



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANGA
ELC NO. 57 OF 2018

NAFTALI N MWANGI.....1ST PLAINTIFF
MICHAEL THUKU KIMANI.....2ND PLAINTIFF
STEPHEN MUIGAI NJUGI.....3RD PLAINTIFF
JOHN MACHARIA KIHUGU.....4TH PLAINTIFF

VERSUS

MARY WAMBUI GACHANJA.....1ST DEFENDANT
MWANIKI MWANGI.....2ND DEFENDANT
GATAMBIA MWANGI.....3RD DEFENDANT
JOHN MAINA MWANGI.....4TH DEFENDANT

JUDGMENT

1. The 1st and 2nd Plaintiffs filed their plaint dated 10/7/2018 and filed on even date against the Defendants for Judgement THAT;

a. A permanent stay of proceedings in Kigumo SRMCC no. 157 of 2018.

b. A declaration that the revocation of letters of administration issued to Njuguna Mwangi Muhoi and Mwaniki Mwangi in Thika CMCC Succession Cause No. 554 of 2005, in the estate of Mwangi Muhoi (deceased) and subsequent issuance of an amended certificate of confirmation of grant is null and void.

c. An order directed to the Land Registrar at Murang'a Lands Registry to rectify the register and return the names of the Plaintiffs to their respective parcels of land.

d. A permanent injunction be issued against the Defendants prohibiting them whether by themselves, their servants or agents or otherwise from selling, trespassing, disposing off, transferring, alienating or in whichever manner whatsoever from interfering with the Plaintiffs' quiet possession of land reference numbers Loc2/Makomboki/838, 839,840,841,842 & 1486.

e. Costs of this suit

f. Interest on (f) above.

g. Any other order the Court may deem fit to grant.

2. The 2nd and 3rd Plaintiffs filed their Plaint dated 25/11/2019 sought similar prayers as above (prayers a, e, f & g) and further that;

a. A permanent stay of proceedings in Kigumo SRMCC no. 157 of 2018

b. A declaration that the revocation of letters of administration issued to Njuguna Mwangi Muhoi and Mwaniki Mwangi in Thika CMCC Succession Cause No. 554 of 2005, in the estate of Mwangi Muhoi (deceased) and subsequent issuance of an amended certificate of confirmation of grant is null and void. In the alternative and without prejudice to the foregoing, the Court do order that the application by the 3rd and 4th Defendants for revocation of the amended letters of administration and confirmed grant pending before the said Court to be heard on merit.

c. An order directed to the Land Registrar at Murang'a Lands Registry to rectify the register and return the names of the 3rd and 4th Plaintiffs to their respective parcels of land.

d. A permanent injunction be issued against the Defendants prohibiting them whether by themselves, their servants or agents or otherwise from selling, trespassing, disposing off, transferring, alienating or in whichever manner whatsoever from interfering with the Plaintiffs' quiet possession of land reference numbers Loc2/Makomboki/1485 and 1529 respectively.

e. Costs of the suit.

3. The gist of the Plaintiffs' case is that they bought the demised parcels of land from the Defendants (and/or their relations), who are all family members.

4. Specifically, in November 2006, the 1st Plaintiff bought land parcel Loc2/Makomboki/841 from **Mwaniki Mwangi**, the 2nd Defendant and obtained a title deed thereof. He also purchased parcel no. Loc2/Makomboki/842 from **Gatambia Mwangi**, the 3rd Defendant in the same period and similarly obtained a title deed. Further that there was parcel no. Loc.2/Makomboki/840 which was subdivided into Loc2/Makomboki/1485 and 1486. In the year 2008, the 1st Plaintiff bought parcel Loc.2/Makomboki/1486 from **John Maina Mwangi**, the 4th Defendant and was issued with a title deed.

5. Regarding the 2nd Plaintiff, he avers that he bought land parcel no. Loc.2/Makomboki/839 from the late **Njuguna Mwangi Muhoi**. That the said property was included in the certificate of confirmation of grant for the estate of Mwangi Muhoi on 15/11/2006 and was issued with a title deed. That he equally purchased land parcel no. Loc.2/Makomboki/838 from **John Mwangi Muthua** and got a title deed. However, the said title deed was cancelled pursuant to Judgement delivered in Kigumo SPMCC No. 56 of 2010.

6. On the part of the 3rd Plaintiff, he claims that he bought land parcel no. Loc.2/Makomboki/1485 from **John Mwangi Muthua** on 19/11/2006. He was duly issued with a title deed.

7. Similarly, on 12/5/2009, the 4th Plaintiff bought parcel No. Loc.2/Makomboni/1529 from Muhoi Mwangi and obtained a title deed.

8. The Plaintiffs maintain that they have been in quiet possession of their respective parcels of land for a period of 13 years now. They contend that the parcels of lands originally belonged to the estate of Mwangi Muhoi, deceased, which was succeeded vide a certificate of confirmation of grant issued on the 15/11/2006 in Succ. Cause No 554 of 2006. That they acquired the lands between 2006 -2009 from the beneficiaries of the estate of the late Mwangi Muhoi pursuant to the said certificate of confirmation of grant.

9. That to their utter shock, they contend that the 1st Defendant applied for revocation of grant issued to Njuguna Mwangi and Mwaniki Muhoi in respect to the estate of the late Mwangi Muhoi. That the application for revocation of Grant was made by the **1st Defendant** and one **Hannah Wairimu Mwangi**. The application for revocation of grant was allowed on 22/3/2018 in **Thika Succession Cause No. 554 of 2005**.

10. As a result of the said revocation, new letters of administration for the estate of Mwangi Muhoi were issued to **Mary Wambui Gachanja**, the 1st Defendant. That an amended certificate of confirmation of grant was accordingly issued to her. On the strength of the said Grant, the Defendants have reallocated the aforesaid Plaintiffs' parcels of land to themselves. The Defendants have also sought eviction orders against the Plaintiffs in **Kigumo SRMCC case No. 157 of 2018** hence the instant suit.

11. In opposing the Plaintiffs' claims, the Defendants filed an amended statement of defence dated 12/11/2019. As against the 3rd and 4th Plaintiffs' suit, a statement of defence dated 14/12/2020 was filed.

12. The Defendants strenuously denied any contracts for sale of land as pleaded over the said parcels of land. That if any such agreements were entered into then, they are null and void as they were made without the knowledge, consent and involvement of the legal beneficiaries of the estate of Mwangi Muhoi, the Defendants' late father. That since the land was registered in their late father's name, none of the Defendants who purported to sell the lands to the Plaintiffs had authority to transact as alleged.

13. The Defendants were ardent that the Plaintiffs have never been in occupation of the impugned parcels of land. That the lands are occupied by the Defendants family members and their aged mother Hannah Wairimu Mwangi. That if the Plaintiffs hold any title deeds, the same were fraudulently acquired prompting their cancellation and reversion of land to the late Muhoi's name.

14. That there exists a case **No SRMCC No 157 of 2018** seeking eviction of the Plaintiffs. Further that the Plaintiffs being strangers to the estate of their father ought not to be involved in the succession of the estate at all. They maintain that the allegations of fraud against them are mere allegations without any proof and urged this Court to dismiss the suit with costs.

The Evidence

15. The Plaintiffs called a total of 8 witnesses.

16. The 1st Plaintiff, **Naftali Mwangi** testified as PW1. He relied on his witness statement dated 10/1/2018 and supplementary statement dated 5/12/2018 as evidence in chief. He adopted the List of Documents dated 10/7/2018 and supplementary List of Documents dated 6/12/18 and produced the said documents as P. Exh. 1 - 43.

17. On cross-examination, PW1 stated that he purchased his parcels of land (841, 842 & 1486) after completion of **Thika Succession cause no. 554 of 2005**. He admitted that he did not have a copy of official search for parcel 842. That he bought it from Gatambia who showed him a title deed in his (Gatambia's) name. PW1 insisted that his name appeared in the initial grant of administration issued to Mwaniki Mwangi and Njuguna Mwangi as a purchaser.

18. In re-examination, PW1 clarified that he didn't have a sale agreement for parcel 841 but the cheque adduced as **Pexh. 24** at page 10 of Plaintiffs' Supplementary List of Documents suffice as proof of purchase of the land.

19. The 2nd Plaintiff, **Michael Thuku Kimani** took the witness stand as PW2. He relied on his witness statement dated 10/7/2018 and supplementary statement dated 5/12/2019.

20. On cross-examination, he confirmed obtaining title deeds for his parcels of land namely 839 and 838. That he bought parcel 838 from John Mwangi Muthua for Kshs. 545,000/= though he had no sale agreement to that effect. Concerning parcel 839, PW2 told the Court that he bought it from Mwangi Muhoi for Kshs. 410,000/= vide a sale agreement dated 17/11/2006. In re-exam, PW2 pointed out that before his demise, Mwangi Muhoi had sub-divided his land parcel no. 597 into land parcel numbers 835 – 843, totaling 9 plots.

21. PW3, **Peter Wairiuko Njuguna** relied on his statement dated 14/10/2020 as his evidence. He added that he was the son and brother of Mary Wangui and John Mwangi Njuguna respectively. He stated that he knew John Maina Mwangi, his uncle who sold land to the 3rd Plaintiff. That their land was sold and his father bought another parcel in Subukia where they reside todate.

22. On **cross-examination**, he was shown sale agreement dated 17/11/2006 relating to parcel 1839 which he denied signing. He denounced any dealing in the revocation of the initial grant resulting to the 1st Defendant appointment as administrator.

23. PW4 – **Grace Waithera Mukururi's** evidence was as per her statement dated 14/10/2020. She explained that her late father, Mwangi Muhoi had 2 wives and the Defendants were her half-brothers and sister. On re-exam, she stated that her late brother Njuguna Mwangi father sold parcel 839 and bought another land in Subukia where he was buried. That her brothers Njuguna and Mwaniki were appointed administrators of her father's estate. Furthermore, that her father had subdivided his land and allocated it during his lifetime. She informed the Court that she is not supportive of the actions of the 1st Defendant in causing the revocation of the grant issued in 2006.

24. PW5 – **Danson Ndugire Wakaguri** adopted his statement dated 13/10/2020.

25. On cross-examination he confirmed that the 3rd Plaintiff bought land from Maina Mwangi, the 4th Defendant. He denied knowledge of the 1st Defendant's revocation of initial grant.

26. PW6 was the 3rd Plaintiff, **Stephen Mungai Njugi**. He relied on his statement dated 25/11/2019 as evidence in chief. He also adopted the List of Documents of even date and produced the documents therein as P. Exh. 44 - 48 namely sale agreement, copies of title deed, official searches and Court Ruling in Thika SRMCC No. 554 of 2005. He said that he bought land whose title was later revoked. That he went to Thika Court to challenge the revocation but was referred to the ELC Court for determination of the dispute. He was emphatic that he is in possession of the suit land and farms thereon.

27. On cross-exam, he maintained that he bought land from John Maina Mwangi in 2008 and that they obtained the land control board consent. That at the time, the title deed was in Muhoi's name. He admitted that he didn't have such copy of title deed before Court nor certificate of official search. He conceded that the said title was in the late Mwangi Muhoi's name but never knew that he died in 2005. In reference to paragraph 2 of his statement, PW6 denied being the registered owner of title.

28. The 4th Plaintiff – **John Macharia Kihugu** testified as PW7. He relied on his statement dated 25/11/2019 and List of Documents of even date. He produced the documents therein as P. Exh. 49-53. He informed the Court that his late father, David Kihugu bought the suit land. Similar to PW6, he said that his title was cancelled at Thika Court and directed to ELC for determination. He added that his mother, Jacinta Kihugu was well versed on the details of the land purchase.

29. On cross-examination he reiterated that his late father bought land in 2009 from Martha Wanjiku Muhoi. He could not tell whether or not the said land had a title.

30. Last but not least, PW8 – **Jacinta Wangari Kihugu**, PW7's mother adopted her statement dated 25/11/2019. Her evidence was largely on the sale agreement between her late husband and Martha Muhoi dated 23/2/2009. That he bought parcel 843 that was subdivided into parcel 1549. That the said agreement was made in her son's name called Peter Mwangi.

31. On the other hand, the defence lined up 3 witnesses in support of their case.

32. The 1st Defendant testified and informed the Court that she is the administrator of the estate of her late father, Mwangi Muhoi. That she is the daughter of Hannah and Mwangi Muhoi. That the 2nd -4th Defendants are her brothers. She informed the Court that her late father owned

parcel Loc2/Makomboki/597 which he did not subdivide in his lifetime. She informed the Court that her brothers never sold the lands to the Plaintiffs. That there was no sale contract. That the land being family land, the Defendants did not have the capacity to sell the lands without the knowledge, consent and involvement of the whole family. That the Plaintiffs acquired the lands through fraud and illegalities. That the previous administrators were misled and their names used to procure the chiefs letter together with the letters of administration in **Succ cause No 554 of 2005**. That resultantly the distribution of the land was without the knowledge and consent of the family including Hannah Wairimu, the widow of the deceased.

33. The administrator of the estate of Mwangi Muhoi, **Mary Wambui Gachanja** testified as DW1. She relied on her statement dated 14/12/2020 and Lists of Documents dated 9/8/2018, 12/11/2019 and 11/12/2020. She produced the documents therein as D.exh. 1 – 19. DW1 stated that she undertook valuation of the land at a cost of Kshs. 70K and adduced the report and receipts that were marked for identification.

34. On cross-examination, DW1 confirmed that her parents were Mwangi Muhoi and Anna Wairimu and listed 13 siblings thereof. She added that she also had a step mother called Esteri Njeri who had 4 children. That her father died in 2005 and denied any subdivision of the land into 9 portions then. That her father had only given one child the title of the land (without disclosing who). She denied knowledge of how her father's estate was succeeded and that she could not remember when she was appointed as administrator.

35. DW1 asserted that her brothers never sold any land since they did not have titles. She confirmed that the land was reallocated/redistributed as per the amended grant. She expounded that according to paragraph 2 of her statement, she got parcels 838 and 839 to hold in trust for the children of Njuguna Mwangi and Zacharia Muthua, both deceased. Asked about the names, DW1 said she did not know the Njuguna's children's names. Regarding Zacharia, DW1 said his wife had also passed on and the children left were Hannah Wairimu and Mwangi. She also conceded that the Plaintiffs were still on the land.

36. DW1 contradicted herself when she later stated that her late father had subdivided the land into 9 portions. That she knew parcel 838 belonged to Zacharia (who predeceased his father) as her father told her so. DW1 disputed the alleged 3rd and 4th Plaintiffs' purchase of land from her brothers. However, she confirmed that she knew Martha Wanjiku Muhoi, her late brother's (Muhoi Mwangi) wife but denied knowledge of the agreement dated 23/4/200 by the said Martha. She contested any subdivision by Martha and subsequent sale to the 3rd and 4th Plaintiffs. That if they had any titles, the same were forgeries. Moreover, she denied Mwaniki Mwangi and Njuguna Mwangi ever being administrators of their late father's estate.

37. DW1 confirmed that she got a grant on 22/3/2018 but denied its confirmation on 23/3/2018.

38. On 8/6/2021, DW1 was re-examined and stated that parcels 838 and 839 are in her name because she was apprehensive that Mwangi Muhoi's children were not sired by him. She named Muthua's children as Mwangi, Wango, Wairimu and Waithera. In a complete turnaround about the former administrators, in reference to para 3 of page 29 of Plaintiff's bundle, she explained that she applied for revocation of the grant issued on 5/11/2006 to Mwaniki and Njuguna. That after her appointment as administrator, she then filed **Kigumo SRMCC No. 157 of 2018** while Michael Thuku had earlier filed suit **No. SRMCC No 56 of 2010**.

39. The 3rd Defendant, **Gatambia Mwangi** testified as DW2. He confessed knowing the Plaintiffs as his neighbors at Makomboki where he hails from. He adopted his Supplementary statement dated 28/9/2020 as his evidence in chief.

40. On cross-examination, DW2 said that his father died on 20/8/2005. That he had not subdivided his land but had pointed out to his children where to live. That only one child had a title deed. He also contradicted himself and added that his father had subdivided the land and allocated him parcel 842. That there was no administrator for his father's estate before the 1st Defendant's appointment. Surprisingly, he could not remember when she was appointed as such.

41. DW2 acknowledged that Njuguna and Mwaniki were his brothers. That indeed they transferred parcel 842 to him before Advocate Kagongona but maintained it was simply from his father. He denied the sale agreement dated 17/11/2006 together with the signature and ID number. That he never attended Land Control Board meeting as revealed at page 21 of the Plaintiffs' bundle of Documents. He admitted that title for parcel 3167 is in his name but maintained he did not own any such land. He denied receiving any payment and instead accused the 1st Plaintiff of tricking him to release his title deed to Naftali. On whether he reported any complaints against Naftali, the answer was in the negative.

42. On further examination, DW2 stated that he lived in Kimbo and was employed as a lorry driver. He denied his father giving Peter Kibote any land (parcel 837) as recorded in his statement. That his father had shown each son their parcel of land and DW2 received 842. That parcel 843 was given to Martha Wanjiku Muhoi. Again, DW2 contradicted himself and said Peter Kibote was the only son who had a title before his father's demise.

43. The last defence witness was DW3 – Peter Gitaru Ngugi, a practicing land valuer. He produced the valuation report for the suit land parcels 85, 837, 838, 83, 840, 841, 842 & 843 from original parcel no. 59. According to him parcel 835 measured 0.5Ha and jointly belonged to the 1st Defendant and Hannah Mwangi, the rest of the parcels were 1 acre each. Parcel 837 belonged Mwangi Muhoi while 838 and 839 were the 1st Defendant's. Parcels 840, 841 and 843 belonged to Mwangi Muhoi. That parcels 838 and 839 had cautions registered by Michael Thuku claiming purchaser's interests. That parcels 841 and 842 had restrictions registered by the Plaintiffs claiming purchasers' interests too. Notably, DW3 said he was instructed by the 1st Defendant who told him that the land subdivisions were done by her father before he died.

44. He produced the valuation report as Dexh. 20 estimating the land value at Kshs, 16.5M. He disputed the Plaintiffs' valuation of Kshs.22M as arbitrary and without basis and lacking comparables.

Parties' submissions

45. The firm of **Ngulu Mwangi & Co. Advocates** filed submissions dated 16/8/2021 on behalf of the 1st and 2nd Plaintiffs. Seven issues were drawn for determination; whether the purchase of land was lawful, issuance of valid title deeds, whether the said parcels ceased forming of the estate of Mwangi Muhoi, legality of cancellation of Plaintiffs' titles vide Thika **Succ. Cause No. 554 of 2005**, are Plaintiffs entitled to remedies sought and lastly who bears costs of the suit.

46. In answering these issues, heavy reliance was placed on the Plaintiff's bundle of documents. That proof of payment was established through copies of cheques for the sum of Kshs. 100K together with a bank statement. That the affidavit in support of Summons of confirmation of Grant in the Thika case identified the 1st Plaintiff as a purchaser. Additionally, that the initial administrators, Mwaniki Mwangi and Njuguna Mwangi applied to be proprietors of the suit land by way of transmission before transferring the land to the Plaintiffs. However, that the Plaintiffs' titles were cancelled in 2018 upon revocation of Grant and the land reverted to Mwaniki Mwangi. They appointed out that Mwaniki Mwangi despite recording a statement failed to appear in Court to testify.

47. In relation to parcel 842, 1st Plaintiff was categorical that he purchased the same from Gatambia Mwangi and adduced evidence thereof. That indeed Gatambia was issued with a title deed and in turn sold the land to 1st Plaintiff despite Gatambia's denial. That parcel 1486 was duly bought from 4th Defendant upon following due process.

48. The 2nd Plaintiff submitted that he legally purchased parcel 839 and 838 as per his evidence and was recognized as purchaser in the Thika case. That he bought land from Njuguna Mwangi and paid full purchase thereof. That Peter Wairuki evidence corroborated his evidence as Peter's late father bought another land in Subukia using the sale proceeds.

49. That the said parcels of land therefore ceased from being part of the free property of the estate of late Mwangi. Section 2 of LOSA and Section 24, 25, 93 of LRA, Articles 40, 45 (3) of Constitution of Kenya were cited in support. They faulted the trial Court for revoking a grant resulting in cancellation of their title without according them a fair hearing. Sections 2, 3, 4 and 12 of the Fair Administrative Actions Act were quoted. The CoA decision in **Musa Nyaribari Gekone & 2 others v Peter Miyianda & Anor. [2015] eKLR** was also cited. They implored the Court to allow the claim as prayed.

50. The 3rd and 4th Plaintiffs filed submissions dated 21/7/2021 through the firm of **Jesse Kariuki & Co. Advocates**. They rehashed the background of their cases as already outlined. More relevantly, they impugned the 1st Defendant's inconsistencies and lack of candour in her evidence before Court. That she secretly connived with her elderly mother, Hannah, to revoke the Grant issued to her brothers in swift manner laced with malice. That her claims as holding the land in trust for her nephews and nieces are blatant lies and an abuse of Court process.

51. They reiterated that they acquired their lands lawfully and relied on Articles 40, 50 of Constitution of Kenya and Section 24 Land Registration Act. They submitted that they had proven their case on a balance of probabilities.

52. Conversely, the Defendants filed submissions dated 5/10/2021 through the firm of **L.M Kinuthia & Associates**. They drew 5 issues for determination namely whether Plaintiffs lawfully purchased the impugned land, were Plaintiffs entitled to be served with papers for revocation of grant, whether the Thika Court had power to amend the Grant of administration, were the Plaintiffs' titles genuine and their cancellation justified and lastly whether the Plaintiffs' prayers are merited.

53. The Defendants denied any alleged sale of land between the Plaintiffs and 2nd and 3rd Defendants. They argued that the Plaintiffs tried to enter the land through fraudulent process or illegal transfers. That the Plaintiffs misled the 2nd Defendant and Njuguna Mwangi to obtain a chief's letters filed in the Thika succession case. That the said case resulted in a grant issued to the tow on 13/2/2006 and confirmed on 15/11/2006. The defended the amended certificate of grant that was issued on 22/3/2018 and an amended certificate of confirmation of Grant issued on 23/3/2018. That the Plaintiffs were not included in the revocation proceedings since they were not beneficiaries of the estate of Mwangi.

54. The Defendants defended the Registrar move to cancel the Plaintiffs' titles. That the action was prompted by valid Court orders and finding that the titles were fraudulently acquired. They echoed that the suit land parcels are occupied by some family members who farm thereon too. They insisted that the cancellation of titles was lawful and the only recourse the Plaintiffs had was to appeal against the said Court order. The case of **Solome Naliaka Wabwile v Alfred Okumu Musinaka [2020] eKLR** was cited and Court urged to dismiss the Plaintiffs' case with costs for want of proof.

Issues for Determination

55. In my view the issues for determination are as follows; **whether the Plaintiffs validly purchased the stated parcels of land; whether the 2nd Plaintiff's claim against parcel 838 is resjudicata; whether the titles of the Plaintiffs should be reverted to them; whether the Court should declare the revocation and amendment of the grant null and void; whether a permanent injunction should be granted in favour of the Plaintiffs against the Defendants; what orders should the Court make and who bears the costs.**

56. The background of this case is traced to the family patriarch namely Mwangi Muhoi. Mwangi Muhoi had two wives and several children. In his lifetime he owned parcel No Loc 2 Makomboki/597 measuring 3.24 hectares. According to the mutation form on record Muhoi Subdivided the land into 9 plots namely parcel 835-843 way back in 1995. It is not in dispute that the plots had not been registered by the time of his death. These parcels comprised the estate of the late Mwangi Muhoi.

57. Upon his death on the 20/8/2005, Njuguna Mwangi Muhoi and Mwaniki Mwangi, his sons petitioned for grant of administration vide

Succ Cause No 554 of 2005, Thika on the 11/2/2006. The said letters were confirmed on the 15/11/2006 and the estate was distributed as follows;

Beneficiary	Parcel No	Share of heir
Gatambia Mwangi	842	Sole beneficiary
Naftali Mwangi	841	”
Martha Wanjiku Muhoi	843	”
Peter Mwangi Kibote	837	”
John Mwangi Maina	840	”
Michael Kimani Thuku	839	”
John Mwangi Muthua	838	”
Hannah Wairimu Mwangi	835	To hold in trust for; Njuguna Mwangi Muhoe, Martha Wanjiku Muhoi, Gatambia Mwangi, Mwaniki Mwangi, John Mwangi Muthua , John Maina Mwangi and Peter Kibote Mwangi

58. Although DW1 led evidence that the deceased gave one title to one of his sons in his lifetime, the particulars of that title was never disclosed.

59. The Plaintiffs have averred that between 2006 -2009 they purchased plots Nos 838,839,1486 (subdivision of parcel No 840), 841, 842 and 843 (suit lands) from the beneficiaries disclosed above and obtained titles thereon. It is their case that they took possession and carried out farming activities being tea picking todate. Possession is confirmed by the prayers sought by the 1st Defendant in **Kigumo SRMCC No. 157 of 2010** where the main prayer was for the eviction of the Plaintiffs from the suit lands. According to the consent orders recorded by the parties in this case on the 16/9/2019 maintaining status quo, the parties agreed not to interfere with each other’s possession/occupation pending the hearing and determination of the suit. They agreed that tea picking would continue in the respective parcels and no new structures were to be constructed. The import of these orders are that the parties recognized that some of the Defendants were in occupation of the suit lands. I shall make the appropriate orders in the end.

60. Fast forward, it is on record that the 1st Defendant together with her mother Hannah Wairimu Mwangi filed an application in **Succ Cause No 554 of 2005** and successfully revoked and or amended the letters of grant of administration issued to Njuguna Mwangi Muhoe and Mwaniki Mwangi on the 13/2/2005. The grounds supporting the application were that the grant was obtained by concealment of material facts – that the 1st and 2nd Plaintiff were included as beneficiaries and yet they are not children of the deceased. Further that the widow and other beneficiaries including the 1st Defendant were excluded from the estate of the deceased. In her affidavit Hannah Wairimu Mwangi averred that she did not give her consent nor that the Chief gave any introductory letter confirming the dependents of the deceased.

61. On the 22/3/2018 fresh letters of administration were issued to Hannah Wairimu Mwangi and the 1st Defendant as legal administrators of the estate. On the 23/3/2018 the amended certificate of confirmation of grant was issued and the estate was distributed afresh as follows;

Beneficiary	Parcel No	Share of heir
Gatambia Mwangi	842	Whole

Mwaniki Mwangi	841	”
Muhoi Mwangi	843	”
Peter Kibote Mwangi	837	Whole
John Maina Mwangi	840	”
Mary Wambui Gacanja	839	”
Mary Wambui Gacanja	838	”
Hannah Wairimu Mwangi & Mary Wambui Gacanja	835	Jointly

62. I shall now deal with issue No. 1 and examine the validity or otherwise of the Plaintiffs acquisition of the lands.

63. It is the Plaintiffs case that they acquired the various plots from the beneficiaries of the estate of the deceased whereupon they took possession and commenced farming activities and for a period of over 10 years. That in 2018 they were startled by the 1st Defendant who filed a suit in **Kigumo SRMCC No 157 of 2018** seeking their eviction pursuant to a confirmed grant issued in the same year. The Plaintiffs have impugned the process of revocation of the grant as irregular and fraudulent which led to their titles being cancelled without being given chance to be heard. Further that the Defendants did not disclose to the Court that the titles had already been disposed to third parties.

64. The Defendants in turn argue that the process of acquisition of the suit lands by the Plaintiffs was fraudulent and irregular in that they colluded with some of the beneficiaries to obtain letters of grant of administration without the consent and knowledge of the family; Plaintiffs are intermeddlers in the estate of the deceased; procured a fake grant in the names of Njuguna Mwangi Muhoi and Mwaniki Mwangi; that the widow of the deceased did not give consent and the family was not aware of the succession proceedings in 2005 and that beneficiaries were not disclosed.

65. With respect to Plot No 841, the 1st Plaintiff led unchallenged evidence that he purchased the land from Mwaniki Mwangi, the 2nd Defendant, one of the beneficiaries of the estate of Mwangi Muhoi. He presented cheques some paid in the name of Mwaniki Mwangi and the rest of the monies were utilized to buy land for him in Kinangop where he settled to date. A title of the said land was presented which was acquired at the same time. On the 8/12/2006 the administrators of the estate executed a R.L.7 in favour of the 1st Plaintiff and a title issued 18/12/2006.

66. On the 17/11/2006 the 1st Plaintiff entered into an agreement with Gatambia Mwangi, the 3rd Defendant for the sale and purchase of parcel 842 for the sum of Kshs 450,000/-. On the 8/12/2006 the administrators of the estate executed RL7 in favour of the 3rd Defendant on the 8/12/2006 who later obtained land control board consent to transfer the land to the 1st Plaintiff. A title was issued to the 1st Plaintiff on the 10/1/2007. It was the 1st Plaintiffs unchallenged evidence that the 3rd Defendant used the proceeds of the sale to acquire land in Kinangop and a copy of the title registered in his name on the 20/1/2007 for Nyandarua Muruaki/3167. The 3rd Defendant feigned ignorance of this title while giving evidence in Court.

67. The 4th Defendant being the registered owner of parcel 840 caused the subdivision of the same into two plots; 1485 and 1486. This was supported by a copy of the land control board consent dated the 10/6/2008 together with a mutation form dated the 10/6/2006. A title was issued to him on the 18/7/2008.

68. The 2nd and 4th Defendants did not testify in Court and therefore the claim against them went undefended despite service via substituted services.

69. The 2nd Plaintiff led unchallenged evidence that he purchased parcel 839 from Njuguna Mwangi Muhoe vide an agreement of sale dated the 17/11/2006 at a consideration of Kshs 410,000/-. Vide a transfer RL7 dated the 8/12/2006 the land was transferred to him by the administrators of the estate. I note that the said Njuguna Mwangi Muhoe or his estate was not enjoined in the suit and for that reason I hesitate to determine the claim on this parcel of land as doing so will be against the tenets of natural justice. Any orders that will be issued will likely affect him. The claim against parcel 839 is hereby struck out.

70. Vide an agreement of sale dated the 19/11/2008 the 4th Defendant sold parcel 1485 (subdivision from parcel 840) to the 3rd Plaintiff at the sum of Kshs 280,000/- receipt of which was acknowledged by the 4th Defendant leading to the issuance of a title to the 3rd Plaintiff on the 30/10/2009. The evidence of the 3rd Plaintiff has not been controverted least to say that the same is supported by documentary evidence adduced in Court.

71. The 4th Plaintiff led evidence that his father purchased parcel 1529 (subdivision of 843) from Martha Wanjiku Muhoe at the sum of Kshs 210,000/-. See the agreement of sale dated the 23/2/2009. Out of which part of the purchase price was utilized to pay off a loan with the Agricultural Finance Corporation. It is to be noted that Martha Wanjiku Muhoe has not been enjoined to the suit and to avoid condemning her unheard, the claim against parcel 1529 is hereby struck out.

72. Having analyzed the process of acquisition of the parcels with the exception where the claims have either been dismissed or struck out, it is clear that the estate of the late Mwangi Muhoe had been fully administered by the time the transactions took place. The administrators of the estate together with the beneficiaries transferred the properties to the Plaintiffs. As at the time of the transactions the certificate of confirmation of grant had been issued on the 13/2/2006 and therefore the Plaintiffs cannot be intermeddlers.

73. I have perused the succession proceedings and note that the widow of Mwangi Muhoi, Hannah Wairimu Mwangi participated in the proceedings and signed the consent to confirmation of grant dated the 29/9/2006 and it is therefore not true that the grant was issued without her consent and to her exclusion. In any event she was allocated parcel No 835 to hold in trust for her children.

74. Guided by Section 39 of the Law of Succession Act which provides as follows;

“Where intestate has left no surviving spouse or children

1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

a. father; or if dead

b. mother; or if dead

c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subSection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

75. Having held that the Plaintiffs had acquired an interest capable of being protected in law, the validity of their titles was not affected by the revocation of the grant issued in 2006. I say so because there is no evidence that was presented before this Court to show Court orders cancelling the titles of the Plaintiffs. A revocation of grant is another and the cancellation of titles is provided for in Section 26 of the Land Registration Act read together with Section 80 of the Land Registration Act. Pursuant to Article 40 (6) Constitution of Kenya a tainted title cannot be cancelled unless due process of the law has been followed. Due process includes affording the registered owners of the land the opportunity to be heard on their accrued rights. The Plaintiffs rights to title accrued in 2008 and for over 10 years the Defendants did not challenge their possession and occupation despite the 1st Defendant living within 5 kilometers of the land and the widow residing in the neighborhood of the suit lands. This being a Court of law and a Court of equity will not permit the Defendants to acquiesce on their title only to change their minds over a decade later and seek revocation of titles of the Plaintiffs and with a valuation Report in toe seeking to make a quick extra buck. The Plaintiffs having acquired titles took possession and continued to enjoy quiet possession.

76. Further the Defendants having sold the land cannot benefit by purporting to reallocate or redistribute the land to themselves a second time. This will amount to unjust enrichment on the part of the Defendants who sold the lands to the Plaintiffs.

77. The totality of the above exposition is weighed against the legal provision on the right to own property. Article 40 of Constitution of Kenya affords every person the protection of the right to own property. The exception is found in Sub-Article 6 that such right would not extend to any property that has been found to have been unlawfully acquired. The rights of a proprietor are further protected under Section 25 of the Land Registration Act.

78. The Land Registration Act at Section 26 also provides on the criteria for impeaching a title of land. It provides;

“26. Certificate of title to be held as conclusive evidence of proprietorship

(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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

79. It is therefore the firm view of the Court that at the time the Plaintiffs purchased the suit lands the estate of the deceased had been fully administered and the assets distributed to the beneficiaries. As at the time of revoking the grant in 2018, there was no available estate for redistribution. The rights of the Plaintiffs had crystalized so much so that any challenge to the titles must comply with the provisions of Section 26 of the LRA. It is the finding of the Court that no cogent evidence was presented to successfully impugn the said titles. The Defendants have offered generalized and unsupported allegation of fraud and illegalities devoid of proof to the required standard.

80. This case presented a classical example of a shift in discharging evidential burden of proof. I say so because the Defendants’ general defence is that the Plaintiffs’ titles were fraudulently and illegally acquired. It was incumbent upon the Defendants to not only plead fraud but go ahead and prove it. It is trite that the standard of proving fraud is higher than a mere balance of probabilities but lower than beyond reasonable doubt. This position was buttressed by the Court of Appeal in **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR** as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

81. The Court of Appeal in **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR**, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

82. Besides recently the Court of Appeal in **Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR** was categorical that a claimant need not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction.

83. In light of the forgoing authorities, it is the Courts view that the Defendants’ plea of fraud is not proven and therefore their defence is a mere allegation.

84. It is therefore the finding of the Court that the Plaintiffs obtained valid titles and I shall make the appropriate orders in the end.

85. The next issue is whether the claim with respect to parcel 838 is resjudicata. Section 7 of the Civil Procedure Act states as follows;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

86. In **SPMCC No 56 of 2010** the 2nd Plaintiff sued Mary Wamboi Gacanja, Peter Kibote Mwangi, John Mwangi Muthua and Mary Wanjiku Kamau seeking interalia orders of permanent injunction against the Defendants from converting parcel No 838 to their own use. The Defendants on the other hand filed a counterclaim and sought declaratory orders that the suit land is encumbered with family trust. The Court agreed with the Defendants and interalia ordered a permanent injunction restraining the Plaintiff from claiming the land, the title was cancelled and reverted to John Mwangi Muthua and his family were directed to move the appropriate Court for orders to share the property among the beneficiaries. There was no evidence placed before me that the said judgement had been set aside and or vacated. The Court finds that the rights of the parties have been settled by the said judgment issued by a Court with competent jurisdiction. The 2nd Plaintiff is therefore barred from litigating the same issue, same subject matter involving the same parties.

87. It is the finding of the Court that the claim with respect Parcel 838 is resjudicata.

88. Having made a finding that the acquisition of the suit lands was lawful and valid, the presence of the Defendants on the suit land is without any justification, at least none has been demonstrated.

89. As to whether the Court should grant prayer a in the Plaint that to permanently stay the proceedings in **Kigumo SRMCC No 157 of 2018**, the Court finds no necessity to do so in view of the orders in this judgement.

90. Regarding prayer b (declaration that the issuance of the amended Certificate of Grant is null and void); this Court find that it has no jurisdiction in line with Article 162(2) of Constitution of Kenya and Section 13 of Environment and Land Court Act to grant such orders. The same is disallowed.

91. On the issue of costs, Section 27 of the Civil Procedure Act provides as follows;

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in

force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order.

2. The Court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

92. Though costs is at the discretion of the Court, the conduct and circumstances of this case shows that the 1st Defendant was instrumental in orchestrating the mess that the parties have found themselves in. The 2nd – 4th Defendants have tagged along perhaps with the promise of getting the lands back to them, thus benefiting twice. The Defendants had knowledge that the administration of the estate of Mwangi Muhoi was complete and there was no free asset available for distribution. Had the parties disclosed to the Court that the assets had been distributed I believe the Court would have reached a different verdict. At the very least directed the third parties to be served and to proof their claims in a civil Court.

93. In the upshot the Plaintiffs suit partially succeeds and I make orders as follows;

a. Prayer a is declined and therefore dismissed.

b. Prayer b is struck out.

c. Prayer c is allowed in the following terms;

i. the claim against parcel No 838 is resjudicata. It is dismissed.

ii. the claim against parcel 839 is struck out.

iii. The claim against parcel 841 is allowed. The title in the name of the 1st Plaintiff is hereby restored and the one in the name of Mwaniki Mwangi be and is hereby cancelled.

iv. the claim against parcel 842 is allowed.

v. the claim against parcel 1486 is allowed.

vi. the claim against parcel 1485 is hereby allowed.

vii. the claim against parcel 1529 is struck out.

viii. the titles issued pursuant to the grant issued in 2018 as set out in para 61 with respect to parcels 840, 841, 842 1529 and 1485 (if any) be and are hereby cancelled.

d. Prayer d is allowed.

e. Costs of the suit to be met by the Defendants jointly and severally in favour of the Plaintiffs.

94. Orders accordingly

DELIVERED, SIGNED & DATED ON THE 10TH DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

Mwangi for 1st and 2nd Plaintiff

Kinuthia for 1st, 2nd, 3rd and 4th Defendants

Ms. Phyllis – Court Assistant