



REPUBLIC OF KENYA



**Gachui v Gachui & 7 others (Environment & Land Case 340 of 2015)
[2023] KEELC 18510 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18510 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 340 OF 2015**

J OMANGE, J

JUNE 15, 2023

BETWEEN

MARY NYAMBURA GACHUI PLAINTIFF

AND

JOSEPH NDICHU GACHUI 1ST DEFENDANT

WAWERU WANJIRU 2ND DEFENDANT

EDITH MUGURE GACHUI 3RD DEFENDANT

HANNAH NJOKI GACHUI 4TH DEFENDANT

MARGARET NGENDO GACHUI 5TH DEFENDANT

GRACE WAMBUI GACHUI 6TH DEFENDANT

MARGARET WANJIKU WAWERU 7TH DEFENDANT

RUTH NJERI GACHUI 8TH DEFENDANT

JUDGMENT

1. This suit relates to the property Dagoretti/Ruthimitu/1236 hereinafter referred to as the suit property.
2. Vide a plaint dated April 21, 2015, the plaintiff prayed for the following orders;
 - (a) a permanent injunction restraining the Defendants by themselves, servants, agents, employees and any other persons claiming under them from interfering or in any way developing, constructing, alienating, transferring or in any other way dealing with the parcel of land Dagoretti/Ruthimitu/1236.
 - (b) vacant possession of Dagoretti/Ruthimitu/1236.



- (c) eviction orders against the Defendants from the suit property Dagoretti/Ruthimitu/1236.
 - (d) the sum of Ksh 169,600 and any further sums collected by the defendants as rent from the suit property.
 - (e) General damages for trespass.
 - (f) Mesne profits.
3. The plaintiff averred that at all material times she was and is the registered owner of the suit property which she was gifted by her late husband John Gachui Waweru in 2012. She deponed that upon her husband's death, she was violently evicted from the suit property by the Defendants who have been collecting monthly rent of Kshs 21,200 from the property.
 4. The Defendants filed a defence and counterclaim in which they averred that they are children of the deceased John Gachui Waweru. They contend that while it is true that the plaintiff is the 2nd wife of their late father, it is not true that he willingly gifted her the suit property. It is their contention that she coerced him to transfer the suit property to her. Further, they insist that the suit property was developed by their late mother and as such was family property. They denied evicting the plaintiff who they allege ran away after being questioned about the proceeds from property she convinced their father to sell. In the counter claim the defendants prayed that the plaintiff's title be cancelled and the title revert back to their father's estate so as to be subject to succession proceedings.
 5. The plaintiff, Mary Nyabwa Gachui testified in support of her case. She relied on her witness statement dated April 21, 2015. She told the court that the defendants are children to her late husband to whom she was a second wife. It was her evidence that her husband transferred the suit property to her on March 13, 2012. A file was opened on October 14, 2013 but title was only issued on July 31, 2014 by which time her husband had died. She denied that she obtained the land through fraud, insisting that her husband was sane when he transferred the property to her.
 6. Upon cross examination she stated that she was married in the year 1998 but the marriage was formalized on May 11, 2005. She said that the suit property was hived off 901 which was divided into 6 on September 15, 2010. The suit property has the graves of her late husband and his wife who died in January, 2004.
 7. The First Defendant Joseph Ndichu Gachui told the court he belonged to the first family of Ruth Njeri the first wife. He told the court he was released from jail in 2014 to find that his father was ill. His father told him he had a stroke and told him to go to land 1025. He denied that they were involved in the wedding between Mary and his late father. He testified that he was given 1025 by his father. He insisted that the plaintiff was given plot c and not the suit property which he contended was developed by his late mother. He said he witnessed sale of land to the church. He also sold 1025 for Kshs 5.5 million and the money was shared by himself, his brother who is husband to the 5th Defendant and his father. He said that when his father died, the plaintiff tried to sneak out at night with all the household items. When they alerted the police, she disappeared.
 8. Upon cross examination, during which he was visibly agitated and at times shouted, the Defendant confirmed that his father bequeathed 1095 to him. He insisted that 901 was in his father's name. He said that he is not receiving rent from the houses on the suit property.
 9. Both parties filed submissions. Counsel for the plaintiff identified the following issues for the court's determination; Whether the plaintiff is the registered owner of the property of LR Dagoretti/



- Ruthimitu/1236 Whether the plaintiff's title to LR has been acquired fraudulently and whether the same should be cancelled? Whether the plaintiff is entitled to the prayers sought?
10. Counsel submitted that the fact that the plaintiff is the registered owner is *prima facie* evidence she is the proprietor. On the question of whether fraud was proved counsel submitted that this was not proved to the required standard. Lastly counsel urged the court to grant the orders as prayed.
 11. Counsel for the defendant on their part submitted that the suit property is matrimonial property owned by the children's father and their mother who contributed to the development. Furthermore, counsel argued that the defendants being the children of the deceased should have been involved in the consent proceedings.
 12. Having considered the pleadings, the submissions by both counsel and the authorities I find the following issues for determination by the court; Whether the plaintiff's title was obtained fraudulently and whether it should be cancelled? Whether the plaintiff is entitled to the prayers sought?
 13. It is common ground that the plaintiff is the registered owner of the suit property. Both parties agreed on this point. In *Kiplangat Shelisbeli Mutarakwa vs Joesph Rotich Kones*, Nakuru ELC No 171 of 2014 the court reiterated that a certificate of title is *prima facie* evidence of proprietorship. This is in line with Section 26 of the [Land Registration Act](#) which provides;
 14. Section 26 of the [Land Registration Act, 2012](#) provides;
 - “(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.”
 15. A registered owner of land thus enjoys full protection of the law as save for in circumstances outlined in Section 26 of the [Land Registration Act 2012](#). Grounds on which a title can be defeated include fraud, misrepresentation or acquisition of title illegally, unprocedurally or through a corrupt scheme.
 16. Section 112 of the [Evidence Act](#) stipulates that “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
 17. In the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR, Tunoi JA (as he then was) stated as follows:
 - “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is



also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

18. It is the defendant case that the title held by the plaintiff was fraudulently obtained as their father transferred the land to her when he was not in a proper state to do so. The evidence does not support the allegation that John Gachie Waweru was not of sound mind when he made this transfer. It is the evidence of the 1st defendant that after he came back from jail in 2014 his father was able to give him as his son land no 1025. The Defendant also admits that they shared the proceeds from sale of land in the family. How could it be that the deceased was of sound mind when gifting property to the Defendant and even selling the same, but not of sound mind when transferring the property to his wife who he wedded in church before God and man? Furthermore, the defendant did not produce any medical evidence to prove the allegations.
19. On the other hand, the plaintiff narrated the steps that she went through to acquire the title. I am satisfied that all steps were followed in obtaining the title. The Defendant tried to suggest that the suit property is matrimonial property. The *Matrimonial Property Act* provides for rights and responsibilities of spouses in relation to matrimonial property. These rights and responsibilities do not extend to children more so in cases where the children have been given their own property such as in the instant case. There was no evidence adduced to prove that it was given her to hold on behalf of the children who had been given their own share of the inheritance.
20. In the end I find that the plaintiff herein was a lawfully wedded wife of the deceased John Gachui Waweru who found it fit to gift her the suit property and registered it in her name. she is entitled to vacant possession without interference from the Defendants.
21. Regarding the prayer for trespass, I find that this was not established as it was not proved that in the first instance the Defendants had entered the land without permission of the Plaintiffs. It was equally not established that the houses on the suit property had tenants and the amount each was paying.
22. In the final result Judgement is entered for the plaintiff against the Defendants as follows;
 - a. A permanent injunction be and is hereby issued restraining the Defendants by themselves, servants, agents, employees and any other persons claiming under them from interfering or in any way developing, constructing, alienating, transferring or in any other way dealing with the parcel of land Dagoretti/Ruthimitu/1236.
 - b. Vacant possession of Dagoretti/Ruthimitu/1236.
 - c. Eviction orders be and is hereby against the Defendants from the suit property Dagoretti/Ruthimitu/1236.
 - d. Costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF JUNE 2023.

JUDY OMANGE

JUDGE

In the presence of:

Mr. Muhuhu for the Defendants

Ms Muthui holding brief for Mr. Kang’ethe for Plaintiff



Steve - Court Assistant

