



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**CIVIL CASE NUMBER 61 OF 2002**

**BERNARD NGIGI HINGA.....PLAINTIFF**

**VERUS**

**MARGARET MBEERE HINGA.....1<sup>ST</sup> DEFENDANT**

**NJUGUNA HINGA.....2<sup>ND</sup> DEFENDANT**

**KIMANI HINGA.....3<sup>RD</sup> DEFENDANT**

**MBURU HINGA.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**1. Background**

The plaintiff Bernard Ngigi Hinga is the son of Naftali Hinga Karumaindo who died on the 19<sup>th</sup> May 2001. He is the step-son of the 1<sup>st</sup> Defendant Margaret Mbeere Hinga and step brother of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

2. **Land Parcel No. Elburgon/Turi Block 1/29 (MUCHATHA)** subject of this suit was registered in the name of the plaintiff's father aforementioned and a Title Deed issued in this name. On the 24<sup>th</sup> September 1997, the land parcel was transferred and title deed issued in the plaintiff's favour. On the 6<sup>th</sup> July 1999 a restriction forbidding all dealings with the land parcel without the consent of the original owner – Naftali Hinga Karumaindo, deceased - was registered against the title followed by a caution by the 1<sup>st</sup> Defendant claiming a licence interest.

That is the chronology of entries in respect of the Land parcel, subject of this suit.

**3. The Pleadings**

By his plaint dated 6<sup>th</sup> March 2002 the plaintiff sought an order of eviction of the defendants from **Land Parcel No. Elburgon/Turi Block 1/29(Muchatha)**. His claim over the suit land is stated as follows in Paragraph 4:

*“The defendants have been living on the land since 1991 and when the property was transferred to the plaintiff in 1997 the plaintiff gave them notices to vacate but they have refused and/or failed to comply.”*

He therefore sought orders of eviction against the defendants with costs of the suit.

4. In their statement of defence the defendants while denying the plaintiff's claim averred that the land in question is family land and that the transfer and registration of the Title Deed in his favour were obtained through fraud, and listed particulars of fraud, among them that:

- *The plaintiff processed the title deed in his name to the suit land without consulting other family members.*
- *Processing a title deed to the family land without the consent of the land control board.*
- *Transferring the land to himself without giving notice to the present occupants of the land.*
- *Transferring the land to himself while aware of reasonably expected to be aware that it was wrong to do so.*

5. The plaintiff by an application for summary judgment for eviction of the defendants from the suit property was disallowed on the 7<sup>th</sup> June 2002 and the court directed that the suit be heard on merits.

#### 6. Plaintiffs case

Bernard Hinga produced the **Title Deed to the Parcel No. Elburgon/Turi Block 1/29(Muchatha)** to evidence that he was the registered owner as at 24<sup>th</sup> September 1999. He testified that his late father had various land parcels at Molo, Thika and Kwa Mwaura in Keringeti that he shared to his family and that the suit property was given to his late mother while **Molo South Ikumbi Block 4/181** was given to the 1<sup>st</sup> Defendant and her children where the wives and their children lived, and that the distribution was made orally in a family meeting.

7. It was his evidence that in 1997 his father told him he would transfer the suit property to him as he had given it to his mother who had since died, that they attended the Land Control Board meeting and obtained the consent to transfer, and thereafter the land was registered in his name. He produced a copy of the Green Card **PExt.I** and transfer as PExt 2. It was upon such transfer that he gave notices to his step mother (1<sup>st</sup> Defendant) and her children to vacate the suit land. He also gave his father a quit notice upon which he moved and went to live with his daughters. It was his further evidence that upon calling several meetings with the family before the area chief and the land Registrar defendants failed to move out hence the suit.

8. Upon cross examination, the plaintiff stated that he had nothing in writing to show what parcel of land his father had allocated to which party but they knew which parcels were allocated to them. He stated that the defendants had moved out of the land but by his permission he allowed them to re-occupy. He testified that the same but in 1999 his father asked him to evict his step mother (1<sup>st</sup> Defendant) as he had purchased alternative land for her. He testified that his father divided his properties in 1987 when all the defendants were present. It was his evidence that the Land Registrar transferred the suit property to him procedurally.

9. **PW2 Joseph Mulinge Munguti** was the Land Registrar, Nakuru registry at the material time between 1996 to 2000. He produced a certified copy of the **Green Card** (Exh1) and confirmed that the first entry from the government was title to the plaintiff's father, Naftali Hinga Karumaindo. He confirmed signing the Title Deed issued to the plaintiff.

10. He also produced the Transfer of Land Form (PExt 2) from Naftali to Bernard Hinga, and that signatures were attested by an Advocate. He testified that a complaint was registered in 1999 that the title was transferred without the official owners authority. He told the court that he summoned the parties but only the plaintiff and his sisters appeared but his father failed to attend. Upon cross examination, the

Land Registrar (PW2) upon cross examination, the Land Registrar confirmed that if land transfer is a gift, an instrument of gift should be drawn and if it is a sale, a agreement is drawn and kept by the parties, and transfer reflects the consideration the purchase price. He continued that before the transfer is effected, stamp duty should be paid by affixation of Revenue stamps.

11. Shown the Transfer form, the Land Registrar confirmed that it had no signature of the land registrar and no evidence of stamp duty payment.

On the green card, he stated that no consideration was indicated. He further testified that consent to transfer by the Land Board was missing and Minutes of the Board that indicate when a consent is given were also missing. An Application for consent of Land Control Board "DMFI" was produced.

12. He stated that the suit property was purchased on 18<sup>th</sup> September 1997 but no letter of consent was given. He testified that in 1999 when complaints arose, he referred the transaction to the Criminal Investigating Department for investigations. He did not know the outcome of the investigations.

### 13. **Defence Evidence**

The first defendant Margaret Mbeere Hinga testified as DW1. She produced the death certificate of the original owner of the suit property, her husband and father of the plaintiff. He did not know outcome of the investigations.

She testified that notice to vacate the suit land was issued to her, her husband and her children by the plaintiff, and upon the registered owner, the 1<sup>st</sup> plaintiff's husband confirming that the title Deed was missing from his custody, they reported to the C.I.D, and also lodged a complaint at the Lands office, Nakuru.

14. Upon cross examination, **DW1** denied knowledge that the registered owner then - gave the suit land to the plaintiff. She denied any family meeting where the land was given to the plaintiff. She denied that her husband had any other land save the suit land. She clarified that at time of the complaint at Lands office her husband was very sick and he died two weeks after.

### 15. **DW2 was the Nakuru Land Registrar in 2012**

He did not have the file in respect of the suit parcel stating that it could not be traced. He however produced a certified copy of register showing all transactions - PExt 1 (Green Card) showing all transactions in respect of the land parcel.

16. Upon closure of the respective parties cases, written submissions were filed. I have considered the pleadings, the evidence and submissions.

The issues that arise for determination in my view are three fold:

1. ***Whether the Defendants are trespassers on the plaintiffs suit land.***
2. ***Whether the transfer of the suit land to the plaintiff was fraudulent and illegal.***
3. ***Whether the plaintiff has proved his case to the required standard, and therefor entitled to reliefs sought in his plaint.***

### 17. **Analysis of Evidence, submissions and determination**

There is no dispute that the plaintiff's father, the Late Naftali Hinga Karumaindo was the original owner of the suit land upto the 24<sup>th</sup> September 1997 when the plaintiff procured transfer and registration in his favour, after which he ordered his stepmother, his father and step brothers to

vacate from the said.

What is for determination is whether the said transfer was indeed pursuant to an alleged gift of the suit land by his father during his lifetime or the transfer was fraudulently procured.

18. By the nature of the plaintiffs pleadings in Paragraph 4 of the Plant, it is evident that he considered the defendants as trespassers.

By their joint defence, the defendants alleged a scheme of fraudulent transfer of the family land to the plaintiff, to their exclusion.

19. In a bid to prove that the transfer to himself was genuine, the plaintiff produced a transfer document that was purportedly executed by his father and himself before an advocate. A scrutiny of the transfer form showed that it was not signed by the Land Registrar, a fact confirmed by Land Registrar (PW2). The said transfer too lacked evidence of payment of stamp duty by affixation of revenue stamps.

If the transfer was as a result of a gift as alleged, the instrument of a gift ought to have been presented to the Land Registrar and a valuation assessed on the gift. The property being an agricultural property, a Land Control Board consent to transfer ought to have been obtained. These very vital documents having not been evidenced, the Land Registrar reported the matter to the Criminal Investigation Department(CID) for investigation as it appeared that the registered owner had not given authority and consent for the transfer. No doubt that when the plaintiff was asked why he did not produce the Land Control Board consent, he had no answer. DW2, the Nakuru Land Registrar in 2012 confirmed that the original file in respect of the suit land could not be traced hence the Land Control Board Consent to transfer the property could not be found.

20. It is not in tendem that upon transfer of the suit land to himself allegedly by his father, the plaintiff evicted his very own father from the suit land whereupon he went to live with his daughters! This in itself, coupled with the failure of the father to attend the Land Registrar to confirm that he indeed transferred the land to the plaintiff, is evident that there were no other land left for the plaintiffs father to occupy save for the suit land, as stated by the 1<sup>st</sup> Defendant, the plaintiff's step mother.

It is quite evident that the alleged gift of the suit land to the plaintiff was tainted with fraud and illegalities.

21. The **Law of Contract Section (3) (3)** is categorical that any disposition in land must be in writing. No sale agreement was produced by the plaintiff. If the suit land was a gift, no instrument of gift was produced. No Land Control Board consent was procured in terms of the **Land Control Act, Section 6**. It is trite that any transfer involving agricultural land is void unless it was done with the consent of the Land Control Board of the areas or division where the land is located. Production of a Land Control Board application form cannot cure the clear legal requirement. - See **Section 6 of Land Control Act**.

22. In **Civil Appeal No. 5 of 2014 Evanson Wambugu Gachugi -vs- Simon Wainaina Gatwiri & 2 Others (2014) e KLR**, in a situation where the transfer of land was not proceeded by a sale agreement, any payment of consideration and no Land Control Board, the court had no hesitation to declare the whole transaction fraudulent and rendered that there was a scheme of cover-up. This is the case in this case where no sale agreement was produced nor did the Land Registrars produce the file in respect of the land parcel to confirm nor any necessary documents. It is not clear why given the knowledge as exhibited by PW2 – Land Registrar Mr. Munguti – he proceeded to register the transfer and issue a title to the plaintiff without any of the documents. Collusion between the plaintiff and the Land Registrar to unlawfully and fraudulently transfer the land in question to the plaintiff cannot be ruled out.

23. Likewise in the case **National Bank of Kenya Ltd -vs- Wilson Ndolo Ayah, Nairobi C.A.No. 119 of 2002**, the Judges made findings that invalid documents of transfer could not pass an interest in property to a third party.

24. **Section 26** of the **Land Registration Act 2012** states:

***“26 (1) The certificate of title issued by 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, --- and the title to 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.”***

25. The purpose of the above section is to offer protection of a proprietor of land from being deprived of his land illegally and unprocedurally. The transactions pertaining to the present case are evidently clear that the original land owner, the plaintiff's father was deprived of his land by his own son through a corrupt scheme with the Land Registry officials. That title can not stand and must be revoked, and cancelled.

See **ELC Case 51 of 2014 (O.S.) Alice Chemutai Too -vs- Nickson Kiplurui & 2 Others (2015) e KLR.**

26. Once the court has made findings that the title to land was obtained by fraud as is the case in this case, the law allows the court to order cancellation and rectification of the register. See Alice **Chemetai Case (Supra)**.

27. **Section 80(1) Land Registration Act 2012.** States:

***80(1) “ Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”***

28. The defendants claim over the land is that it is family land where they have lived with the registered owner, and therefore beneficial ownership as opposed to being trespassers.

The proprietor of the suit land died at 83 years on the 19<sup>th</sup> May 2001 as confirmed by the death certificate four years after the fraudulent transfer of his land to the plaintiff. He was buried in the suit land and only after his death did the plaintiff give notice to the defendants to vacate the suit land where the 1<sup>st</sup> defendant had lived in from 1971 when she was married and where all the children including the 2<sup>nd</sup> to 4<sup>th</sup> defendants were born and lived.

It is clear from the evidence tendered by the plaintiff and the defendants that all of them have beneficial interest in the suit land as wife and children of the deceased. No evidence was led before the court that there was any succession cause taken out by any of the parties in respect of the deceased estate.

29. Having made a finding that the suit property was fraudulently transferred, and therefore null and void, it is a candidate for cancellation and rectification under **Section 80(1) of Land Act 2012**, and guided by the Law of Succession Act stated in **Cap 80** the suit property ought to revert back to the original proprietor, and to form part of the deceased's proprietors estate, for distribution to the lawful beneficiaries, including the plaintiff.

In its totality, the plaintiff-has not proved to have obtained title to the suit property legally and procedurally. All evidence pointed to a corrupt scheme that led to the original proprietor being deprived of the title. The original proprietor is dead as I have stated above.

The defendants have shown and demonstrated their beneficial interest in the suit including the plaintiff. They can not be trespassers and no acts of trespass were demonstrated.

30. For those reasons, I come to the conclusion that the plaintiffs suit is devoid of merit and he is therefore not entitled to the orders of eviction against the defendants. Consequently, I come to the following determination:

***1. That the plaintiffs suit is hereby dismissed with costs to the defendants.***

***2. An order that the Title Deed over Property known as Title Number Elburgon/Turi Block 1/29 (MUCHATHA) issued on the 24<sup>th</sup> September 1997 in the names of the plaintiff, BERNARD NGIGI HINGA be cancelled forthwith by the Land Registrar, Nakuru County.***

***3. That the Land Registrar, Nakuru County is hereby ordered and directed to rectify the register and restore to the original proprietor Naftali Hinga Karumaindo, deceased, the suit Title Land Parcel No. Elburgon/Turi Block 1/29(Muchatha) to form part of the deceased's estate for distribution to the lawful beneficiaries in a succession cause to be filed, in accordance with the provisions of the Succession Act, Cap 60 Laws of Kenya.***

***4. That a declaration is issued that the defendants are not trespassers on the suit property but beneficiaries, and shall not be evicted therefrom pending filing and determination of a Succession Cause as stated in 3 above.***

***5. That the plaintiff shall pay costs of the suit to the Defendants.***

**Dated, Signed and Delivered this 13<sup>th</sup> Day of April 2017.**

**J. N. MULWA**

**JUDGE**