectified and the title reverted to the Plaintiff's name. The Plaintiff upon subdivision of the mother title had a right to determine to whom she would transfer the subtitles. She has indicated that her intention was to have the suit land transferred to her grandchildren (the Defendant's children) since she did not trust the Defendant would not sell the land. Though the Plaintiff's action would amount to spiting the Defendant, it was also a safeguard to ensure her grandchildren had a place of abode. The Defendant has shown a propensity to sell and it cannot be said the Plaintiff's fears were farfetched.
25. On the basis of my evaluation, discussion and analysis herein above, I am satisfied the Plaintiff has on a balance of probabilities proved her case. I accordingly enter Judgment in favour of the Plaintiff and make the following final orders:-
1. The title number Inoi/Kiamburi/2282 issued to the Defendant was unprocedurally and irregularly issued and the same is hereby revoked and cancelled.
 2. The Land Registrar Kirinyaga County is hereby ordered to register the Plaintiff Grace Wainoi Kiragu as owner of land parcel Inoi/Kiamburi/2282 to hold in trust for Peter Comba Wachira(minor) together with his other siblings.
 3. Each party shall bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 20TH DAY OF APRIL 2023.

JOHN M. MUTUNGI

E.L.C - JUDGE

