



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimani v Gitau (Sued on his behalf and his capacity as the Administrator  
of the Estate of Gitau Karonga) (Environment & Land Case  
777 of 2016) [2023] KEELC 18178 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18178 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 777 OF 2016**

**AA OMOLLO, J**

**JUNE 15, 2023**

**BETWEEN**

**MICHAEL KIMANI ..... PLAINTIFF**

**AND**

**GEORGE KIMANI GITAU (SUED ON HIS BEHALF AND HIS  
CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF GITAU  
KARONGA) ..... RESPONDENT**

**JUDGMENT**

1. Vide a plaint dated 10<sup>th</sup> July, 2016, Michael Kimani sued George Kimani Gitau in his own behalf and in his capacity as the administrator of the estate of the estate of Gitau Karonga – deceased. The plaintiff pleaded that the suit property has been the subject of previous litigation in Civil Suit No. 2940 of 1992 where Angawa J. entered judgment as follows;
  - i. It was declared that the Mweya holds Dagoretti/Kangemi/7 in trust for himself, Gitau and others.
  - ii. Mweya do execute all the documents necessary to effect the sub-division and transfer.
  - iii. Mweya do sub-divide and transfer the suit premises into the names of Gitau and himself.
2. The plaintiff avers that by the time of Mweya’s death, he had not signed any plans for sub-division or mutations. Further, that prior to determination of HCCC No. 2940 of 1992 *Gitau Karonga v Mweya Karonga*, the defendant fraudulently subdivided the parcel a Dagoretti/Kangemi/7 into parcel numbers 754 – 757 purporting to be using court order in ELC No. 20 of 1982.



3. It is pleaded by the plaintiff that the subdivisions that was done was carried out with the intention of defeating justice and trying to remove the subject property from the reach of the plaintiff and others entitled to it. That if the subdivisions continue, they will suffer loss because;
  - a. The land each of the families occupy was not ascertained by the court.
  - b. That the subdivisions presume that Gitau owned one half of the land.
4. The plaintiff avers that the subdivision were illegal, null and void as they went against the orders issued in [\*Civil Suit No. 2940 of 1992\*](#) which case in the judgment had ignored the earlier subdivision. That despite being aware of the illegal actions, on 7<sup>th</sup> July, 2016, the defendant threatened the plaintiff with eviction. He also urged that the judgment in [\*Civil Suit No. 2940 of 1992\*](#) be clarified to enable the plaintiff effectively comply as the executor of the estate of Mweya Karonga.
5. For the reasons pleaded, the plaintiff prayed that judgment be entered for him as follows:-
  - i. A declaration that the subdivision of land registered on 24<sup>th</sup> January, 1994 is fraudulent null and void and that the process of subdivision of Title Number, Dagoret/Kangemi/7 undertaken by the Gitau Karonga is null and void.
  - ii. A declaration that the opening of new registers for Title Number Dagoreti/Kangemi/754, 755, 756 and 757 and all procedural steps leading thereto are null and void and that any transfer of Title numbers Dagoreti/Kangemi/754, 755, 756 and 757 by the Defendant to any party are all null and void.
  - iii. A declaration that all transaction effected upon Dagoreti/Kangemi/7 by the Defendant or others claiming through or under him are invalid null and void and that the Registers and Titles issued for Titles No. Dagoreti/Kangemi/754, 755, 756 and 757 and any other subsequent register and titles resultant therefrom be cancelled.
  - iv. The District Land Registrar does forthwith reinstate the Register and Title for title number Dagoreti/Kangemi/7 in the name of Mweya Karonga.
  - v. The Defendant by himself, his servants or agents and others claiming through him be restrained by injunction from entering, remaining upon, using, dealing with or otherwise transacting upon on that portion of title number Dagoreti/Kangemi/7 currently occupied by the plaintiff and any other person claiming interest from the plaintiff and or the estate of Mweya Karonga and that such Order be effected under the supervision of the Officer Commanding Station Kabete Police Station.
  - vi. Costs of the suit and interest thereon at either Court rates or commercial rates as may be deemed reasonable by this Honourable Court.
  - vii. Such other or alternative remedy as this Honourable Court may deem apt to grant.
6. The Defendant filed his defence dated 4<sup>th</sup> March, 2020 denying the claim generally.
7. The hearing commenced on 3<sup>rd</sup> March 2020 with the evidence of the plaintiff Michael Kimani Kabi. He adopted his witness statement dated 15<sup>th</sup> November, 2019 and stated that the defendant is his uncle. The plaintiff avers that Mweya Karonga who he represents his estate was also his uncle. PW stated that the suit property Dagoretti/Kangemi/7 is occupied by him and other people which include the children of the Defendant. He continued to state that the title for Dagoretti/Kangemi/7 was taken by the Land Registrar from Mweya Karonga- deceased by force.



8. It is the plaintiff's evidence that title for Dagoretti/Kangemi/757 was obtained by the defendant fraudulently. He stated that Mweya Karonga died soon after the judgment in Civil Suit No. 2940 of 1992 hence he did not comply with the decree that had been issued. PW added that he has also not complied with the order because the sons of Gitau Karonga – deceased stated dealing with title for LR Dagoretti/Kangemi/7.
9. PW further states that after parcel 7 was subdivided to give rise to parcel 757 which was again subdivided into numbers 1338 – 1345 and titles were issued in the Defendant's name. He avers that the Defendant came to the land he occupies and cut down many trees with intention to evict him. He asked this court to give him the orders he prayed for.
10. In cross-examination, the witness said the land he occupies was given to him by Mweya Karonga – deceased although he does not have a title for it. He avers that he was allowed by Mweya & Gitau Karonga to occupy the land as their nephew (sister's son). The plaintiff asserted that there are boundaries on the ground for his portion which the defendant has been interfering with.
11. It is PW's contention that the land should be awarded to the whole family. In re-examination, PW clarified that there is no fence separating his portion and that of the Defendant and others. That he will execute the order in Civil Suit No. 2490 of 1992 and share the land in accordance with that decree. He produced the filed documents as P ex 1. This marked the close of the plaintiff's case.
12. The defendant gave his testimony on 24<sup>th</sup> October, 2022 relying on his sole witness. He introduced himself as a beneficiary of the estate of Gitau Karonga – deceased. He adopted his witness statement and documents contained in the list dated 4<sup>th</sup> March, 2022. He referred the court to the letter of Land Control Board Consent which shared LR No 7 to three people namely, Moses Gitau, Boniface Ndichu and Mweya Karonga. He also produced the mutation showing how the land was partitioned into the 3 names.
13. DW stated in cross-examination that the land had been subdivided around 1981 - 1985 prior to the judgment in Civil Suit No. 2490/92. He admitted that the plaintiff is his cousin and neighbour. He avers that the plaintiff lives on his share of the land and he started seeing him live there in the 1980s. He stated that Parcel No. 1345 is a subdivision of parcel 757 and the subdivision was done in 2007. He asserted that they did subdivision after succession of Gitau Karonga's estate. He admitted that he carried out subdivision while the plaintiff was living on the suit portion.
14. The defendant insisted that even if he has not produced evidence of approvals, the process had been approved. That he has severally tried to evict the plaintiff from the land. He admitted that LR 754 and 757 was created during the pendency of Civil Case No. 2490/92. He denied that the decree in 2490/92 cancelled the subdivision of parcel No. 7 into 754 and 757. This marked the close of defendant's case.
15. The parties were granted time on 24/10/2022 to file their written submissions. However, eight (8) months later, there was no submissions filed both in the portal and the physical file. I will therefore analyse the evidence placed before this court. The plaintiff's claim was premised on allegations of fraud that took place during the subdivision of Dagoretti/Kangemi/7 and the subsequent subdivision. The question for the court to answer is;
  - a. Whether or not the allegation of fraud were proved?
  - b. Who bears the costs of this suit.
16. Order 2 rule 10 (1) (a) of the Civil Procedure Rules Provides thus;

“ 10.



- (1) Subject to subrule
- (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —
  - (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and”

17. Section 107 and 109 of the *Evidence Act* Cap 80 states thus;

“ 107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

18. Has the plaintiff met the requirements of the law set out above? The plaintiff pleaded at paragraph 16 of his plaint that the subdivision was fraudulent since the court in *Case No. 2940 of 1992* had made an order for status quo pending determination of that suit. He referred the court to the copy of records for parcel No. 7 produced in evidence. I note that the register was opened in 1958 with Mwea Karonga as the first registered owner. On 3<sup>rd</sup> June, 1992, entry No. 9 is a restriction recording that no transaction should take place on the title until 12<sup>th</sup> June, 1992. Entry No. 10 referred to the withdrawal of the caution which had been registered as entry No. 4.
19. A perusal of the green card for parcel 7 therefore shows the restriction was to last until 12<sup>th</sup> June. This title was closed on 24<sup>th</sup> January, 1994 after it was subdivided. The plaintiff referred this court to an order issued on 14<sup>th</sup> July, 1992 in *Civil Suit No. 2940/92* but that order seemed not to have been registered on the suit title. In any event, disobedience of such an order ought to have been taken up before judgment was rendered in that case on 24<sup>th</sup> May, 2007. It is my considered opinion that once a decree was issued, the plaintiff cannot initiate fresh proceedings pursuing contempt on a different file from that in which the alleged contempt was committed.
20. In contesting the fraud levelled against him, the Defendant produced a copy of Land Control Board letter of Consent issued on 4<sup>th</sup> February, 1981 authorising the subdivision of parcel No. 7 into three between Boniface Ndichu Gitau Karonga and Mweya Karonga. He also produced a mutation for the proposed division that was signed by the three on 28<sup>th</sup> August, 1985 and by the provincial surveyor on 6<sup>th</sup> December, 1985. I have observed from the document that the mutation was not registered as it bears no registration dated or signature of the Land Registrar.
21. The non-registration of this mutation is corroborated by the entries in the copy of register (green card) which shows the title was closed after subdivision in 1994. It is also deducible from the documents adduced particularly the judgment in *Civil Suit No. 2940 of 1992*. That suit was filed by Gitau Karonga (father to the Defendant and who is also sued as the administrator). If indeed parcel No. 7 had been



subdivided between the three in 1985 – 1986, why would Gitau Kalonga – deceased bring a suit in 1992 some six (6) years later claiming as stake this land (whose title ought to have been closed by the subdivision of 1985).

22. To confirm that the subdivision of 1985 was never completed, paragraph 5 of the judgment in [\*civil suit No. 1940 of 1992\*](#) read;

“The land was then divided and plans forwarded to the relevant authorities in Nairobi as this area was now within the municipality. Somehow the defendant went and substituted these plans to include a third party one Michael Kamani subdividing to him one acre. The plaintiff protested. The dispute went before elder’s tribunal which held that Michael Kamani was infact never a claimant to the land. He was the son of their only sister who returned home after leaving her husband, gave birth to Michael then passed away in 1950’s. The parties father had set aside land for the children of the single or unmarried daughter. Someone may have fraudulently sold the land as such the elders ruled that Michael Kimani – who had made no claim to the suit land together with other grandchildren ought to pursue the person who sold their portion of land specifically ear marked for them. Alternately that those concerned ought to give up their portion of shares equivalent to the grand children’s share.”

23. The plaintiff herein had pleaded that the issue of the fraudulent transfer was never considered that in the previous suit (2940/92). However, the judgment clearly demonstrates the issue came up and was considered. Ang’awa J said thus at paragraph 11 and 12;

11. The Defendant filed a defence and counter-claim. In the said counter claim he alleged that whilst the suit was still subsisting the plaintiff had actually effected the sub-division. This was some time in 1994 – whilst the suit was filed in 1992. His advocate was able to rely on the case law of *Redall v. Mact Land* (1881) 17 CLD 174 whereby he argued that the suit be struck out due to his position namely, the transfer of the suit land pending the subsistence of a suit.

12. The Hon. Mr. Githinji was then the presiding judge in his ruling in 2000 stated that the main suit on trust be stayed. That the defendant now proceeds with his counter-claim. If the defendant is able to prove that the transfer was fraudulently done, then the main suit collapses and is dismissed. If the plaintiff referred the suit without fraud, then the main suit becomes alive.

19. The parties held a family meeting that culminated to the agreement of 30<sup>th</sup> November, 1980 whereby the whole land was divided amongst the three brothers as agreed upon as per a map. A sub-division was then undertaken (when the defendant was paid the usual traditional compensation as stated earlier). This sub-division was duly approved and came be known as Dagoretti/Kangemi/754 and 757. The same had been done in 1982.

24. Indeed, the judge made a finding as regards the subdivision of Dagoretti/7 and subsequent transfer of parcel 757 when she stated thus at paragraph 32;

“In this case the issue of contract does not arise. What was being disputed was the beneficial ownership. That although it is true the plaintiff did transfer the property whilst this suit is pending due to the frustration given to him by the defendant who attempted to sell the suit land whilst the suit was still pending, I would find and hold that the action of the plaintiff (deceased) would serve no useful purpose.”

25. In light of the foregoing observations made, I agree with the plaintiff that it was the Defendant Gitau Karonga –deceased, who was the plaintiff in [\*Civil Suit No. 2940 of 1992\*](#) was to get his share awarded



from Dagoretti/Kanegmi/7. Consequently, the burden shifted upon the Defendant to demonstrate that he acquired title for his parcel pursuant to the execution of the decree issued on 7<sup>th</sup> July, 2011 (produced in evidence by the plaintiff).

26. Instead, the Defendant was tracing his title number Dagoretti/Kangemi/1345 to the subdivision which the court in 2007 found to be null and void as already paraphrased in paragraph 32 of that judgment. The mutations he produced in evidence was never registered. The judge in Civil Suit No. 2940 had found that the actions of Gitau Karonga – deceased subdividing the land was null and void. This means that title for parcel No. 757 issued to the deceased on 24<sup>th</sup> January, 1994 had no value. Consequently, there was land available for the Defendant to subdivide.
27. In conclusion, I enter judgment for the plaintiff as prayed in the following terms;
- i. A declaration be and is hereby issued that the subdivision of land registered on 24<sup>th</sup> January, 1994 is fraudulent null and void and that the process of subdivision of Title Number, Dagoretti/Kangemi/7 undertaken by the Gitau Karonga is null and void.
  - ii. A declaration that the opening of new registers for Title Number Dagoretti/Kangemi/754, 755, 756 and 757 and all procedural steps leading thereto are null and void and that any transfer of Title numbers Dagoretti/Kangemi/754, 755, 756 and 757 by the Defendant to any party are all null and void.
  - iii. A declaration that all transactions effected upon Dagoretti/Kangemi/7 by the Defendant or others claiming through or under him are invalid null and void and that the Registers and Titles issued for Titles No. Dagoretti/Kangemi/754, 755, 756 and 757 and any other subsequent register and titles resultant therefrom be cancelled.
  - iv. The District Land Registrar does forthwith reinstate the Register and Title for title number Dagoretti/Kangemi/7 in the name of Mweya Karonga-deceased.
  - v. The Defendant by himself, his servants or agents and others claiming through him be restrained by injunction from entering, remaining upon, using, dealing with or otherwise transacting upon on that portion of title number Dagoretti/Kangemi/7 currently occupied by the plaintiff and any other person claiming interest from the plaintiff and or the estate of Mweya Karonga and that such Order be effected under the supervision of the Officer Commanding Station Kabete Police Station.
  - vi. Costs of the suit awarded to the plaintiff.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JUNE 2023**

**A. OMOLLO**

**JUDGE**

In the Presence of:

Mr Ojuok advocate for the Plaintiff

Mr Obara advocate for Defendant

