



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

LAND CASE NO. 1757 OF 2001

STEPHEN WAITHAKA GATUMBI *As administrator*

of the Estate of GATUMBI WAITHAKA (DECEASED)....PLAINTIFF

VERSUS

FRUMENCE KARIUKI MURIU *As administrator*

of the Estate of MORRIS MURIU

MAGUTANGEA (DECEASED).....DEFENDANT

J U D G M E N T

1. This case is 16 years old. It is unique in that both the persons who are said to have transacted over the land are deceased. Their children now administrators of their late parents' Estates, are now struggling to establish their respective claims over the suit land that is said to have been dealt with by their parents in the 1960s, more than fifty years ago.

2. The file before me is a reconstruction of the original file. The original plaint appears to have been filed on **17/10/2001**. The application for reconstruction was filed on **7/8/2011**. Parties later complied with the rules and filed witness statements and copies of documents and this case finally proceeded to hearing on **22/5/2017**. The plaintiff and the defendant and their witnesses testified in court and adopted their written statements. Thereafter the parties filed written submissions.

3. In this plaint, the claimant as the Administrator of the Estate of one **Gatumbi Waithaka** (deceased) states that his father was registered on **24/5/1958** as owner of all that land parcel known as **Kiganjo/Mundoro/460** comprising of **11.04 acres** or **4.52 Hectares**; however, he states, on or about **27/5/1965**, the defendant's father one **Morris Muriu Ngea** allegedly transferred to himself two out of the eleven acres out of **Kiganjo/Mundoro/460**. It is alleged that this transfer was done fraudulently and without the knowledge of the plaintiff's father.

4. It is alleged by the plaintiff that there was no sale or gift of any of the two acres by the plaintiff's father to the defendant's father; that the plaintiff's father never executed any transfer form or attend before the Gatundu Land Control Board for the procurement of a consent to transfer; that the transfer that is alleged to have effected the transaction is a forgery; that the thumbprint appended to the alleged transfer does not belong to the plaintiff's deceased father, and that there is a discrepancy in that the Land Registrar shows that the defendant's father was registered as owner on **27/5/1965** yet the transfer said to have effected the change of ownership is dated **13/6/1965** and it was registered on **25/2/1965**.

5. By **Succession Cause No. 1448/1993**, the plaintiff states, the defendant was registered as owner as

Administrator of a 2/11 share of LR. No. **Kiganjo/Mundoro/460** in place of his deceased father on 29/9/1994.

6. Citing fraud in the registration of the defendant's father as owner of 2/11 share of the land, the plaintiff pleads that the registration of the defendant should be cancelled and the 2/11 share of LR. No. **Kiganjo/Mundoro/460** should be registered in the name of the plaintiff as Administrator of his late father's Estate. The plaintiff specifically prays for a declaration that the defendant's father was registered on 27/5/1965 as owner of 2/11 acres out of LR. No. **Kiganjo/Mundoro/460** through fraud and his registration should be cancelled.

7. He also prays that the defendant be ordered to transfer to the plaintiff the 2/11 share of **LR. No. Kiganjo/Mundoro/460** to which he was registered as an administrator on **29/9/1994**.

8. This claim is denied vide a defence dated **7/11/2001**. By that defence, the defendant avers that his sister got married to a stepbrother of the plaintiff and that the plaintiff's father gave the defendant's father two acres out of **LR. No. Kiganjo/Mundoro/460** as bride price for that marriage. The defendant terms the allegation of fraud against his father by the plaintiff as untrue and amounting to hearsay. He states that the plaintiff petitioned for a Grant of Letters of Administration to his late father's estate in **RMC Succession Cause No. 291 of 1983** at Thika where the plaintiff stated that his father was only entitled to 9 acres out of the 11 acres comprising Land Title No. **Kiganjo/Mundoro/460** and **ipso facto** the plaintiff is estopped from claiming that his father was entitled to the whole land. The plaintiff also filed a chamber application in **HCCC Succession Cause No. 1448 of 1994** seeking to revoke the Grant issued therein, but later withdrew the same on 10/11/2000.

9. According to the defence the suit is an abuse of the court process aimed at delaying the subdivision and transfer of the suit property to the beneficiaries. The defendant pleads that the plaintiff only filed a suit after receiving notice to execute the mutation forms in respect of the land.

10. The defendant further pleads that the land records are clear as to the shares owned by the two deceased persons and also that the defendant's late father was in occupation and possession of the suit premises from 1965 to 1978 and the defendant has been in occupation from 1978 without interruption from the plaintiff. In view of that occupation, he states, the defendant is thus entitled by virtue of adverse possession to be declared legal owner of the suitland.

11. In his counterclaim the defendant seeks that he be declared the right person to administer the suitland and that the plaintiff be ordered to execute the mutation forms to pave way for the transfer of the land to its beneficiaries and in default or refusal to do so the Deputy Registrar of this court do execute the forms on the plaintiff's behalf.

12. The defendant's claims in the defence and counterclaim are denied by the plaintiff in a reply to defence and counterclaim dated **14/11/2001** filed on the same day. In that reply the plaintiff responds that 9/11 is the share that was registered in his late father's name, hence the succession cause he filed was only concerned with the 9 acres; He never relinquished his father's claim to the other two acres which, he states, could only be litigated by way of plaint and not in a succession case. He asserts that neither the defendant's father nor the defendant has been in adverse possession of the land and prays for the counterclaim to be dismissed.

13. In my view, the issues for determination by this court as follows:-

(1) Was the defendant's father registered as a co-owner of the suitland fraudulently and without the knowledge of the plaintiff's father?

(2) Did the plaintiff ever relinquish his claim to the two acres in Succession Cause No 291/83?

(3) Has the defendant become entitled to title to the property by way of adverse possession?

(4) Are the parties entitled to the prayers sought in the plaint and counterclaim respectively?

14. The issues are addressed as hereunder:-

(1) Was the defendant's father registered as a co- owner of the suitland fraudulently and without the knowledge of the plaintiff's father?

It is a requirement of law that particulars of fraud be stated in any pleading where fraud is alleged. The plaintiff particularizes the fraud on the part of the defendant's father at length in **paragraph 6** of his plaint. Central to the allegations of fraud are the averments that:-

(a) Gatumbi Waithaka did not affix his thumbprint on any transfer forms in order to transfer any land to Mr. Morris Maguta Ngea and the transfer dated 13/5/1965 is a forgery.

(b) Gatumbi Waithaka did not attend before the Gatundu Land Control Board for the issuance of Land Control Board Consent to transfer part of the suitland to Morris Maguta Ngea.

15. (a) Did Gatumbi Waithaka affix his thumbprint on the Transfer Form dated 13/5/1965 or is the said transfer a forgery?

In the court's view, the issue of forgery in the instant case transcends a mere examination of the copy of the transfer dated **13/5/1065** in this case. All the circumstances surrounding the alleged transfer, as well as its contents and the contents of other documents submitted in evidence must be looked at carefully. The issue of whether or not the thumbprints belonged to the deceased persons is an issue that is hard to determine without expert evidence. There is a transfer of an undivided share in respect of the suitland. It is dated 13/5/1965. By that transfer Gatumbi Waithaka appears to be transferring to Morris Moru some land. The transfer states that the transferees shall hold the following undivided shares:-

- Morris Moru 2/11 of share

- Gatumbi Waithaka 9/11 of share

16. The rule in evidence is that he who asserts must prove. **Section 109** of the **Evidence Act CAP 80** of the Laws Of Kenya states as follows:

"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."

17. However, in the instant case, the plaintiff alleges negatives: that there was no execution of the transfer by his father and that his father never attended any Land Board meeting. Should he still be compelled to bear the burden of proof?

18. In the case of **Francis Maina Njogu Versus Nicolas Kiragu Ngacha and John Muchina Njogu Peter Muriuki Njogu Catherine Wanjiru Kerugoya ELC Case No. 102 Of 2014 eKLR**, the court stated as follows:

"As the plaintiff denied all that, one would have expected that either the defendant or the interested parties would have availed a copy of the sale agreement signed by the plaintiff or even called as their witness, the advocate who drew it. They did neither. Since the plaintiff was alleging a negative i.e. that he did not sell the suit land to the defendant nor attend any Land Control Board, it would be impossible to expect him to produce evidence to prove the negative. In the Ugandan Case of J.K. PATEL VS SPEAR MOTORS LTD SCCA No. 4 of 1991 cited by ODUNGA J. in REPUBLIC VERSUS DISTRICT COMMISSIONER MACHAKOS J.R MISC APPLICATION No. 304 of 2013, the Court held:

“The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant”

Therefore the plaintiff having pleaded and testified that the transfer of the suit land to the defendant was fraudulent, it was the duty of the defendant to demonstrate that infact the plaintiff executed a sale agreement to that effect because the plaintiff cannot be expected to prove the negative.” (emphasis mine)

19. The parties to the transaction in the **Francis Maina Njogu** case were testifying on their own behalf in respect of their actions or non-actions. The exceptional circumstances of the instant case are such that shifting the burden of proof to the defendant may not be the proper thing for two reasons.

20. First, it is not the plaintiff who was alleged to have executed the transfer but his father who is now deceased. Though the defendant’s father occupied the suit land during that time, the plaintiff’s father never claimed fraud during his lifetime. The plaintiff, who filed this suit long after the death of his father is not in the same capacity as his father so his mere denial can not in the view of this court shift the burden of proof upon the defendant.

21. Secondly, fraud denotes a state of mind, an intent to obtain what is not lawfully one’s property yet the defendant was not the original beneficiary in the transfer of land but his father who is also deceased. The denial of fraud by the defendant in this case is sufficient to revert the burden of proof upon the plaintiff. Whereas the deceased persons, had they been alive would have given direct evidence of the events that took place, and thereby enabled an assessment by the court as to their veracity, and possibly be subject to the ordinary application of the principle that one should not ordinarily be compelled to prove a negative, the main reliance by the parties and the court in this case where the alleged actors are deceased, is upon reference to and scrutiny of documents produced by the parties. I find that the defendant would be compelled to give hearsay evidence if he were to speak on behalf of his deceased father regarding the fraud. So it suffices for him to respond to the plaintiff’s claim by saying: *“I do not know.”*

22. Those are the exceptional circumstances which at the end of the day in the instant case render the burden of proof to be remain with the plaintiff who, having asserted that the thumbprint on the transfer did not belong to his deceased father, and that his father did not attend the Land Control Board, to prove those facts.

23. The impugned transfer instrument appears to be executed by the transferor by way of thumb printing. It appears to have been received by the Land Registry for registration on 18/5/1965 vide **presentation Book No. 1729**. Registration fees of Kshs.5/= appear to have been paid upon its presentation. A receipt number for the payment receipt is indicated but the same is faint.

24. At the back of that transfer the Chairman of the Divisional Land Board by his signature certifies that the transferor Gatumbi Waithaka did appear before him on **13th May, 1965** and that he was identified by a person only identified as **Hezekiah**. However it is not indicated which thumb print belongs to the transferor and which belongs to the witness.

25. Under cross examination the plaintiff stated that his father had 3 wives and it was not possible for him to give away land without involving the children. **PW2** did not shed more light on this allegation. The court was not told whether the three wives are alive. I find that this allegation is not relevant to the issue of whether the deceased executed the transfer or not. Execution of the transfer must have been strictly an issue between the executing and the witnessing parties.

26. No expert evidence was called to prove that none of the thumbprints on the transfer belonged to the plaintiff’s deceased father. Regrettably, all we have in respect of this allegation are mere conclusory statements on the part of the plaintiff alone without any supporting evidence. I find that the plaintiff has not proved that his father never affixed his thumbprint on the transfer dated **13/5/1965**.

27. Identification by a man only known by one name as **“Hezekiah”** who did not give any other of his

identification details has been challenged as irregular. However the said “Hezekiah” appears to be known by the defendant and his witnesses as a resident in their village. According to Wanyoike Mwaura’s (DW3) Hezekiah was said to be a member of the local Land Board statement filed on 26th September 2013. Hezekiah was not called as a witness by either party. DW3 also mentions other elders who witnessed the “agreement” though he is not specific as to which agreement it was. In the light of the testimony of the defence witnesses who appear to know “Hezekiah”, I find no irregularity in the impugned identification of the parties even if only one name of the identifying party was written on the transfer for the reason that besides that identification, there was also attestation by the Chairman of the Divisional Land Board.

28. The transfer dated **13/5/1965** is also challenged by the plaintiff on the ground of discrepancies between the dates on the transfer and the dates on the Land Register. At paragraph **6(j)** of the plaint the plaintiff pleads that the defendant’s father was registered as owner **“on 27/5/65 while the transfer dated 13/5/65 states that it was registered on 25/2/65.”** With all due respect, the copy of transfer produced by the plaintiff shows the date of registration to be 27th May 1965 and not 25/2/1965. This challenge on the basis of inconsistency in the dates therefore has no basis.

29. The issue of whether the land was given by the plaintiff’s father to the defendant’s father as bride price is pivotal to the defendant’s case. The resolution of this issue may also provide further crucial evidence as to whether or not the impugned transfer was a forgery. The alleged agreement between the plaintiff’s father and the defendant’s father dated **17/5/1965** was produced by **DW1** as a handwritten document whose typed transcript or translation was not filed alongside it. I find it to be of no value in this matter in proving that there was an agreement that the land would form part of the dowry.

30. The transfer dated **13th May 1965** shows at its second page that it was registered on **27th May 1965**. It is believable upon scrutiny of this transfer that this is the document that led to the entry dated 27th May 1965 in the register. The entry on the land register dated **27/5/1965** shows that one “Morris Muru” (a subsequent name change on the register shows this turned out to be the defendant’s father) was introduced into the record on **27/5/1965**. The phrase *“proprietors in common”* and their respective was also made on the register. A certificate of marriage relied on by the defendant shows that a marriage took place between of Joseph Kamau Nganga and Salome Njeri on **3/7/1965**. This shows that the solemnization of the marriage was done not more than two months after the transfer between the parents of the bride and groom was effected. This is consistent with the general practice of payment of bride price, or at least part of it, before weddings in many African communities.

31. At a glance, it appears that the defendant’s father, rather than be issued with a separate title for a two acre portion officially partitioned from the main land parcel owned by the plaintiff’s father, was registered as a co-proprietor. Nothing could have been strange about that co-ownership especially if it was the voluntary choice of the parties to the transfer who were in any case soon to be bonded together in kinship by the imminent nuptials of their children, to be joined at the hip in the manner of co-ownership of the land in defined shares.

32. A further question that arises is if the allegation by Joseph Kamau Nganga (**PW2**) who testified at the hearing and alleged that he has never paid dowry for his wife is to be subjected to the same principle in the **Francis Maina Njogu** case (supra). However this is an issue that needed further support by way of evidence of the then cultural practice of the Agikuyu people as to whether it was the father to the groom or the groom himself who normally paid dowry. If the father of the groom is normally expected to do so, then Joseph Kamau Nganga **PW2** may as well be speaking the truth in saying he never paid dowry. However, this still does not advance the Plaintiff’s case an inch; no evidence was brought forward in the plaintiff’s evidence that dowry was supposed to be paid by the groom and not his father. Yet in his statement which was adopted at the hearing, **DW3** stated as follows:

“At the material time owing to the fact that the plaintiff’s father (Gatumbi Waithaka) had many children and meagre resources he chose to pay bride price by subdividing his parcel of land known as Title No Mundoro/Kiganjo/460 (sic) measuring 11 acres into two portions (one measuring 9 acres and the other measuring 2 acres) he gave the late Morris Muriu (defendant’s

father) 2 acres out of the said parcel of land. All these he did since he did not have the cows and goats to pay dowry.”

33. This being an issue that arose from **paragraph 4** of the defence, it was incumbent upon the plaintiff to table evidence that payment of dowry by a father of a bridegroom in the Kikuyu Community those days was not the practice. He did not.

34. It is clear that the defendant's father occupied the suit land during the plaintiff's father's lifetime. **DW3** states that the defendant's father occupied the land from 1965 till his death in 1978. The question would arise as to why the plaintiff's father never objected to the defendant's father's occupation of the land. I am inclined to believe that there was an agreement between the two old men before their demise, and it led to the execution of the transfer and its registration at the lands office, and the occupation of the land by the defendant's father. Since there is no other evidence on the record to the contrary I conclude that that agreement was based on the impending marriage of the defendant's sister to the Plaintiff's brother.

35. The circumstances analysed above are therefore persuasive that the land was given to the defendant's father as bride price. I find that circumstantial evidence points to the fact that the transfer dated 13/5/1965 was not a forgery.

36. However, before I leave this point I must address some entries in the register; a mistake appears to have been committed in the first instance when Gatumbi Waithaka was allocated 2/11 share and Morris Muru was allocated 9/11 share. The entry was corrected to reflect a 9/11 share for Gatumbi Waithaka and 2/11 share for Morris Muru. The name "Morris Muru" appears to have been changed to "Morris Muriu Maguta Ngea" on 5/1/1966 and a certificate of title was issued on 2/1/1967. These issues are of no consequence for the reason that corrections of details and registration of change of names are regular occurrences in land registers. They do not affect the finding above that the transfer was not a forgery.

37. Did Gathumbi Waithaka attend before the Gatundu Land Control Board?

The issue also arises as to whether the plaintiff's father attended a Land Board meeting. The plaintiff did not bring any evidence save that his father was 100 years old as at 1965 and that he could not leave their home without the company of the plaintiff and therefore he could not have attended the Land Control Board. However the transfer of undivided share dated 13th May, 1965 has a part of it that is executed by the Chairman of Divisional Land Board. The same document has a part in which Gatumbi Waithaka applied for consent to the transaction. Under the thumbprint of Gatumbi Waithaka, there is a line that reads "*consent given/not given*" in capital letters. The words "*not given*" are crossed out by pen. Below these words is a signature which apparently belongs to the Chairman of the Divisional Land Board. The decision of a Land Board meeting attended by members and not the Chairman sitting alone is what gives consent to transfer or denies it. As to whether there was a meeting of the Divisional Land Board and whether the minutes of that meeting exist, and as whether the application for consent to transfer 2/11 acres out of Kiganjo/Mundoro/460 from the plaintiff's father to his father was part of the agenda of such a meeting if any, the contents of the transfer form do not reveal any detail; there are no dates appearing below or alongside the thumbprint said to be Gatumbi Waithaka's or the Chairman's on the transfer form. However, the plaintiff does not exhibit any minutes showing that the transaction was not part of business deliberated upon by the Board at a meeting. He does not in any way substantiate his claim that his father could not have attended the Board meeting save giving the excuse regarding age.

38. The defendant in this case also does not produce any minutes of the Board. He only produces a clearer copy of the transfer, the same as that produced by the plaintiff, this time with an attached declaration as to whether there were permanent improvements on the land for purposes of levying stamp duty. It is also relevant that the parties appeared to thumbprint this declaration declaring that there were no permanent improvements on the suitland.

39. I find that the principal burden of proof remains the plaintiff's. He is the one alleging that someone else never attended the Board meeting. I find that the plaintiff has not proved that there was no meeting,

or approval at a meeting of the Land Board. Having found this I do not find it necessary to inquire deeper into the issue of whether the defendant himself has or has not proved that there was such a meeting. It was incumbent upon the plaintiff to prove that such a meeting never occurred. He has failed to discharge the burden of proof. I therefore find that the plaintiff has not proved that Gatumbi Waithaka never attended any Land Board meeting for the purpose of procuring consent to transfer his land to Morris Maguta Ngea.

40. Did the plaintiff ever relinquish his claim to the two acres in Succession Cause No 291/83?

It is claimed that the plaintiff is estopped from claiming that his father was entitled to 11 acres of the land for the reason that when he petitioned for a grant of letters of administration in **Thika Succession Case No 291 Of 1983**, he stated that his father was entitled to 9 acres out of the 11 acres. The plaintiff also filed an objection in **Nairobi HC Succession No 1448 of 1994** and later withdrew the same.

41. The plaintiff has explained these occurrences and I find his explanations to be proper. He states that he has not included the two acres and so he has not shared out even the 9 acres of land amongst his brothers. This is what he states in his evidence at the hearing: *“The land has not been returned so I have not given my brothers anything.”* The plaintiff had earlier in **paragraph 3** of the reply to defence pleaded that the succession cause was concerned with only 9/11 acres share of the land only. He further pleaded that the issue of the 2 acres subject matter herein could only be litigated by way of a plaint, hence his withdrawal of the objection in the succession proceedings in respect of the defendant’s late father’s estate cited herein earlier.

42. I find that there is in the record a certificate of confirmation of grant dated **24th November 1987** in respect of the 9 acres that the plaintiff and his brothers occupy. The 9 acres have been shared out as follows:

(a) *Stephen Waithaka Gatumbi-2 Acres*

(b) *Joseph Kamau Nganga - 2 Acres*

(c) *Michael Waithaka Gatumbi- 3 Acres*

(d) *Morris Karanja- 2 Acres.*

43. On the other hand the defendant produced a copy of a confirmation of grant dated **20th July 1994** in **Succession Cause No 1448 of 1993**. It shows that 2 out of 11 acres comprised in **Kiganjo/Mundoro/460** were included in the succession cause and distributed amongst the beneficiaries of the defendant’s father’s estate.

44. I find that there are no good grounds for holding that because the distribution of the undisputed assets of the plaintiff’s deceased father’s estate amounts to relinquishing the claim to any other assets that may belong to that estate in legal proceedings such as these. Supplemental proceedings in succession matters are possible. There are signs that the administrators of both estates have made much progress in distributing what was the ascertainable assets of their deceased parents. I find that there is no evidence that the plaintiff never relinquished the claim to the two acres subject matter of this suit by virtue of the restricted list of assets he filed in the **Thika Succession Case No 291 of 1983**, or by withdrawal of the objection in **Nairobi High Court Succession Cause No 1448 of 1993**.

45. Has the defendant become entitled to title to the property by way of adverse possession?

The defendant avers in the counterclaim that he is entitled to the two acres by virtue of adverse possession. The defendant testified that he had been living on the land though about five years previously, the plaintiff had encroached on a parcel thereof measuring about 1 acre. As stated before in this judgment, **DW3** stated that the land was tilled by the defendant’s father from 1965 until his demise in 1978. Thereafter the defendant took possession until the time of the statement. He added that there is an old

house on the land where a male adult of the Muriu family resides. The same was said by **DW2**. I find this to be an issue that was not well contested by the plaintiff by way of evidence and I find that the defendant is as well entitled to the two acres as administrator to his deceased father's estate under the doctrine of adverse possession.

46. Are the parties entitled to the prayers sought in the plaint and counterclaim respectively?

It is clear by now that I have found that the plaintiff has not proved his claim of fraud on a balance of probabilities. Prayers number **(a)** and **(b)** in the plaint dated 20th September 2001 are therefore not merited and the prayer number **(a)** in the defendant's counterclaim is therefore merited save for the clause on costs.

47. I have also find that the circumstantial evidence points to the fact that the transfer being impugned by the plaintiff in this case was not a forgery. It follows that the defendant is the proper person to administer the two acres of land subject matter in this suit on behalf of the estate of his late father. Accordingly the prayers numbers **(b)** and **(c)** in the counterclaim dated **7th November 2001** are merited.

48. In the end, I issue the following orders:

(a) The plaintiff's suit against the defendant is hereby dismissed.

(b) The defendant's counterclaim is allowed to the extent that:

i. The defendant is hereby declared the right person to administer 2/11 acres out of Kiganjo/Mundoro/460 registered in the name of his late father on behalf of the estate of his late father.

ii. The plaintiff will forthwith execute the necessary documents that will pave the way for the subdivision of the land and its distribution to the beneficiaries, failure to which the Deputy Registrar is hereby authorized to execute the said documents on the plaintiff's behalf.

iii. The plaintiff shall give vacant possession of the part of the suit land which he has encroached on.

(c) Each party shall bear their own costs of the suits.

Signed at Kitale on this 18th day of July, 2017

MWANGI NJOROGE

JUDGE

Dated, signed and delivered at Nairobi on this 26th day of July, 2017

K. BOR

JUDGE

Judgement read in open court in the presence of:

Stephen Gatumbi for the Plaintiffs

No appearance for the Defendant

Court Assistant – V. Owuor

K. BOR

JUDGE.