



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELC CASE NO. 209 OF 2016**

**RUTH WANJIRU KINYUA.....1<sup>ST</sup> PLAINTIFF**

**MARGARET WANJIKU NJUGUNA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ELIZABETH WANGARI NGURE.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL(Sued on behalf of County**

**Land Registrar Nakuru County).....2<sup>nd</sup> DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

1. The Plaintiffs filed a plaint dated 10<sup>th</sup> June, 2016. They aver that land parcel No. **Dundori/Muguathi Block 1/769 (Wanyororo 1)** measuring 0.9 acres, hereinafter referred to as the “suit land” , was registered in the name of Esther Njeri Kiritu (deceased).
2. It is their averment that Esther Njeri Kiritu (deceased) was the mother of the Plaintiffs and the 1<sup>st</sup> Defendant.
3. They further aver that on 17<sup>th</sup> June, 2009, the 1<sup>st</sup> Defendant fraudulently transferred the suit land to her name in disregard of the interests of the Plaintiffs.
4. It is also averred that in April 2016 the 1<sup>st</sup> Defendant went to the suit land and uprooted the crops while informing the Plaintiffs that she was the sole owner.
5. The Plaintiffs pray for judgment against the Defendants for:
  - a) *A declaration that the land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo ‘A’) was illegally and fraudulently transferred to the 1<sup>st</sup> Defendant and its rightful owner is Esther Njeri Kiritu (deceased).*
  - b) *The register of land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo ‘A’) be rectified by deleting the 1<sup>st</sup> Defendant’s names and restoring the names of Esther Njeri Kiritu (deceased).*
  - c) *Costs of the suit and interest thereon.*
  - d) *Any other or further relief.*
6. The 1<sup>st</sup> Defendant filed her statement of defence and counterclaim dated 26<sup>th</sup> March, 2018 wherein she avers that the suit land belongs to her and that it is the Plaintiffs who invaded the suit land between October and November 2015 while claiming ownership.
7. The 1<sup>st</sup> Defendant denies all the other allegations in the plaint.
8. In her counterclaim, the 1<sup>st</sup> Defendant avers that as the registered owner of the suit land, she is entitled to the rights and privileges in respect of the suit land and therefore seeks judgment against the Plaintiffs for:

*a) An order of permanent injunction restraining the Plaintiffs (now Defendants) by themselves, their agents, their servants, their surveyors and all persons claiming under them from interfering with the 1<sup>st</sup> Defendant's (now Plaintiff)'s quiet and peaceful use, occupation and enjoyment of all that parcel of land known as Dundori/Muguathi Block 1/769 (Wanyororo A) or in any other way dealing with this particular parcel of land.*

*b) Costs of this suit.*

*c) Interest on (b) above at court rates.*

*d) Any other relief this court may feel fit to grant.*

9. The 2<sup>nd</sup> Defendant in its statement of defence avers that land parcel No. **Dundori/Muguathi Block 1/769 (Wanyororo A)** measures 0.9 acres, was owned by the Government of Kenya and registered on 23<sup>rd</sup> November, 1984.

10. The 2<sup>nd</sup> Defendant also avers that the land was transferred to Njeri Kiritu Kamau on 9<sup>th</sup> May, 1988 and a title deed issued on 7<sup>th</sup> May, 1988.

11. It is the 2<sup>nd</sup> Defendant's averment that the land was subsequently transferred to Elizabeth Wangari Nguni on 5<sup>th</sup> May, 2009 and a title deed issued on 17<sup>th</sup> June, 2009.

12. It is also averred that a restriction was placed on the suit property on 28<sup>th</sup> October, 2015 prohibiting any dealings on the land without the consent of Margaret Wanjiku and Ruth Wanjiru who are claiming beneficial interest.

### **FACTUAL BACKGROUND.**

13. The Court, by an order issued on 9<sup>th</sup> November, 2017, directed that this suit be consolidated with **CMCC No. 1406 of 2015**.

14. In CMCC No. 1406 of 2015, the Plaintiff (Elizabeth Wangari Nguni) avers that she is the sole registered owner of the parcel of land known as **DUNDORI/MUGUATHI BLOCK 1/76 (Wanyoro "A")** measuring 0.9 acres as per a title deed issued to her on 17<sup>th</sup> June, 2009 and seeks the following prayers against the Defendants (Ruth Wanjiru Kinyua and Margaret Wanjiru Njuguna):

*a) An order of permanent injunction restraining the Defendants by themselves, their agents, their servants, their surveyors and all persons claiming under them from interfering with the Plaintiff's quiet and peaceful use occupation, and enjoyment of all that parcel of land known as Dundori/Muguathi Block 1/769 (Wanyororo 'A') or in any way dealing with this particular parcel of land.*

*b) Cost of this case.*

15. The Defendants, in CMCC No. 1406 of 2015, filed their statement of defence dated 7<sup>th</sup> January, 2016 where they deny the averments in the plaint and aver that the suit property belongs to the estate of their late mother Esther Njeri Kiritu (deceased) who was the sole owner at the time of her death which occurred on 5<sup>th</sup> January, 2009.

16. They aver that the Plaintiff acquired the suit property through fraudulent means and they, therefore, seek orders that the plaintiff's case to be dismissed with costs.

17. When the matter came up for directions, this Court was notified that the 1<sup>st</sup> Plaintiff, in this suit, was deceased and the parties agreed that there would be no need for her to be substituted because she was co-administrator of the estate of their deceased mother.

18. It is also important to note that this suit was referred to mediation through the Court Annexed Mediation process. The parties failed to agree and the suit was referred back for trial.

19. In the initial stages of the suit, The 2<sup>nd</sup> Defendant appeared and participated in the proceedings. Subsequently it failed to appear despite service. No evidence was tendered on their behalf.

### **PLAINTIFF'S EVIDENCE**

20. At the hearing, Margaret Wanjiku Njuguna testified as **PW1**. It was her testimony that the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant are her sisters. She stated that their mother Esther Njeri Kiritu (deceased) died on 5<sup>th</sup> January, 2009 and was buried on 10<sup>th</sup> January, 2009 adding that she was buried on land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo A). (the suit land)

21. She produced a bundle of documents which were marked as **Exhibit P1(a-e)**. They are: copies of the death certificate dated 3<sup>rd</sup> February, 2016, burial permit, Nakuru Municipal Council's receipt, and letters dated 8<sup>th</sup> January, 2009 and 12<sup>th</sup> January, 2009.

22. PW1 testified further that their mother was the registered owner of the suit property at the time of her death and that sometime around 3<sup>rd</sup> November, 2015, she got information from the area chief that the 1<sup>st</sup> Defendant had transferred the suit land to her name.

23. She also testified that she reported the matter to the police and the matter was booked in the OB as No. 41/03/11/2015.
24. It is her testimony that in the year 2015, the 1<sup>st</sup> Defendant filed a suit Nakuru CMCC No. 1406 of 2015 against the 1<sup>st</sup> Plaintiff, Ruth Wanjiru Kinyua (deceased) and herself. The suit sought orders of injunction against them.
25. PW1 stated that it was after the filing of the suit Nakuru CMCC No. 1406 of 2015 that they confirmed that the 1<sup>st</sup> Defendant had indeed illegally transferred the suit land to herself.
26. She also testified that from the documents attached in Nakuru CMCC No. 1406 of 2015, it is clear that the transfer of land form and application for consent from the Land Control Board were signed by their late mother on 24<sup>th</sup> February, 2009 and 26<sup>th</sup> January, 2009 respectively. This was long after she had died.
27. It is her evidence that at the time of the death of their mother, each one of them was occupying 1/3 of the portion of the suit land as they awaited distribution.
28. It is PW1's testimony that their occupation of their respective portions has not been peaceful as the 1<sup>st</sup> Defendant, on several occasions, entered their portions of suit land and uprooted the crops planted thereon.
29. PW1 referred to the green card of the suit land and indicated that the first entry was made on 23<sup>rd</sup> November, 1984 when the government of Kenya was registered as the owner.
30. The second entry was made on 9<sup>th</sup> May, 1988 when the suit property was transferred to their mother Njeri Kiritu Kamau.
31. The third entry was made on 11<sup>th</sup> May, 1988 when the title deed was issued to their mother.
32. The fourth entry was made on 5<sup>th</sup> May, 2009 when the suit land was registered in the name of the 1<sup>st</sup> Defendant, Elizabeth Wangari Ngure and a title deed issued on 17<sup>th</sup> June, 2009 in her name.
33. The sixth entry was made on 28<sup>th</sup> October, 2015 when a restriction was registered against the suit land.
34. PW1 also testified that the fourth entry of 5<sup>th</sup> May 2009 was done after the death of their mother and was therefore fraudulent. She produced a copy of the green card as **EXHIBIT P2**.
35. PW1 also referred to the certificate of official search dated 21<sup>st</sup> October, 2015 and stated that it showed that the suit land had been registered in the name of the 1<sup>st</sup> Defendant, an application for consent to the Land Control Board with reference number BLCB 52/1/2009 showed that their late mother and the 1<sup>st</sup> Defendant signed letter of consent to transfer and that the consent is dated 29<sup>th</sup> January, 2009.
36. It is her testimony that the application for consent was made on 26<sup>th</sup> January, 2009 and the board sat on 29<sup>th</sup> January, 2009. It also shows that the parties who attended were Njeri Kiritu Kamau, their late mother, who was deceased at that time and the 1<sup>st</sup> Defendant Elizabeth Wangari Ngure.
37. PW1 also produced a valuation requisition for stamp duty dated 24<sup>th</sup> February, 2009 which showed that the valuation was done on 4<sup>th</sup> March, 2009.
38. Other documents that were produced include the transfer of land dated 24<sup>th</sup> February 2009 which already bears their late mother's signature.
39. PW1 was referred to the statement filed by the 1<sup>st</sup> Defendant and she reiterated that all the documents relied on by the 1<sup>st</sup> defendant indicated that their mother signed the documents and yet at that time, their mother was already dead and buried.
40. She concluded her testimony by praying that the court grants the orders sought in the plaint and that CMCC 1406 of 2015 be dismissed with costs to her.
41. On cross-examination, she confirmed that their mother was registered as the owner of the suit property in 1988 and that the land initially belonged to their father before it was registered in their late mother's name. however, PW1 had no evidence of the same.
42. PW1 was referred to Exhibit P3; the application for consent and confirmed that it has no date. She was also referred to the transfer form and confirmed that the date her mother appeared before the Land Control Board is not included. She also confirmed that she did not raise any objection to the transfer of the suit property to the 1<sup>st</sup> Defendant.
43. PW1 confirmed that she filed a restriction on the suit property because it belonged to her mother and that by extension, she acquired an interest on it upon her mother's demise.
44. On re-examination, PW1 explained that her father's name is not in the green card because by the time of his demise, the land had not

been sub-divided.

45. She went on to explain that she begun cultivating a portion of the suit land after school but before she went to college. She explained that her portion was 0.3 acres and that it is fenced.

46. PW1 was again referred to Exhibit P3; the application for consent. She confirmed that it bears the date 26<sup>th</sup> January, 2009. She added that this is the 1<sup>st</sup> Defendant's document.

47. When referred to the 1<sup>st</sup> Defendant's statement, PW1 confirmed that the 1<sup>st</sup> Defendant states that she appeared with their late mother before the Land Control Board.

48. PW1 also confirmed that the transfer form does not indicate when their mother appeared before the advocate to sign the transfer form but it bears a stamp of a law firm. She confirmed that the name of the advocate is not indicated.

49. This marked the close of the plaintiff's case.

#### **DEFENDANT'S EVIDENCE**

50. Elizabeth Wangari Ngure, hereinafter referred to as **DW1**, testified as a sole witness for the 1<sup>st</sup> Defendant.

51. She introduced herself and stated that she is 67 years old.

52. DW1 stated that she lives in Wanyoro and was in court on account of a suit filed against her by the Plaintiffs. She added that she had also filed a counter claim.

53. DW1 adopted her witness statement as part of her evidence and also produced the following documents as exhibits in support of her case.

*a. Title deed.... Exhibit D1*

*b. Certificate of official search..... Exhibit D2*

*c. Application for consent of the Land Control Board... Exhibit D3*

*d. Letter of consent of Land Control Board.... Exhibit D4*

*e. Valuation of requisition..... Exhibit D5*

*f. Transfer of Land form ...Exhibit D6*

54. It was her testimony that she is the owner of the suit land having bought it for her mother. She stated that she worked as a casual laborer and purchased the suit land from her wages, adding that the suit land was purchased in the year 1977.

55. DW1 stated that all the receipts from the purchase of the suit land were in her mother's name adding that the 2<sup>nd</sup> Plaintiff was a child when she bought the suit land.

56. It was her evidence that the process to transfer land to her name commenced before her mother passed on and testified further that the suit property was transferred to her by their late mother on 17<sup>th</sup> June, 2009 after she had applied for the consent of the Land Control Board and appeared before the Bahati Land Control Board on 29<sup>th</sup> January, 2009.

57. DW1 gave evidence that there were no objections raised before the Land Control Board and that she took the Land Control Board's Consent, original title, transfer of land forms, P.I.N certificate, copy of her identity card, passport size photographs together with their late mother's copies of P.I.N Certificate, Identity Card and her passport size photographs to the Nakuru District Land Registrar to transfer the suit property to her name.

58. She testified further that she paid stamp duty and the land was transferred to her name. It is her testimony that she has been living on the suit property and has built her family house.

59. When DW1 was referred to the title deed produced as Exhibit D1, she confirmed that the suit property is registered in her name. She testified that the Plaintiffs were called by their mother severally to have discussion on matters pertaining to the suit land but they did not turn up.

60. She was also referred to Exhibit D3 which is the consent of the Land Control board and confirmed that no one raised any objection at the Land Control Board. DW1 then prayed that the Plaintiffs be evicted from the suit property.

61. On cross-examination she stated that she bought the suit property in the year 1977 and that it did not belong to their father.

62. DW1 stated that they grew up on a parcel of land at Mpeda which their father had bought from someone and that they were expelled from it.
63. She stated that she does not remember how old she was when she bought the suit property but it was after she completed class seven studies. She also stated that she worked as a house help but could not remember how much she was earning.
64. It was DW1's testimony that she used the money earned as a househelp to purchase the suit land. She stated that she bought the land from Wanyororo Society for KShs. 500,000 but does not remember the year of completion.
65. It is DW1's evidence that the receipts she was given upon payment for the suit land were returned to the society and she was subsequently given a certificate and a title deed.
66. She stated that she could not remember her membership number but reiterated that she bought the suit property for their mother who then transferred it to her in the year 2008.
67. It is her evidence that the plaintiffs were called to a meeting by their mother but refused to attend the meeting.
68. DW1 admitted to signing the documents on her own behalf and also signed for her mother because she (their mother) was dead at that time and she thought no one would raise any objection.
69. She confirmed the contents at paragraph 5 of her witness statement; that she went with her mother to the Land Control Board on 29<sup>th</sup> January 2009. She also confirmed that their mother died on 5<sup>th</sup> January 2009 and therefore she could not have gone with her to the Land control board.
70. When referred to the transfer forms, DW1 confirmed that the photo attached belonged to their mother but she could not see the signature.
71. She also confirmed that her mother did not go to the advocate's office with her adding that it was not necessary because what her mother had intended to say, she had already said while at home.
72. It was DW1's evidence that she signed both her part and that of her mother because the suit parcel was hers. She added that she did not know that it was illegal to sign a document on behalf of a dead person.
73. On re-examination, DW1 stated that since she is sixty seven years old, and therefore does not remember some things. She explained that she used a bit of her salary for herself, her mother and used the rest to pay for the suit land.
74. She also confirmed that she got the land on 17<sup>th</sup> June, 2009 after their mother had passed away.
75. On second thought, DW1 explained that she does not remember who signed the transfer forms on behalf of their mother.
76. The 1<sup>st</sup> Defendant then closed her case.
77. Parties were directed to file and exchange their written submissions.

## **2<sup>ND</sup> PLAINTIFF'S SUBMISSIONS**

78. The 2<sup>nd</sup> Plaintiff in her written submissions gave a summary of the pleadings, an analysis of the evidence and identified the following issues for determination;
- a. Whether the transfer of the title from the deceased's name to the 1<sup>st</sup> Defendant was tainted with fraud.*
  - b. Whether the 1<sup>st</sup> Defendant's title should be canceled and revert to the deceased's estate.*
  - c. Whether the 1<sup>st</sup> Defendant was given the suit land by their deceased mother as a gift inter vivos .*
  - d. Who is to pay the costs of this suit?*
79. On whether the transfer of the title from the deceased's name to the 1<sup>st</sup> Defendant was tainted with fraud, it was submitted that the 1<sup>st</sup> Defendant improperly acquired the suit property as demonstrated by the evidence and the documents produced by the parties and that she admitted to forging the signatures of the deceased.
80. On whether the 1<sup>st</sup> Defendant's title should be canceled and the suit property reverts to the deceased's estate, the 2<sup>nd</sup> Plaintiff submitted that the deceased died on 5<sup>th</sup> January, 2009 and that no succession proceedings had been commenced and therefore the 1<sup>st</sup> Defendant acquired the suit property fraudulently.

81. The 2<sup>nd</sup> Plaintiff relied on **Section 45** of the law of Succession Act and **Section 26** of the Land Registration Act and submitted that even though a title is protected, the protection is removed and the title impeached if it was procured through fraud and misrepresentation to which the person is proved to be a party. It was also submitted that the 1<sup>st</sup> Defendant admitted to committing fraud and therefore the prayers sought in her counterclaim should not be granted.

82. It was further submitted that the court should therefore order for the rectification of the register of the suit property to remove the entries in favor of the 1<sup>st</sup> Defendant and the title to revert to the name of Esther Njeri Kiritu (deceased). On this question, the 2<sup>nd</sup> Plaintiff relied on the judicial decision of **Simon Towett Maritim Vs Jotham Muiruri Kibaru [2006] eKLR**.

83. The question as to whether the 1<sup>st</sup> Defendant was given the suit land by their deceased mother as a gift *inter vivos*, it was submitted that this particular issue is beyond the jurisdiction of this court and can only be determined in succession proceedings under the Law of Succession Act. Pw1 relied on the decision in **Zecharia Wambugu Gathimu & Another Vs John Ndungu Maina [2019] eKLR**.

84. In conclusion, the 2<sup>nd</sup> Plaintiff prayed that the prayers sought in the plaint be granted and the 1<sup>st</sup> Defendant's counterclaim be dismissed together with **Nakuru CMCC No. 1406 OF 2015** with costs.

### **1<sup>ST</sup> DEFENDANT'S SUBMISSIONS**

85. The 1<sup>st</sup> Defendant in her submissions identified the following issues for determination;

*a. Whether the 1<sup>st</sup> Defendant has proved their case.*

*b. Whether the claim of fraud has been substantiated by the 2<sup>nd</sup> Plaintiff.*

86. On whether the claim of fraud has been substantiated by the 2<sup>nd</sup> Plaintiff, it was submitted that the 1<sup>st</sup> Defendant bought the suit property from Wanyororo Cooperative Society and it was registered in the name of their late mother. It was also submitted that the 2<sup>nd</sup> Plaintiff lived far away from home and was not aware of what was happening.

87. The 1<sup>st</sup> Defendant relied on Sections 109 and 112 of the Evidence Act and the case of **Demutilla Nanyama Pururmu Vs Salim Mohamed Salim [2021]**. This decision is used to support the claim that the Plaintiffs failed to discharge their burden of proof and that the 2<sup>nd</sup> Plaintiff failed to establish fraud on the part of the 1<sup>st</sup> Defendant.

88. The 1<sup>st</sup> Defendant also relies on the decision in **Vijay Morjaria Vs Nansigh Madhusing Dabar & Another [2000] eKLR** and **Kinyanjui Kamau Vs George Kamau [2015] e KLR** to support his submission that fraudulent conduct must be distinctly alleged and distinctly proved and that it is not allowable to leave fraud to be inferred from the facts.

89. The 1<sup>st</sup> Defendant submits further that the onus of proof was on the 2<sup>nd</sup> Plaintiff and that she ought to have called an expert to authenticate the signatures on the primary documents and she did not.

90. On whether the 1<sup>st</sup> Defendant is the proper registered owner of the suit land, it was submitted that the 2<sup>nd</sup> Plaintiff had the opportunity to lodge any complaints before the Land Control Board but did not do so. The 1<sup>st</sup> Defendant relied on Section 6(1) of the Land Control Act and the case of **Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri [2014] eKLR**. This decision is relied on by the 1<sup>st</sup> Defendant to support her submissions that there is no room for the courts to import the doctrine of equity in the Act. Essentially the 1<sup>st</sup> Defendant states that the assertion that the 1<sup>st</sup> Defendant holds the suit land in trust for the plaintiffs cannot and should not hold.

91. The 1<sup>st</sup> Defendant also makes reference to Sections 24 (interest conferred by registration) and 25( Rights of a proprietor) of the Land Registration Act, 2012.

92. The 1<sup>st</sup> Defendant also cited the decision in **Edward Njoroge Mwangi Vs Francis Muriuki Muraguri & Another [213] eKLR**. This decision is in reference to title obtained, illegally, through fraud or misrepresentation. The learned Judge states that the court is empowered to rectify the register by cancelling registration due to fraud or mistake.

93. In conclusion, the 1<sup>st</sup> Defendant prayed that the Plaintiff's suit be struck out with costs and the 1<sup>st</sup> Defendant's counterclaim be allowed.

### **ANALYSIS AND DETERMINATION**

94. I had the opportunity to read the pleadings, hear witnesses testify, observe their demeanour, read submissions and judicial decisions cited. I have also perused all the documents produced as evidence in this case and have taken them into consideration in making my determination.

95. It is my considered view that the issues for determination are:

*a. Whether land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo 'A') was illegally and fraudulently transferred to the 1<sup>st</sup> Defendant and its rightful owner is Esther Njeri Kiritu (deceased).*

***b. Whether the register of land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo 'A') should be rectified by deleting the 1<sup>st</sup> Defendant's names and restoring the names of Esther Njeri Kiritu (deceased).***

***c. Whether an order of permanent injunction should issue restraining the and all persons claiming under them from interfering with the 1<sup>st</sup> Defendant's quiet and peaceful use, occupation and enjoyment of all that parcel of land known as Dundori/Muguathi Block 1/769 (Wanyororo A).***

***d. Who should bear the cost of the suit and interest thereon ?***

96. The first question for determination is Whether land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo 'A') was illegally and fraudulently transferred to the 1<sup>st</sup> Defendant.

97. The 1<sup>st</sup> Defendant has submitted that the 2<sup>nd</sup> plaintiff suit cannot succeed on the question of fraud for the reason that the particulars of fraud were not specifically pleaded and proved. This is, however, a total misapprehension of the facts in this suit. The reply to defence and counterclaim dated 15<sup>th</sup> October, 2018 and filed on 16<sup>th</sup> October, 2018 at paragraph 2 gives particulars of fraud on the 1<sup>st</sup> Defendant. A sample of the particulars are:

***a. Causing fraudulent transfer of the suit land to herself***

***b. Fraudulently obtaining consent of the Land Control Board***

***c. Forging transfer and Land Control Board documents in order to effect transfer of the said parcel to her name***

***d. Colluding with the 2<sup>nd</sup> Defendant to fraudulently transfer the suit land***

***e. Securing the transfer of the suit land without regard and without taking into account the interests of the Defendants as beneficiaries of the estate of their deceased mother knowing that she did not have legal capacity to deal with the land after the death of the proprietor of the suit land...***

98. The 1<sup>st</sup> Defendant has made reference to section 24 and 25 but said nothing on the provision of Section 26 of the Land Registration Act which not only makes reference to Fraud but also cites illegality, corrupt schemes, unprocedural acquisition and misrepresentation as factors vitiating the indefeasibility of title.

99. More specifically, Section 26 of the Land Registration Act provides that:

***(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. ( *Emphasis is mine*)***

100. The 2<sup>nd</sup> Plaintiff in her submissions reiterates that that 1<sup>st</sup> Defendant illegally and fraudulently transferred the suit land to herself and that the same formed part of the undistributed estate of their deceased mother. It is her submission that this is violation of the Law of succession Act, CAP 160 Laws of Kenya.

101. The 2<sup>nd</sup> Plaintiff submits that the resultant title in the name of the 1<sup>st</sup> Defendant is therefore null and void, cannot be said to be indefeasible and should therefore be cancelled.

102. A scrutiny of the documents presented by the 1<sup>st</sup> Defendant and her evidence; more particularly her admission during cross examination leave no doubt that serious fraud and illegalities were committed in the process culminating to the transfer of the suit parcel to the 1<sup>st</sup> Defendant's name. I will list the evidence tendered as hereunder:

***i. The suit parcel was registered in the name of the deceased one Esther Njeri Kiritu ( deceased). She died on 5<sup>th</sup> January, 2009.***

***ii. The 1<sup>st</sup> Defendant in her statement dated 7<sup>th</sup> December, 2015 which has been adopted in evidence states that the deceased and herself appeared before the Land Control Board on 29<sup>th</sup> January, 2009.***

***iii. The transfer forms produced in evidence show that the forms were signed by the deceased on 24<sup>th</sup> February, 2009 and 26<sup>th</sup> January, 2009 long after she had died.***

iv. The 1<sup>st</sup> Defendant while giving evidence stated more than once that she signed the forms ; both her part and that of her mother because the suit parcel was hers. She added that she did not think anyone would raise any objection because the suit land was bought by her.

v. The 1<sup>st</sup> Defendant in cross examination feigned ignorance and stated that she did not know that it was illegal to sign a document on behalf of a dead person.

103. It is not only shocking but disheartening that even in light of these admission of illegality and fraud, the 1<sup>st</sup> Defendant still believes that she is entitled to orders of permanent injunction against the Plaintiffs.

104. These illegal documents were presented to the 2<sup>nd</sup> Defendant and the 2<sup>nd</sup> Defendant used them to transfer the suit parcel to the 1<sup>st</sup> Defendant.

105. Lord Denning in Macfoy Vs United Africa Co Ltd [1961] 3 All ER 1169 at page 1172 where he stated as follows: -

*“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there...”*

106. The Law of succession Act at Section 45 provides that:

**(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.**

**(2) Any person who contravenes the provisions of this section shall—**

**(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and**

**(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration..**

107. Section 45 of the Law of Succession Act speaks to the illegality of the acts of the 1<sup>st</sup> Defendant and further support the proposition that the title to the suit land was illegally acquired by the 1<sup>st</sup> Defendant who had no legal authority to deal with the property of the deceased.

108. PW1 has contended vigorously that they ought to get a share of the suit property. Both the written statements by the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff state that their mother, before her demise, was the registered owner of the parcel and had intended that it be shared between the Plaintiffs and the 1<sup>st</sup> Defendant.

109. The evidence, witness statements and documents presented to the court make a good case for a declaration that the land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo ‘A’) was illegally transferred to the 1<sup>st</sup> Defendant and its rightful owner is Esther Njeri Kiritu (deceased). This brings me to the second issue.

110. The second question for determination is whether the register of land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo ‘A’) should be rectified by deleting the 1<sup>st</sup> Defendant’s names and restoring the names of Esther Njeri Kiritu (deceased).

111. Section 80 of the Land Registration Act provides:

**80. Rectification by order of Court.**

**(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.**

**(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.**

112. Lord Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372, discussing the burden of proof had this to say-

*“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.*

*Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."*

**113. It is my view, therefore, that the Plaintiff has sufficiently proved that the 1<sup>st</sup> Defendant fraudulently and illegally caused the suit land to be registered in her name by presenting forged documents to the 2<sup>nd</sup> Defendant.**

**114.** Section 80 of the Land Registration Act states that this Honourable Court has power to order rectification of the register if it is satisfied that the registration was obtained, made or omitted by fraud or mistake. This section further gives guidance on mode of rectification by the court i.e. by directing that any registration be cancelled or amended.

**115.** Consequently, for this second question, I find that the register of land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo 'A') should be rectified by deleting the 1<sup>st</sup> Defendant's names and restoring the names of Esther Njeri Kiritu (deceased).

**116.** The third question for determination is based on the counter claim filed by the 1<sup>st</sup> Defendant. i.e. Whether an order of permanent injunction should issue restraining the Plaintiffs and all persons claiming under them from interfering with the 1<sup>st</sup> Defendant's quiet and peaceful use, occupation and enjoyment of all that parcel of land known as Dundori/Muguathi Block 1/769 (Wanyororo A).

**117.** Having found that the 1<sup>st</sup> Defendant committed acts of fraud and illegality and caused the 2<sup>nd</sup> Defendant to effect transfer in her favour, and also having found that on account of this fraud, the suit land was registered in the name of the 1<sup>st</sup> Defendant and that consequently, the 2<sup>nd</sup> Defendant shall rectify the register in respect of the suit land by deleting the 1<sup>st</sup> Defendant's names and restoring the names of Esther Njeri Kiritu (deceased) it follows that the prayer by the 1<sup>st</sup> Defendant for orders of permanent injunction against the Plaintiffs fails.

**118.** The fourth issue for determination is Who should bear the cost of the suit and interest thereon? The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. This was the holding in **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.**

#### **DISPOSITION**

**119. The Upshot of the foregoing is that the Plaintiffs' suit as against the Defendants succeeds and the 1<sup>st</sup> Defendant's Counterclaim is dismissed with costs to the Plaintiffs.**

**120. Consequently, I declare and grant orders as follows:**

*a. The land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo 'A') was illegally and fraudulently transferred to the 1<sup>st</sup> Defendant and its rightful owner is Esther Njeri Kiritu (deceased).*

*b. The register of land parcel No. Dundori/Muguathi Block 1/769 (Wanyororo 'A') shall be rectified by deleting the 1<sup>st</sup> Defendant's name and restoring the name of Esther Njeri Kiritu (deceased).*

*c. The 1<sup>st</sup> Defendant's counterclaim is dismissed with costs to the Plaintiffs.*

*d. The suit CMCC 406 OF 2015 is dismissed with costs.*

*e. The Plaintiffs shall have costs of this suit and interest thereon.*

**121. It is so ordered.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 16<sup>TH</sup> DAY OF FEBRUARY 2022**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**Mr. Mbuthia for the 2<sup>nd</sup> Plaintiff.**

**No appearance for the 1<sup>st</sup> Defendant.**

**No appearance for the 2<sup>nd</sup> Defendant.**

**Court clerk. Jeniffer.**