



Kimundui & another (Both Suing as the Legal Representatives of Francis Kimundui Keigi, Deceased) v Macharia & 4 others (Environment & Land Case 737 of 2017) [2025] KEELC 186 (KLR) (27 January 2025) (Judgment)

Neutral citation: [2025] KEELC 186 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 737 OF 2017
JG KEMEI, J
JANUARY 27, 2025**

BETWEEN

**ESTHER MWITHA KIMUNDUI 1ST PLAINTIFF
CAROL WANGARI KIMUNDUI 2ND PLAINTIFF
BOTH SUING AS THE LEGAL REPRESENTATIVES OF FRANCIS KIMUNDUI
KEIGI, DECEASED**

AND

**JOYCE WANJIRU MACHARIA 1ST DEFENDANT
SIMON MWANGI WAINAINA 2ND DEFENDANT
JOSEPH GICHUKA MUKORWO 3RD DEFENDANT
MONICA WANJIKU KARANJA (AS A TRUSTEES OF MWIKI TOGETHER
SELF HELP GROUP) 4TH DEFENDANT
AGNES WACERA MACHARIA 5TH DEFENDANT**

JUDGMENT

The Pleadings

1. Vide a plaint dated the 15/4/2015 and amended on the 5/8/2019 the Plaintiffs sought the following orders;
 - a. A permanent injunction be issued against the Defendants restraining them from interfering trespassing alienating subdividing or in any way interfering with land parcel Number Thika/Mun/Block40/1656-1658 (the suit lands).



- b. That the Land Registrar Thika be compelled to cancel the title deeds for the suit lands currently in the names of the Defendants and once cancelled the same be restored back the original title namely Thika/Municipality Block40/1211 registered in the name of the Plaintiffs.
 - c. Any other relief that this Honourable Court may deem fit to grant
 - d. Costs of the suit and interest thereon
2. It is the Plaintiffs case that at all material times to the suit, Francis Kimundui Keigi (Kimundui) , deceased was the legal owner of parcel 1211(head title) which was subsequently subdivided into three portions namely parcel 1656-1658.
 3. The Plaintiffs aver that on 11/3/2015, Kimundui, deceased, upon carrying out a search of the head title discovered that the defendants had illegally caused the registration of the suit lands in their favour by way of fraud and misrepresentation and falsification of documents before the Land Registrar as well as the subdivision of the head title into three parts. Particulars of fraud was pleaded and itemized under para 7 of the Plaint. That the said deceased had never sold the suit lands to the defendants, never transacted with them nor obtained land control board consent and therefore the acquisition of the property by the defendants was illegal irregular fraudulent and null and void. That as a result, the Plaintiffs stand to be dispossessed of the suit lands and the Court was urged to cancel the titles and revert the property to its original owners.
 4. The Defendants denied the Plaintiffs claim vide their statement of defence dated the 13/10/2017 and amended on the 4/9/2019. The Defendants contend that in 2010 or thereabouts they entered in oral and written agreements with Kimundui for the sale of the suit lands measuring 20 acres which land was to be excised from the head title that was registered in the names of Thika Municipal Council Umoja Housing Cooperative Society (the Society) and Kimundui. That upon payment for the lands, Kimundui subdivided the head title into three parts and transferred the lands as follows;
 - a. Parcel 1657 measuring 4 acres – 1st Defendant
 - b. Parcel 1658 measuring 15 acres – 2nd Defendant (Mwiki Self Help Group)
 - c. Parcel 1656 measuring 1 acre - 5th Defendant
 5. That upon executing the necessary transfer forms in their favour, Kimundui surrendered to each purchaser the documents of completion namely original title deed, consent to transfer, transfer forms, original photocopies of PIN and ID, original coloured passport size photographs and approved subdivision plans of the land in respect to the head title showing three portions namely A, B and C.
 6. The Defendants further denied the allegations of fraud as set out in para 6 and 7 of the amended plaint and aver that Kimundui voluntarily, consciously and on his own free will on receiving the purchase price in full duly executed the relevant instruments of transfer of the lands to the defendants and sought to put the Plaintiff in strict proof.
 7. In addition, the Defendants averred that the Plaintiffs cause of action if at all has abated by dint of the provisions of Order 2 rule 3(2) of the CPR on the basis that Kimundui died on the 14/10/2017 and was substituted on 26/8/2019.

The Evidence of the parties.

8. PW1 – Esther Mwitha Kimundui testified and relied on her witness statement dated the 24/9/2020 and produced documents marked as PEX No 1-8 in support of her claim.



9. She stated that she is the wife of Kimundui, deceased. That the Defendants acquired her late husband's land fraudulently and illegally on the grounds that; spousal consent was not obtained from her; her husband's signature was forged as detailed in the forensic report; Land Control Board (LCB) consent used in the transaction did not emanate from the Thika East County Commissioners office, the same having not been part of the agenda of the board of the said dates; LCB consents are dated 26/2/2015 while the entries with respect to the transfers were made on 11/3/2015 and further still the green cards were opened on 6/3/2015 and the three subtitles were hurriedly registered on 11/3/2015, a period of 3 working days.
10. She added that her husband died before completing the transaction and the Defendants proceeded to subdivide the head title and obtained titles in their favor. In addition, she stated that she did not know who subdivided the land into three portions. That she does not know if Kimundui signed the documents for the subdivision of the land as he was too sick to grant any approvals at the time the land is alleged to have been subdivided.
11. In cross she stated that she was present when Kimundui filed the complaint at the Criminal Investigations Department (CID) offices. That the defendants were charged in Court but the case was later withdrawn. Asked whether the Plaintiffs had refunded the purchase price to the defendants she answered in the negative.
12. She stated that she was not present when Kimundui sold the land and thus is not aware how much he received from the Defendants. She was aware that Kimundui was paid part of the purchase price but later the family had a change of mind and refused to sell the land. She stated that she was not aware that the head title was subdivided into 3 portions. She narrated the history of the land and informed the Court that Kimundui inherited the larger parcel of land from his father and that the same was subdivided by Kimundui's brother namely Nganga. That she is aware that a portion was sold by Kimundui to the County Council and the remainder was registered in the joint names of Thika Municipality Council Umoja Housing and Kimundui. That she does not know why Nganga registered the land in the joint names but was aware that Kimundui never raised any objection nevertheless. She stated that though she was aware that the Self Help Group was buying 15 acres she was not aware of the purchase price. She confirmed that Kimundui held a bank account at Equity Bank Limited.
13. The witness stated that though the LCB was a forgery she had not called a witness to testify before the court. Neither was she going to call the Land Registrar to testify.
14. DW1- Joyce Wanjiru Macharia testified and relied on her written statement dated the 7/2/2020 and produced documents marked as PEX No 1-13 in support of her defence.
15. She stated that in the month of October 2010 she and the deceased entered into an oral agreement for the purchase of a portion of 4 acres out of Keigi Farm also known as parcel 1211 at the consideration of Kshs 600,000/- which purchase price was paid to Kimundui in full. Upon completion of the payment Kimundui executed an acknowledgement of receipt of the purchase price on the 2/7/2013.
16. She added that thereafter Kimundui commenced the process of subdivision of the suit land with the aim of excising the parcels purchased by the defendants including obtaining the LCB consents for the subdivision of the head title into three portions as shown on the subdivision plan. Thereafter Kimundui also obtained the LCB consent for the transfer of the suit land in her favour and executed a transfer and surrendered three passport size photographs, PIN certificates and ID for purposes of registration of the land in her favour. That in 2017 Kimundui lodged a complaint at CID offices alleging fraud in the manner the land was transferred but to date she does not know the outcome of



the investigations and opined that perhaps the CID noted her innocence hence no adverse action was taken against her.

17. In cross she stated that though she had no sale agreement in writing she obtained the land legally. She clarified that there was no LCB consent for the transfer of parcel 1657 in her favour. That she did not know if Kimundui applied and obtained any as she herself did not attend any board meeting. All she did was to sign the same and Kimundui went with the document. Later Kimundui gave her the completion documents which she used to register the land in her favour. That the LCB application is dated 26/2/15 and her title was issued on 11/3/15.
18. With respect to the criminal case, she informed the Court that she was charged with fraud in the acquisition of the land but the case was withdrawn to allow parties prosecute the current suit before this court. Having been shown the forensic report, she emphasized that she never forged any documents. She stated that the proposed subdivision of the land was signed by Kimundui and the Physical planner Juja division and that equally he executed the transfer along with the officials of Thika Municipality Cooperative Society.
19. DW2- Simon Mwangi Wainaina testified and relied on his witness statement dated the 17/3/2020 as his evidence in chief and produced documents marked as PEX No 14-34.
20. Similarly he informed the Court that he acquired the land from Kimundui , paid the full purchase price and with the completion documents obtained from Kimundui the title for parcel 1658 was registered in favour of the Self Help . He denied any forgery of whatever form in the transaction and stated that in any event Kimundui and the 1st Plaintiff executed the agreement of sale dated the 27/5/2010. He stated that he too was charged but the criminal case was later withdrawn. He stated that Kimundui continued receiving monies from the self-help group until payment in full. That the Society purchased 15 acres and paid the sum of Kshs 2,225,000/- in full, amounts that were acknowledged by Kimundui.
21. DW3 – Alphonse Okoth Agello relied on his statement dated the 5/12/2022. He stated that he is the Director of Thika Municipal Council Umoja Cooperative Society Limited. That the Society purchased a parcel of land from Kimundui or Keigi Farm. That when Kimundui took long to transfer the portion in its favour, to protect its interests it was decided that the subsequent subdivisions being parcels 1207 -1213 would be registered in the name of both Kimundui and the Society. That he was aware that Kimundui sought to sell parcel 1211 to the Defendants and since the parcel was registered in the joint names the society gave the necessary approvals, consents and clearances. That the society executed the transfer forms for the suit lands as well and provided copies of IDs, PIN and photographs for the officials of the Society. He stated further that there was no coercion threat or force that was applied on them to execute the transfers.

The written submissions

22. Parties filed written submissions which I have read and considered in the judgment.

Analysis and Determination

23. Having considered the Pleadings of the parties, the written submissions and case law where applicable, I consider the following issues falling for determination;
 - a. Whether the Plaintiffs suit has abated
 - b. Whether the Plaintiff has proven fraud and illegality
 - c. Who meets the costs of the suit?



Abatement of suit

24. The Defendants pleaded under para 8 (a) that the Plaintiff's cause of action has since abated by dint of the provisions of order 24 rule 3(2) of the CPR because Kimundui died on the 14/10/2017 and was not substituted until 26/8/2019 when the Plaintiffs amended the Plaint.
25. Unrelenting the Defendants moved the Court by way of Notice of motion dated the 30/1/2019 seeking in the main an order to declare the suit as having abated.
26. The Plaintiffs in turn responded to the application vide their grounds of opposition dated the 14/3/2019.
27. Order 24 Rule 3(2) of the CPR provides as follows;
 - 2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff: Provided the court may, for good reason on application, extend the time.
28. I have perused the record that bears evidence that according to the death certificate on record dated the 25/1/2018, Kimundui died on 14/10/2018. A grant of letters of administration was issued to the current plaintiffs on the 3/7/2018
29. Vide the application before Court filed on the 10/7/2018 and dated the 10/7/2018, the current Plaintiffs sought to be substituted in the suit in place of Kimundui and enclosed a grant of letters of administration issued on the 3/7/2018 in support of their plea for substitution.
30. On the 20/3/2019 the parties consented and the Court recorded orders granting the substitution orders sought in the application of 10/7/2018. The Defendants on the other hand consented to withdraw their application of the 30/1/2019.
31. In conclusion it is clear that the objection was settled vide the orders of 20/3/2019 and the Court finds that the suit has not abated.

Historical background of the suit

32. It is not in dispute that the original suit land namely parcel 1211 measuring 20 acres was owned by Thika Municipal Council Umoja Housing Cooperative Society Limited (the Society) and Kimundui. PW1 led evidence that the suit land was a subdivision of the larger Keigi farm owned by the father of Kimundui. That earlier subdivisions of the Keigi farm were carried out by Nganga the brother of Kimundui. DW3 explained that the Society purchased a portion of the family land that had been allocated to Kimundui and since he took long to transfer the same, the original land being parcel 27 was registered in the joint names of the society and Kimundui and later subdivided into 7 parcels being parcels 1207-1213 and the subdivisions were registered in the joint names of the Society and Kimundui. He led evidence that he was aware that Kimundui sold parcel 1211 to the defendants.

Has fraud and illegality been proven by the Plaintiffs.

33. It is the Plaintiffs case that Kimundui discovered on 11/3/2015 through an official search that the suit lands had been illegally registered in the names of the Defendants. The Plaintiffs annexed the copies of the official searches of even date in support. The Plaintiffs averred that Kimundui never transferred the land to the Defendants and had no idea how the Defendants ended up being the registered owners



of the suit land. Further that Kimundui never sold the land to the Defendants, did not obtain the land control board consent and that the acquisition was illegal irregular fraudulent and voidable.

34. In furthering their claim, the Plaintiffs pleaded particulars of fraud on the part of the Defendants which is; securing the registration of the suit lands without authority and or consent from the Plaintiff, the legal owner; presenting forged documents for the registration at Thika Lands Office which resulted in title deeds for the suit lands being issued; purporting that the Plaintiff had obtained consent for the transfer of the head title from the Land Control Board which was not the case.
35. The Defendants contended that the Plaintiffs through Kimundui sold the suit lands to them at the price of Kshs 150,000/- per acre in 2010 measuring 20 acres; he subdivided the land into three parcels which now comprise the suit lands and effected the transfer to them. That Kimundui obtained land control board consents for subdivision and transferred of the suit lands to the Defendants. That he handed over all the completion documents to them to wit original title deeds, transfers forms consent to transfer, PIN, ID and approved subdivision plan of the head title which they used to effect registration at the Lands offices.
36. It is now settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition quoting with approval the cases of Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489 it is stated that: -

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (i). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

37. As regards standard of proof in respect to a charge of fraud, the law is quite clear. In R.G. Patel v. Lalji Makanji(1957) EA 314 the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

38. In the case of Vijay Morjaria vs 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



39. Section 26 of the [Land Registration Act](#) provides two instances where a title can be challenged. The first is on the ground of fraud and/or misrepresentation to which the person is proved to be privy to and/or a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
40. The starting point is the examination of the documentary evidence presented by the parties.
41. DW1 and DW2 led evidence that they entered into an agreement to buy a total of 20 acres from Kimundui in 2010. They produced a letter dated the 28/3/2010 which captured the agreement of the 2nd Defendant and Kimundui of 24/3/2010 where the key highlights of the terms of the contract were agreed as thus; Kimundui sold 15 acres of land to the 2nd Defendant at the sum of Kshs 150,000/- at a consideration of Kshs 2,250,000/-; the purchase price was payable directly to the account of Kimundui No 0020100042358 at Equity Bank Limited. The agreement captured the amounts of Kshs 3000/- previously paid to Kimundui. On 28/5/2010 Kimundui acknowledged receipt of Kshs 10,000/-. The agreement is executed by Kimundui and the 1st Plaintiff, his wife and their witness namely a Mr Muhiu as well as the representatives of the 2nd Defendant. On the 27/5/2010 Kimundui acknowledged Kshs 100,000/- in cash and Kshs 400,000/- deposited in his Equity Account as part of the purchase price of Kshs 2,250,000/- . There are various acknowledgements of the payments by Kimundui alone and some with his wife running from 2010 all the way to 2013 with a lull in 2014. In 2015 unchallenged evidence was led that he received the final Kshs 3,000/- from the 2nd Defendant.
42. With respect to the 1st Defendant unchallenged evidence was led that she paid the sum of Kshs 600,000/- for 4 acres and the attendant agreements were annexed. One of the payments was made directly to the account of Kimundui in Equity Bank on the 2/10/2010. This is the account that Kimundui had given the defendants for purposes of depositing the purchase price which was payable in installments. This is the link between Kimundui and the sale transaction as far as payments are concerned.
43. The payments by the 3rd Defendant who purchased 1 acre in the sum of Kshs 150,000/- was duly accounted for and no challenge was mounted by the Plaintiffs.
44. PW1 led evidence and stated that she was aware that her husband sold the land to the Defendants but sometime in 2015 the family changed its mind because the defendants had paid Kimundui little monies. That she and her children demanded that the purchase price received by Kimundui from the Defendants be refunded and the sale be cancelled. That the defendants declined to accept the refunds. This evidence is corroborated by DW2 who stated that Kimundui suggested to reduce the acreage of the land they had purchased but they repulsed his overtures and insisted on the delivery of the land they had fully paid for.
45. The Court finds that there was a valid agreement between Kimundui and the Defendants; the description of the land that was being sold was disclosed; the agreement was in writing ; it was executed by all the parties; and lastly witnessed by witnesses.
46. The next area of examination is whether the subdivision and transfer of the suit lands was lawful.
47. PW1 led evidence that the subdivision of the head title into three parcels forming the suit land was illegal on the ground that the signatures of Kimundui appearing on the application for land control board was a forgery. She produced a land control board application and a land control board consent in respect to the subdivision of the head title dated the 26/2/2015. She also produced a forensic report which indicated that the signatures on the land control board application were different. In addition, she produced minutes of the Land control board meeting dated the 26/6/2015 which does not include



the approval of parcel 1211 into the suit lands. She added that neither Kimundui nor the Land Control Board chair signed the land control board consent of 26/2/2015.

48. Section 35 and 36 of the Evidence Act provides for admissibility of facts and documents as follows;

(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—(a)if the maker of the statement either—(i)had personal knowledge of the matters dealt with by the statement; or(ii)where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and(b)if the maker of the statement is called as a witness in the proceedings:Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable.(2)In any civil proceedings, the Court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—

(a) notwithstanding that the maker of the statement is available but is not called as a witness;(b)notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the Court may approve, as the case may be.(3)Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.(4)For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.(5)For the purpose of deciding whether or not a statement is admissible by virtue of this section, the Court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.

Section 36 guides the court in weighing the evidence as follows:

(1) In estimating the weight, if any, to be attached to a statement rendered admissible by section 35 of this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts.(2)For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a



statement rendered admissible by section 35 of this Act shall not be treated as corroboration of evidence given by the maker of the statement.

49. The case of the Defendants was that Kimundui subdivided the suit land and applied for the land control board consent and only surrendered the documents to them for registration of the land.
50. Going by the provisions of the law set out in para 47 the Plaintiff has not explained why the makers of the said documents were not called to testify. It is borne by the record that the Plaintiffs obtained witness summons against the makers of the documents but it is not explained why they were not presented in court. The Court was not informed of any circumstances that prevented the makers of the documents from presenting the evidence in court. In the absence of the makers of the documents the authenticity of the documents is put in doubt and the Court is unable to rely on them in arriving at its decision.
51. In the end there is therefore nothing to support the Plaintiffs allegation that the subdivision and the transfer of the suit lands was illegal. Even the Land Registrar was not called to testify to any illegality or otherwise.
52. There was therefore no evidence to support the allegation that the Defendants actions were illegal and or unlawful. It is to be noted that as at 2015 Kimundui had received the full purchase price from the Defendants and what remained was to transfer the land to them. At that point he held the land in trust for the sellers, his right to the purchase price having been satisfied.

Costs.

53. Although costs of an action or proceeding are at the discretion of the court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. The Plaintiffs have lost their case and there is no reason to deny the Defendants costs.
54. Final orders for disposal
 - a. On a balance of probabilities, the Plaintiffs case is unmerited.
 - b. It is dismissed with costs to the Defendants.
55. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JANUARY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

Luis Wahome for Plaintiffs

Ms. Koki for Defendants

Philomena – Court Assistant

